

Court of Federal Claims Bar Association
Executive Summary
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Welcome to Executive Summary

We introduce this month a new publication, *Executive Summary*, which summarizes recent decisions of the Court of Federal Claims and the Court of Appeals for the Federal Circuit. The case summaries are intended to be concise, objective reports of noteworthy decisions.

We have grouped the case summaries according to the principal categories of cases decided by the Court of Federal Claims, including Government Contracts, Takings, Tax, and Vaccine Litigation. This month we have also included a Native American tribal trust case and two cases that address procedural issues. The summaries include links to the full text of the decisions that are posted on the websites of the Federal Circuit and the Court of Federal Claims.

We hope that this new publication will be useful to members of the Bar Association. This month Executive Summary is included with the Bar Association's Newsletter and made available on the website. In coming months, it will be distributed separately to members of the Bar Association.

We welcome contributions, particularly about developments that may not be reported on the courts' websites, such as Fed. Cir. R. 36 affirmances. If you would like to contribute a case summary, please send it to jwilliamson@mcguirewoods.com.

GOVERNMENT CONTRACTS

Contra Proferentem

***Gardiner, Kamy & Associates, P.C., v. Jackson*, No. 05-1524 (Nov. 8, 2006), 467 F.3d 1348 (Fed. Cir. 2006)**, <http://www.fedcir.gov/opinions/05-1524.pdf>

The Court of Appeals for the Federal Circuit provided clarification of the applicability of the doctrine of *contra proferentem* in the interpretation of contracts, in which contractual ambiguities are construed against the drafter. In *Gardiner*, the court affirmed the decision of the Department of Housing and Urban Development (“HUD”) Board of Contract Appeals (“BCA”) in the interpretation of certain contract modifications with respect to the retroactivity of certain adjustments to the unit prices.

Though the court upheld the BCA’s ultimate interpretation, the court found that “the BCA’s approach to construction of contract language and to the doctrine of *contra proferentem* is misplaced.” *Id.* at 1352. The court clarified that “*contra proferentem* is a ‘rule of last resort’ that ‘is applied only where there is a genuine ambiguity and where, after examining the entire contract, the relation of the parties and the circumstances under which they executed the contract, the ambiguity remains unresolved.’” *Id.* (citing *Chris Berg, Inc. v. United States*, 197 Ct. Cl. 503, 455 F.2d 1037, 1044 (Ct. Cl. 1972)). The court further noted the doctrine is inapplicable “if the intention of the parties . . . otherwise appear[s].” *Id.* at 1352-53.

The Court then proceeded to analyze the language of the contract as a whole and found the contract to be unambiguous in that the price modification was not retroactive. *Id.* at 1353. The Court also looked to the negotiating history of the modification, noting that – even if it had found ambiguity in the contract – it would be appropriate to look to extrinsic evidence before resorting to the doctrine of *contra proferentem*. *Id.* at 1354. The court found that the negotiations history likewise demonstrated that under the circumstances, if the parties had wanted to increase unit prices retroactively, they would have done so explicitly. *Id.*

Award Fee Determination Authority

***The Boeing Company, Successor-in-Interest to Rockwell Int’l Corp. v. United States*, 2007 WL 113947 (Fed. Cl. Jan. 17, 2007) (Lettow, J.)**
<http://www.uscfc.uscourts.gov/Opinions/Lettow/07/LETTOW.BOEING.11707.PDF>

The Court of Federal Claims found that the government breached its cost-plus-fixed-fee contract with Rockwell – to operate a nuclear weapons plant under the supervision of DOE officials – by causing the award fee for two periods in 1989 to be mandated by the Department of Energy’s (“DOE”) headquarters rather than by an official formally designated the Award Fee Determination Official, as required by the contract. In relevant part, the contract provided that “[t]he amount of the award fee actually to be paid to the Contractor shall be determined by the Award Fee Determination Official.” In 1989, the Award Fee Determination Official (“AFDO”) forwarded his recommended award fee to DOE’s headquarters, pursuant to the new Secretary of Energy policy whereby fee determinations were reviewed by Headquarters prior to issuance to the contractor. During this same time period, and pursuant to an independent evaluation of operations at the facility, the AFDO was removed from substantive oversight responsibility and was limited to ministerial functions. The award recommendation was reviewed and revised by Headquarters, with the ultimate award to Rockwell significantly lower than that recommended by the AFDO. Rockwell submitted a claim to the Contracting Officer and then filed a complaint, initiating the action in 1991.

