

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Note

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at <http://www.jagcnet.army.mil>.

CERCLA Remedial Investigations, Feasibility Studies, Proposed Plans and Records of Decision

Cleanup Documents

The Comprehensive Environmental Response, Compensation and Liability Act¹ (CERCLA) addresses the identification, characterization, and the cleanup of releases of hazardous substances into the environment. It is triggered by the release or the substantial threat of a release into the environment of a hazardous substance as defined by the Act, or any pollutant or con-

taminant which presents an imminent and substantial danger to the public health or welfare.² Once triggered, CERCLA requires that the appropriate agency, known as the lead agent,³ assess the situation and take necessary steps to clean up the site.⁴ Whether these site cleanups, known as response actions, take the form of a removal action⁵ or a remedial action,⁶ they must be conducted consistent with the National Contingency Plan⁷ (NCP). This article focuses on the procedures generally applicable to remedial actions.⁸

In a cleanup conducted under CERCLA, after conducting some preliminary assessments of the clean up site,⁹ the lead agent responsible for cleanup will undertake a remedial investigation (RI) to determine the nature and extent of remediation needed at the site.¹⁰ This study is often performed concurrently with a feasibility study (FS),¹¹ which will be discussed in greater detail below. On the basis of the RI/FS, the lead agent can assess the available cleanup alternatives and select a preferred remedy.¹² These conclusions are then summarized in a proposed plan that explains the cleanup alternatives and preferred remedy to the public.¹³ Once the lead agent receives public comment, the conclusions of both studies are incorporated into the CERCLA Record of Decision (ROD).¹⁴ The require-

1. 42 U.S.C. §§ 9601-9675 (2000).

2. *See id.* § 9604(a).

3. The lead agency is the agency responsible for planning and implementing response actions addressing contamination. For releases occurring on or from DOD facilities or vessels, DOD is the lead agency. 40 C.F.R. § 300.5 (1999); *see also*, Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). For most matters concerning Army installations or sites, DOD has further delegated this authority to the Department of the Army.

4. *See* 42 U.S.C. § 9604; 40 C.F.R. pt. 300 (National Contingency Plan).

5. Removal actions address emergency situations and are usually taken in response to releases or contaminations that pose an imminent danger to human health or the environment. *See* 40 C.F.R. § 300.415(b)(1); *see also* ADMINISTRATIVE & CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 234, ENVIRONMENTAL LAW DESKBOOK VI-17 (1998) [hereinafter JA 234], available at <http://www.jagcnet.army.mil> (Civil Law/Environmental Law/Environmental Law).

6. Remedial actions are long-term actions designed to provide a permanent solution for any releases that have occurred. *See generally* 40 C.F.R. § 300.430 (Remedial investigation/feasibility study and selection of remedy); *see also* JA 264, *supra* note 5, at VI-20.

7. 40 C.F.R. pt. 300.

8. For the procedures applicable to removal actions *see id.* § 300.415; *see also* JA 264, *supra* note 5, at VI-17 through VI-20; Environmental Law Division Note, *CERCLA Non-Time Critical Removal Actions*, ARMY LAW., Aug. 1998, at 68.

9. This initial assessment is known as the remedial site evaluation, and consists of a Preliminary Assessment and possibly a Site Inspection. *See* 40 C.F.R. § 300.420; JA 264, *supra* note 5, at VI-20 through VI-22. This process might best be described as an initial reconnaissance of the clean up site.

10. 40 C.F.R. § 300.430(a)(2). The RI is a process undertaken to fully determine the nature and extent of the problem presented by the release and generally involves collecting and analyzing data relating to contamination at a given site. *Id.* §§ 300.430(a)(2), (b), (d).

11. *Id.* §§ 300.5, 300.430(e).

12. *See* 42 U.S.C. § 9621 (2000); 40 C.F.R. § 300.430(e).

13. *See* 42 U.S.C. § 9613(k); 40 C.F.R. § 300.430(f)(2).

14. 40 C.F.R. § 300.430(f)(4).

ments for the RI/FS, the proposed plan, and the ROD are provided for in the NCP.¹⁵

The Components of a Remedial Investigation

The NCP states that the purpose of the remedial investigation is to ensure that decision-makers have sufficient information to determine whether specific remedial action is needed and what form it will take.¹⁶ The information in the RI is then used when developing and weighing remedial alternatives intended to deal with risk.¹⁷ In order to properly and efficiently focus the RI, the lead agent goes through an initial planning phase which typically consists of the collection of existing site data, including data from previous investigations such as the Preliminary Assessment and Site Investigation.¹⁸ This stage of the process is referred to as scoping.¹⁹

RI/FS Scoping

As stated in the NCP, “[d]uring scoping, the lead and support agencies shall confer to identify the optimal set and sequence of actions necessary to address site problems.”²⁰ Steps are taken to gather initial information and conduct initial site management planning to, inter alia: preliminarily identify boundaries of the study area; identify likely remedial action objectives; determine whether removal or interim remedial actions are necessary; preliminarily identify initial data quality objectives and required or appropriate levels of clean up;²¹ and develop a baseline risk assessment (BRA).²²

A critical aspect of the scoping, and ultimately the RI/FS process, is to conduct the risk assessment—an investigation of possible risks posed to human health and the environment.²³ This information is needed when choosing the cleanup remedy.²⁴ To determine the appropriate remedy in response to a release of a hazardous substance, the lead agent must assess the level of contamination at the remediation site. To do so, it must, through the RI/FS process, collect and analyze data and identify specific areas of contamination, as well as likely responses to the situation.²⁵ The RI also identifies data quality objectives, outlining whether and what further work is needed. This data forms the foundation for a BRA, which looks to the release in question, possible migration patterns, and potential threats to human health and the environment.²⁶

Land reuse will be an important aspect of the risk assessment process. For example, cleanups of industrial sites that are intended to remain industrial will involve a different level of cleanup than if the same site was to be developed into a housing complex. Other important risk factors would include the proximity of residents or vulnerable species to the site, as well as the use and overall contamination of surrounding properties. Here, context is important. If your cleanup site is in the middle of an industrial complex, CERCLA would not require the lead agent to pursue the same level of cleanup required of a site surrounded, say, by apartments. All of these risk-related issues are assessed as part of the scoping process.²⁷ Then, the appropriate levels of cleanup are determined, in part, by identifying and analyzing the remediation standards applicable to the site.²⁸

15. *Id.* pt. 300. *See id.* § 300.430 (detailing the requirements of the RI/FS process); *see also* O'REILLY, RCRA AND SUPERFUND, A PRACTICE GUIDE WITH FORMS, ENVIRONMENTAL LAW SERIES §§ 11.12-.15 (2nd ed. 1995) (providing a detailed overview of the process).

16. 40 C.F.R. § 300.430(d).

17. *Id.* §§ 300.5; 300.430(d).

18. *See supra* note 9.

19. *Id.* § 300.430(b).

20. *Id.*

21. *See infra* notes 30-39 and accompanying text discussing Applicable or Relevant and Appropriate Requirements (ARARs).

22. *See* 40 C.F.R. § 300.430(b); JA 264, *supra* note 5, at VI-27.

23. 40 C.F.R. § 300.430(d)(1).

24. *Id.*

25. *Id.* § 300.430(b)-(e).

26. *Id.* § 300.430(b), (d)(1)-(2) (providing additional information on scoping).

27. *See id.* § 300.430(b).

28. The remediation standards are derived principally from applicable federal and state statutory and regulatory standards; the ARARs. *See infra* notes 30-39 and accompanying text.

Community Acceptance

The NCP requires that the cleanup agent also consider, when practicable, community concerns before beginning field work on the RI.²⁹ Community issues and needs should be assessed along with other information relating to remediation.

ARARs

Section 9621 of CERCLA specifies that remedial actions must comply with federal cleanup requirements and standards or, in specific cases, more stringent state environmental laws.³⁰ So, an important part of the RI process is to identify federal and state standards, known as Applicable or Relevant and Appropriate Requirements³¹ (ARARs), to determine what level of cleanup may be required at a given site.³²

Applicable Requirements include “those cleanup standards, standards of control and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location or other circumstance found at a CERCLA site.”³³ Relevant and Appropriate Requirements are the same as Applicable Requirements except that, “while not ‘applicable’ to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, [they] address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.”³⁴

For a standard to rise to the level of an ARAR, it must meet two requirements. First, it must be substantive.³⁵ In other words, the standard in question must pertain directly to the cleanup action.³⁶ Second, the standard must be properly promulgated; draft regulations or proposed standards do not rise to the level of a promulgated requirement.³⁷ If federally or state promulgated standards or regulations do not exist, it is possible that non-promulgated standards, proposed cleanup levels or other forms of guidance may be considered when defining cleanup goals.³⁸

Using the data and standards that have been defined so far, the lead agent develops a site-specific RA, which is incorporated into the RI. This assessment helps the decision-maker develop acceptable exposure levels for remedial alternatives³⁹ generally found in the FS.

The Components of the Feasibility Study

The FS is often performed concurrently with the RI. The purpose of the FS is to develop, screen, and analyze a range of remediation alternatives.⁴⁰ The driver for this document is the NCP's requirement that the decision maker outline the cleanup problems that may be encountered at a site and outline how they will be addressed. First, the FS discusses the specific contaminants at a site, their potential exposure pathways and the remediation goals. Remediation goals may be provided via ARARs⁴¹—such as maximum containment levels (MCL)⁴²—or other cleanup levels that are based on readily available information. Land use controls (LUCs) may be factored into alternatives, particularly among those that require little treatment.⁴³

29. 40 C.F.R. § 300.430(c)(2).

30. 42 U.S.C. § 9621(d)(2)(A)(ii) (2000). Only certain state standards will be considered applicable or relevant and appropriate within the meaning of section 9621. This category is limited to state standards that: (a) are identified by a state in a timely manner, and (b) are more stringent than federal requirements. See 40 C.F.R. § 300.5.

31. 42 U.S.C. § 9621(d). Section 9621 states that potential ARARs include any standard, requirement, criteria, or limitation under any federal environmental law and any promulgated standard, requirement, criteria, or limitation under a state environmental or facility siting law that is timely identified and more stringent than any federal standard. *Id.* § 9621(d)(2)(A).

