
Title 4

Civil Division

U.S. ATTORNEYS MANUAL 1988

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U.S. ATTORNEYS MANUAL 1988

UNITED STATES ATTORNEYS' MANUAL

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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. Among other things, the Act forbade the Secretaries of the Executive Departments to employ other attorneys or outside counsel at government expense, and required them to

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. . . .

Section 17, 16 Stat. 164.

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 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. 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). See also *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (Attorney General "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"); *Perry v. United States*, 28 Ct.Cl. 483, 491 (1893); *Sutherland v.*

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International Insurance Co., 43 F.2d 969, 970-71 (2d Cir.1930), cert. denied, 282 U.S. 890 (1930).

The present statutory authority vesting plenary litigating authority with the Attorney General, including 28 U.S.C. §§ 516, 519 and 5 U.S.C. § 3106, parallels that found in the 1870 Act. 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 (1868); *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.*, supra; *FTC v. Guignon*, 390 F.2d 323 (8th Cir.1968); *ICC v. Southern Railway Co.*, 543 F.2d 534 (5th Cir.1976), reh. denied en banc, 551 F.2d 95 (5th Cir.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. See *United States v. Sandstrom*, 22 F.Supp. 190, 191 (N.D.Okla.1938).¹

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, as well as those in 28 C.F.R. § 0.47 (alien property matters), 28 C.F.R. § 0.49 (international judicial assistance), 28 C.F.R. § 0.171(a) (collection of judgments, fines, penalties and forfeitures), and 28 C.F.R. § 0.46, "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 supplied).

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

¹ 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"

Civil Division, subject to the supervision and direction of the Assistant Attorney General. These components are the Torts Branch, Commercial Litigation Branch, Federal Programs Branch, Office of Immigration Litigation, Office of Consumer Litigation, and the Appellate Staff, 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 4-1.217, *infra*.

The compromise and closing authority exercised by the Assistant Attorney General and subordinate Civil Division officials is described in USAM 4-3.100, *infra*.

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.

Four Branch Directors are responsible for the Torts Branch's litigative responsibilities as follows:

| <u>Staff</u> | <u>Mailing Address</u> |
|--|--|
| Aviation & Admiralty | Post Office Box 14271 Washington, D.C. 20044-4271 |
| Constitutional Torts | Post Office Box 7146 Washington, D.C. 20044 |
| Environmental & Occupational Disease Litigation Section | Post Office Box 340 Washington, D.C. 20044 |
| FTCA Litigation | Post Office Box 888 Washington, D.C. 20044 |

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; 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

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Division, and for the enforcement of the Division's monetary judgments. Commercial Litigation Branch attorneys handle all commercial 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 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 registrability. 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 that reports directly to the Assistant Attorney General. That staff is responsible for coordinating suggestions for regulatory and legislative changes from within the Civil Division and for positions on other regulatory and policy initiatives.

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 Fed.Reg. 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. The Office coordinates 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).

4-1.217 Office of Immigration Litigation

Because of the transfer from the Criminal Division (48 Fed.Reg. 9522 (1983)) of certain litigation arising under the Immigration and Nationality Act, the Civil Division has established an Office of Immigration Litigation. The Office has assumed the Department's responsibility for virtually all civil litigation arising under the immigration laws, including court of appeals petitions for review of final deportation orders, and matters pertaining to legalization and employer sanctions under the Immigration Reform and Control Act, Pub.L. No. 99-603 (Nov. 6, 1986), 100 Stat. 3359. The Criminal Division retains 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). The Civil Rights Division has responsibility for discrimination claims under the 1986 reforms.

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. 163-86, 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 163-86 §§ 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 4-3.000, *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*. If an agency makes an emergency referral or request as to the 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*.

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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. 163-86, *supra*, 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 representative. 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 must be consulted.

A. Money claims by the United States (except penalties and forfeitures) where the gross amount of the original claim does not exceed \$200,000.

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, 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 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 Agreements Act of 1937, as amended, 7 U.S.C. § 671, *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. § 2023 involving retail stores.

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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, 29 U.S.C. § 201, *et seq.*, and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*

K. Cases referred by the Department of Labor solely for collection of civil penalties under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1853.

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. 163-86, *supra*, upon the recommendation of branch and office directors and unit chiefs, the Assistant Attorney General, Civil Division, may delegate to U.S. Attorneys compromise or suit authority for 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 4-3.120, *infra*). The limitations of Section 1(c) of the Directive (discussed below at USAM 4-3.140, *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. 163-86, *supra*, and regardless of the amount in controversy, the following matters will normally not be delegated to the U.S. Attorneys for handling but will be retained and personally handled or monitored by the appropriate branch within the Civil Division:

- A. Civil actions in the United States Claims Court;
- 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 cases where the amount of single damages, plus forfeitures, exceeds \$200,000;

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E. Any case involving vessel-caused pollution in navigable waters;

F. Cases on appeal, except as determined by the Director of the Appellate Staff (see USAM, Title 2);

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 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.

J. Asbestos 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 to 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.

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 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. Cf. *FTC v. Guignon*, 390 F.2d 323 (8th Cir.1968); *Faubus v. United States*, 254 F.2d 797 (8th Cir.1958), *cert. denied*, 358 U.S. 829 (1958). U.S. Attorneys are requested to notify the Civil Division promptly whenever they learn of such cases. If an amicus brief is filed, the Civil Division will forward a copy of the brief to the U.S. Attorney in the district in which the suit is pending.

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 Civil Division 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.

4-1.325 Judicial Assistance to Foreign Tribunals

Section 1782 of Title 28 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 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. See 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' of-

fices will only infrequently become involved in *service* requests, which are referred to the United States Marshals Service for execution.

4-1.326 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 to 105.5. See USAM 4-4.430, *infra*. Please note that the Federal Claims Collection Act has been amended by the Debt Collection Act of 1982, 31 U.S.C. §§ 3711-20 (1983). Amendments to the joint regulations also have been issued, 4 C.F.R. §§ 101 to 105 (49 Fed.Reg. 8896 (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 that are not within the U.S. Attorneys' original authority, and all claims involving bribery, and the conversion of government property.

4-1.327 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.

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.1938); *FTC v. Guignon*, 390 F.2d 323 (8th Cir.1968); E.O. 6166 § 5, June 10, 1933. In rare cases a statute may provide continuing settlement or other authority in the referring agency. Cf. 28 U.S.C. § 2348. An agency's recommendation (which may be couched in terms such as 'we have accepted the offer of

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settlement," for example) should not be construed as an acceptance but rather only as a 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 1941); *Aviation Corp. v. United States*, 46 F.Supp. 491, 494 (Ct.Cl.1942), cert. denied, 318 U.S. 771 (1943); 38 Ops.A.G. 124, 125. Where the authority of the Attorney General has been redelegated to U.S. Attorneys, and the client agency objects to the compromise, dismissal, or closing, 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 attorney under his/her supervision. See *Sutherland v. International Ins. Co.*, 43 F.2d 969, 970-71 (2d Cir.1930), cert. denied, 282 U.S. 890 (1930); E.O. 6166 § 5, June 10, 1933. 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.

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 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 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.

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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. Excessive delays by government agencies in furnishing litigation reports should be brought to the attention of the Assistant Attorney General of the Civil Division.

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 reflect accurately the facts and the appropriate litigating position which should be taken under the circumstances.

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 to them. Non-fraud referrals for the recovery of money should comply with the joint regulations (see 4 C.F.R. §§ 101.1 to 105.5) implementing the Federal Claims Collection Act, 31 U.S.C. §§ 3701 to 3718.

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 of the 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

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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 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, with the exceptions set forth below, 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 to the Civil Division routinely, except that the Torts Branch 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. The Division generally has no individual files on delegated 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. 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. Disposition of delegated cases, like the disposition of nondelegated cases, must be accurately reported on the Department's statistical reporting system. In particular, all money and property collected for the government should be reported.

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 4-4.414, *et seq.*

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

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

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 Monitored by Civil Division

In cases referred by the Civil Division to the U.S. Attorney for handling on a *monitored* 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 memorandum. If such a case is transferred to another judicial district, a copy of the memo transferring papers on the case should be furnished to the Civil Division. In foreclosure actions, U.S. Attorneys must promptly advise the Civil Division in writing of the dates of:

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- 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 copies of communications, pleadings, briefs, orders, etc., without a 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 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 only at the request of a U.S. Attorney or if the proposed stipula-

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tions are tantamount to a stipulation of liability. 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 "'discretionary function'" defense in FTCA suits should be discussed with the Torts Branch before it is 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-referenced telephone number if *in camera* inspection is demanded or considered in FOIA suits. If a stay of an order entered 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 Section (FTS 633-3311) should be notified at once.

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, member of the armed forces, or employee, sued personally for money damages for acts done within the outer perimeter of his/her official duties, without authorization from the Civil Division pursuant to 28 C.F.R. Part 15. 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. Attorney's 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:

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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 A.

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 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.

4-1.600 PRIOR APPROVALS

PRIOR APPROVAL REQUIREMENTS

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| USAM SECTION | TYPE & SCOPE OF APPROVAL | WHO MUST APPROVE | COMMENTS |
|-----------------|---|--|---|
| 4-1.312 | Compromise or close any delegated case or claim involving amounts up to \$750,000, except as specified in the delegation or in Section 1(c) of Civil Division Directive No. 145-81. | Civil Division | See Section 4(b) Civil Division Directive No. 145-81; 28 C.F.R. Chapter I, Part O, Appendix to Subpart Y See USAM 4-3.120. |
| 4-1.325 | Execute foreign evidence requests from foreign tribunals. | Office of Foreign Litigation, Civil Division | |
| 4-3.120 | 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 \$500,000; or accept and 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 \$500,000 or 10% of the original claim, which ever is greater; or settlement of the claim would adversely impact other claims totaling more than \$500,000. | Civil Division | Civil Division Directive No. 145-81; 28 C.F.R., Chapter I, Part O, Appendix to Subpart Y. |
| 4-3.120 | 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 \$500,000. | Civil Division | |
| 4-3.140 | In cases where the authority of the Attorney General has been redelegated to the U.S. Attorney, 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 Civil Division. | Assistant Attorney General, Civil Division | See Section 1(d)(3), Civil Division Directive No. 145-81; 28 C.F.R., Chapter I, Part O, Appendix to Subpart Y. |
| 4-4.430 | 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. | Civil Division | |
| 4-4.550 | No compromise should be entered into with the mortgagor prior to liquidation of the security property in HUD multi-family foreclosures. | Civil Division | |
| 4-5.200 | The undertaking of representation of government employees in Biven type actions. | Torts Section, Civil Division | |
| 4-6.334 | Where a government employee is served with a subpoena duces tecum in litigation and the interested agency wishes to resist production, the U.S. Attorney should never formally resist production by claiming "confidential privilege." | Federal Program Branch, Civil Division | In emergency, USA should contact Federal Program Branch. The Agency employee seeking to resist production must have the General Counsel of the agency request authorization from the Civil Div. |

UNITED STATES ATTORNEYS' MANUAL

DETAILED
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4-2.000 INSTITUTING ACTION

See Civil Division Monograph entitled "'Jurisdiction Venue and Service of Process'" (rev.1982).

4-2.100 JURISDICTION AND RELATED MATTERS

4-2.110 Sovereign Immunity

4-2.111 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, 399 (1976); *Reid v. United States*, 211 U.S. 529, 538 (1909); *Munro v. United States*, 303 U.S. 36, 41 (1938); *United States v. Sherwood*, 312 U.S. 584, 590 (1941); *Dalehite v. United States*, 346 U.S. 15, 30 (1953); *United States v. Shaw*, 309 U.S. 495, 500 (1940); *Feres v. United States*, 340 U.S. 135, 137 (1950); *United States v. King*, 395 U.S. 1, 4 (1969). 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).

4-2.112 Consent to be Sued is Strictly Construed

The terms of a statute waiving immunity from suit defines the court's 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*, 211 U.S. at 538; *Munro v. United States*, *supra*; *Dalehite v. United States*, 346 U.S. 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, 474 (10th Cir.1950); *Finn v. United States*, 123 U.S. 227, 233 (1887).

Jurisdiction cannot be extended by implication beyond the plain language of the statute. See *United States v. Michel*, 282 U.S. 656, 659 (1931); *Lynch v. United States*, *supra*; *United States v. Sherwood*, *supra*; *Dalehite v. United States*, *supra*.

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, 116 (1952); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916). 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

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Gulf Refining Co. v. United States, 269 U.S. 125, 137 (1925); *Gulf, Col. & S.F. Ry. v. Dennis*, 224 U.S. 503, 506 (1912); *United States v. The Schooner Peggy*, 1 Cranch (5 U.S.) 102, 110 (1801).

4-2.113 Government Agencies are not Subject to Suit, Absent Statutory Waiver of Immunity

A government department or agency (as distinguished from a government official or employ) 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, 515 (1952); *Keifer & Keifer v. RFC*, 306 U.S. 381 (1939).

4-2.114 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, 575 (1959); *Howard v. Lyons*, 360 U.S. 593, 597 (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, 709 (4th Cir.1972). However, the same government officials sued for constitutional torts, generally are only protected by a qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Butz v. Economou*, 438 U.S. 478 (1978). Where applicable, qualified immunity also protects an official from trial and the burdens of litigation. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). No general rule governs the immunity that protects executive officials sued on statutory theories. See USAM 4-5.214, *infra*; Torts Branch Monograph Representation III.

4-2.120 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, 553 (1954); *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752 (1947). Exhaustion is also required in Privacy Act suits, 5 U.S.C. § 552a, in suits challenging adverse personnel actions, and in many other contexts.

4-2.130 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, 37 (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*, 454 U.S. 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, 497 (1974). The required injury must be both real and immediate, not conjectural or hypothetical. See *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969).

4-2.140 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 under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. By Pub.L. No. 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 or 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." 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. & Ad. News 6133.

Another barrier to judicial review of administrative action was removed by section 2 of Pub.L. No. 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

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the Administrative Procedure Act is not an *independent* grant of jurisdiction. See *Califano v. Sanders*, 430 U.S. 99, 105-07 (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, 239 (9th Cir.1967), *cert. denied*, 391 U.S. 954 (1968); *Schilling v. Rogers*, 363 U.S. 666, 677 (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.

4-2.150 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, 493 (1947); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 96 (1949).

4-2.200 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); accord *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), quoting, *General Investment Co. v. Lake Shore Ry. Co.*, 260 U.S. 201, 275 (1922); *Hoiness v. United States*, 335 U.S. 297, 302 (1948). Venue is a personal privilege which may be lost, unless venue is seasonably challenged. See *Leroy*, *supra*, 443 U.S. at 180; 28 U.S.C. § 1406(b); See *Neirbo Co.*, 308 U.S. at 168; *Freeman v. Bee Machine Co.*, 319 U.S. 448, 455 (1943). (Addition to venue, just as any other litigant may * * *.) See *Industrial Assn. v. Commissioner*, 323 U.S. 310, 314 (1945); *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, 25 (1915). A specific objection to venue may be made by a separate motion under Fed.R.Civ.P. 12(b), joined as a separate 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.

4-2.210 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.

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.

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 local 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 of vessels or cargo, see 28 U.S.C. § 1395(d), (e).

4-2.220 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. Const. 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).

4-2.230 Government Officers and Agencies as Defendants

Suits against government officers acting in their official capacities or under color of office or legal authority, and against government agencies or the United States, may be brought, pursuant to 28 U.S.C. § 1391(e), in any judicial district in which:

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- A. A defendant in the action resides;
- B. The cause of action arose;
- C. Any real property involved in the action is situated; or
- D. Where the plaintiff resides if no real property is involved.

Section 1391(e) of Title 28 is a venue statute and confers no jurisdiction upon the court. See *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 608 n. 6 (1978). A suit for money damages to be paid by an individual who is or was a federal employee "is not encompassed by the venue provisions of § 1391(e)." *Stafford v. Briggs*, 444 U.S. 527, 542 (1980); see also *Micklus v. Carlson*, 632 F.2d 227, 240-41 (3d Cir.1980). This section may not be used to obtain venue over a former employee, where the federal employment had terminated as of the date suit was filed or the individual was joined as a defendant. See *Sutain v. Shapiro & Lieberman*, 678 F.2d 115, 117 (9th Cir.1982).

For purposes of 28 U.S.C. § 1391(e)(1), the residence of federal officers is that place where the officers perform their official duties. See *Reuben H. Donnelley Corporation v. F.T.C.*, 580 F.2d 264, 266 n. 3 (7th Cir.1978). The presence of an agency regional office within a judicial district does not make the agency a resident of the district for venue purposes. *Id.* at 267. Only one of the plaintiffs need reside in the district for venue to be proper under 28 U.S.C. § 1391(e)(4). *Exxon Corporation v. F.T.C.*, 588 F.2d 895, 899 (2d Cir.1978).

However, 28 U.S.C. § 1391(e) was only intended to apply to Executive Branch employees, and not to Members of Congress or their employees. *Liberation News Service v. Eastland*, 426 F.2d 1379 (2d Cir.1970). 28 U.S.C. § 1391(e) does not apply to suits filed in the Canal Zone. See *Drummond v. Bunker*, 560 F.2d 625, 626 (5th Cir.1977).

4-2.240 Change of Venue

Section 1404(a) of Title 28 provides that: "for the convenience of parties and witnesses, in the interest of justice, a district may transfer any civil action to any other district where it might have been brought."

Any party, including plaintiff, may move for a transfer under 28 U.S.C. § 1404(a). *I.T.E. Circuit Breaker Company v. Regan*, 348 F.2d 403 (8th Cir.1965); *American Standard, Inc. v. Bendix Corporation*, 487 F.Supp. 254, 260 (W.D.Mo.1980). A party may move for transfer, even if it has waived any objection to venue. *Montgomery Ward & Co. v. Anderson Motor Service, Inc.*, 339 F.Supp. 713, 718 n. 3 (W.D.Mo.1971). The court may also transfer an action *sua sponte*. *Lead Industries Association, Inc. v. O.S.H.A.*, 610 F.2d 70, 79 n. 17 (2d Cir.1979); *Mobil Corporation v. S.E.C.*, 550 F.Supp. 67, 69 (S.D.N.Y.1982). While 28 U.S.C. § 1404(a) contains no time limit for the

filing of a motion, the motion may be denied if the passage of time or any delay causes undue prejudice or is considered dilatory. See *American Standard, Inc.*, 487 F.Supp. at 261, and cases cited. "'The moving party has the burden of proof, and must make a convincing showing of the right to transfer.'" *Id.*

The power of the court to transfer is limited to those districts or divisions where the case "'might have been brought.'" 28 U.S.C. § 1404(a); *American Standard*, 487 F.Supp. at 261, and authorities cited. 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 v. Blaski*, 363 U.S. 335, 344 (1960); *In Re Fine Paper Antitrust Litigation*, 685 F.2d 810, 819 (3d Cir.1982), cert. denied, 459 U.S. 1156 (1983); *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).

One of, if not the most important factors to be considered, is that of convenience of the witnesses. 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 Constructors, 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).

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 v. Barrack*, 376 U.S. 612 (1964). Other examples of 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 (1960); *Smith-kline Corporation v. Sterling Drug, Inc.*, 406 F.Supp. 52, 55 (D.Del.1975); avoidance of inconsistent adjudications and "'possibility of prejudice to the plaintiff flowing from that transfer,'" *Amoco Production Co. v. 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 cited; and permitting the transferee judge to interpret his outstanding protective order and familiarity of transferor judge with relevant documents. *Mobil Corporation*, 550 F.Supp. 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*, 487 F.Supp. 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*,

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Inc., 587 F.2d 1149, 1156 (D.C.Cir.1978), *cert. denied*, 440 U.S. 913 (1979).

4-2.300 SERVICE OF PROCESS

An action is commenced in a United States district court by the filing of a complaint. See Fed.R.Civ.P. 3. 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, 287 (6th Cir.1978); *Windbrooke Development Corp. v. Environmental Enterprises Inc. of Fla.*, 524 F.2d 467, 463 (5th Cir.1975); *Moore Company v. Sid Richardson Carbon & Gasoline Co.*, 347 F.2d 921 (8th Cir.1965), *cert. denied*, 383 U.S. 925 (1966). 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*, 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, Pub.L. No. 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."

4-2.310 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 (2) 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." See *Messenger v. United States*, *supra*.

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. 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).

4-2.320 Service on Government Officers in Official Capacity, Agencies and Corporations

Service of process and pleadings upon an officer, sued in his/her official capacity, or agency of the United States is accomplished by serving the United States (see USAM 4-5.213, *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, Inc. 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.1979); *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. See *Smith v. McNamara*, 395 F.2d 896 (10th Cir.1968), *cert. denied*, 394 U.S. 934 (1969). The provisions of the rule as to service are mandatory. *Wallach v. Cannon*, 357 F.2d 557 (8th Cir.1966). See USAM 4-5.213, *infra*, for service on government officials in individual capacity.

4-2.400 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 is that of whether 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 4-4.450 *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.

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As noted in USAM 4-2.100, *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, 388-89 (1939); *Gleason v. United States*, 458 F.2d 171, 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. § 2702), 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. § 2458), 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. The cost of the removal bond may be paid as a litigation expense out of the U.S. Attorney's funds.

See generally Civil Division Monograph entitled "'Removal of Cases from State to Federal Court'" (rev. 1982).

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4-3.000 COMPROMISING AND CLOSING

4-3.100 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 (1868) (action brought by an informer with expectation of financial gain); *Conner v. Cornell*, 32 F.2d 581, 585-6 (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. 114, 126; see *United States v. Throckmorton*, 98 U.S. 61, 70 (1878); *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.1952), aff'd, 207 F.2d 503 (3rd Cir.1954), cert. denied, 347 U.S. 933 (1954); 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*, 276 U.S. 311, 331-2 (1927).

Note the additional authority delegated to the Attorney General by the second paragraph of section 5 within Executive Order 6166.

4-3.110 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 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 defense claim when the principal amount of the proposed settlement does not exceed \$750,000, 28 C.F.R. § 0.160(a)(2);

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;

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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 compromise 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, 28 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).

4-3.120 General Redelegation of the Attorney General's Authority to Compromise and Close

The Assistant Attorney General for the Civil Division has re delegated 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 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. 163-86, published in the Appendix to Subpart V 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 4-3.140, *infra*:

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.

B. United States Attorneys, 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 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 \$200,000, nor can they close (other than by compromise or by entry of judgment) any claim or case of the United States where the gross amount involved exceeds \$500,000, or accept or reject any offers in compromise of any such claim or case

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in which the difference between the gross amount of the original claim and the proposed settlement exceeds \$500,000 or 10% of the original claim, whichever is greater. United States Attorneys and the Directors 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 \$500,000.

4-3.130 Ad Hoc Redelegations of the Attorney General's Authority to Compromise and Close

By virtue of section 4(b) of Directive 163-86, upon the recommendation of the appropriate Director, 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 delegations 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(c) of the Directive, discussed at USAM 4-3.140, *infra*, also remain applicable in any case or claim redelegated under section 4(b).

4-3.140 Exceptions to the Redelegation of the Attorney General's Authority

By virtue of section 1(c) of Directive 163-86, 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);

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; or

E. The case is on appeal, except as determined by the Director of the Appellate Staff.

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4-3.200 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 4-3.120, *supra*, only when one or more of the following bases for such action are present:

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

B. The U.S. Attorney believes that a claim 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 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 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);

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

G. The U.S. Attorney believes that the enforcement policy underlying a claim 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);

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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.

