FEDERAL CLAIMS BAR ASSOCIATION

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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 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.

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 Denies Attorney's Motion to Intervene on His Own Behalf in Pending Class Action, Finding That He Failed To Satisfy The Requirements in RCFC 24(a)(2) and (b). *Manuel Almanza, et al., v. United States*, Fed. Cl. No. 13-130C, 136 Fed. Cl. 290 (2018) [Kaplan, J.]

In this decision, the Court addressed the proper standard for intervention under RCFC 24 where an attorney unsuccessfully sought to intervene in a pending action before the Court to protect his alleged right to recover attorney's fees.

RCFC 24(a) provides that the Court "must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." RCFC 24(b) gives the Court discretion to allow someone to intervene in the case if it finds that he "has a claim or defense that shares with the main action a common question of law or fact." The rule further provides, however, that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." RCFC 24(b)(3).

In this Fair Labor Standards Act ("FLSA") class action case, the plaintiffs' counsel engaged another attorney, Robert Gaudet, to perform certain services in support of the plaintiffs' suit on the understanding that Mr. Gaudet would be paid if and when the Court awarded attorney fees. After the parties settled the case, the plaintiffs requested attorney's fees and costs, which the Court granted in an opinion issued on January 11, 2018. Dissatisfied with the Court's fee award, Mr. Gaudet filed a motion to intervene pursuant to RCFC 24(a)(2) and (b), arguing that there were factual errors in the Court's fee decision that needed to be corrected and that he had a "property" interest that would be impaired if he could not intervene.

The Court denied Mr. Gaudet's motion, holding, first, that he did not meet the requirements in RCFC 24(a) because his interest in recovering his fees does not constitute an interest in the "property or transaction that is the subject of the action[,]" *i.e.*, plaintiffs' FLSA claims. The Court noted that the Federal Circuit had not ruled "whether or under what circumstances attorneys may intervene in an underlying action to protect their right to recover fees," but found that Mr. Gaudet's request did not fall within the rationale offered by other Circuits indicating that such intervention might be appropriate. It reasoned that because his compensation was determined by his agreement with the plaintiffs' counsel, it will only be "indirectly" determined by the Court's fee award. The Court also held that Mr. Gaudet's interests were adequately represented by the plaintiffs.

Second, the Court declined to exercise its discretion to allow Mr. Gaudet to intervene under RCFC 24(b). Although the Court found that Mr. Gaudet's claim shared a common question of law or fact with the main action, the Court expressed concern that if an attorney could intervene to protect his fees, it could prejudice the party to the litigation because the intervening counsel might raise arguments that had not been raised or that conflict with arguments that had been made.

Read the decision here.

Court Dismisses Several of Plaintiffs' Claims in Spent Nuclear Fuel Case On Grounds of Collateral Estoppel and Failure to State a Claim Upon Which Relief May Be Granted. *Alabama Power Company v. United States*, Fed Cl. 17-1480C, 2018 WL 1466281 (Mar. 26, 2018) [Campbell-Smith, J.]; *Georgia Power Company v. United States*, Fed. Cl. 17-1492C, 2018 WL 1466283 (Mar. 26, 2018) [Campbell-Smith, J.]; *Georgia Power Company v. United States*, Fed. Cl. 17-1481C, 2018 WL 1466282 (Mar. 26, 2018) [Campbell-Smith, J.].

These separate cases are part of long-running litigation brought by the plaintiffs, Alabama Power Company and Georgia Power Company, against the United States seeking to recover contract damages related to the removal of spent nuclear fuel from the plaintiffs' facilities.

The Court granted the government's motions to dismiss two claims in the plaintiffs' complaints, issuing three nearly identical opinions in the separately filed cases. The plaintiffs' first claim in their respective complaints included a request for damages consisting of fees collected by the Nuclear Regulatory Commission ("NRC"). The Court agreed with the government that this claim should be dismissed because the Court had already ruled in a previous round of spent nuclear fuel litigation that the plaintiffs were collaterally estopped from re-litigating their entitlement to NRC fees. Notwithstanding this earlier ruling, the plaintiffs argued that they should be permitted to seek recovery of the NRC fees because the issue had not yet been "settled" by the United States Court of Appeals for the Federal Circuit, and the issue was also the subject of pending litigation in an unrelated spent nuclear fuel case before the Court. The Court found that the allegations made in each of the present cases were "nearly identical" to those made in the previous round of litigation and, thus, were barred by the doctrine of collateral estoppel, which bars a party from re-litigating issues that have been finally decided and that the party had a full and fair opportunity to litigate. The Court found that the plaintiffs were "not without a remedy" because, should the Federal Circuit issue a relevant decision regarding NRC fees before final judgment is entered, the plaintiffs could move, pursuant to RCFC 59(a), for reconsideration of the Court's finding that their claims for NRC fees are barred.

The Court also granted the government's motion to dismiss the plaintiffs' claims alleging breach of the implied duty of good faith and fair dealing, finding that this claim was duplicative of the plaintiffs' breach of contract claim, on which liability had already been established. The Court explained that, "[i]n order to maintain both claims, plaintiff must show that each is founded on different allegations." The Court found that the only portion of the plaintiffs' good faith and fair dealing claims that "might be fairly construed as alleging subterfuge or evasion, beyond a breach of the express terms of the contract," was unaccompanied by any supporting factual allegations. Thus, the Court found that the claim failed to state a claim upon which it could grant relief under *Twombly*, and dismissed the case pursuant to RCFC 12(b)(6).

Read the *Alabama Power* decision here and the *Georgia Power* decisions here and here.