32. 40 C.F.R. § 300.430(d)(3).

33. *Id.* § 300.5.

34. *Id.*

35. *Id.*; see also 40 C.F.R. § 300.400(g)(2)(I)-(viii).

36. 40 C.F.R. § 300.400(g)(2). See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, RCRA, SUPERFUND AND EPCRA HOTLINE TRAINING MODULE: INTRODUCTION TO APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS 6-7 (Updated ed. 1998) (OSWER9205.5-10A) [hereinafter OSWER9205.5-10A], available at <http://www.epa.gov/superfund/contacts/sfhotline/arar.pdf>.

37. *Id.*

38. 40 C.F.R. § 300.400(g)(4); OSWER9205.5-10A, *supra* note 36, at 8.

39. *Id.* § 300.430(d)(4).

40. *Id.* § 300.430(e). This would include a no-action alternative. *Id.* § 300.430(e)(6).

The LUCs are legal, technical, or administrative restrictions relating to access or use of property.⁴⁴

Once this process is complete, the FS identifies potential forms of treatment, including innovative technologies, if appropriate.⁴⁵ On the basis of all this data, the lead agent forms remedial alternatives⁴⁶ for consideration in accordance with the identified ARARs. These alternatives must be protective of human health and the environment.⁴⁷ Protectiveness is determined by assessing the likelihood that containment or treatment will be effective in eliminating, reducing, or controlling the risks posed by a given contaminant.⁴⁸ When developing alternatives, the FS is guided by three criteria: effectiveness, implementability, and cost.⁴⁹

Effectiveness

This is the degree to which a particular remedial alternative will reduce risk and offer long-term protection. The decision maker focuses on whether each alternative is likely to reduce toxicity, mobility, or volume of potential contamination while minimizing risk and maximizing compliance with ARARs.⁵⁰ Though active treatment is preferred, LUCs may be considered.⁵¹

41. *Id.* § 300.430(e)(2)(i).

42. The MCLs and MCL goals are established under the Safe Drinking Water Act, 42 U.S.C. §§ 300f, 300g-1 (2000). *See* 40 C.F.R. § 300.430(e)(2)(i)(B)-(C).

43. 40 C.F.R. § 300.430(e)(3)(ii).

44. Policy Letter, Department of Defense, subject: Policy on Land Use Controls Associated With Environmental Resotration Activities (17 Jan. 2001) (issued to the Secretary of the Army) [hereinafter DOD Policy Letter].

45. 40 C.F.R. § 300.430(e)(2)(ii).

46. *See Id.* §§ 300.430(e)(3)-(7).

47. The NCP requires that remediation goals shall establish acceptable exposure levels that are protective of human health and the environment. *Id.* § 300.430(e)(2)(I). Remedy alternatives must also be protective. *Id.* § 300.430(e)(9)(iii)(A)-(B).

48. *Id.* §§ 300.430(e)(2), (5). *See* 40 C.F.R. §§ 300.430(e)(2)(i)(A)(1) (systemic toxicants), 300.430(e)(2)(i)(A)(2) (known or suspected carcinogens), 300.430(e)(2)(i)(A)(3)(4) technical limitations and uncertainty, 300.430(e)(2)(F) (alternatives to MCLs or MCL goals)

49. 40 C.F.R. §§ 300.430(e)(7)(i)-(iii).

50. *Id.* § 300.430(e)(7)(i).

51. DOD Policy Letter, *supra* note 44.

52. *Id.* § 300.430(e)(7)(ii).

53. *Id.* § 300.430(e)(7)(iii).

54. *Id.* § 300.430(e)(9)(iii).

55. *Id.* § 300.430(e)(9)(iii)(A).

56. *Id.* § 300.430(e)(9)(iii)(B). Note that it is possible for an ARAR to be waived. *See id.* § 300.430(f)(1)(ii)(C).

Implementability

At this point, the decision-maker looks at the types of technologies that are available to deal with a problem and whether they are appropriate. If a remedial alternative requires equipment or specialists that are not likely to be available, it may be removed from consideration.⁵²

Cost

Both construction costs and long-term operations and maintenance costs are considered. Those alternatives that have an unreasonable price tag will be dropped from consideration.⁵³

Remedy Selection

Once alternatives have been identified, they are assessed against nine criteria established in the NCP.⁵⁴ These are: (1) *Overall Protection of Human Health and the Environment*: the lead agent considers each alternative to see whether it will adequately address risks to human health and the environment, assessing both short and long term risks;⁵⁵ (2) *Compliance with ARARs*: alternatives are assessed to determine whether they comply with ARARs;⁵⁶ (3) *Long Term Effectiveness and Permanence*: the decision-maker looks at effectiveness and permanence of a proposed remedy to see if each alternative can be

successful, assessing the magnitude of the residual risk from contamination that may remain onsite as well as the adequacy and reliability of controls;⁵⁷ (4) *Reduction in Toxicity, Mobility and Volume Through Treatment*: this step considers the degree to which the alternatives reduce contamination at the site;⁵⁸ (5) *Short-Term Effectiveness*: this criterion looks to the risks that may be posed during cleanup and a general estimate of when protection may be achieved;⁵⁹ (6) *Implementability*: this step looks at the technical and administrative feasibility of an approach, as well as the availability of services and materials;⁶⁰ (7) *Cost*: this criterion considers both the direct and indirect costs of a given alternative; the main question being whether it is practical given the expense;⁶¹ (8) *State Acceptance*: the decision maker assesses state concerns regarding cleanup issues and examines state comments on ARARs;⁶² (9) *Community Acceptance*: finally, the decision maker considers the public reaction to alternatives, outlining reservations or support for different cleanup approaches.⁶³ Also, after the RI/FS is completed, the documents are made available for public comment in accordance with the process described below.

After this weighing process is over, the alternatives are compared to one another. The same criteria outlined above will be used to assess each remedy. However, the terms of the NCP's nine criteria are broken out into specific phases. Criteria one and two (protection of human health and the environment and compliance with ARARs) are threshold considerations. If a proposed remedy does not meet these requirements, it cannot receive further consideration.⁶⁴ Then, the practical consider-

ations outlined in criteria three through seven are the balancing criteria; these examine the practical and technical aspects of a remedial alternative.⁶⁵ By balancing these first seven factors, the decision-maker begins to identify the most effective alternatives. Among these, the lead agent selects the preferred alternative: the remedy that is expected to be the most protective of human health and the environment, meets ARAR requirements, and is the most practical.⁶⁶ When confirming the preferred alternative, the last two modifying criteria—state and community acceptance—are considered.⁶⁷ After the positives and negatives of all alternatives have been assessed, the preferred alternative can be formalized as the preferred remedy.⁶⁸

Proposed Plan

At this point, the lead agent prepares a Proposed Plan, the purpose of which is to present the preferred alternative to the public.⁶⁹ The Proposed Plan should explain the steps taken by the lead agent to reach specific conclusions. The public is then given at least thirty days to comment.⁷⁰ Once public comment is received, a Responsiveness Summary is prepared. This document brings together comments, criticisms, and any new information that may have arisen during the comment period. The lead agent is also expected to provide its responses to the issues raised by the community. The Proposed Plan becomes part of the administrative record and is to be made available along with the final ROD.⁷¹

57. *Id.* § 300.430(e)(9)(C).

58. *Id.* § 300.430(e)(9)(D).

59. *Id.* § 300.430(e)(9)(E).

60. *Id.* § 300.430(e)(9)(F).

61. *Id.* § 300.430(e)(9)(G).

62. *Id.* § 300.430(e)(9)(H).

63. *Id.* § 300.430(e)(9)(I).

64. *Id.* § 300.430(f)(i)(1)(A).

65. *Id.* § 300.430(f)(i)(1)(B).

66. Note that the level of EPA involvement in the final remedy determination will be higher when a cleanup site is on the EPA's National Priorities List (NPL). *Id.* § 300.430(f). When a federal facility is on the NPL and parties fail to agree, the remedy may be selected by the EPA Administrator. *See id.* § 300.420(f)(4)(iii). Federal facilities that are not on the NPL must comply with state laws regarding a remedial action. 42 U.S.C. § 9620(a)(4) (2000).

67. 40 C.F.R. § 300.430(f)(1)(ii)(C). This does not mean that state or community acceptance to proposals cannot be considered earlier. When they become known, these factors can be considered as part of the decision making process.

68. *Id.* §§ 300.430(f)(1)(ii), (f)(4).

69. *Id.* §§ 300.430(f)(1)(B)(2), (f)(2).

70. *Id.* § 300.430(f)(3)(C).

71. *Id.* § 300.430(f)(3)(F).

The selected remedial action is documented in a CERCLA ROD.⁷² On a non-NPL site, the CERCLA lead agent may choose a final remedy with the assistance of the state and other regulators.⁷³ At an NPL site, final remedy selection authority rests with the EPA.⁷⁴ Either way, the requirements of the ROD are fundamentally the same. The document should explain what the lead agent plans to do and the logic behind its decision.

The ROD describes the site and the types of contamination at issue, outlining the risks being addressed. The document then outlines the alternatives considered, detailing why the selected alternative was chosen.⁷⁵ Specifically, the ROD explains why the selected remedy is expected to be protective of human health and the environment and how it will meet listed ARARs.⁷⁶ Then, the technical aspects of the remedy should be described. The ROD describes the technical aspects of how treatment will address or mitigate a given level or type of contamination.⁷⁷ In addition, the ROD will outline LUCs imposed at the site and list post remedy commitments, such as inspection requirements or conducting five-year reviews.⁷⁸ Finally, the ROD should also discuss public comments and the Army's responses. Once finalized, the ROD should be made available for public inspection.⁷⁹

When faced with the release or the substantial threat of a release into the environment of a hazardous substance as defined by CERCLA, the Army, when acting as a lead agent, must follow the requirements of the Act and the NCP. Doing so will help to ensure the proper response action that will protect the environment, public health and safety, and the interests of the Army. Ms. Barfield.

