FEDERAL CLAIMS BAR ASSOCIATION

Inside 717

Vol. 9, No. 4 ~ October 2017-January 2018

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 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 and Vaccine Claims.

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

Court Orders Government to Submit to Fed. R. Evid. 502(d) "Quick Peek" Procedure Over Government's Objections

Fairholme Funds, Inc., et. al. v. United States, Fed. Cl. No. 13-465C, 134 Fed. Cl. 680 (Oct. 4, 2017, re-issued Oct. 23, 2017) [Sweeney, J.]

The *Fairholme* plaintiffs, relying on Fed. R. Evid. 502, sought to compel the Government to allow a "quick peek" of some 1,500 documents in the Government's possession that had been withheld under the deliberative process and bank examination privileges.

Fed. R. Evid. 502(d) was adopted in 2008 to protect against inadvertent waivers of the attorney-client privilege or attorney work-product protection. The rule facilitates production of documents, particularly in large, complex cases, and can reduce the cost of conducting document reviews. The rule provides that "[a] federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."

The Court granted the plaintiffs' motion, citing the need to "facilitate the speedy and efficient conclusion of jurisdictional discovery" in the case. The Court held that it could grant such relief over defendant's objections as part of its broad discretion to fashion discovery orders, and rejected defendant's concerns that, if plaintiff sees privileged material, the harm will be irreversible. The Court also noted that, if it were to deny the plaintiff's motion, the plaintiff would likely ask the Court to conduct an *in camera* review of the documents, which would take significant time.

Read the decision here.

Court Refuses to Preliminarily Enjoin the Award of a Satellite Communications Support Services Contract, Finding that Plaintiffs' Protest is Unlikely to Succeed on the Merits

Intelligent Waves, LLC and Mission1st Group, Inc. v. United States and Professional Services1, LLC, Fed. Cl. No. 17-1765 and No. 17-1842, ___ Fed. Cl.___ (Dec. 1, 2017, re-issued Dec. 19, 2017) [Sweeney, J.]

In this post-award bid protest challenging the Defense Information Systems Agency's (DISA) award of a five-year Indefinite Delivery, Indefinite Quantity contract to provide satellite communications support services, the Court denied a motion for a preliminary injunction to prevent the agency from lifting a stop-work order, holding that the protest was unlikely to succeed on the merits and that the balance of harms and public interest weighed against an injunction.

The protestors, Intelligent Waves, LLC ("Intelligent Waves") and Mission1st Group, Inc. ("Mission1st"), were disappointed bidders on DISA's award of the contract to support DISA's Enhanced Mobile Satellite Services Program Office, which provides satellite communications and other services to the Department of Defense and other agencies. DISA awarded the contract, a Service-Disabled Veteran-Owned Small Business set aside, to Professional Services1, LLC ("ProSol"), concluding that it was the "best value" to the Government.

The Court held that neither of the protests was likely to succeed on the merits, rejecting the protestors' arguments that DISA improperly evaluated the offerors' proposals. In particular, the Court sustained the agency's determination that Intelligent Waves' sales of Iridium satellite communications would compete with the agency's program and thus presented an organizational and consultant conflict of interest. Also, the Court held, Intelligent Waves failed to establish prejudicial error because the agency had found that ProSol's proposal was technically superior, notwithstanding the conflict of interest issues. The Court concluded that, although the protestors had shown that they would be irreparably harmed absent injunctive relief, the balance of harms and the public interest weighed against an injunction. DISA, the Court found, was "understandably reticent to award a sole-source bridge contract" to the protestor, which was "not selected for the follow-on effort and competes with the services at issue . . . ."

Read the decision here.

Federal Circuit Reverses; Holds that Army Execution Order is Not a Procurement Decision Subject to Bid Protest Review and that Supplementation of Administrative Record Was an Abuse of Discretion

AgustaWestland N. Am., Inc. v. United States, Fed. Cir. No. 2017-1082, 880 F.3d 1326 (Jan. 23, 2018) [Hughes, J.]

The Federal Circuit reversed a preliminary injunction blocking the Army's execution order and justification and approval to purchase additional helicopters through a sole source follow-on contract immediately before expiration of a prior competitively sourced contract. Among other things, the Federal Circuit also held that the trial court's decision to supplement the administrative record was an abuse of discretion.

