



# The Judgment Fund: History, Administration, and Common Usage

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## Summary

The Judgment Fund is a permanent, indefinite appropriation that was created by Congress in 1956 to pay judgments entered against the United States. Generally, the United States cannot be sued unless it has waived its sovereign immunity. Originally, such waivers were rare, so individual claims were assigned to congressional committees, which in turn appropriated funds to satisfy the judgments. Prior to the creation of the Judgment Fund, the number of claims grew rapidly, taking up an increasing amount of Congress's time and resources. Eventually, the Judgment Fund was created to reduce Congress's workload, so that individual appropriations were not needed for each award entered.

The Fund's administration has changed substantially since its inception, with varying degrees of control and oversight by Congress, the Government Accountability Office, and the Treasury Department. Originally, the Fund was limited to claims of less than \$100,000, entered by the Court of Federal Claims or a U.S. District Court. As payments grew in size, Congress transferred authority to the Justice Department to make payments on behalf of the United States, as certified by the Attorney General.

Today, the Fund is administered by the Financial Management Service in the Treasury Department and is only accessible when certain closely circumscribed statutory requirements are met. Most importantly, an agency may not access the Fund when there is another appropriation that may be applied or when the plaintiff prevailed through an administrative remedy. In addition, the fund can only be used for monetary awards that are final, meaning the award cannot be changed or overturned. The awards must result from claims that were or could have been litigated in court.

This report sets out specific instances in which the Fund can be accessed and illustrates the procedural mechanisms for obtaining payment under certain statutory causes of action. Although primarily used for the payment of principal awards, attorneys' fees and interest on awards may also be paid from the Fund. At the court's discretion, certain costs enumerated in 28 U.S.C. §1920 may be awarded to the prevailing party. In addition, certain statutes, such as the Federal Tort Claims Act, provide that attorneys' fees may be recovered by the prevailing party. In addition, interest that accrues after the judgment may also be payable from the Fund. This report provides examples of how the payments from the Fund may be made under the Equal Access to Justice Act, Contract Disputes Act, Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), and through tribe-specific judgment funds.

In addition, this report will briefly highlight several recently proposed changes to the Judgment Fund's administration. In the 113<sup>th</sup> Congress, the Judgment Fund Transparency Act of 2013 (H.R. 317) would require the Secretary of the Treasury to post on a public website the claimant, agency, fact summary, and payment amount for each claim paid out of the Fund. Introduced but not enacted in the 112<sup>th</sup> Congress, the Government Transparency and Recordkeeping Act of 2012 (S. 3415) would have required the Treasury Secretary to publicly report all payments from the Fund under the Equal Access to Justice Act since 2003 and all future claims. Amendments to the No FEAR Act that were proposed in H.R. 6780 (110<sup>th</sup> Congress) and H.R. 67 (111<sup>th</sup> Congress) would have impacted reimbursement of the Fund for payments under the No FEAR Act.

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## Introduction

The Judgment Fund (or Fund) is a permanent appropriation enacted by Congress in 1956. The Fund is an unlimited amount of money set aside to pay judgments against the United States. It is only accessible when the United States has waived its sovereign immunity and certain statutory conditions are met. The Fund has evolved in administration and function over the last half century and has been subject to limiting principles. Most importantly, the Judgment Fund cannot be used in place of a specific appropriation. The Fund remains a source of continued controversy and discussion, especially in the current fiscal environment. During the budget uncertainties in the 1990s, federal agencies became increasingly concerned about the Judgment Fund's solvency, as statutory and constitutional constraints precluded the agencies from obligating funds where appropriated money is not available.<sup>1</sup>

This report reviews the history of the Judgment Fund, which has been administered through different agencies and with variable levels of congressional oversight since its inception. This report also outlines specific instances in which the Fund may be accessed, and when costs other than the principal award may be paid. Finally, this report provides examples of how and when the Judgment Fund may be accessed, as well as instances of when tribal judgment funds are implicated.

## History and Overview of the Judgment Fund

### Basic Framework for Litigating Against the United States

The U.S. government has sovereign immunity, meaning it cannot be sued unless it has waived immunity or consented to suit.<sup>2</sup> Article III, Section 2 of the U.S. Constitution immunizes federal officials from lawsuit, disallows suits against the federal government by the states, and has been interpreted to prohibit suits against the federal government generally.<sup>3</sup> Under limited circumstances, the United States has waived sovereign immunity; it has done so in a constitutional provision, by express statutory authority, or through a contract.<sup>4</sup> Therefore, the United States can be sued pursuant to certain statutes, most commonly the Federal Tort Claims Act,<sup>5</sup> The Tucker Act,<sup>6</sup> the Military Personnel and Civilian Employees Claims Act,<sup>7</sup> and the Federal Employees Compensation Act<sup>8</sup> are other examples of sovereign immunity waivers passed

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<sup>1</sup> Vacketta & Kantor, "Obtaining Payments from the Government's Judgment Fund," Briefing Papers No. 97-3 at 2 (February 1997).

<sup>2</sup> See *United States v. Sherwood*, 312 U.S. 584 (1981).

<sup>3</sup> U.S. CONST. ART. III §2. See *Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983) ("The United States is protected from unconsented suit under the ancient common law doctrine of sovereign immunity.").

<sup>4</sup> See *infra* notes 44-49. See also CRS Report R40996, *Contract Liability Arising from the Nuclear Waste Policy Act (NWPA) of 1982*, by (name redacted).

<sup>5</sup> 28 U.S.C. §§1346(b), 2671-2680.

<sup>6</sup> 28 U.S.C. §1491.

<sup>7</sup> 31 U.S.C. §3721.

<sup>8</sup> 5 U.S.C. §8101 *et seq.*

in the last century.<sup>9</sup> These statutes often contain substantial limiting principles and have been narrowly construed by courts.<sup>10</sup>

Congress must make provisions to pay judgments when suits against the United States are successful. Appropriated funds may not be used to satisfy claims unless there is specific statutory authority that allows the claim to go forward and provides a source of funds to pay any award.<sup>11</sup> In the wake of several legislative enactments waiving the United States' sovereign immunity, Congress enacted the Judgment Fund in an effort to reduce the need to allocate specific appropriations for payment of claims.<sup>12</sup>

## **Awards Prior to the Creation of the Judgment Fund**

While waiver of sovereign immunity was less common in the early Republic than it is today, determining and settling claims against the United States occupied a substantial amount of Congress's time since its first session.<sup>13</sup> As early as the Continental Congress, the legislature established committees to audit and settle claims against the United States. The structure and staffing of these committees left most of them with an overwhelming workload, as claims from the War for Independence multiplied and dragged on.<sup>14</sup>

Therefore, one of Congress's first priorities after the ratification of the Constitution was establishing an executive branch agency that could manage payments of claims against the United States. In its first session, Congress established the Treasury Department in the Treasury Bill of 1789, with an extremely detailed enabling statute that left Congress with substantial control over monetary policy but little ministerial responsibility.<sup>15</sup> Among other things, the act authorized the Treasury Department to settle all claims and accounts, delegating to the Auditor the duty to examine claims and to the Comptroller the duty to approve or disapprove of the Auditor's finding.<sup>16</sup> In the event a claim was disputed by the government, the Treasury Department disallowed the claim and accepted the government's facts.<sup>17</sup> If the claim was denied by the Treasury Department, the claimant could petition Congress directly. Congress, in turn, made specific appropriations for each claim validated by the department or through the petition process.

