FEDERAL CLAIMS BAR ASSOCIATION

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Summarizing recent rulings from the United States Court of Federal Claims and United States Court of Appeals for the Federal Circuit at 717 Madison Place, NW

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MESSAGE FROM THE EDITORS-IN-CHIEF

We want to thank all our contributors!

If you are ever interested in joining the editorial board, please let us know. In particular, we could use additional contributors for the Pay practice area.

As always, feel free to share any ideas or comments. You may reach us at Sgrigsby@bsfllp.com, Amanda.Tantum@usdoj.gov, or Colleen.Hartley@usdoj.gov. Thank you.

COURT PROCEDURE

Federal Circuit Affirms The Court's Dismissal of Contract-Based Claims, Reaffirming The Rule That There Can Be No Implied-In-Fact Contract Where There Is An Express Contract on The Same Subject. *Seh Ahn Lee, et al. v. United States*, Fed. Cir. No. 2017-1643, 895 F.3d 1363 (July 13, 2018). [Bryson, J.]

In this appeal of a class action from the Court of Federal Claims, the Federal Circuit affirmed the trial court's dismissal of a complaint asserting theories of breach of express contract, breach of implied-in-fact contract, and *quantum meruit*, reaffirming the rule that implied-in-fact contracts cannot exist if there is an express contract between the parties on the same subject.

Plaintiffs, Seh Ahn Lee, Irina Ryan, Ahmad Nariman, and Mark Peach provided services to Voice of America ("VOA") based upon a series of individual purchase order vendor ("POV") contracts that each of them entered into with the Broadcasting Board of Governors, which oversees VOA. The plaintiffs argued that their services were improperly obtained using POV contracts and that they were entitled to the same pay and benefits as federal employees. The Court of Federal Claims dismissed the plaintiffs' amended complaint for failure to state a claim and denied their motion to amend the complaint, finding each of the plaintiffs' contract theories to be deficient.

The Federal Circuit agreed with the trial court. The Federal Circuit rejected the plaintiffs' breach of express contract claim, finding that the plaintiffs' allegations that they should have been paid as if they were providing personal services were "not tied to the rights and obligations of the parties defined by the contracts and therefore fail to state a claim of express contract breach." The Court noted that the plaintiffs' POV contracts provided that they were independent contractors who were not providing personal services, thus refuting the plaintiffs' argument.

The Court also rejected the plaintiffs' implied-in-fact contract theory, citing the general rule that there can be no implied contract where there is an express contract between the parties covering the same subject. In support of their implied-in-fact contract theory, the plaintiffs argued that their express contracts were void because they were personal services contracts prohibited by Federal Acquisition Regulation 37.104, which provides that an agency "shall not award personal services contracts unless specifically authorized by statute." The Court was unpersuaded, however, noting that the POV contracts did not specifically provide for direct government supervision to a degree that made them personal services contracts. Also, the Court noted, "the fact that a contract may be inconsistent with a statutory or regulatory requirement does not *ipso facto* render the contract void." Finally, the Court rejected the plaintiffs' *quantum meruit* theory because it was essentially the same as their implied-in-fact contract theory.

Read the decision here.

The Court Analyzes "At Issue" Waiver of Attorney-Client Privilege And Other Discovery Issues Arising Out of Motion To Compel. *Kansas City Power & Light Co. v. United States*, Fed. Cl. 15-348C, 139 Fed. Cl. 546 (August 30, 2018). [Sweeney, C.J.]

In this contract case, the Court considered a variety of discovery issues arising out of a motion to compel, including the extent to which information that is placed "at issue" in litigation may result in a waiver of attorney-client privilege or work-product doctrine protection.

The plaintiff, Kansas City Power & Light Co., sought indemnification, under its electrical service contract with the General Services Administration ("GSA"), for the cost of defending and settling a wrongful death lawsuit arising out a 2006 incident at a federal building. After a contracting officer denied the claim, the plaintiff filed an action in the Court.

On the defendant's motion to compel pursuant to Rule 37, the Court examined the plaintiff's various objections to document requests and interrogatories and the plaintiff's invocation of the attorney-client privilege, attorney work product, and common-interest privilege.

