

**Department of  
Veterans Affairs**

# Memorandum

Date: April 24, 1998

VAOPGCPREC 6-98

From: Acting General Counsel (021)

Subj: Consideration of Waiver and Challenge to Validity of Debt

To: Deputy Assistant Secretary for Financial Management (047G)

**QUESTION PRESENTED:**

If a veteran both challenges the validity of a debt assessed by the Department of Veterans Affairs (VA) and, in the alternative seeks waiver of such debt, must VA first fully adjudicate the debt validity issue, and the veteran exhaust all appeals on that issue, before waiver may be considered?

**DISCUSSION:**

1. Under a number of statutes and regulations, a veteran may become indebted to the Government as a result of his or her participation in a program of benefits administered by the VA. Among the more common reasons for such a debt would be the overpayment of a monetary benefit by VA to a veteran, or the foreclosure of a loan guaranteed by VA on behalf of the veteran. Once VA becomes aware of circumstances indicating that a veteran or other person may be indebted to the Government, VA must take aggressive action on a timely basis to collect all claims owed to VA. 31 U.S.C. § 3711(a)(1); 4 C.F.R. § 102.1(a); 38 C.F.R. § 1.910.

2. When VA first notifies a veteran of a debt and makes a written demand for payment, VA must also advise the veteran of his or her rights and remedies in connection with the debt. 38 C.F.R. § 1.911(b). “[T]he debtor has the right to informally dispute the existence or amount of the debt, to request waiver of collection of the debt, to a hearing on the waiver request, and to appeal the . . . [VA] decision underlying the debt. These rights can be exercised separately or simultaneously.” 38 C.F.R. 1.911(c).

3. Your inquiry concerns cases where a veteran both disputes the validity of the debt and, assuming such debt is nonetheless valid, seeks waiver of the debt under the “equity and good conscience” standard contained in 38 U.S.C. § 5302. As your memorandum noted, the United States Court of Veterans Appeals (CVA) in Schaper v. Derwinski, 1 Vet. App. 430 (1991) held that “when a veteran raises the validity of the debt as part of a waiver application . . . it is arbitrary and capricious and an abuse of discretion to adjudicate the waiver application without first deciding the veteran’s challenge to the lawfulness of the debt asserted against him or her.” 1 Vet. App. at 437. You have asked whether the issue of validity of the debt must be fully and

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completely resolved at all possible levels of appeal before the waiver request may be considered, or whether both the validity of debt and the waiver may be considered at each level simultaneously. Then, if necessary, both issues could be reviewed together at subsequent appellate levels. For the reasons discussed below, we conclude the latter is the proper procedure.

4. Schaper involved a housing loan debt. The veteran obtained a VA guaranteed loan in June 1983 and sold the property to a third party in July 1986. This purchaser assumed the veteran's loan, but never made any payments on this loan. The loan holder subsequently foreclosed the loan and VA was required to pay a claim under its guaranty. VA, therefore, assessed a debt against the veteran under its indemnity regulation. 38 C.F.R. § 36.4323(e). The veteran asserted a number of defenses to liability, including defenses based on State foreclosure law and inadequate notice. The veteran also claimed he was entitled to retroactive release of liability under 38 U.S.C. § 1813(b) (now codified as § 3713(b)). In addition, the veteran sought waiver of the debt under the provisions now codified at 38 U.S.C. § 5302. 1 Vet. App. at 432. The veteran's request for waiver was referred to the Regional Office Committee on Waivers and Compromises (ROCOWAC), which denied waiver. The veteran appealed to the Board of Veterans Appeals (BVA), which upheld the decision denying waiver. Id. Neither the Regional Office nor the BVA addressed the veteran's claims that the underlying debt was not valid. 1 Vet. App. at 433.