4-3.210 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 of 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 as "forced sale" and "fair market" value, 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. § 101.9. 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. *Id.* Managing such stock holdings places unusual burdens on client agencies. Letters of credit provide an excellent method for securing payment.

4-3.220 Compromising Claims in Conjunction With Bankruptcy Code Proceedings

A U.S. Attorneys' 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 inadequate 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.

4-3.230 Cases 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 4-3.200, *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;

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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 forborne 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

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

4-3.231 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 4-2.330, *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 cases. 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 its

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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 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.

4-3.300 MEMORANDA BY U.S. ATTORNEY

4-3.310 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 4-3.120 and 4-3.130, *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. 163-86, published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172.

4-3.320 Memoranda Containing the U.S. Attorney's Recommendations for the Compromising or Closing of Claims Beyond His/Her 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. 163-86, *supra*.

4-3.400 CONSUMMATION OF COMPROMISE OF CLAIMS OF THE UNITED STATES

4-3.410 General

When a claim of the United States is compromised, the compromise should be effected and evidenced in the manner provided in USAM 4-3.300, *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.

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.

4-3.411 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.

4-3.412 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 Fed.R.Civ.P. 41(a). Port 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.

4-3.420 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 the settling debtor's property, but not as to the property of the nonsettling debtors.

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4-3.430 Payment of Compromise

4-3.431 Compromise 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 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 Suits in Admiralty Claims Act (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.

4-3.432 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 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 of the 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 4-11.111, *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.

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4-4.000 COMMERCIAL LITIGATION

Commercial Litigation Branch attorneys represent the United States in the federal district courts, the United States Claims Courts, the federal courts of appeals, administrative boards, state courts and international courts. Branch attorneys work in four broad areas of practice: civil fraud, Claims Court and Federal Circuit litigation, intellectual property, and general commercial matters.

4-4.100 CIVIL FRAUD CASES

| | | |
|----------|-------------------|----------------|
| Contact: | Michael F. Hertz | (FTS 724-1271) |
| | Director | |
| | Stephen D. Altman | (FTS 724-6780) |
| | Rita S. Geier | (FTS 724-7351) |

4-4.110 Civil Fraud Litigation

Civil statutory remedies available for fraud against the government are set forth in the False Claims Act, as amended, 31 U.S.C. § 3729 *et seq.*, the Contract Settlement Act of 1944, as amended, 41 U.S.C. § 119, the Anti-Kickback Act, as amended, 41 U.S.C. §§ 51 to 54, 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. Common law actions should also be pursued.

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 an employee takes any gift, gratuity, or benefit in violation of his/her duty, accepts employment or acquires any interest adverse to his/her employer 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); *United States v. Drisko*, 303 F.Supp. 858 (E.D.Va.1969).

There should be vigorous enforcement of civil sanctions against fraud. Expedient 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 multiple damages and penalties under relevant statutes generally, should not be compromised for less than multiple damages and some forfeitures. *See* 28 C.F.R. Subpart Y and Appendix, for current delegations of compromise authority to U.S. Attorneys. Criminal and civil fraud investigations by the FBI and other investigative agencies should be carried out concurrently, including investigations as to the extent of the government's damage. Care should be taken to utilize grand jury materials in connection with civil actions only pursuant to

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Fed.R.Cr.P. 6e. See *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). See Memorandum from Attorney General to All United States Attorneys dated July 16, 1986 regarding Coordination of Criminal & Civil Fraud, Waste & Abuse Proceedings.

4.4.120 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, either party may demand a jury. See *Union Insurance Co. v. United States*, 6 Wall. 73 U.S. 159 (1867). 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.1962); *United States v. Sykes*, 310 F.2d 417 (5th Cir.1962). 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 to satisfy elementary standards of fairness and reasonableness. See *Lloyd Sabauo Societa Anomina Per Azioni v. Elting*, 287 U.S. 329 (1932).

Civil penalties and civil monetary forfeitures abate with the death of the defendant. *Bowles v. Farmers National Bank of Lebanon, Ky.*, 147 F.2d 425 (6th Cir.1945). Suit thereon must be commenced within five years. See 28 U.S.C. § 2462. 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 § 523(a)(7) (11 U.S.C. § 523(a)(7)). Absent express statutory provision, pre-judgment interest is not recoverable. See *Rodgers v. United States*, 332 U.S. 371 (1947).

4-4.200 CLAIMS COURT AND FEDERAL CIRCUIT

| | | |
|----------|----------------|----------------|
| Contact: | David M. Cohen | (FTS 724-7196) |
| | Director | |
| | Susan Burnett | (FTS 724-7232) |

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| | |
|----------------------|----------------|
| Velta A. Melnbrencis | (FTS 724-7309) |
| Mary S. Mitchelson | (FTS 724-7232) |
| Thomas W. Petersen | (FTS 724-7232) |
| Robert A. Reutershan | (FTS 724-7237) |

4-4.210 Claims Court

Commercial Litigation Branch attorneys handle virtually all non-tax cases in the Claims Court. U.S. Attorneys should be vigilant in moving to dismiss or transfer cases brought in the district court over which the Claims Court has exclusive jurisdiction. Reference should be made to the Civil Division monograph entitled "Transfer of Cases to the Court of Claims."

Under the "Little Tucker Act," 28 U.S.C. § 1346, the district courts possess concurrent jurisdiction with the Claims Court to entertain any monetary claim against the United States for an amount not exceeding \$10,000 "founded either 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 not sounding in tort" When more than \$10,000 is claimed, the Claims Court possesses exclusive jurisdiction in these cases. 28 U.S.C. § 1491. Although the general rule is that jurisdiction is established at the time of filing, there is precedent that a claim which is for less than \$10,000 when filed but is accruing so that it will be for more than \$10,000 at the time of judgment is within the exclusive jurisdiction of the Claims Court. *Goble v. Marsh*, 684 F.2d 12 (D.C.Cir.1982). It is settled that a plaintiff may remain in the district court under the Tucker Act even if his damages exceed \$10,000 as long as he waives all recovery in excess of \$10,000. *E.g.*, *Stone v. United States*, 683 F.2d 449, 451 (D.C.Cir.1982).

There is some precedent that a district court possesses jurisdiction to grant equitable relief even though the Claims Court possesses exclusive jurisdiction over the derivative monetary claim. *E.g.*, *Giordano v. Roubush*, 617 F.2d 111 (8th Cir.1980) (holding in a civilian personnel case that a district court has jurisdiction to grant reinstatement even though Court of Claims had exclusive jurisdiction over a claim for monetary damages exceeding \$10,000). The majority of courts, however, have adopted the better rule that, when the employee claims reinstatement and more than \$10,000 of back pay, the Claims Court possesses exclusive jurisdiction to hear and decide the suit. *E.g.*, *Keller v. Merit Systems Protection Board*, 679 F.2d 220 (11th Cir.1982); *Cook v. Arentzen*, 582 F.2d 870 (4th Cir. 1978); *Carter v. Seamans*, 411 F.2d 767 (5th Cir.1969), *cert. denied*, 397 U.S. 941 (1970).

Disputes arising out of contracts with the Federal Government are generally governed by the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* (CDA). Both claims by a contractor against the Government and claims by the Government against a contractor must be decided first by the contracting

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officer. 41 U.S.C. § 605(a). A contractor may contest the contracting officer's final decision either by filing a direct action in the Claims Court or by appealing to a board of contract appeals. 41 U.S.C. §§ 606, 609(a)(1). The CDA provides the exclusive method for resolution of any dispute relating to a Government contract and district courts possess no jurisdiction in these cases. 28 U.S.C. § 1346(a)(2) ('[T]he district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978'); 28 U.S.C. § 1491(a)(2) ('The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.'). *United States v. Dabbs*, No. J84-0506(B) (S.D. Miss. May 8, 1985) (holding that the CDA provides the exclusive method for challenging the final decision of the contracting officer). Thus, even if a claim arising out of a Government contract is for less than \$10,000, it is within the exclusive jurisdiction of the Claims Court. For a discussion of affirmative suits under the CDA, see USAM 4-4.420.

The Federal Courts Improvement Act of 1982 (FCIA) empowered the Claims Court 'to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief' in bid protest cases brought before contract award. See 28 U.S.C. § 1491(a)(3). Award after the complaint has been filed does not divest the Claims Court of jurisdiction. See *F. Andrete General Contractor v. United States*, 715 F.2d 1476 (Fed.Cir.1983). We take the position that the Claims Court possesses exclusive jurisdiction and that the district courts possess no jurisdiction in these pre-award cases. *Rex Systems, Inc. v. Holiday*, 814 F.2d 994 (4th Cir.1987); *Contra In re Smith & Wessan*, 757 F.2d 431 (1st Cir.1985); *Coco Brothers, Inc. v. Pierce*, 741 F.2d 675 (3d Cir.1984) (looking behind the express language of the statute to its legislative history). It is settled that, notwithstanding the FCIA, the district courts still have jurisdiction over bid protests filed after contract award. *B.K. Instruments, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983).

If a case within the exclusive jurisdiction of the Claims Court is filed in the district court, a motion to dismiss or a motion to transfer is appropriate. See the Commercial Litigation Branch's monograph entitled 'Transfer of Cases to the Court of Claims'. Section 1631 of title 28, United States Code, authorizes a court without jurisdiction over a case to transfer it to a different court in which the case could have been brought 'if it is in the interest of justice.' There is a division of authority as to whether an order transferring a case from a district court is final and appealable. Compare *Jesko v. United States*, 713 F.2d 565 (10th Cir. 1983) (holding the transfer order is interlocutory) with *Goble v. Marsh*,

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supra (holding the transfer order is appealable; see *Town of North Bonneville v. United States District Court, Western District of Washington*, 732 F.2d 747 (9th Cir.1984) (granting a writ of mandamus directing the district court to recover jurisdiction of cases the district court had ordered transferred to the Claims Court)).

4-4.220 Federal Circuit

Commercial Litigation Branch attorneys handle the majority of cases in the United States Court of Appeals for the Federal Circuit. The Federal Circuit possesses exclusive jurisdiction to entertain an appeal from a final decision of a district court if the jurisdiction of the district court is based "in whole or in part" on the Little Tucker Act. See 28 U.S.C. § 1295(a)(2); *United States v. Hohri*, 107 S.Ct. 2246 (1987). Commercial Branch attorneys also represent the United States and its agencies in appeals to the Federal Circuit from decisions of the boards of contract appeals, the Claims Court, the Merit Systems Protection Board, and the Court of International Trade. 28 U.S.C. § 1295.

4-4.300 INTELLECTUAL PROPERTY

Contact: Vito DiPietro (FTS 724-7223)
Director

Thomas J. Byrnes (FTS 724-7221)
John J. Fargo (FTS 724-7415)

4-4.310 Copyright Suits

The exclusive remedy of the owner of material protected by statutory copyright (17 U.S.C. § 101, *et seq.*) against unauthorized use by the Government or its contractors is by suit against the United States in the Claims Court. 28 U.S.C. § 1498(b). The use by the contractor must have been with the authorization or consent of the Government.

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. Such a suit will be handled or monitored by that Branch.

A suit for infringement of an unregistered copyright may be brought against a private party provided the Register of Copyrights is also named as a party defendant. See 17 U.S.C. § 411(a). Any such complaint should be immediately brought to the attention of the Commercial Litigation Branch and the General Counsel, Copyright Office, Washington, D.C. 20540. If the Register of Copyrights decides to appear and defend such suit, it will be handled by the Commercial Litigation Branch or under its supervision.

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4-4.320 Patent Suits

The exclusive remedy of the owner of a patented invention used or manufactured by or for the Government without the permission of the owner is by suit against the United States in the Claims Court. See 28 U.S.C. § 1498(a). Such use or manufacture by a contractor for the United States must be with the authorization and consent of the United States. Authorization and consent clause is usually included in contracts issued by Department of Defense agencies.

The district courts have concurrent jurisdiction with the Claims Court when the use or manufacture by or for the United States arises out of the furnishing of equipment to foreign governments in connection with mutual security agreements (22 U.S.C. § 2356) or as the result of the imposition of an order requiring the invention to be kept secret for national security reasons. See 35 U.S.C. § 183.

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. Such a suit will be handled or monitored by that Branch.

4-4.330 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. Such suits will be handled or monitored by that Branch.

4-4.400 GENERAL COMMERCIAL LITIGATION

| | | |
|----------|---------------------|----------------|
| Contact: | J. Christopher Kohn | (FTS 724-7450) |
| | Director | |
| | Robert M. Hollis | (FTS 724-7329) |
| | John W. Showalter | (FTS 724-7174) |

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Tracy Whitaker

(FTS 724-7154)

4-4.410 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.

4-4.411 Claims in Bankruptcy

A. Preparation of Claims. 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, a proof of claim should be filed; it can be amended later.

B. Filing of Claims. 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.

C. Priority of Government Claims

D. Allowance of Claims.

E. Secured Claims.

F. Discharge of Debtor.

4-4.413 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

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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.

4-4.414 Procedures in Bankruptcy

A. 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 adverse rulings and of the U.S. Attorney's recommendation.

B. Constitutional Challenges and Other Representation. The Civil Division should be notified promptly of constitutional challenges and of requests for intervention or for the filing of briefs *amicus curiae*. *See USAM 4-1.323 and 4-1.324, supra*.

C. Property of Co-Debtors. A special problem is presented where a jurisdiction recognizes tenancy by the entirety 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 entire property for the joint debt. *See Fetter v. United States*, 269 F.2d 467 (5th Cir.1959). 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 entire property, the bankruptcy can proceed without affecting the government's lien against the entire property unless the government's claim is disallowed in the bankruptcy. *See* 11 U.S.C. § 506(d).

4-4.420 Contracts

Affirmative Government claims arising out of a contract subject to the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.* (CDA) must be the subject of a contracting officer's decision. If no appeal is taken, an affirmative CDA suit should be filed in the district court. *See generally* Civil Division Monograph entitled "'Affirmative Claims by the Government under the Contract Disputes Act'" (1985). The Commercial Litigation

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Branch should be contacted prior to a suit being filed. Defensive contract litigation is discussed at USAM 4-4.210.

4-4.421 The Contract Disputes Act

The CDA is applicable to all contracts¹ with the Government, express or implied, entered into on or after March 1, 1979, for:

- A. The procurement of property, other than real property;
- B. The procurement of services;
- C. The procurement of construction, alteration, repair or maintenance of real property; or
- D. The disposal of personal property.

See 41 U.S.C. § 602(a). The CDA creates a comprehensive system for resolving disputes between a contractor and a procuring agency relating to the performance of most procurement contracts. The starting point for this system is the contracting officer's decision. The claims of both the contractor and the agency must be the subject of a contracting officer's decision. See 41 U.S.C. § 605(a). The contractor may appeal such a decision to the appropriate agency board of contract appeals; such boards are specifically authorized by the CDA. 41 U.S.C. § 607. Alternatively, the contractor, in lieu of appealing a contracting officer's decision to a board of contract appeals, may file suit on its claim in the United States Claims Court. 41 U.S.C. § 609(a).² In both forums the claim is heard *de novo*. If the contractor or the agency (with the approval of the Attorney General) wishes, either may appeal a decision of a board of contract appeals or the Claims Court to the United States Court of Appeals for the Federal Circuit ('CAFC'). 41 U.S.C. § 607(g). See USAM 4-4.220.

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 *Zidell v. United States*, 427 F.2d 735, 739 (Ct.Cl.1970). Questions concerning the CDA should be directed to the Commercial Litigation Branch.

4-4.422 Validity and Construction of Liquidated Damages Provisions

Liquidated damages provisions are no longer viewed with disfavor. *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 119 (1907); *Southwest*

¹ Contracts with the Tennessee Valley authority and contracts with foreign entities may be excepted from the CDA under certain circumstances. 41 U.S.C. § 601(b)(c).

² Where the claim arises under a maritime contract, jurisdiction over an appeal from a contracting officer's decision is governed by 41 U.S.C. § 603, which confers jurisdiction on the district court.

Engineering Co. v. United States, 341 F.2d 998, 1001 (8th Cir.), cert. denied, 382 U.S. 819 (1965). 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.*, 205 U.S. at 105; *Priebe & Sons v. United States*, 332 U.S. 407, 412 (1947). 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*, 332 U.S. at 422; cf. *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 (1956). 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 amount. See *Printing & Publishing Ass'n v. Moore*, 183 U.S. 642 (1902). Recovery of liquidated damages may be had even though actual damages are not proved. *United States v. Bethlehem Steel Co.*, supra (war ended and importance of time disappeared).

4-4.423 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.*, 711 F.2d 1038 (Fed.Cir.1983); *Burnett Electronics Laboratory, Inc. v. United States*, 479 F.2d 1329 (Ct.Cl.1973); *Alabama Shirt & Trouser Company v. United States*, 121 Ct.Cl. 313 (1952); *Ruggiero v. United States*, 420 F.2d 709 (Ct.Cl.1970). 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 48 C.F.R. § 1-2.406-31; *United States v. Hamilton Enterprises, Inc.*, supra; *United States v. Metro Novelty Manufacturing Company*, 125 F.Supp. 713 (S.D.N.Y.1954).

4-4.424 Construction and Other Performance Deficiencies

Performance 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.1902), and *United States v. Hammer Contracting Corp.*, 216 F.Supp. 948 (E.D.N.Y.1963), *aff'd*, 331 F.2d 173 (2d Cir.1964).

4-4.425 Contracts to Supply Equipment

United States v. Wegematic Corp., 360 F.2d 674 (2d Cir.1966); *Hoffman v. United States*, 276 F.2d 199 (10th Cir.1960); and *Silverman Brothers, Inc.*

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v. United States, 324 F.2d 287 (1st Cir.1963), illustrate cases in which recovery has been had for default on contracts for the fabrication and delivery of specific items of equipment.

4-4.426 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.1958); *Wendel Presses, Inc. v. United States*, 343 F.2d 961 (Ct.Cl.1965).

4-4.427 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). 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.

4-4.428 Quasi-Contractual Claims

Monies illegally or improperly disbursed, including those disbursed on an erroneous understanding of facts, may be recovered in a quasi-contractual suit for unjust enrichment. *United States v. Bentley*, 107 F.2d 382 (2d Cir.1939); *United States v. Independent School District No. 1*, 209 F.2d 578 (10th Cir.1954); *Kingman Water Co. v. United States*, 253 F.2d 588 (9th Cir.1958); *J.W. Bateson Co., Inc. v. United States*, 308 F.2d 510, 514-515 (5th Cir.1962); *Mt. Sinai Hospital of Greater Miami v. Weinberger*, 517 F.2d 329 (5th Cir.1975). Similarly, the United States may recover the value of government services provided under a mistake as to the recipient's eligibility for such services. *United States v. Shanks*, 384 F.2d 721 (10th Cir.1967). 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).

Overpayment of (1) government civilian pay, (2) pay and allowances for member 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 statutes provide only for administrative relief and are not a proper basis for denial of judicial relief. Cf. *United States v. Kelley*, 192 F.Supp. 511, 513 (D.Mass.1961).

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4-4.430 Collections

A major responsibility of the Attorney General, the Civil Division, and the U.S. Attorneys is recovering sums owed the United States. Prompt action should be taken to collect such debts, including the filing of suits, obtaining judgments, and enforcing judgments. Prompt and effective action is necessary if debtors are to respect the Department's ability and will to collect these debts and if the public is to have confidence in the institutions of Government. Prompt and effective action is also important 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. See 28 C.F.R. § 0.171.

It is important that agency referrals be screened, pursuant to the joint regulations 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.* 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. Parts 101 to 105 (42 Fed.Reg. 8889 (March 9, 1984)). See generally Civil Division Monograph entitled "'Seminar: The Debt Collection Act of 1982 and the Federal Claims Collection Standards'" (1985).

An appropriate supersedeas bond should be required in every 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. 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.

4-4.440 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.1963), *cert. denied*, 376 U.S. 909 (1964); *United States v. Mathews*,

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244 F.2d 626 (9th Cir.1957); *United States v. Carson*, 372 F.2d 429 (6th Cir.1967); *Cassidy Commission Co. v. United States*, 387 F.2d 875 (10th Cir.1967); *United States v. Union Livestock Sales Co.*, 298 F.2d 755 (4th Cir.1962); *Duvall-Wheeler Livestock Barn v. United States*, 415 F.2d 226 (5th Cir.1969); *United States v. Gallatin Livestock Auction*, 589 F.2d 353 (8th Cir.1979).

Sommerville, supra; Mathews, supra; Carson, supra; Cassidy, supra; and United States v. Hext, 444 F.2d 804 (5th Cir.1971), hold that liability for conversion in such circumstances is determinable by federal rather than state law. *But see United States v. E.W. Savage & Sons*, 475 F.2d 305 (8th Cir.1973).

4-4.450 Decedent's Estate

The United States may hold itself aloof from 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 are fully protected. *See Viles v. CIR*, 233 F.2d 376, 380 (6th Cir.1956). 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.1942); *United States v. Muntzing*, 69 F.Supp. 503 (N.D.W.Va.1946). 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.

4-4.451 Devise and Bequests to the Government

The United States may receive both testamentary and *intervivos* donations of either real or personal property, if they 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 Branch, which will ascertain the authority of the beneficiary agency, and its wishes in the matter. If acceptance is desired, the U.S. Attorney will be asked to enter an appropriate appearance in the probate proceeding.

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4-4.452 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 Linquist's Estate*, 25 Cal.2d 697, 154 P.2d 879, cert. denied, 325 U.S. 869 (1944). A state enacting an abandoned personal property law cannot thereby defeat the escheat claim of the United States. See *In re Hammond's Estate*, 154 N.Y.S.2d 820 (1956), aff'd, 170 N.Y.S.2d 505, 147 N.E.2d 777 (1956).

4-4.453 VA Vesting Claims

The personal estates of veterans who die intestate and without heirs or next of kin while being furnished care and treatment by the VA in government facilities 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 to 5228. The veteran's application for care under such circumstances includes a contractual provision consonant with the statute.

4-4.460 Grants—Breach of Conditions

An increasingly large portion of federal disbursements are made through grants 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., addresses 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. See *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1980). 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 substantial evidence basis. See *Bell v. New Jersey*, 103 S.Ct. 2187 (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 (1935); *United States v. Bank of Metropolis*, 40 U.S. 377, 401 (1841).

Payments made by mistake—e.g., under misapprehension that grant conditions are being observed—are recoverable. See *United States v. Mead*, 426 F.2d 118 (9th Cir.1970). A failure to observe record-keeping requirements can support recovery of unsupportable disbursements. See *United States v. Independent School District No. 1*, 209 F.2d 578 (10th Cir.1954). In deter-

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mining 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).

4-4.470 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.1967); *Feldstein v. United States*, 352 F.2d 74 (9th Cir. 1965); *United States v. Newton Livestock Market, Inc.*, 336 F.2d 673, 677 (10th Cir.1964); *United States v. Vince*, 270 F.Supp. 591 (E.D.La.1967), *aff'd*, 394 F.2d 462 (5th Cir.1968), *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. 1962); *United States v. Dubrin*, 373 F.Supp. 1123, 1126 (W.D.Tex.1974).