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<sup>9</sup> See gen. Donald A. Cyze, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U. L. REV. 527 (1980).

<sup>10</sup> See, e.g., *Shaw v. Library of Congress*, 478 U.S. 310, 317 (1986) (“[W]e must construe waivers strictly in favor of the sovereign.”).

<sup>11</sup> Customs Service—Wrongful Acts of Employees, 17 Comp. Gen. 931, A- 92313, May 12, 1938 (explaining that the absence of appropriated funds does not imply the absence of a right of action). See also Waiver of Statutes of Limitations in Connection with Claims Against the Department of Agriculture, 22 Op. Off. Legal Counsel 127, June 18, 1998 (“[N]o money may be paid on a claim against the government unless a statute authorizes payment or mandates compensation.”).

<sup>12</sup> See *infra* “Creation of the Judgment Fund.”

<sup>13</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (GAO REDBOOK), Third Edition Volume III, Chapter 14, Claims Against and By the Government, at 14-3.

<sup>14</sup> *Id.*

<sup>15</sup> 31 U.S.C. §301(a)-(b). Act of September 2, 1789, ch. 12, 1 Stat. 65, originally enacted as the Treasury Bill of 1789, H.R. 9, 1<sup>st</sup> Congress, text available online: <http://www.gwu.edu/~ffcp/mep/displaydoc.cfm?docid=fc061975d1>.

<sup>16</sup> *Id.*

<sup>17</sup> GAO Redbook, at 14-5.

This resulted in many claims waiting in limbo, where the Auditor and Comptroller had agreed to pay the claim, but where Congress had yet to make an appropriation to satisfy the judgment.<sup>18</sup>

By 1855, Congress was still dedicating a large portion of its resources to passing appropriations to satisfy claims against the United States, and hearing petitions from claims that were denied by the Treasury Department.<sup>19</sup> In order to reduce its workload, Congress established the Court of Claims, which served in an advisory capacity.<sup>20</sup> Rather than issuing binding decisions, the court simply considered the merits of claims filed against the United States, and recommended appropriations to Congress.<sup>21</sup> At President Lincoln's urging, Congress subsequently empowered the Court of Claims to issue binding decisions, though the Supreme Court found that the Treasury Department could decline enforcement of the decisions.<sup>22</sup> Once Congress repealed this authority, the Supreme Court could hear appeals from the Court of Claims, and the Court of Claims' decisions carried finality and enforcement on par with other Article III courts. Congress also clarified that certifications from the Treasury Department were final and conclusive.<sup>23</sup>

However, in 1921, desiring a tighter hold on the payment of claims, Congress again changed the administration of the settlement process. In the Budget Accounting Act of 1921, Congress transferred authority to the General Accounting Office (GAO)<sup>24</sup> for all claims settlement duties previously held by the Treasury Department.<sup>25</sup> GAO, in turn, sought appropriations from Congress, so that Congress could strengthen controls over expenditures. This allowed Congress to regain structural control over the payments process. However, Congress was left with considerable involvement in appropriating funds for each claim, which encumbered committees and ultimately proved untenable.<sup>26</sup>

## Creation of the Judgment Fund

In 1956, Congress passed the Judgment Fund enabling statute, a permanent and indefinite appropriation available to pay all judgments against the United States not covered by a specific appropriation.<sup>27</sup> Congress aimed to reduce the time lapse between judgments entered against the

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<sup>18</sup> *Id.*

<sup>19</sup> See generally, *Appropriate Source for Payment of Judgments and Settlements in United States v. Winstar Corp. and Related Cases*, Memorandum for Neal S. Wilson, Deputy General Counsel, Department of the Treasury, Office of Legal Counsel, July 22, 1998, <http://www.justice.gov/olc/winstarfinal.htm>.

<sup>20</sup> See Act of February 24, 1855, Ch. 122, 10 Stat. 612, 612-13.

<sup>21</sup> See Judith Resnik, "Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One's Anomalous Character" (2003). Faculty Scholarship Series Paper 764 at 861. Available Online: [http://digitalcommons.law.yale.edu/fss\\_papers/764/](http://digitalcommons.law.yale.edu/fss_papers/764/).

<sup>22</sup> Cong. Globe, December 3, 1861, 37<sup>th</sup> Cong., 2d Sess. app at 2 ("[I]t is as much the duty of Government to render prompt justice against itself in favor of citizens, as it is to administer the same between private individuals," Lincoln urged). See 12 Stat. 765, Reprinted at 37 Cong. Ch. 92, March 3, 1863. See also *Muskrat v. United States*, 219 U.S. 346 (1911).

<sup>23</sup> Act of February 24, 1855, Ch. 122, §1, 33 Cong. Ch. 122, 10 Stat. 612 (1855).

<sup>24</sup> GAO's name was changed in 2004 to the Government Accountability Office, P.L. 108-271, 118 Stat. 811 (2004).

<sup>25</sup> P.L. 67-13, 42 Stat. 20-27, 67 Cong. Ch. 18, June 10, 1921. See also Legislative Branch Appropriations Act, P.L. 104-53, 109 Stat. 514 (1995) (transferring authorities to GAO previously held by the Treasury Department).

<sup>26</sup> GAO Redbook, at 14-8.

<sup>27</sup> 31 U.S.C. §1304. For an example of an instance where the Judgment Fund cannot be used due to a more specific, available appropriation, see Comptroller General of the United States, Letter to the Honorable Pete Hoekstra, B-279886, 1998 WL 229292, April 28, 1998 ("The fact that Congress has chosen to bar the use of funds made available (continued...)

