

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Rates of Courts-Martial and Nonjudicial Punishment

The rates of courts-martial and nonjudicial punishment for the fourth quarter of fiscal year 1996 are shown below.

Rates per Thousand

Fourth Quarter Fiscal Year 1996										
	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.37	(1.49)	0.36	(1.46)	0.59	(2.35)	0.34	(1.38)	0.36	(1.45)
BCDSPCM	0.13	(0.51)	0.12	(0.46)	0.18	(0.71)	0.22	(0.86)	0.00	(0.00)
SPCM	0.02	(0.07)	0.01	(0.06)	0.04	(0.14)	0.02	(0.09)	0.00	(0.00)
SCM	0.13	(0.52)	0.16	(0.65)	0.00	(0.00)	0.04	(0.17)	0.72	(2.90)
NJP	21.06	(84.24)	22.39	(89.56)	16.66	(66.64)	24.73	(98.93)	35.16	(140.65)

Note: Based on average strength of 488,104. Figures in parenthesis are the annualized rates per thousand.

Military Justice Statistics, FY 1992-1996

General Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1992	1,168	93.9%	88.2%	60.0%	66.6%	19.4%	23.0%	1.75
1993	915	93.6%	84.8%	56.2%	65.3%	23.6%	20.7%	1.56
1994	843	92.8%	87.9%	60.1%	64.5%	26.0%	20.2%	1.51
1995	825	92.9%	83.5%	58.1%	66.0%	28.1%	20.7%	1.57
1996	789	93.5%	85.5%	56.6%	65.3%	26.4%	24.4%	1.60

Bad-Conduct Discharge Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1992	543	90.2%	63.6%	59.1%	67.9%	20.6%	16.3%	.82
1993	327	85.3%	54.1%	51.3%	63.3%	28.7%	16.5%	.58
1994	345	89.8%	54.1%	57.1%	58.2%	34.2%	24.3%	.62
1995	333	87.3%	56.4%	55.6%	64.5%	28.8%	19.5%	.64
1996	329	87.2%	60.9%	51.6%	62.6%	33.1%	21.8%	.67

Other Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1992	70	62.8%	NA	21.4%	50.0%	38.5%	2.8%	.11
1993	45	51.1%	NA	20.0%	48.8%	33.3%	0.0%	.08
1994	32	62.5%	NA	18.7%	50.0%	37.5%	9.3%	.06
1995	20	80.0%	NA	40.0%	60.0%	35.0%	5.0%	.04
1996	28	71.4%	NA	21.4%	50.0%	42.8%	10.7%	.06

Summary Courts-Martial

FY	Cases	Conv. Rate	Guilty Pleas	Drug Cases	Rate/ 1,000
1992	684	90.1%	37.0%	10.2%	1.03
1993	364	86.3%	36.3%	10.2%	0.62
1994	349	92.0%	35.2%	11.2%	0.63
1995	304	93.1%	34.5%	11.8%	0.58
1996	238	89.9%	37.8%	17.2%	0.48

Nonjudicial Punishment

FY	Total	Formal	Summarized	Drugs	Rate/ 1,000
1992	50,066	78.6%	21.4%	6.6%	75.20
1993	44,207	77.5%	22.5%	6.4%	75.42
1994	41,753	78.3%	21.7%	6.6%	75.00
1995	38,591	79.3%	20.7%	8.4%	73.64
1996	36,622	78.3%	21.7%	7.8%	74.18

Average strength for rates per 1000: FY 1992, 665,800; FY 1993, 586,149; FY 1994, 556,684; FY 1995, 524,043; FY 1996, 493,700.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)* which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically which appears in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 4, number 4, dated January 1997, is reproduced below.

Ten Percent Increase in Civil Penalties

On 31 December 1996, the United States Environmental Protection Agency (USEPA) issued a Civil Monetary Penalty Inflation Adjustment Rule (IAR), the first of the USEPA's periodic inflation adjustments to its civil monetary penalty policies.¹ The purpose of the IAR, as mandated by the Debt Collection Improvement Act of 1996, is to ensure that the penalty policies keep pace with inflation and thereby maintain the deterrent effect that Congress intended when it originally specified penalties.²

The IAR, which will take effect 30 January 1997, will increase almost all penalty provisions within the major environmental statutes by ten percent (with the exception of the new

penalty provisions added by the 1996 amendments to the Safe Drinking Water Act). For example, the new statutory maximum penalties for civil, judicial, or administrative proceedings for the Resource Conservation and Recovery Act (RCRA) will be \$27,500, an increase from \$25,000 as of 30 January 1997. The USEPA will review its penalties at least once every four years and will adjust them as necessary for inflation according to a specified formula. Captain Anders.

Did you know? . . . The seven ton Killer Whale can reach swimming speeds of 50 miles per hour.

