

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA**

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VIETNAM VETERANS OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 08-1934 (RBW)
	)	
JAMES B. PEAKE, M.D., in his official capacity as	)	
Secretary of the Department of Veterans Affairs,	)	
	)	
Defendant.	)	

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**DEFENDANT'S MOTION TO DISMISS AND  
OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
VIETNAM VETERANS OF AMERICA AND	)	
THE VETERANS OF MODERN WARFARE	)	
	)	
Plaintiffs	)	
	)	Civil Action No. 08-CV-01934 (RBW)
v.	)	
	)	
JAMES B. PEAKE, M.D.,	)	
SECRETARY OF VETERANS AFFAIRS	)	
	)	
Defendant	)	
_____	)	

**DECLARATION OF DIANA M. RUBENS**

I, Diana M. Rubens, declare as follows:

1. I am currently employed as the Associate Deputy Under Secretary for Field Operations (ADUSFO) in the Veterans Benefits Administration (VBA). I have held this position since January 2008. Before selection as the ADUSFO, I served as the Director of VBA's Western Area Office for five years, and as the Director of the Pittsburgh Regional Office (RO).

2. In my current capacity as the ADUSFO, I am responsible for the oversight of 57 regional offices and four area offices within VBA. The regional offices employ over 13,000 personnel and administer benefit programs that annually pay over 31 billion dollars to veterans and their beneficiaries. The information contained in this declaration is based on my personal knowledge and information made available to me as a senior executive within VBA.

3. I am aware of this litigation and plaintiffs' motion for a preliminary injunction set for hearing before the Court on December 17, 2008.

4. VBA is a component of the Department of Veterans Affairs (VA) that administers benefit programs for veterans. This case concerns certain claims for compensation benefits administered by VBA's Compensation and Pension Service (C&P) known as ratings claims. Veterans may file a rating claim at any of the 57 VA Regional Offices (ROs) throughout the country.

5. The majority of rating claims seek compensation for a disability arising as a result of an injury or disease allegedly incurred in service. A rating claim may seek compensation for more than one condition. Each separate condition is considered an “issue” in the claim. A claim remains open until all issues have been resolved.

6. In addition to rating claims, C&P also administers non-rating claims, claims for which no disability rating is required. Non-rating claims include dependency changes, claims for burial benefits, initial death pension claims for widows, and income adjustments to pension.

7. If a rating claim is granted, VBA issues a rating decision and notice informing the veteran of (1) the percent he is considered disabled according to the statutory rating schedule and (2) the effective date of the award, which is the date from which a veteran is entitled to compensation.

8. Veterans Service Organizations (VSOs) like plaintiff Vietnam Veterans of America provide free representation to veterans who ask for it. VA provides these VSOs with space within the RO, with computer systems, with access to VA databases, and with free telephone service. No advocate for VA opposes a claim.

9. Once a claim is filed, the Veterans Claims Assistance Act (VCAA) imposes a “duty to notify” under which a VBA employee known as a Veterans Service Representative (VSR) informs the veteran of what evidence VBA will need to adjudicate the claim and, of that evidence, what evidence the veteran must supply and what evidence VBA will seek on his behalf. Under the VCAA’s duty to assist, VBA must seek all federal government records that may pertain to the claim. Typically, these will include military service personnel and medical records, but may also include VA medical treatment records, social security records, or other records.

10. The duty to assist also requires VBA to undertake reasonable efforts to acquire non-federal records identified by the veteran, typically private medical records. VBA cannot initiate the search for these records without a release executed by the veteran. The VBA duty-to-notify letter includes the necessary release forms for the veteran to execute. In the alternative, the veteran may personally acquire the private records and present them to VBA himself. The duty-to-notify letter

provides veterans with a 30-day deadline to respond with any releases and with any evidence in their possession. Once the releases are received, VBA requests the private records from their custodian. The request asks the provider to return the records within 30 days. If the provider fails to do so, VBA sends out another request seeking a reply within 30 days.