United States and actual payment, so that agencies would pay less post-judgment interest on awards.<sup>28</sup> Originally, the Fund was available only for judgments for claims of less than \$100,000 entered in the Court of Federal Claims or a U.S. district court.<sup>29</sup> Congress anticipated that the Fund would cover over 98% of all claims, thereby drastically reducing the need for individual appropriations and also streamlining the payment process.<sup>30</sup> The House report accompanying the bill indicates that a permanent appropriation “will permit a simplification of the payment procedure, will provide uniformity in interest computation, and will serve to reduce the total amount of interest paid by the government.”<sup>31</sup> The Senate report underscored the limitations in the bill on what payments could be made from the Judgment Fund, emphasizing the audit, review, and finality requirements.<sup>32</sup>

## Changes in Administration from 1956 to Present

Administration of payments from the Fund changed significantly in the latter 20<sup>th</sup> century. In 1961, Congress authorized payment from the Judgment Fund for settlements negotiated by the Department of Justice on behalf of the United States, where litigation could have resulted in a monetary judgment.<sup>33</sup> In addition, the Judgment Fund could also pay for judgments against the United States from state and foreign tribunals subject to certification by the Attorney General.<sup>34</sup> By the mid-1970s, the Fund’s \$100,000 payment ceiling proved too low to cover many settlements and judgments, and Congress raised the allowable damages to avoid making specific appropriations for larger awards.<sup>35</sup> In 1996, Congress transferred certification of payment from the Judgment Fund from GAO to the Financial Management Service in the Department of the Treasury.<sup>36</sup> GAO retained administrative settlement authority for settlement of non-litigative claims.<sup>37</sup> In recent years, Congress has taken an interest in the amount of money that has been

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in the 1998 Justice and Labor Appropriations Acts to pay the cost of the Election Officer’s supervision of the 1996 election rerun should not be viewed as an open invitation to convert the Judgment Fund from an appropriation to pay damage awards against the United States to a program account to circumvent congressional restrictions on appropriations that would otherwise be available to cover these expenses.”)

<sup>28</sup> See *infra* notes 30-32, 36.

<sup>29</sup> Vacketta & Kantor, *supra* note footnote 1, at 2 (February 1997) (clarifying that the fund was not originally available for settlements or judgment from other tribunals, such as state or foreign bodies).

<sup>30</sup> H.REPT. 84-2638, at 72 (1956).

<sup>31</sup> *Id.*

<sup>32</sup> S. DOC. 84-146 (1956), reprinted in 1961 U.S.C.C.A. 243.

<sup>33</sup> Albert D. Parker, Comp. Gen. Dec. B-215672, 64 Comp. Gen. 349 (1985). The definition of monetary damages is drawn from Section 702 of the Administrative Procedure Act. 5 U.S.C. §702.

<sup>34</sup> Pub. L. No. 87-187, §1, 75 Stat. 415 (August 30, 1961); 28 U.S.C. § 2414. The compromise settlement could also be negotiated by any person authorized by the Attorney General.

<sup>35</sup> Vacketta & Kantor, *supra* note 1, at 3 (“[T]his limitation began to subvert the purpose of the Fund because Congress had to provide a supplemental appropriation for every judgment or compromise settlement that happened to exceed \$100,000.”). Supplemental Appropriations Act of 1977, P.L. 95-26 §101, 91 Stat. 61, 96 (May 4, 1977). See, e.g., Tamoak Band of Western Shoshone Indians v. United States, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979).

<sup>36</sup> H.R. REPT. No.104-141, part II at 31. (1996) (“The committee has taken this action because claims and judgment duties are not legislative activities and detract from the essential purposes of the agency.”). See also *Legislative Branch Appropriations for Fiscal Year 1996, Hearings on H.R. 1854 Before the Subcomm. of the Senate Comm. on Appropriations*, 104<sup>th</sup> Cong. 1<sup>st</sup> sess. 38 (1996) (detailing staff cuts at the Government Accountability Office that would necessarily accompany a reduction in responsibilities for the agency).

<sup>37</sup> P.L. 104-53, Section 211, 109 Stat. 514, 535 (1996). See also GAO Redbook, at 14-10. GAO’s settlement authority, (continued...)

spent from the Judgment Fund. Generally, these bills deal with transparency and improved agency accountability, including the Judgment Fund Transparency Act and proposed amendments to the No FEAR Act.<sup>38</sup> In 2011, the Financial Management Service, the bureau in charge of administering the Fund, published a 2011 fiscal report, which included information about payments made from the Judgment Fund.

## How Does the Judgment Fund Operate Today?

### Overview

The Judgment Fund is a permanent, indefinite appropriation.<sup>39</sup> By definition, it requires no further congressional action and does not expire at the close of any fiscal year. The appropriation makes an unlimited amount of funds available for payment of certain judgments against the United States.<sup>40</sup> Awards are only paid out of the Judgment Fund when payment is not otherwise provided for in a specific appropriation. All judgments must be final, meaning the award will not be overturned on appeal. In addition, all settlements paid out of the Judgment Fund must represent the final and comprehensive award for the actual or threatened litigation, negotiated and agreed to by the Department of Justice.<sup>41</sup> Finally, the Judgment Fund may be used to pay certain costs to the prevailing party in litigation, as enumerated in 28 U.S.C. §1920.<sup>42</sup> These costs typically include court fees and compensation for court-appointed experts.<sup>43</sup>

### When Is the Judgment Fund Appropriately Used?

The Judgment Fund statute sets out four requirements for accessing the Fund. First, the Fund may only be used to pay judgments or settlements involving money judgments.<sup>44</sup> For example, if a

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however, is limited to accounts and debts unrelated to claims against the United States. *See* 31 U.S.C. §3526. GAO may also relieve liable officials and certifying officers. *See* 31 U.S.C. §3527. For a full explanation of GAO's authorities after 1996 and examples of agency delegation, see GAO Report B-275605, "Transfer of Claims Settlement and Related Advance Decisions, Waivers, And Other Functions," March 17, 1997, available online: [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/foia/gc\\_march17.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/foia/gc_march17.pdf).

<sup>38</sup> *See infra* notes 127-138.

<sup>39</sup> 31 U.S.C. §1304.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 28 U.S.C. §2412(a) ("Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in Section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.").

<sup>43</sup> 28 U.S.C. §1920 (1-6) (enumerating each allowable cost to be taxed). *See infra* "Costs Allowable Under Awards Paid from the Judgment Fund."

<sup>44</sup> *See* Matter of: Availability of Expired Funds for Non-monetary Judicial Awards, 70 Comp. Gen. 225, February 4, 1991. *See also* *Availability of Judgment Fund in Cases Not Involving A Money Judgment Claim*, 13 Op. Off. Legal Counsel 98, 104 (1989) ("When the Judgment Fund statute was enacted in 1956, only the payment of money judgments was provided for.... Had Congress wished to provide for the payment from the Judgment Fund of all settlements when it amended the Judgment Fund statute in 1961, presumably it would specifically have so indicated. Its failure to do so supports the conclusion that in extending the Judgment Fund statute to reach settlements, Congress believed it was only bringing within the statute's ambit settlements of causes that could have resulted in Judgment Fund disbursements, had (continued...)



court ordered an agency to hire a consultant to implement fair employment practices, the Judgment Fund could not be used to pay costs and fees associated with fulfilling this requirement.