Settlement with other parties will not release the unconditional guarantor. See *Commercial Credit Corp. v. Sorgel*, 274 F.2d 449, 466-467 (5th Cir.1960), *cert. denied*, 364 U.S. 834; *United States v. Dubrin*, 273 F.Supp. 1123 (W.D.Tex.1974); Restatement of Security § 121(1)(b) Reporter's Note § 121, comment on Tent. Draft No. 2 1965); 9B Uniform Laws Ann., Model Joint Obligations Act (1966).

4-4.480 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 been paid more than its reasonable costs for medically necessary 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). Also, if the provider has dropped out of the Medicare Program, suit may be necessary to recover the overpayments. In *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 the designated time would create a conclusive presumption that all Medicare payments during the relevant time period were 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 to 1833, formerly 20 C.F.R. §§ 405.490 to 405.49(i). For accounting periods ending on or after June 30, 1973, see 42 U.S.C. § 11395oo, and 20 C.F.R. §§ 405.1801 to 1889. The provider should be encouraged to seek administrative review of the overpayment claims against it even for earlier periods.

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.

HHS wishes to be consulted with respect to all compromise proposals and to be advised of developments in these cases. 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

4-4.500 GENERAL COMMERCIAL LITIGATION (Continued)

4-4.510 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 31 U.S.C. § 9305. If a surety fails to make payment, its privilege of writing bonds may be suspended or revoked by the Treasury Department. Whenever the Federal 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 itself to the jurisdiction of the court, its liability may be enforced on motion without the necessity of an independent action. See Fed.R.Civ.P. 65.1.

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

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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). A surety must pay all of an obligation before it is entitled to enforce its principal's rights by way of subrogation. *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).

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, *United States v. Continental Casualty Co.*, 346 F.Supp. 1239 (N.D.Ill. 1972); but see *Balboa Insurance Co. v. United States*, 775 F.2d 1158 (Fed. Cir.1985); *United States v. Continental Casualty Co.*, 512 F.2d 475 (5th Cir.1975); *American Fidelity Fire Insurance Co. v. United States*, 513 F.2d 1375 (Ct.Cl.1975), as to actions which may prejudice the surety.

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, 400 (5th Cir.1960). If the surety participates in the proceeding against its principal, it is concluded as to the issue therein decided against its principal. See *Mass. Bonding & Ins. Co. v. Denike*, 92 F.2d 657, 658 (3d Cir.1937); see generally 20 Appleman, *Insurance Law & Practice* § 11523 (1963).

4-4.520 VA Loan Claims

Veterans who default on VA insured or guaranteed loans remain liable for any deficiency, after foreclosure by the lending institution, by virtue of 38 C.F.R. § 36.4123(e). The VA indemnity regulation permits recovery notwithstanding state anti-deficiency judgment statutes. See *United States v. Shimer*, 367 U.S. 374 (1961). When suit is brought on the indemnity regulation, only the veteran is liable. However, the veteran's spouse may be liable on the theory of subrogation. Thus, if there is no state anti-deficiency judgment statute, a second count on the subrogation theory is desirable, particularly in states recognizing estates by the entirety, and in community property states.

4-4.530 Warranties

4-4.531 Express Warranties

Government contracts frequently contain express warranty clauses. The warranty clause, by its terms, provides the exclusive remedies for nonlatent defects or those not involving fraud or such gross mistakes as amount

to fraud, by requiring the contractor to repair or replace the defective article or part, or, if the article or part was retained, by requiring the contractor to pay an amount which is equitable under the circumstances. See *United States v. Franklin Steel Products*, 482 F.2d 400, 404 (9th Cir.1973). A frequent defense asserted by contractors in such cases is that the government's right of inspection before acceptance, under another clause included in such contracts, see 48 C.F.R. § 1-52.246.2 *et seq.*, relieved the contractors of liability, since the government should have inspected, or it negligently inspected, the product or part. However, the inspection clause was added to give the government further protection, not less. *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir.1972); *United States v. Franklin Steel Products*, 482 F.2d at 400 (9th Cir.1973). Assuming, *arguendo*, that the government had a duty to inspect, the warranty clause specifically provides that inspection and subsequent acceptance are not conclusive as to "latent defects, fraud, or such gross mistakes as to amount to fraud." Thus, latent defects, not discoverable by visual inspection or the tests specified in the contract, would be the basis for relief in any event. See *United States v. Franklin Steel Products*, 482 F.2d at 403.

4-4.532 Implied Warranties

A. Affirmative Actions Based on Implied Warranties. Unless specifically forbidden from doing so by regulation or by the contract in question, the government may claim the benefits of implied warranties found in the Uniform Commercial Code (UCC). Although federal law applies to determine rights and liabilities of parties to a government contract, the Uniform Commercial Code may serve as a guide for federal law in this area, at least to the extent that the question is not governed by the contract or by federal regulations. See *United States v. Hext*, 444 F.2d 804 (5th Cir. 1971); *Everett Plywood & Door Corp. v. United States*, 419 F.2d 425 (Ct.Cl. 1969); *United States v. Megawatic Corp.*, 360 F.2d 674 (2nd Cir.1966). The implied warranty of merchantability is found at section 2-314 of the UCC. The implied warranty of fitness for a particular purpose is found at section 2-315. In a proper case, the government may also recover incidental and consequential damages, pursuant to section 2-715 of the UCC. It should be noted that the implied warranties found in sections 2-314 and 2-315 will not apply if, prior to entering into the contract, there was an examination or inspection of the goods by the buyer, unless the defects could not have been reasonably discovered at the time of the examination. U.C.C. § 2-316.

B. Defenses to Allegations of Implied Warranties. Contractor may not defend or recover on an implied warranty theory where the government expressly disclaims such warranties. *Webco Lumber, Inc. v. United States*, 677 F.2d 860 (Ct.Cl.1982). The issue arises most often in contracts which contain an estimate of quantities. Where such estimates are clearly de-

fined as estimates only and any implied warranty is expressly disclaimed, the disclaimer will be given effect. *Id.*; *Caffall Brothers Forest Products, Inc. v. United States*, 678 F.2d 107 (Ct.Cl.1982). In order to prevail on a claim of breach of warranty, the plaintiff must establish that:

1. The government assured the plaintiff of the existence of a fact;
2. The government intended that plaintiff be relieved of the duty to ascertain the existence of the fact for itself; and

3. The government's assurance of that fact proved untrue. See *Kolar, Inc. v. United States*, 650 F.2d 256 (Ct.Cl.1981). 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. *Id.* For a warranty to exist, there must be either an affirmation of fact or a promise which relates to performance under the contract. *American Ship Building Company v. United States*, 654 F.2d 75 (Ct.Cl.1981). 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.*

4-4.533 Warranty of Prior Endorsement of Checks

Treasury regulations provide that a bank presenting a check for payment is deemed to have guaranteed prior endorsements. 31 C.F.R. § 240.4. Suit should be brought against the presenting bank, which is liable on its warranty of the prior endorsement. *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945). The UCC does not control in such situations. See *United States v. First National Bank of Atlanta*, 441 F.2d 906 (5th Cir.1971). Rather, federal law controls the rights and duties of the United States on its commercial paper. See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

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. § 3712(a). In the event of fraudulent concealment, suit may be commenced within two years after discovery of the cause of action, 31 U.S.C. § 3712(b). 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 Branch of the Civil Division. See *United States v. Continental-American Bank & Trust Co.*, 175 F.2d 271 (5th Cir.1949), *cert. denied*, 338 U.S. 770 (1949); *Atlantic Nat'l Bank of Jacksonville v. United States*, 250 F.2d 114 (5th Cir.1957); *United States v. Bank of America Nat'l Trust and Savings Assn.*, 274 F.2d 366 (9th Cir.1959).

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4-4.540 Defense of Foreclosure, Quiet Title, and Partition Actions: 28 U.S.C. § 2410

Section 2410 of Title 28 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.

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 lien, the Commercial Litigation Branch of the Civil Division supervises. The Land and Natural Resources Division (General Litigation Section) supervises defense of a 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 5-7.000, *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, 1963).

4-4.541 Actions Not Within 28 U.S.C. § 2410

Section 2410 of Title 28 does not apply if the plaintiff seeks an injunction, see *Shaw v. Rippel*, 224 F.Supp. 77 (E.D.Ill.1963), 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 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 foreclosures, see 59 C.J.S. 1030, Mortgages § 596(a). *Mennonite Board of Missions v. Adams*, 103 S.Ct. 2706 (1983), held that in tax foreclosure by state and local bodies, advertising and posting are not constitutionally adequate and that notice by mail was the minimum required.

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.

4-4.542 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.1956). 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.

4-4.543 Removal of Actions Brought in State Courts

Usually the Commercial Litigation 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.1954); *Hamlin v. Hamlin*, 237 F.Supp. 299 (N.D.Miss. 1964). Removal should be accomplished within thirty days of receipt of a copy of the initial pleading, whether by service of process or otherwise.

4-4.544 Responsive Pleadings

Informal requests to opposing counsel to correct deficiencies, such as those cited in USAM 4-4.542, *supra*, will often obviate filing a preliminary

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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 4-4.545, *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.

4-4.545 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:

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. 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.*, 708 F.2d 804 (1st Cir.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 *vis-a-vis* 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 also *United States of America v. David Friedland, et al.*, 502 F.Supp. 611 (D.N.J.1980).

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 law that prejudice federal interests ... (citing case). The issue here, however, involves commercial rules of general applicability, based on codes that are remarkably uniform throughout the Nation.

(440 U.S. at 736, note 37)

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 Commercial Litigation Branch Monograph, *Choice of Laws Decision in Federal Courts After Kimbell Foods*.

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.

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.

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. The dollar amount of the authority delegated to the U.S. Attorney to

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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.

4-4.550 Foreclosure of Government-Held Mortgages

Judicial foreclosures are discussed in detail in the *Civil Division Practice Manual*. See also Civil Division Monograph entitled "Affirmative Multi-Family Mortgage Litigation: Foreclosure, Deficiencies, and Interlocutory Relief (Mortgagee-In-Possession and Receiver)" (1983). 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 Branch.

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. Motions for summary judgment should be utilized when appropriate, to expedite the entry of foreclosure decrees. In HUD, multi-family foreclosures, no compromise should be entered into with the mortgagor prior to liquidation of the security property, without the express approval of the Civil Division.

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4-4.600 CASES WITH INTERNATIONAL OR FOREIGN LAW ASPECTS

4-4.610 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.

4-4.620 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). D.J. Memo No. 386, Rev. 2, June 15, 1977, "Instructions for serving judicial documents in the United States and for processing requests for 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).

4-4.630 Obtaining Testimony and Documents Abroad

Guidance in obtaining testimony and documents from abroad may be obtained from the Office of Foreign Litigation (FTS 724-7455).

4-4.650 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.

UNITED STATES ATTORNEYS' MANUAL

DETAILED
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4-5.000 TORT LITIGATION

Tort litigation against the Federal Government is under the general supervision of the Civil Division's Torts Branch. The work of the Torts Branch is divided into four principle categories (1) aviation/admiralty or maritime claims, (2) general tort FTCA claims, (3) litigation involving exposure to asbestos and other toxic substances (both in the workplace and in the environment), and (4) cases involving the personal liability of federal officials (constitutional and common law torts). Each of these categories comes within the purview of a separate component of the Torts Branch, and each is treated separately below.

Admiralty and Aviation Litigation arises as a result of the government's role as aircraft or ship owner, and as regulator of both air traffic and the nation's coastal and inland waterways. General tort claims include traditional actions against the government for personal injury and medical malpractice brought under the Federal Tort Claims Act. Occupational or environmental exposure litigation involves injuries or medical conditions attributed to toxic substances such as asbestos. The Branch also routinely represents federal employees sued in their individual capacities for alleged violations of the common law or constitutional rights of another, resulting from action taken within the employees' scope of employment.

Although separated by component in the discussion below, many aspects of defending a federal tort lawsuit are common to all, or several, categories of tort cases. For example, many of the defenses available under the Federal Tort Claims Act may be equally applicable in aviation cases, general tort cases, and cases involving exposure to hazardous substances. Similarly, it is not uncommon for a single case to present alternative causes of action which cross the boundary between particular categories. For example, a single case will often include both a constitutional tort claim against individuals and a general tort claim against the government.

4-5.100 FEDERAL TORT CLAIMS ACT LITIGATION

Contact: Jeffrey Axelrad (FTS 724-6810)
Director

Roger D. Einerson (FTS 724-6703)
Paul Figley (FTS 724-6820)
Ralph H. Johnson (FTS 724-6696)
Phyllis J. Pyles (FTS 724-6745)

Civil Division
United States Department of Justice
P.O. Box 888
Ben Franklin Station
Washington, D.C. 20044

4-5.110 Conduct of FTCA Litigation

The U.S. Attorney will receive a letter after the Attorney General is served with the summons and complaint in a suit under the Federal Tort

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Claims Act stating whether the case is designated as a ''primary,'' ''joint,'' ''monitored,'' or ''delegated,'' case within the Civil Division's Torts Branch. See USAM 4-1.310.

If an adverse judgment is received in a delegated case, the amount of judgment is less than \$500,000, and there is no significant issue presented by the adverse decision, and the U.S. Attorney and the affected agency recommend against appeal, the judgment can be promptly forwarded to the Torts Branch Director responsible for FTCA matters who is authorized to determine against appeal if he/she acts on the recommendations within thirty days after entry of judgment. In all other matters involving adverse judgments, the adverse judgments along with comments and supporting materials must be forwarded to the Appellate Staff; in those cases, a copy of the materials forwarded to the Appellate Staff should also be forwarded to the Torts Branch.

Copies of all compromise memoranda should be forwarded to the Torts Branch, Post Office Box 888, Ben Franklin Station, Washington, D.C. 20044.

4-5.120 Research and Guidance Materials

The Torts Branch has prepared Monographs and a Handbook covering many recurring substantive issues pertaining to Federal Tort Claims Act (FTCA) litigation. The current FTCA Monographs are:

1. Administrative Claims
2. Administrative Claim Sum Certain Requirement and the Ad Damnum Limitation
3. Actionable Duty
4. Checklist of FTCA Defenses
5. Contribution and Indemnity
6. Discretionary Function
7. Employees or Independent Contractors
8. FTCA Exception: Claims Arising in a Foreign Country
9. Jurisdiction, Venue and Service of Process
10. 'Loss of a Chance' for Survival and a Cause of Action for Medical Malpractice
11. Provisions and Procedures Governing the Payment of Interest on Federal Tort Claim Judgments
12. Removal of Cases from State to Federal Courts

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13. Scope of Employment Determinations in Military Permanent Change of Station (PCS) and Temporary Duty (TDY) Cases
14. Statute of Limitations
15. The Exception for Misrepresentation and the Exception for Interference with Contract Rights Under the Federal Tort Claims Act
16. The *Feres* Doctrine and Servicemen's Immunity

Each U.S. Attorney has received copies of the foregoing Monographs. If an Assistant U.S. Attorney needs an additional copy of a particular Monograph, it can be obtained by calling FTS 724-6737 or by writing to the Torts Branch, Post Office Box 888, Ben Franklin Station, Washington, D.C. 20044. In addition, a looseleaf handbook entitled "'Damages Under the Federal Tort Claims Act'" has been sent to each U.S. Attorney's office and will be updated periodically. Contributions to the Damage Handbook are solicited from Assistant U.S. Attorneys.

4-5.130 Substantive Considerations in FTCA Litigation

An Assistant U.S. Attorney assigned to defense of a Federal Tort Claim Act suit is expected to assume full responsibility for preparation of an aggressive, professional defense to the suit. The initial letter from the Torts Branch will request the agency to forward a litigation report to the AUSA. This litigation report will be the starting point for development of the facts and legal position to be taken in the litigation. However, the Assistant U.S. Attorney is responsible for ensuring that each reasonable legal and factual defense is pursued regardless of whether the agency litigation report identifies the defense. The Torts Branch Monographs and, particularly the "'Checklist of FTCA Defenses'" Monograph, provide assistance.

The AUSA should obtain approval from the Torts Branch prior to pressing the "'discretionary function exception'" defense in any case and may well desire to consult with the Branch when a difficult issue pertaining to any of the exceptions or exclusions to the Federal Tort Claims arises. If the case is designated as a monitored case, he/she should contact the attorney or reviewer designated in the initial letter from the Torts Branch to the agency requesting a litigation report. If the case is designated as a delegated case, the author of the appropriate Monograph, if any, should be contacted or inquiry may be made by calling the responsible Director's office (FTS 724-6810).

4-5.131 Special Authority to Represent Government Drivers and Physicians

AUSAs are authorized to make the certification required by law in order to substitute the United States for a federal employee against whom a civil action or proceeding is brought under the Federal Tort Claims Act when the

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action arises out of an employee's operation of a motor vehicle within the scope of his employment. See 28 C.F.R. § 15.3. Similarly, AUSAs are authorized to make the certification required to substitute the United States when an action arises on account of an employee's performance of medical care or treatment within the scope of his employment with the Public Health Service, the Veterans Administration, the Department of State, the Armed Forces, the Central Intelligence Agency, or the National Aeronautics and Space Administration. See 28 C.F.R. § 15.3.

4-5.132 Settlement of Federal Tort Claims Act Suits

U.S. Attorneys responsible for the defense of FTCA litigation are currently delegated \$200,000 in settlement authority, subject to the limitations set forth in Civil Division Directive No. 163-86. If a U.S. Attorney seeks to settle for an amount in excess of his/her delegated authority, he/she must prepare a detailed justification for the settlement and forward it to the Torts Branch. The responsible Director will then make a recommendation to the Assistant Attorney General (and when the settlement proposes to pay more than \$750,000, to the Deputy Attorney General). Although the Torts Branch endeavors to expedite consideration of settlement proposals, opposing counsel and, if necessary, the court should be informed that immediate action cannot be guaranteed on any settlement proposal.

It is customary to consult with the Torts Branch during settlement negotiations when any concern regarding the advisability of settlement or of the amount of the settlement is reasonably possible. Although authority to settle a case can be obtained in exceptional cases prior to submission of an authorized offer from the other party(ies) to the case, this procedure is highly disfavored and should not be used unless special justification for its use is provided. However, the Torts Branch will provide counsel as to what amount it will recommend to the Assistant Attorney General in advance of initiation or completion of settlement negotiations.

Stipulations for admissions which are tantamount to a stipulation of liability must be approved by whatever level of authority is appropriate based on the highest reasonably predictable judgment or settlement that the Court could enter predicated upon the stipulation or admission.

4-5.140 FTCA Payment Procedure

The procedures for payment of an FTCA settlement should not be initiated until after all required approvals are obtained. Most FTCA settlements are paid by means of a Treasury check issued upon making a request to the General Accounting Office (GAO). Forms for use in transmitting your request for payment to the General Accounting Office are included at USAM 4-11.110.

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Structured settlement agreements require careful attention to the terms and provisions of the agreement. The Torts Branch should be consulted regarding the particular terms of a structured settlement and copies of the final settlement papers should be forwarded to the Torts Branch for retention. In the event that a reversionary trust provision is included in a structured settlement, the trust should include a requirement that the reversionary interest be paid to the United States Treasury in care of the Torts Branch pursuant to the terms of the agreement. Further information on the format and provisions for structured settlements is included in the Torts Branch Handbook entitled "'Damages Under the FTCA.'"

4-5.150 Medical Care Recovery Act Cases

Sections 2651 to 2653 of Title 42 authorize 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.

Administrative agencies are bound by regulations promulgated by the Attorney General (28 C.F.R. §§ 43.1 to 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. 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. Intervention should be utilized as a measure of last resort only if private counsel do not cooperate with the agency to protect our right to participate in agency recovery.

If advice is needed, the FTCA staff may be contacted (FTS 724-6810).

4-5.160 Medicare Recovery Cases

Section 1395y(b)(1) of Title 42 provides that Medicare shall be a secondary payer in certain circumstances, including automobile accident cases or other instances where a third party would otherwise be liable for medical costs. This provision also expressly authorizes the United States to bring an independent action to recover from an insurer the cost of Medicare payments needed as a result of an automobile accident, or to join or intervene in any such action.

If advice is needed, the FTCA staff may be contacted (FTS 724-6810).

4-5.200 REPRESENTATION OF FEDERAL EMPLOYEES/BIVENS¹

¹ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Contact: John J. Farley, III (FTS 724-6805)
Director

Nicki L. Koutsis (FTS 724-6733)
Dawn M. MacPhee (FTS 724-6701)
Assistant Directors

Civil Division
United States Department of Justice
P.O. Box 7146
Benjamin Franklin Station
Washington, D.C. 20044

4-5.210 Introduction

The Constitutional Tort attorneys defend present and former government officials in suits against them in their official and individual capacities based upon official conduct. Pursuant to 28 U.S.C. §§ 516 to 519, the Attorney General and the Department of Justice are responsible for attending to the interests of the United States in litigation which includes providing representation to present and former government employees who are sued for acting within the scope of their employment. Policy guidelines for Department of Justice representation are published at 28 C.F.R. §§ 50.15 and 50.16. The Constitutional Tort staff processes the majority of representation requests in suits against individual federal employees. Questions regarding representation requests should be directed to John J. Farley, III, Branch Director.

Personal damage claims against individuals raise special concerns which are critical to their defense and with which the government attorney must be able to deal effectively. These are discussed briefly in subsequent sections. However, it is important to note at this juncture that for many years suits against federal executive officials in their individual capacities were relatively infrequent since aggrieved persons generally were limited to suits asserting common law claims for which absolute immunity was the norm. In 1971 the Supreme Court dramatically altered the course of official immunity with its ruling in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that federal officials may be sued for violations of certain constitutional rights (hence, the *Bivens* suit). See Torts Branch Representation Monograph III for historical development of the immunity doctrines.

4-5.211 Research and Guidance Materials

The Constitutional Tort Staff has prepared several Monographs covering substantive issues pertaining to the representation of federal employees and *Bivens* litigation. The current monographs are:

- Torts Branch Representation Monographs
 - I — Representation Practice & Procedure
 - II — Personal and Jurisdictional Defenses
 - III — Immunity of Federal Employees in Personal Damages Actions

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4-5.212 Representation Process

A. Generally. Personal representation of government employees is necessary only when they are sued in an individual capacity. When a government employee is sued in an official capacity, the real defendant is the United States. Should relief be awarded, it would be against the resources of the United States. The Department of Justice represents federal officials sued in their official capacities for declaratory, injunctive or other forms of relief. No formal request for representation is necessary.

When an employee (present or former) is sued in his or her individual capacity, he or she is the personal target of the lawsuit. The plaintiff seeks recovery from the personal assets of the employee as opposed to the assets of the United States. Additionally, it is noted that in most instances a federal employee providing testimony (i.e., deposition), and who is not a party to the action, does not need personal representation and Department of Justice representation will not be authorized. See Torts Branch Representation Monograph I.

B. Criteria. Department of Justice representation is never available in a federal criminal proceeding or investigation or in an agency disciplinary proceeding. 28 C.F.R. § 50.15(a)(4) and (b). Nor is it available in a civil case if the employee is the subject of a federal criminal investigation for the same act(s). 28 C.F.R. § 50.15(a)(4) to (6).

The criteria for personal representation of an employee are:

- (a) Scope of employment. The employee's actions giving rise to the suit must reasonably appear to have been performed within the scope of his/her federal employment.
- (b) Interest of the United States. It must also be in the interest of the United States to provide the requested representation. 28 C.F.R. § 50.15(a).