First, citing the requirement that objections to document requests and interrogatories be stated with specificity and tailored to the disputed discovery requests, the Court held that general objections advanced by the plaintiff were insufficient "because they consist of broad, boilerplate language relatively untethered to the facts of the case."

Second, the Court held that the plaintiff could not rely on attorney work product or attorney-client privilege to withhold certain documents related to the wrongful death action, explaining that work-product privilege does not protect facts from disclosure and that the "record is clear that responsive facts have been improperly withheld."

The Court next examined the implications of the "at-issue waiver" doctrine, pursuant to which a party implicitly waives applicable privileges by taking an affirmative act that puts protected information at issue and makes it relevant. The Court held that the "at-issue" waiver did not apply to the plaintiff's legal analysis related to the reasonableness of its settlement of the wrongful death action because such information was not "vital" to the indemnification case. But the Court held that an "at-issue" waiver had occurred with respect to whether the plaintiff's decision to settle was based solely on potential liability for negligence and what portion of the settlement was allocated to the negligence claim, finding that such information was relevant to the case and could not be found elsewhere.

The Court further held that the plaintiff had expressly waived the assertion of privileges as to certain information by failing to timely lodge objections to interrogatories within 30 days. The Court also rejected the plaintiff's argument that certain information used in a mediation was subject to a settlement privilege. The Court also found that information that the plaintiff had shared with its excess insurer was not protected by the common-interest privilege.

The Court ordered the plaintiff to supplement its discovery responses.

Read the decision here.

GOVERNMENT CONTRACTS

The Court Reviews De Novo The Legality Of a Contract Provision. *United Launch Services, LLC & The Boeing Co. v. United States*, Fed. Cl. No. 12-380C, 139 Fed. Cl. 664 (September 12, 2018). [Kaplan, J.]

It is well-settled that a contracting officer does not have the authority to bind the government to a contract provision that is contrary to law. But does the government's prior view of the legality of the provision make such a provision nonetheless enforceable? In *United Launch Services, LLC & The Boeing Co. v. United States*, the Court of Federal Claims recently confirmed that it does not.

In *United Launch Services, LLC & The Boeing Co. v. United States*, the plaintiffs filed a breach of contract action against the government alleging that the government had failed to honor 2006 and 2008 agreements pursuant to which the Air Force would pay plaintiffs for costs that Boeing incurred before 2006. Plaintiffs filed a motion for summary judgment, and the government argued that the provisions violated government Cost Accounting Standards and the Federal Acquisition Regulation. Citing *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), plaintiffs asserted that the provisions were only unenforceable if the government could demonstrate that the payment provisions were "palpably illegal."

The Court rejected this argument, confirming that it is the Court's role to determine the legality and enforceability of contract provisions and that the Court's legal determination is independent of the government's views. The Court considered the *John Reiner* case to be inapposite because that case — unlike United Launch Services and Boeing's case – concerned the legality of the contract award and the government's decision to cancel the contract in its entirety. Although plaintiffs argued that the palpably illegal standard ensured contractors' confidence in government contracts, the Court did not consider itself to be "breaking new ground or upsetting settled expectations in ruling that where a payment provision in a government contract is illegal it will not be enforced." Ultimately, the Court denied summary judgment, finding that there was a genuine dispute of material fact.

Read the decision here.

Court Lacks Tucker Act Jurisdiction to Entertain Suit Alleging Breach of Civil Enforcement Settlement Agreement With Agency. *Aluminum Shapes, LLC v. United States*, No. 18-548C, 139 Fed. Cl. 709 (October 17, 2018). [Campbell-Smith, J.]

The Tucker Act, 28 U.S.C. § 1491, is the Court of Federal Claims' jurisdictional lodestar, authorizing the Court to entertain money-damages claims founded upon, among other things, "any express or implied contract with the United States." But the scope of "any . . . contract," while seemingly broad, does not extend to every type of agreement between the government and a private party. A recent decision illustrates the often murky contours of the Court's jurisdictional confines.

