



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Judgment Fund and Law Enforcement Seizure Claims

File: B-259065

Date: December 21, 1995

DIGEST

1. As a general principle, the Judgment Fund, 31 U.S.C. § 1304, is available to pay monetary awards arising from the government's failure to return seized property or to return such property in good condition. The fact that a court orders an award in response to a request for the exercise of equitable authority does not render the Judgment Fund unavailable to cover the award.
 2. This Office will certify for payment from the Judgment Fund, 31 U.S.C. § 1304, litigative awards under the Federal Tort Claims Act, 28 U.S.C. ch. 171, that arise from seizures of property by law enforcement officials, as described in 28 U.S.C. § 2680(c), and are referred by the Department of Justice.
 3. Litigative awards against the United States for the return of cash (or other property converted to cash) credited to the Justice Department's Asset Forfeiture Fund, 28 U.S.C. § 524, must be paid from that fund, not from the Judgment Fund, 32 U.S.C. § 1304.
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DECISION

This decision addresses the use of the Judgment Fund, 31 U.S.C. § 1304, to pay litigative and administrative awards arising from the loss of cash or the loss or damage to personal property while in the government's custody as a result of law enforcement activities.¹ The typical factual setting of the awards before us involved loss of or damage to cash or property seized by law enforcement officers. These seizures were incident to the arrest and detention of a person suspected or convicted of violating the law, or because the property was forfeited as the "fruit" of criminal activities, or because law enforcement officers regarded the property as

¹This decision responds to inquiries from the Torts Branch of the Justice Department's Civil Division, the Executive Office for Asset Forfeiture (EOAF), the Drug Enforcement Administration (DEA), the Customs Service, and the Office of the United States Attorney for the Eastern District of New York.

tainted or illegally imported or exported. In virtually every case, the claimant initially sought return of the seized property, and later settled for or was awarded the payment of money in substitution for the property. Among the authorities cited by the courts and agencies in making these awards are the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704, Rule 41(e) of the Federal Rules of Criminal Procedure, the Tucker Act, 28 U.S.C. §§ 1346(a), 1491, and the Federal Tort Claims Act (FTCA), 28 U.S.C. ch. 171.

The awards in question here present three issues. First, are monetary awards that result from the exercise of a court's equitable authority to order the return of seized cash or property, such as the APA, payable from the Judgment Fund? Second, may FTCA awards on claims that appear to be within the scope of that act's exception for seizures of money or property by law enforcement officers, 28 U.S.C. § 2680(c), be paid from the Judgment Fund? Third, where a court has ordered a monetary award in an action to secure the return of money (or property which has been converted to cash) deposited into the Justice Department's Asset Forfeiture Fund, is that award payable from the Judgment Fund or the Asset Forfeiture Fund?

We conclude that the Judgment Fund is available for payment of monetary awards which result from requests for exercise of a court's equitable power to order the return of property. We also believe that the Judgment Fund is available to pay monetary awards ordered under the FTCA even if they appear to fall within the scope of the exception stated in section 2680(c), so long as they are final litigative awards or the Justice Department, in the exercise of its authority to supervise the various agencies, advises that it has approved the agencies' administrative allowance of such claims. However, the Judgment Fund may not be used to pay awards that represent the refund of moneys deposited into the Asset Forfeiture Fund. The Asset Forfeiture Fund must bear the burden of those awards.

DISCUSSION

Monetary Awards Made Under Equitable Authorities

The Judgment Fund is a permanent, indefinite appropriation. 31 U.S.C. § 1304. It is used to pay most litigative and many administrative awards against the United States. Generally, the Judgment Fund is available if the award: (1) is "final," (2) has been made under one of the authorities specified in section 1304(a)(3), and (3) is "not otherwise provided for." 31 U.S.C. § 1304(a). See also 28 U.S.C. §§ 2414, 2517.

This Office has long viewed the Judgment Fund as available only to pay specific monetary damage awards, as distinguished from the costs of complying with injunctive orders. Typically, a monetary damage award directs the government to pay a sum certain as damages to the claimant, while an injunction orders the

government to do or refrain from doing certain acts. Of course, an award of injunctive relief, nevertheless, does cost the government a determinable amount of money; the expenses of obeying the court's commands can be estimated or quantified. However, Congress did not intend the consequential expenses of complying with the injunctive orders of a court to be payable from the Judgment Fund. 70 Comp. Gen. 225, 228 (1991); 69 Comp. Gen. 160, 162 (1990). The Justice Department's Office of Legal Counsel (OLC) concurs in this view. 13 Op. Off. Legal Counsel 118, 119 (1989).

