FEDERAL TAX OFFSETS OF DEFAULTED STUDENT LOANS—HOW LONG IS TOO LONG?

THOMAS V. BENNETT

INTRODUCTION

In 1984 Congress enacted two statutes designed to facilitate the collection of debts owed to the government.1 These statutes enabled the federal government to reduce income tax refunds by the amount of the debt owed to the government.2 The statutes establish a procedure known as administrative offset to reduce the income tax refunds and forward the amount collected to the agency which is owed the debt.3 When the administrative offset procedure statutes were enacted Congress failed to indicate whether a statute of limitations would apply to the offset procedures.4 Because the administrative offset statutes contain no reference to a statute of limitations, the judicial system has been faced with the task of sorting through the statutory and common law principles involved to determine if a statute of limitations bars the collection of stale claims through the use of the administrative offset procedure.5

In Thomas v. Bennett,6 the United States Court of Appeals for the Eighth Circuit was faced with the issue of what statute of limitations applied to an administrative offset. The court determined that the term “legally enforceable debt” as used in the offset statute did not mean that the debt had to be enforceable through the normal judicial procedures.7 The Eighth Circuit then concluded that the statute of limitations would not prevent the use of administrative offset to collect debts that could no longer be collected by filing a lawsuit.8

This Note sets out the policy and history of statutes of limitations,9 and outlines the legislative history behind the passage of the administrative offset statutes.10 This Note then presents and discusses the common law doctrines and case law regarding administra-

5. See infra notes 117-64 and accompanying text.
6. 856 F.2d 1165 (8th Cir. 1988).
7. See infra notes 37-44 and accompanying text.
8. See infra notes 45-46 and accompanying text.
9. See infra notes 77-101 and accompanying text.
10. See infra notes 47-76 and accompanying text.
tive offset that existed at the time of the Thomas decision\textsuperscript{11} and analyzes the rationale of the Thomas decision in light of this history.\textsuperscript{12} Finally, this Note suggests some changes in the administrative offset law that would improve the collection procedure.\textsuperscript{13}

**FACTS AND HOLDING**

In 1976, Deborah Thomas, a secretarial student, applied for and received a federally-guaranteed student loan in the amount of $825.00.\textsuperscript{14} Thomas borrowed the money to enable her to attend Minneapolis Business College.\textsuperscript{15} The loan was given under the Federal Insured Student Loan program established by the Higher Education Act of 1965.\textsuperscript{16} The loan agreement signed by Thomas obligated her to begin repayment of the loan within nine months after she ceased attending school on at least a half-time basis.\textsuperscript{17}

Thomas ceased to attend school on at least a half-time basis in April of 1976.\textsuperscript{18} Following the nine-month grace period provided in the loan agreement, Thomas failed to make the payments on the note as they became due and as a result the note was considered to be in default.\textsuperscript{19} After Thomas left school she was unable to find a job and therefore could not repay the loan.\textsuperscript{20}

The United States Office of Education\textsuperscript{21} was assigned the defaulted loan in August of 1977 and paid $873.00 to the Student Loan Marketing Association on the default claim.\textsuperscript{22} Following the assignment, the United States Office of Education attempted to collect on Thomas' outstanding debt.\textsuperscript{23} The agency was unsuccessful in attempting to collect the debt because Thomas could not be located.\textsuperscript{24}

In 1986, nine years after the August 1977 default, the Depart-
ment of Education (the successor to the United States Office of Edu-
cation) requested the Department of Treasury to offset any income
tax refund due Thomas against the amount due on the defaulted
loan.\textsuperscript{25} The accrual of interest over the nine years had increased the
amount owed to $1,359.21.\textsuperscript{26} Thomas' 1985 income tax refund of
$1,016.98 was offset in its entirety and credited against the outstand-
ing debt, leaving a remaining balance of $342.23.\textsuperscript{27}

The Department of Education sent Thomas a letter advising her
that they would request the offset of any 1986 income tax refund due
her because of the remaining balance on her loan.\textsuperscript{28} The Department
of Education was in the process of offsetting Thomas' 1986 income
tax refund when she objected to the use of the offset procedure and
filed suit in the United States District Court for the District of
Minnesota.\textsuperscript{29}

Thomas sought an injunction and declaratory relief against the
Department of Education to prevent them from using the offset col-
lection procedures against her 1986 tax refund.\textsuperscript{30} Thomas alleged
that the general federal six-year statute of limitations for contract
claims brought by the federal government barred the government
from using an administrative offset to collect the amount due on the
loan.\textsuperscript{31}

The Department of Education argued, however, that the statute
of limitations did not apply to an administrative offset but only to an
action brought at law.\textsuperscript{32} The district court granted the Secretary of
Education's motion for summary judgment, dismissed Thomas' claim,
and held that even though the statute of limitations had run, Thomas' debt was a "legally enforceable" debt and subject to the off-
set procedure.\textsuperscript{33}

Thomas appealed the district court's decision to the United
States Court of Appeals for the Eighth Circuit.\textsuperscript{34} Thomas again ar-
gued that the administrative offset procedure used by the govern-
ment was time-barred because the statute of limitations had run.\textsuperscript{35}
The Secretary of Education argued to the Eighth Circuit that the off-

\begin{itemize}
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Defendant's Memorandum at 3 Thomas.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} Thomas, 856 F.2d at 1166.
  \item \textsuperscript{30} Id. at 1166-67.
  \item \textsuperscript{31} Id. at 1166. See 28 U.S.C. § 2415 (Supp. II 1984) (providing a general six-year
statute of limitations for contract claims brought by the federal government).
  \item \textsuperscript{32} Defendant's Memorandum at 9 Thomas.
  \item \textsuperscript{33} Thomas, 856 F.2d at 1167-69.
  \item \textsuperscript{34} Id. at 1167.
  \item \textsuperscript{35} Id. at 1168-69.
\end{itemize}
set procedure was proper.\textsuperscript{36}

In determining the propriety of the tax refund offset, the court stated that the threshold question was whether Thomas’ debt was a “legally enforceable debt” as provided in the statute which created the procedure to offset income tax refunds.\textsuperscript{37} The tax refund offset statute allows an offset by the Department of the Treasury only if the debt owed is a “past-due legally enforceable debt.”\textsuperscript{38} Thomas argued that since 28 U.S.C. section 2415(a) (the “general statute of limitations”) contains a six-year statute of limitations and since more than six years had passed, the debt was no longer “legally enforceable.”\textsuperscript{39}

The court interpreted the six-year time limit contained in the general statute of limitations to only prevent the right to file a lawsuit.\textsuperscript{40} The loss of this right, the court said, did not extinguish the obligation itself.\textsuperscript{41} The court explained that there were many ways

\textsuperscript{36} Id. at 1166-67. The Secretary of Education also contended that 26 U.S.C. § 6402(e) (Supp. III 1985) deprived the district court of jurisdiction to hear the action. Thomas, 856 F.2d at 1167. Subsection (e) withdraws from all courts in the United States the jurisdiction to hear any action brought to restrain the Secretary of the Treasury from carrying out the offset procedure. This subsection also allows these suits to be brought only against the federal agency that requested the offset. 26 U.S.C. § 6402(e) (Supp. III 1985). Thomas asserted that her claim was not against the Secretary of the Treasury, but rather against the Secretary of Education and thus, by the terms of the last sentence of subsection (e), the claim was permitted. Thomas, 856 F.2d at 1167. The Eighth Circuit held that the suit was in fact appropriately directed at the Secretary of Education and thus was allowed by the statute. Id.

