

An Overview of the Judgment Fund and How Its Availability Can Impact
a Contracting Officer's Decision to Settle a Claim

Timothy A. Furin
American Bar Association's Fiscal Law and Contract Administration Panel
August 3, 2018

I. Introduction

The Judgment Fund was established by Congress in 1956 to alleviate the need for specific legislation following every successful claim against the United States.¹ The purpose behind the Judgment Fund was to eliminate the procedural burdens involved in getting an individual appropriation from Congress, allowing for the prompt payment of judgments and reducing the amount of interest accrued between the time the judgment was awarded and payment was made.² Although the Judgment Fund successfully eliminated the need for legislative action in almost every case, and in most cases resulted in prompter payments to successful claimants, it also had the unintended consequence of incentivizing procuring agencies to avoid settling meritorious claims in favor of prolonged litigation.³ Specifically, an agency could avoid making payment from its own appropriated funds if it refused to settle a case and instead sought a decision from a court, subsequently providing it access to the Judgment Fund which draws money straight from the Treasury.⁴ Congress eliminated this problem when it passed the Contracts Disputes Act (CDA) of 1978⁵, which requires agencies to reimburse the Judgment Fund with appropriated funds that are current at the time of the judgment against the agency.⁶ Although contracting officers are no longer incentivized to avoid settlement, the source and availability of funds can still impact whether or not they decide to settle a claim because there are differences between how a judgment is funded and how a settlement can be funded. This article will examine those differences to ensure that practitioners understand how something

¹ See H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

² See *United States v. Varner*, 400 F.2d 369 (5th Cir. 1968); H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

³ See S. Rep. No. 95-1118, 95th Cong., 2d Sess. 33 (1978).

⁴ *Id.*

⁵ 41 U.S.C. § 7108.

⁶ See 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 120210; DFAS-IN 37-1, Table 8-6, para. 15.

as simple as the funding source can impact the procedural outcome of a claim potentially resulting in higher costs and delays in payment.

This article begins by providing an overview of the Judgment Fund. It discusses the requirements necessary for an agency to access the Judgment Fund, and then reviews the allowable costs an agency can pay from the Judgment Fund. Next, it examines the differences between how a judgment is funded compared to how a settlement is funded. Finally, it explores how those differences can impact a contracting officer's decision of whether or not to settle a claim and the impact that decision can have on the government and a claimant in terms of time and money.

II. An Overview of the Judgment Fund

A. Basic Fiscal Law Principles

Before discussing the Judgment Fund and its characteristics, it is necessary to quickly review some basic fiscal law principles. The Appropriations Clause of the Constitution (Article I, § 9, cl. 7) provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁷ Accordingly, Congress must pass and the President must sign an annual appropriations act before executive agencies can spend any money.⁸ In basic terms, an appropriations act is a statutory authorization that allows agencies to incur obligations and make payments out of the Treasury for specified purposes.⁹ An appropriations act can contain many different provisions of budgetary authority, which are typically referred to as “colors of money”, “pots of money”, or simply “appropriated funds”.

⁷ U.S. CONST. art. I, § 9, cl. 7.

⁸ See generally, *Principles of Fed. Appropriations Law*, 3d ed., vol. I, ch. 1, 1-26 – 1-27, GAO-04-261SP (Jan. 2004).

⁹ *Id.*

Appropriated funds are available for obligation only for a defined period of time, which is known as the period of availability.¹⁰ The periods of availability are different for each different type of appropriation.¹¹ For example, the period of availability for the Operations and Maintenance (O&M) appropriation is one year while the period of availability for the Military Construction (MILCON) appropriation is five years.¹² If appropriated funds are not obligated during their period of availability, then the funds expire and agencies cannot use them to make new obligations.¹³ Expired appropriations however, retain their fiscal identity and remain available to adjust and liquidate previous obligations for a period of five years.¹⁴ These adjustments can include settlements for claims that relate to in-scope contract changes.¹⁵ A fund is closed five years after the end of its period of availability and is no longer available for any purpose to include settling claims.¹⁶