The basis for this distinction can be seen in the legislative history of the Judgment Fund. As OLC noted in 13 Op. Off. Legal Counsel 118 (1989), the legislative history underpinning the Judgment Fund statutes:

"manifests an understanding that the Judgment Fund was designed to effect payments of final judgments without the need for the enactment of specific appropriations bills That understanding, which centers solely on monetary judgments (judgments that previously required specific appropriations) supports the conclusion that the Judgment Fund is to be tapped for final judgments requiring the United States to pay specified sums of money." Id. at 121-22 n.5 (underscoring omitted).

From this, OLC concluded that:

"by definition, [the law] only provides for disbursements from the Judgment Fund that are payable, i.e., judgments that, by their terms, require the United States to pay specified sums of money to certain parties. [Judgments] that require anything other than the direct payment of specified sums of money may not be paid from the Judgment Fund." Id. (underscoring omitted).

Some of the awards at issue here resulted from the courts' exercise of equitable authorities, the APA for example. As a general principle, the courts resort to the exercise of equitable authority only where traditional remedies at law, i.e., money damages, are either unavailable or inadequate to do justice to the plaintiff's cause. 27 Am. Jur. 2d Equity § 87 (1966). Consequently, the courts acting in equity do not usually order the payment of sums of money in compensation for damages suffered. Id., §§ 106, 112. Here, however, we are confronted with instances where a court, acting under equitable authorities, orders the government to make payment of

money to compensate for loss of or damage to private property.² For example, the APA allows claims against the United States for "relief other than money damages," 5 U.S.C. § 702, but the Supreme Court concluded that this does not foreclose monetary awards as an APA remedy. Bowen v. Massachusetts, 487 U.S. 879, 910 (1988).³

We have not previously addressed whether, for purposes of the availability of the Judgment Fund, we should treat "equitable" monetary awards such as these the same as traditional money damage awards. While the consequential cost of taking specific action to comply with an equitable order is clearly not payable from the Judgment Fund,⁴ we see no reason to treat monetary awards made under equitable authorities differently from other monetary awards. Certainly, the relief granted by these awards differs fundamentally from the relief conferred under the traditional exercise of equitable authority, where a particular act is ordered, or forbidden, to be performed. Although the courts rendered some of the awards at issue here as monetary "damages" and others as "injunctive relief," the effect of the awards is the same. In either case, the courts have ordered the government to disburse money to restore to the claimant the value of what he or she lost at the government's hands. Accordingly, to the extent that monetary awards made under equitable authorities otherwise satisfy the statutory criteria governing use of the Judgment Fund, those awards should be paid in the same manner as other monetary awards against the

²See, e.g., Gallerstein v. United States, Civ. No. 91-1277-S, USAO No. 9120651 (S.D. Cal., Mar. 22, 1993), Z-2924526 (APA, 5 U.S.C. §§ 702, 704); United States v. \$207,112.29, Civ. No. M-91-249 (S.D. Tex., Jan. 20, 1994), Z-2935508 (Rule 41(e) of the Federal Rules of Criminal Procedure); United States v. Articles of Food, No. 92-C-5507, (N.D. Ill., Nov. 19, 1993), Z-293133 (Tucker Act, 28 U.S.C. § 1491(a)(2), (3)).

³While recognizing that normally neither equity nor the APA authorize "money damages" against the government, the Court distinguishes between "money damages" and "money judgments." The latter, the Court maintains, are allowed under equity and the APA when they represent "injunctive" or "specific" relief. Bowen v. Massachusetts, 487 U.S. at 891-901. See also, e.g., Zellous v. Broadhead Associates, 906 F.2d 94, 96-99 (3rd Cir. 1990).

⁴See, for example, 69 Comp. Gen. 160 supra, in which an agency, ordered to develop and implement measures to remedy past discriminatory practices, entered into a court-approved agreement requiring the agency to pay a specified amount to cover both the government's and the plaintiff's anticipated costs in fashioning the court-ordered remedy. This agreement did not convert the court's award of injunctive relief into a monetary award payable from the Judgment Fund. Id. at 162. See also 52 Comp. Gen. 175 (1972) (Civil Service Retirement Fund); B-236414, Feb. 22, 1991 (military Survivor Benefit Plan).

United States.