In *Aluminum Shapes*, OSHA assessed several hundred thousand dollars in fines against the operator of an aluminum-extrusion plant and executed a settlement agreement with the operator to resolve further liability. Thereafter, OSHA inspected the operator's plant and proposed to assess nearly $2 million in additional fines. The operator alleged that the later inspection and additional fines breached the settlement agreement and sued in the Court, seeking monetary damages in the form of any additional fines that OSHA ultimately would impose because of the agency's post-settlement agreement conduct.

The Court first explained that it lacked jurisdiction to adjudicate any contest to the assessment of OSHA fines – something within the exclusive jurisdiction of the Occupational Health and Safety Commission. The Court then turned to whether the OSHA settlement agreement gives rise to contract-based Tucker Act jurisdiction for the government's alleged breach. In holding it did not, the Court emphasized the difference between agreements arising under the government's "sovereign" capacity (which generally are not covered by Tucker Act jurisdiction) and the government's "proprietary" acts (which generally are covered by Tucker Act jurisdiction). The Court explained that for settlement agreements arising in the sovereign "criminal and quasi-criminal contexts" the Tucker Act's jurisdictional analysis is "exacting" and requires that a settlement agreement "clearly and unmistakably subjects the government to monetary liability for breach." Because the settlement agreement in *Aluminum Shapes* lacked such clear-and-unmistakable language, the Court granted the government's motion to dismiss.

Read the decision here.

TAKINGS

Court Rules in Rails-To-Trails Litigation that Temporary Takings Analysis Is Appropriate Where No Final Trail Use Agreement Has Been Signed. *Balagna v. United States*, Nos. 14-21L, 16-405L, 138 Fed. Cl. 398 (Aug. 6, 2018). [Kaplan, J.]

The plaintiffs in this rails-to-trails litigation own land abutting a 14.5 mile railroad right-of-way in Illinois. In 2013, the Surface Transportation Board ("STB") issued a Notice of Interim Trail Use ("NITU"), but no final trail use agreement was reached.

The plaintiffs moved for partial summary judgment, arguing that they suffered a permanent taking as a matter of law, even though no final trail use agreement had been implemented. The plaintiffs also sought a ruling that their compensation should be determined based upon the methodology utilized in cases involving permanent takings. The government maintained that only a temporary taking occurred at this time and the Court should defer any compensation award until either a final trail use agreement was reached or negotiations concluded without any agreement. The government also moved for partial summary judgment on the issue of the effect the NITU had upon the plaintiffs' crossing rights.

The Court denied both motions for partial summary judgment. Addressing the plaintiffs' arguments, the Court held that the plaintiffs suffered a taking on the date the STB issued the NITU in 2013. However, the Court declined to rule that the taking was permanent, explaining that such a ruling is inconsistent with *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), wherein the Federal Circuit recognized that trail use negotiations could fail and the NITU would convert to a notice of abandonment. The Court expressed concern that applying a permanent taking methodology would permit future plaintiffs to sue immediately after issuance of an NITU and potentially obtain compensation for a permanent taking when, sometime thereafter, trail use negotiations would fail. Such a situation, the Court cautioned, "could provide a windfall to the landowner, as opposed to 'just compensation' for the property interest taken." The Court also rejected the plaintiffs' argument that any sale of the property soon after issuance of an NITU warrants application of a permanent takings methodology, observing that a landowner who sells the property remains eligible to receive the difference in price between market value before and after the taking.

Next, the Court rejected the government's argument that any claim that the market values of the properties are diminished by uncertainty about crossing rights is too speculative to serve as a basis for compensation. It reasoned that, "in the before-taken state," crossing rights are not at issue since there is no easement that requires a crossing. In other words, crossing rights are implicated only after creation of a new easement over the properties as a result of an NITU. Since crossing rights implicated factual issues, the Court ruled that summary judgment was not appropriate. The Court also denied the government's request to stay the valuation portion of the case.

Read the decision here.