Procurement Fraud Division Note

The Miscellaneous Receipts Statute and Permissible Agency Recoveries of Monies

Recently, the Boeing Company and the Department of Justice (DOJ) settled two False Claims Act (FCA)⁸⁰ *qui tam* lawsuits,⁸¹ which alleged Boeing subcontractors provided the Army with defective transmission gear systems for the Chinook helicopter.⁸² As part of the settlement, Boeing agreed to pay approximately \$54 million in damages in addition to \$7.5 million in legal fees.⁸³ Significantly, a substantial portion of the settlement amount will be returned directly to open Army contracts at the affected command. As part of the settlement agreement, the Army will receive both goods and services at no additional cost to the government, to include: (1) a \$23.9 million contract modification that permitted the affected command to receive replacement transmission gears, (2) the waiver of

72. *Id.* §§ 300.430(f)(4)(i), (5)(ii).

73. 42 U.S.C. § 9604(c)(4) (2000); *see also* Exec. Order 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1967).

74. 40 C.F.R. § 300.430(f)(4)(iii). Additional requirements relating to cleanup documentation may be found in a Federal Facilities Agreement negotiated between the Army and the EPA.

75. *Id.* § 300.430(f)(5)(ii)(A)-(F).

76. If the proposed alternatives cannot meet ARARs or if ARAR requirements are expected to be waived, the ROD should outline these factors as well.

77. 40 C.F.R. § 300.430(f)(5).

78. *Id.* § 300.430(f)(5)(iii)(A)-(D).

79. *Id.* § 300.430(f)(6). Typically, RODs and other relevant documents are made available at local public libraries.

80. 31 U.S.C. §§ 3729-3733 (2000).

81. “[*Qui tam pro domino rege quam pro se ipso in hac parte sequitur* ‘who as well for the king as for himself sues in this matter.’” BLACK’S LAW DICTIONARY 1262 (Bryan A. Garner et al., eds., 7th ed. 1999). A *qui tam* action is one brought under a statute that allows a private person to sue for a penalty, part of which the government will receive. *Id.* In the case of the FCA, the statute authorizes an individual, acting as a private attorney general, to bring suit in the name of the United States and gives the government sixty days to decide whether to join the action. If the government joins the suit, it conducts the action. 31 U.S.C. § 3730. If the government decides not to join, the individual, known as the “relator,” conducts the action. *See id.*

82. *Miscellany*, 42 GOV’T CONTRACTOR 18, ¶ 319 (Aug. 9, 2000); *Boeing Moves To Have Judge Removed In Helicopter Whistleblower Case*, SEATTLE TIMES, July 7, 1997, at D.1, available at <http://archives.seattletimes.nwsource.com/cgi-bin/taxis/web/vortex/display?slug=boe&date=19970707>. The DOJ assumed control of a *qui tam* lawsuit filed by Brett Roby, alleging Speco, a Boeing subcontractor, made hundreds of faulty transmission gears that were installed in helicopters delivered by Boeing to the Army. *Id.*

83. *Miscellany*, *supra* note 82, at 18. A portion of the settlement amount was made contingent on unsuccessful appeals by Boeing of several district court rulings. Boeing made no admissions of liability. *United States ex rel. Brett Roby v. The Boeing Co.*, No. C-1-95-375 (S.D. Ohio Aug. 3, 2000) (Settlement Agreement).

\$3.4 million of reinspection costs, and (3) a warranty on over 400 such gears.

To anyone generally familiar with the Miscellaneous Receipts Statute⁸⁴ (MRS), the settlement structure described above might seem problematical in that the settlement award will not be deposited directly to the U.S. Treasury. This note will review the restrictions of the MRS and discuss several potential exceptions to the statute that allow an agency to retain funds recovered as a result of criminal, civil, and administrative procurement fraud related actions.

The Miscellaneous Receipts Statute

As a general rule, the MRS requires that all funds received on behalf of the United States be deposited in the general fund of the U.S. Treasury. Specifically, the law provides that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”⁸⁵ The general mandate of the MRS applies to “money for the Government *from any source* The original source of the money—whether from private parties or the government—is thus irrelevant.”⁸⁶ The United States Court of Appeals for the District of Columbia Circuit described the MRS as “deriv[ing] from and safeguard[ing] a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause, that ‘[n]o Money shall

be drawn from the Treasury, but in Consequence of Appropriations made by law.’”⁸⁷ The MRS precludes the Executive Branch from using these miscellaneous funds without the benefit of the proper exercise of Congress’s appropriations authority.⁸⁸ Improper obligation and expenditure of such moneys constitutes an “illegal ‘augmentation’” of an agency’s appropriated funds.⁸⁹

Significantly, the MRS only applies to the receipt of money. The Act is not applicable when an agency receives goods or services,⁹⁰ as was the case in the Boeing settlement mentioned above. Further, agency receipt of goods or services does not require an “offsetting transfer from current appropriations to miscellaneous receipts.”⁹¹ The nonapplicability of the MRS holds even if the agency could have received money in lieu of the goods or services and such funds would have been required to be deposited in the U.S. Treasury.⁹²

There are two established exceptions to the MRS mandate that moneys received on behalf of the United States be deposited in the Treasury: “(1) where an agency is specifically authorized to retain moneys it collects, and (2) where the moneys received qualify as refunds to appropriations.”⁹³ For example, “when a program is funded out of a revolving fund, the enabling legislation ordinarily expressly authorizes the agency to deposit program income into the revolving fund.”⁹⁴ However, the mere existence of a revolving fund, by itself, does not permit the agency to retain the funds; express statutory authority must still exist.⁹⁵ Additionally, in *Security and Exchange Commission –*

84. 31 U.S.C. § 3302(b).

85. *Id.*

86. *Scheduled Airlines Traffic Office, Inc. v. Department of Defense*, 87 F.3d 1356, 1362 (D.C. Cir. 1996) (emphasis in original).

87. *Id.* at 1361 (citations omitted).

88. *Id.* at 1362 (“By requiring government officials to deposit government monies in the Treasury, Congress has precluded the executive branch from using such monies for unappropriated purposes.”).

89. *Securities and Exchange Commission – Retention of Rebate Resulting From Participation In Energy Savings Program*, B-265734, 1996 U.S. Comp. Gen. LEXIS 82, at * 8 (Feb. 13, 1996).

90. *Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties*, B-226004, 1988 U.S. Comp. Gen. LEXIS 770, at *3 (July 12, 1988) (“The miscellaneous receipts statute is applicable only when money, as opposed to goods or services, has been provided to the agency.”).

91. *Id.*

92. *Id.*

93. *Tennessee Valley Authority—False Claims Act Recoveries*, B-281064, 2000 U.S. Comp. Gen. LEXIS 98, at * 4-5 (Feb. 14, 2000). For purposes of the second exception, the General Accounting Office (GAO) has defined a refund as “returns of advances, collections for overpayments, adjustments for previous amounts disbursed, or recovery of erroneous disbursements from appropriations or fund accounts that are directly related to, and are reductions of, previously recorded payments from the accounts.” *Id.* at *5-6 (citing 7 GAO POLICY AND PROCEDURES MANUAL FOR THE GUIDANCE OF FEDERAL AGENCIES § 5.4.A.1 (n.d.)).

94. *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*, B-230250, 1990 U.S. Comp. Gen. LEXIS 426, at *4 (Feb. 16, 1990); see also *TVA*, 2000 U.S. Comp. Gen. LEXIS 98, at *5. A revolving fund is a “fund established to finance a cycle of operations through amounts received by the fund. Within the Department of Defense, such funds include the Defense Working Capital Fund, as well as other working capital funds.” U.S. DEP’T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 2A, ch. 1, para. 010107.49 (Jan. 22, 2001), available at <http://www.dtic.mil/comptroller/fmr/02a/Chapter01.pdf>.

Retention of Rebate Resulting from Participation in Energy Savings Program,⁹⁶ the SEC was permitted to credit part of a rebate received from a utility company directly to that agency as a result of their energy efficiency efforts because the Energy Policy Act of 1992,⁹⁷ coupled with the relevant appropriations act, specifically permitted retention of fifty percent of energy efficiency rebates.⁹⁸ In the area of affirmative medical recovery, The Federal Medical Care Recovery Act⁹⁹ permits military medical treatment facilities to retain recoveries from third-party payers rather than return the money to the Treasury.¹⁰⁰

Criminal Restitution

A statutory exception to the MRS exists for criminal restitution ordered by federal courts directly to agencies. In 1982, Congress passed the Victim and Witness Protection Act (VWPA)¹⁰¹ in order to “provide restitution to as many victims and in as many cases as possible.”¹⁰² Significantly, governmen-

tal entities, including federal agencies, are considered victims entitled to restitution under the VWPA.¹⁰³ Congress amended the VWPA in 1996 with the passage of the Mandatory Victim Restitution Act (MVRA),¹⁰⁴ which provided for mandatory restitution for certain crimes,¹⁰⁵ “regardless of a defendant’s anticipated ability to pay.”¹⁰⁶ Governmental agencies remain victims entitled to restitution despite the amendments,¹⁰⁷ but in multiple victim cases the government is the last to be made whole.¹⁰⁸

Agency Recovery in Civil False Claims Act Litigation

The Civil False Claims Act¹⁰⁹ imposes pecuniary liability for false or fraudulent claims.¹¹⁰ Additionally, one unique feature of the FCA is its *qui tam* provision, which permits a private party to bring a FCA action on behalf of the United States.¹¹¹ The FCA provides for double damages and costs in the case of

95. *FEMA*, 1990 U.S. Comp. Gen. LEXIS 426, at *4 (“Our Office has held that if the legislation establishing a revolving fund does not expressly authorize an agency to deposit receipts of a particular type into the revolving fund and there is no other basis for doing so, those receipts—even if related in some way to the programs the revolving fund supports—must be deposited in the Treasury as miscellaneous receipts.”); *accord TVA*, 2000 U.S. Comp. Gen. LEXIS 98, at *5.

96. B-265734, 1996 U.S. Comp. Gen. LEXIS 82, at *1 (Feb. 13, 1996).

97. 42 U.S.C. § 8256(c) (2000).

98. *SEC*, 1996 U.S. Comp. Gen. LEXIS 82, at *5-7.