Candidate Species Final Decision

On 5 December 1996, the United States Fish and Wildlife Service (USFWS) announced a final decision to discontinue the practice of maintaining a list of species regarded as "category 2 candidates."³ The summary of the Notice states in part:

Future lists of species that are candidates for listing under the Endangered Species Act (Act) [16 U.S.C. §§ 1531-1544 (1988)] will be restricted to those species for which the Service [USFWS] has on file sufficient information to support issuance of a proposed listing rule. A variety of other lists describe "species of concern" or "species in decline" and the Service believes that these lists are more ap-

¹ Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (1996) (to be codified at 40 C.F.R. pt. 19.4).

² Debt Collection Improvement Act of 1990, Pub. L. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461), as amended by the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321 (1996) (codified at 31 U.S.C. § 3701).

³ Endangered and Threatened Wildlife and Plants; Notice of Final Decision on Identification of Candidates for Listing as Endangered or Threatened, 61 Fed. Reg. 64,481-64,485 (1996) (to be codified at 50 C.F.R. pt. 17) [hereinafter *Threatened Wildlife*].

appropriate for use in land management planning and natural resource conservation efforts that extend beyond the mandates of the Act.

Army Regulation 200-3 requires installations to consider candidate species in making decisions that may affect those species.⁴ Previously, the USFWS categorized candidate species as Categories 1, 2, or 3 with the result that approximately 1400 species were considered candidate species. In the past, Category 1 candidates consisted of (1) proposed species, and (2) species for which the USFWS had sufficient information on file to support issuance of a proposed rule.

The present practice is to term these species simply (1) proposed species, and (2) candidate species. Also in the past, Category 2 candidates were those species for which the USFWS had information on file to suggest that listing action was possibly appropriate. Under this final decision, the USFWS is discontinuing the designation of these species as Category 2 species and does not regard these species as candidates.⁵ The USFWS also clarified previously that Category 3 species, species that were once considered for listing but are no longer under such consideration, are not to be considered candidates for listing.⁶ Major Ayres.

Overseas Environmental Compliance

Although signed in April 1996, the Department of Defense (DOD) only recently released *Department of Defense Instruction (DODI) 4715.5* entitled *Management of Environmental Compliance at Overseas Installations* (22 April 1996).⁷

The DODI 4715.5 sets guidelines for compliance to environmental standards at United States installations overseas. Like its predecessor, DODI 4715.5 requires DOD components to establish and comply with Final Governing Standards (FGS) to protect human health and the environment for each foreign country where the Department of Defense maintains substantial installations. The Instruction also requires the continued maintenance of the Overseas Environmental Baseline Guidance Document (OEBGD) as a set of objective criteria and management practices developed to protect human health and the environment for use in foreign nations where no FGS has been

established. The OEBGD is generally based upon environmental standards applicable to DOD installations, facilities, and actions within the United States. The FGS is a comprehensive set of country-specific substantive provisions, typically specific management practices or technical limitations on effluent, discharges, and other items.

The FGS is promulgated by the designated DOD Environmental Executive Agent and is determined by applying the stricter of applicable host-nation environmental standards, standards under applicable international agreements (e.g., Status of Forces Agreements), or standards within the OEBGD. Environmental law specialists (ELs) desiring a copy of DODI 4715.5 or the OEBGD should contact me via electronic mail at ayrestho@otjag.army.mil. Major Ayres.

Did you know? . . . Farmers use approximately 1/10th of the pesticides per acre that private homeowners use.

Legislative Update

Look for heightened congressional focus on reform of the Clean Water Act (CWA)⁸ and the Resource Conservation and Recovery Act (RCRA)⁹ in the 105th Congress.

In the RCRA arena, the focus is likely to be on the reform of the corrective action program, and will evolve from legislation introduced in the Senate during the last session.¹⁰ Opposition to reform is expected from environmental groups. Because of increased dialog among environmental groups, industry, the USEPA, and Congress, however, this legislation could have a strong chance of passing in the next session if negotiations are successful. That Congress will not include the RCRA reforms as part of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Reauthorization, which will be a separate focus for reform, will increase the chances of successful legislation in this area.¹¹ Of significance in the version proposed in the 104th Congress is the provision that if cleanup wastes are managed under a state or the USEPA approved cleanup plan, they will be exempted from the hazardous waste management requirements of the RCRA Subtitle C.

⁴ DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES-LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 11-4(a) (28 Feb. 1995).

⁵ *Threatened Wildlife*, 61 Fed. Reg. at 64,481.

⁶ *Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species*, 61 Fed. Reg. 7,596-7,613 (1996) (to be codified at 50 C.F.R. pt. 17).

⁷ This DODI replaces *DOD Directive 6050.16, DOD Policy for Establishing and Implementing Environmental Standards at Overseas Installations* (20 Sept. 1991), that was canceled by *DOD Directive 4715.1, Environmental Security* (24 Feb. 1996).