Though the government argued for a functional test whereby the “AFDO” referred not just to the individual who retained the title, but also the Secretary of Energy or other high level officials, the court rejected this argument, pursuant to the “plain language” rule. It found that by use of the definite article “the” (among other things), the contractual language strongly indicated that at any given time, one person would serve as that official and the identity of the AFDO as meant by the contract was thus limited. “In short, the contractual description of the AFDO as the ‘Manager, or anyone acting as Manager, Albuquerque Operations,’ means just what it says and cannot be stretched to encompass anyone performing some functions of the Manager.” Furthermore, the mere fact that the Secretary had authority over personnel decisions did not relieve DOE from its contractual obligations, which designated one particular official to make certain factual determinations. To the extent that circumstances changed, the government could seek modification of the contractual

terms or name a different individual to the AFDO position, but it could not override the provision. Finally, because that individual was contractually designated to make a subjective determination, that determination could not be overridden by DOE Headquarters.

NATIVE AMERICAN CLAIMS

Tribal Trust

***Rosebud Sioux Tribe v. United States*, No. 05-1023L (Fed. Cl. Jan. 5, 2007) (Merow, J.)**

<http://www.uscfc.uscourts.gov/Opinions/Merow/07/MEROW.ROSEBUD010507.pdf>

Plaintiff alleged that the United States breached its fiduciary duties owed to the Tribe arising out of the government's 1998 approval of 15-year lease of Tribal lands to a third party for the construction and operation of a large-scale pork production facility, a subsequent declaration that the lease was void, the handling of numerous lawsuits and subsequent settlement of claims that related to the lease. Defendant moved for judgment on the pleadings for lack of jurisdiction on the grounds that (1) the Tribe's claims were barred by the statute of limitations and/or laches, (2) those claims were an impermissible attack on a final consent judgment entered in one of the related lawsuits, and (3) the complaint failed to identify a statutory or regulatory provision that can be fairly interpreted to mandate compensation.

The court granted defendant's motion as to any causes of action that accrued six years prior to the filing of the complaint but otherwise denied the motion, finding that factual issues precluded summary dismissal of the entire complaint. The court further determined that refinement of the claims and issues was warranted and ordered the plaintiff to identify each specific claim of breach of fiduciary duty, the time frame of each claim, the legal theories and factual bases for each claim, and a corresponding itemized list of damages.

PROCEDURE

Interlocutory Appeals

***Nebraska Public Power Dist. v. United States*, No. 01-116C (Fed. Cl. Dec. 19, 2006) (Allegra, J.)**

<http://www.uscfc.uscourts.gov/Opinions/Allegra/06/ALLEGRA.NEBRASKA121906.pdf>

In this spent nuclear fuel contract case, the Court of Federal Claims issued a decision on October 31, 2006, finding a writ of mandamus issued by the Court of Appeals for the D.C. Circuit to be void for want of jurisdiction and ordering defendant to brief its defenses under the "unavoidable delays" clause of the subject contract. The plaintiff moved to have the trial court's opinion and order certified for interlocutory appeal.