FTCA Awards

The second issue is whether an award under the Federal Tort Claims Act (FTCA) for money damages for property seized by law enforcement officials that is either lost or damaged may be certified for payment from the Judgment Fund. The FTCA waives sovereign immunity for any claim for money damages caused by the negligent or wrongful act of a federal employee while acting within the scope of his duties under circumstances where a private employer would be liable under applicable state law. These awards can be made by the courts, by the Justice Department in compromise settlements of actual or imminent litigation, or by government agencies in administrative settlements rendered under the supervision of the Attorney General. 28 U.S.C. §§ 1346(b), 2672, 2677. All litigative FTCA awards and those administrative FTCA awards in excess of \$2,500 are to be paid "in a manner similar to judgments and compromises in like causes." 28 U.S.C. § 2672. The Judgment Fund's statute adds that it is generally available to cover awards "payable under . . . [the FTCA]." 31 U.S.C. § 1304(a)(2)(A).

Many of the FTCA awards at issue here resulted from attempts to obtain orders compelling the return of property that was found to have been seized improperly. Upon discovering the loss of or damage to this property, courts have awarded monetary damages. Unlike monetary awards made in response to requests for injunctive relief, awards under the FTCA are monetary awards in the strictest sense and, so long as the applicable criteria of the Judgment Fund statute are otherwise met, may be certified for payment from the fund. Questions concerning the availability of the fund arose because of the FTCA's exception to the waiver of sovereign immunity for

"[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. § 2680(c).

In Kosak v. United States, 465 U.S. 848 (1984), the Supreme Court held that section 2680(c) precluded recovery under the FTCA against the United States for damage to a serviceman's art collection sustained during temporary detention of the property by the Customs Service. Some courts and administrative agencies have attempted to limit application of section 2680(c) and the Kosak decision to seizures by the Customs Service, as opposed to seizures by other law enforcement officers. E.g., Kurinsky v. United States, 33 F.3d 594 (6th Cir. 1994); Formula One Motors, Ltd. v. United States, 777 F.2d 822, 825 (2d Cir. 1985) (Oakes, J., concurring). Others have given this exception a broader application based on the broad reference in section 2680(c) to "law enforcement officers." E.g., Halverson v. United States, 972 F.2d 654 (5th Cir. 1992), cert. denied, 113 S. Ct. 1297 (1993); Garnay, Inc.

v. M/V Lindo Maersk, 816 F. Supp. 888 (S.D.N.Y. 1993)(criticizing Mora v. United States, 955 F.2d 156 (2d Cir. 1992)).

This Office has no authority to review the merits of a given award or to take unilateral action to correct a real or perceived error of fact or law. B-124720, B-129346, Sept. 23, 1981. Once a court makes an award there are only two alternatives. The authorized representatives of the United States may either contest the judgment through appropriate judicial channels, or comply with it as written. Id. Once all rights of appeal have been exhausted in any particular case, or it has been decided to forego appeal, the court's decision becomes final, which is also to say conclusive and binding upon the government and the Judgment Fund process. Similarly, compromise settlements of actual or imminent litigation that are negotiated by the Justice Department are conclusive and binding on the Judgment Fund process. 28 U.S.C. § 2414 (compromise settlements are payable in the same manner as judgments on like causes of action). With regard to administrative settlements of claims, the FTCA specifically vests in the Attorney General authority to supervise such resolutions by agencies. 28 U.S.C. § 2672, 2677. See also 28 C.F.R. pt. 14 (Justice Department FTCA regulations). Agency dispositions of FTCA claims that comply with the Justice Department's supervision and regulations⁵ are also conclusive and binding on the Judgment Fund process.

Our role under section 1304(a)(3)(A) is to assure, insofar as relevant here, that the award is payable under the FTCA. This role is largely ministerial. Once we establish that an award has been made under the FTCA and that that award has become final, our inquiry concerning payability under the FTCA is at an end.⁶ Consequently, the applicability of section 2680(c) to any award which has become final is not relevant to our processing of awards under section 1304.

Refund Awards

The final issue involves whether the Justice Department's Asset Forfeiture Fund must pay awards which represent the return of cash (or property converted to cash) which has been deposited into that fund as the result of a law enforcement

⁵Agencies are required by Justice's regulations to obtain the department's approval before allowing any claims under the FTCA which present new precedent, points of law, or policy issues. 28 C.F.R. § 14.6(d) (1994).

⁶Consistent with requests by the Torts Branch of the Department of Justice's Civil Division, prior to certifying payment from the Judgment Fund, we refer to that Office any claims administratively allowed which appear to fall within the scope of section 2680(c) but do not appear from the record to have been previously approved by the Justice Department staff responsible for litigating this issue.

seizure that is later overturned by the courts. This fund is available without fiscal year limitation for use at the discretion of the Attorney General for a wide variety of expenses and purposes. Included among the allowable discretionary purposes are "equitable sharing payments" to other federal, state, and local law enforcement agencies. With only a few exceptions, the fund receives all amounts from the forfeiture of property under any law enforced or administered by the Justice Department. 28 U.S.C. § 524. This fund is administered by the Executive Office for Asset Forfeiture (EOAF).