The Judgment Fund is a permanent, indefinite appropriation that is available to pay those final judgments¹⁷, awards¹⁸, and compromise settlements¹⁹ that are statutorily specified for payment out of the Judgment Fund.²⁰ Unlike the two examples used above, the Judgment Fund has no fiscal year limitations (its period of availability is indefinite meaning that it is always available), nor are there any limits with respect to the amount of funds available for withdrawal from the Treasury.²¹ The CDA does however require an agency to reimburse the Judgment Fund

¹⁰ GAO Glossary, at 23.

¹¹ See Department of Defense Appropriations Act, 2018, Pub. L. No. 115-141 (2018).

¹² *Id.*

¹³ GAO Glossary, at 23.

¹⁴ See 31 U.S.C. § 1553(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ A judgment is a “decision issued by a court . . . that resolves a case, as far as that court is concerned, by ruling on the issue in that case.” See Ralph C. Nash et al., *The Government Contracts Reference Book*, p. 305 (4th ed., 2013).

¹⁸ An award is a decision issued by an administrative board such as the Boards of Contract Appeals.

¹⁹ A compromise settlement is an “agreement reached by the parties involving mutual concessions.” *GAO Red Book*, vol. III, ch. 14, 14-34 (citing Op. Att’y Gen. 94,95-96 (1933)).

²⁰ 31 U.S.C. § 1304(a)(3), (b), (c); see also *GAO Red Book*, vol. III, ch. 14, 14-32.

²¹ 31 U.S.C. § 1304.

from its operating appropriations that are current at the time of the judgment against the agency.²² This reimbursement requirement is often a critical factor for contracting officers when they are considering whether or not to settle a case.

B. Availability and Limitations of the Judgment Fund

Identifying when the Judgment Fund is available, and exactly what costs it can be used for, is often a difficult task for both contracting officers and fiscal law practitioners alike. Payments from the Judgment Fund can only be made when the following four conditions are met: (1) payment of the judgment, award or compromise settlement is authorized by statute; (2) the judgment, award, or compromise settlement is final; (3) the judgment, award, or compromise settlement is monetary; and (4) payment may not legally be made from any other source of agency funds.²³ These four requirements are discussed in greater detail below.

1. Authorized by Statute

Only those judgments, awards, and compromise settlements that are statutorily specified are eligible for payment out of the Judgment Fund.²⁴ In the federal acquisition arena, authorized payments include judgments made by a United States District Court²⁵ or the Court of Federal Claims²⁶, awards made pursuant to the CDA by a Board of Contract Appeals (BCA)²⁷, or compromise settlements negotiated by the Department of Justice to dispose of actual or imminent litigation²⁸. There are many other instances where judgments and awards are eligible

²² See 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 120210; DFAS-IN 37-1, Table 8-6, para. 15.

²³ See generally, *Principles of Fed. Appropriations Law*, 2d ed., vol. III, ch. 14, 14-30 – 14-44, GAO-08-978SP (Jan. 2004); See also, Bureau of the Fiscal Service, U.S Dept. of the Treasury, <https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/background.htm> (last visited May 29, 2018).

²⁴ *Nash*, *supra* note 17.

²⁵ See 28 U.S.C. § 2414.

²⁶ See 28 U.S.C. § 2517; See also 41 U.S.C. § 7108(a).

²⁷ See also 41 U.S.C. § 7108(b).

²⁸ See 28 U.S.C. § 2414.

for payment from the Judgment Fund but they are not directly applicable to the issues discussed in this article.

