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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: District of Columbia Courts—Payment of Settlements and Litigation Expenses

File: B-300009

Date: July 1, 2003

DIGEST

1. The District of Columbia Courts may pay settlements entered into during fiscal years 2002 and 2003 that are under \$10,000 and not more than 2 years old from their operating funds as prescribed in District legislation, the Risk Management for Settlements and Judgments Amendment Act of 2000, D.C. Code Ann. § 2-402 (2001). By statute the District of Columbia may not obligate or expend funds unless the legislation is approved by an act of Congress. Pub. L. No. 93-198, § 446, 87 Stat. 774, 801 (1973). Both the 2002 and 2003 District of Columbia Appropriations Acts contain provisions that specifically authorize implementation of the Risk Management Act. However, the provisions are not permanent; for any fiscal years for which no such provisions are enacted, payments should be made from other available appropriated funds.

2. The Office of the Corporation Counsel's appropriated funds, which include funds for defending lawsuits and claims and for paying witness fees, and not D.C. Courts' funds, should be used for litigation expenses incurred in tort suits against the Courts.

DECISION

The District of Columbia Courts (Courts) request an advance decision on whether they may pay settlements of claims and suits as prescribed in D.C. Code Ann. § 2-402(3)(A) (2001). Section 2-402 empowers the Mayor, in his discretion, to settle civil claims and suits against the District of Columbia arising out of acts of negligence by its officers and employees. That section requires generally that the payment of settlements and judgments of suits under \$10,000 and not more than two years old must come from the current fiscal year operating budget of the agency named in the suit. Under the Home Rule Act, Congress retains control over District of Columbia budgetary matters. District legislation may not conflict with the fiscal prerogatives of the Congress. The Courts ask whether section 2-402 conflicts with

the appropriations Congress makes for settlements. The Courts also ask whether their operating funds are available for litigation expenses other than settlement payments.

As explained below, we conclude that although section 2-402 impinges upon the congressional prerogative, for those settlements meeting the criteria of section 2-402 entered into during fiscal years 2002 and 2003, payment should be made from the Courts' operating funds. This is because of the inclusion of section 137 in the District's fiscal year 2002 Appropriations Act and section 133 in the District's fiscal year 2003 Appropriations Act by which the Congress temporarily approved the implementation of section 2-402. For any other fiscal year that has no similar provision, payments should be made from the District's otherwise available funds. We also conclude that the Courts' operating funds are not available for litigation expenses. Such expenses should be paid from the Office of the Corporation Counsel's appropriated funds.

BACKGROUND

The Settlements and Judgments Authority

The District of Columbia defends itself, its officers, employees, or agents, from civil actions and assumes any liability resulting from the action or proceeding. National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 712, 786 (1997). The District is responsible for the payment of judgments in connection with such suits and is empowered, at its discretion, to settle claims and suits against the District. D.C. Code Ann. § 2-402 (2001). D.C. Courts and its judges, officials and employees, as part of the D.C. government, are covered under this provision. See Letter from John M. Ferren, Corporation Counsel, to Ulysses B. Hammond, Executive Officer, District of Columbia Courts, Nov. 6, 1997. To provide a source to settle and pay claims and lawsuits as well as judgments entered against the District arising from tort cases, the District established the Settlements and Judgments Fund (S&J Fund).¹ See, e.g., *District of Columbia Appropriations for 2003 Hearings Before the Subcommittee on the District of Columbia Appropriations, Committee on Appropriations, House of Representatives*, 107th Cong. 660-661 (2002). The S&J Fund is a separate account in the District's General Fund administered by the Office of the Corporation Counsel. *Id.* The S&J Fund uses appropriated locally generated revenues. *Id.*

¹ In previous correspondence with this office, the Office of Corporation Counsel explained that historically each District government agency pays out of its own budget all settlements and judgments that arise from the agency's own contract and personnel transactions. Letter from Arabella W. Teal, Principal Deputy Corporation Counsel to the U.S. General Accounting Office, January 28, 2002.

Congress has long included a general provision in District appropriations acts that granted authority for the payment of judgments and recently added language for the payment of settlements as well. The general provision now provides "There are appropriated from the applicable funds of the District of Columbia such sums as may be necessary for making refunds and for the payment of *legal settlements or judgments* that have been entered against the District of Columbia government" District of Columbia Appropriations Act, 2002 (2002 D.C. Appropriations Act); Pub. L. No. 107-96, § 103, 115 Stat. 923, 946 (2002). Congress included this same provision as section 103 in the fiscal year 2003 appropriation. Pub. L. No. 108-7, § 103, 117 Stat. 11, 121 (2003)(fiscal year 2003 provision).