The Eighth Circuit went on to explain that the general purpose of subsection (e) was to allow the Department of Treasury to implement setoffs without being constantly challenged on the merits of the specific case and that the best place to adjudicate the claims was with the agency requesting the setoff. Id. The Thomas court determined that it had jurisdiction because the suit was properly brought against the agency that had initially requested the refund setoff. Id. at 1168.

The second jurisdictional argument of the Secretary of Education claimed that Thomas was unable to request an injunction as a remedy. Id. The Eighth Circuit, relying on 20 U.S.C. § 1082(a)(2), found that this subsection of the Code did in fact prohibit Thomas from obtaining an injunction. Id.; see 20 U.S.C. § 1082(a)(2) (Supp. III 1985) (precluding injunctive relief against the Secretary of Education in litigation involving the federally insured student loan program). The Court determined, however, that Thomas’ request for declaratory relief and “such other relief as is just and equitable” was proper. Thomas, 856 F.2d at 1168.

The second issue on appeal was that the claim was moot. Id. In 1985 the Secretary had requested and received an offset of Thomas’ tax refund and the 1986 request was being processed at the time of this suit. Id. at 1166. The Court found, however, that because Thomas had yet to satisfy the full amount of the defaulted loan, “the case fits well within the classic exception to the mootness doctrine for disputes.” Id. at 1168.

See Roe v. Wade, 410 U.S. 113, 125 (1973) (finding that a case is not moot if it is capable of repetition but, because of time limitations, evades review).

\textsuperscript{37} Thomas, 856 F.2d at 1169.

\textsuperscript{38} Id. at 1168. See infra notes 138 to 166.

\textsuperscript{39} Thomas, 856 F.2d at 1168-69. See infra notes 75 to 98.

\textsuperscript{40} Thomas, 856 F.2d at 1169.

\textsuperscript{41} Id.
that a contract could be enforced after the statute of limitations has barred the filing of a lawsuit. The court cited 28 U.S.C. section 2415(f) as an example stating that the running of the six-year statute of limitations did not prevent the assertion of the obligation as a counterclaim in a suit brought against the government. The court also stated that the obligation could be collected by offset.

The court then distinguished a statute of limitations which "cut[s] off the remedy without extinguishing the right" from other events such as bankruptcy, death, or fraud, which would extinguish both the remedy and the right. The court concluded by holding that the general statute of limitations did not limit the term "legally enforceable debt" used in the tax refund offset statute to those debts that were less than six years old.

BACKGROUND

LEGISLATIVE HISTORY

The practice of offsetting income tax refunds against defaulted student loans was instituted as a part of the Deficit Reduction Act of 1984. Prior to the passage of the Deficit Reduction Act, the Department of the Treasury did not have statutory authority to offset income tax refunds against debts owed to government agencies.

The federal offset program was included in the Deficit Reduction Act of 1984 due to the massive amount of federal loans in default. Almost ten percent of these defaulted loans were student loans. Congress also relied on a study done prior to the institution of the offset program in which the General Accounting Office found that tax refunds were routinely made to persons who have defaulted on

---

42. Id.
43. Id. See 28 U.S.C. § 2415(f) (Supp. II 1984) (eliminating the six-year limitation period either when a counterclaim is asserted should the two claims be related or if offset is utilized should the two claims be unrelated).
44. Thomas, 856 F.2d at 1169.
45. Id.
46. Id.
debts owed to the federal government.  

Federal Offset Procedure

The federal offset statutes were at issue in the Thomas case. The first statute passed by Congress to allow offsets was 31 U.S.C. section 3716 (the "general offset statute") which was passed in 1982. The general offset statute empowered the head of an executive or legislative agency to offset debts owed to the agency against money owed by the agency to the debtor. The general offset statute provided that the agency must notify the debtor of the agency's intention to offset, inform the debtor of the amount of the claim, and provide information to the debtor about the debtor's rights to dispute the claim. The legislative history of the general offset statute indicates that the debtor's income tax refund claims were specifically excluded from the reach of the general offset statute.

Two years later, in 1984, Congress expanded the federal government's offset power to allow offsets against a debtor's income tax refund. Two statutes govern the expanded offset powers: 31 U.S.C. section 3720A and 26 U.S.C. section 6402.

51. Id. at 76 (statement of John Simonette, Assoc. Dir. Accounting and Financial Management Div., GAO). The agency reported that based on a sample group of defaulted debtors, thirty-six percent of the outstanding debts could have been collected in a two-year period using a tax refund offset procedure. Id.
52. Thomas, 856 F.2d at 1168-69.
53. 31 U.S.C. § 3716 (Supp. II 1984). Section 3716 provides, in pertinent part, as follows:

(a) After trying to collect a claim from a person under 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor—
   (1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;
   (2) an opportunity to inspect and copy the records of the agency related to the claim;
   (3) an opportunity for a review within the agency of the decision of the agency related to the claim; and
   (4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

Id.
55. Id.
56. Ways and Means Committee Report, supra note 47, at 2101.
57. Id.
58. 31 U.S.C. § 3720A (Supp. II 1984). This statute provides in part:

(a) Any Federal agency that is owed a past-due legally enforceable debt (other than any OASDI overpayment and past-due support) by a named person shall, in accordance with regulations issued pursuant to subsection (d), notify the Secretary of the Treasury of the amount of such debt.

(b) No Federal agency may take action pursuant to subsection (a) with respect to any debt until such agency—
Federal agencies are authorized by 31 U.S.C. section 3720A (the "internal authorization statute") to notify the Department of the Treasury that they are owed a "past due, legally enforceable debt."\footnote{31 U.S.C. § 3720A(a).} The internal authorization statute provides that the agency requesting the treasury department to make the offset must take steps to notify the debtor, and consider any evidence presented by the debtor.

\begin{enumerate}
\item notifies the person incurring such debt that such agency proposes to take action pursuant to such paragraph with respect to such debt;
\item gives such person at least 60 days to present evidence that all or part of such debt is not past-due or not legally enforceable;
\item considers any evidence presented by such person and determines that an amount of such debt is past due and legally enforceable; and
\item satisfies such other conditions as the Secretary may prescribe to ensure that the determination made under paragraph (3) with respect to such debt is valid and that the agency has made reasonable efforts to obtain payment of such debt.
\end{enumerate}

(c) Upon receiving notice from any Federal agency that a named person owes to such agency a past-due legally enforceable debt, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such person. If the Secretary of the Treasury finds that any such amount is payable, he shall reduce such refunds by an amount equal to the amount of such debt, pay the amount of such reduction to such agency, and notify such agency of the individual’s home address.