2. Finality Required

The Judgment Fund is only available for judgments, awards, and compromise settlements that are final.²⁹ This requirement is necessary because it is in the government's best interest to pay claims only when the government's obligation and a claimant's entitlement are fixed and not subject to change.³⁰ For purposes of the Judgment Fund, finality attaches to those proceedings which "have become conclusive by reason of loss of the right to appeal."³¹ A proceeding becomes final if any of the following circumstances are met: (1) a court of last resort issues a decision or elects not to hear an appeal; (2) both parties decide not to seek further review; or (3) the time permitted to file an appeal has expired.³²

3. Monetary Awards Only

The Judgment Fund is only available for judgments where a court directs the government to pay monetary damages, as opposed to where a court orders some form of specific performance or other injunctive relief.³³ The Government Accountability Office (GAO) addressed this issue in a 1991 opinion dealing with a class action suit brought against the Department of Veterans Affairs (VA) in the Sixth Circuit.³⁴ In that case, the VA argued that both the district court judgment and a compromise settlement pending before the circuit court (whichever became final first) should be payable from the Judgment Fund.³⁵ The GAO disagreed and instead found that both the district court order and the pending compromise settlement only required the VA to

²⁹ 31 U.S.C. § 1304(a)

³⁰ See generally, *Principles of Fed. Appropriations Law*, supra note 23 at ch. 14.

³¹ *Christian v. United States*, 49 Fed. Cl. 720,727 (2001). rev'd in part on other grounds, 337 F.3d 1338 (Fed. Cir. 2003).

³² *Principles of Fed. Appropriations Law*, supra note 23 at 14-34.

³³ *Availability of Expired Funds for Non-Monetary Judicial Awards*, B-238615, 70 Comp. Gen. 225, 228 (1991).

³⁴ *Id.*

³⁵ *Id.*

perform a discretionary act, which did not constitute a monetary award payable from the Judgment Fund.³⁶ The GAO specifically determined that “in order to qualify for payment from the Judgment Fund, there must be a monetary award against the United States under a judgment or settlement agreement (that is, the judgment or agreement must direct the government to pay money), as opposed to judgments and settlements which are injunctive in nature (i.e., which either direct the government to perform, or not to perform, some particular action).”³⁷

4. Not Otherwise Provided For

Finally, the Judgment Fund is only available if payment cannot legally be made from any other source of agency funds.³⁸ The GAO addressed this issue in an unpublished 1993 opinion dealing with the source of payment for claims administratively settled pursuant to the Military Claims Act (MCA).³⁹ In that case, the Air Force sought guidance from the GAO concerning whether it was required to pay, from its own appropriations, the first \$100,000 of any MCA claim that it administratively settled.⁴⁰ The GAO found that the Air Force was required to use its own appropriations to pay for any administratively settled claims up to \$100,000.⁴¹ The GAO reasoned that the Judgment Fund was only available to pay that portion of any settlement that exceeded \$100,000 because another source of funds, the MCA, was available to pay the first \$100,000 of any settled claim.⁴² Specifically, the GAO noted that 10 U.S.C. §§ 2733(d) and 2734(d) “otherwise provided” the funding source for the first \$100,000 on a MCA settlement.⁴³

³⁶ *Id.*

³⁷ *Id.*

³⁸ 31 U.S.C. § 1304(a)(1).

³⁹ *Lieutenant Colonel Hervey A. Hotchkiss*, B-249060.2, 1993 U.S. Comp. Gen. LEXIS 1070 (Oct. 19, 1993)(unpub.).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

Payment is considered to be “otherwise provided for” when another appropriation is legally available to satisfy the judgment or award.⁴⁴

C. Allowable Costs: Interests, Fees and Other Expenses

Identifying which costs can be paid from the Judgment Fund can be as confusing as identifying whether the Judgment Fund is available in any particular case. Obviously if the four aforementioned criteria are met, the judgment, award, or compromise settlement itself can be paid from the Judgment Fund. Claimants however, often incur additional costs when pursuing a claim. These costs can include accrued interest, attorney’s fees, and other expenses associated with litigation like administrative court fees, compensation for court-appointed experts, and costs associated with preparing expert reports.⁴⁵ In some cases, these costs are allowable and can be paid from the Judgment Fund, in other instances they cannot.