Noting that interlocutory appeals under 28 U.S.C. § 1292(d)(2) are reserved for "exceptional" or "rare" cases, the court found that certification of its decision for interlocutory appeal was appropriate because all of the requirements for certification were satisfied. Applying the three-prong test set forth in section 1292(d)(2), the court found: (1) that the question of whether the mandamus is void and, therefore, whether defendant may present a defense based on the unavoidable delays clause, is a controlling question of law; (2) that, based on the "healthy tension" between Federal Circuit and D.C. Circuit rulings, there are "substantial grounds for difference of opinion" on this controlling question; and (3) that interlocutory review of this controlling question may materially advance this litigation, and also may impact the dozens of spent nuclear fuel cases pending before the court.

Statute of Limitations

***Chaney v. United States*, No. 06-519C (Fed. Cl. Feb. 2, 2007) (G. Miller, J.)**

<http://www.uscfc.uscourts.gov/Opinions/GMiller/07/GMILLER.CHANEY020207.pdf>

In this Military Pay Act case, the plaintiff appealed from a decision by the Air Force Board for Correction of Military Records ("the Board") rejecting her request to amend her records to show a disability retirement. The government moved

to dismiss for lack of jurisdiction on the ground that the plaintiff's claim was time-barred by the applicable statute of limitations. In granting the motion to dismiss, the Court of Federal Claims addressed the "[c]onsiderable debate" that has arisen as to whether a motion to dismiss a complaint as time-barred by the statute of limitation should come as a motion to dismiss for failure to state a claim upon which relief can be granted or as a motion to dismiss for lack of jurisdiction.

Following a survey of decisions of the Court of Appeals for the Federal Circuit, the court concluded that it was bound to follow the Federal Circuit's *en banc* decision in *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003), and its more recent decision in *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (Fed. Cir. 2006), *reh'g en banc denied* (Nov. 30, 2006), both of which concluded that statutes of limitations for causes of action against the United States are jurisdictional in nature. The court also declined to toll the statute of limitations based on a legal disability, finding that the plaintiff's demonstrated capacity to pursue her claims before the Board indicated that she had the capacity to understand the nature of her legal rights during the time period in question.

TAKINGS

Relevant Parcel Determination

***Cane Tennessee, Inc. v. United States*, Nos. 96-237L and 00-513L (Oct. 27, 2005), 71 Fed. Cl. 432 (Hewitt, J.), <http://www.uscfc.uscourts.gov/Opinions/Hewitt/05/HEWITT.Cane102705.pdf>**

In this regulatory takings case, the plaintiffs alleged a taking of their mineral interest in approximately 10,000 acres of land in Tennessee based on the Secretary of the Interior's designation of the lands as unsuitable for surface coal mining operations under the Surface Mining Control and Reclamation Act. Following a trial on the question of the economic impact of the designation on the plaintiffs' property interests, the Court of Federal Claims issued a decision on October 27, 2005, in which it applied the multi-factor Penn Central analysis and held that the designation did not result in a taking of the plaintiffs' property. 71 Fed. Cl. 432.

The plaintiffs appealed this final decision to the Federal Circuit and specifically challenged the trial court's relevant parcel determination, its analysis of the reasonableness of the plaintiffs' investment-backed expectations, and the conclusion that there was no taking. On January 10, 2007, the Federal Circuit issued a *per curiam* affirmance of the trial court's decision without a written opinion under Fed. Cir. R. 36. *Cane Tennessee, Inc. v. United States*, No. 06-5045, 2007 WL 188155 (Fed. Cir. Jan. 10, 2007).

Physical "Occupation" or Appropriation

***Evans v. United States*, No. 06-439C, 2006 U.S. Claims LEXIS 400 (Fed. Cl. Dec. 22, 2006) (Lettow, J.) <http://www.uscfc.uscourts.gov/Opinions/Lettow/06/LETTOW.EVANS122206.pdf>**