The judgment must also be final, so that payments are not made from the Fund when there is a chance the award could be changed or overturned.<sup>45</sup> This has been interpreted to mean that the judgment must come out of action by the court of last resort or that the parties have declined to seek further review.<sup>46</sup> Most often, the time for appeal simply expires before payment from the Judgment Fund. However, the statute exempts payment for an “irreducible minimum amount,” meaning an amount that has been assessed as final.<sup>47</sup> For example, in *Trout v. Garrett*, the D.C. Circuit Court of Appeals found that payment from the Judgment Fund was proper for interim attorneys’ fees in a Title VII employment discrimination action against the government.<sup>48</sup> The court found that the Judgment Fund statute was intended to serve as a mechanism for payment rather than to interfere with the ordinary course of litigation.<sup>49</sup>

The Judgment Fund may not be used for payments if the award is otherwise provided for, by appropriation or statute. For example, courts have held that annual appropriations to the Land and Water Conservation Fund must be used where there is a land condemnation judgment against the U.S. Park Service.<sup>50</sup> Courts look for an appropriation that has programmatic specificity, regardless of the agency’s use of the funds. The actual funding level is irrelevant; so long as the appropriation exists, it precludes payment from the Judgment Fund.<sup>51</sup> For example, if an agency had already spent an appropriated sum on other litigation or expended the money elsewhere, the Judgment Fund still could not be used. Under these circumstances, the agency would have to seek an additional appropriation from Congress.<sup>52</sup>

Lastly, the Judgment Fund is limited to litigative awards, meaning awards that were or could have been made in a court. Litigative awards are distinguished from administrative awards because the latter are provided for by statute and are paid from the agency’s appropriation.<sup>53</sup> These include EEOC claims, awards under the Military Claims Act, and Merit Systems Protection Board matters. The primary exception to this rule is claims under the Federal Tort Claims Act that are over \$2,500, which Congress exempted in the statute.<sup>54</sup> Permissible awards include the principal amount, some attorneys’ fees, allowable costs, and interest as stated in the judgment or settlement. For settlement awards to be considered litigative, the settlement must be negotiated by

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such causes resulted in final money judgments rather than settlements.”).

<sup>45</sup> *McDonald v. Schweiker*, 726 F.2d 311, 313 (7<sup>th</sup> Cir. 1983) (clarifying that “final judgment” does not have a single fixed meaning, but that the case must be situated such that no further action is contemplated).

<sup>46</sup> See *infra* notes 47-52.

<sup>47</sup> 31 U.S.C. §1304.

<sup>48</sup> *Trout v. Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989) (explaining that the Judgment Fund “is auxiliary legislation; its sole office is to furnish ‘a mechanism for facilitating payment of judgments’ rendered on claims authorized by *another* statute.”).

<sup>49</sup> *Id.*

<sup>50</sup> *United States v. 14,770.65 Acres of Land, More or Less, Situated in Richland County, State of S.C.*, 616 F. Supp. 1235, 1248-1253 (D.S.C. 1985).

<sup>51</sup> 31 U.S.C. §1304.

<sup>52</sup> GAO Redbook, at 14-7.

<sup>53</sup> 31 U.S.C. §1304.

<sup>54</sup> *Id.*

the Department of Justice (or any person authorized by the Attorney General) and based on a claim that could have resulted in a monetary judgment in court.<sup>55</sup>

## **When Is the Judgment Fund Inaccessible?**

There are nearly 100 statutes that impact payment from the Judgment Fund, 17 of which specifically dictate denial of payment from the Fund.<sup>56</sup> For example, administrative awards less than \$2,500 arising under the Federal Tort Claims Act may not be paid from the Judgment Fund.<sup>57</sup> When there is a specific appropriation, the Judgment Fund may not be used. The most common example of an award against the United States to which the Judgment Fund is inapplicable is tax judgments.<sup>58</sup> Congress makes special, term-limited appropriations to pay tax refunds and judgments, and therefore, they may not be paid out of the Judgment Fund. Neither judgments against the Postal Service, nor those against government corporations, such as the Pension Benefit Guaranty Corporation, are payable from the Judgment Fund.<sup>59</sup> This is in part because government corporations segregate their revenues from the general fund and operate largely without appropriated funds.<sup>60</sup> Therefore, the rationale for using the Judgment Fund, which was intended to reduce the need for Congress to make appropriations, would be inapplicable. In addition, the Judgment Fund may not be used for land condemnation judgments or certain court-awarded contempt citation awards.<sup>61</sup>

## **Who Administers the Judgment Fund?**

Since 1996, the Judgment Fund has been administered by the Financial Management Service (FMS) in the Treasury Department. Once a party has received a final court judgment or negotiated settlement, FMS requires the responsible agency to submit a request for certification of payment from the Fund.<sup>62</sup> FMS considers the proposed payment in light of the aforementioned rules, determining whether payment out of the Fund is proper or whether it is an obligation chargeable to agency funds.<sup>63</sup> In this respect, FMS is the primary enforcer for the limits on the Judgment Fund's use. FMS also determines whether the judgment is final, and calculates interest subject to the above limitations. If the payee is indebted to the United States, FMS may offset that

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<sup>55</sup> P.L. 87-187, §1, 75 Stat. 416 (August 30, 1961); 28 U.S.C. § 2414.

<sup>56</sup> Department of the Treasury, Financial Management Services, Judgment Fund: Common Questions, June 20, 2012, <http://fms.treas.gov/judgefund/questions.html>. See, e.g., 18 U.S.C. §2712(b)(5); *cf.* 26 U.S.C. §7432.

<sup>57</sup> 28 U.S.C. §1346(a)(2).

<sup>58</sup> See Financial Management Service, Department of the Treasury, The Judgment Fund: Background, March 11, 2011 <http://www.fms.treas.gov/judgefund/background.html>.

<sup>59</sup> *Id.* See also *The Availability of the Judgment Fund for the Payment of Judgments or Settlements in Suits Brought Against the Commodity Credit Corp. Under the Fed. Tort Claims Act*, 13 Op. Off. Legal Counsel 362 (1989) (“The creation of the Judgment Fund therefore did not disturb the prior practice, reflected in GAO decisions, that a government corporation would be required to pay judgments and settlements on personal injury claims where it has express authority to apply its own corporate funds to discharge such debts.”). For an overview of government corporations, see CRS Report RL30365, *Federal Government Corporations: An Overview*, by (name redacted).

<sup>60</sup> GAO Redbook, at 14-9.

<sup>61</sup> See *infra* note 50 and accompanying text.