⁸ 33 U.S.C. §§ 1251-1387 (1990).

⁹ 42 U.S.C. §§ 6901-6992k (1988).

¹⁰ S. 1274, 104th Cong., 1st Sess. (1996).

¹¹ *Comprehensive Environmental Response, Compensation, and Liability Act*, 42 U.S.C. §§ 9601-9674 (1994) [hereinafter CERCLA].

Similarly, the CWA is expected to be a priority in the 105th Congress. Where the RCRA reform is likely to build on previous legislation, the CWA reform will depart from earlier, much criticized, legislative reform efforts in 1995. Highlighted areas for reform to date include pollutant trading and wetlands mitigation. Although no mention has been made of expanding the federal waiver of sovereign immunity under the CWA, reform efforts will build on the compromise that led to the Safe Drinking Water Amendments of 1996. If so, a similar broadening of the waiver of sovereign immunity could be likely. Such an expansion would have great impact on federal installations because federal entities currently are exempt from paying fines and penalties under the present CWA.

Regardless of what factors facilitate compromise, legislation implementing reforms probably will not be enacted until late in the session. Any reforms that appear to be imminent will be synopsisized in the *Environmental Law Division Bulletin (ELD Bulletin)* and *The Army Lawyer*, and the legislation itself will be loaded onto the Environmental Law Files Area on the Legal Automation Army-Wide Systems Bulletin Board Service (LAAWS BBS) as soon as it is available.

There is now a separate environmental law file area on the LAAWS BBS. Undoubtedly, this will please those users who are tired of sifting through message files for the information they need. Now that information, which includes the *ELD Bulletin*, is in the files area. All files are saved in Word Perfect 5.1 format. Our vision is to use the area as a mini-practice resource location where environmental law attorneys can read and download policy memos, information papers, and solutions to environmental problems. We also plan to include media specific lists of resources for practitioners. We encourage your input on resources you would like to see on-line, but always remember that this area is a complement to rather than a substitute for accurate, up-to-date research.

The Environmental Law Division (ELD) soon expects to launch a web site of convenient environmental and general law links to be used as a springboard for on-line research. Also included in the site will be a listing of the ELD personnel for e-mail contact. Captain DeRoma.

Did you know? . . . It takes approximately 100 times more water to produce a pound of beef than it does to produce a pound of wheat.

Dithiocarbamate Task Force v. EPA

On 1 November 1996, the United States Court of Appeals for the District of Columbia Circuit ruled that USEPA had acted arbitrarily and capriciously in listing certain carbamate compounds as hazardous wastes under RCRA.¹² The petitioners, Dithiocarbamate Task Force (DTF), represented manufacturers who make or use four classes of carbamate compounds. The case concerns the listing of certain derivatives of carbamic acid that are used as pesticides, herbicides, and fungicides, as well as for various purposes used by the rubber, wood, and textile industries.

The USEPA proposed listing various carbamates as hazardous wastes under RCRA's implementing Regulations.¹³ The regulations require the USEPA to consider ten specified factors when determining whether a waste poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed, or otherwise managed. These factors include the nature, concentration, and toxicity of constituents, their potential for persistence and bioaccumulation, and "the plausible types of improper management to which the waste could be subjected."¹⁴ The DTF challenged the listing determinations on a number of theories, one of which was the USEPA's failure to consider each of the ten regulatory factors.

The court found that the USEPA must consider each factor and that even a finding that a factor is unimportant or irrelevant would be subject to deferential review. In this case, however, the USEPA did not consider each factor for each product listed. Additionally, the court found that the USEPA's consideration of the mismanagement factor was flawed. The court dismissed some of the "plausible mismanagement" scenarios that the USEPA relied on in making the listing determination. The ruling specified that USEPA must provide some support for the conclusion that a particular mismanagement scenario is plausible. The USEPA should only consider those scenarios that may reasonably occur and result in probable harm.

¹² *Id.* §§ 6901-6992k (1988).

¹³ Criteria for Listing Hazardous Waste, 40 C.F.R. § 261.11 (1992).

¹⁴ *Id.*

¹⁵ 98 F.3d-1394 (D.C. Cir. 1996).

It is unclear whether the USEPA will appeal the ruling in *Dithiocarbamate Task Force v. EPA*.¹⁵ The court's decision will restrict USEPA's ability to list certain hazardous wastes. At the same time, the decision also lends support to the USEPA's decision not to list some wastes as hazardous using the "plausible mismanagement" factor. Another approach would be for the Agency to allow the case to stand and rewrite the listing criteria to fit its current approach to listing determinations. It is clear that this case mandates careful consideration of the regulatory factors, in particular "plausible mismanagement" in future hazardous waste listing determinations by the USEPA. Major Anderson-Lloyd.

