In the Matter of:	:	
	:	
	:	HUDBCA No. 06-A-CH-AWG03
Douglas P. Hansen,	:	Claim No. 780007354
	:	
Petitioner	:	
	:	

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For the Secretary

DECISION AND ORDER

Petitioner requested a hearing concerning a proposed administrative wage garnishment relating to a debt allegedly owed to the U.S. Department of Housing and Urban Development ("HUD"). The Debt Collection Improvement Act of 1996, as amended (31 U.S.C. § 3720D), authorizes federal agencies to utilize administrative wage garnishment as a mechanism for the collection of debts owed to the United States Government.

The administrative judges of this Board have been designated to determine whether the Secretary may collect the alleged debt by means of administrative wage garnishment if contested by a debtor. 24 C.F.R. § 17.170(b). This hearing is conducted in accordance with the procedures set forth at 31 C.F.R. § 285.11, as authorized by 24 C.F.R. § 17.170. The Secretary has the initial burden of proof to show the existence and amount of the debt. 31 C.F.R. § 285.11 (f)(8)(i). Petitioner thereafter must present by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. In addition, Petitioner may present evidence that the terms of the repayment schedule are unlawful, would cause a financial hardship to the Petitioner, or that collection of the debt may not be pursued due to operation of law, 31 C.F.R. § 285.11 (f)(8)(ii). Pursuant to 31 C.F.R. §

285.11 (f)(10)(i), issuance of a wage withholding order was stayed by this Board until the issuance of this written decision.

Summary of Facts and Discussion

On or before July 30, 1987 Petitioner executed and delivered to Green Tree Acceptance, Inc. ("Green Tree"), an installment note in the amount of $26,627.18 for a mobile home loan that was insured against nonpayment by the Secretary pursuant to Title I of the National Housing Act, 12 U.S.C. § 1703. (Secretary's Statement, "Secy. Stat.," ¶ 2; Exh. A). Petitioner and his former wife failed to make payments as agreed in the note. A notice of default dated May 14, 1996 was sent to Petitioner by Green Tree. (Petitioner's Response to Secretary's Statement, "Pet. Resp.", Exh. 2). On October 9, 1996, Green Tree assigned the defaulted note to the United States of America in accordance with 24 C.F.R. § 201.54 (2005). (Secy. Stat., ¶ 3; unmarked exhibit). The Secretary is the holder of the note on behalf of the United States of America. Id.

The Secretary has filed a Statement with documentary evidence in support of his position that Petitioner is indebted to the Department in the claimed amounts. The Secretary alleges that Petitioner is currently in default on the note and that Petitioner is indebted to the Government in the following amounts: $9,526.73 as the unpaid principal balance as of October 30, 2005; $4,941.39 as the unpaid interest on the principal balance at 5% per annum through October 30, 2005; and interest on said principal balance from November 1, 2005 at 5% per annum until paid. (Secy. Stat., ¶¶ 4-5; Declaration of Brian Dillon, ¶¶ 3-4).

1. Effect of Petitioner's Divorce Decree

Petitioner denies being responsible for the debt and disputes the enforceability of the debt. (Pet. Resp.). In denying responsibility for the debt, Petitioner refers to a 1994 divorce decree between himself and his ex-wife. Id. Petitioner asserts that "Patty Ruth Hansen . . . [was] awarded the Palm Harbor mobile home . . . and also ordered . . . to pay the indebtedness thereon to Green Tree." Id. at 1. Petitioner included a copy of the divorce decree as evidence to support his position, and further asserts that it is "inequitable" to garnish his wages due to the divorce decree. Id., Exh. 1, p.4. However, as a co-signer on the note, Petitioner is jointly and severally liable with his former wife for repayment of the debt. "Liability is characterized as joint and several when a creditor may sue the parties to an obligation separately or together." Mary Jane Lyons Hardy, HUDBCA No. 87-1982-G314, at 3 (July 15, 1987). A divorce decree that purports to release Petitioner from a joint obligation does not affect the claims of an existing creditor unless the creditor was a party to the action. Wendy Kath, HUDBCA No. 89-4518-L8, at 2 (December 26, 1989). Here, neither the Secretary nor the lender were parties to the divorce action, thus binding Petitioner to his prior contract obligations. The divorce decree only determined the rights and liabilities between Petitioner and his former spouse. Kimberly S. King (Thiede), HUDBCA No. 89-4587-L74 (April 23, 1990). Petitioner may enforce the divorce decree

against his ex-wife in state or local court to recover monies paid to HUD by him to satisfy this obligation. However, this does not preclude the Secretary from enforcing this debt against Petitioner. Deborah Gage, HUDBCA No. 86-1276-F283 (January 14, 1986). Consequently, Petitioner remains jointly and severally liable to the contract at issue and the Secretary has the right to enforce the obligation against him individually.

2. Time Period for Commencent of Administrative Wage Garnishment

The crux of the dispute presented here is whether the absence of an explicit period of time in 31 U.S.C. § 3720D relating to when an authorized action may be brought means, as the Secretary contends, that there is no time limitation within which an administrative wage garnishment order may be issued against a party indebted to the United States Government.

In denying the enforceability of the debt, Petitioner asserts that collection of this debt by administrative wage garnishment is barred by a time limitation period, interchangeably referred to below as a statute of limitations, set forth at 28 U.S.C. § 2415(a), which states, in relevant part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . . .

