

WAIVER OF GOVERNMENTAL IMMUNITY TO  
PREJUDGMENT INTEREST WHEN THE UNITED  
STATES IS SUED AS ASSIGNEE OF A PRIVATE  
CONTRACT

Sovereign immunity has long been a troublesome area of the law because rules designed to shield the federal government from liability come into conflict with substantive rules of law. One specific area of this conflict is presented when the federal government is not an original party to a contract, but becomes involved in a suit as the assignee of one of the original contractors.

This situation arose in a recent Sixth Circuit decision—*United States v. P & D Coal Mining Co.*<sup>1</sup> The Atomic Energy Commission has the power to hire private companies to manage its installations.<sup>2</sup> One such manager is the National Lead Company, employed by the AEC to manage its project at Fernald, Ohio. In need of coal at Fernald, National Lead, in 1955, entered into a one-year maximum-minimum contract with the P & D Coal Mining Company. Payment was to be made solely from Government funds. By the end of 1955 things were not going well; P & D refused to deliver more than the minimum on its contract, and National Lead withheld payment on some of the coal delivered, claiming P & D had breached.

Although the facts so far do not present an unusual situation, the problem grows in complexity when the third party—the federal government—is included. The contract provided for assignment to the AEC and, in 1957, National Lead duly assigned its rights and liabilities to the Commission. In 1962, the Government brought suit against P & D for breach of contract, and P & D counterclaimed for the withheld payments.

The district court dismissed the Government's claim. On P & D's counterclaim, the court held the Government liable not only for the principal amount but also for prejudgment interest<sup>3</sup> from the date of the assignment to the Government.<sup>4</sup> The court of appeals,

<sup>1</sup> 358 F.2d 619 (6th Cir. 1966), *affirming* 251 F. Supp. 1005 (W.D. Ky. 1964).

<sup>2</sup> Thus we find du Pont managing the Savannah River project and Union Carbide running Oak Ridge.

<sup>3</sup> Prejudgment interest can grow to a substantial sum. In this case P & D's claim arose in 1955 and judgment was not final until 1966. Thus interest covers eleven years and will, at 6% simple interest, amount to 66% of P & D's original claim. Compare *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951) (*per curiam*), where the Supreme Court reversed an award of interest on a claim which arose in 1855.

<sup>4</sup> It should be noted that, although no reason was given by either court, the Government was not held liable for interest from the time the claim arose (when the payments were withheld by National Lead) until the assignment was made two years later.

one judge dissenting, affirmed. The court of appeals held, without citation, that, although the Government is not normally liable for pre-judgment interest, the fact that the Government was not a party to the original contract between National Lead and P & D changed this result: a "mere assignment"<sup>5</sup> to the Government could not compromise P & D's otherwise assertable right to prejudgment interest.<sup>6</sup>

The usual immunity of the United States from prejudgment interest is derived from the doctrine of sovereign immunity. The judicial history of sovereign immunity has been extensively commented upon elsewhere.<sup>7</sup> For purposes of this Comment it is sufficient to note that, while abandoning its unsuccessful efforts to justify the doctrine

<sup>5</sup> 358 F.2d at 621.

<sup>6</sup> Implicit in the court's finding that the Government was not a party to P & D's contract is a holding that National Lead, in its dealings with P & D, was not merely acting for the Government as a purchasing agent without independent liability on the contract. Were National Lead merely such an agent, there could have been no assignment to the Government, as National Lead would have had no "rights or obligations" to assign. Had this been the case, there would be no possible argument that the normal rules of sovereign immunity be altered.