The Department of Justice is ultimately responsible for making the "scope" and "interest" determinations after benefiting from the agency recommendation. Since the Executive Branch is responsible for determining the interests of the United States in litigation, decisions of this nature are precluded from Judicial Branch scrutiny by the doctrine of separation of powers. *Falkowski v. Equal Employment Opportunity Commission*, 764 F.2d 907 (D.C.Cir.1985),² reh'g denied, 783 F.2d 252 (D.C.Cir. 1986), cert. denied, 106 S.Ct. 3319 (1986).

C. Procedure for Requesting Department of Justice Representation.

² Vacating 719 F.2d 470 (D.C.Cir.1983), vacated and remanded *United States Department of Justice v. Falkowski*, 471 U.S. 1001 (1985).

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1. Generally. Department of Justice representation is neither automatic nor compulsory; federal employees are free to retain counsel of their choice at their own expense. Every individual defendant who desires Department of Justice representation must request it in writing. The written request should be submitted to the individual's employing agency (usually the Office of the General Counsel, Chief Counsel, or Solicitor) along with a copy of the Summons and Complaint or other legal papers. The agency should then forward the request with all available factual information to the Department of Justice with a recommendation as to whether representation should be provided based upon the criteria of "scope" and "interest." It is also suggested that a courtesy copy of the papers be provided to the United States Attorney in the district where the suit is filed.

Most representation requests are routed to the Torts Branch where the Assistant Director in charge of representation may approve routine requests. Requests for representation in traffic cases and other small matters may be denied by the Director of the Torts Branch responsible for representation. Cases that are difficult or involve requests that should be denied are forwarded to the Assistant Attorney General or a designated Deputy Assistant Attorney General through the "Civil Division Representation Committee." This Committee, which meets informally when necessary and is open to presentation, makes a recommendation to the Assistant Attorney General or Deputy Assistant Attorney General, who then renders a decision. Unless the employing agency reasonably concludes that representation is "clearly unwarranted" (28 C.F.R. § 50.15(a)(1)), a request for representation should be forwarded to the Department. See Torts Branch Representation Monograph I.

2. Conditional Representation. Frequently, a representation matter must be determined quickly. In such cases, telephone approval may be secured from the Assistant Director in charge of representation in the Torts Branch. See 28 C.F.R. § 50.15(a)(1). This approval is conditional and must be supplemented by the aforementioned written materials. Additionally, United States Attorneys have automatic authority to seek 60 days in which to respond to a complaint when they are dealing with summonses specifying a shorter response time.

D. Representation Agreements. Upon formal approval of representation, the litigating attorney should forward a Form 399 to the client with a copy for signature and return. The form sets forth the limitations of Department of Justice representation so that the client fully understands and enters into the attorney-client relationship on a basis of informed consent. See Department of Justice Order 2770.5.

E. Representation of the Judiciary. Very often a judge may be sued in an individual capacity for money damages as a result of judicial acts. Because the judiciary is constitutionally separate from the Executive

Branch, each request must be individually examined and approved. As a practical matter, the Assistant Director in the Torts Branch in charge of representation ordinarily authorizes representation in routine cases. The procedure for requesting representation is the same for judges as for other federal employees. If a federal judicial officer wishes Department of Justice representation, he/she should make a written request to the Department of Justice and forward it through the Administrative Office of the U.S. Courts. It must be determined that a judge or judicial officer acted within his judicial or official capacity, and that the case is one in which Department of Justice representation is appropriate. As a general rule, the Department may represent a member of the judiciary where the only relief sought is money damages against the judge personally. It may not represent him in a collateral proceeding which is in the nature of an appeal to overturn a decision of the judicial officer rendered in favor of one party or another.

F. Payment of Adverse Judgments. Regardless of whether representation is provided by the Department of Justice, a federal employee remains personally responsible for the satisfaction of a judgment entered solely against the employee; there is no right to compel indemnification from the United States or an agency thereof in the event of an adverse judgment. However, in June, 1986, the Attorney General promulgated a change in the policy of the Department of Justice permitting the possible indemnification of Department of Justice employees for adverse judgments or, in exceptional circumstances, for adverse settlements. 28 C.F.R. § 50.15, as amended, 51 Fed.Reg. 27,021 (1986). It is important to note that indemnification is neither automatic nor routinely authorized.

G. Private Counsel. Where conflicts in the factual or legal positions of a number of defendants make representation by a single attorney impossible, the Assistant Attorney General or his designee may authorize the retention of private counsel at government expense provided the scope and interest criteria have been satisfied and subject to the availability of funds. See 28 C.F.R. § 50.16. Special written agreements between the Department of Justice and the attorney are required. See Administrative Directive 2120.

4-5.213 Analysis of Complaint

Reference should be made to the Torts Branch Representation Monographs for detailed guidance on how to approach complaints filed against individuals. This section will touch briefly upon some typical problems in suits against individuals.

A complaint filed against a federal official must be carefully evaluated and even before reaching the merits one must consider the threshold defenses available under Fed.R.Civ.P. Rule 12. Care must be taken not to waive any defenses.

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A. Lack of Jurisdiction Over the Subject Matter. This requirement, referring to the authority and power to hear and decide cases under the Constitution and federal statutory law, cannot be waived. See *Davis v. Passman*, 442 U.S. 228, 239 n. 18 (1979), citing *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379 (1884). This is explained in further detail in Torts Branch Representation Monograph II.

B. Removal. With few exceptions, cases against individual federal defendants filed in state court should be removed to federal court as soon as representation is granted and prior to the expiration of the 30-day period after receipt of service. See 28 U.S.C. § 1446(b); Torts Branch Representation Monograph I; 28 U.S.C. § 1442(a)(1). Criminal prosecutions must be removed within 30 days after arraignment or before trial, whichever is earlier, except the time may be extended on a showing of good cause. 28 U.S.C. § 1446(c)(1). Civil or criminal actions commenced against a member of the military arising out of actions committed under color of military office may be removed anytime prior to trial. 28 U.S.C. § 1442(a). The cost of the removal bond may be paid as a litigation expense out of the United States Attorney's funds.

C. Personal Jurisdiction and Service of Process. Personal jurisdiction refers to the court's ability to exercise power over an individual for the purpose of adjudicating his rights and liabilities stemming from a particular transaction or event. Because a *Bivens* action seeks relief against the personal resources of a federal employee in his individual capacity, the court must acquire personal jurisdiction in order to enter a binding judgment. See *Griffith v. Nixon*, 518 F.2d 1195 (2d Cir.), cert. denied, 423 U.S. 995 (1975); see also *Hansberry v. Lee*, 311 U.S. 32 (1940); *Micklus v. Carlson*, 632 F.2d 227 (2d Cir.1980).

Federal Rules of Civil Procedure Rule 4, describes the methods of service by which personal jurisdiction may be acquired, and by which proper service of process may be accomplished. It is important to note that in suits against federal officials for acts allegedly done within the scope of their employment, plaintiffs must serve the United States in addition to the individual under Rule 4(d)(5). E.g., *Light v. Wolf*, 816 F.2d 746 (D.C.Cir.1987). Additionally, caution is advised when dealing with amended Rule 4 which permits personal service on individual defendants by first-class mail. See Rule 4(c)(2)(C)(ii). Remember that the Department takes the position that the sufficiency of service and amenability of an individual to personal jurisdiction and venue are not altered or improved by amended Rule 4. However, whenever an acknowledgment is returned, it should be accompanied by a caveat to the effect that "no defenses under Rule 12(b) are hereby waived but are specifically preserved." See Torts Branch Representation Monograph II for discussion on Rule 4.

D. Venue. Since venue is a personal right of the defendant and is waivable, consideration must be given to the propriety of venue in all

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cases. In actions against federal employees, venue must be established under 28 U.S.C. § 1391(b) either in the district where all the defendants reside or where the claim arose. Nationwide venue under 28 U.S.C. § 1391(e) is available only when a federal officer is sued in his official capacity solely for equitable relief and not when the claim seeks money damages from the official individually. *Stafford v. Briggs*, 444 U.S. 527 (1980). See Torts Branch Representation Monograph II for a more detailed discussion as to where a cause of action arose.

E. Exclusive Remedies. Congress and the courts have decreed certain remedies to be exclusive, thereby immunizing certain federal employees both from suit and from liability. For example, 28 U.S.C. § 2676 provides that a judgment (or settlement) against the United States under the FTCA serves as a bar to entry of a judgment against the federal employee whose conduct gave rise to the action. Thus, a tort judgment against the United States effectively immunizes federal employees from liability. See *Arevalo v. Woods*, 811 F.2d 487 (9th Cir.1987); *Serra v. Richardo*, 786 F.2d 237 (6th Cir.), cert. denied, 107 S.Ct. 103 (1986). [Please consult the FTCA section for further discussion on exclusive remedies as they pertain to FTCA cases; see Torts Branch Representation Monographs I & III for further discussion on cases arising from the federal employment context.]

F. Failure to State a Claim Upon Which Relief Can Be Granted. Several pleading deficiencies commonly found in *Bivens* complaints which make them subject to dismissal will be mentioned here briefly. See Torts Branch Representation Monograph III for a more detailed discussion.

1. A complaint should be dismissed as to any defendant named but not alleged to have taken any action against the plaintiff. A complaint seeking damages from a government official must allege his personal involvement or responsibility with respect to the conduct being challenged. See *Douthett v. Jones*, 641 F.2d 345, 346 (5th Cir.1981); *Marvasi v. Shorty*, 70 F.R.D. 14, 21-22 (E.D.Pa.1976).

2. A plaintiff cannot state a claim against a supervisory official for a subordinate's misconduct by relying on the doctrine of *respondeat superior* or vicarious liability. *Robertson v. Sichel*, 127 U.S. 507 (1888); *Lojuk v. Quandt*, 706 F.2d 1456, 1468 (7th Cir.1983), cert. denied, sub nom. *Lojuk v. Johnson*, 106 S.Ct. 822 (1986); *Beard v. O'Neal*, 728 F.2d 894, 900 (7th Cir.), cert. denied, 469 U.S. 825 (1984). Plaintiff must affirmatively demonstrate the supervisory official's responsibility for the challenged conduct.

3. Actions against federal officials alleging civil or constitutional rights violations require greater specificity of pleading than is required generally in federal civil actions (Rule 8). Complaints which contain conclusory terms or rely on broad allegations of conspiracy should be dismissed. See, e.g., *Elliott v. Perez*, 751 F.2d 1472,

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1479 and n. 20 (5th Cir.1985); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir.1977). The Supreme Court in *Butz v. Economou*, 438 U.S. 478 (1978), enjoined the courts to be alert to the possibilities of artful pleading and to firmly apply the federal rules. See also *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

4. It is important to categorize the claim asserted. Statutory claims usually are self-evident and only require researching the particular statute to determine its applicability. Common law claims are frequently pleaded under the guise of constitutional tort. There is an obvious advantage to this, since the immunity that protects executive officials from the latter generally is more limited than from the former. The Supreme Court has cautioned against the practice. See *Paul v. Davis*, 424 U.S. 693 (1976); *Baker v. McCollan*, 443 U.S. 137 (1979). Even if a viable constitutional claim has been alleged, this does not mean that the plaintiff automatically has a *Bivens* remedy. *Bivens*, itself, 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." 403 U.S. at 396. Although the Supreme Court has held that the remedy provided by the FTCA does not preclude recognition of a *Bivens* remedy, *Carlson v. Green*, 446 U.S. 14 (1980), the court has also held that "special factors" do preclude creation of a *Bivens* remedy in the federal personnel context. *Bush v. Lucas*, 462 U.S. 367 (1983) and the military context. *United States v. Stanley*, 55 U.S.L.W. 5101 (U.S. June 25, 1987); *Chappell v. Wallace*, 462 U.S. 296 (1983).

4-5.214 The Immunity Defenses

Depending upon the individual sued and activity in question, federal defendants may have an immunity defense available which should be asserted as soon as strategy and tactics permit. The current immunity doctrines are designed to protect officials from liability as well as the burdens of litigation. See *Anderson v. Creighton*, 107 S.Ct. 3034 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Because the nature of the lawsuit determines the scope of protection a defendant official receives and the immunity analysis the court must undertake, immunity briefs should avoid generally characterizing all damages actions as *Bivens* suits. Instead, briefs should specify whether the plaintiff is seeking recovery under a constitutional tort (*Bivens*), common law, or statutory theory. Additionally, because this is a rapidly evolving area of the law, immunity arguments which have not yet received general acceptance in the courts should be approved by the Torts Branch before they are made.

A. Judicial and Legislative Immunity Doctrines.

1. Judicial Immunity. The general rule is that judges receive absolute immunity for their judicial actions as long as they do not act in

the clear absence of all jurisdiction. See *Stump v. Sparkman*, 435 U.S. 349 (1978). Clearly, the purpose of the immunity is to allow judges to perform their functions free of intimidation. *Dennis v. Sparks*, 449 U.S. 24, 31 (1980). See also *Pierson v. Ray*, 386 U.S. 547 (1967); *Eades v. Sterlinske*, 810 F.2d 723 (7th Cir.1987); *Forrester v. White*, 792 F.2d 647 (7th Cir.1986), cert. granted, 107 S.Ct. 1282 (1987). But see *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.), cert. denied, 107 S.Ct. 574 (1986).

Judicial immunity may have derivative application to court employees. See, e.g., *Sharma v. Stevas*, 790 F.2d 1486 (9th Cir.1986); *Williams v. Wood*, 612 F.2d 982 (5th Cir.1980); *Dieu v. Norton*, 411 F.2d 761 (7th Cir.1969); *Green v. Maraio*, *supra*. Significantly, some courts have extended the immunity to persons who are not court employees, (*Ferri v. Ackerman*, 444 U.S. 193 (1979) (grand jurors); *Briscoe v. LaHue*, 460 U.S. 325 (1983) (witnesses); *Slavin v. Curry*, 574 F.2d 1256, 1266 (5th Cir.1978) (bar association grievance committee members)), for the reason that these individuals perform functions that are an integral part of the judicial process. Moreover, the same reasoning has justified an absolute immunity for certain functions of the prosecutor, *Imbler v. Pachtman*, 424 U.S. 409 (1976) (discussed *infra*), but the Supreme Court has refused to extend the immunity to public defenders, *Tower v. Glover*, 467 U.S. 914 (1984), and court appointed counsel, *Ferri v. Ackerman*, *supra*, on the ground that they perform functions that traditionally have not been accorded any special immunity at common law. Likewise, in *Malley v. Briggs*, 475 U.S. 335 (1986), the Court refused to extend the immunity to a state police officer applying for an arrest warrant holding that activity too far removed from the judicial phase of criminal proceeding.

2. Legislative Immunity. The general rule is that Members of Congress receive absolute immunity under the Speech or Debate Clause for performing functions that are integrally related to the legislative process. Only qualified immunity protects a Member's administrative actions. The Member's immunity derivatively extends to his aide when the latter performs an act which would be protected had it been performed by the Member. Similar immunity concepts, grounded in the common law, apply to other officials who perform legislative functions. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Lake County Estates v. Tahoe Regional Planning Authority*, 440 U.S. 391 (1979); *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

B. Executive Immunity Doctrines.

1. Common Law Claims. The general rule is that executive officials sued for common law torts receive absolute immunity for performing

non-ministerial (*i.e.*, discretionary) duties which are not manifestly or palpably beyond their authority. See generally *Spalding v. Vilas*, 161 U.S. 483 (1896); *Barr v. Matteo*, 360 U.S. 564 (1959). However, recent decisions indicate that serious disagreements between the circuits exist as to what type of conduct is protected by absolute immunity. Compare *Strothman v. Gefreh*, 739 F.2d 515 (10th Cir.1984); and *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir.1985), *cert. denied*, 106 S.Ct. 822 (1986), with *Johns v. Pettibone Corp.*, 769 F.2d 724 (11th Cir.1985). See also *Franks v. Bolden*, 774 F.2d 1552 (11th Cir.1985). The Eleventh Circuit has recently decided to consider the question *en banc*, *Andrews v. Benson*, 817 F.2d 1471 (11th Cir.1987). Moreover, on March 2, 1987, the Supreme Court agreed to consider *Erwin v. Westfall*, 785 F.2d 1551 (11th Cir.1986) to clarify the issue (*cert. granted*, 107 S.Ct. 1346 (1987)). See Torts Branch Representation Monograph III.

2. Constitutional Claims.

a. Generally. 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; 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. See *Anderson v. Creighton*, *supra*.

b. Prosecutorial Immunity. The applicability of an absolute immunity to prosecutorial functions within the scope of the prosecutor's duties in initiating and pursuing a criminal prosecution and in presenting the government's case was settled by *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity afforded a state prosecutor sued under 42 U.S.C. § 1983 for allegedly using false testimony and suppressing material evidence at plaintiff's trial). See also *Gray v. Bell*, 712 F.2d 490, 499 (D.C.Cir.1983), *cert. denied*, 465 U.S. 1100 (1984). *Imbler*, however, is limited to the actions of a prosecutor in initiating a prosecution and in presenting the government's case, and specifically reserved opinion on the other aspects of a prosecutor's responsibility. Department attorneys perform a wide variety of activities, and there is no clear consensus on how to

properly characterize all the various forms of prosecutorial conduct. The courts of appeals are continuing to develop the law regarding these "other actions of a prosecutor." Additionally, courts have held that the absolute immunity which a prosecutor enjoys also applies to government attorneys who undertake the defense of civil suits. *Barrett v. United States*, 798 F.2d 565 (2d Cir.1986). Attorneys are urged to consult Torts Branch Representation Monograph III and update all cases. See, e.g., *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675 (9th Cir.1984).

c. Qualified Immunity. 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 (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." *Harlow*, 457 U.S. at 818. As a corollary to this rule, the Court went on to hold that even where the law was clearly established, an official pleading the defense of qualified immunity was nevertheless entitled to show any "extraordinary circumstances" in which he acted and that he neither knew nor should have known of the relevant legal standard, in which case he would be protected by immunity. *Harlow*, 457 U.S. at 819.

In *Harlow*, the Supreme Court dispensed with the requirement that an official demonstrates subjective good faith and ruled that immunity questions should be decided at the threshold, on the basis of whether the applicable law was clearly established at the time the

defendant acted. *Id.* at 818. See *Krohn v. United States*, 742 F.2d 24 (1st Cir.1984). See also *Davis v. Scherer*, 468 U.S. 183 (1984). Although the Supreme Court in *Harlow* did not define just how a right becomes "clearly established," an examination of other cases is helpful. See, e.g., *Anderson v. Creighton*, 107 S.Ct. 3034 (1987); *Hobson v. Wilson*, 737 F.2d 1, 26 (D.C.Cir.1984), *cert. denied, sub nom. Brennan v. Hobson*, 470 U.S. 1084 (1985) (emphasis in original). Significantly, in *Anderson* the Court reaffirmed the *Harlow* mandate and concluded that the defendant would be entitled to summary judgment if a reasonable officer could have believed that the conduct at issue was lawful even though it actually was not. It seems clear that something more is required than that the unconstitutionality of the challenged conduct was "clearly foreshadowed" by earlier decisions. (*Zweibon v. Mitchell*, 720 F.2d 162, 172 (D.C.Cir.1983) (*Zweibon IV*), *cert. denied*, 469 U.S. 880 (1984)).

3. Statutory Claims. The general rule is that an executive official who performs acts that are protected by established immunity doctrines should be immunized from statutory damages actions unless it seems clear that Congress intended to abrogate their protection. In other situations, an official is arguably entitled to a qualified immunity if he did not violate clearly established statutory standards unless a specific immunity defense is statutorily mandated.

Although few decisions have treated the question of whether immunity might protect the governmental actor in these cases, some general guidance is available. First, it must be determined whether the statute even provides for a private right for damages. Where an official is sued under a statute that expressly defines the scope of his defense, courts generally will be reluctant to expand on what Congress has deemed sufficient. See generally *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-25 (1975). But see *Zweibon v. Mitchell*, 516 F.2d at 670-71; *Halperin v. Kissinger*, 606 F.2d 1192, 1209 at n. 115 (D.C.Cir.1979). However, the Supreme Court consistently has refused to assume that Congress intends to abrogate well established immunities when it enacts general remedial provisions. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 748-49 n. 27 (1982).

4. Presidential Immunity. The general rule is that the President is entitled to an absolute immunity for all presidential acts. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). This immunity does not depend upon a particularized functional analysis and, because the immunity is grounded in the Constitution, most likely cannot be abrogated by statute. The President's immunity may have derivative application for senior Presidential assistants who act in such central areas as those involving national security and foreign policy. But see *Mitchell v. Forsyth*, 472 U.S. 511, 520-24 (1985).

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4-5.215 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 ruled 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), and has also resolved the question with regard to qualified immunity holding that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue 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*, 472 U.S. 511, 530 (1985). However, not every denial of an immunity claim merits an appeal and very close contact should be maintained with the Torts Branch and Appellate Staff. See Torts Branch Representation Memorandum III.

4-5.300 ENVIRONMENTAL AND OCCUPATIONAL DISEASE LITIGATION (EODL)

Contact: J. Patrick Glynn (FTS 724-6691)
Director

Torts Branch, Civil Division
United States Department of Justice
P.O. Box 340
Ben Franklin Station
Washington, D.C. 20044

The Environmental and Occupational Disease Litigation (EODL) staff, along with the FICA staff, defend the United States in toxic tort actions arising from contamination of the environment or exposure in the workplace to chemicals or substances. One of the most visible examples of the litigation over the past few years has been those cases dealing with occupational exposure to asbestos.

Toxic tort litigation involves direct personal injury actions and third-party claims by manufacturers and suppliers for contribution and indemnity. Claims are filed under the Federal Tort Claims Act, the Suits in Admiralty and Public Vessels Act, the Tucker Act, and against individual government employees seeking monetary damages. The EODL staff litigates in the district courts and the U.S. Claims Court.

Inquiries regarding toxic tort and asbestos litigation may be made by calling FTS 724-6691 or by writing EODL, Torts Branch, Post Office Box 340, Benjamin Franklin Station, Washington, D.C. 20044. Federal Express deliv-

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eries should be mailed to EODL, Torts Branch, 521 12th Street, N.W. Washington, D.C. 20035.

4-5.310 Conduct of Toxic Tort and Asbestos Litigation

Mass tort actions pose special case management problems and thus are generally designated as "'primary'" to be handled by Department of Justice attorneys. Given long latency periods, the litigation often is not filed until decades after exposure. The cases can require massive and prolonged discovery involving millions of documents and the analysis of convoluted and complex fact situations. For example, in the asbestos litigation fact issues have spanned a period since prior to World War II. All asbestos cases are designated for primary handling by EODL and as a general rule will not be referred to U.S. Attorneys.

The litigation also requires familiarity with specialized scientific and medical issues. The source of contamination in any particular case may be chronic and latent, as with asbestos exposure or progressive groundwater contamination, or may be readily apparent, as with chemical or industrial spills. Disease or injury often manifests itself only following cumulative or repeated exposure, and in many instances, the effects of exposure have not been definitively scientifically or medically documented.

U.S. Attorneys confronted with large-scale tort claims against the United States should contact EODL as early as possible, preferably before suit. EODL is prepared to assume "'primary'" responsibility for toxic tort litigation as described within USAM 4-5.110.