28 U.S.C. § 2415 became law on July 18, 1966 as a result of the enactment of P.L. 89-505. According to Petitioner, any effort to collect this debt by administrative wage garnishment is barred because the "Government has not commenced a lawsuit or administrative action within six years of March 1, 1996 or even October 1, 1996 (the default and assignment dates, respectively)." (Pet. Resp. at 2) (parentheses in original).

(a). Applicable Cases

There is currently a split in the opinions among various federal circuit courts of appeals as to whether 28 U.S.C. § 2415(a) applies to cases filed in federal district court exclusively, or whether the statute also applies to administrative proceedings. Petitioner relies on the cases supporting the application of section 2415(a) to administrative proceedings, while the Secretary relies on cases finding to the contrary. While none of these cases cited by the parties address the issue of administrative wage garnishment specifically, a discussion of certain cases cited by the parties is useful.

Petitioner has cited several cases in support of his position that 28 U.S.C. § 2415(a) applies to actions in both federal district court and administrative proceedings, specifically

noting the holdings of the courts in United States v. Hanover Ins. Co., 82 F.3d 1052 (Fed. Cir. 1996) and in OXY USA, Inc. v. Babbitt, 268 F.3d 1001 (10th Cir. 2001) (en banc). In Hanover Ins. Co., 82 F.3d at 1052, the U.S. Court of Appeals for the Federal Circuit considered an appeal from the U.S. Court of International Trade which had held that the U.S. Customs Service could not enforce a time-barred claim for anti-dumping duties by using administrative procedures. On appeal to the Federal Circuit, the government argued that 28 U.S.C. § 2415(a) does not apply to administrative actions, but rather only prevents the government from collecting duties "by judicial process." Id. at 1054. In making this argument, the government looked to the language of section 2415(a) that refers to the filing of a "complaint" which the government construed to be a complaint filed in a federal district court. Id. The appellate court in Hanover rejected this argument, stating:

> As explained in the Court of International Trade's thorough opinion, for the government to prevail in its argument, the court must find that "in enacting section 2415, Congress intended to do no more than prohibit the commencement of court actions" and that "Congress intended agencies to be free to assert their claims at any time and by any means other than court actions, unencumbered by the period of limitation imposed by section 2415(a)." 869 F.Supp. at 952. Like the Court of International Trade, we do not believe this is what Congress intended.

Id. at 1055.

Subsection (i) of 2415 provides an exception to the general rule in subsection 2415 (a). 28 U.S.C. § 2415(i) states: "The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of title 31." Pursuant to this subsection, the six-year limitation period does not prevent the United States from collecting a claim by means of administrative offset under section 3716 of Title 31. In affirming the decision of the U.S. Court of International Trade, the court in Hanover Ins. Co. interpreted this exception to mean that all other pertinent administrative procedures must, subsequently, fall within the ambit of section 2415(a). "Unlike the express exception for offsets, Congress did not include an exception to section 2415(a) for coercive agency actions predicated upon an otherwise time-barred claim, and we decline the government's invitation to judicially legislate one." Hanover Ins. Co., 82 F.3d at 1055.

The court in OXY USA, Inc. considered the issue of whether the six-year statute of limitations of 28 U.S.C. § 2415(a) applied to Mineral Mining Service (MMS) orders directing lessees to pay additional royalties on oil and gas production. A three-judge panel had previously found section 2415 inapplicable partly because it determined MMS orders were not "actions" under that section. OXY USA, Inc., 268 F.3d at 1004. On appeal, the government argued that MMS orders were not "actions" under section 2415(a), and that while section 2415(a) limits the time in which MMS can initiate an action in a federal district court to recover royalties, it established no time limitation for the commencement

of administrative collection proceedings. In rejecting the government's argument, the court concluded that the statutory language, purpose, and scheme would instruct that section 2415(a) does indeed apply to MMS orders. Id. at 1005.

In construing section 2415(a), the court in OXY USA, Inc., determined that the phrase "every action" is "patently broad" and expressly limited only by the possibility of a specific exception provided by Congress. Id. Similarly, the court concluded that the reference to the filing of a "complaint" cannot reasonably be interpreted to apply only to formal judicial proceedings because: (1) the purpose of the statute is to level the playing field between "government and private litigants" by "forcing the government to promptly assert its claims"; and (2) reading subsections (f) (permitting the government to defensively assert time-barred claims by way of offset or counter-claim) and (i) (making an exception for administrative offset) evidence "Congress' desire to deal with extra-judicial agency actions" along with judicial actions. Id. The court reasoned that if Congress did not intend for section 2415(a) to apply to administrative proceedings, then section 2415(i), would be superfluous. Id. at 1006. The court in OXY USA, Inc. agreed with the Hanover Ins. Co. court in its determination that permitting federal agencies to avoid the limitation period by using "administrative orders to collect monies owed under contract" would thwart the purpose of section 2415(a). Id.

The court continued its analysis by addressing the term "money damages." It found that the MMS claims against OXY USA Inc. for royalties were substantively no different from other government claims to recover money owed under contracts governed by the limitations period under section 2415(a). Id. at 1008, citing United States v. Sackett, 114 F.3d 1050, 1052 (10th Cir. 1997) (action to recover on defaulted small business administration loan); Hanover, 82 F.3d at 1055-56 (custom duties owed under surety contract); United States v. Alvarado, 5 F.3d 1425, 1428 (11th Cir. 1993) (claim for money owed on a promissory note).