Court Finds Movement Of Water, By A Government-Owned Pump, Into A Property Owner's Portion of A Canal Constitutes A Taking. *Liebman v. United States*, 139 Fed. Cl. 563 (Aug. 28, 2018) [Hodges, S.J.], *consolidated appeals filed*, 2019-1128, - 1187 (Oct. 30, 2018; Nov. 9, 2018).

The property owners of land underlying a navigable canal in Louisiana and rights to the water above it brought an action alleging that NASA's construction and use of a redundant pump station to move storm water into the canal constituted a taking. Prior to NASA's construction of the redundant pump station to supplement the original 1960's pump station, the property owners' predecessors in interest had an easement agreement with NASA, namely, a servitude of drainage related to the original pump station.

The Court concluded the claim should be analyzed under *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003). The Court then found that surface turbulence created when the pump station operated effectively rendered an area of the canal unsuitable for barging and that this constituted the taking of a "servitude of drainage" warranting compensation.

Read the decision here.

Court Denies Government's Summary Judgment Motion in Automobile Industry Bailout Litigation Alleging Taking of Franchise Agreements. *Colonial Chevrolet Co., et al. v. United States*, Nos. 10-647C, 11-100C, 12-900C, 139 Fed. Cl. 599 (Sept. 17, 2018). [Firestone, S.J.]

The plaintiffs, former General Motors and Chrysler dealers whose dealerships were terminated as part of the government's bailout of the automobile industry in 2009, filed suit alleging a taking of their franchise agreements. According to the plaintiffs, the government conditioned giving greater financial resources to General Motors under the Troubled Asset Relief Program upon General Motors terminating franchise dealerships through wind-down agreements. Fifty-nine plaintiffs contend they were coerced into signing wind-down agreements, and six plaintiffs that refused to sign wind-down agreements had their dealerships rejected in General Motors' bankruptcy.

In December 2008, the government provided General Motors with bridge loans and, in exchange, required General Motors to submit a viability plan to show the company could achieve financial stability with an infusion of additional government funds. General Motors submitted its first plan in February 2009. The plan included, among other things, an incremental reduction in the number of General Motors dealerships over a five-year period. The government rejected plan, in part, because General Motors' proposed pace for closing dealerships was deemed too slow. General Motors submitted a revised plan in May 2009 and proposed to reduce the number of dealerships by 1,454 within 1.5 years. General Motors then filed for bankruptcy in June 2009 and requested approval to sell its assets to a new General Motors entity.

As part of the sale agreement, the original General Motors offered participation agreements to approximately 4,100 dealerships, allowing them to continue functioning for the new General Motors. The original General Motors then offered the remaining dealerships wind-down agreements, which generally allowed dealers to remain in business for 17 months, sell remaining inventory of new vehicles, purchase General Motors parts, and service General Motors vehicles. The wind-down agreements provided for cash payments, and allowed dealers to continue participating in General Motors marketing programs. The wind-down agreements contained a release clause and were not negotiable. Dealerships were advised that the original General Motors would reject the dealership agreement if dealerships failed to accept and return the wind-down agreements. Over 89 percent of the dealers that were offered wind-down agreements accepted the agreements.

The bankruptcy court ruled that the wind-down agreements were valid and binding contracts. It then approved the sale agreement between the original and new General Motors entities. Thereafter, the original General Motors moved the bankruptcy court to reject the dealership agreements from 38 dealerships that did not sign wind-down agreements. The bankruptcy court granted the motion, leaving those dealerships with unsecured breach of contract claims against the original General Motors.

The government sought summary judgment against all of the General Motors plaintiffs. In denying the motion, the Court concluded that factual issues remained as to whether the plaintiffs' franchise dealership agreements were terminated because of government action. The Court also noted that it lacked evidence related to whether the value provided in the wind-down agreements equaled or exceeded the value of the franchise agreements in the "but for" world. Finally, the Court concluded that the release language in the wind-down agreements was ambiguous and a trial was necessary to determine the scope of the release.

Read the decision here.

