
FEDERAL CLAIMS BAR ASSOCIATION

# Inside 717

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

**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 Finds That Work Product Doctrine Applies to Counsel's Communications With Testifying Expert Witness**
*Davita Healthcare Partners, Inc. v. United States*, 128 Fed. Cl. 584 (Sept. 29, 2016) [Williams, J.]

Davita Healthcare Partners alleged that the Department of Veterans Affairs underpaid for dialysis services Davita provided under both contracts and regulations. The Government moved to compel production of 58 documents withheld by Davita under the attorney work product doctrine. The withheld documents consisted of work papers prepared by Davita's expert witness, as well as work papers related to the expert's compensation.

The Court denied the Government's motion to compel, finding that, under the current version of Rule 26(b)(4)(C) of the Rules of the Court of Federal Claims, the work product doctrine applies to counsel's communications with testifying expert witnesses unless they fall within three specific exceptions. The Court concluded that this doctrine extended to spreadsheets, scripts, analyses, and presentations created by the testifying expert, including documents created for and included in draft expert reports. The Court also found that the portion of the expert's invoices that describe the work completed is not discoverable under Rule 26(b)(4)(C)(i)'s requirement for disclosure of compensation for an expert's study or testimony.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2011cv0297-371-0

**Court Denies Motion to Compel Agency Rulemaking Documents Under the Deliberative Process Privilege**
*Estes v. United States*, 128 Fed. Cl. 285 (Sept. 15, 2016) [Kaplan, J.]

In this takings case, the Treasurer of Kansas, Ron Estes, sued the United States seeking to recover proceeds of matured, but unredeemed United States savings bonds. Kansas moved to compel the Government to produce documents that were withheld by the Government under the deliberative process privilege.

The Court denied the motion to compel, finding that Treasury documents related to proposed and final agency rulemaking were appropriately withheld under the deliberative process privilege. These documents included internal memoranda related to publishing proposed and final rules, draft notices of the proposed rulemaking, internal memoranda on Treasury's decision on Kansas's request to redeem the escheated bonds, and internal communications and memoranda about Treasury's website and communication strategy. The Court then found that the plaintiff's need for the documents did not outweigh the harm of disclosure because, among other things, the documents were not especially relevant and other, non-privileged information is available for Kansas to attempt to prove its case.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2013cv1011-79-0

## GOVERNMENT CONTRACTS

**Court Applies 10 U.S.C. § 2377 To Sustain Protest of Solicitation; Concludes Agency Did Not Issue Solicitation In Bad Faith, But That Army Did Not Adequately Investigate Whether Commercially Available Alternatives Met Army's Requirements**
*Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218 (Nov. 3, 2016) [Horn, J.]

Palantir challenged the Army's solicitation for a developmental contract for DCGS-A2, the Army's primary system for processing and disseminating multi-sensor intelligence and weather information to the warfighter. Palantir alleged that because it had developed a commercially available technology that solves the needs of DCGS, the Army arbitrarily issued a solicitation for a developmental contract in violation of 10 U.S.C. § 2377, "Preference for Commercial Items." Palantir also alleged that the Army issued the solicitation in bad faith and/or was biased against Palantir.

Although the Court stated that it appeared Palantir and the Army had a strained relationship, the Court ultimately found that Palantir had not produced clear and convincing evidence of bias and/or bad faith. With respect to the preference for commercial items in section 2377, the Court first concluded that the issues fell within the Court's bid protest jurisdiction and observed that the Court of Federal Claims had not yet squarely addressed the application of section 2377 in the bid protest context. The Court then held that, pursuant to section 2377(a), the Army was required to investigate whether there were commercial item options, but that the Army's investigation did not satisfy section 2377(a) because the Army's market research focused upon developmental projects, not commercial items. The Court also found that, under section 2377(c), the Army was required to document its conclusion that commercial items were unavailable, but that the Army had failed to do so adequately.

The Court enjoined the Army from issuing a contract award under the solicitation, and directed that the Army "must satisfy the requirements of 10 U.S.C. § 2377, which, thus far, the Army has failed to do," and "[o]nly after the Army has properly and sincerely complied with 10 U.S.C. § 2377 should defendant proceed to award a contract to meet its DCGS-A Increment 2 requirements."