In April 2014, the Army issued Execution Order 109-14, which among other things, standardized the use of Airbus's UH-72A Lakota helicopter as the Army's "only one responsible source" for its future helicopter training needs. In effect, this Order, which sought to implement President Obama's new strategic guidance on restructuring military acquisitions, precluded all future competition for fulfilling the Army's helicopter training needs. In December 2015, the Army issued a justification and approval ("J&A") for the sole source acquisition of 16 additional Lakota helicopters. The Army characterized this acquisition as a follow-on contract to a 2006 contract for an initial purchase of 8 helicopters with options to purchase 483 additional helicopters, which it had already exercised.

AgustaWestland protested both the Order and the J&A, and in August 2016, the Court of Federal Claims enjoined the execution order. Most significantly, the trial court held that the Order was "a quintessential procurement decision, as it determined a need for property or services," and as such was amenable to bid protest jurisdiction. The Federal Circuit disagreed, and held that the Order was a mere "policy decision," because it did not directly discuss or direct the procurement of the Lakotas, but "simply formalized the Army's decision designating the UH-72A Lakota as the Army's training helicopter." This conclusion potentially has significant consequences for government contractors—to the extent an agency can characterize a decision to exclude competition as a "policy decision" rather than a "procurement decision," it can close off entire markets to competition without being subject to independent judicial review.

The trial court also considered whether supplementation of the administrative record was appropriate. Below the trial court allowed the protester to supplement the administrative record with pre-decisional materials, reasoning that the information was "in existence" and part of the administrative record. The

Federal Circuit disagreed, holding that the trial court had failed to sufficiently explain "why the evidence omitted from the record frustrated judicial review." Accordingly, the Federal Circuit concluded that supplementing the administrative record under these circumstances was an abuse of discretion.

Read the decision here.

Court Holds that Whether a Regulatory Takings Claim is Ripe is a Question of Subject-Matter Jurisdiction to be Resolved under Rule 12(b)(1), and Dismisses Claim As Not Ripe

Bassett, New Mexico LLC v. United States, Fed. Cl. No. 16-709L, ___ Fed. Cl. ___ (Jan. 26, 2018) [Campbell-Smith, J.]

In this takings case involving an alleged denial of access to land, the Court held that a motion to dismiss a takings claim for lack of "ripeness" is a jurisdictional challenge that must be analyzed under Rule 12(b)(1), not Rule 12(b)(6).

The plaintiff, an owner of 66 acres of undeveloped land in New Mexico that was surrounded by Federal land, alleged that the Bureau of Land Management ("BLM") denied it access to its property, citing, among other things, a 2012 change in BLM policy that allegedly restricted BLM's authority to grant new road access to landlocked parcels surrounded by BLM wilderness areas. Importantly, the plaintiff never completed a right-of-way application to BLM that it needed to submit in order to gain access to a public highway over BLM land.

The Court held, first, that the claim was properly viewed as a regulatory takings claim, as opposed to a physical takings claim, and rejected the argument that all denial of access takings claims are necessarily physical takings claims.

Turning to the question of ripeness, the Court held that whether the ripeness doctrine bars the claim should be evaluated under Rule 12(b)(1) as a question of subject-matter jurisdiction, rather than a merits issue under 12(b)(6). The Court reasoned that ripeness of regulatory takings claims is a "threshold" issue that should be considered along with other jurisdictional issues, citing cases that show that that the ripeness doctrine is drawn from limitations on the judicial power under Article III of the Constitution and prudential reasons for refusing to exercise jurisdiction. The Court also observed the settled rule that plaintiffs must establish jurisdictional facts in a particular case. Under the Court's ruling, plaintiffs have to show that their regulatory takings claim is ripe (and that they had exhausted their administrative remedies) to establish that the Court has jurisdiction.

In this case, the Court concluded that the plaintiff's claim was not ripe because the plaintiff had not yet submitted a right-of-way application to BLM, and dismissed the complaint without prejudice. The Court also rejected the plaintiff's argument that such a right-of-way application to BLM would have been futile, because BLM had some discretion as to whether to grant such an application and it was not reasonably certain that BLM would deny such an application.

Read the decision here.

BID PROTEST

COFC Bid Protest Filed 250 Days After Dismissal by GAO Not Untimely

Geo-Med, LLC v. United States, Fed. Cl. No. 17-1006 C, ___ Fed. Cl. ___ (Dec. 21, 2017) [Smith, J.]