(d) The Secretary of the Treasury shall issue regulations prescribing the time or times at which agencies must submit notices of past-due legally enforceable debts, the manner in which such notices must be submitted, and the necessary information that must be contained in or accompany the notices. The regulations shall specify the minimum amount of debt to which the reduction procedure established by subsection (c) may be applied and the fee that an agency must pay to reimburse the Secretary of the Treasury for the full cost of applying such procedure. Any fee paid to the Secretary pursuant to the preceding sentence may be used to reimburse appropriations which bore all or part of the cost of applying such procedure.

\textit{Id.}\footnote{26 U.S.C. § 6402 (Supp. III 1985). This section provides in part:}

(d) Collection of debts owed to Federal agencies—

\begin{enumerate}
\item In general. — Upon receiving notice from any Federal agency that a named person owes a past-due legally enforceable debt (other than any OASDI overpayment and past-due support subject to the provisions of subsection (c)) to such agency, the Secretary shall—

\begin{enumerate}
\item reduce the amount of any overpayment payable to such person by the amount of such debt;
\item pay the amount by which such overpayment is reduced under subparagraph (A) to such agency; and
\item notify the person making such overpayment that such overpayment has been reduced by an amount necessary to satisfy such debt.
\end{enumerate}
\item Priorities for offset. — Any overpayment by a person shall be reduced pursuant to this subsection after such overpayment is reduced pursuant to subsection (c) with respect to past-due support collected pursuant to an assignment under section 402(a)(26) of the Social Security Act and before such overpayment is credited to the future liability for tax of such person pursuant to subsection (b). If the Secretary receives notice from a Federal agency or agencies of more than one debt subject to paragraph (1) that is owed by a person to such agency or agencies, any overpayment by such person shall be applied against such debts in the order in which such debts accrued.
\end{enumerate}
to prove that the debt is not legally enforceable or is not past due.\textsuperscript{61}

The internal authorization statute also authorizes the Secretary of the Treasury, after receiving notice from another federal agency, to determine if the debtor is getting an income tax refund, and if so, to reduce the refund in an amount equal to the debt owed and forward that amount to the federal agency that initiated the request.\textsuperscript{62} The internal authorization statute allows the Secretary of the Treasury to issue procedural regulations to notify all federal agencies of the offset procedure.\textsuperscript{63} Finally, the internal authorization statute also allows the Department of the Treasury to promulgate rules and regulations prescribing the time limits and methods that federal agencies must use to request offsets.\textsuperscript{64}

Part of the procedures and administration section of the Internal Revenue Code consists of 26 U.S.C. section 6402 (the "offset regulation statute").\textsuperscript{65} The offset regulation statute outlines the procedures that the Internal Revenue Service ("IRS") shall use to offset a debtor's tax refund.\textsuperscript{66}

After the IRS receives notice from a federal agency, in accordance with the internal regulation statute, the offset regulation statute directs the Secretary of Treasury to reduce the debtor's income tax refund by the amount owed on the past-due debt, to pay that amount to the requesting agency, and to notify the debtor that the refund was offset to satisfy the past-due loan.\textsuperscript{67} The internal regulation statute allows any federal agency to request an offset from the Department of the Treasury and to receive the amount of the refund that was offset.\textsuperscript{68} The internal regulation statute also gives the Department of the Treasury the authority to promulgate regulations governing the internal procedures to be used by other agencies.\textsuperscript{69} Section 6402, the offset regulation statute, gives the Department of the Treasury the authority to offset the tax refund upon a valid request from a federal agency.\textsuperscript{70} Thus, the two statutes work in tandem.

As a part of the passage of these two statutes, Congress decided that the income tax refund offset program should be tried on a lim-
FEDERAL TAX OFFSET

ited basis to judge its effectiveness.\footnote{Ways and Means Committee Report, supra note 47, at 2101.} Congress specifically limited the offset regulation statute to a trial period which ended in July of 1988, and provided for a study by the General Accounting Office to determine the effectiveness of the statute, including recommendations, by April of 1989.\footnote{Omnibus Reconciliation Act of 1987, Pub. L. No. 100-203, 10 Stat. 1330, 1376-77 (1987).}

Neither of the statutes dealing with the offset of tax refunds contains a specific reference to a statute of limitations.\footnote{See infra note 113.} The Department of the Treasury, under the internal regulation statute, promulgated a rule allowing offsets for loans that have been delinquent for no more than ten years.\footnote{26 CFR § 301.6402-6T(b)(2) (1988).} This ten-year period allows the government four years longer to collect a debt by administrative offset than by filing a suit to collect the debt.\footnote{Compare 26 C.F.R. § 301.6402-6T(b)(2) (1978) (establishing a ten-year collection period for administrative offsets) with 28 U.S.C. § 2415(a) (Supp. II 1984) (prescribing a six-year statute of limitations for contract claims brought by the federal government).} If the statute of limitations applies directly to administrative offsets, however, the time limit on administrative offsets would also be six years notwithstanding the treasury regulation.\footnote{Hurst v. United States Dept. of Educ., 695 F. Supp. 1137, 1139 (D. Kan. 1988). See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that a regulation may not go beyond the authority granted by statute).}

APPLICATION OF THE STATUTE OF LIMITATIONS TO ADMINISTRATIVE OFFSET

History of Statutes of Limitation

Statutes of limitation place a limit on the amount of time a person has to bring a legal claim for a particular grievance.\footnote{Riddlesbarger v. Hartford Insurance Co., 74 U.S. (7 Wall.) 380, 390 (1868).} The limitations period typically starts to run from the time the claim accrues.\footnote{Note, Developments in the Law — Statutes of Limitations, 63 Harv. L. Rev. 1177, 1200 (1950).} In order to comply with the statute, a person must commence an action on the claim within the limitations period.\footnote{Riddlesbarger, 74 U.S. at 390.}

The United States Supreme Court has on many occasions discussed the rationale behind statutes of limitation.\footnote{See, e.g., American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1973) (finding that statutes of limitations provide justice); Weber v. Board of Harbor Comm'rs., 85 U.S. 57 (18 Wall.), 70 (1873) (encouraging the litigation of valid claims); Bell v. Morri-
by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." The underlying rationale for limiting the time period for bringing suit is to protect the defendant from having to defend against stale claims.

Protection from stale claims was the basis for the enactment in 1966 of the general statute of limitations. This statute was the first general statute of limitations on claims brought by or against the United States. The limitations period adopted by Congress for contract claims was six years. The Committee on the Judiciary of the House of Representatives issued a favorable report and recommended adoption of the general statute of limitations, saying that in many ways government litigation is the same as claims of private individuals and since a private person is barred from litigating stale claims the government should be as well.

