

# Assignment of Claims

FUPWG

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# Assignment of Claims Act

- 31 U.S.C. § 3727(b) –An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. ... An assignment under this subsection is valid for any purpose.
- 41 U.S.C. § 15



# Purpose of Anti-Assignment Statutes

## ...to protect the government!

- To prevent buying up of claims, which might improperly be submitted for payment
- To prevent possible multiple payments of the same claim and to enable the government to deal only with the original claimant
- To save government defenses (setoff and counterclaims)



# US v. Sinton Dairy Foods Co.

- The Players:
  - Old Sinton
  - New Sinton
- New Sinton files for tax refunds based on a carryback of losses generated by Old Sinton. Taxpayer identified as Old Sinton, Forms signed by president of New Sinton.
- New Sinton endorses and cashes check
- IRS sues to recover \$592,838 in tax refunds
- Assignment of claims doesn't comply with US statutes
- Government argues there is possibility of multiple recovery of the refund. Old Sinton could demand the refund
- Although government sought to apply part of the refund to an alleged tax debt owed by Old Sinton



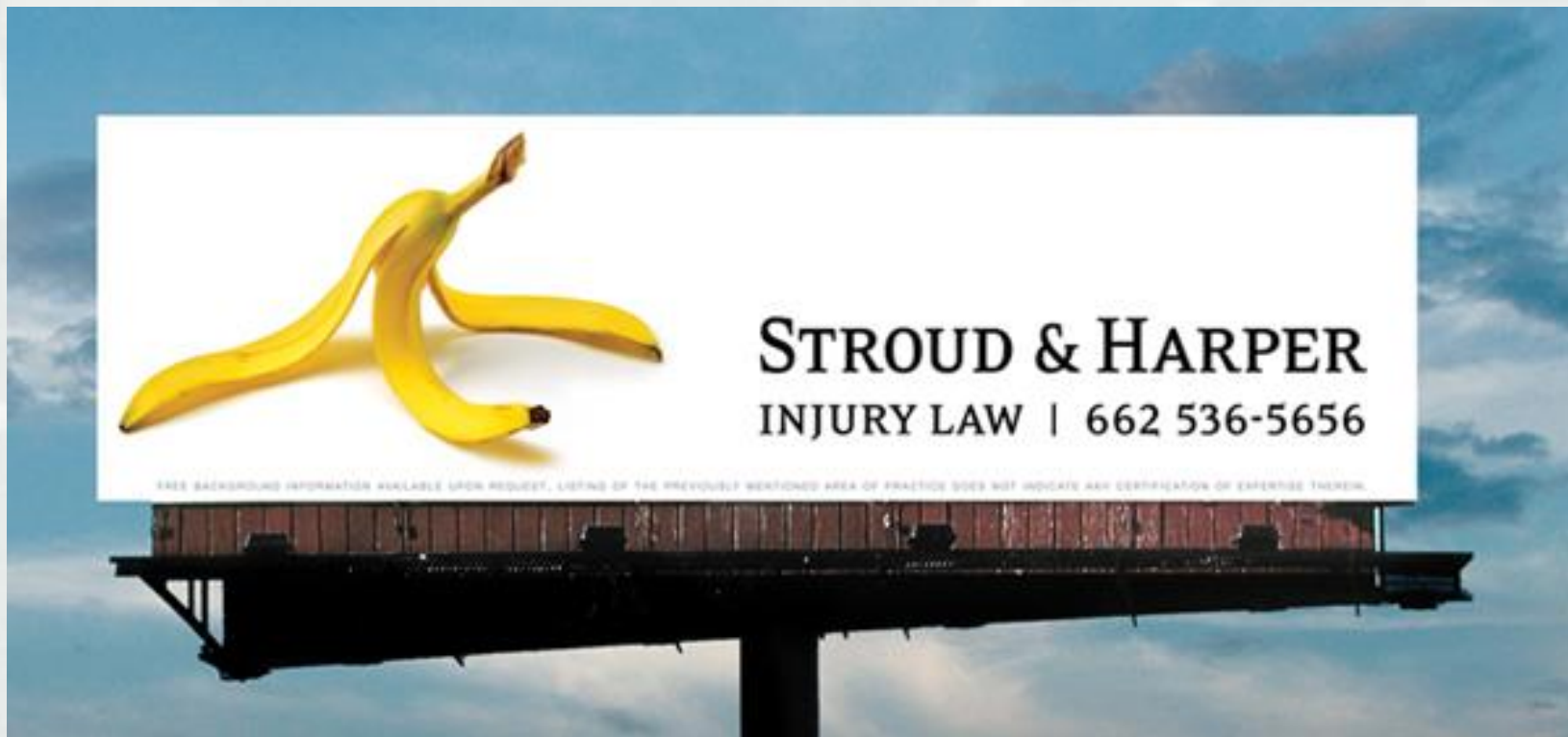
# Principles developed through litigation

- Prohibition does not apply to assignments by operation of law
- Statute is for protection of the government, so the government can waive it
- Noncomplying assignment is voidable at the government's option.