Court Grants Government Summary Judgment On Temporary Regulatory Takings Claims. *Anaheim Gardens v. United States*, No. 93-655C, 104 Fed. Cl. 72 (Sept. 25, 2018) [Campbell-Smith, J.], *appeal filed*, Nos. 2019-1277, -1279 (Fed. Cir. Dec. 10, 2018).

Owners of low-income housing projects alleged that federal statutes (the Emergency Low Income Housing Preservation Act (ELIHPA) and the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA)) effected temporary regulatory takings under the Fifth Amendment by delaying the termination of government rent restrictions. The Court evaluated the claims under the *Penn Central* test. In the case of one owner, the Court found that because the owner had purchased its property after LIHPRHA went into effect and was aware of its restrictions on mortgage prepayment, the owner had no reasonable investment-backed expectation in a mortgage prepayment. With regard to the other owners, despite the fact that the character of the governmental action weighed in favor of finding a taking, the Court granted summary judgment for the United States because these owners failed to produce sufficient evidence of economic injury to prevail at trial.

Read the decision here .

TAX

Court Holds that Plaintiff Willfully Failed to File FBARs and Upholds Imposition of $803,530 Civil Penalty (50% of Account Balance). *Norman v. United States*, Fed. Cl. No. 15-872 T, 138 Fed. Cl. 189 (July 31, 2018). [Damich, J.]

In this Report of Foreign Bank and Financial Account ("FBAR") refund suit, the Court held that the plaintiff willfully failed to file an FBAR for the 2007 year.

The Court based its decision on documentary evidence that the plaintiff had opened a numbered Swiss bank account, concealed the account from U.S. authorities by waiving her right to invest in U.S. securities, actively managed the account in annual face-to-face meetings with a representative of the

Swiss bank and, on one occasion, withdrew a substantial sum from the account in cash. The Court further held that plaintiff was put on inquiry-notice of the FBAR requirement when she signed her tax return in 2007 and that her failure to read the return did not "shield" her "from the implications of its contents." "Because of her false statements and because her memory of every other issue is uncertain," the Court found that plaintiff's trial testimony that she was unaware of her interest in the account was not credible. Likewise, the Court could not "…believe that Ms. Norman, a schoolteacher of at least 7 subjects including economics and government over a 40 year career . . . could do all of this account management over the course of a decade for an account with a large sum of money in it, without once reading any documents, and without realizing that the account had tax implications."

Notably, the Court held that the authority of the IRS to assess the 50% penalty at issue was not limited by 31 C.F.R. § 1010.820(g), which plaintiff argued placed a $100,000 ceiling on the civil penalty that the IRS was authorized to assess against her. Disagreeing with the analysis of the district court in *United States v. Colliot*, 2018 U.S. Dist. LEXIS 83159 (W.D. Tex. 2018), the Court held that the regulation was superseded by the relevant statute -- the 2004 statutory amendment in which Congress "mandate[d] that the maximum penalty be set to the greater of $100,000.00 or 50 percent of the balance of the account."

Read the decision here.

I.R.C. §§ 6611 and 6621, Overpayment Interest Rate for Corporations: A Non-profit Corporation Is a Corporation, Not an Individual. *Charleston Area Medical Center, Inc. v. United States*, Fed. Cl. No. 17-1528 T, 138 Fed. Cl. 626 (July 31, 2018). [Kaplan, J.]

Plaintiffs, non-profit hospital corporations, filed a class-action complaint seeking additional overpayment interest at the higher, individual rate under 26 U.S.C. § 6621(a)(1)(B), rather than at the corporate rate. Plaintiffs also sought to certify a class of approximately 285 taxpayers. Following the holdings in the Second, Sixth, and Seventh Circuits, and the District of Kansas, the Court found that the term "corporation" in § 6621(a) plainly encompassed both for-profit and not-for-profit corporations, and granted the Government's motion for judgment on the pleadings.

Read the decision here.