The Secretary submits, in addressing this statute's legislative history, that "nothing requires expanding Section 2415(a) to cover administrative proceedings as well as civil actions in the District Courts." (Secretary's Brief, para. 8). The Secretary cites several cases in support of his contention that 28 U.S.C. § 2415(a) does not apply to administrative proceedings, including Amoco Production Co. v. Watson, 410 F.3d 722 (D.C. Cir. 2005) and Phillips Petroleum Co. v. Johnson, not reported in F.3d, No. 93-1377, 1994 WL 484506 (5th Cir. Sept. 7, 1994). The Phillips Petroleum case involved the issuance of administrative orders by the MMS of the U.S. Department of the Interior for oil and gas royalties due. Phillips Petroleum Co. argued that section 2415(a) barred the orders that called for payment of royalties over six years old because the orders were "actions" and the royalty demands were "for money damages." Phillips Petroleum Co., at *1. In rejecting this argument, the court construed the phrase, "action for money damages" in section 2415(a), as referring to a lawsuit in court for compensatory damages. Id. Coupling that with the statute's reference to a "complaint," the court concluded that actions for money damages are commenced only by filing a complaint in court, and, since the government had not filed such a complaint, the administrative order could not be interpreted as an action for money damages. Id. The court, unlike the 10th and Federal Circuit appellate courts,

concluded that orders issued by MMS seek monies due under a contract with the government, and "[s]uch obligations cannot be considered compensatory." Consequently, the court held that section 2415 does not apply to agency orders. Id.

In Amoco Prod. Co., Amoco Prod. Co., brought suit to enjoin the U.S. Department of the Interior and its Mineral Mining Service from enforcing decisions related to royalties due on methane gas production. One of the issues on appeal was whether the district court erred in determining that MMS orders assessing royalties were not barred by the statute of limitations under 28 U.S.C. § 2415(a). Amoco Prod. Co., at 732. The court framed the issue around the determination of whether an administrative order for royalties can be interpreted as an "action for money damages" initiated by the filing of a "complaint." Id. at 733. In construing section 2415, the court found that the phrase "action for money damages" tends to indicate a suit in court, as opposed to an enforcement order regarding money due. Id. The court found that section 2415(a) measures its time limitation from the filing of a "complaint." Id. According to the court, "it strains legal language to construe this administrative compliance order as a 'complaint' for money damages in any ordinary sense of the term." Id.

While the court in Amoco Prod. Co. found that the MMS orders were not subject to section 2415(a), it also admitted that section 2415, as a whole, is less clear. Id. The court was referring to section 2415(i), which provides an exception for administrative offset. Both courts, in Hanover Ins. Co. and in OXY USA, concluded that if section 2415(a) were not meant to apply to administrative proceedings, there would be no need for section 2415(i). While the court in Amoco Prod. Co. conceded that there was merit to this conclusion reached by the 10th and Federal Circuit appellate courts on this issue, it did not believe that such a conclusion comes from the plain reading of section 2415(a). Id. The court in Amoco Prod. Co. disagreed with the Tenth Circuit and Federal Circuit appellate courts in their application of the general purpose of the statute over its plain meaning. Id. at 734. Furthermore, when examining the legislative history behind section 2415(i), the court found that the specific legislation was simply an attempt by Congress to settle a debate between the U.S. Department of Justice and the Comptroller General. Id. The Department of Justice felt that section 2415(a) could be used to "bar administrative offsets," while the Comptroller General felt that it could not. Id. The Comptroller General suggested that section 2415(i) be passed "as a means of resolving the differences between us." (internal citations omitted). Id.

The Debt Collection Act of 1982 allows the federal government to collect delinquent debts by means of administrative offset, but limits it to the recovery of debts ten years old or less. 31 U.S.C. § 3716(e)(1). The parties do not dispute the fact that the statute which authorizes federal agencies to collect debts by means of administrative wage garnishment is silent as to a time limit in which wage garnishment can be implemented. 31 U.S.C. § 3720(D). The fact that 28 U.S.C. § 2415(a) provides an exception for administrative offset in subsection 2415(i), while not referencing any other administrative action, apparently convinced the Federal Circuit and Tenth Circuit appellate courts that the statute can be applied to other administrative proceedings. The Fifth and District of

Columbia Federal Circuit courts, with a more narrow view, focused on the plain meaning of the words of the statute.

The Secretary urges the Board to apply the holding in the Amoco Prod. Co. decision and to find that section 2415(a) does not apply to claims by the United States against debtors in administrative proceedings, including hearings related to administrative wage garnishment. (Amended Secretary Statement, "Amended Secy. Stat.," at ¶ 9). In addition, the Secretary cites the Board's decision in Kevin S. Becker, HUDBCA No. 05-D-NY-AWG26 (September 12, 2005), as further evidence that section 2415(a) does not apply to administrative wage garnishment. (Amended Secy. Stat., ¶ 8). There, in dicta, while comparing the ten-year statute of limitations for administrative offset, the Board stated "there is no equivalent statute of limitations for collecting a past-due legally enforceable debt by means of administrative wage garnishment." Kevin S. Becker at 4.