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0784-113-0

**Court Rejects Post-Award Protest Alleging Organizational Conflicts of Interest in Air Force Procurement**
*AEgis Techs. Group v. United States*, 128 Fed. Cl. 561 (Sept. 28, 2016) [Firestone, J.]

In this post-award protest, the Court rejected a challenge by a disappointed bidder, AEgis Technologies Group, which alleged that the Air Force's procurement of combat-simulation software and related services was tainted by organizational conflicts of interest under FAR § 9.505-1. AEgis argued that the awardee's proposed subcontractor, Booz Allen Hamilton, had a conflict of interest because it had earlier developed statements of work and determined parameters for the Air Force program. The Court concluded that there were insufficient facts to support the bias allegations. Specifically, the Court held that, because "there is no proof that Booz Allen could have played a role in designing specifications or developing test requirements that could result in biased ground rules," Booz Allen's role as the awardee's proposed subcontractor did not violate FAR § 9.505-1. The Court similarly rejected AEgis's assertion that the awardee had unequal access to information, concluding that the contracting officer

had mitigated any possible conflict by "releas[ing] serially" information about the requirements to "all interested parties" through an extensive "bidders library," among other things. The Court also rejected AEgis's "impaired objectivity" organizational conflict of interest allegations, finding that Booz Allen was not involved in evaluating proposals under the solicitation, and a declaration by an AEgis official that Booz Allen was "potentially unable to be impartial" was merely inference and suspicion. The Court rejected several other of the protestor's arguments, including that a cost-realism analysis was improperly conducted, and that the Air Force erred in making its past-performance evaluation.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0863-44-0

**Court Rejects Bright-Line for Bid-Protest Jurisdiction; Performance of Contract Not Dispositive for Jurisdictional Purposes**
*Dorado Services, Inc. v. United States*, 128 Fed. Cl. 375 (Sept. 30, 2016) [Kaplan, J.]

In this post-award protest, the Court clarified that the distinction between the Court's bid-protest jurisdiction under 28 U.S.C. 1491(b)(1) and the application of the Contracts Disputes Act does not turn on whether contract performance has started. The solicitation, which was a set-aside for qualified HUBZone small businesses, involved a request for solid-waste collection and disposal services at Joint Base San Antonio. Dorado received the award, but a competitor, GEO, filed a status protest at the Small Business Administration (SBA), alleging that Dorado was not qualified under the HUBZone program. SBA ultimately agreed that Dorado had not complied with HUBZone requirements and decertified Dorado, but not before Dorado had begun performance of the Air Force contract. Dorado then filed a protest with the Court, alleging that the SBA's decertification was arbitrary and capricious. The Government moved to dismiss, asserting that there exists a "bright-line rule that a Government contractor that has been performing under a contract lacks bid protest standing to raise a challenge related to that contract." The Court rejected this argument, concluding that the "critical question is whether a plaintiff's claims concern violations of procurement law or whether, instead, they involve issues of contract administration." Here, the Court concluded that the SBA's decision to decertify Dorado "had nothing to do with the administration of Dorado's contract or a future procurement" but instead "concerned whether Dorado was eligible to be awarded the contract it was then performing." On the merits, the Court rejected Dorado's challenge to the SBA's decertification decision, explaining that the decision was not arbitrary and that Dorado had failed to carry its burden to establish compliance with HUBZone program requirements.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0945-48-0

## INDIAN CLAIMS

**Court Partially Grants Plaintiffs' Motion for Partial Summary Judgment in Tribal Breach of Trust Cases, Denies Government's Cross Motion for Partial Summary Judgment**
*Goodeagle v. United States*, 128 Fed. Cl. 642 (Sept. 12, 2016) [Wheeler, J.]

An Indian tribe and its members brought consolidated actions against the United States for, among other things, breach of fiduciary duty and trust obligations arising out of alleged Federal mismanagement of land belonging to the Quapaw Indian Tribe. In 2002, the Quapaw Tribe filed suit against the United States in district court requesting an accounting of the Federal management of the Tribe's trust assets. In 2004, the parties entered a settlement agreement, whereby the parties agreed

that a tribal entity, Quapaw Information Systems, Inc., would prepare an analysis of Federal management of tribal assets (the Quapaw Analysis). After the Quapaw Analysis was completed in 2010, plaintiffs filed complaints in the Court of Federal Claims seeking money damages based upon the results of the analysis.