In this pre-award bid protest, defendant moved to dismiss the protest as untimely, on the basis that protester had unreasonably delayed filing the protest until 250 days after GAO had denied a related protest. The protester, in response, argued that the pre-award protest was timely notwithstanding the delay because it had been filed before the end of the solicitation period. Protester also argued that "[t]here is little doubt that the Agency would have alleged Geo–Med's protest was premature if it was filed prior to any of the numerous substantive amendments that occurred in the months preceding the protest."

The court agreed. Relying upon the 2016 *Palantir* decision, the court held that the pre-award protest was timely because "no award had yet been made." Moreover, "given the fact that [protester's] first GAO protest was dismissed because the terms of the Solicitation were not yet finalized, it is reasonable to assume that as the Agency kept issuing amendments, the procurement process was ongoing." Finally, the court found that the protester had "exercised reasonable diligence in pursuing the protest" by filing multiple GAO protests.

Nonetheless, as to the merits, the court was not persuaded by the protester's argument that the Solicitation improperly and unnecessarily bundled a number of requirements that were previously procured separately, and found that the agency had acted reasonably and within its discretion..

Read the decision here.

Court Grants CEO of Protester Limited Access to Protected Material

Zeidman Technologies, Inc. v. United States, Fed. Cl. No. 17-1662C, ___ Fed. Cl. ___ (Jan. 19, 2018) [Campbell-Smith, J.]

In this bid protest action, the protester requested that Mr. Robert Zeidman—the founder, president and CEO of the protestor—be permitted to access all protected material in the case. The protester argued that access was necessary because Mr. Zeidman is "an expert witness with specialized knowledge about the technology at issue in this protest," and his involvement "is essential to Plaintiff's full and fair resolution of this matter." The protester also stated that the protester's business is "no longer functioning," and that "Mr. Zeidman is not involved in technological development."

The government generally objected to Mr. Zeidman's admission to the protective order, although in its reply brief it pointed to specific pages in the administrative record that contain competitively-sensitive information to which Mr. Zeidman should not be granted access.

The Court noted that Mr. Zeidman's application for access to all protected material omitted several customary paragraphs from RCFC Form 10, including the paragraph stating that "I am not involved in competitive decision making . . . ." The court also found that the protester had failed to explain why Mr. Zeidman needed access to the entire administrative record. The court granted, in part,

Mr. Zeidman's application, but denied it, in part, as to the pages identified by defendant as particularly competition-sensitive.

Read the decision here.

GOVERNMENT CONTRACTS

Court Requires Plaintiff to Provide Methodology Underlying Damages Calculation Pursuant to RCFC 26(a)(1)(A)(iii)

CanPro Investments Ltd. v. United States, Fed. Cl. No. 16-286C, 2017 WL 5776751 (Fed. Cl.) (unpublished) (Nov. 29, 2017) [Sweeney, J.]

After filing a complaint seeking $250,000 in damages, the plaintiff served initial disclosures containing a calculation of damages as required by RCFC 26(a)(1)(A)(iii). The plaintiff's explanation of its claimed damages stated that the damages were actual losses, expectancy damages, and reliance damages, and that "[p]laintiff's total damages cannot be calculated at this time, because they are ongoing" and "further expert consultation and/or opinion" was required.

The Court granted the defendant's motion to compel, requiring the plaintiff to supplement its initial disclosures with a thorough explanation of its damages, including the methodology with which they were calculated, and supporting documentation. The court found that the plaintiff's "generic listing of categories of damages while failing to provide sufficient – in this case, any – backup computations for its $250,000 estimate" was insufficient. The court noted that, because the plaintiff had submitted a claim to the agency contracting officer seeking these costs, "[i]t is axiomatic that a claim made in good faith has an underlying basis" and that the plaintiff must, therefore, disclose the basis and methodology for arriving at that estimate. The Court explained that the plaintiff was not excused from providing a computation because it had not yet hired an expert, given that RCFC 26(a)(1)(E) requires that initial disclosures be "based on the information then reasonably available" and states that a "party is not excused from making its disclosures because it has not fully investigated the case." The court required that the plaintiff certify that all documentation supporting the damages computation has been disclosed.

Read the decision here.

Court Interprets Cooperative Agreement between the United States and the State of California in Suit Brought by State for Reimbursement of Costs

State of California, acting by and through Betty T. Yee, State Controller v. United States, Fed. Cl. No. 17-206, ___ Fed. Cl. ___ (Dec. 20, 2017) [Horn, J.]