11. VBA may order a medical examination, known as a Compensation & Pension Examination. The purpose of this examination is to confirm that a disability exists, and to obtain information concerning the current level of disability to assist a claims adjudicator to determine the percentage to which the veteran will be considered disabled pursuant to the rating schedule. Thus, even veterans who have been treated for a disability at a VA medical facility may be required to undergo a C&P Exam, as medical treatment records may not provide the information needed to determine the percentage a veteran is disabled. VBA arranges for and pays for this examination. Currently, the time between a request and the examination is approximately 30 days.

12. By regulation, the evidentiary record remains open throughout the claims adjudication process. At any point, the veteran may supply new evidence or information about the existence of evidence. The VCAA duty to assist applies to this new evidence, thereby possibly requiring VBA to issue new requests for private records and to wait up to 30 days for an initial response and an additional 30 days for a follow-up. Additionally, at any time the veteran may introduce a new issue into the claim. For new issues, the entire claim development process will have to be initiated to develop the evidence in support of this new disability. It is estimated that as many as 20% of all claims have a new issue presented during the pendency of the claim.

13. Once all the evidence has been gathered, a Rating Veteran Service Representative (RVSR) will rate all the issues that are ready for rating. The RVSR determines whether the disability should be service connected and, if so, assigns the percent disability according to the statutory rating schedule and assigns the effective date. The RVSR prepares a rating decision for those issues that have been decided. A VSR then processes and promulgates the rating decision and, if appropriate, an award letter to the veteran.

14. Approximately 82% of all rating claims are at least partially granted, meaning at least one issue is granted, though it may be rated as a 0% disability entitling the veteran to no monetary benefit.

15. A veteran dissatisfied with a rating decision may appeal the decision first within the VBA, and then to the Board of Veterans Appeals (the Board). The veteran initiates an appeal by filing a Notice of Disagreement (NOD), an informal paper stating that he disagrees with some part of the rating decision. The veteran need not present arguments or other details, but in a multiple issue claim, the veteran may be required to specify what part of the decision he disagrees with.

16. A veteran may appeal any part of any issue in the rating decision: the denial of service connection, the percentage disability assigned, or the effective date. In a multiple issue claim, an appeal may entail one issue, several, or all of them. If the rating decision being appealed from was granted, at least in part (for example, the veteran's claim was granted but he is appealing the percentage disability awarded), the veteran begins to receive the granted benefit immediately despite the appeal. The record remains open at all times, permitting the veteran to attempt to change the rating decision by submitting additional evidence. The VCAA duty to assist applies to any new evidence submitted at this stage. Thus, VBA may be required to seek additional private records and readjudicate the claim at this stage.

17. There are two non-exclusive paths an appeal may take: (1) a traditional appeal that proceeds straight to the Board of Veterans Appeals if the rating agency does not change its decision in response to the NOD or later submissions by the veteran or (2) a prior review (before proceeding to the Board) by an Decision Review Officer (DRO). A DRO is a senior RVSR located in the RO where a claim was adjudicated who may exercise de novo review prior to an appeal being forwarded to the Board. Upon receiving a NOD, an RO will send a veteran an election letter providing the veteran with 60 days to elect which path he desires to follow. Because this period follows receipt of the NOD, it is considered part of the time to resolve the appeal.

18. Under the "traditional" path, the RO will prepare a Statement of the Case (SOC) after receipt of the NOD. A SOC is a more detailed explanation of the rationale underlying the rating decision. Currently, the average time from the filing of the NOD until the completion of the SOC is 194.3 days.

Once the SOC is issued, the veteran has the greater of (1) one year from the date the rating decision was mailed or (2) 60 days from the date of the SOC to file a Substantive Appeal on a VA Form 9. This period is also counted as part of the time to resolve the appeal.

19. Even after a Substantive Appeal has been filed, the record remains open and the veteran may submit additional evidence at any time. If the veteran does so, the RO must readjudicate his claim and, if it does not totally grant the relief the veteran seeks, it must issue a Supplemental Statement of the Case (SSOC). A veteran is provided 30 days to respond to the SSOC before the appeal proceeds. For FY 2008, 58% of all appeals had at least one SSOC issued, indicating that additional evidence was presented to the VBA after the SOC issued. In that same year, 23% of all appeals had two or more SSOCs issued. SSOCs may also be issued after a remand to the RO from the Board because a veteran submitted new evidence for the first time to the Board.