The committee reasoned:

In this way the issues presented at the trial can be decided at a time when the necessary witnesses, documents, and other evidence are still available. At the same time, the witnesses are better able to testify concerning the facts involved for their memories have not been dimmed by the passage of time. The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice.

The Department of Justice, which proposed the legislation, gave several bases for its support of the proposal: (1) that a statute of limitations would place the government and the private citizen on a more equal footing; (2) that it would encourage early adjudication to prevent the claim from becoming stale; (3) that it would reduce the
cost of record keeping; (4) that it would encourage agencies to refer their claims promptly to the Department of Justice; (5) that it would avoid the hostility of the judiciary by not allowing the government to submit old claims; and (6) that it would minimize collection costs.\footnote{88}

\textit{Legislative Analysis re: Applicability of Statute of Limitations}

Federal agencies have differed as to whether the six-year limitation period applies to administrative offsets.\footnote{89} In 1978, the Department of Justice issued an opinion memorandum concluding that if the general statute of limitations has expired on a particular cause of action, the debt is also not enforceable by the use of administrative offset.\footnote{90}

The Department of Justice based its opinion in part on the finding of the United States District Court for the Northern District of California in \textit{Tomakin v. United States}.\footnote{91} In \textit{Tomakin}, the court held that the purpose of the general statute of limitations was to extinguish stale claims unless the debtor brought suit against the government and the government asserted the stale claim as a compulsory or permissive counterclaim.\footnote{92}

The Comptroller General, however, disagreed with the conclusion of the Department of Justice.\footnote{93} The Comptroller General relied on the case of \textit{Atwater v. Roudebush}.\footnote{94} In \textit{Atwater} the United States District Court for the Northern District of Illinois held that the six-year period set out in the general statute of limitations was not applicable to administrative offsets.\footnote{95} The \textit{Atwater} court explained that even though the statute of limitations bars the remedy of court action, it does not extinguish the underlying right to collect on the debt.\footnote{96}

To settle this disagreement between agencies, Congress in 1982
amended the general statute of limitations. The amendment provides that, "[t]he provisions of this section shall not prevent the United States or an officer of agency thereof from collecting any claim of the United States by means of administrative offset, in accordance with section 3716 of Title 31 [the general offset statute]." The legislative intent behind the addition of the amendment to the general statute of limitations indicates that the revision was made to allow administrative offsets of debts owed the government to be applied "against future payment benefits, or non-tax refunds due the delinquent debtor beyond the six-year statute of limitations." The statutory revision applies only to those offsets made pursuant to the general offset statute. Because the amendment only applies to those offsets, at least one commentator has indicated that the subsection does not apply to income tax offsets.

Judicial Analysis: General Offsets

Several courts have addressed the applicability of a statute of limitations to administrative offsets generally. In United States v. Grace Lines, the United States Comptroller General set off, against a freight bill, damages that the United States had allegedly suffered in an unrelated transaction several years earlier. The government did not begin legal proceedings to collect the alleged damages within the period prescribed by the applicable statute of limitations. Grace Lines brought an action to recover the

98. 28 U.S.C. § 2415(i) (1982). The reference to section 3716 in the amendment is only to the original offset procedure passed in 1982, which did not encompass the offset of income tax refunds. DEBT COLLECTION ACT, supra note 97, at 3393. The offset of income tax refunds is addressed in 26 U.S.C. § 6402 and 31 U.S.C. § 3720A. See supra notes 58, 59 and accompanying text.
99. DEBT COLLECTION ACT, supra note 97, at 3393.
100. See supra note 98 and accompanying text.
101. See Riggs, 20 CLEARINGHOUSE REV. at 824.
102. Id.
103. 255 F.2d 810 (2d Cir. 1958).
104. Id. at 811.
105. Id.
106. Id.
amount set off by the government, arguing that the set-off had been time-barred.\(^{108}\)

The United States Court of Appeals for the Second Circuit held that the use of an administrative set-off does not make it "unnecessary for the government to prove its claim on the merits," nor does it preclude the assertion of any defenses that may exist to the claim.\(^{109}\) The Second Circuit found that one proper defense would be the assertion of the statute of limitations.\(^{110}\) The court in *Grace Lines* further found that in order for a set-off to satisfy the requirement that it be a "legally enforceable debt," the set-off must occur before the end of the time period prescribed by the statute of limitations.\(^{111}\)

Another case finding the statute of limitations applicable to administrative offset was *Flying Tiger Line, Inc. v. United States*.\(^{112}\) In *Flying Tiger*, Flying Tiger Line, Inc. brought an action against the United States in the United States Court of Claims for monies owed to it for freight transported by airplane.\(^{113}\) The government paid a small part of the total bill but refused to pay the balance, claiming the transport company was indebted to the government because an earlier shipment had been lost.\(^{114}\) The Court of Claims held that the government could not use an administrative set-off as a defense to a claim unless the government could have sued upon that claim.\(^{115}\)

The court stated that:

A setoff or counterclaim is, in its nature and effect, like an independent action by the defendant against the plaintiff, and, as a general rule, a party cannot avail himself of a claim as a [set-off] or counterclaim unless it is a legally subsisting cause of action upon which he could maintain an independent action.\(^{116}\)

### Judicial Analysis: Income Tax Offsets

When Congress enacted the statutes allowing the offset of tax refunds (31 U.S.C. section 3720A and 26 U.S.C. section 6402) no reference was made to a statute of limitations for offsetting income tax

---

\(^{108}\) *Grace Line*, 255 F.2d at 812.

\(^{109}\) *Id.* at 812-13.

\(^{110}\) *Id.* at 813.

\(^{111}\) *Id.* See J. MCBRIDE, I. WACHTEL, & T. TOUHEY, *GOVERNMENT CONTRACTS* § 7.70[1], at 7-99 (1988) (asserting that the government's right to offset is limited to claims brought within the statutorily prescribed time period).

\(^{112}\) 170 F. Supp. 422 (Cl. Ct. 1959).

\(^{113}\) *Id.* at 423.

\(^{114}\) *Id.*

\(^{115}\) *Id.* at 425.