# Attorney's fees



# Prohibition on Transfer of Contracts

## 41 USC 15

- To prevent speculator from getting a contract and selling it to another company.
- To prevent bidder from making several bids through friends or associates with a deal that the contract will be assigned to him regardless of who gets it.
- Court made exceptions:
  - Transfer of contracts in corporate merger or sale of entire business
  - Subcontracting a significant portion of the work



# Assignment of Contract Payments

- Enacted by Congress in 1940s to encourage lending to defense contractors . Offered security in form of assignment of contract proceeds.
- Assignee must be a bank, trust company, or other financing institution.
- Contract is not assigned, only the right to be paid for the performance.
- Partial assignments are invalid.
- Government decides whether or not to allow assignment:
  - FAR 52.232-24 prohibits
  - FAR 52.232-23 allows





# Other requirements

- Assignment must be given “as security for a loan to the contractor.” FAR 32.801.
- Assignment does not have to be contemporaneous with the loan, but the proceeds must have been used in the performance of the contract or at least available for use in performance.
- Excludes assignment of proceeds of a contract that has been fully performed.
- Loan can be made for financing of government contracts in general such as assignment of several contracts under revolving credit agreement.



# Other requirements

- Assignment to only one party at a time, but one party can be an agent or trustee for multiple parties participating in the financing.
- If original assignee releases the assignment, a subsequent assignment can be made.
- Who if financing institution? FAR 32.802(b)
  - Banks , trust companies, and federal lending agencies
  - Other financing institution (undefined in statute or in FAR )



# Other Financing Institutions?

- Financing institution is “one which deals in money as distinguished from other commodities as the primary function of its business activity. 43 Comp. Gen. 138
- Firm whose lending is “merely incidental or subsidiary to another...more important purpose , is not f financing institution.” 43 Comp. Gen. 138



# Financing Institutions Include

- Factoring companies (firms which purchase accounts receivable). 20 Comp. Gen. 415
- Small business investment companies under SB Investment Act of 1958.
- State government small business financing agencies,
- Insurance companies



# Financing Institutions DO NOT include:

- Sureties
- Subcontractors
- Holding Companies
- Manufacturer or materialman who agrees to extend credit in consideration of assignment of claims.
- A trust (pension or non-pension) is not a finance company but is also allowed under the statute , so trust funds under control of a trust company may be used for loans secured by assignment of proceeds. Assignment may be made to one party as agent or trustee for multiple parties participating in the financing.



# How is assignment accomplished?

## Assignee files notice in accordance with FAR 32.805

- Executed by authorized representative
- Attested by secretary or assistant secretary of corporation
- Include corporate seal or accompanies by a true copy of corporate board's resolution, etc,
- Original and three copies and a copy of the instrument of assignment
- Format is in the FAR
- Contracting Officer examines and acknowledges if acceptable
- Assignee should also notify the disbursing office





# Effect of Assignments

- Government has duty to pay the assignee. If government mistakenly pays the assignor, it remains liable to the assignee.
- No entitlement for the assignee to receive prompt payment interest.
- Liability of government to the assignee is contingent upon compliance with the statutory notice requirement.



# Effect of Assignments

- FAR 32.804(a) prevents government from getting money back to satisfy a debt of the contractor.
  - Possible exception if fraud is involved
  - Possible exception for an obvious arithmetical mistake.



# No Offset Provisions

- Statutory provision (DoD, GSA, and DOE) allows inclusion of “no –setoff provision,” which protects assigned against setoff for:
  - Liability of the assignor arising independently of the contract
  - Liabilities for fines and penalties (except those imposed for contract non-compliance), taxes, or social security contributions.



# Requirement for Presidential Declaration

- Statute requires Presidential Declaration
- Blanket declaration signed by President Clinton with delegation to Secretary of Defense
- Further delegations and DFARS 232.803 = current DoD policy
  - RULE: A need exists for DoD to agree NOT to reduce or set off any money due or to become due when proceeds have been assigned in accordance with the Assignment of Claims Provision
  - EXCEPTION TO RULE: Departments and agencies can nevertheless make a determination concerning a significantly indebted offeror to exclude the no-setoff commitment.