Interest associated with disputes against the United States is generally not recoverable unless expressly allowed by a statute or the underlying contract.⁴⁶ The CDA is one of the few statutes that allow a claimant to recover accrued interest on a meritorious claim.⁴⁷ Interest under the CDA accrues from the date the contracting officer receives a valid claim, with the necessary certification if required, to the date that final payment is made.⁴⁸ Allowable interest on claims under the CDA is calculated as simple interest in accordance with the rates established by the Treasury and is payable from the Judgment Fund.⁴⁹

⁴⁴ *Id.*

⁴⁵ 28 U.S.C. § 2412(d).

⁴⁶ *See e.g., Monroe M. Tapper & Assocs. v. United States*, 611 F.2d 354, 357 (Ct. Cl. 1979).

⁴⁷ 41 U.S.C. § 7109; *Servidone Constr. Corps. v. United States*, 931 F.2d 860, 862-863 (Fed. Cir. 1991).

⁴⁸ *Id.*

⁴⁹ FAR 33.208(b); *ACS Constr. Co. v. United States*, 230 Ct. Cl. 845 (1982). *See also A.T. Kearney, Inc.*, 86-1 BCA ¶ 18,613 at 93,509 (interest tolled by contractor’s unreasonable delay in processing a claim).

In most cases, each party involved in litigation is required to pay their own legal expenses. The Equal Access to Justice Act (EAJA⁵⁰) is a statutory exception to this general rule that allows a prevailing party to recover certain costs and fees from the government if the government's legal position was not substantially justified.⁵¹ The term "substantially justified" means that the government's position must be "justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person."⁵² This standard does not create a presumption that the government's position was not substantially justified just because it lost the case.⁵³ Rather, the government's position must have a reasonable basis in both law and fact.⁵⁴

The Judgment Fund may be used to pay a prevailing party's costs or fees if a court or board approves a claimant's EAJA application⁵⁵ after finding that the government's position was not substantially justified.⁵⁶ However, if a claimant is awarded attorney's fees those fees cannot be paid from the Judgment Fund.⁵⁷ Instead, EAJA specifically requires agencies to pay attorney's fees using appropriated funds that are current at the time of the judgment or award.⁵⁸

III. Funding Settlements and Judgments

The differences between how a judgment is funded versus how a settlement is funded can impact a contracting officer's decision of whether or not to settle a claim. This could mean higher litigation costs for both parties and significant delays before meritorious claims are paid. This result seems to run counter to the reason that the Judgment Fund was originally established – to reduce costs for the government and provide prompter payment to claimants.

⁵⁰ 28 U.S.C. § 2412(d)(1)(A).

⁵¹ 5 U.S.C. 41 U.S.C. § 7109a(1).

⁵² *Pierce v. Underwood*, 487 U.S. 552,565 (1988).

⁵³ *See Scarborough v. Principi*, 541 U.S. 401, 415 (2004).

⁵⁴ *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991).

⁵⁵ Access to EAJA funds is not automatic and is limited by factors such as a party's net worth. *See* 28 U.S.C. § 2412(d).

⁵⁶ 28 U.S.C. §§ 1920 and 2412(d).