20. Under the alternative DRO path, a DRO will review the file, meet with the veteran and his representative, consider new evidence, reconsider old evidence, and can alter the decision if warranted. If the DRO resolves some but not all of the appeal, a SOC will be prepared, and the veteran will be given 60 days to file a Substantive Appeal. Even if the DRO resolves 90% of the appeal, the appeal will not be considered resolved as to the remaining 10%.

21. Once the formal appeal has been received, the VBA certifies the appeal to the Board. Despite certification, a file may not be transferred immediately to the Board, but may remain at the RO pending a "Travel Board" hearing, a hearing before a Veterans Law Judge from the Board held at the veteran's option at the RO. Such "Travel Board" hearings are held once or twice a year at each RO, more frequently at the larger ROs.

22. On average, claimants file a NOD in only approximately 11% to 14% of the claims adjudicated by VBA, and only approximately 5% proceed to the Board. An avoidable remand is defined as an appeal in which at least one error occurred prior to the VBA certifying the case to the Board. As calculated by VBA, the current avoidable remand rate is 17.7% of those cases that reach the Board. Additionally, the evidentiary record remains open for at least part of the Board appellate process, thus

partially explaining why some cases may have been remanded. Most significantly here, the Board grants benefits sought in only approximately 20% of the cases that it hears either before or after a remand (of those cases that are remanded, the vast majority – 75% – are returned to the Board and ultimately are reflected in the 20% grant or the 39% denial rates).

23. In fiscal year 2008, the VBA received 888,112 ratings claims, and 781,800 non-rating claims. In FY 2000, VBA received 580,773 ratings claims. During this same period, the estimated number of issues contained in these claims increased from approximately 1,656,466 to 3,043,809. In FY 2008, at least 61,666 original claims had 8 or more issues. Since fiscal year 2005, the number of original claims with 8 or more issues has risen almost 41%, while the number with 7 or fewer has remained essentially steady. Since fiscal year 2001, the number of claims with 8 or more issues has risen 171%. See Attachments A-C.

24. Average Days to Complete (ADC) is a statistic routinely compiled and kept in the ordinary course of business to monitor production of rating claims throughout VBA. ADC measures the time to adjudicate all rating claims completed over a finite period of time. ADC is computed by taking all rating claims adjudicated during a period (a year, a month, or fiscal year to date), adding the number of days it took to complete each one, and dividing by the total number of claims that were adjudicated. The ADC for fiscal year 2008 was 178.9 days, and for FY2009 to date is 162.6 days. The ADC for each month of FY 2008 and FY 2009 to date are shown in the following table:

FY08	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	FY09	Oct	Nov
ADC	178.4	179.6	177.2	189.6	187.2	182.2	178.7	183.0	174.1	174.3	174.5	170.4		161.9	163.5

25. Between FY 2000 and FY 2008, ADC increased only 3.4%, from 173 days to 179 days.

26. Between FY 2000 and FY 2009 year-to-date ADC has actually decreased 5.8%.

27. The VBA has studied the reasons for the increase in claims – and issues – per year and has determined that the reasons for this increase include the current overseas conflicts, presumptive

service connections of certain diseases for Vietnam-era veterans, and the aging of the veteran population as a whole.

28. In 2001, VBA instituted the Claims Process Improvement Model, whereby the processing of rating claims was standardized across all ROs. In 2002, VBA created four Resource Centers dedicated to adjudicating rating claims that ROs had fully developed but were unable to rate promptly. VBA has established five more Resource Centers. Currently, over 100,000 rating claims per year are brokered from ROs to these centers or to other ROs that have additional capacity to rate claims. VBA estimates that these two improvements are primarily responsible for limiting the rise of ADC between 2000 and 2007 to just 3.6% while the estimated number of issues adjudicated rose over 68.9%.