99. 10 U.S.C. § 1095 (2000).

100. *Id.* § 1095(g)(1) (“Amounts collected under this section from a third-party payer or under any other provision of law from any other payer for health care services provided at or through a facility of the uniformed services shall be credited to the appropriation supporting the maintenance and operation of the facility and shall not be taken into consideration in establishing the operating budget of the facility.”).

101. 18 U.S.C. § 3663 (2000).

102. *United States v. Martin*, 128 F.3d 1188, 1190 (7th Cir. 1997). The VWPA provided federal courts with the authority to order restitution without making the order a condition of probation. *Id.*

103. *Id.* (“federal courts have consistently held that governmental entities can be ‘victims’ under the VWPA.”). According to the Seventh Circuit, agencies or entities entitled to restitution include the Postal Service, the Small Business Administration, Medicare and the Department of Labor. *Id.* at 1190-91 (citations omitted). The court also noted cases in other circuits authorizing restitution to such agencies as the Department of Labor, Social Security Administration, Federal Bureau of Investigation, Department of Housing and Urban Development, Department of Agriculture and the Department of Defense. *Id.* at 1191 (citations omitted).

104. 18 U.S.C. § 3663A (codification of Pub. L. No. 104-132, § 204(a), 112 Stat. 1227). The MVRA “governs actions dating from April 2, 1996.” *United States v. Malpeso*, 126 F.3d 92, 94 n.1 (2nd Cir. 1997).

105. Mandatory restitution must be ordered in cases where the defendant has been convicted or plead guilty to crimes of violence, pro perjury crimes including those “committed by fraud or deceit,” and certain offenses involving “tampering with consumer products.” 18 U.S.C. § 3663A(c)(1)(a).

106. *Weinberger v. United States*, 71 F. Supp. 2d 803, 809 (S.D. Ohio 1999).

107. *Martin*, 128 F.3d at 1192.

108. 18 U.S.C. § 3664(i) (“In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.”).

109. 31 U.S.C. §§ 3729-3733 (2000).

110. *Id.* § 3729(a).

111. *Id.* § 3730(b).

voluntary disclosures, treble damages otherwise, and a civil penalty of \$5,500 to \$11,000 per claim.¹¹²

Significantly, the Comptroller General has characterized certain types of recoveries under the FCA as refunds for purposes of the MRS. In a 1990 opinion involving the Federal Emergency Management Agency (FEMA), the Comptroller General posited that FEMA could retain single damages, interest on that amount, and the administrative costs of investigating the false claims as a result of any FCA award or settlement.¹¹³ These funds were a direct consequence of the fraud and would serve to make the agency whole.¹¹⁴ In contrast, the Comptroller General refused FEMA's request to retain the treble damages, determining that any amount collected from a FCA lawsuit which exceeded the agency's actual losses were more in the nature of a civil penalty and must be returned to the Treasury as miscellaneous receipts.¹¹⁵

Last year, the Comptroller General again addressed the issue. In *Tennessee Valley Authority—False Claims Act Recoveries*,¹¹⁶ the TVA was permitted to retain from a FCA recovery, as a refund, "moneys erroneously disbursed on the basis of the false claim" and "investigative costs . . . directly related to the false claim."¹¹⁷ Once again, the Comptroller General denied the agency request to retain double and treble damages because

they were "exemplary damages, not actual losses" and TVA did not possess statutory authority to retain damages in the nature of a penalty.¹¹⁸

A significant limitation on agency retention of recovered money is the time required to receive the funds. Oftentimes it will take years to resolve a FCA lawsuit. In *Appropriation Accounting—Refunds And Collectibles*,¹¹⁹ the Comptroller General determined that refunds may be credited to the appropriation account charged with paying the original obligation, even if it has "expired," and those funds would then be "available for recording or adjusting obligations properly incurred before the appropriation expired."¹²⁰ However, if the appropriation account is "closed," any refund must be returned to the Treasury's general fund as a miscellaneous receipt.¹²¹

No Agency Recovery for PFCRA Actions

The Program Fraud Civil Remedies Act of 1986 (PFCRA)¹²² was enacted to provide agencies with an administrative mechanism to take action against any person who submits a false, fictitious or fraudulent claim for payment,¹²³ usually after the Department of Justice has declined to litigate it.¹²⁴ The Act subjects a contractor to a penalty of up to \$5,500 per false claim or

112. *Id.* § 3729(a) (as adjusted for inflation by DOJ, Civil Monetary Penalties Inflation Adjustment, 28 C.F.R. § 85.3(a)(9) (2000)).

113. Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act, B-230250, 1990 U.S. Comp. Gen. LEXIS 426, at *2 (Feb. 16, 1990).

114. *Id.* at *9.

115. *Id.* at *10.

116. B-281064, 2000 U.S. Comp. Gen. LEXIS 98, at *1 (Feb. 14, 2000).

117. *Id.* at *6.

118. *Id.* at *7 ("In the absence of statutory authority, agencies must deposit into the Treasury amounts recovered that are in the nature of penalties."); *see also*, Public Int. Research Group of N.J. v. Powell Duffryn Term., Inc., 913 F.2d 64, 82 (3rd Cir. 1990) (stating that civil penalties in Clean Water Act cases must be paid to the U.S. Treasury); *accord* United States v. Smithfield Foods, Inc., 982 F. Supp. 373 (E.D. Va. 1997). As a general rule, any "penalty which is imposed pursuant to a federal statute, in a suit brought by the federal government . . . constitutes 'public money' . . . [and] [a]s such, it must be deposited with the Treasury, in accordance with the Miscellaneous Receipts Act, unless otherwise specified by Congress." *Id.* at 374.

119. B-257905, 1995 U.S. Comp. Gen. LEXIS 821, at *1 (Dec. 26, 1995).

120. *Id.* at *6.

121. *Id.* To illustrate, Operation & Maintenance appropriations expire after one fiscal year (FY), but are closed five years after the end of the original FY. In FY 1 the Army contracts for widgets, but is overcharged and receives defective widgets. The Army, or a *qui tam* relator, files a FCA suit against the contractor, who settles in FY 5. Money recovered pursuant to a FCA award or settlement that represents the Army's actual losses as a result of the fraud may be returned to the expired OMA account. However, if the case is resolved when the OMA account has closed, the entire recovery must be deposited in the general fund of the U.S. Treasury.

122. 31 U.S.C. §§ 3801-3811 (2000).

123. *Orfanos v. Department of Health And Human Serv.*, 896 F. Supp. 23, 24-25 (D.D.C. 1995) (citing 31 U.S.C. § 3802 and stating that the PFCRA was "enacted in 1986 to allow federal departments and agencies . . . to pursue administrative actions against individuals for false, fictitious or fraudulent claims for benefits or payments under a federal agency program.").

124. S. REP. NO. 99-212, at 8, 10 (1985); *see also* Major Uldric L. Fiore, *Program Fraud Civil Remedies Act—The "Niche" Remedy*, ARMY LAW., Sept. 1990, at 58 (stating that "PFCRA cases must not be subject to DOJ/U.S. Attorney civil action. PFCRA does not require criminal declination, but an ongoing criminal investigation usually indicates PFCRA is at least premature.").

statement and an assessment of up to double the amount falsely claimed.¹²⁵

Because the legislative history indicates that PFCRA was designed to target “small-dollar fraud cases”¹²⁶ and because the jurisdictional cap for PFCRA actions is \$150,000 per claim (or group of related claims),¹²⁷ the Act has been characterized as a “mini False Claims Act.”¹²⁸ Unlike the FCA, which does not specifically address the disposition of money collected as a result of an award or settlement, PFCRA is not silent on the issue.¹²⁹ Section 3806(g) specifically states that, with the exception of certain penalties or assessments imposed by the United States Postal Service or the Secretary of Health and Human Services, “any amount of penalty or assessment collected . . . shall be deposited as miscellaneous receipts in the Treasury of the United States.”¹³⁰ Further, money collected by administrative offset¹³¹ must be treated as miscellaneous receipts and deposited in the U.S. Treasury.¹³² As such, in contrast to the FCA, recovery under the PFCRA may not be

retained by the agency, even if the amount recovered would be used to make the agency whole. There is, therefore, little incentive for agencies to use it.¹³³ If the statute could be amended to allow agencies to keep recoveries, however, PFCRA could become a valuable weapon in the arsenal of recovery mechanisms that steer clear of the MRS.

Replacement Contracts

Federal acquisition law provides a number of grounds for default terminations of a contract.¹³⁴ In some circumstances, contract fraud may provide grounds to terminate the contract.¹³⁵ In *Daft v. United States*,¹³⁶ the U.S. Court of Federal Claims stated: “Fraud taints everything it touches[;] . . . [c]onsequently, proof of fraud by clear and convincing evidence is a ground for default termination.”¹³⁷ Further, in *Morton v. United States*,¹³⁸ the court sustained a default termination of a “large,

125. 31 U.S.C. § 3802 (as adjusted for inflation by DOJ, Civil Monetary Penalties Inflation Adjustment, 28 C.F.R. § 85.3(a)(10) (2000)); *see also* S. REP. NO. 99-212, at 19 (“The sponsors of [the bill] always intended . . . that the assessment would be calculated only on the false portion of the claim.”). In March 1991, the Army achieved its first successful PFCRA recovery when a subcontractor agreed to pay double damages of \$5,000 plus \$10,000 in penalties. Procurement Fraud Division Note, *Army Procurement Fraud Program—Recent Developments*, ARMY LAW., Aug. 1991, at 22, 23 (*Army Obtains First DOD Recovery Under The Program Fraud Civil Remedies Act*).

126. S. REP. NO. 99-212, at 5, 8, 10.

127. 31 U.S.C. § 3803(c)(1)(A) & (B).

128. S. REP. NO. 99-212, at 24; *see also id.* at 34 (“[T]he Program Fraud bill is based on the civil False Claims Act—serving as the administrative alternative for small-dollar false claims . . .”).

129. Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act, B-230250, 1990 U.S. Comp. Gen. LEXIS 426, at *9 n.2 (Feb. 16, 1990) (holding that the FCA is silent on the issue, while the PFCRA is not).

