FEDERAL CLAIMS BAR ASSOCIATION

Inside 717

Vol. 8, No. 2 ~ March 2016-May 2016

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

WHAT'S INSIDE

MESSAGE FROM THE EDITORS-IN-CHIEF

We would like to thank all the Inside 717 contributors! Without you, this publication would not be possible.

If you are ever interested in joining the editorial board, please let us know. And, as always, feel free to share any ideas or comments. You may reach us at James.Connor@usdoj.gov or Allison.Kidd-Miller@usdoj.gov. Thank you.

COURT PROCEDURE

Court Dismisses Plaintiff's Case After He Refused To Attend His Deposition Or Trial
Topsnik v. United States, No. 14-275T, __Fed. Cl.__ (May 31, 2016) [Kaplan, J.].

The Court dismissed plaintiff's tax refund suit for failure to prosecute pursuant to Rule 41(b) of the Rules of the Court of Federal Claims. Plaintiff, a former Canadian professional wrestler and gourmet food distributor who allegedly resides in Germany, claimed that various Internal Revenue Service (IRS) collection actions were untimely. Plaintiff asserted that, despite his absences from the United States (totaling as many as 355 days in a year), the IRS could not toll its 10-year period for collection under Treas. Reg. § 301.6503(c)-1(b), which makes tolling available when the taxpayer is absent for "a continuous period . . . extending for 6 months or more." Plaintiff asserted that any presence in the United States, however brief, would interrupt his period of absence and thus defeat tolling. The Government disputed plaintiff's interpretation, and sought to depose him regarding the nature of his presence in the United States.

Plaintiff repeatedly avoided, and ultimately refused, to sit for his deposition. Depositions in Germany, where plaintiff lives, are subject to various restrictions that would complicate discovery at a late stage in litigation, and the Government offered Prague as a more accommodating alternative location. Plaintiff refused. The Court ultimately ordered plaintiff to sit for his deposition in Los Angeles, where he had requested trial be held. In January, with trial only three weeks away – the arrangement of which the Court had "bent over backwards" to make on plaintiff's behalf – plaintiff's counsel took the position that deposing plaintiff in Los Angeles would violate the Hague Convention. The Court informed counsel that, if he sought a meritless protective order, then plaintiff would still be expected to appear for his deposition. A few days later, plaintiff's counsel moved for a protective order, claiming he had obtained an opinion from an unnamed German lawyer that plaintiff should not appear for the deposition, and indicated that plaintiff also would not appear for trial. Instead, he insisted that the Court allow him to seek summary judgment.

After issuing a show cause order, the Court determined in a published opinion that plaintiff's "counsel repeatedly and flagrantly failed to comply with the Court's orders and rules and often engaged in obstructionist behavior." The Court then listed a "non-exhaustive" number of abuses for which plaintiff was responsible, all of which occurred "[e]ven before [plaintiff]'s ultimate act of defiance," his refusal to appear in the United States for his deposition or trial. The Court further determined that, even though plaintiff "may have preferred to have the case decided without a trial so that he might never have to travel to the United Sates to prosecute the case he filed here, it was the Court's prerogative, not his, to decide whether summary disposition was appropriate in this case." The Court dismissed the case for lack of prosecution under Rule 41(b). Read the decision here.

Court Awards Attorney Fees Under EAJA Despite Absence Of Written Opinion On The Merits
Dellew Corp. v. United States, No. 15–808C, __ Fed. Cl. __ (May 5, 2016) [Sweeney, J.], *appeal docketed*, No. 16-2304 (Fed. Cir. Jul. 7, 2016).

In this post-award bid protest, an unsuccessful bidder challenged the award of a contract for the provision of logistics support services at Army barracks in Hawaii. During oral argument, the Court observed that the protester was likely to prevail on the merits. Less than one month later, the

Government filed a motion informing the Court that the agency intended to take corrective action. The Court then dismissed the case without prejudice – and did not issue a written opinion on the merits.