29. VBA has recently established four Development Centers to handle the evidentiary development of rating claims for those ROs that have a surplus of claims awaiting development. Other recent initiatives to improve timeliness include increased overtime, rehiring retired annuitants, and operational consolidations such as assigning all pension work to three ROs and creating national call centers to handle the millions of calls per year previously handled by all the ROs.

30. In the spring of 2007, Congress provided funding to VBA to hire an additional 3,100 employees. Over 2,950 of these new employees were hired into C&P. These 2,950 new employees are in addition to the approximately 8,100 who were already employed in C&P. The impact that these additional employees is having on ADC is readily borne out by the FY 2008 and FY 2009 ADC statistics. As the majority of positions were filled in late 2007 and early 2008, ADC initially worsened because experienced adjudicators had to be diverted to training and supervising the new hires. But since May 2008, ADC has dropped as these new employees have begun to complete rudimentary training and become more proficient through actually performing their duties. Based primarily on these new hires, VBA projects that ADC for all ratings claims will continue to improve as VBA seeks to reach its strategic goal for ADC of 125 days, which is the absolute best that management estimates it could ever do based on the current statutory compensation system.

31. Similar efforts have been made to improve appeal times. In 2004, the VA consolidated most of the work on cases remanded by the Board at the Appeals Management Center (AMC) in Washington, D.C. The staffing of the AMC was recently increased from 89 to 111. VBA just established two Appeals Resource Centers to assist the RO's with the processing of appeals.

32. To comply with the mandatory deadlines sought by plaintiffs, a substantial reordering of agency priorities would occur that would substantially prejudice the affected programs. Claims processing staff are funded solely from VBA's General Operating Expense appropriation, a limited fund which supports multiple activities. To comply with mandatory deadlines, VBA would have to redirect funds and employees devoted to other equally important VBA activities to rating claims adjudication. VBA would have to severely curtail successful outreach programs that currently use personnel with claims processing backgrounds. Programs such as Benefits Delivery At Discharge and the Transition Assistance Program where VBA employees brief and actually assist military members leaving active duty to file claims would be cut back. Specialized outreach efforts to homeless veterans, first Gulf War veterans, current Afghanistan and Iraq combat veterans, Vietnam veterans, elderly veterans, and women veterans would all be severely curtailed. Personnel would also have to be redirected from non-rating claim adjudications. Matters such as death pension for veterans' survivors, dependency adjustments, special home adaptations (for disabled veterans), and burial payments would all see processing times increase substantially as a result. New employee training would have to be modified to focus all new employees on only part of the current curriculum, namely gathering evidence and processing interim benefit awards, at the expense of learning to actually rate disability claims – leading to substantial delays in the future as the number of qualified adjudicators diminishes for lack of trained replacements. Expert employees currently working to develop and test improvements to the claims process would instead have to be returned to claims processing, at the expense of future efficiencies, especially VBA's progress to a paperless claims process. Quality of claims adjudication would decrease as the quality review program would be curtailed to return experienced reviewers to the adjudication process. Internal controls and system analyses would similarly be affected as personnel devoted to monitoring production were, instead,

diverted to meeting the Court's deadline. This would severely curtail management's ability to oversee production. C&P compensation examinations would suffer because they would have to occur without a proper chance to accumulate all the proper medical records.

33. VBA has for several years accelerated adjudication of claims for veterans in need such as those over 70, those suffering from a terminal illness, or those who are homeless. Currently, VBA's highest priority is adjudicating the claims of veterans seriously injured in current combat operations in Afghanistan and Iraq; these claims are being handled before all others. And the claims of the remaining current combat veterans also receive priority adjudication, with the goal to complete processing of them within 100 days.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Attachments A through C are true and correct copies.

Executed this 4<sup>th</sup> day of December, 2008.



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DIANA M. RUBENS  
Associate Deputy Under Secretary for Field  
Operations Veterans Benefits Administration  
Washington, D.C.