Required Agreements Between the Army and the USEPA for Army Facilities on the National Priorities List

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires federal agencies with facilities on the national priority list (NPL) to enter into an interagency agreement (IAG) with the USEPA within 180 days after completion of the facility's Remedial Investigation/Feasibility Study (RI/FS).¹⁶ All such IAGs shall include public participation as set forth in CERCLA section 117.¹⁷ The IAG must include the following:

- (1) A review of alternative remedial actions and the selection of a remedial action;
- (2) A schedule for the completion of the remedial action; and,
- (3) Arrangements for long-term operation and maintenance of the facility.¹⁸

The USEPA and a federal facility must enter into a Federal Facility Agreement (FFA), which is intended to serve as a procedural "blueprint" for the facility's cleanup, and to meet the requirements of CERCLA section 120. At most installations, it is anticipated that the FFAs will be entered into years before a record of decision (ROD) is signed. The ROD, an agreement between the Army and the USEPA with concurrence by the affected state, addresses the specific requirements found in CERCLA section 120(e)(4). Case law and the USEPA guidance do not consider the RI/FS process complete until the ROD for an operable unit is signed. With respect to CERCLA section 120 requirements, because the FFA is signed before the ROD is completed, the FFA will not contain analysis of reme-

dial alternatives nor contain a detailed cleanup schedule, because these are two of the ROD's roles.

The FFA, however, can and should include how the ROD process will be completed, when the cleanup schedule will be attached to the ROD, and provisions for long-term operation and maintenance. By having an FFA in place before the ROD is completed, the ROD signing perfects CERCLA section 120(e)(4) requirements. Therefore, the FFA, supplemented by the ROD, serves as the comprehensive CERCLA IAG between the USEPA and the Army at NPL sites. Major Cook.

Did you know? . . . Red-cockaded woodpeckers prefer placing their nesting cavities on the westerly side of trees.

Third Circuit Rules on Passive Migration

The United States Court of Appeals for the Third Circuit recently held that passive migration of contamination released prior to a party's ownership of property does not constitute "disposal" during that party's tenure as owner for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁹

The current owner of the property, HMAT, was sued by the United States pursuant to the CERCLA for the costs of the response action, and sought contribution on a passive migration theory from the company that had sold it the land, Dowel Associates. HMAT argued that disposal occurred because contamination that was released on the land prior to Dowel's purchase of the property spread during Dowel's ownership.

The court rejected HMAT's migration theory, holding that there had been no disposal during Dowel's ownership of the property and, therefore, Dowel did not fall within the definition of a responsible party.²⁰ The court based its ruling on the plain language of CERCLA's definition of "disposal," as well as on the structure of the statute's liability scheme.

The court rejected several rulings by other jurisdictions that have held that passive migration can constitute disposal, including one from the United States Court of Appeals for the Fourth Circuit.²¹ The Third Circuit found that the words "leaking" and "spilling," by their definitions, require some active human conduct. Even if they did not, however, the court found that neither

¹⁶ CERCLA § 120(e)(2), 42 U.S.C. §§ 9620(e)(2) (1996).

¹⁷ CERCLA § 117, 42 U.S.C. § 9617 (1986).

¹⁸ 42 U.S.C. § 9620(e)(4) (1996).

¹⁹ *United States v. CDMG Realty Co., et al.*, 96 F.3d 706 (3rd Cir. 1996).

²⁰ CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994).

²¹ *See United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984).

word denotes the gradual spreading of contamination that was alleged by HMAT. Moreover, the court found that the passive migration theory would create a complicated way of making liable all people who owned or operated facilities after the introduction of hazardous substances, an intent that the court was not willing to impute to Congress. Ms. Fedel.

District of Columbia Circuit Invalidates Aggregation Policy

The United States Court of Appeals for the District of Columbia recently invalidated a USEPA policy on aggregating sites for listing on the national priorities list (NPL).²² The USEPA policy provided for listing noncontiguous facilities on the NPL as a single site on the basis of such factors as whether the two areas were part of the same operation (historically), whether the potentially responsible parties were the same or similar entities, whether the target population was the same or overlapping, and the distance between the noncontiguous areas.²³

The court held that the policy, as used to justify the listing of noncontiguous sites whose listing cannot be individually justified by reference to risk criteria, is unlawful because USEPA lacks statutory authority to list sites in this manner. The court found the inclusion of low-risk sites on the NPL contrary to Congress' intent in creating the NPL, namely to create a system of prioritizing sites for response based on risk levels.

The court rejected the USEPA's argument that its authority in the liability section of CERCLA was broad enough to encompass the aggregation policy.²⁴ The court held that section 104(d)(4) authority, which allows the USEPA to treat noncontiguous facilities that are reasonably related on the basis of geography or risk as one facility for the purposes of liability, did

not affect USEPA's listing authority in section 105.²⁵ Nor does the USEPA's ability to group separate facilities together on the NPL for response priority purposes include those sites that do not qualify as priority sites.²⁶

The court also restated its previous recognition of the harmful effect that the status of being ranked on the NPL has on business entities. In doing so, the court rejected the USEPA's argument that Mead Corporation's ranking on the NPL would have no effect on Mead's liability for the low-risk site because the NPL is merely a response planning tool. Ms. Fedel.