As to this particular argument, the Board believes that the Secretary's reliance on the dicta in Becker is misplaced. While the Board did note in Becker that 31 U.S.C. § 3720D contains no explicit language imposing a time limitation for "collecting a past-due legally enforceable debt by means of administrative wage garnishment," neither the absence of an explicit time limitation in 31 U.S.C. § 3720D nor the dicta in Becker, per se, compels this Board to conclude that no statutory time limitation exists with respect to the commencement of administrative wage garnishment actions.

(b). Sovereign Immunity

The Secretary contends that the doctrine of sovereign immunity grants the Department an unlimited time period in which to collect its debts by means of administrative wage garnishment. The Secretary relies upon the Supreme Court's holding in Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 132 (1938) in arguing that "[i]n the absence of a statute setting forth a limitation on a particular action, a statute of general application setting forth a period of limitations does not apply to the government." (Secy. Brief, p. 12, ¶ 10). The court in Guaranty Trust Co. of New York stated that the "implied immunity of the domestic 'sovereign,' state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included . . . ." Guaranty Trust Co. of New York at 133.

However, it appears that the government, when 28 U.S.C. § 2415 became law in 1966, wished to establish a six-year limitation period for the commencement of the collection of certain sums by federal agencies. See Federal Claims Collection Act of 1966, 31 U.S.C. § 951 et. seq. While the Supreme Court decided Guaranty Trust Co. of New York in 1938, a case which considered the effect of a state statute of limitations on a foreign government, the Board finds nothing in that decision which would affect the time limitations in 28 U.S.C. § 2415 relating to actions for money damages founded upon a contract, a statute which became law twenty-eight years later. "While the general rule stated above is that the sovereign is exempt from the operation of statutes of limitations, an exception to that general rule exists when the sovereign (through the legislature) expressly imposes a limitation period upon itself." United States v. Weintraub, 613 F.2d 612, 619

(6th Cir. 1979)(citing, Guaranty Trust of New York, United States v. Frank B. Killian Co., 269 F.2d 491, 494 (6th Cir. 1959). The government made such an exception when it adopted as law the limitation period set forth at 28 U.S.C. § 2415.

(c). Relevance of 28 U.S.C. § 2415 to Administrative Proceedings

The Secretary cites Jack McAdoo, HUDBCA No. 03-A-NY-DD021 (May 13, 2005), for the proposition that section 2415 "does not apply to administrative actions." (Amended Secy. Stat., ¶ 9). However, the citation to McAdoo to support his contention is not only faulty, but potentially counter-productive to the Secretary's position. The Board in the McAdoo case did not directly address the issue presented here, but essentially determined precisely when, as a matter of law, the Secretary's right to seek recovery of an outstanding debt by means of administrative offset commenced. While the Board in the McAdoo case noted the applicability of the 10-year statute of limitations to administrative offset actions, the Board noted in its decision the language in HUD's existing regulations at 24 C.F.R. § 17.160(b) where section 24 U.S.C. § 2415 was explicitly referenced: "(b) When the debt first accrued is determined according to existing law regarding the accrual of debts. (See, for example 28 U.S.C . § 2415.)" McAdoo at 7. (parentheses and emphasis in original).

The decision in the McAdoo case quotes a prior assertion by the Secretary that, in fact, section 2415 is applicable to an administrative proceeding. The Board noted in McAdoo the Secretary's prior acceptance, articulated in his Motion for Reconsideration in an administrative offset case, Sharon Dell, HUDBCA No. 90-493-L439 (1990), of the holding in Federal Deposit Ins. Corp v. Hinkson, 848 F.2d 432 (3d Cir. 1988) regarding when the Secretary's right to collect a debt by administrative offset commences and the pertinence of section 2415 to administrative proceedings. In Dell the Secretary stated:

> The Secretary submits that the holding in Hinkson supports the proposition that the applicable date of commencement of the period for the collection of a debt by administrative offset is the date the claim is assigned to HUD, rather than the date of default. The Secretary notes that 28 U.S.C. § 2415, the pertinent statute in Hinkson, specifically refers to 31 U.S.C. § 3716(e)(1), the applicable section in the instant case . . . . Thus, [t]he Secretary believes that given the existence of a direct reference to 31 U.S.C. §3716 within 28 U.S.C. § 2415, the two statutes may be read together. Secy. Motion for Reconsideration in Dell.

McAdoo at 8. It seems inconsistent that the Secretary does not now argue that these "two statutes…be read together" in the circumstances presented in this proceeding, although if he adhered to his position articulated in Dell, he would surely be compelled to adopt the

conclusion reached on this issue by the 10th Circuit and Federal Circuit appellate courts on the applicability of the time criteria in section 2415 to agency administrative actions. Id.

Given a choice between the views of the 10th Circuit and the Federal Circuit appellate courts versus the views of the D.C. Circuit and the 5th Circuit appellate courts, the Board is more persuaded by the reasoning of the 10th Circuit and the Federal Circuit appellate courts on this issue. The decisions of the 10th Circuit and Federal Circuit appellate courts considered the relevant underlying purpose of section 2415 (a) and held that the provisions of section 2415(a) apply to administrative actions and that these administrative actions are governed by the six-year period limiting the commencement of such actions. The Board concurs with the holding of the Federal Circuit appellate court which broadly interpreted section 2415 and determined that Congress intended for section 2415(a) to apply to more actions of the federal government than those which involve the filing of a complaint in court. See Hanover Insurance Co., 82 F.3d at 1055. This holding, in the Board's view, would be an accurate interpretation of the language of section 2415(a) whose provisions apply to "every action for money damages brought by the United States on an officer or agency thereof which is founded upon any contract…." (emphasis added).