5. The CVA severely criticized VA for not addressing the veteran's claims with respect to the validity of the underlying debt. The court correctly noted that, under existing regulations, if a veteran writes to VA and questions whether he or she owes the debt or questions the amount he or she owes, "[VA] will, as expeditiously as possible, review the accuracy of the debt determination." 38 C.F.R. § 1.911(c)(1). 1 Vet. App. at 434. Because VA failed to carry out its "obligation" to make a decision regarding the validity of the debt, the CVA remanded the case to BVA to make an appropriate finding. Id. In cases where a veteran raises an issue regarding the validity of the debt as part of the waiver application, the court opined that "the making of such a determination [on the issue of the validity of the debt] is also implicit in making a determination on the waiver application under the standard whether 'collection of such indebtedness would be against equity and good conscience.' [Citation omitted.]" 1 Vet. App. at 437.

6. Using the language quoted in paragraph 3, above, the CVA held that, when a veteran challenges the validity of the debt and also seeks waiver, VA may not adjudicate the waiver issue "without first deciding" the issue of the validity of the debt. We understand that you have initially interpreted the CVA's mandate as requiring a full and total adjudication of the debt's validity at all levels before waiver is considered. We do not believe that the court intended such a result.

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7. The CVA decision in Schaper does not contain any language stating or implying that the debt validity issue must be considered alone and all appeals exhausted before the debt waiver may be considered. Rather, the court quoted 38 C.F.R. § 1.911(c) that permits veterans to challenge the debt and also request waiver “separately or *simultaneously*.” 1 Vet. App. at 434 [emphasis added]. If the validity of the debt needed to be fully considered at all levels (the Regional Office, the BVA, the CVA, the Federal Circuit, and the Supreme Court) before the ROCOWAC could first consider the waiver application, then simultaneous exercise of these appeals rights by the veteran would appear meaningless. The CVA faulted both the Regional Office and the BVA for failing to decide the veteran’s challenge to the validity of the debt. The CVA did not fault either element for considering the waiver issue before all avenues of appeal of the debt issue were exhausted. Finally, we note that, under the heading “CONCLUSION,” the CVA opinion “[H]old[s], alternatively, that the question of the validity of the asserted debt . . . must be determined *as part of* . . . [the veteran’s] application for a waiver of the debt.” 1 Vet. App. at 437 [emphasis added].

8. From our reading of the Schaper decision, we believe it is clear that, when a veteran both challenges the validity of the debt and requests waiver, the Regional Office must fully review the file and any material the veteran submits, and make appropriate written findings with regard to the validity of the debt. If the Regional Office concludes that the debt is validly established, then the waiver request should be referred to the ROCOWAC. Assuming the debt is not fully waived, the veteran must be advised of the decision on both issues; *i.e.*, debt validity and waiver, and informed of his or her right to appeal. If the veteran files a Notice of Disagreement, the Statement of the Case must fully discuss both the validity of the debt and the reasons for not waiving such debt. If the veteran appeals both issues, the BVA should fully consider and decide both questions. If BVA upholds the Regional Office, the veteran may then seek judicial review of either or both issues.

9. This result is consistent with the general principle that “a statute . . . is presumed not to have been intended to produce absurd consequences . . . .” 73 Am. Jur. 2d Statutes § 265. Requiring both a veteran and VA to litigate the validity of a debt in possibly three different courts (CVA, the Federal Circuit, and the Supreme Court) when an administrative remedy that might render the case moot is held in abeyance would be ridiculous and a waste of the veteran’s and the Government’s resources. Further, it is a well-established principle that individuals must exhaust their administrative remedies before resorting to the Federal courts. Insisting that a veteran seek judicial review of a debt’s validity before the veteran may avail himself or herself of the administrative waiver remedy would be at cross-purpose with that doctrine. In addition, as this office

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noted in VAOPGCADV 27-96, the Federal Claims Collection Act of 1996 mandates that Federal debt collection efforts be cost-effective. Defending the validity of a debt VA may later waive is simply not cost-effective. Nothing in the plain language of title 38, United States Code, or any other statute, purports to demand the full adjudication of a debt's validity before administrative waiver can be considered.

**HELD:**

When a veteran both challenges the validity of a debt and seeks waiver of the debt, the Regional Office must first fully review the debt's validity and, if the office believes the debt to be valid, prepare a written decision fully justifying the validity of the debt. At that point, the veteran's request for waiver should be referred to the Committee on Waivers and Compromises. If waiver is denied, the veteran must be informed of his or her right to appeal both decisions to the Board of Veterans Appeals.

John H. Thompson