In addition to the indefinite appropriation for the payment of legal settlements or judgments entered into against the District of Columbia in section 103, the D.C. Appropriations Act, 2003, appropriated a definite amount for the payment of judgments and legal settlements. Congress appropriated \$22,822,000 for: "making refunds and for the payment of legal settlements or judgments that have been entered against the District of Columbia government: Provided, That this appropriation shall not be construed as modifying or affecting the provisions of section 103 of this Act." Pub. L. No. 108-7, § 626, 117 Stat. 11, 119 (2003).²

D.C. Council Amendment of Settlements and Judgments Authority

Section 2-402 of the District of Columbia Code empowers the District, at its discretion, to settle civil claims and suits against the District of Columbia arising out of acts of negligence by its officers or employees. In fiscal year 2000, the D.C. Council enacted legislation, the Risk Management for Settlements and Judgments Amendment Act of 2000 (Risk Management Act), amending the District's settlement authority to require that certain settlement and judgment payments be charged to the current fiscal year operating budgets of the agency or office named in the suit when the amount involved is less than \$10,000 and the case was originally filed no more than 2 years before the settlement or judgment. D.C. Code Ann. § 2-402(3)(A) (2000).³ Before this change, the S&J Fund would be charged with any settlements reached in tort cases. The fiscal impact statement, which accompanied the provision, explained the amendment's purpose as follows:

² Appropriations of definite amounts for settlements have been sporadic. Some fiscal years there is no definite amount for settlements; other fiscal years Congress appropriated definite amounts "available solely for the settlement of claims and suits." Pub. L. No. 97-378, 96 Stat. 1925, 1927 (1982).

³ The law also provides that the Mayor may waive this requirement on a case-by-case basis for good cause. *Id.* at § 2-402(3)(B).

“This amendment will have a positive, although unquantified, fiscal impact on the District. The current practice of paying all settlements and judgments out of a central fund provides little if any incentive for agencies to engage in risk management. This amendment does not increase the number of settlements and judgments, but will encourage agencies to improve risk management. To increase agency budgets to pay this cost would be to remove any incentive on the agency to attempt to control cost. In any case in which the Mayor waives application of this title, the cost will be borne by the Settlements and Judgments fund, as currently practiced.”

D.C. Law 13-172, § 4303, 47 DCR 6308, 6393 (Oct. 19, 2000).

The District of Columbia Home Rule Act provides that no amount may be obligated or expended by a District government officer or employee unless such amount has been approved by an act of the Congress.⁴ Section 137 of the 2002 D.C. Appropriations Act provided the authority for the District to implement the Risk Management Act:

“Sec. 137. RISK MANAGEMENT FOR SETTLEMENTS AND JUDGMENTS. In addition to any other authority to pay claims and judgments, any department, agency, or instrumentality of the District government may pay the settlement or judgment of a claim or lawsuit in an amount less than \$10,000, in accordance with the Risk Management for Settlements and Judgments Amendment Act of 2000, effective October 19, 2000 (D.C. Law 13-172; D.C. Official Code, sec. 2-402).”

Pub. L. No. 107-96, § 137, 115 Stat. 923, 957 (2001). Section 133 of the 2003 D.C. Appropriations Act contains this same language. Pub. L. No. 108-7, § 133, 117 Stat. 11, 128 (2003).

DISCUSSION

Availability of Operating Funds for Settlements

By statute, the District of Columbia may not obligate or expend funds unless the legislation is approved by an act of the Congress. Pub. L. No. 93-198 § 446, 87 Stat. 774, 801 (1973). B-288173, June 13, 2002. Section 2-402(3)(A) of the D.C. Code authorizes the expenditure of appropriated funds for the payment of the specified settlements and judgments from agency operating funds which appears to differ from the source of funds the Congress has appropriated for that purpose.

⁴ Pub. L. No. 93-198, § 446, 87 Stat. 774, 801 (1973).

Consequently, the Courts ask whether they may implement section 2-402(3)(A) of the D.C. Code, requiring that certain settlement and judgment payments be charged to fiscal year operating budgets, instead of from the S&J Fund, in accordance with the D.C. Appropriations Act.

The enactment by the Congress of sections 133 and 137, quoted above, clearly indicates its approval of settlement and judgment payments under section 2-402(3)(A) for fiscal years 2002 and 2003. These sections state that any instrumentality of the District government may pay the settlements or judgments of claims or lawsuits of less than \$10,000, in accordance with D.C. Code Ann. § 2-402. By including these provisions in the D.C. appropriation acts through this fiscal year the Congress has provided the explicit statutory authority to implement the payment provisions of the Risk Management Act.