<sup>62</sup> See Vacketta & Kantor, *supra* note 1, at 5 (clarifying that for government contract disputes, the responsible agency is always the Department of Justice). See also 31 U.S.C. §1304(a).

<sup>63</sup> See Financial Management Service, Department of the Treasury, The Judgment Fund: Overview, March 11, 2011, <http://www.fms.treas.gov/judgefund/background.html>.

amount before payment.<sup>64</sup> Generally, unless the claim arises under the Contract Disputes Act (CDA) or the No FEAR Act, the agency does not reimburse the Judgment Fund; therefore, payment ends the process.<sup>65</sup>

The certification and payment is primarily a ministerial function. At no point in the process does FMS consider the nature or merit of the underlying action except to the extent necessary to determine the propriety of payment from the Fund. FMS makes a payment directly to the plaintiff, without an intermediary.<sup>66</sup> This substantially ends the agency's involvement. However, if FMS does not render payment to the correct party, this does not discharge the United States' obligation.<sup>67</sup>

In the event FMS refuses to make payment, the submitting agency is notified, and it may alter and resubmit claims as appropriate. Most commonly, rejections result from errors in the submission forms, absence of underlying documents, or other technical issues. A claim is only denied if, during administration, FMS determines that payment from the Judgment Fund is not proper.<sup>68</sup> Claims are most commonly denied because payment has been provided for by a specific appropriation or the award is less than the legal thresholds for statutes such as the Military Justice Act.<sup>69</sup>

## Costs Allowable Under Awards Paid from the Judgment Fund

Federal courts have some discretion when deciding at the end of litigation whether to charge the losing party with costs for the prevailing party. However, the categories of costs that may be awarded are strictly circumscribed and the subject of considerable debate.<sup>70</sup> Under 28 U.S.C. §1920, the clerk of the court may award costs for court fees, transcripts, fees related to witnesses, materials for presentation in the case, compensation for court-appointed experts, and docket fees.<sup>71</sup> To obtain costs for such items in payment from the Judgment Fund, the submitting agency must include a bill of costs or the court's order awarding costs with the request for payment.<sup>72</sup> Courts have limited payment to the enumerated items in §1920 and the specific exemptions in

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<sup>64</sup> 31 U.S.C. §3728.

<sup>65</sup> See Financial Management Service, Department of the Treasury, *The Judgment Fund: Common Questions*, March 11, 2011, <http://www.fms.treas.gov/judgefund/questions.html>. See *infra* "Illustrations of the Judgment Fund."

<sup>66</sup> See 31 C.F.R. §256.10.

<sup>67</sup> See Department of the Treasury, Transmittal Letter No. 677, March 28, 2012, <http://fms.treas.gov/tfm/vol1/v1p5c150.pdf>.

<sup>68</sup> See Financial Management Services, *The Judgment Fund: Overview*, <http://www.fms.treas.gov/judgefund>.

<sup>69</sup> Financial Management Service, Department of the Treasury, *Congressional Report on the Judgment Fund*, June 25, 2012, <http://www.fms.treas.gov/judgefund/congress-reports.html>. See AFARS 5133.212.90-0(b) and (c)(2) (capping claims under the Military Justice Act to \$100,000).

<sup>70</sup> See 28 U.S.C. §1920; *cf.* *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2005, 192 L. Ed. 2d 903 (2012) (explaining that courts construe costs under 28 U.S.C. §1920 narrowly).

<sup>71</sup> 28 U.S.C. §1920(1-6).

<sup>72</sup> 31 C.F.R. §256.12.

applicable statutory authority when awarding costs.<sup>73</sup> Payments of interest and attorneys' fees have caused considerable debate with respect to this issue.<sup>74</sup>

## **Payment of Attorneys' Fees from the Judgment Fund**

As a preliminary matter, the U.S. legal system does not generally allow recovery of attorneys' fees by the prevailing party.<sup>75</sup> Termed the "American Rule," this approach distinguishes the U.S. system, making each party responsible for payment of their own legal fees, regardless of the result, unless specifically authorized by statute or contract.<sup>76</sup> In most legal systems around the world, the losing party pays the prevailing party's legal fees as part of the damages award.<sup>77</sup>

The American Rule applies with two major common law exceptions and numerous statutory provisions exempting certain classes of cases.<sup>78</sup> The common benefit rule allows federal courts to award attorneys' fees when a party prevails in a suit at his own expense that benefits a large class of other persons. This shifts the cost of attorneys' fees to those who benefit from the suit, not the opposing party.<sup>79</sup> This allows for so-called private attorneys general to effectuate policy in litigation, benefitting a large class of people, with the added incentive that attorneys' fees will be paid if they prevail.<sup>80</sup> The bad faith exception allows a federal court to award counsel fees to a successful party when his opponent acted vexatious or for oppressive reasons, making the award of fees punitive.<sup>81</sup> This requires proof of malice and a showing that the claim had virtually no chance of success.<sup>82</sup>

Specific statutory exemptions, called fee-shifting provisions, make the federal government responsible for attorneys' fees in a wide variety of suits. Statutes that allow for award of attorneys' fees often do so with an eye towards equalizing two unevenly matched parties, and often apply to environmental and consumer protection litigation. This has the effect of

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<sup>73</sup> Obtaining Payments from the Judgment Fund and under Private Relief Bills, 71 FR 60848-01.

<sup>74</sup> See gen. James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 AM. J. COMP. L. 195 (2010).

<sup>75</sup> *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

<sup>76</sup> Black's Law Dictionary (9<sup>th</sup> Ed. 2009) ("The general policy that all litigants, even the prevailing one, must bear their own attorney's fees. The rule is subject to bad-faith and other statutory and contractual exceptions.")

<sup>77</sup> Black's Law Dictionary (9<sup>th</sup> Ed. 2009) see English Rule, Fee-Shifting, Loser-Pays Rule.

<sup>78</sup> CRS Report 94-970, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies*, by (name redacted).

<sup>79</sup> *Trustees v. Greenough*, 105 U.S. 527 (1881) (explaining that this exception is grounded in policy as opposed to a rule or tradition).

<sup>80</sup> *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) ("[I]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief ...").

<sup>81</sup> *Hall v. Cole*, 412 U.S. 1, 5 (1973) (finding a party acted in bad faith when there was no sound legal basis for the claim and the defendant produced evidence of a pre-existing conflict between the parties).