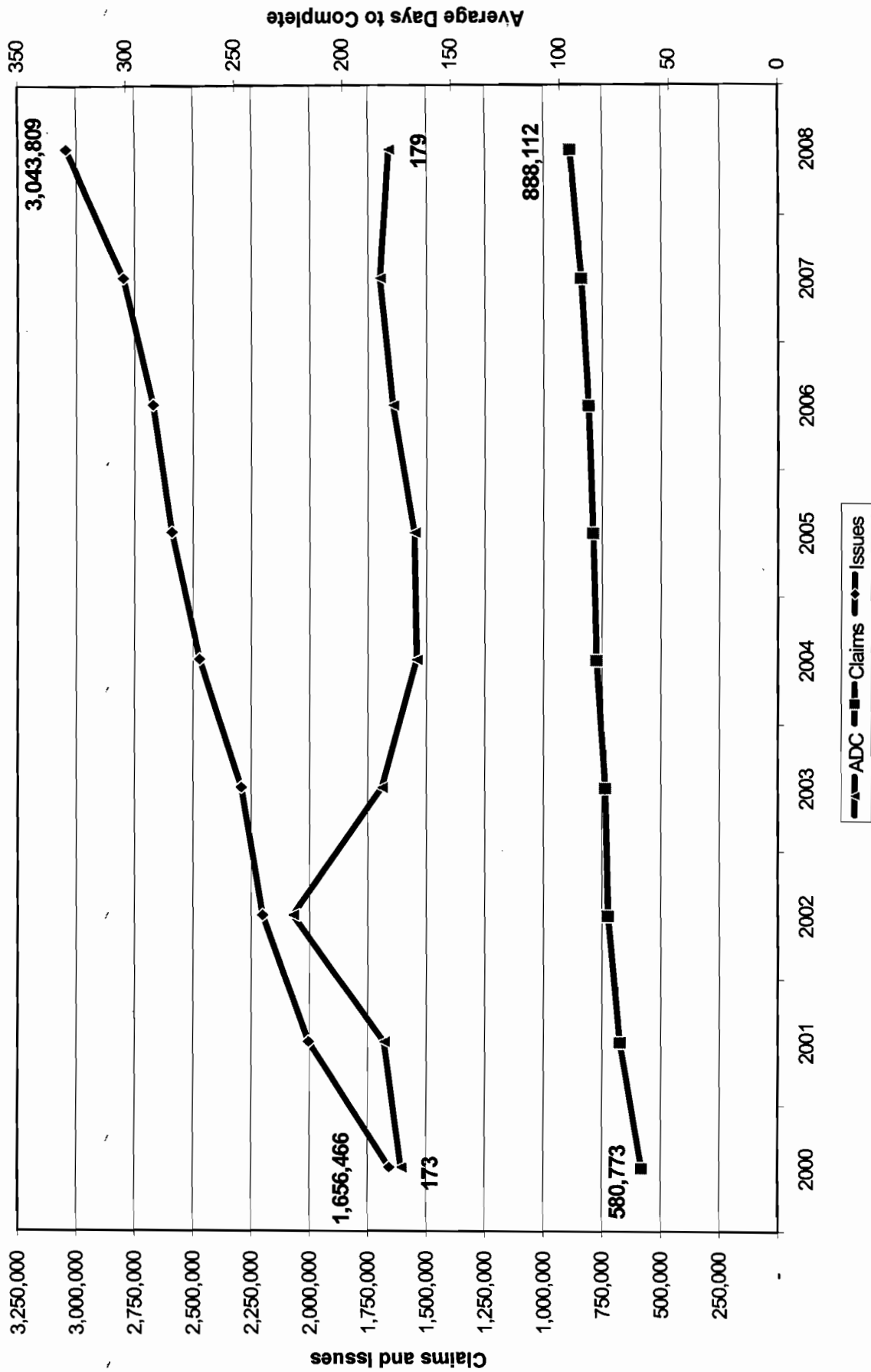
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**DEFENDANT'S MOTION TO DISMISS AND  
OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