The agency issue has been reached by earlier courts in cases where the Government has attempted to have its contractors declared purchasing agents so that they could escape state sales and use taxes. Although an AEC contractor has been held immune from these taxes, as an agent, under circumstances similar to those in *P & D Coal*, see *United States v. Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959), *aff'd per curiam*, 364 U.S. 281 (1960) (du Pont, the contractor, engaged for \$1.00), the Supreme Court has since narrowed considerably any immunity for an AEC contractor engaged for profit. See *United States v. Boyd*, 378 U.S. 39 (1964), involving an AEC management contract at Oak Ridge which was practically indistinguishable from National Lead's contract. Although immunity from state sales taxes was left unresolved in *Boyd*, *id.* at 45 n.6, it would be difficult to argue that National Lead was an agent without liability on the P & D contract, even if it were an agent for the purposes of state sales taxes.

It is settled by *Boyd* that National Lead could not enjoy general immunity as a governmental instrumentality, and thus the issue reduces to whether it is immune from liability on the particular contract as the Government's purchasing agent. But this result is also precluded, as the Government tacitly admitted by failing to raise the issue in *P & D Coal*. It is clear that in AEC contracts, as now written, the principal contractor—National Lead—is liable to the supplier—P & D—on the contract. As the Government said in its brief in *United States v. Davison Fuel & Dock Co.*, *appeal docketed*, No. 10567, 4th Cir., 1966, arguing that for purposes of the Walsh-Healey Act the United States was a party to the coal contract issued by National Lead to P & D's successor: "[U]nlike the typical principal-agent situation, National Lead, the agent, has liabilities under the Purchase Orders. Indeed, it would seem that the initial liability to pay for the coal is on National Lead, the Government being liable as purchaser of the coal only if National Lead fails to make payment." *Id.* at 22. See *E. I. du Pont de Nemours & Co. v. Lyles & Lang Constr. Co.*, 219 F.2d 328, 332-33, 341-42 (4th Cir.), *cert. denied*, 349 U.S. 956 (1955), where du Pont, which was held immune from state sales taxes in *United States v. Livingston*, *supra*, was sued by one of its subcontractors, and the latter recovered the amount due plus prejudgment interest.

Thus it can be said that a court, which was presented with the issue, would probably find the prerequisites to a valid assignment satisfied in the *P & D Coal* situation: National Lead was initially liable, and there was a bona fide assignment to the Government of the rights and obligations of a private party who had no immunities, and who would have been liable on the contract before the assignment. Thus the issue posed in *P & D Coal*, whether the assignment to the Government could waive P & D's right to prejudgment interest, was squarely before the court.

<sup>7</sup> Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953), and authorities cited therein.

as applied in America, the Supreme Court has concluded that sovereign immunity is an integral part of our legal heritage and the starting point for any inquiry into suit against the Government.<sup>8</sup>

Once a court has determined that the doctrine of sovereign immunity is applicable, the next question must be whether the Government has consented to a waiver of immunity.<sup>9</sup> The Government cannot be held liable unless it has waived immunity.

This method of analysis has been applied in the interest situation. The Supreme Court has declared the "traditional rule"<sup>10</sup> to be that the United States is liable for payment of interest on damages only to the extent that it consents, and that consent can only be given by statute or by authorized contract.<sup>11</sup> There are statutory waivers of the Government's immunity from interest attendant to each of the statutes conferring jurisdiction on the federal courts to hear claims against the Government. P & D brought its counterclaim under the Tucker Act;<sup>12</sup> the applicable federal interest statutes allow only a limited amount of interest against the United States, to run from the time judgment becomes final.<sup>13</sup> The Supreme Court has held that these interest statutes must be strictly construed,<sup>14</sup> and thus, because the statutes do not expressly provide for prejudgment interest, there is no statutory waiver in the *P & D Coal* situation.

Similarly, there was no contractual waiver of immunity by the Government. Because there were no direct contractual dealings between the Government and P & D, P & D could only claim a contractual waiver of immunity to prejudgment interest as a third-party

<sup>8</sup> *United States v. Shaw*, 309 U.S. 495, 501 (1940); *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 388 (1939); see Pugh, *supra* note 7, at 493-94.