Litigation Division Note

What is a Case Worth? How to Defend the \$300,000 Cap on Compensation Damages in Title VII Suits

Introduction

Title VII employment discrimination suits filed against the Army in federal court are often the culmination of several different formal complaints of discrimination that were processed administratively. Many of the plaintiffs who file these suits are members of more than one protected class and assert intentional discrimination claims on every available basis.²⁷ This results in several different claims and theories of liability within each suit against the Army. With increasing frequency, plaintiffs seeking large settlements, or trying to uphold excessive jury verdicts, are claiming that the \$300,000 compensatory damages cap²⁸ applies to each individual claim or at least each different basis of discrimination for which a decision is rendered, rather than to each suit filed.

The damage cap issue is currently pending before the United States Court of Appeals for both the Sixth and Eleventh Cir-

²² *Mead Corp. v. Browner*, 100 F3d 152 (D.C. Cir. 1996).

²³ *Aggregation Policy*, 48 Fed. Reg. 40,663 (1983).

²⁴ CERCLA § 104(d)(4), 42 U.S.C. § 9604(d)(4) (1992).

²⁵ CERCLA § 105, 42 U.S.C. § 9605 (1986).

²⁶ CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B) (1986).

²⁷ Title VII, Civil Rights Act of 1964, *as amended* by 42 U.S.C. §§ 2000e-2000e-17 (1994) prohibits discrimination against applicants for employment, employees, and former employees on the basis of race, color, religion, sex, or national origin.

²⁸ The relevant portion of Title VII provides: "In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory . . . damages as allowed in subsection (b) of this section . . ." Subsection (b)(3) provides: "The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . awarded under this section, shall not exceed, for each complaining party—

....
(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000." 42 U.S.C. § 1981a(a)(1) (1994).

cuits.²⁹ Until a decision is rendered and ultimately ruled upon by the United States Supreme Court, more and more complainants alleging intentional employment discrimination at both the administrative and litigation stages will seek compensatory damages in excess of \$300,000. Increasingly, Army labor counselors may find themselves faced with outrageous settlement offers and threats of astronomical liability figures in federal court under the theory of multiple compensatory damage caps.

Plaintiffs have been aided in their efforts to obtain multiple damage caps by the Equal Employment Opportunity Commission General Counsel (EEOCGC). In an *Amicus Curiae* brief filed in the United States Court of Appeals for the Eleventh Circuit, the EEOCGC contended that, according to the history and purpose of Section 1981a, Congress did not intend a plaintiff who prevails on multiple claims of discrimination to be limited by a single cap on damages.³⁰

Because labor counselors are likely to encounter arguments similar to those advanced in the EEOCGC's amicus brief in support of a complainant's claim for multiple damage caps, this note will discuss ways labor counselors can counter these arguments and present the current legal standard.³¹

The EEOC General Counsel's Position

First, the EEOC General Counsel asserts that the language "in an action" found in subsection (a) of 42 U.S.C. § 1981a does not modify the limitations on damages set forth in subsection (b). The language simply describes the type of proceeding to which section 1981a applies—a Title VII action challenging intentional discrimination. The EEOCGC contends that since subsection (b) does not contain similar language or make any other reference to a per suit limitation on the amount of compensatory damages recoverable by a plaintiff, there is no cap on damages awarded for the entire action.

Second, the EEOC General Counsel argues that because subsection (b) does provide that the amount awarded "for each com-

plaining party" shall not exceed the applicable cap, Congress did not intend the statutory caps to be applied as a per suit limitation on the amount of compensatory damages.

Third, because subsection (b) only limits the amount of compensatory damages for future losses and not compensatory damages for past losses such as back pay, the cap was not intended to impose a single limit on Section 1981a damages recovered in a particular lawsuit.

Fourth, the EEOC General Counsel warns that to hold otherwise would result in irrational consequences that could not have been intended by Congress. Plaintiffs faced with a per suit limitation on damages would file all of their distinct claims in separate lawsuits so that they might receive a separate cap for each action filed. It should be presumed, argues the EEOC, that Congress did not intend this unreasonable result that is produced by a per suit limitation on compensatory damages.