130. 31 U.S.C. § 3806(g)(1) & (2); *see also* S. REP. NO. 99-212, at 50 (“[A]ny penalty and assessment collected shall be deposited as miscellaneous receipts in the U.S. Treasury.”).

131. Offset authority permits “an agency to deduct the amount of any sum owed by a person under a Program [sic] Fraud proceeding from amounts otherwise owed to that person from the United States.” S. REP. NO. 99-212, at 30.

132. 38 U.S.C. § 3807(b); *see also* S. REP. NO. 99-212, at 50 (“All amounts retained through setoff . . . shall be deposited as miscellaneous receipts in the U.S. Treasury.”).

133. The PFCRA in fact acts as a disincentive because the agency must bear the costs of litigation in an administrative hearing. The Army Procurement Fraud Division is currently pursuing its first PFCRA case in almost a decade.

134. “The standard default clauses identify three different grounds for termination: (1) failure to deliver the product or complete the work or service within the stated time, (2) failure to make progress in prosecuting the work and thereby endangering completion, and (3) breach of ‘other provisions’ of the contract.” JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 908 (3rd ed. 1995). Two nonenumerated grounds include the failure to proceed and anticipatory repudiation. *Id.*

135. *Id.* at 938 (*citing in part* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.203-3 (June 1997) (anti-gratuities clause) [hereinafter FAR]); 41 U.S.C. §§ 51-54 (2000) (Anti-kickback Act, prohibiting any subcontractor from making a gift to a contractor or higher-tier subcontractor as inducement for the award of a subcontract).

136. 31 Fed. Cl. 682 (1994), *aff’d*, *Daft v. United States*, 78 F.3d 1566 (Fed. Cir. 1996).

137. *Id.* at 688. The court also held that a termination for default based on fraud can be supported by additional fraud discovered after the initial termination decision. *Id.* Affirming the decision, the United States Court of Appeals for the Federal Circuit found a valid reason to default the contract or in addition to fraud, “defective contract performance,” but declined to address the issue of whether a contracting officer could terminate for default based *solely* on fraud. *Daft*, 78 F.3d at 1572 n.9.

138. 757 F.2d 1273 (Fed. Cir. 1985).

sophisticated contract” for fraud involving a single change order.¹³⁹

As a remedy for default terminations, the government is entitled to reprocurement or completion costs.¹⁴⁰ Rather than requiring that reprocurement costs be placed in the U.S. Treasury, an agency may use these funds for replacement contracts.¹⁴¹ The agency may retain all funds received that are necessary to pay for the replacement contract, even if the reprocurement costs exceed the cost of the original contract.¹⁴² Similarly, money received as liquidated damages, including performance bond money, may be retained by an agency if used to fund a replacement contract.¹⁴³ The funds received by the agency are in the nature of “refunds.”¹⁴⁴ The rationale for allowing the agency to retain excess costs of reprocurement is “that the money should be used ‘to make good the appropriation which will be damaged’ by having to incur costs in excess of the original contract price to receive the goods or services that would have been received under the original contract but for the default.”¹⁴⁵ This reasoning applies regardless of the type of appropriation.¹⁴⁶

However, the agency is limited in how it uses these funds. The Comptroller General has held that “an agency may only credit the funds to the appropriation charged with the contract that resulted in the liquidated damages. As such, the funds are only available to fund contracts properly chargeable to the original appropriation.”¹⁴⁷ A bona fide need must still exist for the goods or services contemplated in the original contract. The replacement contract “must be of substantially the same size and scope as the original contract and should be executed ‘without undue delay’ after the original contract is terminated.”¹⁴⁸

Negotiated Contractual Resolutions

Whenever the Contracting Officer (CO) suspects that a contract has been tainted by fraud, the CO must refer the matter for investigation.¹⁴⁹ The CO may not settle, pay, compromise, or adjust any claim involving fraud.¹⁵⁰ By statute, authority for all fraud-related litigation rests with the DOJ¹⁵¹ and inherent to that authority is the ability to settle.¹⁵² However, in cases where allegations of fraud are “founded” by criminal investigators, but DOJ has declined criminal and civil action, the CO may

139. In *Morton*, the contractor “point[ed] out there were approximately 950 alterations and change orders by the government.” *Id.* at 1277.

140. CIBINIC & NASH, *supra* note 134, at 998 (“Excess costs of reprocurement or completion are the unique remedies given to the Government upon a valid default termination.”).

141. Major Timothy D. Matheny, *Go On, Take te Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions*, ARMY LAW. Sept. 1997, at 31, 39 (citations omitted) (“The GAO recognizes an exception allowing an agency ‘to retain recovered excess reprocurement coststo fund replacement contracts.’”).

142. *Id.*

143. National Park Service—Disposition of Performance Bond Forfeited To Government by Defaulting Contractor, B-216688, 64 Comp. Gen. LEXIS 625, at *6 (June 20, 1985). Excess reprocurement costs reflect the government’s actual costs and are “based on the difference in price between the defaulted contract and the reprocurement contract as adjusted for all increases in the original contract price to which the defaulted contractor is entitled, and for any cost increases resulting from changes in the work or Government misconduct under the reprocurement contract.” CIBINIC & NASH, *supra* note 134, at 1042. Liquidated damages reflect the parties’ reasonable estimate of the government’s damages in the event of breach or termination. *Id.* at 1050-51. The government may recover both excess reprocurement costs and liquidated damages. *Id.* at 1049. Despite the distinction between the two, the Comptroller General has opined that when liquidated damages are used to fund a replacement contract, any legal distinction between liquidated damages and reprocurement costs “is not pertinent.” *National Park Service*, 64 Comp. Gen. LEXIS 625, at *6.

144. Department of Interior—Disposition of Liquidated Damages Collected for Delayed Performance, B-242274, 1991 U.S. Comp. Gen. LEXIS 1072, at *2-3 (Aug. 27, 1991) (“An agency may, however, deposit receipts that constitute refunds, including amounts collected as liquidated damages, to the credit of the appropriation or fund charged with the original expenditure.”).

145. Army Corps of Engineers – Disposition of Funds Collected in Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838 at*4-7 (Sept. 8, 1986). In this case, the Comptroller General stated further that “[i]f the agency could not retain the funds for the purpose and to the extent indicated, it could find itself effectively paying twice for the same thing, or possibly, if it lacked sufficient unobligated money for the reprocurement, having to defer o r forego a needed procurement, with the result in many cases that much if not all of the original expenditure would be wasted.” *Id.* at *6.

146. *Id.* at *9 (holding that the type of appropriation, to include a multi-year appropriation, would make no difference).

147. *Department of Interior*, 1985 Comp. Gen. LEXIS 625, at *3.

148. *Id.* at *4.

149. FAR, *supra* note 135, at 33.209. The Army Procurement Fraud Division is authorized to receive such referrals directly from the CO and a Procurement Fraud Advisor should be contacted in the event of a fraud investigation. U.S. DEP’T OF ARMY, REG. 27-40, LITIGATION, para. 8.3(a)(2) (19 Sept. 1994).

150. FAR, *supra* note 135, at 33.210. Additionally, the Contract Disputes Act, 41 U.S.C. § 605(a) (2000), precludes the agency, and the CO as an agent of the agency, from resolving disputes involving fraud. TDC Management Corp., DOT BCA No. 1802, 90-1 BCA ¶ 22,627, at 113, 492.

151. 28 U.S.C. § 516 (2000).

desire to resolve the contractual dispute—subject to DOJ approval—rather than allow the dispute to languish or terminate for default and force the contractor to appeal.

Under such circumstances, the CO will want to structure the contractual resolution in such a manner as to maximize the monetary return directly to the agency. The CO may legitimately obtain goods and services as a replacement-in-kind for nonconforming items or work without triggering the MRS. Further, any monetary relief obtained which is properly characterized as a refund¹⁵³ of an erroneous payment or an overpayment,¹⁵⁴ may also be retained by the agency without running afoul of the MRS.

Conclusion

As the Boeing case illustrates, proactive involvement in the resolution of contractual disputes, particularly those involving allegations of fraud, can pay hefty dividends to agency coffers. Judge Advocates should be aware that, despite the fiscal law restrictions contained in the Miscellaneous Receipts Statute, certain procurement fraud-related recoveries may be retained by the agency rather than being deposited in the U.S. Treasury. This note has attempted to identify several avenues for the retention of such recoveries. Lieutenant Colonel Davidson.

Litigation Division Note

Renting a Car While TDY: Let the Renter Beware

Introduction

A service member has temporary duty (TDY) orders that authorize use of a rental car. Could this be his chance to tool through the streets of San Diego in a Mercedes convertible the weekend after his conference ends? And what about this document called U.S. Rental Car Agreement Number 2? What is it and how will it affect him? What does he

need to know before renting a car using government orders, what are authorized uses of the rental car, and will he be considered to be within the scope of his employment for all rental car uses while on TDY?

This article tells you all you ever wanted to know about U.S. Government Car Rental Agreement Number 2 (*Rental Agreement Number 2*), and why anyone renting a car while on TDY should be familiar with its terms. It also discusses factors to consider before renting a car with government orders, and provides guidance on determining the authorized uses of a rental car. The article next addresses the liability implications of using a rental car for official and non-official travel. Lastly, the article describes what judge advocates should do if their office receives a request for representation dealing with an accident involving a rented vehicle, and what the judge advocate should consider when making a recommendation as to whether a service member or federal employee was acting within the scope of his employment.

U.S. Rental Car Agreement Number 2

The Military Traffic Management Command (MTMC) negotiated *Rental Agreement Number 2*¹⁵⁵ with many car rental agencies for use by government employees. When renting a car with government orders from one of the participating rental franchises, the terms of the MTMC negotiated car rental agreement apply.

Rental Agreement Number 2 covers “rentals of cars and passenger vans by employees of the Federal Government” when the employee rents the vehicle with government orders.¹⁵⁶ Participating rental companies submit a list of participating outlets annually to MTMC.¹⁵⁷ Generally, the agreement specifies the rental terms with participating rental companies. The terms include specifics about reservations, rental car quality, location of participating outlets, and liability insurance.