<sup>9</sup> See generally Pugh, *supra* note 7.

<sup>10</sup> *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951) (per curiam). For a criticism of this "traditional rule," see 33 VA. L. REV. 621 (1947).

<sup>11</sup> *E.g.*, *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951) (per curiam); *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947); *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947).

<sup>12</sup> 28 U.S.C. §§ 1346(a), (c) (1964).

<sup>13</sup> 28 U.S.C. § 2411(b) (1964); 75 Stat. 416 (1961), 31 U.S.C. § 724a (1964). Section 2411(b) provides:

[O]n all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act for payment of the judgment.

Section 724a provides:

[W]henever a judgment of a district court to which the provisions of section 2411(b) . . . apply, is payable from this appropriation, interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States, and then only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance (except that in cases reviewed by the Supreme Court interest shall not be allowed beyond the term of the Court at which the judgment was affirmed) . . . .

<sup>14</sup> *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947); *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 590 (1947).

beneficiary of a contract between National Lead and the Government. The Government did not expressly consent to pay P & D these charges in either the master or the assignment contract.<sup>15</sup> In this connection, the agreement by the Government to assume all the "rights and obligations" of the assignor does not constitute a contractual waiver of its immunity from prejudgment interest. The cases are clear that such waiver must be explicit;<sup>16</sup> when consent is not explicit, waiver cannot be inferred.

Thus in *P & D Coal* there was no waiver of immunity within the traditional categories of statute or authorized contract.<sup>17</sup> The *P & D Coal* court did not reject the concept that governmental consent was a prerequisite to liability for interest, but rather found a new exception to governmental immunity in this area. It derived this exception from the law of assignment.

The initial appeal of this assignment argument is not difficult to understand. Much of the rhetoric of assignment is aimed at making the status of the assignee equivalent to that of the assignor.<sup>18</sup> The question becomes whether the law of assignment can be used to assault the law of sovereign immunity. In order to answer this question, an inquiry into the history of assignment to the Government is necessary.

Despite an early common law ban on the assignment of choses in action,<sup>19</sup> the Supreme Court, in *United States v. Buford*,<sup>20</sup> upheld assignments to and from the sovereign. The question posed in *Buford* and in subsequent cases is the same as that posed in *P & D Coal*: What rights or obligations does the Government acquire as the assignee of a contract?

<sup>15</sup> Neither the court nor the parties mentioned such a provision; for the purposes of this Comment it is assumed that no such provision existed. For a discussion of the implications of a promise by the Government to National Lead in the master contract to reimburse National Lead for amounts that might be assessed against it, see text accompanying notes 44-47 *infra*.

<sup>16</sup> See, e.g., *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947).

<sup>17</sup> One further exception to the Government's nonliability for interest occurs in connection with the fifth amendment ban on the taking of private property without just compensation. Interest is allowed from the time of the taking until the time the claim is paid, as part of "just compensation," when the Government takes property by condemnation under its eminent domain power. *Seaboard Air Line Ry. v. United States*, 261 U.S. 299 (1923). However, the cases have repeatedly distinguished the eminent domain situation from that essentially contractual in nature, and have held that there is no constitutional right to interest in the latter situation. *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *Seaboard Air Line Ry. v. United States*, *supra* at 305; *United States v. North Am. Co.*, 253 U.S. 330, 337 (1920). *P & D Coal* was a contract action and not an eminent domain case, and there was no suggestion by the court that P & D had a constitutional right to prejudgment interest.

<sup>18</sup> Thus we find such recurrent aphorisms as: "The assignee stands in the shoes of the assignor"; "The assignee takes subject . . ."; "The assignee acquires no greater rights than the assignor."

<sup>19</sup> 3 WILLISTON, CONTRACTS § 405 (3d ed. 1960).

<sup>20</sup> 28 U.S. (3 Pet.) 12 (1830).