Plaintiffs filed a motion for partial summary judgment, arguing that the Quapaw Analysis is binding on the Government, while the Government disputed the binding authority of the analysis. The Court found that the Quapaw Analysis is binding on the United States as to its factual findings, but not as to the models it used to calculate damages. As a result, the Court granted the Tribe's motion for partial summary judgment only as to three claims for amounts identified in the factual findings of the Quapaw Analysis. Although the Government will not be allowed to refute the factual findings of the Quapaw Analysis, the Court found that the Government could challenge the valuation, extrapolation, and calculation models used in the Quapaw Analysis to calculate damages at trial.

The Court also denied the Government's cross-motion for summary judgment. The Court first rejected the Government's argument that the Tribe had failed to identify a money-mandating duty for their claims. In doing so, the Court held that the Tribe had identified an "extensive network of federal statutes and regulations" concerning the Government's fiduciary duty to tribes and that these citations plausibly give rise to a money-mandating duty sufficient for Tucker Act jurisdiction. The Court also disagreed with the Government's argument that certain of the Tribe's claims are untimely because they are based only on hypothetical leases, not actual leases. The Court held that whether a claim was based upon an actual lease is a disputed issue of fact that was not appropriate for resolution at the summary judgment phase. The Court also would not bar as untimely the Tribes' claims that relied on extrapolation from actual leases because the Government's failure to provide access to the leases caused the need for extrapolation. Finally, the Court would not apply the doctrine of res judicata to the Tribe's claims based on royalty under-collection because the parties were not adverse in prior litigation. The Government had intervened in that litigation on behalf of Goodeagle's predecessors, not plaintiffs in this case.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2012cv0431-182-0

**PAY**

**Court Grants Government's Motion To Dismiss Plaintiff's Request For Review of Court-Martial Conviction**
*Jerome Randolph v. United States*, 129 Fed. Cl. 301 (Nov. 16, 2016) [Wheeler, J.]

Mr. Randolph received a dishonorable discharge from the U.S. Navy following a court-martial conviction. Mr. Randolph filed a complaint seeking to reverse the decision by the Board of Correction of Naval Records (Board) not to upgrade his discharge status to honorable, and for damages associated with his corrected discharge. Mr. Randolph also sought to expunge his court-martial conviction, and sought damages against the Government for alleged defamation.

The Court granted the Government's motion to dismiss Mr. Randolph's claims related to his court-martial conviction. In doing so, the Court rejected Mr. Randolph's argument that 28 U.S.C. § 1491(a)(2) authorized the Court to correct records relating to his court-martial conviction. The Court explained that this statutory language did not allow the Court to review a court-martial conviction simply because Mr. Randolph sought related monetary relief. Rather, to collaterally attack a court-martial conviction,

the Court held that plaintiff must plead facts showing a fundamental lack of fairness in the court-martial process so as to impair constitutional guarantees of due process. Because Mr. Randolph alleged no constitutional violations, the Court found that it lacked jurisdiction to entertain Mr. Randolph's challenge to his court-martial conviction. The Court also dismissed Mr. Randolph's defamation claims because the Court lacks jurisdiction to entertain tort claims.

The Court granted the Government's motion for judgment on the administrative record on Mr. Randolph's remaining claims, holding that the Board's decision not to upgrade Mr. Randolph's discharge status to honorable was reasonable and supported by substantial evidence. Specifically, the Board found that Mr. Randolph pled guilty to two violations of the Uniform Code of Military Justice, which supported the Board's decision not to upgrade Mr. Randolph's discharge status.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0672-18-0

**Court Finds Part-Time Census Bureau Employees Entitled To Sunday Premium Pay**
*Gross v. United States*, 128 Fed. Cl. 745 (Oct. 31, 2016) [Campbell-Smith, C.J.].

Plaintiff, a part-time employee of the Federal Census Bureau, brought a putative class action alleging that the Government failed to pay Sunday premium wages under 5 U.S.C. § 5546(a). That statute provides that employees who perform work on a Sunday during a "regularly scheduled 8-hour period of service which is not overtime" are entitled to their rate of basic pay plus a premium rate of 25 percent of basic pay. The parties cross-moved for summary judgment on whether part-time employees are entitled to these Sunday premium pay.