\(^{116}\) *Id.*
refunds.\textsuperscript{117} Three courts have reached differing results in addressing this oversight specifically as it applies to student loan defaults.\textsuperscript{118}

The United States Court of Appeals for the Ninth Circuit in \textit{Gerrard v. United States Office of Education}\textsuperscript{119} reached a conclusion different from that of the claims court in \textit{Flying Tiger} on the applicability of the statute of limitations.\textsuperscript{120} \textit{Gerrard} like \textit{Thomas v. Bennett},\textsuperscript{121} involved a defaulted student loan.\textsuperscript{122} In \textit{Gerrard}, the Department of Education was assigned the loan in January of 1979.\textsuperscript{123} Pursuant to the federal offset program, Gerrard’s income tax refund was diverted to the Department of Education on March 31, 1986.\textsuperscript{124} Gerrard, appearing pro se, argued that under the general statute of limitations the tax refund offset was barred.\textsuperscript{125}

The Ninth Circuit decided, however, that the language of the general statute of limitations supported the government’s argument that the section was inapplicable to offsets of tax refunds.\textsuperscript{126} The court in \textit{Gerrard} determined that the phrases “action for money damages” and “file a complaint” contained in the legislative history of the general statute of limitations indicated that the six-year bar was to apply only to judicial proceedings.\textsuperscript{127} The \textit{Gerrard} court also found further support in the policy outlined in the legislative history of the general statute of limitations, finding that the statute’s purpose was “to provide a more balanced and fair treatment of litigants in civil actions involving the government.”\textsuperscript{128} The \textit{Gerrard} court

\begin{itemize}
\item \textsuperscript{117} Swaney v. Secretary, United States Dept. of Education, 664 F. Supp. 172, 176 (D. Del. 1987).
\item \textsuperscript{118} \textit{See infra} notes 119-58.
\item \textsuperscript{119} 656 F. Supp. 570 (N.D. Cal. 1987).
\item \textsuperscript{120} \textit{Id.} (holding the six-year statute of limitations inapplicable to administrative offsets). \textit{But see Flying Tiger}, 170 F. Supp. at 425 (holding the six-year statute of limitations controlling for administrative offsets).
\item \textsuperscript{121} 656 F.2d 1165 (8th Cir. 1988).
\item \textsuperscript{122} \textit{Gerrard}, 656 F. Supp. at 571.
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.} at 572.
\item \textsuperscript{125} \textit{Id.} at 573.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.} \textit{See Statutes of Limitations Report, supra} note 83, at 2503 (emphasizing that the purpose of the statute of limitations was to provide fairness for litigants in civil actions). The \textit{Gerrard} court utilized the statutory construction theory of \textit{expressio unius est exclusio alterius} in its discussion. \textit{Gerrard}, 656 F. Supp. at 573. This theory asserts that the expression of one thing is the exclusion of another. Since subsection (f) of the general statute of limitations provides for two exceptions to the time-bar of the statute of limitations, the court reasoned that the statute should apply to all situations not specifically excluded. \textit{Id.} at 573. The court did not adhere strictly to the theory, however, since that would have mandated the opposite result. \textit{Id.} at 574. The \textit{Gerrard} court concluded that the relevant sections were not all enacted as one legislative package and therefore it might be wrong to assume that the tax refund offset procedure was meant to be included within the statute’s six-year limitation. \textit{Id.}
FEDERAL TAX OFFSET

held that the statute of limitations did not apply because "'legally enforceable' does not mean 'not barred by the statute of limitations.'"129 The lack of specific reference to a statute of limitations in the income tax refund offset statutes leaves the meaning of the phrase "legally enforceable debt" as the only statutory limitation to collecting a government debt by offsetting the debtor's tax refund.130

Legally Enforceable Debt

The offset procedure for income tax refunds provides that upon notice from any federal agency tax refunds shall be reduced by the amount of any "past due, legally enforceable debt."131 However, the term "legally enforceable debt" is not statutorily defined.132

The phrase "legally enforceable debt" is unique to income tax refund offsets.133 The phrase does not appear in any other federal statute and has no legislative history attached to it.134 The phrase also does not appear in the general offset statute, the original act authorizing debt collection by offset.135

At least one senator was sufficiently concerned with the breadth of the offset program to testify to a Senate Subcommittee that during the trial period tax refund offsets should be utilized only if there was an outstanding judgment against the debtor.136 A judgment could only be obtained as the result of a legal suit, and therefore all debts more than six years old could not be offset if the Senator's suggestion were adopted.137

The lack of legislative history has left the courts to interpret the meaning of the term "legally enforceable debt."138 A primary rule of statutory construction is that a statute should not be construed so as to make some of the provisions superfluous.139 The courts that have dealt with this definition have approached the problem in different ways.140 In Hurst v. United States Department of Education141 the

129. Id.
130. Rigg, supra note 91, at 825.
131. See supra notes 58-59 and accompanying text.
132. Rigg, supra note 91, at 825.
134. Id.
135. Rigg, supra note 91, at 825.
137. See Hurst, 695 F. Supp. at 1139 (defining "legally enforceable debt" as those debts falling within the six-year statutory period).
139. Conway County Farmer's Assoc. v. United States, 588 F.2d 592, 598 (8th Cir. 1978).
140. See infra notes 141-64.
Department of Education was attempting to offset a tax refund against a defaulted student loan.142

In 1969 and 1970 Hurst borrowed $500.00 from the National Defense Student Loan Program.143 Hurst defaulted on the loan in 1974 and on June 15, 1981, Pittsburgh State University assigned the loan to the United States Department of Education.144

In March of 1987 the IRS offset Hurst's income tax refund using the administrative offset procedure.145 Hurst brought suit seeking a refund of the amount offset.146 The Department of Education then asserted a counterclaim for the remaining balance owed on the defaulted student loan.147 Hurst moved for summary judgment, arguing that the loan was in default in 1974 when the initial payments were not made and thus the statute of limitations barred the government's claim.148 The Department of Education also moved for summary judgment and argued simply that the offset was proper.149

The United States District Court for the District of Kansas looked to the procedural regulations promulgated by the Department of the Treasury in accordance with the internal regulation statute.150 These regulations provide in pertinent part that "a past-due legally enforceable debt" is one that "has been delinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made."151 The court in Hurst found this regulation to be "ambiguous and of little help" because the term "delinquent" could be interpreted in several ways.152 The court concluded, however, that due to the ambiguity of the regulation it should be disregarded and the "plain language" of the statute should be examined.153

142. Id. at 1138.
143. Id. This program is now known as the National Direct Student Loan Program. Id. at 1138 n.3.
144. Id. at 1138. See Higher Education Act of 1965, 20 U.S.C. § 1087cc(a)(5) (1982), which provides:
   (a) An agreement with any institution of higher education for the payment of federal capital contributions under this part shall—
      (5) provide that where a note . . . has been in default . . . the institution may assign its rights under such note . . . to the United States.
145. Hurst, 695 F. Supp. at 1138.
146. Id.
147. Id.
148. Id. at 1139.
149. Id.
150. Id.
152. Hurst, 695 F. Supp. at 1139. Hurst claimed that the debt became "delinquent" in 1974 when default first occurred and thus the debt was enforceable only until 1984. Id. Alternatively, the court reasoned that the date the debt was assigned, 1981, could be considered the date of delinquency for purposes of the statute of limitations. Id.
153. Id. at 1139.
The court found that "[i]n its most basic sense, 'legally enforceable' means that a party could go to court and obtain a judgment on the debt."

Using this as its first step, the court found that the six-year statute of limitations as set out in 20 U.S.C. section 1091(a)(4)(C) had not run and the loan was properly subject to offset. The court determined that the statute of limitations begins to run from the date of the assignment of the loan to the government, not from the date the debtor is first considered in default.