Finally, when interpreting the legislative history, the EEOC General Counsel relies upon an interpretive memorandum placed in the *Congressional Record* by seven sponsors of the bill that became the Civil Rights Act of 1991. The memorandum describes the caps as limitations "placed on the damages available to each individual complaining party for each cause of action under section 1981a."³² The General Counsel contends that the use of the term "cause of action" strongly suggests that the framers of Section 1981a intended the caps to be applied on a per claim basis. Further support is elicited from the remarks of Congressman Edwards, a sponsor of the House version of the bill. Congressman Edwards states that "the limitations on damages awards in the legislation . . . apply to the damages available to each individual complaining party for each *cause of action* brought under Section 1981[a]."³³

Congressman Edwards notes that individuals may have different independent causes of action under section 1981a arising out of the same or different factual situations. An individual suffering discrimination on the basis of two or more protected grounds, such as disability or sex, would be entitled to recover

²⁹ *Reynolds v. CSX Transportation, Inc.*, 1995 U.S. Dist. LEXIS 9853 (M.D. Fla. June 14, 1995) *appeal docketed*, No. 95-3364 (11th Cir. 1995); *Hudson v. Reno*, Civ. 3:92-CV-737 (E.D. Tenn. Oct. 14, 1995) *appeal docketed*, No. 96-5232 (6th Cir. 1996).

³⁰ The EEOC, in accordance with 42 U.S.C. § 2000e-5, can prevent anyone from engaging in any unlawful employment practice; it also possesses litigating authority in the lower federal courts independent of Solicitor General review which is otherwise required under 28 C.F.R. § 0.20. However, the EEOC does not possess such independent authority before the Supreme Court. *See* 28 U.S.C. § 518(a) (1993). The view expressed in the EEOC amicus brief is not shared by the United States as determined by the Solicitor General of the United States. "The EEOC position articulated in *Reynolds* is contrary to the plain meaning of the statute and thus should not be followed." Brief for Appellees Janet Reno and United States Department of Justice at 18 n.4, *Hudson*.

³¹ Though edited to present a more general application for Army labor counselors, the arguments presented against the EEOC's position are largely adapted from the Department of Justice brief submitted in *Hudson*.

³² Sponsors' Interpretive Memorandum, 137 CONG. REC. S15484 (daily ed. Oct. 30, 1991).

³³ 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (emphasis added).

damages on each of the independent causes of action. The EEOC concludes by emphasizing that the per claim cap interpretation conforms to the overall purpose of Section 1981a—to fully compensate persons harmed by discrimination and to deter businesses from engaging in further discrimination.

The Plain Language of the Statute

To successfully refute arguments for compensatory damages in excess of \$300,000, labor counselors must first look to the plain language of the statute. The plain language of 42 U.S.C. § 1981a is very clear. The dollar limitations in subsection (b) apply “in an action” described in subsection (a). To find that subsection (b) stands alone and places dollar limits on “causes of action” is to ignore the plain meaning of the words and the statutory construction of the section.

A complaining party may not recover more than the cap “in an action” brought under sections 706 and 717 of the Civil Rights Act of 1964. An “action” brought under those sections is simply a “civil action” for intentional discrimination. Other sections of the Act also support this interpretation: “a civil action may be brought against the respondent named in the charge;”³⁴ and, an aggrieved federal employee “may file a civil action as provided in section 2000e-5 of this title.”³⁵ *Black's Law Dictionary* defines “civil action” or an “action” as simply “a suit brought in court.”³⁶ The *Federal Rules of Civil Procedure* (FRCP) also use the terms “action” and “civil action” to refer to all claims for

relief alleged in a *single lawsuit*. Rule 2 states: “There shall be one form of action to be known as ‘civil action’.” Rule 3 states: “A civil action is commenced by filing a complaint with the court.” Additionally, by stating that the sum of compensatory damages shall not exceed, “for each complaining party,” the prescribed amounts, subsection (b) reinforces the conclusion that a single plaintiff in a single lawsuit is entitled to a single award.

In sum, a complaining party's total compensatory damages are capped for the entire “civil action.” The clear language within the statute alone should end the argument in favor of labor counselors who are contesting damages in excess of \$300,000. “[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.”³⁷

Judicial Treatment

The trial courts that have considered the multiple cap issue have uniformly rejected contentions that the cap applies to each claim rather than the entire civil action.³⁸ These results are also consistent with the federal circuit court precedent.³⁹

Limited Waiver of Sovereign Immunity

The United States, as sovereign, defines the terms and conditions upon which it may be sued.⁴⁰ Any waiver of this tradi-

³⁴ 42 U.S.C. §§ 2000e-5(f)(1) (1994).

³⁵ *Id.* § 2000e-16(c).

³⁶ BLACK'S LAW DICTIONARY 26 (5th ed. 1979).