The protester sought attorney fees and costs under the Equal Access to Justice Act (EAJA). To be entitled to attorney fees and costs under EAJA, a movant must be "the prevailing party" in the case. The Court concluded that the absence of a consent decree or a written opinion on the merits does not bar relief. The Court reasoned that the "substantive comments [made] during oral argument regarding the merits of the case and how it intended to rule" carried a sufficient "judicial imprimatur" to give protester prevailing party status under EAJA.

The United States appealed to the Federal Circuit. Read the Court of Federal Claims' decision here.

Post-Judgment Motion For Intervention Rejected As Untimely
Excelsior Ambulance Serv., Inc. v. United States, No. 15–189C, __Fed. Cl.__ (Mar. 23, 2016) [Sweeney, J.].

In this post-award bid protest, the Court denied as untimely the awardee's post-judgment motion for intervention, filed pursuant to Rule 24 of the Rules of the Court of Federal Claims. The awardee alleged that, when it originally asked the contracting officer about the protest grounds, the contracting officer informed the awardee that the protest only concerned pricing. The awardee contended that it would have intervened had it known about the existence of other protest grounds (on which the protester ultimately prevailed).

The Court rejected the awardee's request for intervention as untimely under Rule 24, which requires that motions to intervene must be filed in a "timely" fashion. The Court held that the awardee's motion to intervene was untimely because (1) it was filed nearly eleven months after the original protest, (2) the delay and waste of time would be prejudicial to the Government and the protester, (3) no unusual circumstances warranted granting the motion. The Court also disagreed with the awardee's reliance on information allegedly received from the contracting officer, because the Court found that the contracting officer was not required to advise the awardee of the grounds of the protest. Read the decision here.

Court Denies Parties' Pretrial Motions *In Limine* In Patent Infringement Litigation
Hitkansut LLC v. United States, No. 12-303C, __ Fed. Cl. __ (May 11, 2016) [Lettow, J.].

In this patent infringement action, the Court resolved several pretrial motions *in limine*, including (1) plaintiffs' motion to strike the Government's responses to plaintiffs' discovery requests as untimely, (2) plaintiffs' motion to exclude the testimony of the Government's expert witness as unreliable and flawed, and (3) the Government's motion to exclude the testimony of a fact witness not disclosed during discovery.

The Court first denied plaintiffs' motion to strike the Government's supplemental discovery responses, which identified additional prior art used by the Government's expert to support his opinion that plaintiffs' patent was invalid. Although the Court found that the Government's supplemental responses were untimely because they were issued after the close of fact discovery, the Court found the lateness to be harmless and substantially justified under Rules 26 and 37 of the Rules of the Court of

Federal Claims. Specifically, the Court noted that the Government's supplemental disclosure was provided two months before plaintiffs' expert report was issued, allowing plaintiffs' expert to address the new material in his expert report. The Court reached the same conclusion for plaintiffs' motion to strike updated financial data produced by the Government to plaintiffs after the close of fact discovery. The Court held that the Government's additional disclosure, while untimely, should not be stricken because it was necessitated by events that post-dated the Government's original discovery responses. The Court also denied plaintiffs' motion to preclude the Government from relying on data not produced in discovery, finding that plaintiffs were attempting to re-litigate a motion to compel which was denied on procedural grounds earlier in the case.

The Court further denied plaintiffs' motions to exclude the testimony and report of the Government's expert. The Court first rejected plaintiffs' argument that the Government's patent infringement expert must address all elements of plaintiffs' infringement claim. Although plaintiffs' expert was required to address all infringement elements, the Government's expert was not, because the Court found that a defendant need only rebut one element of a plaintiffs' claim to prevail. The Court also rejected various other challenges to the opinions of the Government's expert, including plaintiffs' claim that the expert failed to specify a standard of proof, which the Court found to be a legal question and not an issue for expert testimony.

Finally, the Court denied the Government's motion to exclude the testimony of one of plaintiffs' fact witnesses not disclosed as a potential witness during fact discovery. The Court held that plaintiffs complied with the procedures in Appendix A to the Rules of the Court of Federal Claims by including the witness on plaintiffs' final witness list, even though the witness was not disclosed in discovery. The Court further found that plaintiffs' failure to disclose the witness during discovery was harmless because the witness's involvement was well known to the parties. The Court did, however, require plaintiffs to make the witness available for a deposition in accordance with Appendix A. Read the decision here.