Federal employees making reservations with a participating rental company outlet do not need a credit card.¹⁵⁸ The reserva-

152. United Technologies Corp., ASBCA No. 46880, 95-2 BCA ¶ 27, 698; see also 4 C.F.R. § 101.3 (2000) (“Only the Department of Justice has authority to compromise, suspend, or terminate collection action on [false claims or those where there is an indication of fraud].”).

153. “In situations where we treated a contract adjustment or price renegotiation as a refund that could be credited to an [originally charged] appropriation . . . the ‘refund’ reflected a change in the amount the government owed its contractor based on the contractor’s performance or a change in the government’s requirements.” Securities and Exchange Commission-Reduction of Obligation of Appropriated Funds Due To a Sublease, B-265727, 1996 Comp. Gen. LE XIS 374, at *1 (July 19, 1996).

154. Matheny, *supra* note 141, at 40 (citations omitted). The return of these types of payments may also be characterized as a refund. Rebates from Travel Management Center Contractors, B-217913, 65 Comp. Gen. LEXIS 600, at *4 (May 30, 1986).

155. MILITARY TRAFFIC MANAGEMENT COMMAND, U.S. GOVERNMENT CAR RENTAL AGREEMENT NUMBER 2 (Feb. 26, 1996) [hereinafter CAR RENTAL AGREEMENT], at <http://dcsop.mtmc.army.mil/travel/car/agree.PDF>.

156. *Id.* ¶ 1.

157. Not all franchises of rental companies participate in the program. A list of all program participants is available at <http://dcsop.mtmc.army.mil/travel/car/list.pdf>.

tion agency will provide a confirmation number.¹⁵⁹ If a car is not available, the rental company agent must offer to rent a larger car at the same price, or, with the renter's consent, provide a smaller car at a reduced rate.¹⁶⁰ Rental companies must hold reservations at least two hours after a scheduled pick-up time.¹⁶¹

Federal employees renting vehicles must show travel orders or a government credit card to verify their travel status.¹⁶² Acceptance of a government credit card is mandatory.¹⁶³ Employees without a credit card are required to provide a cash deposit up to the estimated amount of the rental charge.¹⁶⁴ Rental companies are "strictly prohibited" from pre-charging a renter's credit card.¹⁶⁵ If the rental contract contains provisions that are contrary to *Rental Agreement Number 2*, the provisions of the agreement control and the contrary provisions of the rental contract will not bind the renter.¹⁶⁶

If more than one federal employee is traveling to the same destination, all drivers need not be listed on the rental contract. Authorized drivers of the rental vehicle include the renter and fellow employees acting within the scope of their employment duties.¹⁶⁷ Federal employees who are eighteen years of age or

older may rent and operate a vehicle when on official business.¹⁶⁸

Participating rental companies agree to provide vehicles that are less than two years old and have fewer than 40,000 miles on the odometer.¹⁶⁹ The vehicles must be clean, properly licensed, and have a full tank of gas.¹⁷⁰ If the car is disabled, the renter should notify the rental company.¹⁷¹ If the car is damaged, the renter must request a copy of the accident report for the rental company, if applicable.¹⁷² If a renter needs a new car, the rental company franchise will deduct time spent waiting for a replacement from the total amount of rental time.¹⁷³

Rental companies participating in the program must have either in-terminal outlet locations or off-terminal outlet locations within the vicinity of the airport.¹⁷⁴ If a renter has a reservation and no vehicle is available, the agency must arrange for another vehicle through another participating rental agency.¹⁷⁵

Participating rental franchises must carry insurance "which will protect the United States Government and its employees against liability for personal injury, death, and property damage arising from the use of the vehicle."¹⁷⁶ *Rental Agreement Number 2* requires the rental companies to provide personal injury

158. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 6.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.* ¶ 7.

163. *Id.* *See generally* General Services Administration, Federal Travel Regulations; Mandatory Use of the Travel Charge Card, Part III, 65 Fed. Reg. 3054 (2000), *as amended by* 65 Fed. Reg. 16,828 (2000) (codified in scattered sections of 41 C.F.R. ch. 301). All government travelers must use their government travel charge card for official travel after 1 May 2000. 65 Fed. Reg. 16,828.

164. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 7.

165. *Id.* If the rental company pre-charges a credit card, it is grounds for immediate nonuse of the rental company. *Id.*

166. *Id.* ¶ 1.

167. *Id.* ¶ 8.

168. *Id.* The employee must be eligible to rent a car. For example, the employee must have a valid license.

169. *Id.* ¶ 10.

170. *Id.* The renter is expected to return the vehicle with a full tank of gas unless he agrees to pay the refueling fee and will use the full tank and return the tank empty. The renter should consider what option is most economical for the government, not just what is most convenient.

171. *Id.* ¶ 11.

172. *Id.*

173. *Id.*

174. *See id.* ¶ 3a. Any off-terminal locations "must be accessible by timely and clearly marked shuttle bus service or other such service, from clearly defined locations in the airport . . . [and] elapsed time to the rental office [may] not exceed 25 minutes from the time the traveler requested pick up service." *Id.*

175. *Id.* ¶ 5.

and wrongful death limits of “at least \$100,000 for each person for each accident or event, \$300,000 for all persons in each such accident or event, and property damage limits of \$25,000 for each such occurrence.”¹⁷⁷ If state or host nation law requires more favorable insurance, “such terms will apply to the rental.”¹⁷⁸

The United States is not liable for loss or damage to the rented vehicles. The participating rental company must bear the risk of damage or loss from all causes,¹⁷⁹ except for loss or damage caused by the following:

- (1) Willful or wanton negligence on the part of the driver;
- (2) Obtaining the vehicle through fraud or misrepresentation;
- (3) Operation of the vehicle by a driver who is under the influence of intoxicants or any prohibited drugs;
- (4) Use of the vehicle for any illegal purpose;
- (5) Use of the vehicle in pushing or towing another vehicle;
- (6) Use of or permitting the vehicle to carry passengers or property for hire;
- (7) Operation of the vehicle in live artillery fire exercises, or use in training for tactical maneuvers;
- (8) Operation of the vehicle in a test, race, or contest;
- (9) Operation of the vehicle by a person other than an authorized driver;

(10) Operation across international boundaries unless specifically authorized at time of rental;

(11) The vehicle is stolen and the renter cannot produce vehicle keys, unless a filed Police report indicates keys were stolen through theft or robbery; [or]

(12) Operation of the vehicle off paved, graded, state or professionally maintained roads, or driveways, except when the Company has agreed to this in writing beforehand.¹⁸⁰

If a federal employee damages or destroys a vehicle by one of the listed exceptions, the rental company will bill the renter’s agency, not the employee. However, if the renter’s agency determines the employee was not acting within the scope of his employment¹⁸¹ and declines reimbursement, the rental company may deal directly with the employee.¹⁸²

If a rental company violates the terms of *Rental Agreement Number 2*, MTMC may place the rental company off limits.¹⁸³ *Rental Agreement Number 2* does not state how long a rental company will be placed off limits. The MTMC will look to the nature of the violation, whether this is the first reported violation, and whether the company has had numerous violations. Employees aware of violations or problems with rental cars may report them to MTMC.¹⁸⁴

Rental Agreement Number 2 governs rental car contracts for federal employees renting cars from participating outlets when such rentals are “authorized by the Government.”¹⁸⁵ It is a comprehensive document that contains the terms and conditions of

176. *Id.* ¶ 9a.

177. *Id.* Because the rental company provides insurance, claims for damages involving federal employees in a rental car are referred to the rental company. The United States Army Claims Service (USARCS) will usually only participate in settling claims that exceed the limits of the required insurance. See *infra* notes 201-206 and accompanying text.

178. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9a.

179. *Id.* ¶ 9b. The rental company also bears the “costs of towing, administrative costs, loss of use, and replacements.” *Id.* *Rental Agreement Number 2* states that the rental company “assumes and shall bear the entire risk of loss of or damage to the rental vehicles . . . from any and every cause whatsoever, including without limitation, casualty, collision, fire, upset, malicious mischief, vandalism, tire damage, falling objects, overhead damage, glass breakage, strike, civil commotion, theft, mysterious disappearance.” *Id.* See Matter of: Americar Rental System, Inc.—Damage to Rental Cars, B-261274, 1996 U.S. Comp. Gen. LEXIS 8, at *1 (Jan. 16, 1996).

180. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9b. The enumerated exceptions are not valid if prohibited by state law. *Id.*

181. See *infra* notes 211-220 and accompanying text.

182. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9c.

183. See *id.* ¶ 12.

184. The MTMC asks that the renter bring the complaint initially to the manager of the renting location. If the problem cannot be resolved there, the renter should contact his agency’s transportation office, or the government representative of the rental car company. If those steps do not work, complaints should be sent to HQ MTMC, Hoffman II, ATTN: MTPP-AQ (Christine Braswell), 200 Stovall Street, Alexandria, VA 22332-5000. See Military Traffic Management Command, *Car Rental*, at <http://dcsop.mtmc.army.mil/travel/car/default.htm> (last modified Dec. 5, 2000).

185. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 1.

participating outlets and enumerates when and to what extent rental car companies are liable for damages arising out of accidents involving their rentals as well as when they will bear the cost of damages to their vehicles. Knowledge of the contents of the agreement is helpful to federal employees renting cars for official travel if there are problems with the car or if they are involved in an accident.

Authorized Uses of Rental Cars

Generally, federal employees must use government property only for government purposes.¹⁸⁶ Use of government owned or leased vehicles while on TDY is authorized under limited circumstances,¹⁸⁷ but strictly restricted to official use.¹⁸⁸ The question remains, however, whether a car rented with official travel orders is government property subject to certain use limitations.¹⁸⁹

In *Chufo v. Department of the Interior*,¹⁹⁰ the Court of Appeals for the Federal Circuit held that a car rented by a government employee using his government charge card was not a “government leased” vehicle for purposes of 31 U.S.C. § 1349(b).¹⁹¹ Although the government ultimately reimburses a traveler for the cost of his official travel, the court held that the government is not a party to the rental contract between the rental company and the traveler.¹⁹² This is true even though the

government establishes the terms of the rental through *Rental Agreement Number 2*.¹⁹³

At issue in *Chufo* was whether the plaintiff violated 31 U.S.C. § 1349(b) when he used his rental car for personal travel over the weekend before his government conference began on a Monday. Mr. Chufo requested permission to rent a car over the weekend to visit a work-related establishment. He did not, however, visit the establishment; instead he used the car to travel 300 miles on personal business.¹⁹⁴ The court held that Mr. Chufo, not the government, had rented the car. Mr. Chufo was responsible for paying the debt on his government-issued credit card, even though the government would reimburse him for his official travel expenses.¹⁹⁵ According to the court, since the government was not party to the contract, the rental car could not be considered a vehicle “owned or leased by the United States Government,” as those terms are used in section 1349(b).