<sup>82</sup> *Copeland v. Martinez*, 603 F.2d 981, 991 (D.C. Cir. 1979), cert. denied, 444 U.S. 1044 (1980) ("We doubt that such a finding may be supported without some proof of malice entirely apart from interferences arising from the possibly frivolous character of a particular claim. Only in this manner would we assure a sensible distinction between the contents of the equitable and statutory exceptions to the American rule. If, as seems probable, Congress chose to exclude the United States from the statutory 'prevailing party' recovery in all cases, we are obliged to observe closely such a distinction.")

implementing public policy through private litigation.<sup>83</sup> In some instances, statutes specifically limit the awards of attorneys' fees. For example, the Federal Tort Claims Act allows for attorneys' fees up to 20% for administrative settlements and up to 25% for judicial awards.<sup>84</sup> The Freedom of Information Act statute limits attorneys' fees to actual litigation (as opposed to administrative remedies). When attorneys' fees are statutorily authorized, payment may generally be authorized from the Judgment Fund, unless otherwise provided by law.<sup>85</sup> The parties may not alter the source of payment by stipulation or other agreements in the settlement.<sup>86</sup>

## Payment of Interest from the Judgment Fund

Payment from the Judgment Fund includes principal awards and, in limited cases, post-judgment interest. However, payment of interest must be considered in light of special considerations for awards entered against the United States. In *Library of Congress v. Shaw*, the Supreme Court held that interest cannot be recovered in a suit against the government unless Congress has expressly waived sovereign immunity for an award,<sup>87</sup> and has specifically contemplated an award of interest on damages.<sup>88</sup> Prejudgment interest is considered in the calculation of damages, and is not awarded separately.<sup>89</sup> Historically, courts have treated post-judgment interest as a separate element of damages unrelated to the substantive claim, and therefore awarded only upon agreement of the parties.<sup>90</sup> Because the United States is immune from suit absent its consent, this rule especially applies in awards against the government.<sup>91</sup> With respect to the Judgment Fund, payment of interest is authorized in certain instances. If a district court award is awaiting appeal by the government, the Judgment Fund statute authorizes payment of interest if the plaintiff sends a trial transcript to the Treasury Department and payment is limited to the period from the date Treasury receives the transcript until judgment is mandated or affirmed.<sup>92</sup>

In *Library of Congress v. Shaw*, the Court also identified two widely recognized exceptions to the no-interest rule, which are not drawn from specific statutes but have been found to be a constitutional waiver of sovereign immunity.<sup>93</sup> The Fifth Amendment provides that private

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<sup>83</sup> CRS Report 94-970, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies*, by (name redacted).

<sup>84</sup> 28 U.S.C. §2678; *See also* Calculation of Attorneys' Fees under Federal Tort Claims Act, 86 ALR Fed 866 (1988).

<sup>85</sup> Department of the Interior-Funding of Receptions at Arlington House Reconsideration, 61 Comp. Gen. 260 (Comp. Gen.), B-206173 (February 23, 1982).

<sup>86</sup> Office of the Comptroller General, Payment of Refund Ordered by Court of Claims in National Presto Industries, Inc. and *World Aerospace Corp v. United States*, B-164766, June 1, 1979.

<sup>87</sup> *Library of Cong. v. Shaw*, 478 U.S. 310, 320 (1986) ("The no-interest rule is to the effect that interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest. In this case, attorney's fees, as well as interest on those fees, were awarded to a plaintiff who prevailed ...").

<sup>88</sup> *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 260 (1888) ("The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an act of congress, either by the name of interest or by that of damages. This appears from a succession of the opinions of the attorney general of the United States ...").

<sup>89</sup> *Library of Cong.*, 478 U.S. at 321. ("Prejudgment interest, however, is considered as damages, not a component of 'costs.'").

<sup>90</sup> *See Reid v. Rensselaer Glass Factory*, 3 Cow. 393 (N.Y. 1824).

<sup>91</sup> Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 605 (2003).

<sup>92</sup> *See* Financial Management Services, *The Judgment Fund: Overview*.

<sup>93</sup> *Library of Cong.*, 478 U.S. at 323 (clarifying that Congress's waiver of immunity as to attorneys' fees did not constitute a waiver as to the government's traditional immunity from interest).

property shall not be taken for public use without “just compensation.”<sup>94</sup> Courts have determined that this exception inherently recognizes interest in order to make the person whole. However, courts have not been receptive to the Fifth Amendment as a means to obtain interest when a takings claim is not otherwise involved.<sup>95</sup> The second constitutional exception where interest may be allowed is the commercial venture exception, set out in *Standard Oil Company v. United States*, whereby a plaintiff may recover attorneys’ fees from a commercial government enterprise.<sup>96</sup> The commercial venture exception requires that the government entity involved in the suit have a sue-and-be-sued clause. Therefore, the commercial venture exception is limited to litigation where the agency has been opened to suit by statute and is engaged in a primarily commercial, as opposed to governmental, function.<sup>97</sup>

Therefore, to determine whether interest is payable from the Judgment Fund, a plaintiff bringing suit against the government must engage in a three-step analysis. First, the statute under which suit was brought should first be considered. If the statute authorizes payment of interest, then it may be payable from the Fund. For example, if a plaintiff prevailed under the Back Pay Act, the Fund would pay interest on the claim from the date of the withdrawal or reduction of pay, because this is specifically authorized in the statute.<sup>98</sup> Second, if the case was pending appeal, the plaintiff should consider the interest allowance in 31 U.S.C. §1304(b).<sup>99</sup> If a plaintiff won in district court, and filed a transcript of judgment with the Treasury Department, interest may be paid in the time between the judgment and when the government decides not to appeal.<sup>100</sup> Finally, a plaintiff should determine whether the cause of action amounts to a taking under the Fifth Amendment or falls under the commercial venture exception.

## Illustrations of the Judgment Fund

As discussed above, the Judgment Fund enabling statute limits an agency’s ability to access the Fund. This section provides examples of statutes that prevent an agency from relying on the Judgment Fund as the source of payment, and briefly outlines the legislative intent of these statutes.

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<sup>94</sup> U.S. CONST. AMEND. V.

<sup>95</sup> GAO Redbook, at 14-11.

<sup>96</sup> 267 U.S. 76, 79 (1925).

<sup>97</sup> *Loeffler v. Frank*, 486 U.S. 549 (1988) (“[I]f the general authority to ‘sue and be sued’ is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the ‘sue and be sued’ clause in a narrow sense.”).

<sup>98</sup> *Cf. Granville House, Inc. v. Dep’t of Health, Educ. & Welfare*, 813 F.2d 881, 883-884 (8<sup>th</sup> Cir. 1987) *with Knight v. United States*, 982 F.2d 1573, 1576 (Fed. Cir. 1993).

<sup>99</sup> 31 U.S.C. §1304(b)(1) (“Interest may be paid from the appropriation made by this section... on a judgment if the Court of Appeals for the Federal Circuit or the United States Court of Federal Claims... only from the date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance.”).

<sup>100</sup> *See supra* “Payment of Interest from the Judgment Fund.”