³⁷ *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

³⁸ See *Solomon v. Godwin and Carlton, P.C.*, 898 F. Supp. 415, 416 (N.D. Tex., 1995) (“the cap imposes a single limitation on both types of damages, so that the total of compensatory and punitive damages awarded may not exceed the applicable cap amount”); *Flor v. O'Leary*, Civ. 93-1343 JC/WWD, at 2 (D. N.M. July 25, 1995) (because Congress set the cap on damages “in an action brought by a complaining party,” the limitation applies “whether liability was premised on a single post-Act violation or multiple post-Act violations if brought in the same litigation”); *Rogerson v. Widnall*, Civ. 92-5038, at 2 (D. S.D. May 11, 1995) (“the law and the statute clearly provide” that the plaintiff is limited to \$300,000 for the entire action rather than for each discriminatory act found by the jury); *Baker v. Dalton*, Civ. 92-1082, at 3 (S.D. Cal. Jan. 28, 1994) (denying plaintiff leave to amend her claim for damages from \$300,000 to \$3.6 million on the grounds of futility in light of the “plain meaning of the statute”); *Reynolds v. CSX Transportation, Inc.*, 1995 U.S. Dist. LEXIS 9853, at *3 (M.D. Fla. June 14, 1995) (“the language of the statute on its face makes it clear that the limitation is for the entire action”); *Hudson v. Reno*, Civ. 3-92-CV-737 (E.D. Tenn. Oct. 14, 1995) (reducing a jury award of \$1.5 million to \$300,000 pursuant to the cap on compensatory damages set forth in 42 U.S.C. § 1981a(b)(3)(D) (1994)).

³⁹ See *Hogan v. Bangor and Aroostook R.R.*, 61 F.3d 1034, 1037 (1st Cir. 1995) (“The statute is clear on its face that the sum of compensatory damages (including its various components) and punitive damages shall not exceed \$200,000”); *Selgas v. American Airlines, Inc.*, 858 F. Supp. 316, 326 (D.P.R. 1994), *affirmed in part, vacated in part*, 69 F.3d 1205 (1st Cir. 1995) (the court reduced the jury award of \$350,000 in punitive damages to \$300,000, the maximum award permitted against an employer with more than 500 employees); *E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995) (“[T]he Civil Rights Act of 1991 limited the amount of monetary recovery under Title VII . . . by placing caps on the total amount of compensatory and punitive damages that could be awarded to any complaining party.”); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1355 (7th Cir. 1995) (“In fashioning new remedies under Title VII, Congress determined that a company the size of Penril, with more than 100 but less than 201 employees, should have to pay no more, in total compensatory (with back pay excluded) and punitive damages, than \$100,000”); *Emmel v. Coca-Cola Bottling Co. of Chicago, Inc.*, 904 F.Supp. 723, 739-41 (N.D. Ill. 1995) *affirmed*, 1996 WL 517292 (7th Cir. Sept. 12, 1996) (upholding a punitive damage reduction from \$500,000 to \$300,000, the maximum award permitted against an employer with more than 500 employees).

⁴⁰ *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. Testan*, 424 U.S. 392, 399 (1975); *Lehman v. Naskshian*, 453 U.S. 156, 160 (1981).

tional sovereign immunity is strictly construed in favor of the government⁴¹ and therefore it must be unequivocally expressed and not implied.⁴² The statutory cap on compensatory damages is a limitation or condition on the waiver of the government's sovereign immunity and, as such, must be strictly construed, in terms of its scope, in favor of the government.

Legislative History

Although the amendments imposed by the Civil Rights Act of 1991 now permit compensatory damage awards to plaintiffs who establish intentional discrimination, the Act does not guarantee compensation to plaintiffs for the full extent of their injuries. The monetary cap on damages was a key component of the compromise needed for the passage of the Act.⁴³ Section 1981a was not intended to provide full relief.

The limited legislative history reveals that the damage cap provision was enacted to address the concern that American businesses, particularly smaller ones, might not be able to withstand unlimited damages.⁴⁴ The damage caps were a compromise that balanced these concerns with the overall goal of deterring intentional workplace discrimination and making reasonable remedies available to victims of discrimination.⁴⁵

Plaintiffs and administrative complainants may point to a statement in a memorandum submitted by seven sponsors of the 1991 Act that describes the caps as "limitations . . . placed on the damages available to each individual complaining party for each *cause of action* under section 1981a."⁴⁶ However, this statement has

been taken out of context. The phrase "cause of action" in the Interpretive Memorandum was not used in response to an argument that the cap applies per lawsuit, but rather as part of a discussion distinguishing Title VII claims from claims made under 42 U.S.C. § 1981.⁴⁷

Some plaintiffs also may find support in the extension of remarks placed in the *Congressional Record* by individual congressmen after final passage of the Civil Rights Act of 1991.⁴⁸ However, such post-enactment statements are not part of the legislative history of the Act and could not possibly have influenced Congress in passing the Act. Moreover, the isolated remarks of a single legislator are to be given little weight.⁴⁹

Truly Distinct Claims May Still Recover Multiple Caps

Under the Civil Rights Act of 1991, a plaintiff with distinct claims may, under the appropriate circumstances, recover multiple caps by bringing separate lawsuits. Noting this, the plaintiff's bar argues that limiting a plaintiff to one cap in a given action will encourage plaintiffs to file multiple lawsuits to challenge a course of conduct that would normally have generated a single lawsuit. However, this concern over the lack of judicial economy is misplaced.