Consistent with *Chufo*, the Department of Army General Counsel has opined that “[i]f the cost of renting a vehicle for a period during which the vehicle is used for both official and non-official travel does not exceed the cost of renting the vehicle for the period required to accomplish official travel, there is no requirement to prorate the rental fee in computing authorized reimbursement.”¹⁹⁶ Of course, renters using rental cars for both official and non-official travel may seek reimbursement for the expenses resulting from official travel only.¹⁹⁷

186. U.S. DEP’T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION, para. 2-301 (Aug. 30, 1993) (C2, 25 Mar. 1996) [hereinafter JER]. The regulation provides that federal government resources, including “personnel, equipment, and property, shall be used by DOD employees for official purposes only,” subject to limited exceptions. *Id.* para. 2-301b.

187. See 1 Joint Fed. Travel Regs. ¶ U3200 (1 Mar. 2001) (military members) [hereinafter JFTR]; 2 Joint Travel Regs. ¶ C2001.A.3 (1 Mar. 2001) (civilian employees) [hereinafter JTR].

188. JER, *supra* note 32, para. 2-301; JFTR, *supra* note 33, ¶ U3200; JTR, *supra* note 32, ¶ C2050.C.2. Official use while on TDY is limited to transportation between places where the member’s presence is required for official business and between such places and temporary lodging. When public transportation is unavailable or its use is impracticable, travel to restaurants, drugstores, places of worship, barbershops, cleaning establishments, and similar places required for the subsistence, comfort or health of the member is also considered authorized official use. See JFTR, *supra* note 187, ¶ U3200.A.; JTR, *supra* note 187, ¶ C2050.C.2. Use of a government vehicle for anything other than these authorized uses could subject the user to disciplinary and possibly criminal sanctions, and, in the case of an accident, a finding that he was acting outside the scope of his employment. See, e.g., 31 U.S.C. § 1349(b) (2000); 18 U.S.C. § 641 (2000); UCMJ art. 121a(2) (2000); U.S. DEP’T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES, para. 1 (10 June 1999) (C1, 28 Jan. 2001) [hereinafter AR 58-1]; see also *infra* notes 211-220 and accompanying text.

189. This article addresses only situations where the TDY traveler rents a vehicle directly from the rental company. Vehicles leased directly by the government are considered government property. See JFTR, *supra* note 187, app. A; JTR, *supra* note 187, app. A; AR 58-1, *supra* note 188, paras. 1, 3-10, 3-11.

190. 45 F. 3d 419 (Fed. Cir. 1995).

191. *Id.* at 420.

192. *Id.* at 422.

193. *Id.* at 422. *But cf.* *Abrams v. Trunzo*, 129 F.3d 1174, 1176-78 (11th Cir. 1997) (government employee who rented car pursuant to TDY orders through *Rental Agreement Number 2* found to have acted as an agent of the government; government therefore “hired” the rental car).

194. *Id.* The Department of Interior charged plaintiff with misusing a government vehicle in violation of § 1349(b). The Department did not charge plaintiff “with insubordination, nor with submission of a false vehicle or reimbursement request.” *Id.*

195. *Id.* at 421.

Therefore, if the traveler receives a weekly rate for the car, and he wishes to use the car after his official business is over, he may continue to use the vehicle if the non-official use will not exceed the cost of the official travel.¹⁹⁸ For example, if an employee is going to The Judge Advocate General's School, U.S. Army, to attend a five-day course, and the most economical rental car rate is a weekly rate, the employee may use the car for the full week. He does not need to prorate the cost of his non-official travel.¹⁹⁹

What then is official travel? Official travel would generally include travel to and from the airport, to and from your lodging location to your place of temporary duty, travel to and from your place of worship, and travel to and from places to eat. Other official travel will include trips to the doctor, drug store, laundry or dry cleaning establishments, barbershops, and "similar places required for the traveler's subsistence, comfort or health."²⁰⁰ Federal employees will be reimbursed for official travel only. While use of the rental vehicle for non-official travel is not expressly prohibited, it does raise liability questions for the government and more importantly, the renter.

Fender-Benders: Who Pays?

Liability Coverage

Unfortunately, accidents do happen while service members or government employees on TDY are driving rented vehicles. While many of these accidents cause only property damage, sometimes only to the rental vehicle itself, some accidents involve significant personal injury to third parties. This note next addresses the issue of liability costs for these accidents.

Who bears the liability: the individual renter, the rental car company, or the United States? The answer to this question may turn on whether the renter was engaged in official or non-official travel at the time of the accident.

Official Travel

As a general matter, any service member or government employee who has an accident while engaged in official travel will not be held personally liable for resulting damages. As noted above, under the provisions of *Rental Agreement Number 2*, it is the car rental company that will be responsible for damages both to the rental vehicle and to any injured third parties. For damages in excess of the liability limits under the rental contract, the federal government will be responsible.²⁰¹

Rental Agreement Number 2 requires participating rental companies to maintain liability insurance for personal injury, wrongful death, and property damage caused while renting to federal employees. Under this coverage, the rental company assumes responsibility for all collision damage to its vehicle, regardless of fault,²⁰² and up to the required minimum policy limits for personal injury and third party property damages resulting from an accident.²⁰³ In such cases, claims filed against the Army are usually denied and the claimant is directed back to the rental company.²⁰⁴

Some cases will involve damages in excess of the required insurance limits provided in the rental contract or, with regard to damages to the rental vehicle, will fall within one of the exceptions to vehicle damage coverage listed in *Rental Agreement Number 2*. In such cases, third-party personal injury and

196. See Memorandum from Mr. Matt Reres, Deputy General Counsel, Ethics and Fiscal, Department of the Army, Office of the General Counsel, to Office of the Inspector General (ATTN: SAIG-ZXL), subject: Reimbursement for Rental Cars Used for Both Official and Non-official Travel (17 Apr. 1997) (on file with author) [hereinafter Reres Memo].

197. *Id.* For example, the traveler must bear any additional costs, such as gas, mileage charges, and liability, associated with non-official travel. *Id.*

198. *Id.* But cf. JFTR, *supra* note 187, ¶ U3415G ("Use of a [rental vehicle] is limited to official purposes."); JTR, *supra* note 187, ¶ C2102F (same). Litigation Division believes travelers can use a rental vehicle for personal use. First, *Rental Agreement Number 2* does not prohibit personal use of rental vehicles. Second, while some may argue that ¶ U3415G and ¶ C2102F restrict use of the rental car to official business, we believe the JFTR and JTR only address what is reimbursable, and does not restrict other uses that incur no additional cost to the government. Prior Comptroller General determinations, to the extent they have decided that use had to be for official purposes, were premised on a system of reimbursement that has been primarily replaced by *Rental Agreement Number 2*. Before *Rental Agreement Number 2*, a federal employee who incurred damage to a rental vehicle was required to pay the deductible amount for the damage and then had to seek reimbursement for the deductible on his travel voucher. Before the amount could be reimbursed, ¶ U3415G and ¶ C2102F required a determination that the damage occurred while the claimant was conducting official business. Now, *Rental Agreement Number 2* eliminates the need for this official use determination because it covers all costs for property damages to the rented vehicle.

199. Reres Memo, *supra* note 196.

200. JFTR, *supra* note 187, ¶ U3415G; JTR, *supra* note 187, ¶ C2102F; see also *In re Captain Kenneth R. Peterson, USA*, B-217921, 1986 U.S. Comp. Gen. LEXIS 1595, *1 (Jan. 29, 1986); Decision of Comptroller General, B-156536, 1965 U.S. Comp. Gen. LEXIS 2713, *1 (May 6, 1965).

201. U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS PROCEDURES, paras. 2-82e(2), 2-100k (1 Apr. 1998) [hereinafter DA PAM 27-162].

202. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9b.

203. *Id.* ¶ 9a. See *supra* notes 176-182 and accompanying text.

204. See DA PAM 27-162, *supra* note 201, paras. 2-32e(3), 2-82e(1)(d)-(e).

FTCA and Scope of Employment

damage claims should be processed under the appropriate tort claims statute. So long as the employee or service member is found to have been operating the vehicle while in the scope of his federal employment, as discussed below, the federal government will bear any liability.²⁰⁵ Claims for damage to the rental car should be processed under the *JFTR* or *JTR* as appropriate.²⁰⁶

Non-Official Travel

By the terms of *Rental Agreement Number 2*, coverage is not limited to times when the renter is engaged in official travel, or within the scope of his employment.²⁰⁷ *Rental Agreement Number 2* requires the rental company to maintain insurance that will “protect the United States Government and its employees against liability for personal injury, death, and property damage arising from the use of the vehicles.”²⁰⁸ With regard to this coverage, “[t]he conditions, restrictions and exclusions of the applicable insurance for any rental shall not be less favorable to the Government and its employees than the coverage afforded under standard automobile liability policies.”²⁰⁹ The insurance provisions of *Rental Agreement Number 2* may therefore apply even if an accident occurs while the renter is engaged in non-official travel.²¹⁰ If the damages exceed the required insurance limits provided in the rental contract, or if the rental company correctly denies coverage under *Rental Agreement Number 2*, who will be held liable, the federal government or the individual renter? The answer to this question will turn on whether the driver was operating the vehicle within the scope of his employment.