## The Equal Access to Justice Act

The Equal Access to Justice Act (EAJA) provides for award of attorneys' fees for individuals and small entities that prevail in cases against the federal government.<sup>101</sup> EAJA applies only when the claimants are the "prevailing party," or when they are successful on a significant issue in the litigation.<sup>102</sup> The party must also show that the result of the lawsuit was not a gratuitous act by the government.<sup>103</sup> The act also contains specific size requirements, so that larger entities may not recover under the act.<sup>104</sup>

Since the passage of EAJA, agencies have disputed whether payments under the act must be made out of their appropriations or whether attorneys' fees may be charged to the Judgment Fund.<sup>105</sup> In *Cienega Gardens v. United States*, the Federal Circuit ordered an award for the plaintiffs, finding that amendments to the Department of Housing and Urban Development's (HUD's) low income housing program constituted a taking.<sup>106</sup> EAJA provides for payment, by directing that a fee award "be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise."<sup>107</sup> However, the plaintiffs sued the United States, instead of the agency, and HUD argued that they should not be liable because the Department of Justice did not seek review on a facially questionable ruling.<sup>108</sup> HUD proposed that no agency should be responsible under these rare facts, and therefore, payment under EAJA should be made from the Judgment Fund instead of the agency's appropriations.<sup>109</sup> The Treasury Department countered that the Judgment Fund is not responsible for payment when the party prevails over the agency, and denied payment.<sup>110</sup>

In an opinion by its Office of Legal Counsel (OLC), the Justice Department concluded that the Judgment Fund could not pay the award for attorneys' fees, because HUD was the agency over which the party prevailed.<sup>111</sup> OLC had previously concluded that an agency could only seek payment from the Judgment Fund when payment of attorneys' fees would constitute a heavy

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<sup>101</sup> 28 U.S.C. §2412. See also CRS Report 94-970, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies*, by (name redacted).

<sup>102</sup> 28 U.S.C. §2412(d)(1)(A).

<sup>103</sup> 28 U.S.C. §2412(d)(1)(B).

<sup>104</sup> 5 U.S.C. §601 (defining a small entity as a small agency, small organization such as a nonprofit, or small governmental organization).

<sup>105</sup> See generally Office of Legal Counsel, Responsibility of Agencies to Pay Attorney's Fee Awards Under the Equal Access to Justice Act, Memorandum Opinion for the Assistant Attorney General, Civil Division, October 16, 2007, <http://www.justice.gov/olc/2007/cienega-gardens-final.pdf>.

<sup>106</sup> 331 F.3d 1319, 1324 (Fed. Cir. 2003).

<sup>107</sup> 28 U.S.C. §2412(d)(4).

<sup>108</sup> See Office of Legal Counsel Opinion, *supra* note 105, at 3.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 4.

<sup>111</sup> *Id.* at 6 ("As a general rule, the 'agency over which the party prevails' under EAJA will be the agency whose regulatory interest was at stake in the litigation and whose actions or policies are successfully challenged in the court action. This interest may be identified by the fact that the agency took affirmative action against the prevailing party, in the form of a regulation or administrative ruling, or it may be identified by the fact that the agency had statutory authority over the regulatory program that the prevailing party successfully challenged. In a typical case, that agency may be named as the plaintiff or the defendant, but EAJA does not require that the agency itself be specifically named as a party. These considerations, as we explain, point towards the conclusion that HUD is the agency responsible under EAJA.").

financial blow to the agency, a loophole that was closed in a subsequent version of EAJA.<sup>112</sup> The opinion looked to congressional intent underlying EAJA, which was in part to create agency accountability when taking a regulatory or adverse action which was not substantially justified.<sup>113</sup> In addition, Congress left no statutory mechanisms for payment of EAJA claims from the Judgment Fund.<sup>114</sup> The opinion did not leave open the possibility that agencies could be reimbursed for awards made pursuant to EAJA from the Judgment Fund and strongly suggested they would have to use their own appropriations.

## **Contract Disputes Act and No FEAR Act**

Congress has passed two statutes that require agencies to reimburse the Judgment Fund for payment of claims. The Contract Disputes Act of 1978 (CDA) allows payment from the Judgment Fund when a contractor for an agency wins a judgment from a court or a contract appeals board, or reaches a settlement with an agency on a contract dispute.<sup>115</sup> The agency must then reimburse the Judgment Fund from its operating appropriations.<sup>116</sup> If the agency has insufficient funds available to reimburse the Funds, CDA requires that the agency seek additional funding from Congress.<sup>117</sup> Congress wanted to incentivize agencies to engage in settlement talks and keep them accountable for the costs of judgments.<sup>118</sup>

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) covers whistleblower and employment discrimination suits for federal employees, creating a cause of action for federal employees who have been subjected to harassment or discrimination in the workplace.<sup>119</sup> The act requires the agency to reimburse the Judgment Fund within a reasonable time.<sup>120</sup>

In 2008, the GAO released a report on reimbursements to the Judgment Fund from CDA and No FEAR payments. The report concluded that, while virtually all agencies have reimbursed the

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<sup>112</sup> See Funding of Attorney Fee Awards Under the Equal Access to Justice Act, 6 Op. O.L.C. 204, 205 (1982).

<sup>113</sup> *Id.* at 205-206

<sup>114</sup> *Id.* at 208-209 (“Contemporaneous discussion on the House floor shows that §207 [of the EAJA] was specifically intended to ensure that such payments could not be made under the appropriations authority of 31 U.S.C. §724a (Supp. V 1981), the source of authority for what is commonly known as the judgment fund. The effect of §207 is, and was intended to be, that the promise of the second sentence may be fulfilled only by additional congressional action in the form of legislation.”).

<sup>115</sup> See 41 U.S.C. §601-613. See generally CRS Report R41230, *Legal Protections for Subcontractors on Federal Prime Contracts*, by (name redacted).

<sup>116</sup> 41 U.S.C. §7108.

<sup>117</sup> 41 U.S.C. §7108(c).

<sup>118</sup> See S. REPT. NO. 95-1118, at 35 (1978). (“Section 13(c) provides that all such payments will be back charged to the procuring agency involved. There may be an incentive in certain cases on the part of the procuring agency to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds. Second the practice may tend to hid from Congress the true economic costs of some procurements by not requiring the agencies to seek additional appropriations to pay the judgment.”). The House Report echoed this sentiment. See H.R. REPT. NO. 95-1556, at 86 (“We favor this approach since it ultimately obligates the agency to account for all awards against it out of its own appropriations... This will also provide visibility to Congress.”).

<sup>119</sup> 5 U.S.C. §2301 note 1. See also CRS Report RS21778, *Legal Overview of P.L. 107-174, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002*, by (name redacted)

<sup>120</sup> For further discussion, see *infra* “Recent Legislative Proposals,” see also H.R. 6780 (110<sup>th</sup> Cong. 2009).