The court's ultimate conclusion was that the clear meaning of the tax refund offset statute restricted administrative offsets to the six-year statute of limitations that governs a cause of action. Since the government offset Hurst's income tax refund within that period, the offset was proper.

The Ninth Circuit in Gerrard also addressed the meaning of the term "legally enforceable debt" as part of its determination of whether the statute of limitations applied to administrative offsets. Using Black's Law Dictionary to define the relevant words, the court found that even though the general statute of limitations prevented the government from bringing a judicial suit to enforce the debt, "the government still has lawful means of collecting the debt."

The Gerrard court then gave examples of other lawful means that the government could use to enforce the debt, such as administrative offset, foreclosure on a mortgage that secures the debt, or by counterclaim. Thus, according to the Ninth Circuit, the statute of

154. Id.
155. See 20 U.S.C. § 1091(a)(4)(C) (Supp. IV 1986). This statute provides that the government may file suit "for collection of the amount due from a borrower on a National Defense Student Loan . . . until six years following the date on which the loan was assigned; transferred or referred to the Secretary [of Education]." Id.
156. Hurst, 695 F. Supp. at 1139. The Government asserted a counterclaim to collect on the balance of the defaulted note, arguing that under the general statute of limitations, 28 U.S.C. § 2415(f), the claim arose "out of the same transaction or occurrence as that stated in the original complaint." Id. The district court held, however, that the same six-year statute of limitations applied to the assertion of the counterclaim that applied to the original claim and thus the debt was not legally enforceable. Id. Although the administrative offset took place within six years after the loan assignment, Hurst's lawsuit was filed more than six years after the assignment date. Id. Since the counterclaim was filed after the lawsuit, the government's counterclaim was barred by the six-year statute of limitations. Id.
157. Id. at 1139.
158. Id.
159. Gerrard, 656 F. Supp. at 574.
160. Black's Law Dictionary (5th ed. 1979) defines the term "legally" as "lawfully; according to law," Id. at 850, and the term "enforce" as "[t]o put into execution; to cause to take effect . . . as to enforce . . . the collection of a debt." Id. at 474.
limitations bars only the legal cause of action on the debt but not the obligation itself. After finding that the statute of limitations was not a bar to the administrative offset, the Gerrard court deferred to the authority of the Secretary of the Treasury to promulgate regulations governing the offset procedure. The court then held that the regulation requiring that the loan be delinquent for no more than ten years was entitled to deference.

The Department of Education, the agency administering the federally-insured student loan program, has not been consistent in its interpretation of "legally enforceable debt." In 1986, Region IV of the Department of Education addressed the meaning of "legally enforceable debt." On September 21, 1985, the Internal Revenue Service sent to Jane Doe a standard notice of intent to offset. Brian Wolfman, attorney for Legal Services of Arkansas who was representing the debtor, responded to the demand letter by asserting that Ms. Doe's debt was no longer "legally enforceable" because the general statute of limitations had run. The Department of Education then notified Arkansas Legal Services that the Department had declined to certify Doe's defaulted student loan to the IRS for offset because the statute of limitations had expired. This stand directly contradicts the position the Department of Education took in Thomas, Gerrard, and Hurst where the department contended that the six-year statute of limitations did not apply to the administrative offset. Even if the statutory right to offset was limited by statute,

162. Gerrard, 656 F. Supp. at 574.
163. Id.
164. Id. The court determined, however, that the regulation does not have the full force of law because the statute does not give the Secretary of Treasury the power to define statutory terms. Id. at 574 n.4. The court concluded that "the regulation is therefore due less deference than would be the case had Congress expressly delegated the power to define the phrase ""legally enforceable debt."" Id. (citing McDonald v. Commissioner, 764 F.2d 322, 328 (5th Cir. 1985) (finding less deference is due when a treasury regulation defines a term without explicit authorization to do so)).
165. See infra notes 166-70.
168. Letter from Brian Wolfman to Stan Watson (March 5, 1986) (available through the Clearinghouse Review) (arguing that Jane Doe’s debt was not legally enforceable).
169. Letter from R.L. Giddish to Brian Wolfman (Mar. 11, 1986) (available through the Clearinghouse Review) (acknowledging that statute of limitations had expired and declining to certify Ms. Doe’s student loan to IRS). In Mr. Wolfman’s letter to the IRS he also alleged that Ms. Doe’s debt was not "legally enforceable" by reason of her ex-husband’s bankruptcy proceeding. Letter of Brian Wolfman to Stan Watson (Mar. 5, 1986). However, the Department of Education only mentioned the statute of limitations as the reason for not certifying the loan. Letter of R.L. Giddish to Brian Wolfman (Mar. 11, 1986).
170. See supra notes 40-46, 119-30, 141-58 and accompanying text.
a common law right might still expand the government’s right to offset tax refunds against debts owed to the government.\textsuperscript{171}

**COMMON LAW HISTORY OF ADMINISTRATIVE OFFSET**

The Department of Education bases its right to offset after the applicable statute of limitations period has run on the common law, stating that “the federal government has long had, and exercised, the right to collect its debts by offset against tax refunds.”\textsuperscript{172} The government’s power of set-off at common law, however, was historically limited.\textsuperscript{173} The set-off had to meet strict procedural requirements, and was only available in particular fact patterns.\textsuperscript{174} When the statute of limitations had barred judicial action, set-off was not available to the government.\textsuperscript{175}

Cases involving administrative offsets were rare and inconclusive.\textsuperscript{176} The United States Supreme Court has reviewed common law offsets, and upheld that right only if the government subsequently brings suit on the offset.\textsuperscript{177}

The Court of Claims examined the issue more recently and refused to find a common law right to offset after the statute of limitations had expired.\textsuperscript{178} In *Flying Tiger*, the Court of Claims

---


\textsuperscript{172} *Id.* However, not everyone agrees with this position as the Joint Committee on Taxation’s explanation of the Deficit Reduction Act of 1984 indicated that prior to the passage of this act the Internal Revenue Service had no authority to offset tax refunds to satisfy debt owed the government. *General Explanation Provisions*, supra note 48, at 1220.

\textsuperscript{173} *Grace Line*, 255 F.2d at 812-13.

\textsuperscript{174} *Id.* at 814. At common law, several different devices were used to balance claims between parties. J. FRIEDENTHAL, M. KANE & A. MILLER, *Civil Procedure* § 6.7, at 348 (1985). Recoupment was available only as a defensive tactic, and allowed a defendant to assert against a plaintiff a claim that arose out of the same claim on which the plaintiff was suing. *Black’s Law Dictionary* 1146 (5th ed. 1979). A set-off was an equitable counterclaim or demand by the defendant against the plaintiff "arising out of a transaction extrinsic of plaintiff’s cause of action." *Id.* at 1230. Both of these procedures have been replaced by the modern counterclaim (compulsory and permissive, respectively) in jurisdictions following a rules practice, such as that established by the Federal Rules of Civil Procedure. *Id.* In federal actions counterclaims are governed by Fed. R. Civ. P. 13. *Id.*

\textsuperscript{175} *Grace Lines*, 255 F.2d at 813. Authorities on Civil Procedure have stated that "the institution of an action by the plaintiff is held by most courts to suspend the running of the statute of limitations on any compulsory counterclaim. Permissive counterclaims are barred in this situation." J. FRIEDENTHAL, M. KANE & A. MILLER, *Civil Procedure* § 6.7, at 354-55 (1985) (emphasis added). The government’s claim in *Thomas* would be a permissive counterclaim; that is one “not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.” Fed. R. Civ. Proc. 13(b).

