



FEDERAL CLAIMS BAR ASSOCIATION

Inside 717

Vol. 9, No. 1 ~ December 2016 - February 2017

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 would like to start by thank outgoing Editors-in-Chief, Allison Kidd-Miller and James Connor for their excellent work! With this current volume, Amanda Tantum and Stacey Grigsby will take over sharing Editor-in-Chief responsibilities for Inside 717.

In addition, thank all the Inside 717 editors and for your contributions to the current issue. 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 Amanda.Tantum@usdoj.gov or Sgrigsby@bsflp.com. Thank you.

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COURT PROCEDURE

Court Denies Equal Access to Justice Act (EAJA) Attorney Fees Award, Finding that the Government's Litigation Position Was Substantially Justified Because the Issue Was One of First Impression, and that Special Circumstances Made an EAJA Award Unjust

The Meyer Group, Ltd. v. United States, 129 Fed. Cl. 579 (Dec. 19, 2016) [Williams, J.].

After receiving a judgment against the Government in an action pursuant to the Contract Disputes Act, plaintiff sought \$284,800.24 in attorney fees pursuant to EAJA. The Court concluded that plaintiff was a prevailing party, given that the Court had found, in the underlying action, that the Postal Regulatory Commission (PRC) breached an exclusive real estate brokerage agreement by failing to pay commissions to plaintiff after the agreement ended, as called for by an "extension clause" requiring such payment if PRC purchased or leased any properties submitted by plaintiff for PRC's review during the term of the agreement. Because the extension clause contained no limitation governing how long after termination of the agreement plaintiff could receive a commission for work done pre-termination, the Court determined whether the four leases at issue were executed within a reasonable time after termination of the agreement – a question it recognized as an issue of first impression. The Court concluded that two of the four were executed within a reasonable time after termination of the agreement (655 and 412 days, respectively) and that plaintiff was entitled to commissions related to these two leases.

In its opinion denying EAJA attorney fees, the Court found that, because the indefinite temporal language of the extension clause presented an issue of first impression, the Government had a reasonable legal and factual basis for its positions throughout the dispute, including its refusal to pay plaintiff commissions for lease transactions executed over a year after the agreement was terminated. In addition, the Court found that special circumstances made an EAJA award unjust because plaintiff was not vindicating rights that serve a public purpose, but, rather, pushing its interpretation of the agreement to an extremely unreasonable limit by claiming that it was entitled in perpetuity to commissions for properties that it submitted to PRC during the term of the agreement. Accordingly, the Court denied plaintiff's request for attorney fees pursuant to EAJA. Read the decision:

https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2012cv0488-107-0

Court Declines to Dismiss Differing Site Condition Claims for Failure to State a Claim Prior to Factual Development Requiring Expert Testimony

ASI Constructors, Inc. v. United States, 129 Fed. Cl. 707 (Dec. 20, 2016) [Kaplan, J.].

In this matter brought pursuant to the Contract Disputes Act, plaintiff sought damages on a differing site condition (DSC) claim relating to a contract awarded by the United States Army Corps of Engineers (Corps) for construction work at the Canton Lake Dam in Oklahoma. The Court denied the Government's motion to dismiss all of plaintiff's claims for lack of jurisdiction and failure to state a claim.

The Court denied the motion to dismiss the differing site condition claims for failure to state a claim, finding that the contractor met its burden to allege adequately the four elements of a DSC claim. The Government asserted that plaintiff had not made an adequate allegation, as to the first element – that a reasonable contractor reading the contract documents as a whole, including an Engineer Research and Development Center (ERDC) Report, would interpret them as making an affirmative representation as to the site conditions – particularly given caveats and disclaimers in the contract documents. Drawing all inferences in plaintiff's favor for purposes of considering the motion to dismiss, the Court concluded

that it could not find that the contractor's interpretation of the ERDC Report's technical provisions was implausible, noting that the Court's interpretation of the report's text and the test results required factual determinations for which expert testimony would likely be needed and which could not be made in the context of a motion to dismiss. For the same reason, the Court denied the Government's motion to dismiss plaintiff's superior knowledge claims and misrepresentation claims for failure to state a claim. The Court also denied the Government's motion to dismiss plaintiff's good faith and fair dealing claim, which contended that this claim and the superior knowledge and misrepresentation claims are redundant. The Court accepted plaintiff's assertion that additional facts supported its good faith and fair dealing claim and found that, even if the claims are redundant, the Government would not be prejudiced by allowing the good faith and fair dealing claim to continue. Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0687-12-0