4-5.320 Research and Guidance Materials

EODL has prepared Monographs covering many recurring substantive issues pertaining to EODL asbestos litigation. The current EODL Monographs are:

1. A Brief Overview of Navy Procurement
2. Acquisition, Stockpiling, and Disposal of Asbestos by the Government
3. Asbestos Exposure and Neoplasia
4. Asbestos Litigation: An Overview of Defenses and Strategies
5. Asbestos TLVs and the Federal Government's Efforts to Limit Exposure to Asbestos in the Work Place
6. Industrial Hygiene: An Historical Perspective
7. MARAD: An Overview
8. Navy Department Organization, Responsibilities and Documentation

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9. The Navy's Efforts to Control and Eliminate Exposure to Dust from Asbestos Insulation Products
10. Occupational Disease, Product Liability, and Hazardous Waste: Three Legislative Approaches to the Asbestos Problem
11. Recent Developments in Asbestos Litigation
12. Smoking and Exposure to Asbestos
13. State-of-the-Art
14. Use of the Bankruptcy Laws by Asbestos Manufacturers

Further information is available in a loose leaf binder of materials called the Asbestos Reference Book.

If an Assistant U.S. Attorney needs a copy of any of these materials, he/she can obtain it by calling FTS 724-6691 or by writing to EODL, Torts Branch, Post Office Box 340, Ben Franklin Station, Washington, D.C. 20044.

Telephone inquiries concerning substantive issues on asbestos litigation may be addressed to EODL's Deputy Director, at FTS 724-7827. Telephone inquiries concerning substantive issues on other toxic tort matters may be addressed to EODL's Assistant Director, at FTS 724-6853.

4-5.400 AVIATION AND ADMIRALTY LITIGATION

4-5.410 Admiralty Litigation

| | | |
|----------|---|----------------|
| Contact: | Gary W. Allen Director | (FTS 724-7172) |
| | <u>Admiralty</u> David V. Hutchinson Assistant Director | (FTS 724-7290) |
| | Thomas L. Jones | (FTS 724-6837) |
| | Debra J. Kossow Senior Counsel | (FTS 724-6845) |
| | <u>Aviation</u> Joan Von Flatern Assistant Director | (FTS 724-8238) |
| | Kathlynn Fadely | (FTS 724-6830) |
| | Herbert Lyons Senior Counsel | (FTS 724-7320) |

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), the Supreme Court found the commerce clause of the Constitution, Art. 1, § 8, sufficient authority to give Congress regulatory power over navigable rivers. Congress has exercised that authority by various regulatory statutes in an effort to give the executive branch sufficient power to keep those rivers and harbors

free of hazards to navigation. The principal legislation in the field is the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.* (Wreck Act). The Wreck Act is an assertion of the sovereign power of the United States, *Sanitary Dist. v. United States*, 266 U.S. 405 (1925), over this country's navigable waters that "'are the public property of the nation," *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63 (1913). The "'great design of this legislation," *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960), includes the obligation "'to maintain and promote the safety of navigation," *Atlantic Ref. Co. v. Moller*, 320 U.S. 462, 466 (1943).

4-5.411 Wreck Removal and Marking

Sections 403 and 409 of the Wreck Act provide the statutory basis for the United States to recover its wreck removal and marking expenses. When a wreck is sunk in the navigable waters of the United States, the United States may mark and/or remove it and seek reimbursement for such expenses from the owner of the wreck or the party who negligently caused it to sink. See *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967). If the owner can successfully show that he/she was not negligent in causing his vessel to sink and that he abandoned the vessel to the United States, the owner will not be responsible for wreck removal expenses. See *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 592 F.2d 930 (5th Cir.1979). He/she, however, will be responsible for marking expenses until the wreck is removed or he/she has abandoned it. *In Re Marine Leasing Serv., Inc.*, 328 F.Supp. 589 (E.D.La.1971), *aff'd*, 471 F.2d 255 (5th Cir.1973); *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455, 459 (5th Cir.1984). Although the Fifth Circuit has held that the United States may not recover its wreck removal expenses against an innocent owner, we continue to assert that the owner has a nondelegable duty to mark and remove his wreck. See 33 U.S.C. §§ 403, 409 and *Wyandotte*, 389 U.S. at 196 n. 9 (1967).

The statute of limitations is three years and begins to run from the date the cause of action arises. 28 U.S.C. § 2415(b). The cause of action arises, however, when the wreck is removed, not when it is sunk. See *United States v. Barge Shamrock*, 635 F.2d 1108 (4th Cir.1980) *cert. denied*, 454 U.S. 830 (1981). See, e.g., *United States v. Arrow Transportation Co.*, 658 F.2d 392 (5th Cir.1981), *cert denied*, 456 U.S. 915 (1982).

4-5.412 Government Works Damage

Sections 408 and 412 of the Wreck Act impose strict liability against a vessel which causes damage to a "'work built by the United States.'" *Chotin Transportation Inc. v. United States*, 819 F.2d 1342 (6th Cir.1987) *cert. denied*, 108 S.Ct. 344 (1987); *United States v. Tug Colette Malloy*, 507 F.2d 1019 (5th Cir.1975); *United States v. Federal Barge Lines, Inc.*, 573 F.2d 993 (8th Cir.1978). Section 411 imposes penalties for violating Section

408. The statute of limitations for recovery of the penalty is five years. See 28 U.S.C. § 2462.

4-5.413 Oil Pollution Clean-Up

The Federal Water Pollution Control Act (FWPCA), entitles the government to recover its "actual costs" of the clean-up of an oil spill, 33 U.S.C. § 1321(f)(1); see *United States v. Beatty Inc.*, 401 F.Supp. 1040 (W.D.Ky.1975), any civil penalty properly assessed, *United States v. Independent Bulk Transport, Inc.*, 394 F.Supp. 1319 (S.D.N.Y.1975) and prejudgment interest at the money market rate of borrowing money. See *Sabine Towing and Transportation Co., Inc. v. Zapata Uglund Drilling Inc.*, 553 F.2d 489, 491 (5th Cir.), cert. denied, 434 U.S. 855 (1977); *United States v. M/V Gopher State*, 614 F.2d 1186, 1190 (8th Cir.1980). The courts have generally found that the FWPCA is the government's exclusive remedy in an oil spill case. See *Steuart Transportation Co. v. Allied Towing Corp.*, 596 F.2d 609, 618 (4th Cir.1979); *United States v. Rohm & Haas Co.*, 500 F.2d 167, 171 n. 1 (5th Cir.1974) cert. denied, 420 U.S. 962 (1975).

4-5.414 Cargo Claims

When government cargo is lost or damaged between the time of loading and discharge, the United States maintains an action against the shipper and vessel under the Carriage of Goods by Sea Act, 46 U.S.C. § 1300-15 (COGSA). Damages are usually proven by authenticated copies of the bills of lading. *United States v. Lykes Brothers S.S. Co.*, 432 F.2d 1076 (5th Cir.1970). The measure of damages is the invoice cost at loading, not discharge. *Standard M. Ins. Co. v. Scottish Mutual Assurance Co.*, 283 U.S. 284, 288-289 (1931); *Illinois Central R. Co. v. Chail*, 281 U.S. 57 (1930). COGSA establishes a one year statute of limitations but it can be extended by a written agreement of the parties.

4-5.415 Mortgage Foreclosure

These cases generally involve the arrest of vessels. The forms involved with the arrest procedure can be obtained from the admiralty section of the Torts Branch.

4-5.416 Suits in Admiralty Act and Public Vessels Act Cases

A maritime tort exists when the claim involves navigable waters and there is a maritime nexus between the act and the injury. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). The term "navigable waters" has more than one meaning, essentially depending upon whether the United States is plaintiff or defendant. As plaintiff, we will be enforcing some regulatory right, in which case the term is applied most broadly. As defendant, the term will be construed more narrowly, to mean "contemporary navigability in fact" in the commercial sense. See *Liv-*

ington v. United States, 627 F.2d 165 (8th Cir.1980) *cert. denied*, 450 U.S. 914 (1981), which discusses both aspects most thoroughly.

There is an important national interest in uniformity of law affecting waterborne transportation. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). 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 Moya v. Henderson*, 496 F.2d 973, 979 (8th Cir.1974), *cert. denied*, 419 U.S. 884 (1974). 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 (1963). 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, Ltd. v. United States*, 324 U.S. 215 (1945).

4-5.420 Aviation Litigation

The Torts Branch of the Civil Division maintains an Aviation Section specializing in the defense of aviation cases arising primarily out of the activities of the FAA, NWS, NOAA and the military services. Primary responsibility for the defense of aviation litigation, including preparation and trial, will normally be retained in the Aviation Section if questions of broad national import with particular precedential significance are involved, or if the litigation will raise questions concerning the use of air traffic control services or dissemination of weather and in-flight information to operators of commercial and private aircraft. In any aviation case handled primarily by an Assistant United States Attorney, there should be close cooperation with the Aviation Section.

UNITED STATES ATTORNEYS' MANUAL

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4-6.000 FEDERAL PROGRAMS

The Federal Programs Branch litigates on behalf of approximately 100 departments and federal agencies, Cabinet officers, and other government officials. The Branch's caseload consists primarily of defending suits that challenge actions of Government agencies and officers in which the plaintiffs seek injunctive or declaratory relief. In addition, the Federal Programs Branch brings actions in the name of the United States or federal agencies to enforce Government rights, functions and claims for monetary relief. The Branch's ten subject matter areas are as follows:

Area 1—Affirmative Litigation and Regulatory Enforcement

Director: David J. Anderson
Room 3643 Main DOJ
633-3354

Assistant Director: Surell Brady
Room 3639 Main DOJ
633-3331

Area 2—Non-Discrimination Personnel Litigation

Director: Brook Hedge
Room 3535 Main DOJ
633-3501

Assistant Director: Mary Goetten
Room 3525 Main DOJ
633-4651

Area 3—Government Information (Includes Freedom of Information Act, Privacy Act, Government in Sunshine Act, Federal Advisory Committee Act and Defense to Third Party Subpoena Litigation)

Director: David J. Anderson
Room 3643 Main DOJ
633-3354

Assistant Director: Linda Lance
Room 3646 Main DOJ
633-3178

Area 4—Human Resources (Includes Department of Health and Human Services and Department of Education)

Director: Brook Hedge
Room 3535 Main DOJ
633-3501

Assistant Director: Sheila Lieber
Room 3521 Main DOJ
633-3786

Area 5—Housing and Community Development (Includes Department of Housing and Urban Development and Federal Emergency Management Agency)

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Director: Dennis G. Linder
Room 3744 Main DOJ
633-3314

Assistant Director: Arthur Goldberg
Room 3736 Main DOJ
633-4783

Area 6—National Security and Foreign Relations

Director: David J. Anderson
Room 3643 Main DOJ
633-3354

Deputy Director: Vincent M. Garvey
Room 3645 Main DOJ
633-3449

Area 7—Agriculture, Energy and Interior

Director: Dennis G. Linder
Room 3744 Main DOJ
633-3314

Assistant Director: Stephen Hart
Room 3744 Main DOJ
633-3313

Area 8—Foreign and Domestic Commerce (Includes Departments of Commerce,
Labor, Treasury and Transportation)

Director: Dennis G. Linder
Room 3744 Main DOJ
633-3314

Assistant Director: Sandra Schaitman
Room 3744 Main DOJ
633-3315

Area 9—Government Corporations and Regulatory Agencies

Director: Brook Hedge
Room 3535 Main DOJ
633-3501

Assistant Director: Theodore Hirt
Room 3533 Main DOJ
633-4785

Area 10—Employment Discrimination Litigation

Director: Brook Hedge
Room 3535 Main DOJ
633-3501

Assistant Director: Richard Greenberg
Room 3529 Main DOJ
633-3527

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4-6.100 DEFENSIVE LITIGATION

With the exception of the categories of Direct Reference Cases discussed in Section 4-1.311, *infra*, as soon as a U.S. Attorney's Office is served with a summons and complaint in a new action which falls within the jurisdiction of the Federal Programs Branch, the U.S. Attorney's Office should transmit copies of the pleadings to the Branch. Upon receipt of the pleadings, the Branch will determine the type of handling the case is to receive. Federal Programs Branch cases will be designated for one of the following types of handling:

Personally Handled (P) cases are handled by Branch attorneys. These cases will often involve serious or novel constitutional or statutory challenges to federal programs, cases challenging a nationwide program, with potentially far-reaching implications, cases in which either the client agency or the U.S. Attorney's Office has requested assistance, or cases that for whatever additional reason justify the use of resources of the Civil Division from Washington, D.C. Where practical, the Federal Programs Branch will consult with the U.S. Attorney before designating a case to be personally handled. See section 4(c) of Civil Division Directive No. 163-86 (published in the Appendix to Subpart Y immediately following 28 C.F.R. § 0.172) for types of cases that are frequently retained for personal handling by Civil Division attorneys.

Jointly Handled (JH) cases are those in which both a Branch attorney and an Assistant U.S. Attorney (AUSA) will each personally handle aspects of the litigation.

Monitored (M) cases are handled by AUSAs, with Civil Division attorneys responsible for being knowledgeable about case developments and strategy and available for advice and consultation.

Delegated (D) cases are handled by Assistant U.S. Attorneys, with involvement by Branch attorneys only on request. See Section 4(b) of Civil Division Directive No. 163-86, *supra*, for criteria for delegation of cases to U.S. Attorneys' offices.

As soon as the type of handling is determined, a Branch attorney will request that the client agency prepare a litigation report for the case, and a copy of that request will be forwarded to the appropriate U.S. Attorney's Office. See USAM 4-1.430, *infra*, for discussion of preparation of litigation reports by client agencies. In delegated and monitored cases, the litigation report request letter will be the first official notification to the U.S. Attorney's Office that that office—and not the Civil Division—will have primary litigation responsibility for the case. The request letter from the Branch will request that the agency forward the litigation report, with supporting documents, to the appropriate U.S. Attorney's Office.

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In personally handled and jointly handled cases, the Assistant Branch Director assigned to the case will notify the U.S. Attorney's Office that the Civil Division will retain litigation responsibility for the case. In those cases, the Federal Programs Branch attorney assigned to the case will receive the litigation report from the client agency.

4-6.200 AFFIRMATIVE LITIGATION

Two basic differences between affirmative and defensive suits require particular attention. First, with the exception of the Direct Reference Cases discussed in Section 4-1.311, *supra*, all affirmative cases must be authorized by the Civil Division. Second, several categories of affirmative cases are routinely handled by client agencies, pursuant to Memoranda of Understanding with the Justice Department.

To receive authorization for commencement of an affirmative suit, the client agency should prepare a written referral to the Civil Division. See USAM 4-1.450, *infra*, for discussion of contents of referrals. If a referral is made directly to a U.S. Attorney's Office and the case is not within the category of Direct Reference cases, the U.S. Attorney's Office should request that the agency formally refer the matter to the Civil Division for suit authorization. Upon receipt of a referral, the Branch will assign the referral to a Branch attorney for preparation of a suit authorization recommendation.

Once suit authorization is received, the Federal Programs Branch will determine whether the suit will be handled by the Branch, by a U.S. Attorney's office, or by the client agency. The most common categories of affirmative suits in the Branch, and the procedures for suit authorization and case handling, are discussed below.

4-6.210 Delegated Affirmative Cases

Delegated affirmative cases will usually be of three types: (1) those delegated to U.S. Attorneys' offices for handling by those offices; (2) those for which the agency has statutory litigating authority; and (3) those for which the agency is delegated litigating authority pursuant to a Memorandum of Understanding with the Justice Department. The most common delegated affirmative cases are:

A. Department of Labor. (cases brought under the Employee Retirement Income Security Act, the Occupational Health and Safety Act, the Migrant and Seasonal Agricultural Worker Protection Act, and the Federal Coal Mine Health and Safety Act). Suits under each of these statutes will normally be handled by Labor Department attorneys.¹ In such cases a Branch attorney will review the referral and proposed pleadings for form and content. If

¹ See Civil Division Compendium of Departments and Agencies with Authority Either By Statute Or Agreement To Represent Themselves In Civil Litigation, October 1982.

the papers indicate that the proposed suit has an adequate factual and legal basis, after conferring with the Assistant Director for Area 1, the Branch attorney will prepare letters to the agency and U.S. Attorney authorizing the filing of the suit, and delegating the case to the agency.² In most cases under these statutes, it will not be necessary to obtain formal authorization for the suit from the Deputy Assistant Attorney General for the Federal Programs Branch. However, if any of these cases present novel or sensitive issues, it may be appropriate to notify the Assistant Attorney General of the proposed litigation.

B. Cases under the Labor Management Reporting and Disclosure Act. Most LMRDA suits are handled by the U.S. Attorneys' Offices. After reviewing the referral and proposed pleadings for an LMRDA suit, the Branch attorney will confer with the Assistant Director about whether the proposed litigation has an adequate factual and legal basis. If it is appropriate to authorize suit, the Branch attorney will prepare a letter to the appropriate U.S. Attorney, indicating that the suit is authorized and is delegated to that office, and requesting that a referral acknowledgement form be returned, which shows the date of filing and the name of the AUSA to whom the case is assigned. A copy of the letter will be sent to the labor Department. In most cases, the letter to the U.S. Attorney will request that the suit be filed within two weeks of receipt, unless extenuating circumstances are present.

C. Subpoena Enforcement Suits. Most routine subpoena enforcement actions are handled by the U.S. Attorneys' offices and are authorized by the Director in charge of Area 1, David Anderson. A Branch attorney will review the referral and proposed pleadings, and then prepare a memorandum from the assistant director to the director, recommending whether the suit should be filed.

If the subpoena enforcement action is approved by the director, the Branch attorney will write the agency and the U.S. Attorney, stating whether the suit has been authorized or not, and, if so, that it is delegated to the U.S. Attorney. In cases in which suit is authorized, a referral acknowledgement form will also be sent to the U.S. Attorney, as well as a copy of papers received from the agency.

D. Other Delegated Affirmative Suits. For all other delegated affirmative cases, such as Department of Energy enforcement actions, suits under the various Department of Agriculture statutes, and miscellaneous affirmative litigation, the assigned Branch attorneys will review the litigation request and analysis, and prepare a suit authorization memorandum for the Assistant Attorney General. If the suit is authorized, the Branch attorney

² In those cases where time will not permit a letter authorizing that suit be filed, after conferring with the reviewer, authorization may be given by phone, with confirmation letters to follow.

will prepare a delegation letter with acknowledgement form to the U.S. Attorney, and a follow-up letter to the agency.

4-6.220 Monitored Affirmative Cases

Referrals of monitored affirmative cases will be handled in the same manner as delegated case referrals. However, the letter to the U.S. Attorney's Office or to the agency will advise that a Branch attorney will follow the litigation closely and request that the Branch attorney be kept informed about the status of the case.

4-6.230 Personally Handled and Jointly Handled Affirmative Cases

Personally handled and jointly handled affirmative cases are referred and authorized in the same manner as delegated and monitored cases. The Assistant Director for affirmative litigation in the Federal Programs Branch will notify the appropriate U.S. Attorney's Office that the Branch will retain primary litigation responsibility in these cases. On occasion, it may become necessary for the Branch to request assistance from the U.S. Attorneys' offices in filing the summons and complaint in affirmative cases.

4-6.240 Suits Against State Governments, Agencies or Entities

It is the policy of the Justice Department that, prior to filing suit against a state government, agency or entity, each Division will undertake the following steps:

(a) advise the governor and attorney general of the affected state of the nature of the contemplated action or claim and the terms of the remedy sought;

(b) notify the Deputy Attorney General and, if appropriate, the Associate Attorney General that such prior notification has been given; and

(c) ensure that such prior notice is given sufficiently in advance of the filing of the suit or claim to:

i. permit the state government, agency or entity to bring to the Department's attention facts or issues relevant to whether the action or claim should be filed or,

ii. result in settlement of the action or claim in advance of its filing on terms acceptable to the United States.

See Attorney General Policy Directive, Litigation Against State Governments, Agencies or Entities, August 7, 1981.

When referrals are received for suits against states, the Branch will prepare a suit authorization memorandum to the Assistant Attorney General

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for the Civil Division, and will also prepare notification letters to the governor and attorney general of the state. Suit will be filed in such cases only after written suit authorization is given, prior notification has been provided the state, the Deputy (and, where appropriate, Associate) Attorney General has been notified, and the state has been given the opportunity to confer and attempt to compromise the claim without litigation. It is the practice of the Civil Division to supply the interested U.S. Attorney with copies of the notification letters.

4-6.250 Counterclaims, Amicus Participation and Motions to Intervene

Client agency requests to assert counterclaims in pending defensive litigation, to participate as *amicus curiae*, or to intervene in on-going state or federal court litigation must be authorized in the same manner as affirmative cases. The Civil Division must also be provided the factual and legal basis supporting the cause of action or position the client wishes to assert. Referrals for such litigation must be made as expeditiously as possible, since the federal government's right to participate in on-going litigation will often depend on the status of the underlying case.

4-6.300 SUBSTANTIVE AREAS OF LITIGATION

4-6.310 Area 1—Affirmative Litigation and Regulatory Enforcement

This area includes all affirmative litigation assigned to the Branch in which the United States or an agency or official of the United States initiates a legal action to enforce compliance with federal statutory and regulatory programs, including, for example, actions to enforce administrative subpoenas, suits by the Department of Labor to enforce the Employee Retirement Income Security Act, the Occupational Health and Safety Act, the Migrant and Seasonal Agricultural Worker Protection Act, the Federal Coal Mine Health and Safety Act, and the Labor Management Reporting and Disclosure Act, enforcement actions brought on behalf of the National Highway Traffic Safety Administration, affirmative Department of Agriculture litigation, enforcement actions brought on behalf of the banking agencies (Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Federal Reserve Board), suits on behalf of the Department of Housing and Urban Development to enjoin violations of the Interstate Land Sales Full Disclosure Act, and suits to enjoin state and local interference with federal functions.

4-6.320 Area 2—Nondiscrimination Personnel Litigation

This area includes suits arising from federal governmental employment involving constitutional and other issues of appointment and removal of officers and employees of the United States. Also included in this area are cases challenging Office of Personnel Management regulations and actions

challenging various disciplinary and adverse actions brought by employees pursuant to the Civil Service Reform Act. Litigation in this area arises primarily in district court and before the Merit Systems Protection Board, although some litigation proceeds in the Claims Court.

4-6.330 Area 3—Government Information

4-6.331 General Information

A. Contacts in Civil Division: General: Linda Lance, Assistant Director (633-3178); David Anderson, Director (633-3354). Right to Financial Privacy Act: Drake Cutini (633-4290). Federal Advisory Committee Act: Charles Sorenson (633-2809).

B. Civil Division Policies regarding handling of these types of cases: U.S. Attorneys should inform the appellate staff (Leonard Schaitman, 633-3441) immediately if a stay pending appeal of an order granted in terms of an injunction is denied in FOIA or Privacy Act suits. Otherwise the cases should be handled administratively like any other defensive cases.

4-6.332 Statutes of Limitations

A. FOIA: No statute of limitations is set out in FOIA itself. The Civil Division takes the position that the general six year statute of limitations, 28 U.S.C. § 2401, is applicable. See *Spannaus v. Department of Justice*, 643 F.Supp. 698 (D.D.C.1986).

B. 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. § 552a(g)(5).

C. Right to Financial Privacy Act: Generally, suits 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 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).