There have been two discernible lines of development in answer to this question. *Buford* is the leading authority for the first line of development. In *Buford*, by act of Congress, the Government had accepted an assignment of a private claim, but the assignment was not made until after the state statute of limitations on the contract had run. Though state statutes of limitations do not normally run against the United States, the Court held the Government's suit barred. On the date of assignment, the assignor could not have sued on the claim and "it can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor."<sup>21</sup>

The rule established in *Buford* has been strictly followed. When the United States recognized the Soviet Government in the Roosevelt-Litvinov Agreement of 1933, Russia assigned to the United States all its rights in expropriated funds which had been in the United States since the Russian Revolution. The cases held that the United States acquired no greater rights than those possessed by the assignor.<sup>22</sup> Similarly, in *United States v. Taylor*,<sup>23</sup> where the Government was assigned the claim of a private creditor of defendant after the state statute had run, the district court held the Government barred.<sup>24</sup>

The second line of development deals with the situation where the private claim assigned to the Government is free from any infirmities at the time of the assignment. The question then becomes whether the Government's claim is still subject to any infirmities, such as the running of a state statute of limitations, which may attach after the assignment to the Government, despite the fact that the Government is normally immune from these infirmities. The court in *P & D Coal*

<sup>21</sup> *Id.* at 30.

<sup>22</sup> See, e.g., *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), where, because the state statute of limitations had run against the Russians before they assigned the claim, the United States was also barred from enforcing it. In *United States v. Belmont*, 85 F.2d 542 (2d Cir. 1936), *rev'd on other grounds*, 301 U.S. 324 (1937), the Second Circuit noted that a Russian claim would have been void as it was against New York public policy to enforce a foreign state's expropriation decree, and therefore held that the United States, as assignee of that claim, was likewise barred. *Accord*, *United States v. Bank of N.Y. & Trust Co.*, 77 F.2d 866 (2d Cir. 1935), *aff'd*, 296 U.S. 463 (1936) (the United States had no greater rights than Russia to terminate state court proceedings and force an accounting in the federal courts).

<sup>23</sup> 144 F. Supp. 15 (E.D. Pa. 1956).

<sup>24</sup> In accord are cases concerning the Government's statutory priority in bankruptcy proceedings. Since the rights of creditors become fixed at the date of filing a bankruptcy petition, the rule is that when the United States takes an assignment from the creditor after the debtor has filed for bankruptcy, the Government cannot assert its priority. *United States v. Marxen*, 307 U.S. 200 (1939); *In re Hansen Bakeries, Inc.*, 103 F.2d 665 (3d Cir. 1939); *Federal Housing Adm'r v. Moore*, 90 F.2d 32 (9th Cir. 1937) (alternative ground); *In re Byquist*, 168 F. Supp. 483 (D. Kan. 1958); *In re Wissmeier*, 26 F. Supp. 806 (E.D.N.Y. 1939). *But cf.* *Small Business Administration v. McClellan*, 364 U.S. 446 (1960), where, because 75% of the debt was Government money, it was held that the United States was entitled to priority despite the fact that it received the assignment after the debtor petitioned for bankruptcy.

apparently believed sovereign immunity was not applicable after the assignment. All other cases which have faced this issue, however, have held to the contrary.

The leading authority on this question is *United States v. Nashville, C. & St. L. Ry.*<sup>25</sup> In that case, the United States became the owner of bonds, as trustees for an Indian tribe, before the Tennessee statute of limitations had run on the coupons. Suit was not commenced until after the statute had run. The Supreme Court permitted a recovery by the Government:

[I]f the bar of the statute is not complete when the United States become the owners and holders of the paper, it appears to us . . . impossible to hold that the statute could afterwards run against the United States.<sup>26</sup>

Similarly, in *United States v. Summerlin*,<sup>27</sup> the Federal Housing Administration became the assignee of a private contract. As assignee it filed a claim against the estate of the debtor, but not until after the state statute of limitations had run. The Supreme Court stated the rule:

When the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limitation upon enforcement.<sup>28</sup>

An analogous situation is presented in the federal tax laws, which give the federal government liens against the property of tax defaulters.<sup>29</sup> This includes the right to attach claims which the delinquent taxpayer has against his own private debtors. The question presented has been whether the Government is entitled to enforce the debt when it acquires the claim before the state statute runs, but neglects to do so in time. In *United States v. Jacobs*,<sup>30</sup> the court allowed the Government to recover: "[T]he running of the state statute of limitations is suspended at the moment when the Government acquires the claim, or right, to the property."<sup>31</sup> In a similar case, *United States v. Polan Indus. Inc.*,<sup>32</sup> the court noted the two lines of

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<sup>25</sup> 118 U.S. 120 (1885).

<sup>26</sup> *Id.* at 126.

<sup>27</sup> 310 U.S. 414 (1940).

<sup>28</sup> *Id.* at 417.

<sup>29</sup> INT. REV. CODE OF 1954, § 6321.

<sup>30</sup> 155 F. Supp. 182 (D.N.J. 1957).

<sup>31</sup> *Id.* at 188.

<sup>32</sup> 196 F. Supp. 333 (S.D. W. Va. 1961).

development discussed above and held that the derivative nature of the suit was relevant only at the moment of acquisition; following acquisition of the claim by the Government, sovereign immunity was waived only by express consent.<sup>33</sup>

Although the cases considered above are factually distinguishable from *P & D Coal* in that they do not deal specifically with the question of prejudgment interest, there can be little question that these cases should control the *P & D Coal* situation. We are dealing with the question whether the law of assignment can be used to infer a waiver by the United States of its sovereign immunity. In order to decide this question, the crucial facts are the existence of an originally private contract, and assignment of that contract to the Government. These facts are present in the cases discussed above and also in *P & D Coal*, thus rendering other factual distinctions of no consequence.

No argument can be made that the Government's immunity from prejudgment interest is inherently less broad than other governmental immunities, such as immunity from the operation of state statutes of limitations.<sup>34</sup> The cases on the Government's immunity from prejudgment interest—absent assignment—show that this immunity has been rigidly enforced by the courts. In *United States v. New York Rayon Importing Co.*,<sup>35</sup> the Court of Claims had awarded prejudgment interest because it felt that the Comptroller General had withheld the return of customs duties for an unreasonable length of time. The lower court argued that this award of interest was in accord with sound policy;<sup>36</sup> the Supreme Court unanimously reversed:

Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy.

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<sup>33</sup> *Accord*, *United States v. Bush Constr. Co.*, 176 F. Supp. 524 (E.D.N.Y. 1959) (dictum) (taxpayer had assigned his claim against his debtor to the Government); *United States v. Burke*, 159 F. Supp. 458 (D. Md. 1958) (alternative holding) (assignment to FHA).

Cases under the Bankruptcy Act have also followed this second line of development. When the Government becomes the assignee of a claim against a bankrupt before the petition in bankruptcy is filed, the Government may assert its statutory priority. *United States v. Emory*, 314 U.S. 423 (1941) (Government receives claim before receiver appointed); *Korman v. Federal Housing Adm'r*, 113 F.2d 743 (D.C. Cir. 1940); *Wagner v. McDonald*, 96 F.2d 273 (8th Cir. 1938); *In re Riggs*, 51 F. Supp. 961 (E.D. Pa. 1943); *In re Weil*, 39 F. Supp. 618 (M.D. Pa. 1941); *In re Cherry Valley Homes, Inc.*, 255 F.2d 706 (3d Cir. 1958) (alternative holding).