GOVERNMENT CONTRACTS

Court Rejects Pre-Award Bid Protest Challenging The Department of Veterans Affairs' Decision Not To Set Procurement Aside For Small Businesses; Analyzes Discretion Afforded To Agency For Seeking Waiver Of Non-Manufacturer Rule

Geo-Med, LLC v. United States, Fed. Cl. Nos. 16-182 & 16-183, __ Fed. Cl. __ (Apr. 20, 2016) [Firestone, S.J.].

In these consolidated pre-award bid protests, the Court addressed several recurring issues in contracts set-aside to further socioeconomic objectives. Among other things, the protestors argued that the Department of Veterans Affairs (VA) erred by not setting the procurement aside for service-disabled-veteran-owned small businesses (SDVOSBs) under the "Rule of Two" analysis. *See* 38 U.S.C. 8127(d) (requiring VA contracting officers to set aside contracts for qualifying veteran-owned-and-controlled small businesses if the contracting officer has a reasonable expectation that two or more such firms can meet the agency's needs at a fair and reasonable price); 48 C.F.R. 19.203 (requiring contracting officers to conduct market research to determine if there are qualifying firms that meet the socioeconomic criteria capable of satisfying the agency's needs). Protestors further contended that the contracting officer should have obtained a waiver under the non-manufacturer rule, which permits small businesses to distribute the products of large businesses on set-aside contracts when no small businesses can meet the agency's requirements. *See* 48 C.F.R. § 19.102.

The Court rejected the protestors' argument and granted the Government's motion for judgment on the administrative record. In doing so, the Court upheld the contracting officer's decision not to set aside the procurement for small business, but instead to provide more favorable ratings to small businesses in certain socioeconomic categories, finding that this approach comported with the VA's responsibility to consider socioeconomic goals in conducting procurements. The Court rejected the protestor's argument that the contracting officer was required to obtain a waiver under the non-manufacturer rule. The Court explained that, if accepted, the protestor's argument would obviate the non-manufacturer rule because a contracting officer would be obliged to seek a waiver "practically any time at least two responsible small distributors were likely to bid on a contract." This conflicts with the "structure and purpose" of the non-manufacturer rule, which "demonstrates that the rule was meant to be the default and a waiver [to] the exception, not the other way around." The Court declined to opine on the precise boundaries of a contracting officer's discretion to seek a waiver, but deferred to the contracting officer's decision not to seek a waiver in this case, finding that the contracting officer "clearly did not abuse her discretion." Read the decision here.

INDIAN CLAIMS

Federal Circuit Affirms Court Of Federal Claims' Grant Of Motion For Summary Judgment In Indian Allottees' Breach Of Trust Case

Ramona Two Shields et al. v. United States, 820 F.3d 1324 (Apr. 27, 2016) (Prost, C.J., Moore, Taranto, J.J.].

Appellant allotees brought claims against the United States alleging that the United States had breached a fiduciary duty owed to the Native American plaintiffs by approving leases of mineral rights on appellants' allotments at below market-rates. Those leases were then sold at a substantial profit. Appellants' allotments are on the Fort Berthold Indian Reservation in North Dakota and are part of the large Bakken Oil Shale oil and natural gas deposits. The Court of Federal Claims granted summary judgment for the United States and the Court of Appeals for the Federal Circuit affirmed.

The central issue in the case was whether appellants' claims were barred by the class-action settlement in the *Cobell* litigation, which was approved by the D.C. Circuit in *Cobell v. Salazar*, 679 F.3d 909, 913 (D.C. Cir. 2012). Appellants argued that the release of claims in the *Cobell* settlement did not apply to their claims here. The Federal Circuit found those arguments unpersuasive. Specifically, the Federal Circuit found that the *Cobell* settlement barred appellants' claim that Bureau of Indian Affairs breached its fiduciary duty under 25 U.S.C. § 396 to ensure leases are in the best interests of Indian owners, because appellants were members of the trust administration class in the *Cobell* settlement, and received notice of the settlement, but failed to opt out of that settlement.

