

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

FILE: B-135984

DATE: MAY 21 1976

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098416**MATTER OF: Set-off of Navy claims against insurance companies**

**DIGEST:** Proposed revisions to Manual of the Judge Advocate General, Department of the Navy, would permit reduction in amount of insurance company subrogation claims under Federal Tort Claims Act by amount of certain Navy affirmative claims. Navy is advised that (1) settlement or award of tort claim must be made before debt due Government may be set off; (2) amount of Government claim set-off must be deposited into miscellaneous receipts of Treasury; and (3) payment of awards in excess of \$2,500 must be made by Comptroller General, to whom set-off authority against such awards is reserved.

The Judge Advocate General, Department of the Navy, has asked for our opinion as to the validity of certain regulations proposed to be incorporated in the Manual of the Judge Advocate General (JAG Manual), which provide that certain small Navy affirmative claims against insurance companies may be set-off against insurance company subrogation claims against the Government.

The Navy's proposed regulations provide that all JAG Designees under section 2401b of the JAG Manual shall maintain a file for the purpose of setting off affirmative claims against claims cognizable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1970). Section 2422 of the proposed regulations provides that the following types of affirmative claims shall be contained in the set-off file:

"(1) Property-damage claims against insurance companies whenever the applicable State law authorizes suit directly against an insurance company

"(2) Medical Care Recovery Act claims against insurance companies whenever the applicable State law authorizes suit directly against an insurance company

"(3) Third-party beneficiary medical-payments insurance claims

"(4) Third-party beneficiary uninsured-motorist insurance claims whenever a direct action against an insurer is permissible without a prior judgment against the uninsured motorist

"(5) Third-party beneficiary no-fault insurance claims

"(6) Third-party beneficiary liability-insurance claims"

The proposed regulations also provide that the set-off file should include only affirmative claims of less than \$5,000 which have been denied arbitrarily by insurers. The various Federal agencies have been given the authority to settle administratively certain tort claims against the United States pursuant to 28 U.S.C. § 2672 (1970), which provides in pertinent part:

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General or his designee."

Administrative collection of Government claims is provided for in the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951 et seq. (1970), which provides in section 952(a) that:

"The head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, shall attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency."

The regulations promulgated thereunder in Chapter 2 of title 4 of the Code of Federal Regulations, provide in pertinent part that:

"Collections by offset will be undertaken administratively on claims which are liquidated or certain in amount in every instance in which this is feasible. \* \* \*"  
4 C.F.R. § 102.3 (1974).

28 U.S.C. § 2672, supra, which gives the heads of Federal agencies or their designees the authority to settle tort claims, provides such agencies with authority to pay from the agency's appropriations settlements made pursuant to that section in amounts not in excess of \$2,500. In this regard, section 2672 provides in pertinent part:

"Any award, compromise, or settlement in an amount of \$2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of \$2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter."  
(Emphasis added.)

Pursuant to this section, payment of settlements in amounts over \$2,500 is to be made in a manner similar to judgments and compromises in like causes, which are required by 28 U.S.C. §§ 2414 and 2517, and 31 U.S.C. § 724a, to be made by the General Accounting Office and the Comptroller General of the United States. 31 U.S.C. § 227 (1970), which controls set-off from judgments, provides in pertinent part:

"When any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover

all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch."

Moreover, 4 C.F.R. § 102.3 (1974), which provides for offset by Federal agencies under the Federal Claims Collection Act, provides in pertinent part that:

"Collection by offset against a judgment obtained by the debtor against the United States shall be accomplished in accordance with \* \* \* 31 U.S.C. 227."

Accordingly, any payment of a settlement under the Federal Tort Claims Act, as amended, in excess of \$2,500 would have to be made by the General Accounting Office in accordance with those procedures, which specifically reserve the right of set-off to the Comptroller General.

However, the proposed regulations provide in sections 2422(d), (e), and (f), as follows:

"(d) Before payment is authorized under chapter XX, each insurance company subrogation claim against the Navy shall be reduced by the amount of any affirmative claim against the claimant insurance company contained in the setoff file.

"(e) A claimant insurance company should be promptly advised of the specifics of the affirmative claims which have been setoff against its claim and offered the reduced value of its subrogation claim in final settlement. Failure of the insurer to accept such an offer should be followed by an express denial of the subrogee's claim. Care should be taken to ensure that, on the date of such a denial, at least nine months remain to run on the statute of limitations governing each affirmative claim which has been setoff against the subrogee's claim under chapter XX.

"(f) Before accomplishing a setoff on a dollar-for-dollar basis, JAG Designees should ensure that an insurance company's subrogation claim is supported by evidence of Government liability comparable to the evidence in support of the Government's corresponding affirmative claim. Set-offs on an other than dollar-for-dollar basis are authorized only when agreed to by the claimant insurer."

These sections appear to indicate that the Navy contemplates setting off affirmative claims against insurance company subrogation claims prior to award. The award of an insurance company's claim would only be made if it agreed to a reduction in the amount of its claim by the amount of the Navy's affirmative claim. Presumably, under this scheme if the amount of the settlement was not more than \$2,500, the payment would be made by the Navy out of its appropriations. If the amount was more than \$2,500, the settlement would be forwarded to the General Accounting Office for payment.

Settlement or award of a tort claim must be made before a debt due the Government from the claimant may be set off against such settlement or award. As noted above, any tort claims award in an amount over \$2,500 must be forwarded to the General Accounting Office for payment. Moreover, set-off authority against such awards (i.e., awards over \$2,500) is reserved to the Comptroller General by 28 U.S.C. § 2672 and 31 U.S.C. § 227, as read together. Further, the amount set off against the award, whether set-off is made by the Navy or our Office, must be deposited into the miscellaneous receipts of the Treasury. Under the Navy's proposal no such payment to the Treasury would be made since the amount of the award to the claimant would already have been reduced by the amount of any debt due the Government from the claimant.

In accordance with the foregoing, where the gross amount of a tort claim award is not more than \$2,500 the Navy may set off against such award any debt owed the Government by the claimant. In such case, the award would be paid from Navy's appropriations and any amount set off against the award would be for deposit by the Navy into the miscellaneous receipts of the Treasury, with the net balance of the award (if any) being paid to the claimant. If the gross amount of the tort claim award is greater than \$2,500, it should be forwarded to the General Accounting Office for payment, together with advice as to any indebtedness of the claimant to the Government, and advice as to whether the claimant has consented to set-off of such indebtedness. Payment would then be made by the General Accounting Office consistent with the procedures prescribed in 31 U.S.C. § 227.

Also, we note that section 2422(e) of the proposed regulations provides for the denial of a tort claim, in the event that the claimant does not assent to reduction of his claim by the amount of the Navy affirmative claim. Although the settlement of tort claims against other Federal agencies is not within our jurisdiction, we are of the opinion that the express denial of an otherwise valid tort claim, merely because the claimant will not agree to set-off of an indebtedness, would be inconsistent with 31 U.S.C. § 227.

H. F. Keller

Deputy  
Comptroller General  
of the United States