The Court agreed with plaintiff, and held that part-time employees were eligible for Sunday premium pay. In doing so, the Court relied heavily on *Fathauer v. United States*, 566 F.3d 1352 (Fed. Cir. 2009), which held that the term "employee" pertains to both full and part-time employees. The *Fathauer* decision did not address, however, whether part-time employees – who are assigned work with a fixed deadline but set their own hours – could be deemed "regularly scheduled" under § 5546(a). The Court held that the Census Bureau's manner of setting hours and work is sufficient to bring part-time employees "within the ambit of 'regularly scheduled'" because, although the work was not performed every Sunday, it was regularly scheduled. The Court thus granted plaintiffs' motion for summary judgment and held that part-time Census Bureau employees are eligible for Sunday premium pay.

The Court also found that the plaintiffs met their burden to demonstrate numerosity, commonality, adequacy, and superiority under Rule 23 of the Rules of the Court of Federal Claims to certify the class of all "part-time Field Representatives and Senior Field Representatives who performed non-overtime work on a Sunday and did not receive Sunday premium pay for that work." The Court, however, dismissed all claims more than 6 years from the date the complaint was filed, holding that accrual suspension did not apply to expand the Court's six-year statute of limitations, 28 U.S.C. § 2501.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2011cv0715-76-0

## TAKINGS

**Court Dismisses Health Insurer's Taking Claim Under Affordable Care Act, Finding No Property Interest**
*Land of Lincoln Mutual Insurance Co. v. United States*, No. 16-744C (Nov. 10, 2016) [Lettow, J.]

Land of Lincoln provides qualified health insurance plans in Illinois under the Affordable Care Act. The Act established a three-year risk-corridors program meant to mitigate uncertainty and pricing risk by reimbursing qualified health plan issuers if their calendar year allowable costs exceed 103 percent of their plan's target amount, while requiring issuers to reimburse the Department of Health and Human Services (HHS) if their allowable costs are less than 97 percent of their plan's target amount. The Act does not provide a time limit for HHS to pay health plan issuers. Due to inadequate funding, HHS has paid issuers only 12.6 percent of the payments they were owed in 2014, and owes Land of Lincoln $4.4 million, plus additional payments for 2015 losses. HHS has stated that it will pay the remainder as additional fees are collected in subsequent years. Land of Lincoln filed a claim for a taking, among other claims. Granting the Government's motion to dismiss on the taking claim, the Court held that "Lincoln does not have a valid property interest in receiving full risk-corridors payments annually" and "a statutory right to payment is not a recognized property interest."

Land of Lincoln appealed to the Federal Circuit. Read the Court of Federal Claims' decision:
https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0744-47-0

**Court Dismisses Taking Claim Filed More Than Six Years After Plaintiff Knew Government Took Licenses**
*Alpine PCS, Inc. v. United States*, 128 Fed. Cl. 303 (Sept. 14, 2016) [Lettow, J.]

Alpine PCS purchased two wireless Personal Communications Service (PCS) spectrum licenses at a Federal Communications Commission (FCC) auction in 1996. The PCS spectrum is used for mobile voice and data services, including cell phone, text messaging, and Internet. Alpine defaulted on its payments in 2002 and, after the FCC denied Alpine's debt restructuring request in 2007, the FCC resold the licenses in 2008. Alpine filed a claim for, among other things, a taking. Granting the Government's motion to dismiss, the Court assumed that Alpine's licenses were a property interest because the Communications Act implies the creation of rights to use wireless spectrum that are akin to those created by a property interest. But the Court held that Alpine knew no later than 2008 that the FCC had taken its spectrum licenses because Alpine actively sought a stay of the 2008 auction, and therefore Spectrum's claim fell outside the six-year statute of limitations.

Alpine PCS appealed to the Federal Circuit. Read the Court of Federal Claims' decision:
https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0001-25-0

**Takings Claim Not Ripe Where Landowner Failed To Request Permit That, If Granted, Would Allow Development Of Land**
*Doyle v. United States*, 129 Fed. Cl. 147 (Nov. 30, 2016) [Firestone, J.]

Doyle originally owned 2,440 acres of property in Washington County, Utah, that he planned to develop. But in the early 1990s, the Fish and Wildlife Service (FWS) listed the Mojave desert tortoise as endangered, and designated much of the County, including Doyle's property, as critical habitat. The

County and a steering committee of landowners, including Doyle, submitted a county-wide habitat conservation plan that would have allowed development of some of the property in the County, including Doyle's property, but FWS rejected that plan. Then, in 1996, FWS approved a revised county-wide habitat conservation plan submitted by the steering committee that allowed development of some property in the County—but not Doyle's. Instead, Doyle's land was designated as a reserve area that the Government would acquire by purchase or exchange under a willing-buyer-willing-seller program. After several possible land exchanges with the Government fell through, leaving Doyle with mounting debt from his development efforts, Doyle filed bankruptcy and transferred most of his land to creditors. Doyle emerged from bankruptcy owning just 274 of his original 2,440 acres.