4-6.333 Attorney Fees

A. FOIA: 5 U.S.C. § 552(a)(4)(E) authorizes but does not require the assessment of "'reasonable attorney fees and other litigation costs'" against the United States in any case in which the complainant has substantially prevailed. However, under the developed case law, the court retains

discretion to deny fees even if a party has "'prevailed.'" See, e.g., *Fund For Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 872 (D.C.Cir.1981).

B. Privacy Act: 5 U.S.C. § 552a(g)(2)(B), (g)(3)(B), and (g)(4)(B) contain authorization for the recovery of attorney fees and costs in Privacy Act litigation.

C. Right to Financial Privacy Act: 12 U.S.C. §§ 3417(a)(4) and 3418 authorize the assessment of "'reasonable attorney's fees'" in "'any successful action'" under the Act.

4-6.334 General Information for Particular Case Types (Incl. Jurisdiction and Exhaustion of Administrative Remedies)

A. FOIA

1. Pre-litigation FOIA Requests for Documents. See 28 C.F.R. §§ 16.1 through 16.10, for detailed instructions for responding to pre-litigation Freedom of Information Act requests. See also 5 U.S.C. § 552, as amended. Nine categories of government records are exempt from disclosure under the FOIA. 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.

In the event of a request for documents from a U.S. Attorney's Office, the request should be forwarded to the Executive Office for United States Attorneys, FOIA/PA Unit, Room 6320, 601 D. St. N.W., Washington, D.C. 20530, FTS 272-9826 (see USAM 1-9.000, *supra*) pursuant to 28 C.F.R. Part 16.3(a). The Federal Programs Branch 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.

2. FOIA 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). Because 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 can provide advice and assistance if necessary. Interim relief is generally not permitted under the FOIA; therefore, in the event an emergency hearing is scheduled, the relief requested should ordinarily be opposed.

Branch 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 AUSA assigned to the case will conduct a full review of the withheld documents to determine whether

withholding is legally justified. The AUSA is also responsible, with assistance from the agency General Counsel, for drafting and reviewing affidavits, preparing responses to interrogatories, preparing pleadings, and oral argument.

A general discussion of the requirements of the FOIA and current caselaw is available in the "Freedom of Information Case List" published by DOJ's Office of Information and Privacy each September. Copies can be ordered from that office (633-3642).

Exhaustion of administrative remedies is required before suit may be brought, but exhaustion may be deemed to have occurred if the agency exceeds statutory time limits in processing FOIA requests or appeals. See 5 U.S.C. § 552(a)(6). The statute generally provides for *de novo* review without reference to any administrative record made in the agency. 5 U.S.C. § 552(a)(4)(B). You should note, however, that in challenges to agency determinations regarding waiver of fees for processing FOIA requests, the 1986 amendment to the statute provides for *de novo* review *on the record made before the agency*. 5 U.S.C. § 552(a)(4)(vi). "Reverse" FOIA cases, in which a submitter of information sues to prevent an agency's proposed release of the information under the FOIA are brought pursuant to the APA, and the APA standard of review applies.

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. 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(e).

B. 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 judicial remedies available to persons aggrieved under the Act. OMB guidelines are published at 40 Fed.Reg. 28948, *et seq.* Those guidelines are also included in the *Civil Division Practice Manual*.

Exhaustion of administrative remedies is required. See 5 U.S.C. § 552a(g)(1). 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, are provided for by 5 U.S.C. 552a(g). A

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plaintiff is entitled to a trial *de novo*. Jurisdiction includes express authorization for injunctive actions, both 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 an individual's record with accuracy, or for failure to comply with any of the Act's other provisions in such a way as to have an adverse effect on the individual, the individual can recover damages if the agency acted intentionally or willfully. Damages can in no event be less than \$1000 together with costs and reasonable attorney fees. Venue is set forth in 5 U.S.C. § 552a(g)(5), as is the limitations provision.

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.

Awareness of the Privacy Act is also important during discovery in non-Privacy Act cases since documents requested in discovery in a variety of cases can be subject to the Privacy Act. This is particularly true in cases involving personnel issues or personnel files. Documents subject to the Privacy Act should not be produced in discovery until the Act's requirements involving disclosure of such information have been met. Note that many agencies have published "routine uses" under the Act (5 U.S.C. § 552a(b)(3)) which provide for the release of certain records to the Department of Justice or to parties in litigation. The agency should be able to provide citations in the federal register to such publications.

C. Right to Financial Privacy Act. There are no administrative remedies to be exhausted as a prerequisite to litigation under the Right to Financial Privacy Act. Jurisdiction for such suits covers actions for both money damages and specific injunctive relief. The Act prohibits any agency or department 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: (1) customer authorization; (2) administrative summons or subpoena; (3) search warrant; (4) judicial subpoena; or (5) 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 (see 12 U.S.C. §§ 3416, 3418). The Act provides for the assessment of money damages

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against any agency or department 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 "willfull or intentional," are allowed, together with costs and reasonable attorney fees. See 12 U.S.C. § 3417(a)(2)(3)(4). Venue is set forth at 12 U.S.C. § 3416, as is the limitations provision of the Act. See also 12 U.S.C. § 3410(a) regarding limitations to enjoin intended government access.

D. Government In The Sunshine Act. The Government in 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. Sunshine Act litigation is discussed in the *Civil Division Practice Manual* at § 3-46.1 *et seq.* See also Berg and Klitzman, *An Interpretive Guide to the Government in the Sunshine Act*, published by the Administrative Conference of the United States in June 1978.

E. Production of Documents of Other Departments and Agencies in Non-FOIA Litigation. On occasion, litigants may issue a subpoena for deposition or trial testimony, or a subpoena duces tecum requiring production of information or documents which a client agency deems confidential or otherwise privileged from disclosure. Protection against the compulsory disclosure of such documents or information is recognized in various circumstances. See 5 U.S.C. § 301; *Tencks 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 the DOJ regulations at 28 C.F.R. § 16.21 *et seq.*, instructing employees not to produce or testify unless authorized to do so by a designated official (usually the head of the agency or his/her designee). Such regulations are ordinarily recognized as a valid basis on which to refuse to produce documents or testify. See *Touhy v. Ragen*, 340 U.S. at 657; *Saunders v. Great Western Sugar Co.*, 396 F.2d at 794. 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 decision, see *North Carolina v. Carr*, 264 F.Supp. 75 (W.D.N.C.), *appeal dismissed*, 386 F.2d 129 (4th Cir.1967).

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Requiring compliance with such regulations is not considered to be a claim of privilege, and the regulations do not create a privilege against discovery. There are, however, several common law privileges available only to the government. These include the military or state secrets privilege which is absolute if validly claimed, and the deliberative process, informant's, law enforcement evidentiary, and required reports privileges, which are qualified. There are also privileges available for certain types of presidential documents.

In certain instances a formal claim of privilege may be required to be made by the head of the agency involved. See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318 (D.D.C.1966), *aff'd* 384 F.2d 979 (D.C.Cir.), *cert. denied*, 389 U.S. 952 (1967). It is not necessary to make a "formal" claim of privilege in objecting to production of documents, but it is necessary in opposing a motion to compel or moving to quash a subpoena. U.S. Attorneys should not make a formal claim of a privilege available only to the government in any case without approval from the Civil Division.

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 (15 U.S.C. § 753), 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).

F. Justice Department Materials and Witnesses. 28 C.F.R. §§ 16.21 to 16.28 regulate the production of DOJ information or records 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 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.

4-6.340 Area 4—Human Resources

This area includes all suits involving Social Security, Medicare and Medicaid, Supplemental Security Income, education matters, AFDC cases, Food Stamp cases and other matters including Health Planning Statute cases, Hill-Burton cases, Public Health Service cases, Randolph Shepard

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Act cases, Child Abuse Prevention & Treatment Act cases, and family welfare cases.

4-6.341 Social Security Act Review Procedures

Over eight thousand actions were brought in federal district courts in 1986 challenging administrative determinations of the Secretary of Health and Human Services. See 42 U.S.C. § 405, for judicial review, 42 U.S.C. §§ 409 to 411, 416, for definitions, and 42 U.S.C. § 423, for disability cases. Regulations promulgated under the authority of 42 U.S.C. § 405(a) dealing with disability cases appear in 20 C.F.R. Parts 400 to 499.

Title 42 U.S.C. § 405(g) clearly contemplates an administrative review proceeding. Title 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. Title 42 U.S.C. § 405(g) requires that a certified copy of the transcript of the administrative record be filed with the government's answer to the complaint. Judicial review must be had in accordance with 42 U.S.C. § 405(g). See *Heckler v. Ringer*, 466 U.S. 602 (1984).

Only "final decisions" of the Secretary are reviewable. Normally a claimant must exhaust his administrative remedies. The Secretary can waive the exhaustion requirement, and the courts can waive the requirement upon a showing that the claim is collateral to a claim for benefits and a showing of irreparable harm. See *Mathews v. Eldridge*, 424 U.S. 323 (1976). 42 U.S.C. 405(g) provides that judicial review must be sought within 60 days of the Secretary's final decision. The Supreme Court has held that this is not a jurisdictional requirement but is a period of limitations which can be tolled by the Secretary and, in rare cases, by the courts. *Bowen v. City of New York*, 106 S.Ct. 2022, 90 L.Ed.2d 426 (1986). If a motion to dismiss is to be filed for failure to exhaust administrative remedies or untimely filing the Division of Civil Actions, Office of Hearings and Appeals of the Social Security Administration (SSA), can provide an affidavit reciting the relevant facts.

A. Scope 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). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Hale v. Secretary of Health and Human Services*, 816 F.2d 1078, 1082 (6th Cir.1987). It has also been defined as more than a scintilla and less than a preponderance. *Hames v. Heckler*, 707 F.2d 162, 164 (5th Cir.1983); *Sprague v. Director, Office of Workers' Comp., Etc.*, 688 F.2d 862, 865 (1st Cir.1982). The Secretary's determination must, therefore, be affirmed if supported by substantial evidence, notwithstanding conflict in the medical testimony, and even if there was also substantial evidence which would have supported a finding in favor of

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the plaintiff. See *Sitar v. Schweiker*, 671 F.2d 19, 22 (1st Cir.1982); *Estep v. Richardson*, 459 F.2d 1015, 1017 (4th Cir.1972).

It is the function of the Secretary and not the courts to resolve conflicts in the evidence. *Richardson v. Perales*, 402 U.S. 389 (1971). *Aponte v. Secretary, Department of Health and Human Services*, 728 F.2d 588, 591 (2d Cir.1984); *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.1982). Likewise, it is the Secretary's duty to pass on the credibility of witnesses. *Richardson v. Perales*, 402 U.S. 389 (1971); *Carroll v. Secretary of Health and Human Services*, 705 F.2d 638, 644 (2d Cir.1983); *Smith v. Schweiker*, 646 F.2d 1075, 1081 (5th Cir.1981).

B. Standards For Determining Disability. In order to qualify for disability benefits under the Social Security Act, a claimant must demonstrate that he is unable to "engage in any substantial gainful activity" and that the inability is attributable to a medically determinable physical or mental impairment which can be expected to last for at least twelve months. See 42 U.S.C. § 416(i)(1). See also *McMillian v. Schweiker*, 697 F.2d 215 (8th Cir.1983). Pursuant to 42 U.S.C. § 423(d)(3) a medically determinable physical or mental impairment is an impairment that results from an anatomical, physiological or psychological abnormality which is demonstrable by medically acceptable clinical and laboratory techniques. See also *Bilby v. Schweiker*, 762 F.2d 111 (9th Cir.1985). In addition, the legislative history makes it clear that an unsupported medical conclusion as to an impairment or disability is insufficient to establish disability under the Act, H.R.Rep. No. 544, 90th Cong., 1st Sess. 30 (1967), although courts have held that such a conclusion, if rendered by a treating physician, may not simply be ignored.

Regulations promulgated by the Secretary establish a sequential evaluation process for determining disability. See 20 C.F.R. § 404.1520. If a claimant is engaging in substantial gainful activity at the time the administrative determination is made, the claim will be denied. See 20 C.F.R. § 404.1520(b). If a claimant does not have a "severe impairment," which is defined as one which significantly limits his ability to perform basic work related activities, the claim will be denied. See 20 C.F.R. § 404.1520(c); *Bowen v. Yuckert*, 107 S.Ct. 2281, 2293 (1987). If a claimant has a severe impairment, a determination is made whether he meets or equals the Listings, which is a set of medical criteria contained in 20 C.F.R. Part 404, Appendix 1. If the claimant meets or equals a listed impairment, he is found disabled. See 20 C.F.R. § 404.1520(d). If he does not, a determination is made whether he can do his past relevant work (i.e., that performed within 15 years prior to the application for disability benefits and for a significant amount of time). See 20 C.F.R. § 404.1565. If a claimant can perform his past work (which means his past type of job, not the requirements of his past particular job), the claim is denied. See 20 C.F.R. § 404.1520(e). Finally, if a claimant cannot do his past relevant

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work, the Secretary must show that the claimant, considering his age, education and work experience, can perform other work. The Secretary may establish this through use of either the Medical-Vocational Guidelines (Grids) contained in 20 C.F.R. Part 404, Appendix 2, or through the use of a vocational expert. If the claimant suffers from any non-exertional impairments, the grids may be used only if the non-exertional limitations do not significantly affect the range of jobs which the claimant, given his exertional limitations, could otherwise perform. *Bapp v. Bowen*, 802 F.2d 601, 605 (2d Cir.1986); *Tucker v. Heckler*, 776 F.2d 793, 796 (8th Cir. 1985); *Smith v. Schweiker*, 719 F.2d 723 (9th Cir.1984); *Kirk v. Schweiker*, 667 F.2d 524 (6th Cir.1981), *cert. denied*, 461 U.S. 957 (1983). Otherwise, vocational expert testimony is needed.

C. Burden of Proof. A claimant for disability benefits bears the burden of proving disability. See 42 U.S.C. § 423(d)(5). Once the claimant makes a prima facie showing of an impairment which precludes him from returning to his past work, the burden of going forward shifts to the Secretary. See *Johnson v. Heckler*, 744 F.2d 1333 (8th Cir.1984); *Perry v. Heckler*, 722 F.2d 461, 464 (9th Cir.1983); *Hall v. Harris*, 658 F.2d 260, 264 (4th Cir.1981).

4-6.342 Judgment Authorized

Section 405(g) of Title 42 provides that a court may affirm, reverse or remand the decision of the Secretary. Often plaintiffs' counsel will move for remand in order to adduce further evidence for the record. There must, however, be "'good cause'" for a remand (i.e., the proffered evidence must be new and material, and that good cause must be shown by the proponent for the failure to incorporate such evidence into the record during the prior proceedings). See *Cotton v. Bowen*, 799 F.2d 1403, 1409 (9th Cir.1986); *Willis v. Secretary of Health and Human Services*, 727 F.2d 551, 553 (6th Cir.1984); *Chandler v. Secretary of Health and Human Services*, 722 F.2d 369 (8th Cir.1983). The circuits have held that in order for the proffered evidence to be "'material'" there must be a reasonable possibility that it would have changed the outcome of the administrative determination had it been considered earlier. See, e.g., *Cotton v. Bowen*, 799 F.2d at 1403; *Chaney v. Schweiker*, 659 F.2d 676, 679 (5th Cir.1981). A lost or inaudible recording tape of the administrative hearing is also good cause for remand. H.R.Rep. No. 244, 96th Cong., 2d Sess. 59 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 1392, 1406-07.

4-6.343 Social Security Act Attorney Fees

Section 406(b) of Title 42 authorizes the award of reasonable attorney fees, up to a maximum of 25 percent of past due benefits, for successful representation of social security claimants before the court. The majority rule followed in all but the Sixth Circuit is that the court can award

- c 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. Menendez*, 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 162, 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). In the Sixth Circuit, an attorney who has successfully represented a claimant for disability benefits applies for attorney 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 fee is not in addition to the benefits, but is subtracted from the claimant's award. Several courts of appeals have 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, 146-47 (9th Cir.1975); *Webb v. Richardson*, 472 F.2d 529, 537-38 (6th Cir.1972); *McKittrick v. Gardner*, 378 F.2d 872 (4th Cir.1967).

All applications for fee awards should, as a routine matter, be forwarded to the General Counsel's office in the Social Security Administration for review and determination of whether the application should be opposed. When the court enters an order awarding attorney fees in a Social Security Act review case, HHS will release the fees to plaintiff's attorney unless the U.S. Attorney advises the Civil Division within thirty days of HHS' receipt of the fee award that the award exceeds statutory limits or is excessive under the circumstances.

4-6.344 Teletype/Critical Mail Procedures

Because of the large volume of Social Security cases filed each year, it is imperative that the Office of the General Counsel (OGC), Department of Health and Human Services (HHS) receive notification of suit within three days from service of the Summons and Complaint on a United States Attorney. The teletype should be routed to ''RR AA SSAGC,'' and should contain the following information:

1. Case caption;
2. Plaintiff's Social Security number;
3. District court where case was filed;
4. Date complaint was filed;
5. Date U.S. Attorney was served;

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6. Name and FTS telephone number of Assistant U.S. Attorney handling the case; and
7. Date a petition in forma pauperis was filed, if applicable.

Similarly, when a U.S. Attorney's Office is served with an order requiring compliance and action by HHS during the trial of the case, the following information should be teletyped via the same routing indicator as above:

1. Case caption;
2. Plaintiff's Social Security number;
3. Type of order issued;
4. Operative time limits for HHS action; and
5. Name and FTS telephone number of the Assistant U.S. Attorney handling the case.

Copies of summonses and complaints and other pleadings and material filed prior to the government's initial responses should be mailed to:

Office of the General Counsel
Social Security Division
Answer Unit
P.O. Box 10724
Arlington, Virginia 22210

In addition, HHS has designated certain items as "'critical'" and such items are to be forwarded to a special post office box. Items considered to "'critical'" include: adverse court orders such as Magistrate and court reversals, remands, motions for or threats of contempt or default, or any court order which contains a time limit for action to be commenced or completed by the Secretary. Such items should be forwarded to:

Office of the General Counsel
Social Security Administration
Department of Health and Human Services
Post Office Box 17054
Baltimore, Maryland 21203

All other, non-critical items should be addressed to:

Office of the General Counsel
Social Security Administration
Department of Health and Human Services
Baltimore, Maryland 21235

4-6.350 Area 5—Housing

This area includes all equitable housing and housing-related cases involving the Department of Housing and Urban Development and other

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government agencies. It includes cases involving Title VIII—Fair Housing, suspension or debarments of HUD contractors and agents, Federal Housing Administration Insured Housing Programs (single and multifamily), Government National Mortgage Association (GNMA), National Flood Insurance Act, Federal Crime Insurance Act, Interstate Land Sales Act—defensive suits, Housing and Community Development Act—Section 8 leased housing program, Community Development Block Grant Program, conventional low rent public housing program, tenants' rights, procedures and grievances regarding rent increases, utility rate conversions, evictions, etc., disaster relief (mobile homes), HUD relocation benefits, challenges to HUD refusal to expend funds, nonjudicial foreclosure, miscellaneous HUD program litigation and Farmers Home Administration and Veterans Administration Housing Program litigation.

4-6.360 Area 6—National Security, Military and Foreign Relations

This area includes suits involving the Department of Defense, including the military departments, the Department of State, the Central Intelligence Agency, the Selective Service, cases arising out of federal law enforcement activities, "Bivens" litigation against Executive Branch officials, Legislative Branch officials and Judicial Branch officials where the main issue is not money damages, variable reenlistment bonus litigation, military discharge, enlistment contracts, correction of military records, National Security Act, Omnibus Crime Control & Safe Streets Act, secrecy agreements, miscellaneous intelligence litigation, miscellaneous law enforcement litigation, radiation exposure litigation, miscellaneous military litigation, foreign relations litigation, Selective Service System, shipbuilding claims, Army Corps of Engineers projects, military non-promotion, missing in action litigation, Military Medical Program challenges, military contract challenges and enforcement of intelligence subpoenas.

4-6.370 Area 7—Energy, Agriculture, Interior

This area includes cases involving the programs of the Department of Energy, Agriculture and Interior, including cases involving the Agricultural Adjustment Act, Commodity Marketing Orders, Packers & Stockyards Act, Federal Crop Insurance Corporation, Animal Welfare Act, Federal Meat Inspection Act, Poultry Products Inspection Act, Commodity Price Support programs, miscellaneous Department of Agriculture litigation, defense of challenges to DOE Special Report Orders, defense of challenges to DOE Pricing Regulations—producers, defense of challenges to DOE Pricing Regulations—refiners, defense of challenges to DOE Pricing—wholesale/retail, defense of challenges to DOE Fuel Allocation Regulations—supplier-purchaser relationships, defense of challenges to DOE Fuel Allocation Regulations—defense of challenges to DOE Fuel Allocation Regulations—entitlements, miscellaneous DOE litigation, class of purchaser determinations,

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recordkeeping and financial report requirements, redirection of supply orders, interpretation of DOE Regulation definitions, stripper well exemptions, Public Utilities Regulatory Policies Act, Natural Gas Policy Act, Natural Gas Liquids (NGLs) and NGL products and allocation and rationing of petroleum suppliers, and miscellaneous Department of Interior litigation.

Department of Energy litigation handled by the Branch is for the most part defenses of challenges to DOE policies and decisions made under the laws and regulations which governed the price and allocation of crude oil and petroleum products during the 1973-1981 control period. Although that period has long since ended, a great deal of litigation still remains to be completed. As in the past, however, all of those regulatory enforcement defensive cases will be personally handled by the Federal Programs Branch or by Department of Energy attorneys under DOE's own litigation authority and pursuant to the Memorandum of Understanding between the Department of Justice and DOE.

It is requested that the U.S. Attorneys' offices continue to assist with the filing and service of papers. Additionally, particularly in those cases in which DOE 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' offices should also advise both DOJ and DOE of significant developments in such cases.

4-6.380 Area 8—Foreign and Domestic Commerce

This area includes cases involving the programs of the Department of Labor, Commerce, Treasury and Transportation and other matters involving interstate and foreign commerce. It includes Coast Guard litigation, Trading With the Enemy Act and Foreign Assets Control Regulations, International Travel Act, miscellaneous Labor cases, National Traffic and Motor Vehicle Safety Act, Federal Aviation Acts, revenue sharing funds, federal Coal Mine Health & Safety Act of 1977, CETA (Department of Labor), Mass Transportation Act, ERISA, Railway Labor Act (Mediation Board), Fair Labor Standards Act, Labor Management—Reporting & Disclosure Act of 1959, Labor Management Relations Act, fire arms license litigation, Federal Aid Highway Act—Highway Beautification Act—Highway Safety Act, Railroad Safety Act—Rail Passenger Service Act—Railroad Revitalization and Regulatory Reform Act of 1976, Bridges Act of 1906, Uniform Time Act, miscellaneous Department of Transportation cases, Public Work & Economic Development Act of 1965—Local Public Works Capital Development & Investment Act of 1976—Public Works Employment Act of 1972, Occupational Safety & Health Act of 1970, Davis-Bacon, Walsh-Healy, Services Contract, unemployment compensation, Export Administration Act, Bureau of Census litigation, Mer-

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chant Marine Act of 1936—Ship Act of 1916, miscellaneous Department of Commerce litigation and miscellaneous Treasury litigation.