Appellants alleged that the Bureau of Indian Affairs breached a separate fiduciary duty under 25 U.S.C. § 396 to have disclosed information relating to the undervalued lease claims during the *Cobell* settlement proceedings. The Federal Circuit held that neither 25 U.S.C. § 396 nor any other source of Federal law set forth a specific fiduciary duty "to disclose all information related to the administration of Indian trusts," and thus dismissed that claim for lack of subject matter jurisdiction.

Finally, appellants alleged that the statute implementing the *Cobell* settlement amounted to a legislative taking of two claims alleging breach of fiduciary duty. The Court of Appeals assumed that

these claims did constitute property protected by the Takings Clause but found no unjust taking. Instead, the court of appeals noted that appellants forfeited their claims against the Government by failing to opt-out of the *Cobell* settlement. Read the decision here.

PAY

Armory Employees Entitled To Back Pay For "Meal Break"
Havrilla, et al. v. United States, 125 Fed. Cl. 454 (Mar. 14, 2016) [Kaplan, J.].

This civilian pay case involves Federal employees working in an armory, who must remain in, or within sight of, the armory to issue and receive weapons, clean weapons and keep the armory secure 24 hours a day at Pearl Harbor-Hickman military base. The plaintiffs brought this action pursuant to section 207(a) of the Fair Labor Standards Act (FLSA) claiming entitlement to back pay, liquidated damages, and other relief for overtime work they allegedly performed during their daily unpaid 30-minute meal period.

The Court granted plaintiffs' summary judgment motion as to liability and liquidated damages. Although employees may read, watch television, or otherwise pursue personal interests during mealtime, they are not relieved from their posts and are performing essentially the same tasks throughout their entire shift, including the "supposed meal break." Accordingly, the Court held that that time was compensable as it was predominately for the Navy's benefit. The Court found that the employer had sufficient knowledge, both from the plaintiffs and agency policy, that employees could not leave the armory unless properly relieved. Therefore, the plaintiffs were entitled to the requested 30 minutes of back pay for each shift worked. The Court also awarded liquidated damages, finding that the Navy provided insufficient evidence to demonstrate that it had reasonable grounds for believing it was in compliance with the FLSA. The Court did not issue a ruling on willfulness, and instead stated that it needs a more complete record, and must explore the "state of mind" of plaintiffs' supervisors. Read the decision here.

Court Lacks Jurisdiction Over Federal Employees Pay Act Claim For "Flex" Days
Adams, et al. v. United States, 123 Fed. Cl. 608 (Mar. 17, 2016) [Kaplan, J.].

This case involves claims by United States Secret Service (USSS) Physical Security Specialists that they were denied overtime pay under the Fair Labor Standards Act (FLSA) and Title V when the USSS modified their work schedules in violation of the Federal Employees Pay Act (FEPA), 5 U.S.C. § 6101(a)(3)(A) and (B). Specifically, the employees challenged the USSS's authority to create an off, or "flex," day in the middle of the work week and assign a scheduled shift on Saturday. The employees asserted that this violates the requirement to have two consecutive days off, and to schedule a tour at least one week in advance.

The Court granted the Government's motion to dismiss for lack of jurisdiction. The Court relied in part upon Federal Circuit precedent, *Sanford v. Weinberger*, 752 F.2d 636 (Fed. Cir. 1985), which recognized that § 6101 is not money mandating. The "critical flaw" in plaintiffs' claim, the Court explained, is that they are not statutorily entitled to regular pay for a day (the mid-week flex-day) that they did not work, or overtime for work on a Saturday. Thus, because neither § 6101(a)(3)(A) nor (B) "'command payment of money to the employee' and because neither subsection is reasonably

amenable to the reading that it mandates a right to money damages," the Court lacks jurisdiction. Read the decision here.

TAKINGS

Court Awards $135 Million For Categorical And Regulatory Taking Resulting From Statutory Change Governing Passenger Flights At Dallas Love Field Airport
Love Terminal Partners v. United States, 126 Fed. Cl. 389 (Apr. 19, 2016) [Sweeney, J.], *appeal docketed*, No. 16-2276 (Fed. Cir. Jun. 30, 2016).

