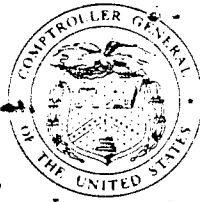


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DECISION

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

[Claim for Damages]

FILE: B-198029

DATE: May 19, 1980

MATTER OF: Herman I. Kamp

DIGEST: Partial settlement by Air Force of a claim under the National Guard Claims Act, 32 U.S.C. § 715, may be certified for payment under 31 U.S.C. § 724a where the partial payment is final, fixed and unchanging as to the specific items of damage enumerated in the settlement, since the settlement is not subject to alteration by any further administrative or judicial review and the claimant has executed a complete release of liability to the United States for all items of damage covered by the settlement.

The Air Force has requested that we allow partial settlement of a claim by Mr. Herman I. Kamp under the National Guard Claims Act, 32 U.S.C. § 715. The claim represents a portion of the damages suffered by Mr. Kamp as a result of a Montana Air National Guard plane crashing into his grain elevator. For the reasons discussed below, we conclude that, in the circumstances presented, the partial settlement may be certified for payment.

Based on the description provided by the Air Force in its submission, we understand the crash to have occurred during a Labor Day parade at Dillon, Montana on September 3, 1979. Two F-106 aircraft assigned to the 120th Fighter Interceptor Group (ANG), Great Falls, Montana, were performing an aerial fly-by requested by the Mayor of Dillon. During the second pass over the downtown area of the city, the lead aircraft hit the side of Mr. Kamp's grain elevator, exploded, then crashed into the street. The pilot was killed after unsuccessfully ejecting. No civilian deaths occurred, but one woman was severely burned, eighteen minor personal injuries were reported and considerable property damaged ensued.

The Air Force states that several Air Force Regulations and at least one Federal Air Regulation were violated during the course of the flight. It further states that the aerial fly-by was performed as part of the deceased pilot's training under 32 U.S.C. § 502. In such training, the United States pays training costs and the pilot's salary,

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although the mission is controlled by the State Government. The Air Force indicates that this is the usual "weekend training" in which the vast majority of Air National Guard flight activity falls, and that the mission in this case was performed under the command and control of the State of Montana.

The Air Force considered Mr. Kamp's claim under the National Guard Claims Act, 32 U.S.C. § 715, which provides in part:

"(a) Under such regulations as the Secretary of the Air Force may prescribe, he or, subject to appeal to him, the Judge Advocate General of the armed force under his jurisdiction, if designated by him, may settle, and pay in an amount not more than \$25,000 a claim against the United States for --

"(1) damage to, or loss of, real property, including damage or loss incident to use and occupancy;

"(2) damage to, or loss of, personal property * * * either caused by a member of the Army National Guard or the Air National Guard, as the case may be, while engaged in training or duty under section * * *, 502, * * *, of this title * * * and acting within the scope of his employment; * * *.

* * * * *

"(d) If the Secretary of the military department concerned considers that a claim in excess of \$25,000 is meritorious and would otherwise be covered by this section, he may pay the claimant \$25,000 and report the excess to Congress for its consideration.

"(e) Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction."

Settlements under the Act are final and conclusive. 32 U.S.C. § 715(g).

The amount recommended for settlement by the Air Force, \$347,523.47, represents only a portion of Mr. Kamp's damages. The Air Force states that another settlement will be forthcoming for the remaining damages when they are ascertained. They will include amounts for the value of the claimant's business structure and possibly loss of wages

for the claimant's mill operators. In its request for partial settlement, the Air Force has included only the particular items of damages that "have a final, fixed and unchanging valuation." They are:

a. Destroyed inventory of grain and fertilizer	\$155,009.63
b. Debris clean-up expenses	20,186.52
c. Set-up costs for new business location	13,740.83
d. Replacement of destroyed office equipment and supplies	9,460.02
e. Lost profits for the six month period ending 31 December 1979	70,879.98
f. Interest through 31 December 1979 on loans obtained to mitigate damages	27,970.92
g. Engineering expenses for detailed estimate and design workup for new plant	50,275.57

The Air Force paid the initial \$25,000 under 32 U.S.C. § 715(d) and now seeks payment of the remaining \$322,523.47, for the following reasons:

"The magnitude of the claimant's loss and the delays encountered in quantifying all aspects of that loss have contributed to the considerable hardship suffered by this claimant. A partial payment would serve to significantly reduce the continuing effect of this hardship. An early partial settlement is also in the best interests of the United States, since it would serve to reduce the amount of interest payable on loans obtained by the claimant following the mishap. * * *"

Prior to 1978, amounts determined meritorious in excess of \$25,000 required specific congressional appropriations for payment. In that year, Congress amended 31 U.S.C. § 724a, which provides a permanent indefinite appropriation for the payment of certain final judgments, awards, and compromise settlements against the United States not otherwise provided for, to include awards under the National Guard Claims Act and similar statutes in excess of amounts payable from agency appropriations. Pub. L. No. 95-240 (March 7, 1978), 92 Stat. 107, 116.

Based on our review of the material submitted by the Air Force, the claim appears properly cognizable under the National Guard Claims

Act, it was presented within two years after its accrual (32 U.S.C. § 715(b)(1)), and the damage was not caused "wholly or partly by a negligent or wrongful act of the claimant" (32 U.S.C. § 715(b)(4)). Accordingly, the only question presented is whether we can certify the partial settlement for payment in view of the finality requirement in the permanent judgment appropriation, 31 U.S.C. § 724a.

We have held that § 724a limits our authority to certify payment of only those judgments and awards that are final, that we have no authority to make partial or intermediate payments, and that a judgment is not final for payment purposes until the appellate process is complete with respect to all elements of the litigation. B-164766, June 1, 1979. This is true even where the possibility of a change in a judgment by a higher court is remote. B-172574, May 19, 1971.

The finality rule developed in the judgment context, in which the possibility of an appeal rendered finality of an award uncertain. The purpose of the requirement is "for the protection of the United States against loss by premature payment of a judgment which might later through appeal be amended or reversed." B-129227, December 22, 1960. Thus, we defined a "final judgment" for payment purposes as one which has "become conclusive by reason of loss of the right of appeal--by expiration of time or otherwise--or by determination of the appeal by the court of last resort." Id.

A review of the provisions of the National Guard Claims Act suggests that the considerations requiring strict application of the finality requirement to judgments are not present in this type of case. The National Guard Claims Act does not afford judicial relief--it is limited to the administrative settlement of claims. That this was the intent of Congress is clear from the legislative history. See, e.g., H.R. Rep. No. 1928, 86th Cong., 2d Sess., 1960 U.S. CODE CONG. & AD. NEWS 3493-94. Also, since the pilot in this case was deemed a State rather than a Federal employee, relief would not appear available under the Federal Tort Claims Act. (*) Maryland ex rel. Levin v. United States, 381 U.S. 41 (1965). Indeed, a prerequisite to considering a claim under the National Guard Claims Act is that it not be cognizable under the Federal Tort Claims Act. 32 U.S.C. § 715(b)(2). Thus, under existing judicial precedent, settlement action under the National Guard Claims Act would not appear to be subject to judicial review. Also, the settlement is not subject to review by any other administrative body.

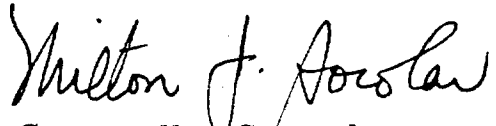
Further, as noted above, the elements of damage included in the Air Force's partial settlement are limited to those with "final, fixed

(*) This discussion does not apply with respect to National Guard members within the scope of the so-called "caretaker" statute, 32 U.S.C. § 709.

and unchanging value." Moreover, the claimant has signed a release discharging the United States, its officers, agents and employees from all liability, claims and demands arising from the specified elements of damage in exchange for the agreed sum. Thus, the settlement is not the equivalent of a "judgment which might later through appeal be amended or reversed."

In the context discussed above, while we do not have a "final award" with respect to all damages resulting from the accident, we do have a final award with respect to the items of damage specified, in that (1) further review of the award is unavailable, (2) claimant has signed a release precluding him from seeking additional amounts for the items of damage specified, and (3) the award for each specified item is complete and final with respect to that item. Accordingly, the award may be certified for payment.

By allowing partial payment, we are not suggesting that the National Guard Claims Act is otherwise exempt from the finality requirement of 31 U.S.C. § 724a. Moreover, we caution that this decision should not be construed as applying in any situation which may ultimately come before a court, such as under the Federal Tort Claims Act.



Acting Comptroller General
of the United States