EOAF argues that the Asset Forfeiture Fund is not legally available to pay refund orders because there is nothing in the fund's authorizing legislation which expressly allows it to be used for that purpose. On the contrary, because of the nature of a refund, no such authorization is necessary. Refunds are intended to return to the claimant cash (or the cash value of property) that was received by the agency. Agencies are prohibited from retaining or using moneys that they receive unless such is expressly allowed by law. *E.g.*, 31 U.S.C. § 3302(b). Consequently, orders to refund monies deposited to the credit of a fund other than the general fund of the United States Treasury are normally paid from the fund so benefitted, rather than from the Judgment Fund. 61 Comp. Gen. 224 (1982); 17 Comp. Gen. 859, 860 (1938). Refunds are necessarily "otherwise provided for" within the meaning of section 1304(a)(1). B-257131, May 30, 1995; B-197742, Aug. 1, 1986. To allow payment in such instances from the Judgment Fund, instead of requiring payment from the fund that was benefitted, would permit the receiving agency to augment the sums made available to it by Congress. 72 Comp. Gen. 164, 165-66 (1993). On the other hand, where the agency has credited the amount it received to the general fund of the Treasury or where the agency disgorges what it received, there is no augmentation. In this context, once the agency returns to the claimant as much as it received, the remaining claim for loss or damage to the property is not a refund, but rather money damages.

In support for its position, EOAF cites Chief Justice Rehnquist's concurring opinion in Republic National Bank of Miami v. United States, 113 S. Ct. 554, 562-63 (1992). In Republic, a bank was seeking to recover property seized and forfeited as the fruit of illegal activities engaged in by an otherwise unrelated borrower. The property at issue (a house) was sold at auction and the proceeds were deposited into the Justice Department's Asset Forfeiture Fund. The issue before the Supreme Court was whether the deposit of the sale proceeds into the Treasury deprived the lower courts of the "in rem" jurisdiction over the property necessary to resolve the underlying claim for the value of the forfeited house. The Court ruled it did not. *Id.* at 562. In his concurring opinion, the Chief Justice noted that the proceeds might be retrieved from the Treasury without an express appropriation for that purpose, but added that it was unnecessary "to plow that uncharted ground here," since he believed payment could also come from the Judgment Fund. *Id.* at 563.

We do not find this comment dispositive. Other Justices expressed differing views,⁷ and the Court did not resolve this aspect of the matter because its resolution was not necessary to decide the case then before the Court. Instead, the Court simply noted, neither approving nor disapproving, that this Office "has long assumed that, in certain situations, an erroneous deposit can be corrected without a specific appropriation." *Id.* at 561. See also *Id.* at 562 (similar observation made in footnote to the Chief Justice's concurring opinion).

EOAF argues, additionally, that it is often not practical to return the funds and property received by the Asset Forfeiture Fund because, once it exercises its discretion to share a portion of the assets of its fund with other federal, state, and local law enforcement authorities, it is difficult to convince the recipients of that aid to return it. Although we understand EOAF's concerns, these difficulties do not alter the fact that, by virtue of the court's order or the agreement of the parties, the distributed assets do not belong to the government and are not properly creditable to or distributable from the fund. Distribution of those amounts to other law enforcement agencies cannot legitimize the fund's previous retention or usage of them.

/s/Robert Murphy
for Comptroller General
of the United States

⁷Justice Blackmun (writing for a minority in this regard) rejected the Chief Justice's suggestion that payment could be made from the Judgment Fund. He claimed that "funds held in the Treasury during the course of an ongoing *in rem* forfeiture proceeding can[not] properly be considered public money" since the purpose of such proceedings is to determine the ownership of the funds at issue. *Id.* at 561. From this he posited that a "formal appropriation" is not required to secure the return of such funds. Instead, he cited 28 U.S.C. § 2465 which requires the prompt return of seized property upon the entry of judgment for the claimant in any proceeding to condemn or forfeit that property. While acknowledging that it "is hardly standard language of appropriation," he had "difficulty imagining how an 'appropriation' of funds determined upon appeal not to belong to the United States could ever be more specific." *Id.* at 560-61. He added that mandating payment from the Judgment Fund in such situations would be "problematic" and would improperly augment the Asset Forfeiture. *Id.* at 560-61 n.6. Justice White argued in his concurring opinion that the issue of what source to pay a possible, future award was not ripe for consideration and should not be addressed. *Id.* at 564. Several additional opinions were filed by other Justices. *Id.* at 565-66.