GOVERNMENT CONTRACTS

Court of Federal Claims Resolves "Novel Question" of Whether an Agency's Formulation of a Mitigation Plan Gives Rise to Bid Protest Jurisdiction

Ecosystem Investment Partners v. United States, __ Fed. Cl. __ (2016) [Bruggink, J.].

Ecosystem Investment Partners (EIP) filed a protest challenging a solicitation that the Army Corps of Engineers issued for dredging services. The dredging services are part of the Corps' mitigation plan to offset the environmental impacts of the Corps' construction of a levee system around New Orleans. The Corps had determined that, for some of these impacts, rather than purchasing credits from mitigation banks, the Corps would undertake wetland restoration. EIP, which sells mitigation credits, protested the dredging solicitation.

The Court found that EIP was not challenging the terms of the dredging solicitation, but instead was challenging the Corps' prior decision, embodied in its mitigation plan, to undertake a mitigation project instead of buying credits. As a result, the Court held that EIP had no standing because EIP was neither an actual nor a prospective bidder and, distinguishing *CCL, Inc. v. United States*, 39 Fed. Cl. 780 (1997), EIP had not diligently pursued its protest rights. Next, the Court held that EIP's various pre-award communications to the Corps did not comply with FAR requirements for an agency-level protest and the Court was unwilling to excuse EIP's non-compliance with those formalities. Thus, EIP had waived its protest, under *Bannum, Inc. v. United States*, 779 F.3d 1376 (Fed. Cir. 2015). Finally, the Court held that although the Corps' mitigation plan ultimately had led to the dredging procurement, EIP's allegation that the Corps had violated a regulatory preference for mitigation banks did not allege a violation of Federal procurement law "in connection with a procurement," as required for bid protest jurisdiction under 28 U.S.C. § 1491(b)(1). Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv1549-31-0

BID PROTEST

Court Sustains Protest of Forest Service Procurement for Failure to Conduct Price-Realism Analysis

Active Network, LLC v. United States, Fed. Cl. No. 16-1071C, __ Fed. Cl. __ (February 6, 2017) (Wheeler, J.)

In a decision issued in February, the Court sustained in part a post-award protest brought against the Department of Agriculture, United States Forest Service. Although the Court rejected several other challenges, the Court directed the Forest Service to conduct a proper price-realism analysis on remand. The solicitation sought proposals for the re-design and administration of the Government's [Recreation.gov](https://www.recreation.gov) website and included a price-realism clause, which required the agency to evaluate "the extent to which the [proposed] pricing approach demonstrates alignment with" the performance work statement, program goals, and best value. Price realism is a tool by which agencies assess whether offerors fully understand the solicitation and can perform at the offered price.

The Court held that it could not conclude that the agency complied with the RFP's price-realism clause based on the documentation in the administrative record. The Court found that the record contained only "two conclusory sentences for each of the four Offerors" that the evaluators had "determined that the Offeror's FPR pricing [was] realistic for the services proposed." In addition, the sentences did not specifically address the standards in the price-realism clause of the RFP. The Court concluded therefore that the agency's failure to its determination "warrant[ed] remand to conduct a proper price realism analysis." The Court rejected several other of the protestor's arguments, but remanded to the agency to conduct a proper price-realism analysis in the first instance. Read the decision:

https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv1071-47-0

PAY

Court Concludes That Government Must Pay Liquidated Damages To Excepted Employees Working During Federal Government Shutdown, Rejecting Government's Argument That Paying Wages During A Lapse Of Appropriations Would Violate The Anti-Deficiency Act

Martin, et al. v. United States, Nos. 13-834C, 16-1297C, __ Fed. Cl. __ (Feb. 14, 2017) [Campbell-Smith, J.]