⁵⁷ *See* 5 U.S.C. § 504(d); DoD FMR, vol. 10, Ch. 12, para. 120203; DFAS-IN 37-1, Table 8-6, para. 16

⁵⁸ *Id.*

A. Obligating Funds Following a Judgment or Award

Determining the source of funds following a judgment, award, or compromise settlement is a pretty straight forward task. If the agency has current funds available, the Judgment is paid using those funds and not the Judgment Fund.⁵⁹ If current funds are not sufficiently available, then the Judgment Fund must be used to pay the judgment.⁶⁰ As noted earlier, the CDA requires an agency to reimburse the Judgment Fund from its operating appropriations that are current at the time of the judgment.⁶¹ At first glance it appears that the CDA's reimbursement requirement renders any distinction between these two funding sources moot because in both instances the payment will ultimately come from an agency's current funds. However, this is not necessarily the case because the CDA does not specify an exact time period for reimbursement, which provides the agency with some discretion to choose when (i.e. which fiscal year) it reimburses the Judgment Fund.⁶²

The GAO addressed this issue in a 1987 opinion and found that the CDA's reimbursement requirement does not mandate that an agency needs to disrupt its ongoing activities or programs to find the money to immediately reimburse the Judgment Fund.⁶³ Rather, an agency has some flexibility regarding the timing of reimbursement which is necessitated by the fact that an agency's annual budget for a given fiscal year will likely be set well in advance of any judgment or award.⁶⁴ The GAO found that "the earliest time an agency can be said to be in violation of 41 U.S.C. 612(c) [the CDA's reimbursement requirement] is the beginning of the second fiscal year following the fiscal year in which the award is paid."⁶⁵ This flexibility is a

⁵⁹ See AFARS 5133.212.98(d).

⁶⁰ See AFARS 5133.212.98(d).

⁶¹ 41 U.S.C. § 7108(c), See also 41 U.S.C. § 612.

⁶² *The Permanent Judgment Appropriation: Overview*, B-217990.25-O.M. (Oct. 30, 1987).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

factor that can be considered by contracting officers when deciding whether or not to settle a case or proceed with litigation.

B. Obligor Funds Following an Agency-Level Settlement

A settlement is an administrative determination that disposes of a claim whether by full or partial allowance or by disallowance.⁶⁶ Most agency-level settlements occur as a result of settlement discussions between the parties that end in an agreed-to compromise of the BCA appeal and the underlying claim.⁶⁷ Settlements are typically implemented through a bi-lateral agreement between the parties and a subsequent contract modification.⁶⁸ Payment is made by the contracting officer following the same obligation rules that are used for standard contract changes.⁶⁹ The Judgment Fund is generally not available to pay agency-level settlements.⁷⁰

If a settlement relates to an in-scope contract change, the settlement should be funded from the same appropriation cited on the original contract.⁷¹ If the appropriation that funded the original contract has expired, it may still be used to fund the settlement if the liability relates back to the original contract.⁷² This is known as the “relation-back theory” and is subject to different agency restrictions.⁷³ If the appropriation that funded the original contract has expired and is exhausted (no remaining funds), the contracting officer should look to see if the same type

⁶⁶ See e.g., 10 U.S.C. § 2731 (defining the verb to “settle” as to “consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance”).

⁶⁷ See e.g., FAR 33.204; FAR 33.210.

⁶⁸ *Id.*

⁶⁹ See DoD FMR, vol.3, ch. 8, par. 080304.

⁷⁰ See DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.98(c)(2)(iii); See e.g., *Casson Constr. Co.*, GSBCA No. 7276, 84-1 BCA ¶ 17,010.

⁷¹ See DoD FMR, vol. 3, ch.8, para. 080306.B, E; DFAS-IN 37-1, Table8-7, para. 4.

⁷² See *Recording Obligations Under EPA Cost-Plus-Fixed-Fee Contract*, B-195732, 59 Comp. Gen. 518 (1980); *To the Adm’r. Small Bus. Admin.*, B-155876, 44 Comp. Gen. 399 (1965).