\textsuperscript{176} Plaintiff’s Memorandum at 9, *Thomas*.

\textsuperscript{177} *Gratiot v. United States*, 40 U.S. (15 Pet.) 336, 368 (1841).

\textsuperscript{178} See supra notes 112-15 and accompanying text.
emphasized that the government should not be allowed to administratively withhold sums of money if it had not instituted judicial proceedings. The court stated that:

It may be that this holding will force the Government to institute judicial proceedings whenever it has a claim for damages . . . even though it has in its hands money belonging to its debtor with which it could pay itself. We agree with the Second Circuit in the Grace Line case, that such a requirement is not unduly onerous.180

Further, the right to common law offset was affected by the passage of the Debt Collection Act of 1982.181 The only case addressing this issue found that the Debt Collection Act abolished federal common law rights as they related to debt collection.182

The above summarizes the state of the law when Thomas filed suit against the Secretary of Education over the offset of her income tax refund. In the absence of adequate legislative history, courts were split on whether or not the statute of limitations applied to administrative offsets; courts were also split over the meaning of the term "legally enforceable debt;" and it was not entirely clear whether the common law procedures were changed by the enactment of the offset statutes.183

ANALYSIS

An analysis of the Eighth Circuit's resolution of Thomas v. Bennett requires an examination of several difficult procedural devices, and a determination of the validity of common law equity devices in the modern federal judicial system. An analysis of these issues must be divided into the following questions:

1. Was the intent of Congress in adopting the general statute of limitations to apply the statute to administrative offsets?

2. Does the federal government have a common law right to offset beyond its statutorily-prescribed power?

3. What is the meaning of the term "legally enforceable debt" as used in the income tax refund offset statute?

180. Id. at 426.
181. Id. at 426.
183. See supra notes 103-30 and accompanying text.
184. See supra notes 140-64 and accompanying text.
185. See supra notes 175-76 and accompanying text.
186. 856 F.2d 1165 (8th Cir. 1988).
THE GENERAL STATUTE OF LIMITATIONS

The passage by Congress in 1966 of the general statute of limitations clearly indicated that Congress wanted suits by and against the government precluded if those suits had been dormant for a long period of time.187 The rationale that prompted congressional limitations on causes of action should apply equally well to administrative offsets.188

The reasons given by the Department of Justice in 1966 in support of a statute of limitations were: placing the government and the private citizen on a more equal footing, encouraging early litigation to prevent stale claims, reducing record keeping costs, encouraging quick referral to the Department of Justice, avoiding judicial hostility, and minimizing collection costs.189 Arguably, the reasons given for barring causes of action on a long overdue debt should also bar its collection by administrative offset.190

While the intent of the general statute of limitations was clear in 1966, its application to legislation passed after that date is not so obvious.191 Congress appeared to recognize the difficulty of applying this statute to subsequent legislation and has attempted to clarify the meaning of the general statute of limitations at least as it applies to some types of administrative offsets.192 When Congress added the amendment to the general statute of limitations that amendment allowed administrative offsets of money due a delinquent debtor beyond the six-year limitations period under the general offset statute.193 At the time the amendment was enacted administrative offsets against income tax refunds were specifically prohibited.194

Two conclusions can be drawn from the passage of the amendment to the general statute of limitations. First, that Congress believed that the six-year statute of limitations applied to administrative offsets and secondly, the amendment was intended to remove that barrier to the collection of debts owed to the government.195 However, because administrative offset of income tax refunds was prohibited at the time the general statute of limitations was passed, there could have been no congressional intent to exclude

187. See supra note 83 and accompanying text.
189. See supra note 88 and accompanying text.
190. See supra notes 83, 188 and accompanying text.
191. See supra notes 90-96 and accompanying text.
192. See supra notes 97-98 and accompanying text.
193. See supra note 99 and accompanying text.
194. See supra note 56 and accompanying text.
195. Debt Collection Act, supra note 97, at 3392-93.
offsets of income tax refunds from the statute of limitations.\textsuperscript{196}

When Congress passed the statutes allowing the offset of income tax refunds in 1986 no language was included that would exempt these provisions from the statute of limitations.\textsuperscript{197} It is a logical inference that since Congress was aware of the problem posed by the statute of limitations, and had taken steps to remove that problem as it applied to non-tax offsets, if Congress had not intended the statute of limitations to apply to tax offsets it could easily have included language in the tax offset statute to demonstrate that intent.\textsuperscript{198}

**COMMON LAW RIGHT TO OFFSET**

The reliance of the Department of Education on any common law right of offset past the statute of limitation period is clearly misguided.\textsuperscript{199} First, passage of the Debt Collection Act of 1982 abrogated any common law rights regarding the collection of debts by the codifying of the federal government’s debt collection procedures.\textsuperscript{200} According to the Department of Justice, adoption of the general statute of limitations also terminated any common law rights to offset beyond the statute of limitations period and the Department of Justice so advised the Comptroller General.\textsuperscript{201}

Second, even if the Department of Education was correct in its assumption that the common law right of offset survived the passage of these laws, the common law procedure would be barred under the circumstances of *Thomas v. Bennett* as the government had failed to institute any judicial proceedings.\textsuperscript{202} The court in *Thomas* asserted, however, that there were other ways besides bringing a legal cause of action for the Department of Education to enforce their claim.\textsuperscript{203} One of these ways, according to the court, was by counterclaim.\textsuperscript{204} However, because this claim would be categorized as a *permissive* counterclaim, it would clearly be barred by the statute of limitations.\textsuperscript{205}

\textsuperscript{197} See supra note 117 and accompanying text.
\textsuperscript{198} See Rigg, 20 CLEARINGHOUSE REV. at 825 (stating that Congress clearly intended to limit tax offsets to six years).
\textsuperscript{199} Id. at 823.
\textsuperscript{200} See supra note 182 and accompanying text.
\textsuperscript{201} See supra note 90 and accompanying text.
\textsuperscript{202} See supra notes 29, 179 and accompanying text.
\textsuperscript{203} See supra notes 42-44 and accompanying text.
\textsuperscript{204} See supra note 43 and accompanying text.
\textsuperscript{205} See supra note 175 and accompanying text. See 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1425, at 135 (1971) (stating that a permissive counterclaim may be barred by the running of the statute of limitations).
The only real authority for offsetting income tax refunds after the statute of limitations has run comes not from congressional authority, but rather from a treasury regulation.\textsuperscript{206} Because the internal regulation statute gave the Department of the Treasury only the authority to promulgate internal procedural regulations, the regulation purporting to extend the statute of limitations was promulgated outside the scope of the authority granted to the Department of the Treasury and thus should not be given great deference.\textsuperscript{207} The Department of Education therefore has no justification in common law, or statutory authority, for its position that administrative offsets on tax refunds can be instituted after the statute of limitations has run.\textsuperscript{208}