This action involved a cooperative agreement between the United States Department of the Interior (DOI) and the State of California related to federal oil and gas royalty collection. Pursuant to the agreement, California would conduct audits and investigations of oil and gas revenues owed to the United States and shared with the state and DOI would reimburse the state up to 100 percent of allowable costs for these audits and investigations. Under the agreement, DOI was responsible for reimbursing the state for approved costs in accordance with 43 C.F.R. Subpart 12(A), which indicated that the agreement was subject to several Office of Management and Budget (OMB) circulars, and that

fringe benefits would be allowed in accordance with the state's established accounting system. The state billed DOI for salary, fringe benefits, and indirect costs using a formula contained in the state's administrative manual, but DOI contended that use of the formula caused the state to overstate its expenses on the requests for reimbursement.

In the state sought reimbursement for certain salary, fringe benefits, and indirect costs that it claimed complied with its own state accounting rules, but which DOI had withheld. The Court found that, under the unambiguous language of the agreement, only costs actually incurred were eligible for reimbursement, and the agreement required that the state calculate fringe benefits and indirect costs in accordance with federal cost principles and administrative requirements, including an OMB circular. This requirement was not rendered inapplicable by the fact that the agreement permitted the state to calculate fringe benefits and indirect costs in accordance with the state administrative manual. The court granted summary judgment to the United States and dismissed the suit in its entirety.

Read the decision here.

TAKINGS

Court finds that Takings Clause is Not Implicated when Property Damage Occurred During the Exercise of Police Power

Bachmann, et al. v. United States, Fed. Cl. No. 17-528L, 134 Fed. Cl. 694 (Oct. 16, 2017) [Bruggink, J.]

The owners of a rental property sued the United States, claiming an unconstitutional taking of their property in violation of the Fifth Amendment when United States Marshals Service entered their house to apprehend a fugitive living there, without owners' knowledge, and the property was damaged. Defendant filed a motion to dismiss.

The Court of Federal Claims granted the United States' motion to dismiss. The court explained that damage to private property that occurs incident to the exercise of the government's police power is not a "taking for the public use" under the Fifth Amendment because the property has not been altered or turned over for public benefit. Instead, both the owner of the property and the public can be said to be benefited by the enforcement of criminal laws and cessation of the criminal activity.

Read the decision here.

Court Finds that the Government did not Effect an Illegal Exaction or Taking when it Collected Port Fees

Virgin Islands Port Authority v. United States, Fed. Cl. No. 13-390, __ Fed. Cl. __ (Jan. 9, 2018) [Bruggink, J.]

In this case, the Virgin Islands Port Authority ("VIPA") claimed that United States Customs and Border Protection ("CBP") effected a taking or illegal exaction by collecting port fees and reimbursing itself from these fees for its costs or, alternatively, in the manner or calculation of its reimbursement. Pursuant to various federal laws and a memorandum of agreement between the Virgin Islands and CBP, CBP collected duties, taxes, wharfage and tonnage fees, and other fees and remitted the amounts collected, less CBP's cost of collection, to the Virgin Islands government. VIPA based its takings and illegal exaction claims on the fact that it had tendered a letter in 2007 requesting that CBP cease collecting these port

fees, which CBP denied. The memorandum of agreement was amended in 2014 to reflect changes in the collection of tonnage and wharfage fees.

The court concluded that, although CBP did not directly exact funds from VIPA, the category of illegal exactions referred to as "in effect" payments – in which the government directs a payment to a third party – was broad enough to embrace a circumstance in which the government directs a payment to itself that VIPA asserts it had the statutory right to collect. However, VIPA could not demonstrate an illegal exaction because it could not demonstrate that anything CBP did was a violation of federal law. Although VIPA argued that CBP acted in contravention of a local statute and VIPA's 2007 demand letter, they were not effective to revoke the memorandum of agreement, and the court declined to extend the theory of illegal exaction to circumstances in which the asserted illegality does not arise under federal law.

VIPA also claimed that CBP effected an illegal exaction when it reimbursed itself for the expense of collection and allegedly reimbursed itself for expenses in excess of those permitted by federal law or expenses that were ineligible for reimbursement. The court concluded that VIPA challenged the way in which CBP calculated reimbursement, not the absence of authority for such reimbursements, and, therefore, this challenge was not within the court's Tucker Act jurisdiction.