Congress enacted section 2415 to "promote fairness . . . notwithstanding whatever prejudice might accrue . . . to the Government as a result of the negligence of its officers." S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 8 (Fed.Cir. 1985). The Secretary's interpretation of section 2415(a), like the government's interpretation in Hanover Insurance Co., "would not encourage . . . [timely actions for the] collection of unpaid claims…." See Hanover Insurance Co. 82 F.3d at 1052. As Judge Brown noted in his dissent, "[e]xcluding administrative collection proceedings from the definition of "action" leads to irrational results and permits government agencies to evade the statute of limitations through procedural gimmickry." OXY USA, 230 F.3d at 1193. As the court observed in United States v. Hanover Insurance Co., 869 F. Supp. at 957, an interpretation that section 2415(a) includes no time limitation on certain administrative actions would allow the government to be "in a better position in some disputes if it allows the six-year period to expire, and then threatens to impose sanctions." Although the Board elects to reply upon the guidance provided by the 10th Circuit and the Federal Circuit appellate courts in this proceeding, this election, while in Petitioner's favor, is not soley determinative of the Board's decision in this case.

(d). Section 2415 of Title 28 of the U.S. Code Has Not Been Repealed

In the absence of a statute which specifically repeals an extant statute of limitations which would otherwise be applicable to the government's right to commence an action to recover money due, the time limitation of six years for the commencement of actions for the recovery of outstanding debt as contained in 28 U.S.C. § 2415(a) must apply. Branch v. Smith, 538 U.S. 254, 123 S.Ct. 1429, 155 L.Ed. 2d 407 (2003). In contrast, the Higher Education Technical Amendments of 1991 explicitly eliminated time limitations on actions to collect debts owed to the U.S. Department of Education arising from defaulted student loans. (20 U.S.C.A. § 1091(a)(2)(d)). While it is uncontested that there is no explicit language in 31 U.S.C.A. § 3720(D) which sets forth a time period in which an

administrative wage garnishment action must commence, neither is there explicit language in this statutory provision that repeals, supercedes, or renders void the government's six-year statute of limitation on money claims, as is the circumstance with both 31 U.S.C. § 3720(A), establishing a ten-year period for collections by means of administrative offsets and 20 U.S.C.A. § 1091(a)(2)(d), establishing an indefinite period for the Department of Education for its administrative collection, by any means, of defaulted student loans. In Branch, the court described circumstances under which a subsequent statute could repeal or substitute for an earlier statute:

> We have repeatedly stated, however, that absent "a clearly expressed congressional intention," Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), "repeals by implication are not favored," Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n, 393 U.S. 186, 193, 89 S.Ct. 354, 21 L.Ed.2d 334 (1968). An implied repeal will only be found where provisions in two statutes are in "irreconcilable conflict," or where the latter Act covers the whole subject of the earlier one and "is clearly intended as a substitute." Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936).

Branch v. Smith, 538 U.S. 273. The Board finds no such "irreconcilable conflict" in the two statutes, 28 U.S.C. § 2415(a) and 31 U.S.C. §3720(D), in the matter presented here which would justify an "implied repeal" of 28 U.S.C. § 2415.

(e). HUD's Regulations Recognize Applicability of Section 2415 in Certain Administrative Proceedings

HUD's own regulations clearly demonstrate that this agency has long accepted and applied section 2415(a) to its administrative actions, and the Board cannot conclude that administrative wage garnishment procedures should be excepted from this Department's application of section 2415(a) to its regulatory procedures relating to its monetary claims. For at least 35 years, HUD has recognized the applicability of 28 U.S.C. § 2415 to administrative actions for the recovery of sums due the Department and has incorporated this statute explicitly in its agency regulations. For example, in 24 C.F.R. Part 17, Subpart B, entitled "Collection of Claims by the Government Under the Federal Claims Collection Act of 1966," the pertinent 1971 provision regarding when claims must be referred to the HUD General Counsel states:

> Referral of claims to the General Counsel.
> (a) Authority of the General Counsel. The General Counsel shall exercise the powers and perform the duties of the Secretary to compromise, or to suspend or terminate collection action on, all Department claims not exceeding $20,000 exclusive of interest,

> except as provided in § 17.25 and paragraph (b) of this section. When initial attempts at collection by the office having responsibility for such claims have not been fully successful, the claim file shall be forwarded to the General Counsel for further administrative collection procedures. Claims shall be referred to the General Counsel well within the applicable statute of limitations (28 U.S.C. 2415 and 2416), but in no event more than 2 years after the claims accrued.

24 C.F.R. § 17.24 (1971). (parentheses in original).

Subsequently, the authority to handle such collection claims was vested in the HUD Assistant Secretary for Administration, with similar references to, and time restrictions controlled by, 28 U.S.C. § 2415. Again, at 24 C.F.R. Part 17, Subpart B, entitled "Collections of Claims by the Government Under the Federal Claims Collection Act of 1966," the pertinent 1975 provision states:

> Referral of claims to the Assistant Secretary for Administration.
> (a) Authority of the Assistant Secretary for Administration. The Assistant Secretary for Administration shall exercise the powers and perform the duties of the Secretary to compromise, or to suspend or terminate collection action on, all Department claims not exceeding $20,000 exclusive of interest, except as provided in § 17.25 and paragraph (b) of this section. When initial attempts at collection by the office having responsibility for such claims have not been fully successful, the claim file shall be forwarded to the Assistant Secretary for Administration for further administrative collection procedures. Claims shall be referred to the Assistant Secretary for Administration well within the applicable statute of limitations (28 U.S.C. 2415 and 2416), but in no event more than 2 years after the claims accrued.