<sup>34</sup> P & D's right to prejudgment interest is no more fundamental than a private party's right to immunity after a state statute of limitations has run. Interest on a claim was generally unknown at common law, and is awarded as prescribed by statute. *United States v. Verdier*, 164 U.S. 213 (1896); *Blair v. Durham*, 139 F.2d 260 (6th Cir. 1943); *Merchant's Fin. Co. v. Goldweber*, 138 Ohio St. 474, 35 N.E.2d 779 (1941). Thus both interest on damages and governmental immunity to state statutes of limitations are within the control of Congress, and may be changed by Congress; no fundamental rights are at stake.

<sup>35</sup> 329 U.S. 654 (1947).

<sup>36</sup> 64 F. Supp. 684, 687-88 (Ct. Cl. 1946).

We reiterate that only express language in a statute or contract can justify the imposition of such interest.<sup>37</sup>

On the basis of the foregoing, the necessary conclusion is that the court's disposition of the interest question in *P & D Coal* was exactly backward. It was wrong to award prejudgment interest after the date of the assignment, because the Government's immunity protected it. It was also wrong to refuse to award it for the period before the assignment. The cases hold that the Government takes an assignment subject to all the equities and defenses then existing between the assignor and the obligor; at the time of the assignment, one such equity would be P & D's claim against National Lead for the accrued interest. Had P & D sued National Lead before the assignment, it could have recovered this interest;<sup>38</sup> by taking the assignment the Government assumed this obligation.

Given the conclusion that the doctrine of sovereign immunity should prevent P & D from recovering prejudgment interest accruing after the date of the assignment to the Government, however, it does not necessarily follow that P & D or a party in a similar position is therefore entirely precluded from recovering such interest. Common law doctrines of assignment, independent of any consideration of sovereign immunity, provide for the continuing liability of the assignor<sup>39</sup> on the contract assigned.<sup>40</sup> However, the assignor may be relieved from liability when the obligor agrees, either in the original contract or at a later time, to release the assignor from liability after the assignment and to look only to the assignee for a recovery.<sup>41</sup>

In the usual situation, where the obligor has not released the assignor from liability, the obligor can ensure that he will recover all prejudgment interest. Because interest on damages is an integral part of the principal recovered, the general rule is that a separate

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<sup>37</sup> 329 U.S. at 663.

<sup>38</sup> In *E. I. du Pont de Nemours & Co. v. Lyles & Lang Constr. Co.*, 219 F.2d 328 (4th Cir.), cert. denied, 349 U.S. 956 (1955), plaintiff was a subcontractor for du Pont at the AEC's Savannah River project with a contract similar to P & D's. Although du Pont executed an assignment of the contract to the Government (as the contract permitted) after suit was commenced, substitution of the United States was denied. After recovering on its claim, the subcontractor was awarded prejudgment interest.

<sup>39</sup> This discussion again presupposes that there was in fact a valid assignment to the Government and thus that no principal-agent relation existed. See discussion in note 6 *supra*. Were the Government a principal, the alleged assignor would be its agent, and thus not liable as an assignor.

<sup>40</sup> *Urban v. Phy*, 24 F.2d 494 (9th Cir. 1928) (dictum); *Canister Co. v. National Can Corp.*, 71 F. Supp. 45, 49 (D. Del.) (alternative holding), appeal dismissed, 163 F.2d 683 (3d Cir. 1947); *Crane Ice Cream Co. v. Terminal Freezing & Heating Co.*, 147 Md. 588, 128 Atl. 280 (1925) (dictum); 4 CORBIN, CONTRACTS § 866 (1951); 3 WILLISTON, CONTRACTS 18-19, 96-97 (3d ed. 1960); RESTATEMENT, CONTRACTS § 160(4) (1932).