With regard to VIPA's takings claim, the court found that VIPA had a property right because Virgin Islands law granted VIPA the right to set and collect port fees. However, a takings claim requires the court to assume that CBP lawfully collected VIPA's port fees pursuant to statutory authority and the memorandum of agreement and that CBP is lawfully permitted to reimburse itself from the total collections. Based on those assumptions, the court found that VIPA's claim was merely that CBP miscalculated how much it was permitted to deduct to reimburse itself, and that such a claim was not a claim of a taking, but rather a dispute over enforcement of statutory, regulatory, or contractual provisions, which belonged in a forum authorized to enforce administrative procedures, rather than the court.

Read the decision here.

TAX

Educational Expenses Incurred to Obtain a Ph.D. in Engineering Held Non-Deductible Pursuant to IRC § 162

Czarnecki v. United States, Fed. Cl. No. 15-1381T, 2017 WL 4564368 (Oct. 13, 2017) [Griggsby, J.]

The Court ruled that plaintiff cannot deduct, under § 162, the educational expenses he incurred in obtaining a Ph.D. in engineering. The Government argued that plaintiff's course of study qualified him for a *new* trade or business as a university professor, rendering his educational expenses nondeductible under Treas. Reg. § 1.162-5(b)(3). Plaintiff, on the other hand, contended that he never intended to become a university professor (a new profession), and, in any event, his Ph.D. courses both improved his skills in his current engineering position and helped him meet his continuing-education requirements. The Court reasoned that the fact that plaintiff's completion of his Ph.D. program qualified him for a *new* trade or business meant that he could not deduct the costs of the program, regardless of whether he intended or did not intend to enter a new profession. The Court further held that plaintiff was not entitled to the deduction because he failed to demonstrate (1) how his course-work in the Ph.D.

program improved the skills that he uses in his current engineering position; or (2) that he was required to undertake continuing-education coursework in engineering for the year at issue.

Read the decision here.

Court Rules that U.S.-Canadian Taxpayers Did Not Have Reasonable Cause for Their Failure to File Foreign Bank and Financial Accounts (FBARs)

Jarnagin v. United States, Fed. Cl. No. 15-1534T, 134 Fed. Cl. 368 (Nov. 30, 2017) [Kaplan, J.]

Plaintiffs, Larry and Linda Jarnagin, failed to file FBARs to report their Canadian bank accounts for the years 2006-2009. The IRS assessed non-willful penalties of $10,000 against Mr. Jarnagin for each year and $10,000 against Mrs. Jarnagin for each year. Plaintiffs defended their failure to file on the basis of "reasonable cause." The FBAR "reasonable cause" exception requires that a taxpayer demonstrate both: (1) that the amount of the balance in the account in question was properly reported (prior to imposition of the penalties); and (2) that there otherwise was "reasonable cause."

The Court held that plaintiffs had failed to show reasonable cause. Specifically, the court found that the Jarnagin's did not exercise ordinary business care and prudence in the handling of their reporting obligations by failing to review their tax returns (and the questions and instructions concerning FBAR reporting requirements thereon) and by failing to inquire of their filing responsibilities from their return preparers. Furthermore, the court found that the Jarnagin's use of a professional return preparer simply to prepare their returns did not excuse their failure to file FBARs because their accountants were never asked to provide and did not provide actual advice on the filing requirements. Because the court determined that plaintiffs did not have reasonable cause for their failure to file, it did not analyze the "reporting" prong of the reasonable cause defense.

Read the decision here.

Court Determines that Plaintiffs Failed to Properly Make a Five-Year Net Operating Loss (NOL) Carryback Election

Pryde v. United States, Fed. Cl. No. 15-878T, 2017 WL 6397828 (Dec. 15, 2017) [Griggsby, J.]

Plaintiffs sought to deduct over $4 million in loans that they had extended (and on which the borrower had defaulted) as a theft loss under § 165(c); as safe-harbor relief under Revenue Procedure 2009-20; or as a bad business debt under § 166(a). Plaintiffs, in addition, sought to carry back these losses from 2009 to 2004 and 2005, resulting in claimed overpayments for 2004 and 2005.