Raisin growers brought a Fifth Amendment takings claim, alleging a *per se* physical taking by the United States through its implementation of the Agricultural Marketing Agreement Act of 1937 ("AMA"). Under a marketing order promulgated under the AMA, raisin handlers are required to separate the raisins they purchase from producers into two categories – "free tonnage" raisins, which are to be sold by the handler on the open market, and "reserve tonnage" raisins, an annually-specified portion of the purchase that is automatically transferred to the government's Raisin Administrative Committee ("RAC"). As a result of the regulations promulgated under the AMA, "handlers pay producers for the 'free tonnage' portion of the raisins, but not for the 'reserve tonnage' raisins." Producers instead receive only an equitable interest in the "distribution of the net proceeds from the RAC's disposition of the 'reserve tonnage' raisins." Asserting that the "net proceeds from the sale of these 'reserve tonnage' raisins has been worthless or nearly so in recent years," plaintiff producers argued that the uncompensated seizure of the "reserve tonnage" raisins by the government constituted a *per se* physical taking in violation of the Fifth Amendment. The Court of Federal Claims disagreed. Finding that there had been no physical "occupation" or appropriation of the plaintiffs' property, and that the transfer of the reserve tonnage raisins to the RAC was tantamount to "an admissions fee or a toll" for marketing raisins, the court ruled in favor of the government, granting its motion to dismiss.

While the plaintiffs had failed to state a cause of action for which relief could be granted, the court observed there were four other potentially viable causes of action available to the plaintiffs that they had not pursued. Two of the potential

actions reviewed by the court involved challenging the administrative process, and the other two involved bringing takings cases under alternative causes of action. The explained that the raisin growers could try bringing a regulatory takings claim, “arguing that the RAC, by returning only meager pool proceeds to plaintiffs, effected a taking.” Or, second, the plaintiffs could pursue an illegal exaction claim which, the court explained, carries with it various bases for relief. Under an illegal exaction theory, a plaintiff could allege that a sum was improperly exacted or retained by the United States in violation of the Constitution, a statute, or a regulation, or the plaintiff could plead “that a ‘particular provision of law relied upon grants [him], expressly or by implication, a right to be paid a certain sum’ and that he has not been so paid.”

Ripeness

***Benchmark Resources, Corp. v. United States*, No. 03-178L, 2006 WL 3412259 (Fed. Cl. Nov. 22, 2006) (C. Miller, J.), <http://www.uscfc.uscourts.gov/Opinions/Miller/06/CMILLER.Benchmark112206.pdf>**

In this case, plaintiffs alleged a regulatory taking of their mineral interests in approximately 31,000 acres of land in Tennessee as a result of the designation of a portion of the land as unsuitable for surface mining by the Interior Department’s Office of Surface Mining Reclamation and Enforcement (“OSM”). The United States moved to dismiss the claim on the grounds that the claim was not ripe because plaintiffs had never submitted an application to mine the property as required by the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. § 1256(a).

Despite a finding that plaintiffs had presented some evidence that submission of a permit application would be futile, because the analysis of the viability of mining is “consigned to the expertise of the OSM,” the claim did not fall within the futility exception to the ripeness doctrine. Thus, because plaintiffs had not filed an application for a permit to mine the property their claim was not ripe. The court also concluded that one of the plaintiffs’ claims was time-barred by the Tucker Act’s six-year statute of limitations, 28 U.S.C. § 2501.

TAX

Statute of Limitations

***Minehan v. United States*, No. 05-924T (Fed. Cl. Jan. 26, 2007) (Bush, J.)**
<http://www.uscfc.uscourts.gov/Opinions/Bush/07/BUSH.MINEHAN012607.pdf>

On January 26, 2007, the Court of Federal Claims granted the motion of the United States to dismiss this *pro se* refund suit for 1998. Plaintiff’s complaint was based on the retroactive conversion of taxable retirement benefits, received during 1998, to non-taxable disability benefits. Plaintiff did not receive the favorable determination regarding the conversion of the benefits until March, 25, 2002, and did not file a refund claim until July 14, 2003--more than three years after she filed her original 1998 return.