Doyle filed suit alleging a *per se* taking of his 274 acres, plus the more than 2,100 acres he lost in bankruptcy. The Government moved to dismiss, arguing that Doyle's claim was unripe because he had not applied for a permit that would remove his land from the reserve and allow development. Doyle argued that the two county-wide habitat conservation plans, which included his land, satisfied the ripeness requirement, but the Court disagreed. The Court held that Doyle was not bound by the limitations in the 1996 county-wide habitat conservation plan and could have chosen to withdraw from the plan and apply for a separate incidental take permit. The Court further held that such an application would not be futile because "the court cannot assume that the FWS will foreclose all development of plaintiffs' land." Therefore, Doyle's claim was unripe. The Court also held that the statute of limitations does not begin to run until Doyle's claim is ripe, and held that an alternative statute of limitations argument raised by the Government was moot. The Court dismissed Doyle's claim without prejudice.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2015cv0572-33-0

**Court Denies Motion To Dismiss, Allowing Plaintiff To Proceed With Claim Based Upon Allegedly Unlawful, But Authorized, Taking Of Water Rights And Other Property**
*Ministerio Roca Solida v. United States*, 129 Fed. Cl. 140 (Nov. 29, 2016) [Kaplan, J.]

Ministerio Roca Solida, or Solid Rock Ministry, alleged a taking after the Fish and Wildlife Service (FWS) diverted a desert spring-fed stream used by the Ministry for baptisms and other activities so that the stream no longer entered Ministry property. The Ministry alleged that this diversion deprived it of vested water rights and also resulted in flooding on its land. The Government moved to dismiss, asserting that the Ministry's claims were based on allegations of illegal and negligent actions and, therefore, cannot be considered "authorized" Government actions as necessary for a taking. The Court denied the Government's motion, holding that Government conduct may be unlawful but nonetheless authorized. The Court granted the Government's motion to dismiss a claim by the Ministry alleging a denial of due process, because the Fifth Amendment Due Process Clause is not a money-mandating constitutional provision.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0826-11-0

## TAX

**Internal Revenue Code § 3102(b): Court Rejects Hospital's Effort To Obtain Reimbursement For Amounts Paid To Settle Class-Action Suits Brought By Former Medical Residents**
*The New York & Presbyterian Hospital v. United States*, 128 Fed. Cl. 363 (Sept. 19, 2016) [Firestone, J.]

In this case of first impression, the Court granted the Government's motion to dismiss the hospital's complaint for lack of subject-matter jurisdiction. In its complaint, the hospital sought a judgment against the Government for the amount it agreed to pay to its former medical residents (now doctors) to settle two class-action lawsuits brought by the doctors against it in the Southern District of New York. In those lawsuits, the doctors alleged that the hospital was liable for fraud, breach of fiduciary duty, and other state-law torts. After losing on a motion to dismiss in the district court, the hospital agreed to pay the doctors $6.6 million to resolve the suits, and the district court approved the settlement.

In the Court of Federal Claims, the hospital sought to recover the $6.6 million (plus the attorneys' fees it incurred in district court) on the theory that the Government is required to reimburse the hospital under Internal Revenue Code (IRC) § 3102(b), which provides that an employer withholding FICA taxes "shall be indemnified against the claims and demands of any person" up to the amount that the employer withheld and paid over to the IRS.

Although the modern understanding of the word "indemnified" is often taken to connote a right to reimbursement, the Court agreed with the Government's reading of § 3102(b) and held that "indemnified" as used in that section means immunity from suit (by employees or other third-parties), rather than a right to reimbursement from the United States. In so holding, the Court relied on, among other things, the definitions of "indemnity" in dictionaries provided from 1935, when the earliest predecessor of § 3102(b) was enacted. The Court also explained that interpreting § 3102(b) to require the Government to reimburse employers "would turn the refund scheme on its head," because the case law is clear that § 7422 bars an employee from suing its employer for a FICA refund. Finally, the Court agreed the sister statutes of § 3102(b) for railroad retirement tax act withholding, IRC § 3202(b), and income tax withholding, IRC § 3403, taken together with their legislative history, show that "indemnification" was used interchangeably with protection against liability.