Leaseholders of property at Dallas Love Field Airport brought this takings claim, alleging that the 2006 Wright Amendment Reform Act (WARA) caused a taking of their property. In 1979, Congress passed the predecessor Wright Amendment to authorize flights from Love Field to limited locations, and limit commuter aircraft to 56 or fewer passengers. Between 2004 and 2006, Southwest Airlines campaigned to repeal the Wright Amendment, and in 2006, Congress struck a compromise in the WARA. That statute modified the Wright Amendment and, the Court found, codified a deal between the cities of Dallas and Fort Worth, the Southwest and American airlines, and Dallas-Fort-Worth Airport to limit passenger flights to 20 gates. The Court thus concluded that WARA called for the destruction of Lemmon Avenue terminal gates, leased by plaintiffs, and prohibited them from ever again using the property as a commercial passenger air terminal.

After a trial, the Court held that the United States was liable for a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as well as a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and awarded $135 million in damages. Applying the *Lucas* factors, the Court determined that the highest and best use for plaintiffs' property was as a passenger air terminal, and that WARA eliminated all economic value of the property. Looking to the *Penn Central* factors, the Court determined that plaintiffs' investment-backed expectations that the Wright Amendment would be repealed were reasonable "for the simple fact that [plaintiffs] were not alone in believing the repeal would happen." The Court also found that the character of the Government action under *Penn Central* also favored plaintiffs, because WARA destroyed plaintiffs' property rights for the sole benefit of the five signatories to the Dallas Love Field agreement, and as the district court for the Northern District of Texas acknowledged, WARA was clearly anticompetitive. The Court awarded just compensation totaling $133.5 million plus interest based on the Moody's Composite Index of Yields on AAA Long Term Corporate Bonds.

The United States appealed to the Federal Circuit. Read the Court of Federal Claims' decision here.

In Rails-To-Trails Case, Court Finds Taking Of Rights-Of-Way That Landowners Conveyed To Railroad Only By Easement, But No Taking Of Those That Conveyed Property In Fee Simple
Hardy v. United States, No. 14-388L, ___ Fed. Cl. ___ (May 4, 2016) [Sweeney, J.].

In this rails-to-trails class action, the Court considered whether a Fifth Amendment taking occurred when the United States authorized the conversion of railroad rights-of-way to recreational trails. On cross-motions for summary judgment, the Court found that some of the deeds for the parcels at issue conveyed property to the railroad in fee simple, and others conveyed only an easement. The

Court determined that, under Georgia state law, a deed that grants a railroad a "right-of-way" conveys an easement under some circumstances. Evaluating the amount of consideration for each conveyance and the presence or absence of a warranty clause, the Court held that some of the deeds conveyed the property in fee simple. The Court concluded that there was no taking as to those parcels that were conveyed from the landowners to the railroad in fee simple, because the landowners no longer owned a cognizable property interest.

As to those parcels that conveyed only an easement to the railroad, meaning the landowners retained a property interest, the Court considered whether the scope of those easements was broad enough to encompass future recreational use, and whether the easements had terminated prior to the alleged taking. The Court found that the scope of the easements was limited to railroad purposes. In so holding, the Court rejecting the Government's reliance upon the Federal Circuit's opinion in *Romanoff Equities, Inc. v. United States*, 815 F.3d 809, 810 (Fed. Cir. 2016) – which held that the conversion of a railway to a recreational trail did not exceed the scope of the easement, and thus, did not constitute a Fifth Amendment taking – because that case relied upon New York, not Georgia, state law. Finally, the Court rejected the Government's contention that no taking occurred because a taking requires abandonment of the rail line. Although the Court agreed that a taking occurs if the rail line is abandoned, it explained that, under Federal Circuit precedent, a taking also occurs if the Surface Transportation Board issues notice of interim trail use or abandonment, which happened in this case. *Ladd v. United States*, 630 F.3d 1015, 1024 (Fed. Cir. 2010). Read the decision here.

TAX

Tucker Act Gives The Court of Federal Claims Subject Matter Jurisdiction Over Report of Foreign Bank and Financial Accounts (FBAR) Penalty Refund Actions
Norman v. United States, 126 Fed. Cl. 277 (Apr. 11, 2016) [Merow, J.].