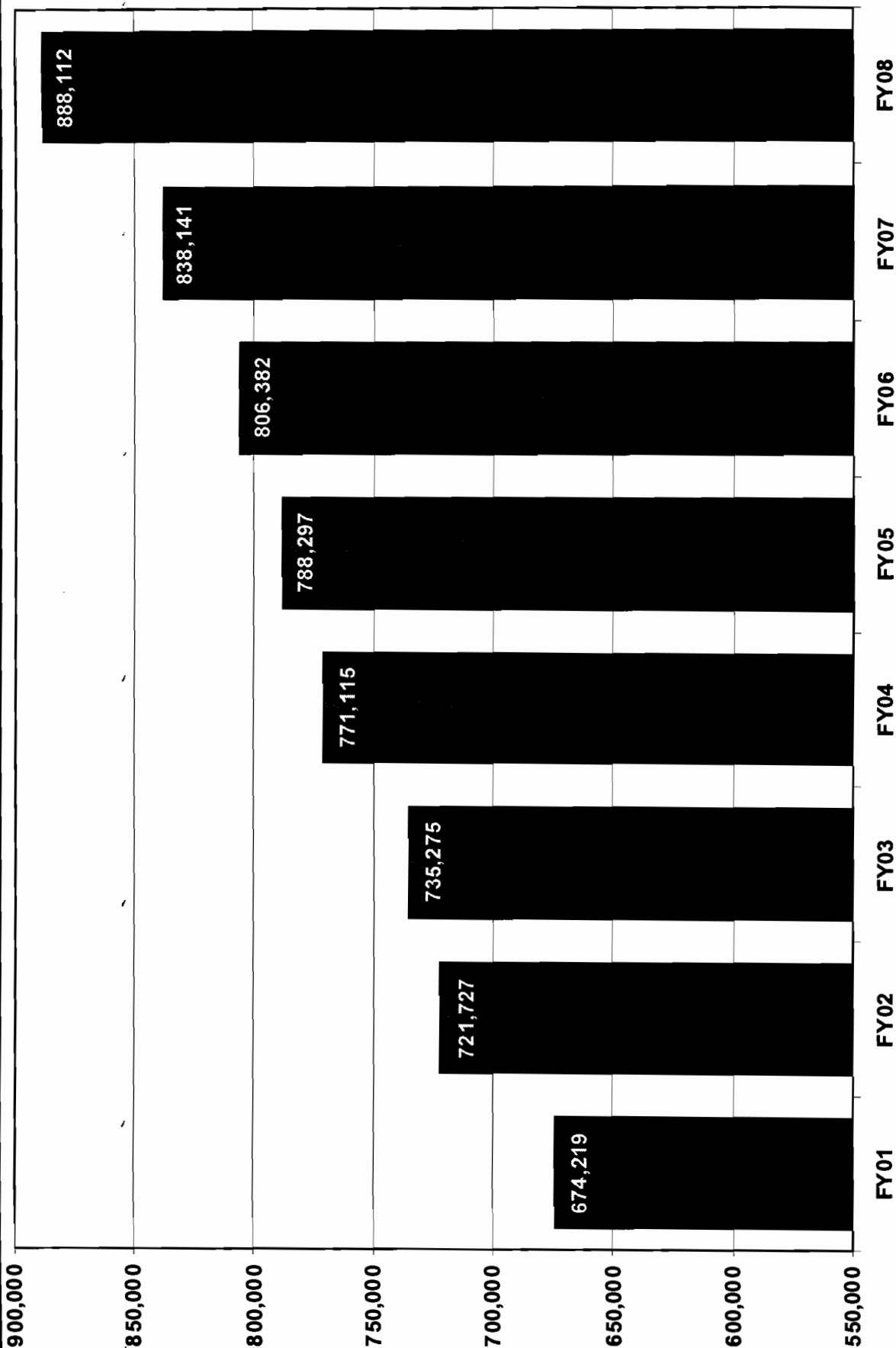
**EXHIBIT 1, ATTACHMENT A**

# Claims Receipts and Total Issues





# Rating Claims Received



**IN THE UNITED STATES DISTRICT COURT FOR THE  
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		)
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	v.	) Civil Action No. 08-1934 (RBW)
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**DEFENDANT'S MOTION TO DISMISS AND  
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**EXHIBIT 1, ATTACHMENT C**

# Original Claim Receipts – Issues Per Claim