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0496-15-0

**American Recovery and Reinvestment Tax Act § 1603: Court Awards Plaintiffs $207 Million for Wind Farm Development**
*Alta Wind I Owner-Lessors C and D v. United States*, 128 Fed. Cl. 702 (Oct. 31, 2016) [Wheeler, J.]

The Court held for plaintiffs in these eight consolidated cases, awarding them an additional $207 million in grants in lieu of tax credits under § 1603 of the American Recovery and Reinvestment Tax Act of 2009 (ARRTA), while denying the Government's $59 million in counterclaims. The cases concern the valuation of plaintiffs' eligible basis in qualified wind energy property resulting from their purchase, through various sale and sale-leaseback transactions, of parts of the Alta Wind Energy Center, the largest wind farm in the United States.

At trial, the Court excluded the Government's sole expert witness at the conclusion of plaintiffs' *voir dire*. As grounds for the exclusion, the Court pointed to the expert's failure to list on his C.V. certain

academic articles he had written between 1986 and 1989 about Marxist economics and East Germany. The Court explained that it "simply could not rely on the substantive expert testimony of a witness who was untruthful in describing his background and qualifications," particularly where, as here, the "untruthfulness related to his writing on economics topics, which was the area in which he was called to testify as an expert."

On the substantive issues, the Court held that it was plaintiffs' purchase prices that set their bases for the purposes of § 1603, notwithstanding the undisputed fact that the values associated with some of the purchased assets were not eligible for inclusion in the basis. The Court relied upon plaintiffs' allocation of their purchase prices based upon historical costs (as opposed to current values), calling historical costs the "least imperfect method." The Court also determined that Internal Revenue Code § 1060, which provides special allocation rules for trade-or-business asset acquisitions, did not apply to the transactions here because there was no goodwill or going concern value attached to the newly-constructed facilities. Finally, the Court rejected the Government's argument that the purchase prices had been inflated by manipulation. Reasoning that "the Court should disregard the purchase price as basis only if the evidence shows that peculiar circumstances have *highly* inflated the purchase price," the Court found no such circumstances in this case.

The Government appealed to the Federal Circuit. Read the Court of Federal Claims' decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2013cv0402-173-0

**Internal Revenue Code § 114 Repeal: No Exclusion for "Extraterritorial Income" After 2006**
*Dreamworks Animation, SKG, Inc. v. United States*, 128 Fed. Cl. 624 (Oct. 7, 2016) [Firestone, J.]

The Court granted the Government's cross-motion for summary judgment in this tax refund case. DreamWorks sought refunds of approximately $4.4 million, plus interest, for "extraterritorial income" it recognized in 2007, 2008, and 2009. DreamWorks sought the refunds pursuant to § 114 of the Internal Revenue Code (IRC), which provided a tax exemption for products sold abroad. The Court determined that Congress repealed the extraterritorial income exemption pursuant to section 101(d) of the American Jobs Creation Act of 2004 (AJCA), Pub. L. No. 108-357. Applying "the plain language" rule of statutory interpretation, the Court agreed that, even if the statute is unclear, the legislative history, as well as subsequent legislative action, "confirmed the government's interpretation of the statute." Thus, the Court held that the 2004 repeal of former IRC § 114 ended the exclusion for extraterritorial income after 2006 pursuant to the two-year transition period provided by § 101(d) of the AJCA. The transition rule only referenced "transactions" entered into in 2005 or 2006 and, most tellingly, specified the percentages of extraterritorial income includible in gross income for 2005 and 2006. The foreign income at issue here was generated by a 2006 feature film distribution agreement. The Court's ruling limited the transition rule's benefits to income received in 2006, not the $250 million of income received in the subsequent years (2007, 2008, and 2009), or unidentified amounts received in future periods covered by the distribution agreement (possibly 10 or more years).

Read the decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2015cv0824-27-0

**Section 6426: Government Wins Industry-Wide Issue of First Impression Involving Excise-Tax Credit for Alcohol Fuel Mixtures**
*Sunoco, Inc. v. United States*, 129 Fed. Cl. 322 (Nov. 22, 2016) [Wheeler, J.]