4-6.390 Area 9—Government Corporations and Regulatory Agencies

This area includes actions against independent regulatory agencies and suits involving agencies or matters not otherwise covered by the above subject matter areas which are handled by the Federal Programs Branch, including Small Business Administration cases, National Credit Union Administration Act, Federal election laws, postal fraud and obscenity, Federal Communications Act, miscellaneous GSA cases, veterans educational benefits cases, other Veterans Administration litigation, Railway Labor Act, NASA cases, ICC Railroad cases, miscellaneous Postal Service matters, Federal Trade Commission, FAA Cases, ICC Motor Carrier Cases, bid disputes litigation, Comptroller of the Currency—branch banking cases, Comptroller of the Currency—banking powers cases, miscellaneous Comptroller of the Currency cases, Federal Reserve Board, other banking agencies, other ICC cases, CAB litigation, postal rates and classifications, miscellaneous cases involving White House officials and SEC, CPIC, NLRB and TVA cases.

4-6.395 Area 10—Employment Discrimination Litigation

This area includes all suits challenging government employment decisions or regulations affecting employment on the basis of prohibited discrimination, including Title VII, Equal Pay Act, Age Discrimination Act, Rehabilitation Act (handicapped discrimination—federal employees), Executive Order 11246, Title VI, Title IX, Civil Rights Attorneys' Fee Awards, and Equal Education Opportunities litigation.

There is a standard of practice for occasions when the government might move for attorney 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 attorney fees as the prevailing defendant in a Title VII suit, under the same standards that a private employer would be entitled to recover fees. See *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 Title VII provision did not bar the federal government from recovering attorney fees under the "bad faith exception to the American Rule."

♦ 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 attorney fees on the standard as outlined should clear the decision with the Assistant Attorney General, Civil Division, before filing.

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UNITED STATES ATTORNEYS' MANUAL

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4-7.000 IMMIGRATION LITIGATION

The Office of Immigration Litigation litigates in the federal district courts and circuit courts of appeals on behalf of the Immigration and Naturalization Service, the Department of State, the Department of Labor, and all other agencies involved in the regulation of aliens seeking to enter or remain in the United States. Additionally, the Office is responsible for litigation involving citizenship and passport matters, as well as the employer sanctions/employment authorization provisions of the Immigration Reform and Control Act of 1986 (Pub.L. No. 99-603, 100 Stat. 3359).

Immigration litigation may be either defensive or affirmative in character. No affirmative civil immigration suit should be instituted by the U.S. Attorney without prior consultation with the Office of Immigration Litigation. Copies of all immigration-related complaints and other pleadings served upon the U.S. Attorney should be promptly forwarded to the Office. Similarly, the Office shall endeavor to provide prompt notification to U.S. Attorneys of significant developments concerning aliens involved in federal court litigation in their districts. Certified records of proceedings before immigration judges are prepared by the Executive Office of Immigration Review; requests for such records should be made through the Office of Immigration Litigation.

For alien-related litigation, the principal governing statute is the Immigration and Naturalization Act of 1952, as amended, 8 U.S.C. 1101, et seq., which establishes critical distinctions between aliens based upon their status as immigrants or nonimmigrants, and based upon whether the individual in question has "entered" the United States (a legal fiction which results in separate avenues of deportation and exclusion for the expulsion of aliens lacking authority to enter/remain in the United States). Special statutory provisions limit the courts' jurisdiction to review immigration disputes. *E.g.*, 8 U.S.C. § 1105a.

Contact: Robert L. Bombaugh (FTS 272-4530)
Director

Lauri Steven Filppu (FTS 272-4705)
Thomas W. Hussey (FTS 272-4364)
Deputy Directors

Mail: Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

Delivery: Room 8136, Patrick Henry Building
601 D Street, N.W.
Washington, D.C. 20530

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4-7.100 REPORTING OF DECISIONS

The outcomes 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 appeal 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.

4-7.200 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).

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.

Title 8 U.S.C. § 1451(h) provides that a person holding a certificate of naturalization or citizenship which has been canceled under the provision of that section shall, upon proper notice, surrender the certificate to the Attorney General. All complaints for revocation of naturalization filed pursuant to Section 1451(h) should contain a demand that the certificate of

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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.

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.

In proceedings under 8 U.S.C. § 1451(d) that involve persons who are outside of the United States, the United States consular officer in the area, as the representative of the Attorney General, will demand surrender of the certificate.

UNITED STATES ATTORNEYS' MANUAL

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4-8.000 COMMON LITIGATION ISSUES

4-8.100 JURY TRIALS IN CIVIL CASES

Rule 38, Fed.R. of Civ.P., 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 to 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. 37, 47 (1914); *United States v. J.B. Williams Company, Inc.*, 498 F.2d 414 (2d Cir.1974). United States Government Life and National Service Life Insurance litigation has been held subject to trial by jury. See, e.g., *Law v. United States*, 266 U.S. 494, 496 (1925). Actions which seek equitable relief are not triable to a jury. See 5 Moore's *Federal Practice*, § 38.13 (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.1960). Tucker Act (28 U.S.C. §§ 1346(a)(2), 1491) and Federal Tort Claims Act (28 U.S.C. § 1346(b)) suits are tried without a jury. 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.1959). The government's counterclaim or setoff, asserted in a Tucker Act or Tort Claims Act suit, is also to be tried without a jury. *McElrath v. United States*, 102 U.S. 426, 440 (1880); *Cargill, Inc. v. CCC*, 275 F.2d at 749; *Terminal Warehouse of N.J. v. United States*, 91 F.Supp. 327 (D.N.J.1950). 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." *Galloway v. United States*, 319 U.S. 372, 388 (1943); See also *United States v. Sherwood*, 312 U.S. at 587. 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 contradictory findings. Cf. *Eastern Airlines v. Union Trust Co.*, 239 F.2d 25 (D.C.Cir.1956), cert. denied, 353 U.S. 942 (1957). In other cases, courts and juries have disagreed substantially in assessing damages against joint tortfeasors. See, e.g., *Benbow v. Wolf*, 217 F.2d 203, 204 (9th Cir.1954); *D.C. Transit System, Inc. v. Slingland*, 266 F.2d 465 (D.C.Cir.), cert. denied, 361 U.S. 819 (1959).

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4-8.200 LACHES AND LIMITATIONS

4-8.210 Laches

As Mr. Justice Story said:

The general principle is, that laches is 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, 22 U.S. (9 Wheat) 720, 735 (1824). 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. *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Merrick Sponsor Corp.*, 421 F.2d 1076 (2d Cir.1970).

4-8.220 Limitations Statutes Applicable to Suits Against the Government

When Congress creates 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, *Limitations 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.), *dismissed*, 299 U.S. 617 (1936); 51 Am.Jur.2d, *Limitation of*

Actions § 424. The time limitation may not be waived or abrogated by estoppel. See *Lynch v. United States*, 80 F.2d 418 (5th Cir.1935), 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 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.1937). While the running of a period of limitations may be tolled during hostilities as between private litigants, no such exception will be read into a statute limiting the time for suit against the government. See *Soriano v. United States*, 352 U.S. 270 (1957).

The limitations provisions applicable to specific actions are discussed in connection with the various kinds of suits discussed in this title.

4-8.300 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.1967); *Aetna Insurance Co. v. United States*, 456 F.2d 773 (Ct.Cl.1972); *Burlington Northern Inc. v. United States*, 462 F.2d 526 (Ct.Cl.1972); *Hilburn v. Butz*, 463 F.2d 1207 (5th Cir.), cert. denied, 410 U.S. 942 (1973). 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 Collection Standards, and, if necessary, the Commercial Litigation Branch should be consulted before advising agencies concerning administrative offset. See USAM 4-8.510.

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 such payment 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 the 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.1951).

4-8.400 PRIORITY FOR THE PAYMENT OF CLAIMS DUE THE GOVERNMENT

The federal priority statute, 31 U.S.C. § 3713,¹ provides:

¹ 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).

(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;

(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.

The statute applies to all claims of the United States. *Bramwell v. United States Fidelity Co.*, 269 U.S. 483, 487 (1926) (U.S. deposit of funds on behalf of Indians). Some of the claims to which priority applies are enumerated in *Massachusetts v. United States*, 353 U.S. 611, 625-26 n. 24 (1948). 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, 357-58 (1964). Bond debts payable *in futuro* are covered by the statute. See *United States v. State Bank*, 31 U.S. (6 Pet.) 29, 35-36 (1832). Criminal fines are included, after imposition of the criminal fine by the court. *United States v. Alan Henry Culbert, supra*. The method of acquisition of a claim is immaterial, and assigned claims are covered. *Lakeshore Apartments, 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. *SBA v. McClellan*, 364 U.S. 446 (1960).

4-8.500 RECOUPMENT AND SETOFF

Even though a counterclaim may not be authorized in the circumstances of a particular case, see USAM 4-8.600, 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.

4-8.510 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. Title 28 U.S.C. § 2415, limiting the time for certain monetary suits by the United

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States, expressly recognizes the government's right to assert claims by way of setoff, notwithstanding the running of the period of limitations. Title 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 *North Dakota-Montana Wheat Growers' Ass'n v. United States*, 66 F.2d 573 (8th Cir.1933), *cert. denied*, 291 U.S. 672 (1934); *Deseret Apartments, 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).

4-8.520 Recoupment

As noted in USAM 4-8.510, *supra*, a setoff which is time barred may not be asserted in an affirmative monetary suit by the government. Even so, 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, 258-63 (1935). However, the doctrine of recoupment applies only 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. 296 (1946). See also *Frederick v. United States*, 386 F.2d 481 (5th Cir.1967).

4-8.600 COUNTERCLAIMS AGAINST THE UNITED STATES

A counterclaim cannot be asserted in the context of a suit brought by the United States in a federal court, absent express statutory consent.² See *United States v. Silverton*, 200 F.2d 824 (1st Cir.1952); *Lacy v. United States*, 216 F.2d 225 (5th Cir.1954); *United States v. Longo*, 464 F.2d 913 (8th Cir.1972); *Marcos Garvey Square, Inc. v. Winston Burnett Construction Co. of Cal., Inc.*, 595 F.2d 1126, 1130 (9th Cir.1979); see Fed.R.Civ.P. 13(d). A counterclaim cannot be asserted except in the manner and in the court in which the United States has consented to be sued. *Oyster Shell Products Corp. v. United States*, 197 F.2d 1022 (5th Cir.), *cert. denied*, 344 U.S. 885 (1952). A statute permitting suit against an agency or its head does not authorize a counterclaim in a suit brought by the government

² 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 applies in the federal courts in certain circuits. See *United States v. Nipissing Mines Co.*, 206 F. 431 (2d Cir.1913), *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*, *supra*; *United States v. 40.60 Acres of Land*, 483 F.2d 927, 928 (9th Cir.1973); *United States v. Springfield*, 276 F.2d 798 (5th Cir.1960); *Thompson v. United States*, 250 F.2d 43 (4th Cir.1957); *Landow v. Carmen*, 555 F.Supp. 195, 196 (D.Md.1983); *United States v. Martin*, 267 F.2d 764 (10th Cir.1959).

in the name of the United States. *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. *Munro v. United States*, 303 U.S. 36, 41 (1938); *United States v. United States Fidelity Co.*, 309 U.S. 506, 514-15 (1940); *Jackson v. Irving Trust Co.*, 311 U.S. 494, 500 (1941).

It should be kept in mind that, if a counterclaim exceeds \$10,000 in amount, jurisdiction in a district court 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 must be dismissed. See, e.g., *United States v. Aleutian Homes, Inc.*, 193 F.Supp. 571 (D.Alaska 1961).

4-8.610 Counterclaim 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. See *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 Apartments v. United States*, 250 F.2d 457 (10th Cir.1957); *Henry Barracks Housing Corp. v. United States*, 281 F.2d 196 (Ct.Cl.1960); *Gross v. United States*, 357 F.2d 368, 372 (Ct.Cl.1966); *Marcus Garvey Square, Inc. v. Winston Burnett Construction Co. of Cal., Inc.*, 595 F.2d 1126, 1130 (9th Cir.1979). Counterclaimants' allegations of government misrepresentation of the feasibility of a project falls within the express exception to the Federal Tort Claims Act, so that the court lacks jurisdiction to review the merits of such allegations. 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, 814-16 (7th Cir.1975); *United States v. Thompson*, 293 F.Supp. 1307, 1312 (E.D.Ark. 1967), 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).

See USAM 4-8.500, *supra*, as to recoupment and setoff.

4-8.700 ESTOPPEL

The general rule is that the federal government may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases. *Heckler v. Community Health Services*, 467 U.S. 51 (1984); *INS v. Miranda*, 459 U.S. 14 (1982); *Schweiker*

v. Hansen, 450 U.S. 785 (1981); *FCIC v. Merrill*, 332 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. See *Heckler v. Community Health Services*, 467 U.S. 51, 59-61 (1984). 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 "commercial dealings." *FCIC v. Merrill*, 332 U.S. 383 n. 1 (1947). 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*.

4-8.800 CHOICE OF LAWS

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 applicable in government litigation is decisional rather than statutory. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 590-94 (1973); *United States v. View Crest Garden Apartments, Inc.*, 268 F.2d 380 (9th Cir.1959). 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 (1944); *United States v. First National Bank of Atlanta*, 441 F.2d 906 (5th Cir.1971). Cf. *Free v. Bland*, 369 U.S. 663 (1962). The rationale for this rule is found in the necessity for uniform construction and application of such contracts and instruments throughout the United States. See *Clearfield Trust Co. v. United States*, *supra*; *T.H. Rogers Lumber Co. v. Apel*, 468 F.2d 14 (10th Cir.1972).

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).

4-8.900 INTEREST

4-8.910 Interest Recoverable by the Government

The United States is entitled to recover pre-judgment interest. *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941); *Billings v. United States*, 232 U.S. 261, 284-88 (1913); *United States v. Eastern Airlines, Inc.*, 366 F.2d 316, 321 (2d Cir.1966). 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 a 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 1922, 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 ask 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. 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. *RFC v. Service Pipe Line Co.*, 206 F.2d 814 (10th Cir.1953). 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 percent from the time of default. 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 representation, collusion, or misconduct of a Postal Service officer or employee. 39 U.S.C. § 2605.

In admiralty suits, pre-judgment interest is awarded in the discretion of the district court to insure compensation of the injured party in full and "should be granted unless there are exceptional or peculiar circumstances." *Mid-America Transp. Co. v. Rose Barge Line, Inc.*, 477 F.2d 914, 916 (8th Cir.1973). A court sitting in admiralty need not fix interest at the legal rate allowed in the state where it sits. *Sabine Towing and Transp. Co. v. Zapata Uglund Drilling, Inc.*, 553 F.2d 489, 491 (5th Cir.), cert. denied, 436 U.S. 855 (1977) (12 percent); *Sea-Land Serv., Inc. v. Eagle Terminal Tankers, Inc.*, 443 F.Supp. 532, 534 (W.D.Wash.1977) (8 percent).

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

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allowed by law, whether or not interest has been expressly provided for in the judgment. See 28 U.S.C. § 1961. Under that statute, the government is entitled to post-judgment interest on the entire judgment as rendered, including any pre-judgment interest included in the judgment. See *United States v. Briggs Manufacturing Company*, 460 F.2d 1195, 1196 (9th Cir. 1972).

4-8.920 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. 28 U.S.C. § 2516(a); *United States v. Worley*, 281 U.S. 339, 341 (1930); *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947); *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585 (1946); *Jacobs v. United States*, 290 U.S. 13 (1933).

In cases brought under the Suits in Admiralty Act, interest shall be at 4 percent per year or at any rate stipulated to by contract and it shall run, as ordered by the court, from the date the complaint is filed. 46 U.S.C. § 743. See *Stoddard v. Ling-Temco-Vought, Inc.*, 513 F.Supp. 314, 330 (C.D. Cal.1980); *Richmond Marine Panama S.A. v. United States*, 350 F.Supp. 1210, 1220 (S.D.N.Y.1972). In suits under the Public Vessels Act, no pre-judgment interest may be awarded unless expressly provided for by contract. 46 U.S.C. § 782. See *Blevins v. United States*, 769 F.2d 175 (4th Cir.1985); *Firth v. United States*, 554 F.2d 990, 996 n. 10 (9th Cir.1977); *Stevens Institute of Technology v. United States*, 396 F.Supp. 986, 992 (S.D.N.Y. 1975). Interest prior to judgment is expressly denied by the Federal Tort Claims Act. 28 U.S.C. § 2674.

The award of post judgment interest is governed in district courts by 28 U.S.C. §§ 1961, 2411, and 31 U.S.C. § 1304. The rate of interest is set forth in 28 U.S.C. § 1961(a). In cases brought under the Suits in Admiralty Act, rate of post-judgment interest is 4 per cent per year. See Civil Division Monograph entitled "'Provisions and Procedures Governing the Payment of Interest and Federal Tort Claims Act Judgments'" (rev. 1983). 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.

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 Litigation Branch Monograph "'Interest on Claims By and Against the Government'" (June 1984).

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4-8.1000 DECLARATORY JUDGMENT ACTIONS

Title 28 U.S.C. § 2201, allowing the issuance of declaratory judgments in cases with the courts' jurisdiction, is procedural and restricted to "cases" and "controversies" in the constitutional sense. See *Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954); *Miller v. Udall*, 368 F.2d 548 (10th Cir.1966). It is not available for the resolution of hypothetical, academic, or theoretical problems. See *Wirtz v. Fowler*, 372 F.2d 315 (5th Cir.1966). The federal courts do not render advisory opinions. *Gold-en v. Zwickler*, 394 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 (1967); *State of Wyoming v. United States*, 310 F.2d 566 (10th Cir.1962), cert. denied, 372 U.S. 553 (1963); *Universal Fiberglass Corp. v. United States*, 400 F.2d 926 (4th Cir.1968).

4-8.1100 EQUITABLE REMEDIES

See generally Civil Division Monograph entitled "Maintaining Status Quo During Litigation" (1984).

4-8.1110 Injunctions

Affirmative relief by way of injunction is sought from time to time to advance major public interests or enforce governmental functions. Such injunction actions may be specifically provided for by statute. See, e.g., *United Steelworkers 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 (1895); *United States v. United Mine Workers*, 330 U.S. 253 (1947). 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).

A preliminary injunction is an extraordinary and drastic remedy. *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572-73 (5th Cir.1974). No injunction will issue if there is an adequate remedy at law. See *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); *Porto Rico Telephone Co. v. P.R. Communications Auth.*, 189 F.2d 39 (1st Cir.), cert. denied, 342 U.S. 830 (1951).

Irreparable injury is an essential prerequisite to the issuance of a preliminary injunction. *County of Santa Barbara v. Hickel*, 426 F.2d 164 (9th Cir.1970), cert. denied, 400 U.S. 499 (1971). Temporary loss of income or other alleged injury involving only the loss of money is not irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). The injury

alleged must be immediate and non-speculative. *Louisiana Environmental Society, Inc. v. Coleman*, 524 F.2d 930, 933 (5th Cir.1975). There must be a convincing showing of irreparable injury, and mere litigation expense will not suffice. *Sierra Club v. Morton*, 405 U.S. 727 (1972). Even if there will be irreparable injury, the granting of a temporary injunction is not a matter of right and may be refused in the exercise of judicial discretion.

In the exercise of its discretion a court "of equity should pay particular regard for the public consequence in employing the extraordinary remedy of injunction." See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). If an injunction will impair the public interest, it should be denied. Cf., *Yakus v. United States*, 321 U.S. 414, 440 (1944); see also *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944).

No security can be required of the United States or an officer or agency thereof. Fed.R.Civ.P. 65(c). However, as to other parties, Fed.R.Civ.P. 65(c) speaks in mandatory terms, to the effect that no temporary restraining order or preliminary injunction shall issue except upon the giving of security by the applicant. *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 273-74 (9th Cir.1964), cert. denied, 380 U.S. 956 (1965). Security is required to be in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. There is no liability on the bond or other security unless there is a final judgment in favor of the party enjoined. See *American Bible Society v. Blount*, 446 F.2d 588 (3d Cir.1971). Liability is for "resulting and consequential" damages. See *Silvers v. TTC Industries, Inc.*, 484 F.2d 194 (6th Cir.1973). Damages will be limited to the amount of the bond, *First Citizens Bank & Trust Co. v. Camp*, 432 F.2d 481 (4th Cir.1970), unless the injured person can prove malicious prosecution. See *Northeast Airlines v. World Airways, Inc.*, 262 F.Supp. 316 (D.Mass.1966). Plaintiff's voluntary dismissal, without defendant's consent, is generally a determination on the merits, so as to render plaintiff and his/her security liable on the injunction bond. See *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970), cert. denied, 402 U.S. 999 (1971).

A TRC is not appealable. See *Grant v. United States*, 282 F.2d 165 (2d Cir.1960). However, its extension beyond the time permitted by Fed.R. Civ.P. 65(b), is tantamount to a preliminary injunction, and it is then appealable. *Sampson v. Murray*, 415 U.S. 61 (1974); *Telex Corp. v. IBM Corp.*, 464 F.2d 1025 (8th Cir.1972); *Sims v. Greene*, 160 F.2d 512 (3d Cir.1947); *National Mediation Board v. Air Line Pilots Ass'n Int'l*, 323 F.2d 305 (D.C.Cir.1963).

4-8.1120 Mandamus

Mandamus is an extraordinary remedy, which should only be used in exceptional circumstances of peculiar emergency or public importance. *LaBuy v.*

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Howes Leather Co., 352 U.S. 249 (1957); *United States v. McGarr*, 461 F.2d 1 (7th Cir.1972). The All Writs Act, 28 U.S.C. § 1651(a), confers the power of mandamus on federal appellate courts. *LaBuy v. Howes Leather Co.*, *supra*. Mandamus may be appropriately issued to confine an inferior court to a lawful exercise of prescribed jurisdiction, or when there is an usurpation of judicial power. See *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). Mandamus may be employed to require a lower court to enforce the judgment of an appellate court, or to keep such a court from interposing unauthorized obstructions to the enforcement of the judgment of a higher court. See *United States v. District Court*, 334 U.S. 258, 263 (1948) (to enforce obedience to court of appeals mandate). Where the right was clear and indisputable, mandamus issued to compel a lower court to release a boat under an assertion of the immunity of a foreign sovereign. *Spacil v. Crowe*, 489 F.2d 614 (5th Cir.1974). It has been utilized to compel the issuance of a bench warrant. *Ex parte United States*, 287 U.S. 241, 248 (1932).

The district courts have no jurisdiction of a suit seeking mandamus against the United States. *United States v. Jones*, 131 U.S. 1 (1889); *Minnesota v. United States*, 305 U.S. 382 (1939); *McCombe v. United States*, 374 F.Supp. 946 (S.D.N.Y.1974). 28 U.S.C. § 1361, giving the United States district court 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.Rep. No. 1992, 87th Cong., 2d Sess. 2; H.Rep. No. 536, 87th Cong., 2d Sess. 1.

Courts have no authority to grant relief in the nature of mandamus if the plaintiff has an adequate 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. *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 542, 544 (1937); *Spielman Motor Co. v. Dodge*, 295 U.S. 89 (1935); *Whittier v. Emmet*, 281 F.2d 24, 28-29 (D.C.Cir.1960); *Nixon v. Sirica*, 481 F.2d 700 (D.C.Cir.1973); *Lovallo v. Froehlke*, 468 F.2d 340 (2d Cir.1972), *cert. denied*, 411 U.S. 918 (1973). 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 (1962). 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.1969), *cert. denied*, 397 U.S. 941 (1970).