This case involves a class of Government workers, who were excepted employees during the 2013 Federal Government shutdown. Although these workers were eventually compensated, they allege that, during the shutdown, the Government did not timely compensate them and failed to properly pay overtime under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b). The Government argued that such payments would have violated the Anti-Deficiency Act (ADA), as there was a lapse in appropriations during the shutdown.

The Court concluded that when Federal agencies are faced with a lapse in appropriations and are prohibited by the ADA from paying excepted employees, the FLSA nevertheless continues to apply and require payment, including payment of overtime. The Court described the conflict between the FLSA and ADA as "superficial" and "harmonized" the two in finding that, while the Government violated the FLSA, the Court would consider the existence and operation of the ADA in its determination of whether the Government met the statutory requirements to avoid liability for liquidated damages. In applying the standard for liquidated damages, the Court found that the Government's reliance solely on the primacy of the ADA showed that it did not make a good faith effort to "take active steps to ascertain the dictates of the FLSA and then act to comply with them." The Court, therefore, awarded plaintiffs liquidated damages. Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2013cv0834-160-0

Court Holds That FBI Police Officers Have No Claim To Higher Pay Allowed Under A Provision For A “Permanent Police Force” That Has Not Been Implemented

King, et al. v. United States, No. 07-589C, ___ Fed. Cl. ___ (Feb. 13 2017) [Firestone, S.J.]

In this action owed seeking back pay and other relief under the Tucker Act, 28 U.S.C. § 1491(a), and the Back Pay Act, 5 U.S.C. § 5596, Federal Bureau of Investigation (FBI) police officers sought higher pay due to their contention that they were a “police force” under 28 U.S.C. § 540C, but were not paid as required by that provision. The Court addressed the long history of a police force within the FBI that pre-existed section 540C and found that the Director of the FBI did not exercise his discretion to implement section 540C following opposition to the statute’s implementation from the Office of Personnel Management and the Office and Management and Budget. The Court held that the FBI director had not established a “permanent police force” and that plaintiffs, therefore, had not been appointed to this force and had no claim to higher pay. Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2007cv0589-189-0

Court Holds That Congress Expressly Provided That Federal Air Marshals Cannot Bring Claims Under The Back Pay Act

Casaretti, et al. v. United States, No. 15-294C, ___ Fed. Cl. ___ (Feb. 16, 2017) [Wolski, J.]

This case involves several thousand Federal Air Marshals seeking back pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), as well as the Back Pay Act, 5 U.S.C. § 5596. The Court dismissed the Back Pay Act claims, concluding that, because Congress expressly provided that the Back Pay Act does not cover Transportation Security Administration (TSA) employees, including Federal Air Marshals, that act cannot waive sovereign immunity with respect to any claims of those employees, including claim for pre-judgment interest. The back pay claims related to the FLSA remain before the Court. Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2015cv0294-54-0

TAKINGS

Court Declines to Dismiss Takings Claim Arising from Foreign Government’s Seizure of Vehicles

Global Freight Sys. Co. W.L.L. v. United States, No. 15-378C, ___ Fed. Cl. ___ (Feb. 28, 2017) [Williams, J.].

Between 2011 and 2014, plaintiff provided services to Camp Lemonnier, a United States Navy base in Djibouti. Plaintiff alleges that, during negotiations between Djibouti and the United States for a new Base Access Agreement, the Navy directed plaintiff to move its vehicles to a villa outside the base within Djiboutian jurisdiction, where they were seized by Djibouti customs officials. Plaintiff ultimately paid \$140,000 for the return of its vehicles. Plaintiff alleges that the Navy ordered plaintiff to remove its vehicles from the protection of the base in order to appease the Djiboutian government during negotiations for the new Base Access Agreement, and that the Navy’s action was a taking that benefited the United States in its negotiations.