24 C.F.R. § 17.24(a)(1975). (parentheses in original). These provisions provide compelling evidence that HUD viewed its collection procedures as governed by the six year statute of limitations set forth in section 2415.

Extant in HUD's current regulations governing the agency's administrative collection procedures is a recognition of the applicability of 28 U.S.C. § 2415 as "existing

law" even when the statute of limitations for administrative offset actions was extended to ten years. 24 C.F.R. § 17.114 states:

> Procedures for administrative offset: time limitation.
> (a) The Secretary may not initiate administrative offset to collect a debt under 31 U.S.C. 3716 more than 10 years after the Secretary's right to collect the debt first accrued, unless facts material to the Secretary's right to collect the debt were not known and could not reasonably have been known by the officials of the Department who were responsible for discovering and collecting such debts.
> (b) When the debt first accrued is determined according to existing law regarding the accrual of debts. (See, for example, 28 U.S.C. 2415.)

24 C.F.R. § 17.114 (2004). (parentheses in original).

Even 24 C.F.R. § 17.160(b), relating to hearings before this Board on proposed administrative offsets, cites the applicability of 28 U.S.C. § 2415 as "existing law" in the Board's administrative offset review proceedings.

> Time limitation for notifying the Department of the Treasury to request offset of Federal payments due.
> (a) The Secretary may not initiate offset of Federal payments due to collect a debt for which authority to collect arises under 31 U.S.C. § 3716 more than 10 years after the Secretary's right to collect the debt first accrued, unless facts material to the Secretary's right to collect the debt were not known by the officials of the Department who were responsible for discovering and collecting such debts.
> (b) When the debt first accrued is determined according to existing law regarding the accrual of debts. (See, for example, 28 U.S.C. § 2415.)

24 C.F.R. § 17.160 (2004). (parentheses in original) Thus, the Board finds it strange that the Secretary now so vigorously contests the applicability of section 2415 to administrative wage garnishment actions when this section has been explicitly incorporated into existing HUD regulations and into prior HUD regulations which conformed the Department's administrative hearing procedures to section 2415 pursuant to the provisions of the Federal Claims Collection Act of 1966. In any event, since HUD's past and present regulations relating to the collection of outstanding HUD debt acknowledge the applicability of 28

U.S.C. § 2415, the Board concludes that the Secretary has failed to establish a persuasive factual or legal basis which would demonstrate that section 2415 does not similarly apply to HUD's regulations controlling the debt collection mechanism of administrative wage garnishment.

(f). The Six-Year Time Limitation Applied to Certain Administrative Actions Prior to 1982

Despite these multiple references to the applicability of 28 U.S.C. § 2415 in HUD's regulations relating to HUD's general collection procedures as well as administrative offsets, the Secretary remains adamant in his argument that, given the absence of a specific statute of limitations in 31 U.S.C. § 3720(D) authorizing administrative wage garnishments, the six-year limitation period provided in section 2415 should not apply. Again, this argument is undercut by the language of P.L. 97-365, the 1982 amendments to the Federal Claims Collection Act of 1966. These 1982 amendments recognized the applicability of 28 U.S.C. § 2415 to administrative offsets which existed prior to the 1982 amendments' explicit extension to ten years of the six-year time period authorized by 28 U.S.C. § 2415. The pertinent language in this 1982 statute reads:

> Statute of Limitations with Respect to Administrative Offsets
> Sec. 9. Section 2415 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:
> "(i) The provisions of this section shall not prevent the United States or an officer or agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 5 of the Federal Claims Collection Act of 1966."
>
> Administrative Offsets
> Sec. 10. The Federal Claims Collection Act of 1966 (31 U.S.C. 951 et seq.) is amended—
> (1) by redesignating section 5 as section 6;
> // 31 U.S.C. 951 // and
> (2) by adding the following new section 5:
> "Sec. 5. // 31 U.S.C. 954.//
> (a) The head of an agency or his designee may, after attempting to collect a claim from a person under section 3(a) of this Act, collect the claim by means of administrative offset, except that no claim under this Act that has been outstanding for more than ten years may be collected by means of administrative offset.
> (b) The head of an agency or his designee may not collect any claim by administrative offset authorized by subsection (a) unless the agency head has

> prescribed regulations for the exercise of such administrative offset, based on the best interests of the United States, the likelihood of collecting a claim by administrative offset, and, with respect to the collection of claims by means of administrative offset after the six-year period provided in section 2415 of title 28, United States Code, has expired for bringing an action on such a claim, the cost effectiveness of leaving such claim unresolved for more than six years. . . .

P.L. 97-365, sections 9, and 10 (1) and (2), redesignating and adding new sections 5(a) and (b) to Federal Claims Collection Act of 1966 (31 U.S.C. § 951 et seq) (emphasis supplied).