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*, 39 U.S. (1 Pet.) 496, 514-17 (1840); *Work v. Rives*, 267 U.S. 175, 177 (1925); *Wilbur v. United States*, 281 U.S. 206, 218 (1930). An official action is not ministe-

rial unless "the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command." *Wilbur v. United States*, *supra*; see *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931); *ICC v. New York, N.H. & H.R. Co.*, 287 U.S. 178, 204 (1932); *United States ex rel. 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.1973). "But where there is discretion . . . even though its conclusion be disputable, it is impregnable to mandamus." *United States ex rel. Alaska Smokeless Coal Co. v. Lane*, 250 U.S. 549, 555 (1919).

4-8.1130 Reformation

Reformation is almost always asserted as a preliminary to some other remedy which is to be pursued. This equitable remedy is available when a written contract or conveyance fails to express the agreement of the parties, due to the fraud or misrepresentation of one party and the mistake of the other. Restatement of Contracts § 491 (1932). In such a situation, rescission is an alternative to the innocent party. Restatement of Contracts § 491, Comment (a) (1932). Reformation is also available in the case of mutual mistake. Restatement of Contracts § 504, Comment (a) (1932).

4-8.1140 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 (1956); *Cotton v. United States*, 52 U.S. (11 How.) 229 (1850). 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. See *Union 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. The United States is not required to record its title under state recording statutes. *United States v. County of Allegheny*, 322 U.S. 174 (1944); *In re Double H Products Corp.*, 462 F.2d 52 (3d Cir.1972); *In the Matter of American Boiler Works, Inc.*, 220 F.2d 219 (3d Cir.1955). No lien can be asserted against government property without its consent. See *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452 (1910); *United States v. Ameco Electronics Corp.*, 224 F.Supp. 183 (E.D.N.Y.1963).

4-8.1150 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.1958) (rescission granted due to use of strawman 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, 563-66 (1961) (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. 456, 506 (1927) (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.* at 510, nor would the Court allow the offending party the cost of improvements made by it. See *id.*, p. 509.

4-8.1160 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), rehearing 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.

4-8.1200 ATTORNEY FEES AND COSTS

4-8.1210 Attorney Fees

The general rule in this country, the so-called "American Rule" is that each party must pay its own attorney fees. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). There are, however, numerous federal statutes providing for attorney fee awards where the United States or a federal agency or official is a party. The most generally applicable statute authorizing attorney fees awards against the United States is the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which makes the federal government liable for fees where

(1) any other party would be liable under common law or under the terms of any statute 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 action, unless the court finds that the

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position of the United States was substantially justified or that special circumstances make an award unjust. 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 in Judicial Proceedings Under the Equal Access to Justice Act—Revised Edition,'" for a more detailed discussion of the statute.

The principal grounds under which the American common law would permit attorney fees to be awarded are the "'bad faith'" and "'common fund'" theories. The "'bad faith'" theory allows an award where a party has willfully disobeyed a court order or has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *accord Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. at 258-59. Under the "'common fund'" theory, a court may award attorney fees to a party whose legal action creates or preserves a fund of money, or obtains a benefit, for others as well as itself. While 28 U.S.C. § 2412(b) authorizes an award of attorney fees against the federal government where any other party would be liable under the common law, it may not authorize an award against the federal government under the "'common fund'" theory. See *Grace v. Burger*, 763 F.2d 457 (D.C.Cir.), cert. denied, 106 S.Ct. 583 (1985); *Cable Atlanta, Inc. v. Project, Inc.*, 749 F.2d 626 (11th Cir.1984); *Chevron U.S.A. Inc. v. May Oilfield Services, Inc.*, 739 F.2d 498 (10th Cir.1984); *Millers Mutual Ins. Ass'n of Ill. v. Wassall*, 738 F.2d 302 (8th Cir.1984); *Holbrook v. Pitt*, 748 F.2d 1168 (7th Cir.1984); *Jordan v. Heckler*, 744 F.2d 1397 (10th Cir.1984); *Puerto Rico v. Heckler*, 745 F.2d 709 (D.C.Cir.1984); *McQuiston v. Marsh*, 707 F.2d 1082 (9th Cir.1983).

Where no statute, including the EAJA, specifically allows for the recovery of fees, sovereign immunity bars the award of fees. It is fundamental that the United States, as a sovereign, is immune from suit save as it consents to be sued and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit. See *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Waivers of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *United States v. King*, 395 U.S. 1, 4 (1969). This rule of strict construction has been specifically applied to claims for attorney fee awards against the United States. *Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986); *Nichols v. Pierce*, 740 F.2d 1249, 1258-59 (D.C.Cir.1984); *Commissioner of Highways v. United States*, 684 F.2d 443, 444 (7th Cir.1982); *Nibali v. United States*, 634 F.2d 494, 497 (Ct.Cl.1980).

A number of statutes allowing for attorney 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.

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§ 2678 (Federal Tort Claims Act); *cf. Nesbit v. Frederick Snare Corp.*, 96 F.2d 535, 537-39 (D.C.Cir.1938), *cert. denied*, 305 U.S. 608 (1938). Fee restrictions imposed by the Congress are constitutional. *See Hines v. Lowarey*, 305 U.S. 85, 91 (1938); *Nebbia v. New York*, 291 U.S. 502, 535-36 (1934); *Margolin v. United States*, 269 U.S. 93, 101 (1925).

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. The amount of attorney fees to be awarded is generally determined by multiplying the reasonable number of hours expended on a case by the reasonable hourly rate at which counsel should be compensated. *See Blum v. Stenson*, 465 U.S. 896 (1984); *Hensley v. Eckelhost*, 461 U.S. 424 (1983).³

4-8.1220 Costs

4-8.1221 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." Section 1924 of Title 28 of the U.S. Code 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 the 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 costs on affirmance); Fed.R.App.P. 39. 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).

³ When attorney fees are awarded to the government, the hourly rate should be in accordance with the schedule set forth in the April 29, 1987 memorandum from Phyllis Gardner, Director of Management Programs to all Civil Division attorneys.

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4-8.1222 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 (1902). 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 Rule 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.1950) (remand to permit trial court to consider allowance in exercise of its discretion); see *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964). 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. § 1821, may be recovered by the United States as a part of its costs. See 6 Moore's *Federal Practice* ¶54.77. 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.1955), cert. denied, 350 U.S. 936 (1956); 12 A.L.R.Fed. 210. See F.R.A.P. 30(b); *United States v. Deaton*, 207 F.2d 726, 727 (5th Cir.1953) (as to recovery of the costs of unnecessarily encumbering the record on appeal).

When considering moving for costs on 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, warrant a request for a reduction in costs or a waiver of costs.

A. 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. 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).

Section 1920(2) of Title 28 of the U.S. Code 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. *Texas City Tort Claims v. United States*, 188 F.2d 900, 902 (5th Cir.1951); cf. *Miller v. United States*, 317 U.S. 192 (1942). 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.1957). However, if the court advises

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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. *Wax v. United States*, 183 F.Supp. 163, 164 (E.D.N.Y.1960). Printing expenses necessarily incurred may be taxed as costs under 28 U.S.C. § 1920(3).

B. 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.Neb.1949). 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. See 6 Moore's *Federal Practice*, ¶55.77[5.-1], p. 54-432 (2d ed. 1987). 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. 1953). 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. 414, 417 (1931).

Deposition expenses are not taxable as costs, where the depositions were taken essentially for purposes 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] (2d ed. 1982). The party's attorney fees in connection with the taking of a deposition are not recoverable. 6 Moore's *Federal Practice* ¶54.77[2] (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, 489-90 (2d Cir.1954).

C. Expenses of Investigation, Consultants, etc. The expenses of investigation, including trial preparation and travel expenses of counsel, are not chargeable as costs. 6 Moore's *Federal Practice*, ¶54.77[4], [6], [8] (2d ed. 1982). The same is true with respect to long distance calls, costs

of preparing lists of exhibits, and other items of overhead. *Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp.*, 11 F.R.D. 259, 265-66 (W.D.Mo.1951), *modified & aff'd*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952). The moving party under Federal Rules of Civil Procedure 34, generally must bear that 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. *Braun v. Hassenstein Steel Co.*, 23 F.R.D. 163, 168 (D.S.D.1959); *American Steel Works v. Hurley Construction Co.*, 46 F.R.D. 465, 468 (D.Minn.1969). 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] (2d ed. 1982).

4-8.1223 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 (1930), or against government officers sued in their official capacity. See *Ewing v. Gardner*, 341 U.S. 321 (1951)). 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 (1938); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940). "Congress alone has power to waive or qualify that immunity." *United States v. Chemical Foundation, Inc.*, *supra*.

The Equal Access to Justice Act ("EAJA"), Title II of Pub.L. No. 86-481, 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.

Section 1923(a) of Title 28 enumerates attorney 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 attorney fees. The attorney 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, 489-90 (2d Cir. 1954), sustaining the action of the district court under a local rule which

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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 treated the expense as a condition for the taking of the deposition, rather than as an item of court costs.

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 2000e-5(k).

Section 2408 of Title 28 excuses the United States, and its department agencies, and employees, from posting security for damages or costs.



U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Washington, D.C. 20530

August 25, 1994

MEMORANDUM FOR ALL: HOLDERS OF UNITED STATES ATTORNEYS' MANUAL
TITLE 9 AND TITLE 4

FROM: *Carol DiBattiste*
Carol DiBattiste
Director

SUBJECT: Contact with Represented Persons
Bluesheet USAM 9-13.200 and USAM 4-8.1300

The proposed Regulation on Contact with Represented Persons was published in the Federal Register on August 4, 1994. See 59 Fed. Reg. 39910 (Aug. 4, 1994) (to be codified at 28 CFR Part 77). It becomes effective on September 6, 1994.

The attached bluesheets provide additional guidance concerning this Regulation and should be inserted in both Title 9 and Title 4 of your United States Attorneys' Manual. The two sections affected are: USAM 9-13.200 and 4-8.1300. Please note that these bluesheets also have an effective date of September 6, 1994.

Attachment



Office of the Attorney General
Washington, D. C. 20530

August 25, 1994

TO: Holders of United States Attorneys' Manual Title 9
and/or Title 4

FROM: Janet Reno
Attorney General

United States Attorneys' Manual Staff
Executive Office for United States Attorneys

RE: Contacts by Department of Justice Attorneys with
Represented Individuals and Organizations

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9 and Title 4.
3. Insert in front of affected section.

AFFECTS: USAM 9-13.200
USAM 4-8.1300

The following new section is added to Title 9, Chapter 13.

9-13.200 COMMUNICATIONS WITH REPRESENTED PERSONS

9-13.210 Generally

28 C.F.R. Part 77 generally governs communications with represented persons in law enforcement investigations and proceedings. This section sets forth several additional departmental policies and procedures with regard to such communications. Both this section and 28 C.F.R. Part 77 should be consulted by Department attorneys before engaging in any communications with represented individuals or represented organizations.

Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect bona fide attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.

The rules set forth in 28 C.F.R. Part 77 are intended, among other things, to clarify the circumstances under which government attorneys may communicate with represented persons. They are not intended to create any presumption that communications are necessary or advisable in the course of any particular investigation or proceeding. Whether such a communication is appropriate in a particular situation is to be determined by the government attorney (and, when appropriate, his or her supervisors) in the exercise of his or her discretion, based on the specific circumstances of the individual case.

Furthermore, the application of this section, like the application of 28 C.F.R. Part 77, is limited to communications between Department of Justice attorneys and persons known to be represented by counsel during criminal investigations and proceedings or civil law enforcement investigations and proceedings. These provisions do not apply to Department attorneys engaged in civil suits in which the United States is not acting under its police or regulatory powers. Thus, state

bar rules and not these provisions will generally apply in civil suits when the government is a defendant or a claimant.

Attorneys for the government are strongly encouraged to consult with appropriate officials in the Department of Justice when the application or interpretation of 28 C.F.R. Part 77 may be doubtful or uncertain. The primary points of contact at the Department of Justice on questions regarding 28 C.F.R. Part 77 and this section are the Assistant Attorneys General of the Criminal and Civil Divisions, or their designees.

9-13.220 Communications During Investigative Stage

Section 77.7 of Title 28, Code of Federal Regulations, generally permits communications with represented persons outside the presence of counsel that are intended to obtain factual information in the course of criminal or civil law enforcement investigations before the person is a defendant or is arrested in a federal criminal case, or is a defendant in a federal civil enforcement proceeding. Such communications must, however, have a valid investigative purpose and comply with the procedures and considerations set forth below.

During the investigative stage of a case, an attorney for the government may communicate, or cause another to communicate, with any represented person, including a "target" as defined in section 9-13.240, concerning the subject matter of the representation if the communication is made in the course of an undercover investigation of possible criminal or wrongful activity. Undercover communications during the investigative

stage must be conducted in accordance with 28 C.F.R. Part 77, and relevant policies and procedures of the Department of Justice, as well as the guidelines for undercover operations of the federal law enforcement agency conducting the investigation (e.g., the Attorney General's Guidelines on FBI Undercover Operations).

Overt communications during the investigative stage are subject to the procedures and considerations set forth in sections 9-13.230 - 9-13.233, 9-13.240 - 9-13.242, and 9-13.250 below.

9-13.230 Overt Communications with Represented Persons

During the investigative stage of a criminal or civil enforcement matter, an attorney for the government as a general rule should communicate overtly with represented persons outside the presence of counsel only after careful consideration of whether the communication would be handled more appropriately by others. Attorneys for the government may not, however, cause law enforcement agents to make communications that the attorney would be prohibited from making personally.

28 C.F.R. § 77.8 prohibits an attorney for the government from initiating or engaging in negotiations of a plea agreement, immunity agreement, settlement, sentence, penalty or other disposition of actual or potential civil or criminal charges with a represented person without the consent of counsel. However, the attorney for the government is not prohibited from responding to questions regarding the general nature of such agreements, potential charges, potential penalties, or other subjects related

to such agreements. In such situations, an attorney for the government should take care not to go beyond providing information on these and similar subjects, and generally should refer the represented person to his or her counsel for further discussion of these issues, as well as make clear that the attorney for the government will not negotiate any agreement with respect to the disposition of criminal charges, civil claims or potential charges or claims or immunity without the presence or consent of counsel.

9-13.231 Overt Communications with Represented Persons --

Presence of Witness

An attorney for the government should not meet with a represented person without at least one witness present. To the extent feasible, a contemporaneous written memorandum should be made of all communications with the represented person.

9-13.232 Overt Communications with Represented Persons --

Restrictions

When an attorney for the government communicates, or causes a law enforcement agent or other agent to communicate, with a represented person without the consent of counsel, the restrictions set forth in 28 C.F.R. §§ 77.8 and 77.9 must be observed.

9-13.233 Overt Communications - Assurances Not to Contact Client

During the investigative stage, and absent compelling law enforcement reasons, an attorney for the government should not deliberately initiate an overt communication with a represented

person outside the presence of counsel if the attorney for the government has provided explicit assurances to counsel for the represented person that no such communication will be attempted and no intervening change in circumstances justifying such communications has arisen.

9-13.240 Overt Communications with Represented Targets

Except as provided in section 9-13.241 or as otherwise authorized by law, an attorney for the government should not overtly communicate, or cause another to communicate overtly, with a represented person who the attorney for the government knows is a target of a federal criminal or civil enforcement investigation and who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such person. A "target" is a person as to whom the attorney for the government: (a) has substantial evidence linking that person to the commission of a crime or to other wrongful conduct; and (b) anticipates seeking an indictment or naming as a defendant in a civil law enforcement proceeding. An officer or employee of an organization that is a target is not to be considered a target automatically even if such officer's or employee's conduct contributed to the commission of the crime or wrongful conduct by the target organization; likewise, an organization that employs, or employed, an officer or employee who is a target is not necessarily a target itself.

9-13.241 Overt Communications with Represented Targets --
Permissible Circumstances

An attorney for the government may communicate overtly, or cause another to communicate overtly, with a represented person who is a target of a criminal or civil law enforcement investigation concerning the subject matter of the representation if one or more of the following circumstances exist:

(a) Determination if Representation Exists. The communication is to determine if the target is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

(b) Discovery or Judicial Administrative Process. The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including but not limited to testimony before a grand jury or the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena, or civil investigative demand.

(c) Initiation of Communication by Represented Person. The represented person initiates the communication directly with the attorney for the government or through an intermediary and, prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the represented person's right to

1
2 speak through his or her attorney and/or to have the attorney
3 present for the communication, manifests that his or her waiver
4 of counsel for the communication is voluntary, knowing, and
5 informed, and, if willing to do so, signs a written statement to
6 this effect.

(d) Waivers at the Time of Arrest. The communication is
made at the time of the arrest of the represented person, and he
or she is advised of his or her rights under Miranda v. Arizona,
384 U.S. 436 (1966), and voluntarily and knowingly waives them.

(e) Investigation of Additional, Different, or Ongoing
Crimes or Wrongful Conduct. The communication is made in the
course of an investigation of additional, different or ongoing
criminal or wrongful conduct. See 28 C.F.R. § 77.6(e).

(f) Threat to Safety or Life. The attorney for the
government believes that there may be a threat to the safety or
life of any person; the purpose of the communication is to obtain
or provide information to protect against the risk of harm; and
the attorney for the government believes that the communication
is reasonably necessary to protect against such risk.

(g) Effective Performance of Law Enforcement Functions.
The Attorney General, the Deputy Attorney General, the Associate
Attorney General, an Assistant Attorney General or a United
States Attorney: (i) determines that exceptional circumstances
exist such that, after giving due regard to the importance -- as
reflected in 28 C.F.R. Part 77 and this section -- of avoiding
any undue interference with the attorney-client relationship, the

direct communication with a represented party is necessary for effective law enforcement; and (ii) authorizes the communication. Communications with represented parties pursuant to this exception shall be limited in scope consistent with the exceptional circumstances of the case and the need for effective law enforcement.

9-13.242 Overt Communications with Represented Targets --

Organizations and Employees

Overt communication with current high-level employees of represented organizations should be made in accordance with the procedures and considerations set forth in section 9-13.241 above, in the following circumstances:

(a) the current high-level employee is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter of the communication; and

(b) the organization is a target.

Whether a person is to be considered a high-level employee "known by the government to be participating as a decision maker in the determination of the organization's legal position" is a fact-specific, case-by-case question.

9-13.250 Overt Communications During Investigative Stage --

Office Approval Procedure

Before communicating, or causing another to communicate, overtly with a target the attorney for the government knows is

represented by counsel regarding the subject matter of the communication, the attorney for the government should write a memorandum describing the facts of the case and the nature of the intended communication. The memorandum should be sent to and approved by the appropriate supervisor before the communication occurs. In United States Attorney's Offices, the memorandum should be reviewed and approved by the United States Attorney. If the circumstances of the communication are such that prior approval is not feasible, the attorney for the government should write a memorandum as soon after the communication as practicable and provide a copy of the memorandum to the appropriate supervisor. This memorandum should also set forth why it was not feasible to obtain prior approval. The provisions of this section do not apply if the communication with the represented target is made at the time of arrest pursuant to section 9-13.241(d).

9-13.260 Enforcement of the Policies

Appropriate administrative action may be initiated by Department officials against government attorneys who violate the policies regarding communication with represented persons.

* * * * *

The following new section is added to Title 4, Chapter 8.

4-8.1300 COMMUNICATIONS WITH REPRESENTED PERSONS

Communications with represented persons in civil law enforcement investigations and proceedings are governed generally by the rules set forth in 28 C.F.R. Part 77 and by USAM 9-13.200 et seq.

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UNITED STATES ATTORNEYS' MANUAL

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(1)

4-9.000 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 4-8.900, as to the allowance of interest. USAM 4-8.1221 discusses the limited circumstances in which court costs may be included in judgments. See USAM 4-8.1210 *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 GAO takes the position that it is without authority to offset or withhold tax claims from "backpay" judgments rendered against the United States, unless the judgment specifically states the amount of such withholding. The Internal Revenue Service, which views such awards as taxable income, has nevertheless 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.

4-9.100 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. 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,

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payment of final judgments will be made by the General Accounting Office pursuant to 31 U.S.C. § 1304; *see* USAM 4-9.110, *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. *See United States v. Aetna Casualty and Surety 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 claim 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.

4-9.110 Payment of Judgments by General Accounting Office and Postal Service

Final judgments adverse to the United States 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.

In cases delegated to them by the Civil Division, U.S. Attorneys should submit adverse final¹ money judgments or compromises which cannot be paid by the client agency, insurer, surety, or indemnitor, to GAO or the Postal Service as appropriate.² In order to facilitate prompt payment of such judgments or compromises, we propose 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

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 2-2.120).

² Exceptions are Swine Flu settlements. Unique payment procedures make it necessary to forward Swine Flu settlements through the Civil Division for distribution to GAO.

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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 award for payment because deductions for certain items to be withheld from such award 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.

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

4-9.111 Sample Letters—Judgments and Stipulations; Backpay Judgments

A. Sample No. 1—Judgments and Stipulations

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

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,¹ 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.

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

¹NOTE: 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.

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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

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.

Deductions¹ 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]

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

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¹Note 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 plaintiff's counsel to GAO.

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4-9.112 Adverse Judgment Data Sheet

A. CASE CAPTION & CIVIL ACTION NO. _____

B. PAYEE(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 Name(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 Claim Act suit, put FTCA in blank 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 if determined. If further litigation over attorney's fees, submit separate sheet for attorney's fees when finally determined. Note that attorney's 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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4-9.113 Adverse Judgment Data Sheet (Attorney's Fees)

A. CASE CAPTION & CIVIL ACTION NO. _____

_____B. PAYEE(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 Name(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(a) are to be 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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CODE OF FEDERAL REGULATION REFERENCES

| Code of Federal Regulation | | Code of Federal Regulation | |
|--|--------------|-----------------------------------|--------------|
| Title & Section | USAM Section | Title & Section | USAM Section |
| 4 C.F.R. § 91.1 et seq. | 4-4.428 | 28 C.F.R. § 0.160 | 4-3.110 |
| 4 C.F.R. § 101-05 | 4-1.326 | 28 C.F.R. § 0.161 | 4-3.110 |
| 4 C.F.R. § 101.1 et seq. | 4-4.430 | 28 C.F.R. § 0.162 | 4-3.110 |
| 4 C.F.R. § 101.1-1-105.5 | 4-1.326 | 28 C.F.R. § 0.163 | 4-3.110 |
| 4 C.F.R. § 101.1-105.5 | 4-1.450 | 28 C.F.R. § 0.164 | 4-3.110 |
| 4 C.F.R. § 102.3 | 4-8.300 | 28 C.F.R. § 0.165 | 4-3.110 |
| 4 C.F.R. § 102.13 | 4-8.910 | 28 C.F.R. § 0.167 | 4-3.110 |
| 4 C.F.R. § 103.4 | 4-3.200 | 28 C.F.R. § 0.168 | 4-1.300 |
| 4 C.F.R. § 103.9 | 4-3.210 | 28 C.F.R. § 0.169 | 4-3.110 |
| 5 C.F.R. Parts 101-105 | 4-4.430 | 28 C.F.R. § 0.171 | 4-1.200 |
| 20 C.F.R. Part 404, Appendix 1 | 4-6.341 | 28 C.F.R. § 0.171 | 4-4.430 |
| 20 C.F.R. Part 404, Appendix 2 | 4-6.341 | 28 C.F.R. § 0.172 | 4-1.300 |
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