⁷³ See DoD FMR, vol. 3, ch.8, para. 080306.B, E; DFAS-IN 37-1, Table8-7, note 1 (requiring submission of written documentation).

of expired funds are available from somewhere else within the agency. If no other expired funds are available within the agency, a consent judgment will be required to settle the case.⁷⁴

As noted above, the Judgment Fund is generally not available to pay agency-level settlements.⁷⁵ One way that parties can work around this limitation is for the agency and claimant to stipulate or consent to an entry of judgment or award based upon the terms of the settlement.⁷⁶ This is called a consent judgment (or sometimes a stipulated judgment). The Judgment Fund is available to pay consent judgments however the agency is still required to reimburse the Judgment Fund from current appropriations.⁷⁷ In practice, consent judgments are subject to prohibitive agency restrictions which make them difficult to use.⁷⁸ For example, the Army policy requires contracting officers to notify the Department of the Army and receive authorization from the Assistant Secretary of the Army (Financial Management & Comptroller) prior to entering into a consent judgment.⁷⁹

Finally, if the appropriation that was used to fund the original contract is closed, the settlement must be paid using current agency funds. The same is true if a settlement relates to an out-of-scope contract change.

IV. Will This Claim Settle?

With few exceptions, contracting officers are authorized, within the limits of their warrant, to decide or resolve all claims arising under or relating to the contract that they are responsible for administering.⁸⁰ The Federal Acquisition Regulation (FAR) shows us that the

⁷⁴ See DoD FMR, vol. 10, ch. 12, para. 120208.B.

⁷⁵ *Supra* note 70.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Supra* note 74.

⁷⁹ *Supra* note 70.

⁸⁰ See FAR 33.210 (regarding the settlement of claims involving fraud).

resolution of claims by mutual agreement is preferred over prolonged litigation.⁸¹ Specifically, the FAR provides that agencies should attempt to resolve all claims by mutual agreement if possible.⁸² Courts have also weighed-in on this matter and have found that one of the main reasons behind the CDA was to “induce resolution of contract disputes with the government by negotiation rather than litigation.”⁸³ When considering whether or not to settle a claim, there are many factors that a contracting officer must consider. One of those factors is how a settlement will be funded.

As discussed above, there are significant differences between how a judgment is funded versus how a settlement is funded. These differences can impact a contracting officer’s decision of whether or not to settle a claim. In practice, the driving factors behind this decision are the source and availability of funds, and the impact, if any, to an agency’s ongoing or planned activities or programs. For example, a settlement will have little impact on an agency if the settlement relates to an in-scope contract change and there are still funds available (either current or expired) from the same appropriation cited on the original contract. In this case, a contracting officer is very likely to settle a meritorious claim. The same is true where there are expired funds of the same type still available within the agency and the claim relates back to the original contract.

The more difficult cases are those where the funding source is exhausted or closed, or the settlement relates to an out-of-scope contract change that requires the settlement to be paid from current funds. In those cases, the contracting officer will have to assess whether settling a claim will significantly impact an agency’s ongoing activities or programs. If so, the contracting officer might decide to pursue a consent judgment which could provide some flexibility regarding the

⁸¹ FAR 33.204; FAR 33.210

⁸² *Id.*

⁸³ *See Patham Constr. Co., Inc. v. United States*, 817 F.2d 1573 (Fed. Cir. 1987).

timing of reimbursement to the Judgment Fund. Alternatively, the contracting officer could decide to litigate the claim and hope that any appeal is denied, knowing that if the appeal is sustained it will take a considerable amount of time before the judgment or award is final and payment is due. Ultimately, a contracting officer's decision could come down to whether or not there is a cash flow advantage to the procuring agency.

If the contracting officer decides to litigate a claim, both the government and claimant will incur additional legal expenses. Litigating an appeal can also result in a delayed payment to a claimant on a meritorious claim and an increased amount of accrued interest owed by the government.

V. Conclusion

Although contracting officers are no longer incentivized to avoid settlement, the source and availability of funds can still impact whether or not they decide to settle a claim because of the effect that a funding source can have on an agency's programs or activities. It is essential that fiscal law practitioners understand the differences between how a judgment is funded versus how a settlement is funded so they can properly advise clients on the potential impacts to the procedural outcome of a claim.