

DATE: 01-15-91

CITATION: VAOPGCPREC 02-91
Vet. Aff. Op. Gen. Couns. Prec. 02-91

TEXT:

Is VA liable to pay interest to lenders on the miscalculation of "net value"?

1. This response to the informal request from the Director of the Loan Guaranty Service inquiring whether VA is required to pay interest on the money that will be paid to lenders due to the technical inaccuracy of the methods used, in the past few years, to determine "net value" of properties securing VA loans in foreclosure. After having an opportunity to review this matter, we believe, as discussed more fully below, that this question can only be answered in the negative.

2. It is well-settled that interest cannot be recovered in a suit against the Government in the absence of an express statutory or contractual provision to that effect. " There can be no consent to the payment of interest by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms." *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). In the absence of such language, interest against the Government is not recoverable .

3. As applicable to the instant case, the no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds. For example, in a recent case, *New York Guardian Mortgage Corp. v. U.S.*, 916 F.2d 1558 (Fed.Cir.1990), the mortgage company acquired 76 mortgages, guaranteed by the VA, which were defaulted upon. The mortgage company conveyed the property to the VA in accordance with 38 U.S.C. § 1832(5) and sought payment on the principal amounts. After delays of payment on the principal, the mortgage company brought suit in the Claims Court seeking interest under the Prompt Payment Act.

4. The Court cited the well-established rule that interest cannot be assessed against the United States except where liability is clearly imposed by statute or assumed by contract. In concluding that no such exception applied in the instant case, the Court affirmed the dismissal of the suit.

5. Although in another case, *Loeffler v. Frank*, 108 S.Ct. 1965 (1988),

prejudgment interest was assessed against the Government, we believe this situation is not applicable to the instant case. Loeffler involved a Title VII discrimination claim against the Postmaster General. The plaintiff claimed he was entitled to prejudgment interest under the Postal Service's sue and be sued clause. The Supreme Court upheld the plaintiff's claim on the theory that " t he no interest rule is ... inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." Id. at 1974.

6. However, the VA's home loan guaranty program is not a "commercial enterprise" analogous to the Postal Service. The VA provides a service which is not available in the commercial world. It guarantees home loans to benefit men and women because of their service to their country. The VA, in the loan guaranty program, performs a uniquely governmental function and not a proprietary or business activity. Further, since the VA's sue and be sued clause does not expressly waive sovereign immunity as to interest, we believe the Loeffler case has no application to the instant situation.

7. Based on the foregoing analysis, we conclude that VA is not required to pay interest on the money that will be paid to lenders due to the technical inaccuracy in the methods used, in the past few years, to determine "net value" of properties securing VA loans in foreclosure.

HELD:

As a general rule, interest cannot be recovered in a suit against the Government in the absence of an express statutory or contractual provision to that effect. Therefore, since no such statutory or contractual provision exists in the instant case, VA is not required to pay interest on money that will be paid to lenders due to VA's miscalculation of net value on properties securing VA loans in foreclosure.

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