The language in this statute indicates that Congress not only viewed the "collection of claims by means of administrative offset" as "bringing an action," but also that, until the passage of P.L. 97-365, administrative offsets were clearly subject to the six-year period authorized by section 2415(a). The Secretary has failed to show that the extant six-year limitation would not similarly apply to the collection of outstanding federal debt by means of administrative wage garnishment in the absence of statutory language exempting the application of section 2415 to this debt collection procedure.

(g). Complaints in Administrative Proceedings

The Secretary contends that section 2415 (a) should not apply to an administrative offset or to an administrative wage garnishment because the commencement of an administrative action is not a "complaint" pursuant to the provisions of section 2415. The Secretary submits that "[a]lthough some statutes provide for a "complaint" that triggers administrative proceedings, … adjudicative hearings on the merits follow such filings." (Secy. Brief, footnote 10) (citations omitted). However, this Board has, in practice, considered HUD's notices to debtors of its intent to collect certain outstanding debts both by means of administrative offsets and by means of administrative wage garnishment to be similar to an administrative complaint within the ambit of section 2415 (a), a position consistent with the views of the 10th Circuit in OXY USA Inc. and the Federal Circuit in Hanover Ins. Co. on this issue. The Board also believes that its practice of treating these notices as complaints is justified because of the regulatory and statutory requirements governing the legal sufficiency of notices to debtors which often "triggers," to use the Secretary's descriptive word, an administrative hearing. (See 24 C.F.R. §§ 17.151, 17.170(a), 26.10; 31 C.F.R. § 285.11(e)).

Unlike the Secretary, the 10th Circuit and Federal Circuit appellate courts were not distressed by the use of the term "complaint" when these courts found section 2415 did apply to pertinent administrative proceedings. The Court stated in OXY USA Inc.:

> The phrase "every action" is patently broad, and is expressly limited in scope only by reference to the possibility of a

> specific exception "otherwise provided by Congress" 28 U.S.C. § 2415(a). Congress' subsequent reference to the filing of a "complaint" within six years cannot fairly be read to limit this broad language to formalized judicial proceedings in light of (1) the statute's obvious purpose to level the playing field between the government and private litigants by forcing the government to promptly assert its claims; and (2) a reading of the entire text of §2415, including subsections (f) and (i), which evidence Congress' desire to deal with extra-judicial agency actions as well as judicial actions.
>
> * * * * * * * * * * * * * *

OXY USA Inc. at 1005.

> We agree with the Federal Circuit that these provisions demonstrate Congress intended for § 2415(a) to encompass more than the filing of a "complaint" in court. See Hanover Ins.Co., 82 F.3d at 1055 ("Administrative offset is not a judicial action. Thus, Congress has considered and dealt not only with judicial actions in section 2415, but with extra-judicial agency actions as well."). More important, if Congress did not intend § 2415(a) to apply to administrative proceedings, then § 2415(i) arguably is superfluous other provisions in the same enactment.

Id. at 1006. (citations omitted)

Even in the absence of statute requiring the use of the term "complaint" that "triggers administrative proceedings" (Secy. Brief. footnote 10), the Department has, pursuant to 24 C.F.R. § 26.10(c), a historical practice of referring to the commencement of some of its administrative actions as a "complaint." For example, when an individual or entity upon whom the Department is proposing an administrative sanction such as a debarment, suspension, or limited denial of participation, the notice often states that it shall "serve as the Department's complaint" in any subsequent administrative hearing. See 24 C.F.R. §§ 24.615, 24.715, 24.805, 24.975, 24.1125, 25.6, and 26.10(a); see also 24 C.F.R. § 1000.540; 24 C.F.R. Part 1720, Subpart D, and 24 C.F.R. §§ 1720.205 and 17.210 (where notice of suspension requires answer in de novo proceeding before administrative law judge).

The Secretary reminds the Board, in footnote 10 of the Secretary's Brief, that Black's Law Dictionary defines a complaint as a pleading which states the basis of the "court's jurisdiction." However, the use of the term "complaint" in administrative proceedings is not foreign to this Department, to other Departments and agencies of the federal government, and to regulatory agencies of the United States. The term "complaint"

is explicitly used in various HUD regulations governing HUD's administrative hearing procedures. See 24 C.F.R. § 26.28 (the applicability of 24 C.F.R. § 26.10 to notices in administrative wage garnishment matters in accordance with 24 C.F.R § 17.170(a)); 24 C.F.R. § 20.10, Rule 6; 24 C.F.R. §§ 7.30 and 7.31; 24 C.F.R. § 28.25. Consistent with the holding of the Court of Appeals for the 10th Circuit in OXY USA, Inc., supra, that the term "complaint" can be properly applied in administrative proceedings, the Board views HUD's notice that the Department intends to collect a debt by administrative wage garnishment as a complaint in a manner consistent with the notification requirements of 31 C.F.R. § 285.11(e) and the complaint requirements of 24 C.F.R. §§ 26.10(c) and (d) (where Board orders Secretary to file a brief and documentary evidence within 20 days of date of Notice of Docketing). The Board concludes that a Departmental notice that this agency intends to collect a debt by means of administrative offset is an administrative complaint which initiates an "action for money damages brought by the United States or an officer or agency thereof," and an action which must be taken "within six years after the right of action accrues . . . ." 28 U.S.C. § 2415(a).