<sup>41</sup> *A. P. Freund Sons v. Vaupell*, 53 Ill. App. 2d 1, 202 N.E.2d 350 (1964); 4 CORBIN, *op. cit. supra* note 40, at 456 & n.39; 3 WILLISTON, *op. cit. supra* note 40, § 420.

action cannot be maintained for interest.<sup>42</sup> Thus the obligor must get a judgment for the whole amount—interest as well as principal—against the assignor. The obligor, in P & D's situation, should sue the assignor—National Lead—alone on the counterclaim, and leave it to him to implead the Government or recover separately. The crucial factor is bringing suit against the correct party—the assignor.<sup>43</sup>

In those cases where the obligor gets a judgment against the assignor, there is a further problem as to the assignor's recourse against the Government. Normally it is unimaginable that the Government would jeopardize a valuable commercial relationship (as it had with National Lead) to contest a single claim.<sup>44</sup> In the unlikely event that the Government were to contest payment of interest, however, the position of the assignor would be the same as that of any other party. Typically the assignor would be operating under a contract indemnifying expenses (such as cost-plus-fixed-fee). He would have to establish that, under this contract, the Government had consented to a waiver of its immunity to prejudgment interest,<sup>45</sup> and in the absence of such a contractual waiver,<sup>46</sup> the assignor could not recover the full interest charges from the Government. This result is not as harsh as it may seem on first impression, because it is the assignor, not the obligor, who has direct dealings with the Government. Thus the assignor is generally the only party who can ensure that appropriate contract clauses are included relieving him of any interest liability.<sup>47</sup>

The court's action in *P & D Coal* may well have been the result of judicial hostility to the doctrine of sovereign immunity. In view of the federal government's increasingly active role in the market

<sup>42</sup> *Stewart v. Barnes*, 153 U.S. 456, 462-63 (1894); *Ring Constr. Corp. v. United States*, 209 F.2d 668, 671 (8th Cir. 1954) (dictum); *Nelson v. Chicago Mill & Lumber Corp.*, 76 F.2d 17, 23 (8th Cir. 1935) (dictum).

<sup>43</sup> *Cf. C. F. Harms Co. v. Erie R.R.*, 180 F.2d 850 (2d Cir. 1950) (per curiam), where the plaintiff recovered both its interest and costs from the secondarily liable party (the railroad) notwithstanding that the Government, which was primarily liable on plaintiff's claim, *C. F. Harms Co. v. Erie R.R.*, 167 F.2d 562 (2d Cir. 1948), was held immune from these charges.

<sup>44</sup> However, where the dealings are not intimate but are more *ad hoc* in nature, the Government has refused to pay interest and costs, leaving the other party to assume these charges. *C. F. Harms Co. v. Erie R.R.*, *supra* note 43.

<sup>45</sup> The assignor would also face the requirement that the contractual waiver be express and unambiguous. See note 16 *supra* and accompanying text.

<sup>46</sup> It has already been demonstrated that there is no operative statutory waiver. See text accompanying note 14 *supra*.

<sup>47</sup> In cases where there is an authorized clause in the contract between the assignor and the Government, binding the Government to pay interest charges (and perhaps costs) which might be assessed against the assignor, and where the assignor is still liable on the assigned contract, there would seem to be no impediment to the obligor's dispensing with a suit against the assignor and suing the Government directly as a third-party beneficiary. There can be little question that such a provision favors the obligor as much as would a direct promise. A direct suit in this situation would have the added beneficial result of preventing a wasteful circuitry of actions.

place, it is probably desirable that the Government as a contractor be treated as a private party, at least to some extent. Any relaxation of the doctrine of sovereign immunity, however, should be by the legislature,<sup>48</sup> not by the courts. The law of assignment does not support the exception formulated by the court in *P & D Coal*.

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<sup>48</sup> It should be added that in addition to Congress, a change in the Government's policy on prejudgment interest may also be effected in certain cases by an administrative agency. As the interest cases hold, the Government's immunity to prejudgment interest may be waived by an authorized contract. What constitutes an authorized contract—one within the authority of the contracting officer—is beyond the scope of this Comment, but provided a contractual waiver would be authorized, an argument that immunity from prejudgment interest is contrary to good policy may be addressed to the appropriate agency.