The Government moved to dismiss plaintiff’s complaint, arguing that plaintiff had not sufficiently alleged that its property was appropriated due to a United States governmental action and, in addition, that Djibouti’s seizure of plaintiff’s property could not constitute a taking because Djibouti’s actions were

done in the context of customs enforcement. The Court held that the plaintiff had asserted a plausible Fifth Amendment taking claim and denied the Government's motion to dismiss. The Court concluded that, to allow it to make the factual assessment of whether a taking occurred, more factual development was required regarding the circumstances surrounding the Navy's directive and the level of Government involvement that lead to the Djiboutian government's seizure of plaintiff's vehicles. The Court also determined that the plaintiff had sufficiently alleged a benefit to the Government by linking the Government's conduct to its interest in negotiating the new Base Access Agreement. Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2015cv0378-53-0

Court Rejects Takings Claim Based on Government's Settlement of Wrongful Death Claims Related to State-Sponsored Terrorism and Subsequent Court Proceeding Vacating Previous Judgment Awarded to Plaintiffs in Wrongful Death Action

Alimanestianu, et al., v. United States, 130 Fed. Cl. 137 (Dec. 29, 2016) [Williams, J.], *appeal docketed* No. 17-1667 (Feb. 22, 2017).

Mihai Alimanestianu was killed in the 1989 bombing of United Trans Aeriens Flight 772, which was caused by Libya in an act of state-sponsored terrorism. A federal district court awarded plaintiffs, family members of Alimanestianu, a judgment of nearly \$1.3 billion against Libya in a wrongful death suit. Ultimately, the United States settled with Libya, and the family members received approximately \$11 million. After the United States moved to intervene in the appeal of the federal district court's decision, explaining that Libya's sovereign immunity had been restored for certain acts and that the United States had made plaintiffs' claims its own through the settlement with Libya, the United States Court of Appeals for the D.C. Circuit granted the motion to intervene and vacated the judgment against Libya.

In their takings claim in the Court of Federal Claims, plaintiffs alleged the Government engaged in a Fifth Amendment taking of their causes of action against Libya, which, under the Federal Circuit's decision in *Abraham -Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997), are compensable property interests. Applying the *Penn Central* factors, the Court held that no taking occurred, explaining that the Government's conduct here, like in *Abraham-Youri*, benefitted the family members economically, because any recovery from Libya was highly speculative and, thus, family members had no reasonable expectation of any recovery. The Court granted the Government's motion for summary judgment.

Plaintiffs have appealed to the Federal Circuit. Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2014cv0704-46-0

TAX

The Government Prevails in Trust-Fund Recovery Penalty Case Against Company CFO

Noffke v. United States, 129 Fed. Cl. 341 (Dec. 13, 2016) [Horn, J.].

In this tax refund case, following a three-day trial, the Court held that plaintiff was a responsible person who willfully failed to remit employment trust fund taxes of Boomj.com, an internet marketing platform, for all four quarters in 2009.

At trial, the parties focused on the "responsible person" element of I.R.C. § 6672. Plaintiff, who was the Chief Financial Officer of Boomj.com in 2009, testified that only the Chief Executive Officer (CEO) had the authority to direct payment to creditors. The CEO, who was not assessed liability under § 6672, also

testified that he, not plaintiff, decided which creditors were paid. Despite this testimony, the Court was satisfied that plaintiff was a responsible person because, most significantly, plaintiff exercised near-exclusive control over the company's bank accounts, and signed and executed numerous payments to creditors.

The Court also found that plaintiff's failure to pay the trust fund recovery taxes was willful. The Court found that plaintiff knew of the company's growing employment tax liability in each quarter of 2009, but plaintiff oversaw and executed repeated payments to other creditors anyway. Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2014cv0106-60-0

Court Finds, After a Three-Week Trial in a \$245 Million Refund Suit, that Plaintiffs Failed to Establish Their Cost Basis in the Intangible Assets at Issue and Thus Dismisses Their Complaint With Prejudice

Washington Mutual, Inc. v. United States, Nos. 08-321T, 08-211T, ___ Fed. Cl. ___ (Feb. 21, 2017) [Griggsby, J.].