Plaintiffs asserted that claim preclusion, issue preclusion, and judicial estoppel bound the Government to a bankruptcy court's opinion concerning the borrower's bankruptcy estate. The Government argued, in part, that even if plaintiffs were entitled to a deduction under any of their theories, they were not entitled to their claimed overpayments for 2004 and 2005 because IRS records showed that plaintiffs had failed to properly file a five-year net operating loss carryback election.

The Court found that plaintiffs failed to present reliable evidence sufficient to overcome the presumption of correctness afforded to the IRS's records. Of note, the Court found that unsigned copies of returns plaintiffs claimed they had filed—but that were not in IRS records—were insufficient to

overcome the presumption of correctness. Moreover, the Court disregarded the unsubstantiated representations of plaintiffs' and their tax return preparer that they had properly filed the five-year carryback election. In doing so, the Court invoked the "sham affidavit" rule, under which a party is precluded from creating a purported issue-of-fact by submitting an affidavit that is contrary to his prior deposition testimony.

Read the decision here.

VACCINE

Federal Circuit Affirms; Holds that Petitioner Lacked Reasonable Basis for Vaccine Claim and Denied Petitioner's Application for Attorneys' Fees and Costs

Simmons v. Secretary of Health and Human Services, Fed. Cir. No. 2017-1405, 875 F.3d 632 (Nov. 15, 2017) [Prost, J.]

The Federal Circuit affirmed the decision by the Court of Federal Claims, denying petitioner's application for attorneys' fees and costs related to his dismissed vaccine claim where there was no "reasonable basis" for the claim. Pursuant to the Vaccine Act, an unsuccessful petitioner may be awarded attorneys' fees and costs if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim. The good faith requirement was not at issue in this case.

In the underlying matter, the petitioner contacted counsel in August 2011, claiming that he developed Guillain-Barre Syndrome ("GBS") as a result of his October 26, 2010 flu vaccine. After August 2011, counsel was unable to contact petitioner despite making several attempts. In March 2013, counsel sent petitioner a letter notifying him that their attorney-client relationship had been terminated. The termination letter was returned as undeliverable. Then, on October 17, 2013, nearly two years after his previous communication and shortly before the three-year statute of limitations might have run, petitioner contacted counsel's firm and expressed that he would like to move forward with his petition. Counsel filed the petition without medical records. In January 2014, the special master ordered counsel to produce petitioner's medical records, and counsel informed the court that they had once again lost all contact with petitioner. The special master dismissed the case for failure to prosecute. Thereafter, counsel filed two fee applications seeking $8,267.89 in fees and costs.

The special master initially found that there was reasonable basis for the claim and awarded attorneys' fees. In finding reasonable basis, the special master focused on the actions of the petitioner and his reemergence close in time to the expiration of the statute of limitations. The government appealed the decision and the Court of Federal Claims agreed that that the statute of limitations did not excuse counsel's obligation to show a basis for the claim beyond a conversation with petitioner. The Circuit also agreed with the government and reasoned that a looming statute of limitations deadline has no bearing on whether there is a reasonable basis for the claim as reasonable basis involves an "objective inquiry" unrelated to counsel's conduct.

Read the decision here.

Court Upholds Special Master's Determination that Petitioner was Not Entitled to Compensation in an Alleged Flu Vaccine/Narcolepsy Case

McCollum v. Secretary of Health and Human Services, Fed. Cl. No. 14-790V, ___ Fed. Cl. ___ (Dec. 21, 2017, Re-Issued, Jan. 5, 2018) [Smith, J.]

In this case, the Court denied petitioner's motion for review of the special master's decision denying compensation under the Vaccine Act in an alleged narcolepsy with cataplexy action following the administration of the flu vaccine. On review, petitioner argued that (1) the special master arbitrarily ignored evidence of a "challenge-re-challenge" and (2) the special master erred by increasing petitioner's burden of proof regarding causation.

First, the Court noted petitioner failed to provide direct evidence that he received the initial flu vaccine at issue or a second flu vaccine to trigger the challenge-re-challenge response and importantly, petitioner never made a challenge-re-challenge argument in the proceedings below. Accordingly, the court found that his first argument was waived as a petitioner cannot expect a special master to *sua sponte* apply a legal theory that petitioner never raised. The Court also rejected petitioner's second argument where the Court found that the special master considered the relevant evidence of record, including the expert reports and testimony proffered by both the petitioner and the government and drew plausible interferences and did not elevate the petitioner's burden of proof.

Read the decision here.