The court held that the three-year period to file claims set in 26 U.S.C. §6511 is not subject to equitable tolling, and therefore bars plaintiff’s refund suit. The court further found that (1) certain oral conversations with IRS representatives alleged by plaintiff did not constitute a valid informal refund claim; (2) the Tucker Act does not grant the court jurisdiction over plaintiff’s complaint to the extent that it sounds in tort; and (3) statements regarding the IRS’s mission in IRS publications cannot form the basis for a contract implied-in-fact.

Res Judicata

***Andrew and Priscilla Tempelman v. United States*, No. 06-414T (Fed. Cl. Jan. 9, 2007) (Wolski, J.)**
<http://www.uscfc.uscourts.gov/Unpublished%20Decisions/07/WOLSKI.Tempelman.pdf>

On January 9, 2007, Judge Wolski granted the motion of the United States to dismiss the complaint for lack of jurisdiction and, alternatively, on *res judicata* grounds. After entering into a stipulated decision in the Tax Court agreeing to certain deficiencies, plaintiffs attempted to repudiate the agreement by alleging in two subsequent district court suits that they had been coerced into signing the stipulation, and that the tax liens and subsequent sale of their restaurant were illegal. The district court held for the government in both cases, and both decisions were affirmed on appeal.

In addition to its alternative *res judicata* determination, the Court of Federal Claims determined that it lacked jurisdiction because (1) the filing of the petition in the Tax Court divested it of any jurisdiction it might otherwise have had, under the Internal Revenue Code, 26 U.S.C. §6512; (2) the taxes at issue were not fully paid; (3) the refund claims were untimely; and (4) the court lacks jurisdiction to decide claims under the Internal Revenue Code, 26 U.S.C. §7433, or the Racketeering Influenced and Corrupt Organizations Act of 1970 ("RICO").

VACCINE

Zatuchni v. Secretary of Health and Human Servs., No. 94-58V (Fed. Cl. Spec. Mstr., May 6, 2006)

<http://www.uscfc.uscourts.gov/Opinions/Specmast/Hastings/hastings.Snyder-Remand-correction.pdf>

In 1994, Barbara Snyder filed a petition for vaccine injury compensation alleging that she suffered chronic joint pain and fibromyalgia syndrome as the result of receiving MMR vaccination. This case involved a prolonged and unusual procedural history. In 2005, the special master dismissed the case, finding insufficient evidence of a vaccine-injury. Snyder v. Secretary of Health and Human Servs., No. 94-58V, 2005 WL 1230787 (Fed. Cl. Spec. Mstr. May 6, 2005).

Ms. Snyder died several days before the issuance of the special master's decision, although counsel for the parties and the court did not learn of her death until after the decision issued. Ms. Zatuchni, executrix of Ms. Snyder's estate, was later substituted for petitioner. Following a motion for review, the Court of Federal Claims reversed, concluding that Ms. Snyder's condition was caused in fact by the vaccination. Zatuchni v. Secretary of Health and Human Servs., No. 94-58V, 69 Fed. Cl. 612 (2006). The court directed the special master to determine whether her death was vaccine-related, and to award damages.

On remand, the special master concluded that Ms. Snyder's death was vaccine-related, and thus awarded the statutory death benefit of \$250,000 pursuant to 42 U.S.C. § 300aa-15(a)(2). Zatuchni v. Secretary of Health and Human Servs. No. 94-58V, 2006 WL 1499982 (Fed. Cl. Spec. Mstr. May 10, 2006). Petitioner sought additional damages, including lost wages, pain and suffering from the time of injury until death, vaccine-related out-of-pocket expenses and payment of the Medicaid lien, all totaling \$554,323.90, which the special master denied. Again, petitioner sought review by the Court of Federal Claims, which again reversed the special master's ruling and awarded both the death benefit and the additional compensation petitioner sought. Zatuchni v. HHS, No. 94-58, 73 Fed. Cl. 451 (2006). On December 28, 2006, respondent filed a Notice of Appeal to the Court of Appeals for the Federal Circuit.

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