Fund for No FEAR payments since it was made mandatory in 2002, CDA payments are considerably less consistent.<sup>121</sup> Typically, CDA payments are much larger, perhaps keeping agencies from reimbursing the Fund.<sup>122</sup> GAO recommended that the FMS take steps to make agency payments more transparent, and that it report to Congress periodically on the status of payments.<sup>123</sup>

## Tribe-Specific Judgment Funds

Congress created a separate but similar system for payment of judgments awarded to tribes under Title XXV of the U.S. Code. The Indian Tribal Judgment Funds Use or Distribution Act created a trust to be administered by the Secretary of the Interior, which would distribute all funds appropriated in judgments in favor of tribes. Courts have held this is the exclusive trust for all such payments, and that no additional congressional action is necessary.<sup>124</sup> The Interior Department holds funds in trust until Congress makes an appropriation to the tribe.<sup>125</sup> When two or more tribes benefit from a single judgment, the Bureau of Indian Affairs submits a plan to Congress recommending a division of the funds, prior to the appropriation.<sup>126</sup>

## Recent Legislative Proposals

The Judgment Fund has changed many times in its over-50-year history, and recent legislative proposals in Congress could again alter certain payments and processes. In the 113<sup>th</sup> Congress, the Judgment Fund Transparency Act of 2013 has been introduced to amend the Judgment Fund enabling statute.<sup>127</sup> The act would require the Secretary of the Treasury to post on a publicly accessible website the claimant, agency, fact summary, and payment amount for each claim from the Judgment Fund, within 30 days after the payment was made, unless a law or court order

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<sup>121</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-295R, THE JUDGMENT FUND: STATUS OF REIMBURSEMENTS REQUIRED BY THE NO FEAR ACT AND CONTRACT DISPUTES ACT 13 (2008).

<sup>122</sup> *Id.* at 8.

<sup>123</sup> *Id.* at 13 (“FMS is taking steps towards implementing its new CDA collection strategy adopted in May 2007, focused on a continued effort to work with agencies and ensure that it has complete information about the status of each agency with regard to CDA reimbursement obligations. However, the strategy does not provide for reporting to Congress the amounts owed by individual departments and agencies for CDA reimbursement obligations. The new FMS strategy could increase transparency regarding federal agencies’ obligations to reimburse the Judgment Fund and aid congressional oversight and decision making if it also included notification to Congress of the amounts owed by individual agencies related to CDA cases.”). For a discussion of suggested changes to this system, see Recent Legislative Proposals, *infra*.

<sup>124</sup> *Wolfchild v. United States*, 101 Fed.Cl. 54, 79 (2011) (explaining that Congress allowed the Secretary of the Interior to disburse funds without further Congressional action in most cases because individual appropriations were timely and caused interest to accrue on judgments). See also H.REPT. 93-377, at 4 (1973), 1973 U.S.C.C.A.N. 2311, 2313.

<sup>125</sup> Bureau of Indian Affairs, What We Do: Overview, Division of Tribal Government Services, <http://www.bia.gov/WhatWeDo/ServiceOverview/TribalGov/index.htm> (“[P]ursuant to the Indian Tribal Judgment Funds Use or Distribution Act, 87 Stat. 466, as amended, the BIA prepares a plan for the use or distribution of funds awarded in satisfaction of a judgment of the Indian Claims Commission of the United States Court of Federal Claims in favor of an Indian tribe.”).

<sup>126</sup> *Id.*

<sup>127</sup> H.R. 317 (113<sup>th</sup> Cong. 2013).

otherwise prohibits the disclosure of such information.<sup>128</sup> Recently, FMS released its 2011 Fiscal Report, which included all of the information from the Transparency Act except for fact summaries,<sup>129</sup> pursuant to the House Appropriations Committee's recommendations that accompanied the Financial Services and General Government Appropriations Act of 2012.<sup>130</sup> The committee instructed FMS to report online each claim paid from the Judgment Fund in the given fiscal year.<sup>131</sup>

In the 112<sup>th</sup> Congress, the Government Transparency and Recordkeeping Act of 2012 was introduced but not enacted. The bill would have amended the Judgment Fund enabling statute to require the Secretary of the Treasury to publicly report all Judgment Fund payments since 2003, and report all future payments from EAJA.<sup>132</sup> The bill's provisions called for the disclosures to be made online and include those required under the Judgment Fund Transparency Act, as well as specific details about attorneys' fees and interest paid from the Judgment Fund.<sup>133</sup>

Legislation in the 110<sup>th</sup> and 111<sup>th</sup> Congress would have amended the No FEAR Act to require agencies to reimburse the Judgment Fund for payments for claims within two years of a final finding of discrimination.<sup>134</sup> Claims under the No FEAR Act are paid from the Judgment Fund; however, the law does not specify a definitive period for agencies to reimburse the Fund.<sup>135</sup> The stated purpose of the legislation was to "encourage timely resolution or settlement of complaints."<sup>136</sup> These bills saw no action.

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<sup>128</sup> *Id.*

<sup>129</sup> See Financial Management Service, 2012 Judgment Fund Transparency Report to Congress, available online: <http://www.fms.treas.gov/judgefund/congress-reports.html>.

<sup>130</sup> H.R. 2434 (112<sup>th</sup> Cong. 2012). This bill was enacted in the Consolidated Appropriations Act of 2012, P.L. 112-74, December 23, 2011. The committee's directive appeared in H.Rept. 112-136, at 6 ("The Secretary of the Treasury shall submit to the Committee and make available to the public on its website an annual report about payments made under 31 U.S.C. 1304 for the fiscal year. Unless the disclosure of such information is otherwise prohibited by law or court order, the report shall consist of: (1) the name of the plaintiff or claimant, (2) the name of the counsel for the plaintiff or claimant; (3) the name of the agency that submitted the claim; (4) a brief description of the facts that gave rise to the claim; and (5) the amount paid representing principal, attorney fees, and interest, if applicable. The first report is due within 60 days of enactment of this Act.").

<sup>131</sup> *Id.*

<sup>132</sup> S. 3415 Government Transparency and Recordkeeping Act of 2012 (112<sup>th</sup> Cong. 2012).

<sup>133</sup> *Id.*

<sup>134</sup> H.R. 6780 (110<sup>th</sup> Cong. 2008); H.R. 67 (111<sup>th</sup> Cong. 2009).

<sup>135</sup> See H.R. 67, §102 (110<sup>th</sup> Cong. 2008) ("[E]stablishing a definitive period for reimbursing the Judgment Fund (as prescribed in Section 201 of the No FEAR Act of 2002) should encourage timely resolution or settlement of complaints.").

<sup>136</sup> *Id.*

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