The Court granted the Government's motion for judgment on the pleadings and denied the taxpayer's cross-motion for summary judgment in this significant oil-company case. Sunoco sought a refund of over $306 million for tax periods between 2005 and 2009. In each of those tax periods, Sunoco paid fuel excise taxes under § 4081 and received excise-tax credits for alcohol fuel mixtures under § 6426. In its original income-tax returns, when Sunoco included fuel excise-tax expenses in its cost-of-goods sold, Sunoco reduced its excise-tax liabilities by the alcohol fuel mixture credits it claimed. However, Sunoco thereafter filed refund claims asserting that it was entitled to include the gross gasoline excise-tax liabilities in its income-tax cost-of-goods sold, without reducing those excise-tax liabilities by the tax credits that it took against those liabilities. The Court determined Sunoco's interpretation of § 6426 was erroneous.

The Court held that, although the language of § 6426 was not dispositive of the legal issue, "the legislative history favors the Government's position," and "analogous cases" involving "manufacturers' rebates and bifurcated credits are sufficiently similar to this case to be persuasive." The Court further reasoned that Congress is expected to "speak unequivocally when it intends to confer tax benefits on the scale Sunoco suggests," explaining, "Sunoco wishes to exempt from gross income a portion of its cost of goods sold that it was never required to pay. There is nothing preventing Congress from conferring such a benefit on Sunoco; however, one would expect Congress to expressly state, either in the legislative history or by statute, that it intended to convey this benefit. Congress has not done so here."

Sunoco appealed to the Federal Circuit. Read the Court of Federal Claims' decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2015cv0587-53-0

## VACCINE

**Court Of Federal Claims Affirms Special Master's Award of Attorneys' Fees And Costs After Petitioner's Voluntary Dismissal Of Vaccine Claim For Lack Of Sufficient Evidentiary Support**
*Allicock v. Secretary of HHS*, 128 Fed. Cl. 724 (Oct. 25, 2016) [Wheeler, J.]

This Court of Federal Claims affirmed a Special Master's award of Vaccine Act attorneys' fees to a petitioner who voluntarily dismissed her claim for lack of sufficient evidentiary support. Under the attorney fee provision, 42 U.S.C. § 300aa-15(e), a special master may award reasonable attorneys' fees and costs to an unsuccessful petitioner, so long as the petitioner: (1) filed the petition in good faith; and (2) had a reasonable basis for the claim.

Petitioner filed one day before the expiration of the applicable statute of limitations, contending that a series of vaccines administered approximately three years earlier aggravated her son's preexisting developmental delay. Petitioner filed additional medical records over the next several months, but on review the Government recommended the case be dismissed because the records did not support petitioner's allegations. The Special Master "conclude[d] that th[e]matter had barely enough reasonable basis to be viable," and the petitioner subsequently dismissed her petition.

Following the dismissal, petitioner's counsel sought attorneys' fees and costs. He asserted there was a reasonable basis for filing based on statements relayed from the petitioner about her son's condition after receipt of one of the vaccines, and further that the treating physician informed petitioner that the vaccine could have caused the developmental delay. Counsel added that he promptly sought medical records to help prove up petitioner's claim, but had to file the petition without complete medical records to avoid operation of the statute of limitations. Over the Government's objection, the Special Master awarded approximately $20,000 in attorneys' fees and costs.

The Government sought review in the Court of Federal Claims, arguing that any award of attorneys' fees and costs was improper. Specifically, the Government urged that, in all vaccine cases, petitioner's counsel should be held to a standard requiring due diligence before filing a petition, thus helping to avoid adding frivolous petitions to the growing caseload in the Vaccine Program. The Court disagreed. It reasoned that under the applicable abuse of discretion standard, it would need to conclude that the Special Master's decision was clearly unreasonable, or clearly erroneous, and it could not do so under the "close decision" presented here. In particular, the Court determined that "on balance the need to file to avoid the statute of limitations bar, together with the key claims made by Petitioner and the delayed receipt of medical evidence to prove them, justified filing." Finally, the Court added that, while it "certainly supports the development of meaningful standards to determine whether a petitioner had a reasonable basis for filing, that goal must be balanced against the public policy of encouraging access by vaccine petitioners to competent counsel."

The Government appealed to the Federal Circuit. Read the Court of Federal Claims' decision: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2015vv0485-38-0