The Court exercised jurisdiction over this suit seeking to recover a $803,530 Report of Foreign Bank and Financial Accounts (FBAR) penalty, which the IRS assessed for her willful failure to report her interest in a Swiss bank account. The complaint alleged jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), as an "illegal exaction" claim. The Government moved to dismiss, arguing that subject matter jurisdiction lay exclusively in the Federal district courts under 28 U.S.C. § 1355, the statute governing "any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture." In denying the Government's motion, the Court distinguished its prior case law, in which it held that Tucker Act jurisdiction was preempted by 28 U.S.C. § 1355 in the context of suits involving fines and forfeitures, and declined to extend those rulings to penalty cases, noting that "[t]his case does not involve a forfeiture action, it does not involve criminal convictions, and it does not implicate the government's efforts to recover funds, as the plaintiff has already paid the penalty at issue, in full." Accordingly, the Court concluded that, "[w]hile there is obvious tension between section 1355(a) and the scope of Tucker Act jurisdiction," there was not sufficient precedent to support the "blanket preemption of Tucker Act jurisdiction in all penalty cases." Read the decision here.

Section 408 (Individual Retirement Account (IRA) Distributions): IRA Distributions Were Properly Reclassified As Taxable Distributions
Powell v. United States, 2016 WL 1043195 (Fed. Cl. Mar. 15, 2016) [Wolski, J.], *appeal docketed* No. 16-2095 (May 19, 2016).

On summary judgment, the Court rejected plaintiffs' claim that they were entitled to a tax refund because a withdrawal they made from their Individual Retirement Account (IRA) was not a taxable distribution, but rather a reinvestment in "commercial real estate" that remains a part of their "IRA portfolio." More specifically, plaintiffs used the withdrawn IRA funds to purchase real property, which they planned to use for commercial development and/or resale. The Court determined that plaintiffs had no evidence to support their claims that their IRA withdrawals were non-taxable events.

The plaintiff taxpayers appealed to the Federal Circuit. Read the Court of Federal Claims' decision here.

Section 71(b)(1) (Deduction For Alimony): Court Finds Material Facts At Issue
Wolens v. United States, 125 Fed. Cl. 422 (Mar. 4, 2016) [Lettow, J.].

Plaintiff sought a tax refund of approximately $350,000 on the ground that a 2007 lump sum payment he made to his ex-wife under a United Kingdom divorce decree constituted deductible "alimony," as defined by § 71(b)(1). Both parties filed dispositive motions. In its motion, the Government asserted that the payment cannot be considered alimony because plaintiff's obligation to make the payment would not terminate in the event of the death of his ex-wife. The Government based its argument on: (1) the express language of the divorce decree; (2) U.K. law (under which the payment is considered to be a lump sum distribution surviving the ex-wife's death); and (3) the divorce decree taken as a whole. Plaintiff alleged that New York state law applies, because both parties to the decree are currently domiciled in New York, and that under those provisions, the payments do not survive the ex-wife's death. Plaintiff also addressed choice-of-law principles and the U.K.'s "clean-break" principle, which bars any post-divorce financial obligations between former spouses.

The Court denied both parties' motions, and directed that the case proceed on the ground that there are material facts at issue. In particular, the Court determined that plaintiff had alleged facts that, if construed in the light most favorable to him, could show that the divorce decree is ambiguous as to (1) whether the payments in question were intended to terminate on the death of the payee-spouse, and (2) whether the payment would be considered a "lump sum" payment under U.K. law. Read the decision here.

Court Grants Motion to Compel Revenue Agent's Deposition and Production of IRS Documents
Herrmann v. United States, 2016 WL 2990519 (Fed. Cl. May 20, 2016) [Lettow, J.]

The Court granted plaintiffs' Rule 37 motion to compel the deposition of an IRS revenue agent and the production of IRS documents. Plaintiffs argued, among other things, that the testimony sought from the agent is relevant, that the IRS testimonial authorization process in Treas. Reg. §§ 301.9000 *et seq.* does not apply in a tax refund suit, and that any participation by plaintiffs' counsel in the testimonial authorization process (prescribed by the IRS's so-called "*Touhy* regulations") would intrude on their work-product protection. In response, the Government asserted that the motion to compel the

agent's deposition was procedurally improper because plaintiffs never issued a subpoena to the agent, and, in any event, both motions should be denied because the deposition testimony and documents sought were irrelevant. The Court ruled that (1) the deposition topics and documents at issue were relevant, and (2) the IRS could not invoke the *Touhy* regulations to limit the testimony of the agent. Read the decision here.