However, sections 137 and 133 are not permanent legislation.⁶ Neither section contains language that would indicate that Congress intended the authority to be effective beyond the fiscal years for which they were enacted. There is a presumption that any provision in an annual appropriation act is effective only for the covered fiscal year because appropriation acts are by their nature nonpermanent legislation. 31 U.S.C. § 1301(c). Accordingly, for fiscal years 2002 and 2003, and other fiscal years in which Congress enacts a provision approving the expenditure of funds as prescribed in section 2-402(3)(A), the Courts may use their operating funds to pay settlements and judgments as specified in that provision. Conversely, in the absence of a provision like section 133 (or section 137), the Courts operating funds may not be used to pay the specified settlements and judgments; they must be paid out of other available appropriated funds. Pub. L. No. 108-7, § 626, 117 Stat. 11,119 (2003).

Availability of Operating Funds for Litigation Expenses

The Courts also ask whether they may use their operating appropriation for expenses associated with litigation expenses, such as for the payment of expert witness fees and witness transportation expenses.

⁶ It is well settled that the Congress has the power to enact permanent legislation in an appropriation act. *See, e.g., United States v. Dickerson*, 310 U.S. 554, 561-62 (1940). The presumption that an annual appropriation provision is not permanent can be overcome if the statutory language or the nature of the provision makes it clear that Congress intended the provision to be permanent. 65 Comp. Gen. 588, 589 (1986). The clearest indication that Congress intended a provision to be permanent is the presence of "words of futurity" such as "hereafter" or "after the date of approval of this Act." *Id.*; B-225832, May 26, 1987. Further, an analysis of a provision's legislative history and purpose may be used to support the conclusion that it is permanent law. 70 Comp. Gen. 351 (1991); B-277719, August 20, 1997.

The Corporation Counsel, by statute, is charged with conducting all of the District's legal business, including the defense of actions against its agencies. D.C. Code Ann. § 1-301.111 (2001). The District's "Governmental Direction and Support" appropriation funds the Office of the Corporation Counsel. See Pub. L. No. 108-7 § 626, 117 Stat. 11, 113 (2003). Included in this appropriation are funds for defending lawsuits and claims, and for paying witness fees. See District of Columbia FY 2003 Budget Submission, reprinted in District of Columbia Appropriations for 2003, Hearings before the House Subcommittee on District of Columbia Appropriations, 107th Cong., 261-262, 265 (2002).

In the somewhat analogous federal arena, the general rule with respect to litigation expenses of federal agencies is that the direct expenses of litigation, such as the ones the Courts are asking about (expert witness fees and factual witness travel expenses), are payable by the agency that conducts the prosecution or defense on behalf of the government in the litigation. In the federal government's case, the agency that conducts the litigation is usually the Department of Justice.

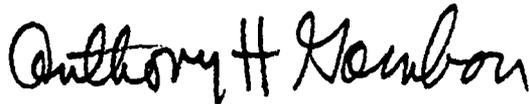
"[I]n the absence of specific authority by the Congress for departments and establishments of the Government to resort to litigation in the courts in the performance of the duties and responsibilities with which they are charged, it is the duty of the Attorney General, as chief law officer of the Government, to institute, prosecute, and defend action on behalf of the United States in matters involving court proceedings, and to defray the necessary expenses incident thereto from appropriations of the Department of Justice rather than from appropriations of the administrative office which may be involved in the proceedings."

38 Comp. Gen. 343, 344 (1958). The Department of Justice receives a specific appropriation for "Fees and Expenses of Witnesses." Pub. L. No. 108-7, § 771, 117 Stat. 11, 54 (2003). Indirect expenses incurred in support of litigation, such as factual support and general assistance in trial preparation, are payable by the agency that is the party in interest in the litigation. 73 Comp. Gen. 90 (1994).

The Office of the Corporation Counsel has also concluded that it "may, upon request, provide legal representation to judges, officials and employees of the D.C. Courts who are sued in connection with the performance of their official court duties." Letter from John M. Ferren, Corporation Counsel, to Ulysses B. Hammond, Executive Officer, District of Columbia Courts, Nov. 6, 1997. This authority reinforces the notion that to the extent the Corporation Counsel is representing the Courts, it should absorb the costs. Accordingly, when representing the Courts, its officers or employees, the Corporation Counsel should defray the costs incident to its performing its litigation function, not the Courts.

CONCLUSION

Sections 137 and 133 of the District of Columbia 2002 and 2003 appropriations acts, respectively, provide Congressional approval for the D.C. Courts to pay settlements from agency operating funds in accordance with the Risk Management for Settlements and Judgments Amendment Act of 2000. However, the two appropriations acts sections are not permanent legislation. Accordingly, for any fiscal years in which the Congress does not enact such provisions, settlements should be paid from the District's otherwise available appropriated funds. Further, litigation expenses should be borne by the District's Office of the Corporation Counsel, not the Courts.



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