VACCINE

Federal Circuit Affirms Denial of Petitioner's Vaccine Act Claim Alleging Dravet Syndrome Following Routine Childhood Vaccinations. *Oliver v. HHS*, Fed. Cir. No. 2017-2540, 900 F.3d 1357 (August 17, 2018) [Wallach, J.], *affirming*, *Oliver v. HHS*, Fed. Cl. 10-394, 133 Fed. Cl. 341 (July 31, 2017). [Kaplan, J.],

The Federal Circuit, in a precedential opinion by Judge Wallach, affirmed the Chief Special Master's denial of petitioners' claim filed under the Vaccine Act 42 U.S.C § 300aa-1 *et seq.*, alleging that E.O., a minor, developed Dravet syndrome as a result of his routine childhood vaccinations.

Dravet syndrome is a rare seizure disorder characterized by prolonged febrile seizures beginning around six months of age. Mutations of a specific gene, the SCN1A gene, can be identified in the majority of those with Dravet syndrome. E.O. received his six-month vaccinations, and within a day experienced his first febrile seizure. E.O. was ultimately diagnosed with Dravet syndrome, and genetic testing later revealed that he had an SCN1A gene defect. Petitioners' expert argued that E.O.'s vaccination caused his Dravet syndrome, and the government presented expert testimony that the vaccinations did not cause his Dravet syndrome, but that instead his condition was caused by his SCN1A gene mutation. The Chief Special Master decided the case without a hearing, concluding that petitioners had failed to establish by preponderant evidence that E.O.'s vaccinations caused his condition, and that the government had established that the SCN1A gene mutation was the cause of E.O.'s Dravet syndrome. In doing so, the Chief Special Master applied the standards for evaluating expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court of Federal Claims denied petitioners' motion for review, and petitioners appealed.

The Federal Circuit held "that the Chief Special Master did not misapply *Daubert* in weighing the parties' experts' testimony and supporting evidence and that the Chief Special Master's factual findings were neither arbitrary nor capricious." The Court further declined to take judicial notice of an extra-record article referenced by petitioners' counsel at oral argument, concluding that petitioners had failed to meet the requisite standard for purposes of taking judicial notice of a scientific theory. Finally, the Court determined that the Chief Special Master did not abuse her discretion by deciding the case without an evidentiary hearing. Judge Newman filed a dissenting opinion.

Subsequently, the Federal Circuit denied the Oliver's petition for a panel rehearing and a rehearing en banc.

Read the decision here.

INDIAN CLAIMS

Federal Circuit Affirms Dismissal of Tribe's Suit for Fifth Amendment Taking of Reserved Water Rights. *Crow Creek Sioux Tribe v. United States*, Fed. Cir. No. 2017-2340, 900 F. 3d 1350 (August 17, 2018) [Dyk, J.], *affirming*, *Crow Creek Sioux Tribe v. United States,* Fed. Cl. No. 16-760 C, 132 Fed. Cl. 408 (June 1, 2017). [Hodges, S. J.]

In this Indian Claims matter, the Crow Creek Sioux Tribe alleged that construction of the Fort Randall and Big Bend Dams on the Missouri River have resulted in a Fifth Amendment taking and a breach of fiduciary duty by mismanagement in the form of a reduction of its rights to water under the *Winters* doctrine. The *Winters* doctrine establishes a right to sufficient water for the needs of Native American reservations. *See Winters v. United States*, 207 U.S. 564, 576-78 (1908). In 1962, Congress authorized $4.4 million to compensate the Crow Creek Sioux Tribe for the loss of reservation land inundated following the construction of these dams. The Court of Federal Claims dismissed this case for lack of subject matter-jurisdiction where there was no statutory authority directing the government to more affirmatively management Indian natural resources and where the Crow Creek Sioux Tribe was unable to identify an actual compensable injury.

The Crow Creek Sioux Tribe appealed. The question before the Federal Circuit was whether the Tribe sufficiently alleged an injury-in-fact. On review, the Federal Circuit held that "the complaint does not allege that the amount of water flowing by the Reservation and available for the Tribe's use is insufficient to fulfill the purposes of the Reservation or will be insufficient in the future. The Tribe therefore has failed to allege injury in fact, as necessary to demonstrate standing." Accordingly, the Federal Circuit affirmed the Court of Federal Claims' dismissal for lack of subject matter jurisdiction.

Read the decision here.