\textbf{LEGALLY ENFORCEABLE DEBT}

As discussed above, the term “legally enforceable debt” is not defined in the federal administrative offset statutes.\textsuperscript{209} The phrase, however, is repeated no less than four times.\textsuperscript{210} The statute that originally authorized administrative offsets of non-tax refunds did not include the term, “legally enforceable debt.”\textsuperscript{211}

Congress was aware of the problem created by the interaction of the statute of limitations and the general offset statute as evidenced by the fact that Congress amended the statute of limitations to allow non-tax offsets after the period of time prescribed in the statute of limitations.\textsuperscript{212} By including the phrase “legally enforceable debt” as the threshold for administrative offset of a tax refund Congress may have been trying to avoid a similar conflict.\textsuperscript{213} The obvious inference is that Congress intended to include the statute of limitations explicitly within the tax offset statute by its use of the term “legally enforceable debt.”\textsuperscript{214}

The Department of Education, however, has chosen to disregard
this apparent congressional intent in defining "legally enforceable debt." Given the fact that Congress plainly knows how to draft statutes that are explicitly excluded from a statute of limitations, it is inconsistent to believe that Congress would choose the language "legally enforceable debt" to exclude a debt from the statute of limitations.

The Department of Education's interpretation clearly does not rely on the primary rule of statutory construction that a term should be given its plain meaning. The most reasonable conclusion is that Congress intended the phrase "legally enforceable debt" to have meaning, and the only common sense meaning of the term is a debt able to be enforced by a suit at law.

Courts have had little opportunity to address the meaning of "legally enforceable debt," however, when courts have examined the meaning of the phrase most have concluded that it means a debt not barred by the statute of limitations. In the absence of another reasonable definition, "legally enforceable debt" should be understood as a debt that is fully enforceable by the institution of legal proceedings. This is exactly what the court in Hurst was addressing when it explained that the ambiguity was resolved by giving the statute its clear meaning. This definition would require that the debt not be outside the applicable statute of limitations at the time of offset.

PROBLEMS WITH THOMAS V. BENNETT

The Eighth Circuit, in Thomas v. Bennett, resolved all three of the critical issues: statute of limitations; definition of legally enforceable debt; and the existence of a common law right to offset in favor of the Department of Education. First, the court decided that the general statute of limitations did not apply to administrative offsets of income tax refunds. The court seemed to base its decision on the idea that the statute of limitations would only bar the institution of a suit at law. The court suggested that "there are numerous ave-

---

215. See supra note 172 and accompanying text.
218. See supra note 139 and accompanying text.
220. See supra notes 103-16 and accompanying text.
221. See supra notes 112-16 and accompanying text.
223. Id.
224. See infra notes 225, 232, 233 and accompanying text.
225. Thomas, 856 F.2d at 1169.
226. Id.
nuces by which the underlying obligation embodied in the contract 
may be enforced after the six year period.\textsuperscript{227}

The court then asserted that the statute of limitations would not 
bar enforcement via a counterclaim or "by way of offset."\textsuperscript{228} In making this assertion, however, the court apparently overlooked the fact 
that in this case the government would not have been able to assert 
this as a counterclaim, since the counterclaim would have been a per-
missive one and thus barred by the statute of limitations.\textsuperscript{229}

The Eighth Circuit did not even discuss \textit{Grace Lines} and \textit{Flying Tiger} to demonstrate why the statute of limitations barred an offset 
in those cases, but would not bar the offset against Thomas. The 
Eighth Circuit seemed to rely on the distinction urged by the Depart-
ment of Education that a statute of limitations extinguishes only the 
remedy, and not the underlying right.\textsuperscript{230}

The Eighth Circuit's decision in \textit{Thomas} contained no discussion 
regarding a common law right to administrative offset. The court 
seemed to hold that the relevant statutes provided a complete basis 
for the Department of Education claim, overlooking the fact that the 
government based its right to offset past the statute of limitations on 
common law, and not the statutes.\textsuperscript{231} The court's conclusion that the 
tax refund statutes themselves allow offset beyond the statute of lim-
itations differs markedly from the government's argument that the 
relevant statutes do not interfere with its common law right to offset 
beyond the statute of limitations.\textsuperscript{232}

The Eighth Circuit concluded by simply stating that "'legally en-
forceable' . . . does not mean 'not barred by the statute of limita-
tions.' "\textsuperscript{233} The court's entire rationale on this point was the same as 
that used to declare that the statute of limitations did not apply.\textsuperscript{234} That is, the court decided that because the statute of limitations 
would only bar the institution of judicial proceedings, the debt would 
still be legally enforceable via other means.\textsuperscript{235} The only examples of 
these "other means" that the court uses, however, are a counterclaim 
(which under these circumstances could not have been brought) and 
offset (the propriety of which the court was supposed to have been

\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} See supra note 175 and accompanying text.
\textsuperscript{230} \textit{Thomas}, 856 F.2d at 1169.
\textsuperscript{231} \textit{Id.} at 1168-69. See supra note 172 and accompanying text.
\textsuperscript{232} Rigg, 20 \textsc{Clearinghouse Rev.} at 823.
\textsuperscript{233} \textit{Thomas}, 856 F.2d at 1169 (quoting \textit{Gerrard v. United States Office of Educ.}, 
656 F. Supp. 570, 574 (N.D. Cal. 1987)).
\textsuperscript{234} \textit{Id.}
\textsuperscript{235} \textit{Id.}
deciding). The court in *Thomas* once again made no effort to discuss or distinguish the cases that define "legally enforceable debt" as meaning those not barred by the statute of limitations. If the Eighth Circuit's interpretation is sound, any debt, no matter how old, would be "legally enforceable." This surely cannot be the result Congress intended by its use of that term.

CONCLUSION

The decision in *Thomas v. Bennett* seems to be supported more by the need to recover defaulted student loans than by sound legal reasoning. Because the United States is undergoing difficult financial times, with the budget deficit widening while loan defaults increase, recovering on government loans has assumed major importance. The importance of the financial recovery, however, should not justify legal conclusions that contradict judicial precedent without comment.

Likewise, the social and political importance of the offset program initiated by the Debt Reduction Act should not blind Congress to the administrative details. If the program is to be continued after the two year trial period, which will terminate in April, 1989, Congress must address the administrative vagaries of the statute. Congress should take steps to insure its intent is demonstrated clearly by the statute itself, and not allow administrative regulations to institute substantive law.

*Karl D. Vogt—'90*

---

236. *Id.*