The Federal Tort Claims Act (FTCA)²¹¹ provides an exclusive remedy against any employee of the government, for “injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission” of the employee “while acting within the scope of his office or employment.”²¹² A finding that a federal employee was acting within the scope of his duties may therefore serve to immunize him from personal liability,²¹³ and the United States may be “substituted as the party defendant.”²¹⁴

Under the FTCA, the law of the state where the incident occurred governs the question of whether a federal employee was acting within the scope of his employment at the time of an accident.²¹⁵ The state law standards will be applied to the particular facts of each incident. Generally, the more the facts indicate that a federal employee was using a rental vehicle for personal, as opposed to official travel, the less appropriate an in-scope finding becomes. This is highlighted by *Clamor v. United States*,²¹⁶ a recent decision out of the Ninth Circuit. Applying Hawaii law, the court found that a civilian employee of the Navy was not acting within scope at the time he had an accident driving a rented car. The accident occurred on the naval base where the civilian employee was performing TDY, while he was on his way back to his hotel at the end of the duty day.²¹⁷ In reaching its holding, the court noted that the employee “was not engaged in any errand for his employer, but was leaving work and free to do whatever he wished.”²¹⁸ The government derived no benefit from his activities once he stopped working and left for the day, “any more than it does

205. *Id.* paras. 2-32e(3)(b), 2-82e(2).

206. *Id.*

207. *See supra* notes 176-182 and accompanying text.

208. CAR RENTAL AGREEMENT, *supra* note 155, ¶ 9a.

209. *Id.*

210. *Editors Note:* The MTMC takes the position that the required coverages would apply to both official and non-official use of the rented vehicle, but acknowledges that some of the participating rental companies do not concur in this interpretation. Telephone Interview with William J. Merrigan, Attorney, Headquarters, Military Traffic Management Command (Mar. 23, 2001) (Mr. Merrigan is the MTMC attorney responsible for *Rental Agreement Number 2*). This interpretation may also conflict with the language of paragraph one of *Rental Agreement Number 2*, which limits the agreement’s applicability to rentals “authorized by the Government.” CAR RENTAL AGREEMENT, *supra* note 155, ¶ 1. *See* USALSA Report, Litigation Division Note, *Liability of the United States for Accidents Involving Vehicles Rented Under the United States Government Car Rental Agreement*, ARMY LAW., July 1995, at 43 (stating that the insurance provisions of *Rental Agreement Number 2* may not apply if the rental vehicle is operated for personal use) [hereinafter USALSA Report].

211. 28 U.S.C. §§ 1346, 2671-2680 (2000). The FTCA is implemented by U.S. DEP’T OF ARMY, REG. 27-20, chs. 2, 4 (1 Apr. 1998) [hereinafter AR 27-20].

212. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2679.

213. *See Flohr v. Mackovjak*, 84 F.3d 386, 389 (11th Cir. 1996).

214. 28 U.S.C. § 2679(d)(1).

215. *Id.* § 1346(b); *see, e.g., Clamor v. United States*, 2001 U.S. App. LEXIS 3114, *4 (9th Cir. 2001) (to be published at 240 F.3d 1215); *Flohr*, 84 F.3d at 390; DA PAM 27-162, *supra* note 201, para. 2-67f.

216. 2001 U.S. App. LEXIS 3114, *1.

when any other employee departs for the evening.”²¹⁹ Although *Clamor* may be viewed as an extreme holding, it highlights that federal employees may not benefit from the immunity conferred by the FTCA if they are using a rental car for non-official purposes.²²⁰

What to Consider When Recommending Whether a Government Employee Was Acting Within the Scope of His Employment While Driving a Rented Vehicle?

Plaintiffs periodically sue government employees in their individual capacity alleging various causes of action arising from a tort.²²¹ When a plaintiff sues a federal employee in his individual capacity, the individual may seek representation by the Department of Justice.²²² *Army Regulation 27-40*²²³ outlines the procedures judge advocates should follow when they receive such requests.²²⁴

Judge advocates should immediately notify Army Litigation Division of a request for representation and then begin to investigate the claim. This usually entails doing a mini-litigation report on the facts and circumstances surrounding the incident that forms the basis of the suit.²²⁵ The staff judge advocate (SJA) or legal adviser should make conclusions as to whether

the employee was acting within the scope of employment. The SJA or legal adviser should also recommend whether the Attorney General should certify that the employee was acting in the scope of employment or whether the DOJ should grant representation.²²⁶ If the U.S. Attorney certifies the employee was acting within the scope of his office or employment, the U.S. Attorney will move to substitute the United States as the defendant and to have the case removed from state to federal court if necessary.²²⁷

When determining whether an employee was acting in the scope of his employment at the time of the incident that is the subject of a lawsuit, the decision will depend on the facts of the individual case and the state law to be applied. Factors to consider include: the time of the accident, how far the employee was from the duty or lodging site, the purpose of the trip, the length of the TDY, and the law of scope of employment in the state where the accident took place. If the driver was involved in official and non-official travel, the judge advocate should also determine the point on the trip where the purpose changed from official to non-official, and whether the trip re-converted at any time to official travel.²²⁸ In close cases, the judge advocate may want to consider including a map of the TDY area and the accident location. These factors are by no means exhaustive, but are illustrative of many seen in the various cases the

217. *Id.* at *3-6.

218. *Id.* at *6.

219. *Id.*

220. For a list of additional cases finding federal employees out of scope at the time of a car accident, see U.S. ARMY CLAIMS SERVICE, OTJAG, FEDERAL TORT CLAIMS ACT HANDBOOK 115 (1998) [hereinafter FTCA HANDBOOK]. For an extreme example of a finding that an employee was within scope at the time of a car accident, see *Prince v. Creel*, 358 F. Supp. 234 (E.D. Tenn. 1972). In *Prince* the Federal District Court for the Eastern District of Tennessee found that an employee of the Federal Trade Commission was acting within the scope of his employment when he had an accident driving his own car to a TDY site. The court reached its holding even though the driver began TDY travel a day early, the day of the accident, to visit relatives. *Id.* at 237-38. For a list of additional cases finding federal employees within scope at the time of a car accident see FTCA HANDBOOK, *supra*, at 114.

221. This article does not discuss suits for medical malpractice or constitutional torts, only torts arising out of use of a rental vehicle while on official travel.

222. 28 U.S.C. § 2679(c) (2000).

223. U.S. DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION, ch. 4 (19 Sept. 1994) [hereinafter AR 27-40].

224. Paragraph 4.4 addresses the actions SJAs or legal advisers should take when they learn “of a lawsuit alleging individual liability against [Department of the Army] personnel as a result of performance of official duties” *Id.* para. 4.4a. Judge advocates might also learn of an accident involving potential government liability before any lawsuits are filed, in which case they should open a potential claim file and initiate an investigation. AR 27-20, *supra* note 211, para. 2-2c.(1). In the case of an accident involving a rental car, the judge advocate should also notify the rental company, as failure to do so in a timely fashion may relieve the company of its contractual liability under some state laws.

225. AR 27-40, *supra* note 223, para. 4.4a(5) requires the servicing judge advocate to provide “facts surrounding the incident for which defendant is being sued and those relating to scope of employment; the SJA’s or legal adviser’s conclusions concerning scope of employment; and, a recommendation whether certification by the Attorney General or representation by a Department of Justice (DOJ) attorney should be granted.” *Id.*

226. *Id.*

227. 28 U.S.C. § 2679(d)(1) (2000).

228. The judge advocate or legal adviser should interview the employee and provide a memorandum of her notes instead of asking the witness to write a statement. Formal statements must be disclosed in discovery while notes of personal interviews are attorney work-product. If the memorandum paraphrases everything the driver says, some Assistant U.S. Attorneys may disclose the paraphrased portions. If the traveler was a civilian employee and a labor case ensued from the accident, include a copy of the proceedings. The proceedings may contain admissions or statements of government officials that may be relevant to scope of employment issues.

Army Litigation Division Tort Branch has considered in making scope of employment recommendations to DOJ.

What To Consider Before Renting a Car While on TDY

If a government employee is going to use a rental vehicle while on authorized TDY, he should ensure that the rental company franchise is a party to *Rental Agreement Number 2*, and that the company applies the agreement to the vehicle he will rent.²²⁹ Renters should also be advised to ensure that the rental contract itself states that *Rental Agreement Number 2* applies.

The employee should also check his insurance policy and with his insurance agent to review the terms of his policy. If he might use the rental car for personal travel, he must determine whether his policy will cover him while driving a rental car rented with government orders. Some insurance companies will cover such damages; others may require a separate rider on the insurance policy.²³⁰

If traveling overseas, or stationed overseas with plans to travel in the United States, he should check his insurance policy to see whether it covers him if involved in an accident while conducting personal travel. Service members and federal employees do not want to learn that they have no coverage after an accident. If the insurance policy will not cover personal

travel, the employee should consider buying additional insurance from the rental company²³¹ or foregoing personal travel.

If using a rental car for non-official purposes, the employee should keep track of the costs for the non-official travel. One suggestion is to fill the tank before beginning the non-official travel and again at completion. This is easy if the traveler is using the car for a longer trip, but it is slightly more difficult to do when he decides to use the car for personal errands. If the traveler decides not to keep track of the individual mileage for personal errands, he should consider foregoing reimbursement for a reasonable portion of his gas costs. If the car rental does not provide for unlimited mileage, the traveler should keep track of all mileage attributable to personal use.

Conclusion

Judge advocates and legal advisers can provide a service to federal employees by alerting them to potential problems when using a rental car while on temporary duty. Because not all travel in a rental vehicle may be for official business, we need to educate employees about what travel will be considered for official business. Federal employees may face personal liability for damages that exceed the insurance limits of *Rental Agreement Number 2*, especially if their personal car insurance does not cover them while using a vehicle rented under government orders. Major Amrein.

229. The terms of paragraph 2 of *Rental Agreement Number 2* should make the agreement applicable to substitute vehicles provided by the rental company. However, some companies assert claims for damages to vehicles not specifically listed in the agreement. See USALSA Report, *supra* note 210, at 42 n.16.

230. See, e.g., *Abrams v. Trunzo*, 129 F.3d 1174 (11th Cir. 1997) (examining applicability of private insurance contract provision excluding coverage for vehicles "hired" by the government).

231. This is a non-reimbursable expense. See *supra* note 197 and accompanying text.