First, if a plaintiff has asserted distinct but related claims in separate actions, the court may consolidate the actions for trial pursuant to Rule 42(a) of the *Federal Rules of Civil Procedure*.⁵⁰ Second, a Title VII plaintiff is barred from splitting a single claim

⁴¹ *Lane v. Pena*, 116 S. Ct. 2092, 2096 (1996).

⁴² *Soriano v. United States*, 352 U.S. 270 (1957); *United States v. King*, 395 U.S. 1 (1968).

⁴³ 137 CONG. REC. S15472, S15486 (daily ed. Oct. 30, 1991) (Statements of Senators Dole and Kohl).

⁴⁴ 137 CONG. REC. S15478-79 (daily ed. Oct. 30, 1991) (comments of Senator Bumpers); 137 CONG. REC. S15486 (daily ed. Oct. 30, 1991) (comments of Senator Kohl).

⁴⁵ 137 CONG. REC. S15479 (daily ed. Oct. 30, 1991) (comments of Senator Bumpers); 137 CONG. REC. S15234 (daily ed. Oct. 25, 1991) (comments of Senator Kennedy).

⁴⁶ Sponsors' Interpretive Memorandum, 137 CONG. REC. S15484 (daily ed. Oct. 30, 1991) (emphasis added).

⁴⁷ 42 U.S.C. § 1981 protects against discrimination on the basis of race or alienage and protects a limited range of civil rights (to, *inter alia*, make and enforce contracts, to sue, to be parties, to give evidence) outside the employment arena governed by Section 1981a. Liability under 42 U.S.C. § 1981 is unaffected by the cap provisions of Section 1981a and defendants are subject to unlimited damages under that statutory provision.

⁴⁸ See, e.g., 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (Remarks by Congressman Edwards).

⁴⁹ See *Chrysler v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."); *Monterey Coal Co. v. Federal Mine Safety & Health Review Commission*, 743 F.2d 589, 598 (7th Cir. 1984) (noting that to give "decisive weight" to the remarks of a single legislator "would be to run too great a risk of permitting one member to override the intent of Congress as expressed in the language of the statute").

⁵⁰ Under Rule 42(a) of the *Federal Rules of Civil Procedure*, a court may order consolidation of actions involving a common question of law or fact.

⁵¹ *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849, 851 (1st Cir. 1947).

into multiple lawsuits. This doctrine is "one application of the general doctrine of *res judicata*."³¹ For *res judicata* to attach, it is sufficient that a claim in one suit could have been presented in a previously filed suit.³² Thus, the question whether a plaintiff has alleged independent claims will depend on whether *res judicata* would bar the second claim. This prohibition against splitting a claim will prevent plaintiffs from bringing a multiplicity of separate suits arising from a common set of facts.

Unauthorized Punitive Awards

Finally, awarding damages under a theory of multiple caps may camouflage excessive awards that are actually unauthorized punitive damages. A jury that is shocked or appalled by the underlying discriminatory conduct that gave rise to the complaint may award "compensatory damages" that far exceed the amount necessary to actually compensate the plaintiff for the harm committed. When this happens, the amount awarded is actually a punitive assessment against the government presented in the only manner made available to the jury—through the compensatory

damage award. However, the 1991 Act clearly precludes a complaining party from recovering punitive damages against the government.³³ Furthermore, as noted above, in establishing the caps on compensatory damages, Congress sought to control excessive damage awards by the juries. "An award of compensatory damages is excessive if it exceeds a rational appraisal of the damages actually incurred."³⁴ Allowing multiple damage caps may frequently result in compensatory damages that exceed a rational appraisal of the damages which in effect is an unauthorized punitive assessment.

Conclusion

Government counsel defending discrimination complaints at both the administrative and district court levels are faced with increasingly proficient and aggressive plaintiffs who creatively plead their case to maximize monetary compensation. Until the Supreme Court has definitively ruled on the issue, counsel must use the arguments presented above, and set forth in detail why the Army should not be exposed to multiple damage caps or unlimited liability. Major Berg.

³² See *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321-22 (1927) ("The injured respondent was bound to set forth in his first action for damages every ground of negligence . . . upon which he relied, and cannot be permitted . . . to rely upon them by piecemeal in successive actions to recover for the same wrong and injury"); *Brown v. Felson*, 442 U.S. 127, 131 (1979) ("[r]es judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding").

³³ 42 U.S.C. § 1981a(b)(1) provides:

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual. (Emphasis added).

³⁴ *Hogan v. Bangor and Aroostook R.R.*, 61 F.3d 1034, 1037 (1st Cir. 1995).