3. Effect of Board Decisions Nationwide

As a collateral issue, Petitioner, a resident of Oklahoma, argues that the Board should find in his favor because any decision rendered by this Board, which is a final agency decision, could be appealed to the Eastern District of Oklahoma, which is bound by the Tenth Circuit's decision in OXY USA, Inc., supra. (Petitioner's Supplemental Brief, p. 3-4). Consequently, Petitioner also submits that the Amoco Prod. Co. decision and Phillips Petroleum Co. decision should have no legal effect on this case because they are not decisions which are binding within the jurisdiction of the 10th Circuit Court of Appeals. Id.

The Secretary, however, submits that the Board has never indicated it is bound by any particular U.S. Circuit Court of Appeals whose decision may be inconsistent with that of another federal appellate court, and that the OXY USA, Inc. decision is, per se, not stare decisis with respect to adjudications before the Board. (Secretary's Brief, p. 11-13, ¶¶ 1-3). The Secretary contends that if the Board were to follow the holding in OXY USA, Inc., "anomalous results" could occur as residents within the jurisdiction of the Tenth Circuit could not have their wages garnished, while residents outside of the jurisdiction of that appellate court could. (Secy. Brief, p.11, ¶ 4). The Secretary further argues that applying the six-year limitation in administrative wage garnishment cases to affected debtors within the geographical jurisdiction of the Tenth Circuit may force him to apply the similar limitation to all affected debtors circuits, including the District of Columbia Circuit, despite the Amoco Prod. Co. decision. Id.

The Secretary's argument here is well-founded in part, and specious in part. In order to avoid the possibility of "anomalous results" described by the Secretary, this Board is well aware of the fact that its decisions must be equitably applicable to affected programs of the Department nationwide in order to provide programmatic operational consistency. The Secretary is on firm ground in his argument for consistency in the application of the Board's determinations. As the Secretary correctly notes:

> Petitioner makes much of the fact that the courts in the 10th Circuit, would have jurisdiction over further challenges he may wish to make to the Board's ruling should the Secretary prevail before the Board. Unlike the [federal] Courts of Appeal, the [HUD Board of Contract Appeals] hears matters from all 52 jurisdictions where HUD operates and its decisions have nationwide impact. The public has an interest in having HUD programs operate uniformly throughout the country. The Board has never indicated that it considers itself bound by decisions of any particular Court of Appeal, notwithstanding the fact that the court may have jurisdiction over an appeal from a decision of a lower federal court reviewing a decision in a matter heard by the Board. Even if venue for judicial review of any final decision of the Board in this matter Petitioner may seek would lie exclusively in the 10th Circuit or the Court of Appeals for the Federal Circuit, the decisions of other Courts of Appeal are relevant to the matter before the Board and the Board is free to follow decisions of other Circuits.

(Secy. Brief, at 11, ¶ 1).

However, the Secretary is on unstable ground in regard to the latter part of this argument. The Secretary claims that if the Board rules in a manner consistent with the holding of the 10th Circuit Court of Appeal on this issue, "the Secretary would probably have to cease efforts in jurisdictions outside the 10th Circuit . . . after the six year limitation expired . . . ." (Secy. Brief, at 14, ¶4). However, such a result is hardly a justifiable anguish, since it is certainly paramount that a federal agency treat all of the nation's citizens equally under the law, and, in relevant circumstances, to apply a uniform time limitation in the collection of HUD's outstanding debts by means of administrative wage garnishment. Since the Board concludes that the six-year limitation established by 28 U.S.C. § 2415(a) applies to the issuance of administrative wage garnishment orders, this limitation should be applied consistently, irrespective of locality, throughout the United States and its territories.

Conclusion

The Secretary has failed to show that the absence of statutory language in 31 U.S.C.A. § 3720(D) regarding the time within which an administrative wage garnishment order may issue invalidates or negates the applicability to administrative wage garnishment of the six-year limitation period set forth in 28 U.S.C. § 2415, particularly in light of this Department's historical recognition of the applicability of section 2415(a) to certain of its administrative proceedings related to debt collection. While the Board finds Petitioner to be indebted to HUD in the amount claimed by the Secretary, "[t]he time honored rule has

been that a statute of limitations bars the remedy and does not extinguish the liability." Carnel R. Atwater v. Richard Rondebush, et al, 452 F. Supp. 622, 632 (1976)(citations omitted).

It is possible that at some future date, the United States Supreme Court will resolve the differing views on this issue between the 10th and Federal Circuit appellate courts, on one hand, and the 5th and D.C. Circuit appellate courts, on the other. Until that time, it would appear that the best remedy for agencies such as HUD, which may desire a period longer than six years in which to utilize administrative wage garnishment as a debt collection mechanism, lies in Congressional legislation such as that specifically benefitting the U.S. Department of Education which currently enjoys statutory authorization of an unlimited period of time within which to recover, by any federal administrative or judicial means, sums due Department of Education resulting from defaulted student loans. 20 U.S.C.A. § 1091(2)(d).

ORDER

While Petitioner remains indebted to the Department in the amount claimed by the Secretary, the Board finds, for the reasons set forth above, that the period of time within which this debt can be collected by means of administrative wage garnishment has expired. It is hereby

ORDERED that the Secretary shall not refer this matter to the Department of the Treasury for issuance of an administrative wage garnishment order. The stay of referral of this matter to the Department of the Treasury which was previously imposed in this proceeding shall be made permanent.

_____
David T. Anderson
Administrative Judge

Concur:

_____
Jerome M. Drummond
Administrative Judge

_____
H. Chuck Kullberg
Administrative Judge

October 6, 2006