VACCINE

Federal Circuit Affirms Constitutionality Of Vaccine Act, And Upholds Special Master's Decision
Milik v. Secretary of Health and Human Services, No. , __ F.3d __ (Fed. Cir. May 20, 2016) [O'Malley, Wallach, HUGHES, JJ.], *petition for rehearing filed* (June 30, 2016).

This case involved an appeal of a special master's decision under the National Childhood Vaccine Injury Act (Vaccine Act) finding that the petitioners failed to provide preponderant evidence that a measles, mumps, and rubella (MMR) vaccine caused their son to suffer a severe neurologic injury. The opinion was affirmed at the Court of Federal Claims. At the Federal Circuit, the petitioners-appellants advanced two principal arguments: (1) that the Vaccine Act, and its attendant arbitrary and capricious standard of review, is unconstitutional because it deprives petitioners of a right to *de novo* review in an Article III court; and (2) even if the standard review is constitutional, the special master's decision was arbitrary and capricious because it was not supported by the record. The Federal Circuit rejected both arguments.

First, the Court traced the legislative history of the Vaccine Act, summarizing how jurisdiction was transferred from Federal district courts to the Court of Federal Claims, and noting the establishment of the Office of Special Masters within the Court of Federal Claims. The Court further pointed out that the Vaccine Act is a no-fault statute and thus no liability issues are determined by the special master. Rather, the only questions addressed by a special master in the Vaccine Program context are the fact of injury and causation. As such, petitioners could revisit the issues decided by a special master in an Article III Court in the context of a manufacturing defect claim, a breach of express or implied warranty claim, or even a contract claim.

Second, looking at the merits of petitioners' claim, the Federal Circuit found that the special master's decision was based on reliable evidence of record and thus was neither arbitrary nor capricious. More specifically, the Court pointed to the contemporaneous medical records, and the accompanying interpretation by the Government's expert neurologist, which indicated that the child's condition likely pre-existed the administration of the MMR vaccine at issue.

Petitioners filed a petition for panel rehearing and rehearing en banc. Read the Panel's decision here.

Special Master Finds Sufficient Proof That Hepatitis B Vaccination Caused Petitioner's Multiple Sclerosis

Smith v. Sec'y of Health and Human Servs., No. 08-864V, ___ Fed. Cl. ___ (Fed. Cl. Spec. Mstr. Apr. 18 2016) [Gowen, S.M.].

In this case filed under the National Vaccine Injury Compensation Program, the petitioner alleged that she suffered from multiple sclerosis (MS) as a result of her Hepatitis B vaccination. Both parties offered expert testimony from a neurologist with respect to vaccine causation. The primary dispute centered on the onset of petitioner's MS. The Government argued that petitioner's MS predated her Hepatitis B vaccination, perhaps by two or more years. Petitioner posited onset was within 4 to 42 days post-vaccination. Weighing the factual testimony from petitioner and her daughter, the expert testimony of petitioner's neurologist, and the medical records, the Special Master determined the onset of petitioner's MS indeed occurred within 4 to 42 days following vaccination.

The Special Master also credited as "a scientifically reasonable theory" petitioner's explanation how the Hepatitis B vaccine can act as the environmental trigger of MS. Petitioner's expert testified that the Hepatitis B vaccine can cause MS via "molecular mimicry," a similarity between foreign viruses and bacteria and the body's own similar components. The expert noted similarities between the vaccine and myelin (the sheath surrounding many nerve fibers), specifically a component of myelin known as myelin oligodendrocyte protein. The Government's expert did not dispute the validity of molecular mimicry as a scientific theory. Nevertheless, due to a lack of epidemiological evidence linking the Hepatitis B vaccine and MS, he did not think it was applicable in this case. Read the decision here.