Plaintiffs in this tax refund case are the successors in interest to Home Savings of America (Home), which was one of the largest thrift institutions in the United States in the 1970s and 1980s. In the 1980s, in order to encourage Home and other "healthy" thrifts to acquire failing thrifts, the Federal Savings and Loan Insurance Corporation (FSLIC) offered incentives that included, in Home's case, two types of intangible assets – (1) the right to open branches in additional states ("branching rights"), and (2) a "Regulatory Approval and Promise" to have certain "goodwill" amortized (for regulatory purposes) over 40 years, notwithstanding any subsequent adverse regulatory directives ("RAP rights"). Plaintiffs, as Home's successors, sought to take deductions with regard to these intangible assets during the 1990s – first, an abandonment-loss deduction for the branching rights, and, second, an amortization deduction for the RAP rights.

At the three-week trial, the Court heard testimony from 13 witnesses, including several expert witnesses. After the conclusion of the trial and post-trial briefing, the Court issued an opinion deciding the case in favor of the Government. The Court first noted that plaintiffs had the burden of proving that they are entitled to the tax deductions in question and the correct amount of the tax refund due. Establishing the amount of the refund due, the Court further noted, requires that plaintiffs establish Home's cost basis in the intangible assets in question to a "reasonable degree of certainty." After conducting a detailed review of the evidence presented in the case, the Court found that plaintiffs had "not established Home's cost basis in these assets to a reasonable degree of certainty for the purpose of pursuing their tax refund claim," and it thus dismissed their complaint with prejudice. Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2008cv0321-336-0

VACCINE

Court Denies Entitlement To Compensation For Alleged Injuries from HPV Vaccine

L.A.M. v. Secretary of HHS, No. 11-852V, 2017 WL 527576, (Fed. Cl. Spec. Mstr. Millman January 31, 2017).

After a three-day entitlement hearing, Special Master Millman denied the petitioner's entitlement to compensation under the Vaccine Act, 42 U.S.C. §§ 300aa-10-34. This petition alleged that a HPV vaccine ("Gardasil") administered to L.A.M. on two occasions in 2008 caused her to develop severe and

debilitating headaches, photophobia, phonophobia, extreme fatigue, dizziness, gait disturbances, as well as additional injuries, including, postural orthostatic tachycardia syndrome (“POTS”), chronic fatigue syndrome (“CFS”), and small fiber polyneuropathy.

In an effort to support petitioner’s claim, petitioner retained an immunologist, Dr. Yehuda Shoenfeld. Dr. Shoenfeld initially attributed petitioner’s condition to aluminum adjuvant in the Gardasil vaccine, basing his analysis on a theory of autoimmune (auto-inflammatory) syndrome induced by adjuvants (“ASIA”). Later, Dr. Shoenfeld opined that there were at least two mechanisms by which Gardasil could cause a malfunctioning of the autonomic nervous system. The government countered the various theories with multiple expert witnesses, including a pediatric rheumatologist, a pediatric neurologist, and an immunologist.

In addition to the hearing testimony, Special Master Millman noted in her decision that L.A.M.’s medical records reflected that she had similar symptoms the year prior to receiving the Gardasil vaccines, and further at the time L.A.M. began to complain of the above-referenced symptomology she was suffering a viral illness. Moreover, multiple treating physicians indicated that L.A.M.’s inability to walk, her variable and inconsistent weakness, and her inability to see were not manifestations of a physical illness. Ultimately, upon reviewing the extensive record, Special Master Millman held that petitioner failed to establish a *prima facie* case of causation-in-fact that Gardasil caused any of the illnesses alleged in the petition or added as the case progressed. Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2011vv0852-131-0