GOVERNMENT CONTRACTS

Court of Federal Claims Rejects Request for Preliminary Injunction in Protest Challenging Solicitation Provision Requiring Compliance with Trade Agreements Act. *Acetris Health, LLC v. United States*, Fed. Cl. No. 18-433C, 2018 WL 1517096, __Fed. Cl. __ (2018) [Sweeney, J.].

Turning back an attempt by an offeror, Acetris Health, LLC, to enjoin the Department of Veterans Affairs ("VA") from proceeding with a procurement for hepatitis B medication, the Court addressed the

jurisdictional overlap between the Court of Federal Claims, Customs and Border Protection ("CBP"), and the United States Court of International Trade. During Acetris' performance of the incumbent contract, a dispute arose between the company and the government regarding the Trade Agreements Act ("TAA") compliance of its medication. Acetris then sought a country-of-origin determination from CBP, which concluded that the medication was not manufactured in the United States, but instead was manufactured in a non-TAA country. The VA adopted this determination, and indicated that it would take a similar view in conjunction with the then pending solicitation for the follow-on VA contract.

Acetris sued, filing a pre-award protest alleging that the VA misinterpreted the solicitation's TAA clause and improperly deferred to CBP's country-of-origin determination. The Court denied Acetris' motion for a preliminary injunction. First, the Court explained that its bid-protest jurisdiction is limited to resolving disputes in connection with a procurement or a proposed procurement, and that much of Acetris' protest related to ongoing matters of contract interpretation—matters which must be challenged—if at all—by the Contract Disputes Act. Second, the Court noted that Acetris' concurrent litigation challenging CBP's country-of-origin determination at the Court of International Trade, raised significant doubt about the Court's jurisdiction given the bar provision in 28 U.S.C. § 1500. Finally, the Court acknowledged that it likely had jurisdiction to entertain just one of Acetris' arguments: that a provision in the solicitation conflicted with other of the solicitation documents, creating a patent ambiguity that can generally be raised in a pre-award bid protest. But after considering the provisions, the Court ultimately concluded that there was, in fact, no ambiguity in the solicitation, meaning Acetris could not show the likelihood of success on the merits. In addition, the Court concluded that Acetris failed to establish that the balance of harms tipped in its favor and that an award of preliminary injunctive relief was the public interest.

Read the case here.

TAKINGS

Court Finds No Fifth Amendment Taking During Term Of Agreement In Which Plaintiff Voluntarily Consented To Government's Entry Onto Its Property. *Waverley View Investors, LLC v. United States*, 135 Fed. Cl. 750 (Jan. 5, 2018); 136 Fed. Cl. 593 (Mar. 8, 2018), *on appeal* (filed Apr. 6, 2018) [Braden, C.J.]

Plaintiff owned real property adjacent to a Superfund site on an Army base. The Army, pursuant to a right of entry ("ROE") agreement with plaintiff, installed wells to monitor groundwater contamination from the base. Plaintiff alleged that the Army's installation of the wells constituted a physical taking that required compensation. The Court held that a physical taking can occur "only where [the government] *requires* the landowner to submit to the physical occupation of his land." The Court rejected plaintiff's claim that a taking occurred during the term of the ROE agreement because the property owner voluntarily consented to the terms of that agreement and, thus, to the government's entry onto its property. However, the Court found the continuing presence of monitoring wells and a related gravel access road, after the ROE agreement's expiration, to constitute a taking.

Turning to the compensation owed, the court rejected the plaintiff's contention that the government's taking precluded it from developing the property, noting that the plaintiff failed to take the necessary steps to begin development. The court also found that any purported stigma associated with the property predated the plaintiff's ownership and the government's activities on the property, noting that the plaintiff had public knowledge of contamination issues resulting from the adjacent Fort Detrick. The

court ordered compensation at a rate of $1.06 per square foot for the property that has been physically occupied by the government's monitoring wells and gravel access road – a rate that reflected the square foot value of the property on the date of the taking.

The Court issued a separate opinion addressing the square footage of property affected by the taking. The Court credited the plaintiff's 53,353 square foot estimate, based upon computer-aided design and drafting software, while concluding that the record did not support the government's 29,928 square foot estimate, based on the use of Google Earth Pro and assumption that the Army would close nine monitoring wells. The Court also resolved the parties' dispute over the appropriate rate of interest by imposing the rate set forth in the Declaration of Takings Act, 40 U.S.C. § 3116.

Read the decisions here and here.

Court Finds Fifth Amendment Taking Claim Stated When Plaintiffs Alleged Use Of Their Vehicle In A Law Enforcement Operation. *Patty v. United States*, 136 Fed. Cl. 211 (Feb. 14, 2018) [Bruggink, J.]

In *Patty,* the Court declined to dismiss a takings claim brought by the owner of a truck that was damaged in the course of DEA operations. Plaintiffs alleged that their employee – who, unbeknownst to plaintiffs, was acting as a DEA confidential informant – used plaintiffs' truck in a law enforcement operation. In that operation, the truck was damaged in a firefight and "riddled with bullet holes." The Court concluded that the character of the government's action differed from circumstances in cases where the government action was deemed an exercise of the police power such that no viable taking claim was asserted. The Court found it significant that the government "did not seize the truck to prevent a harm to the public caused by or related to the truck or anyone associated with it." Instead, the DEA "chose to use the truck as a resource in ridding the area of controlled substances and criminal activity" when it "could just as easily have rented a truck and furnished it to" the confidential informant.

Read the decision here.

Court, Applying Indiana Law, Finds That Various Nineteenth Century Deeds Conveyed Right-of-Way Easements to Railroad for Railroad Use Only, And Grants Several Plaintiffs Summary Judgment on Their Rails-To-Trails Takings Claims. *Schulenburg v. United States*, Fed. Cl. No. 16-371L, 2018 WL 1474861 (Mar. 26, 2018) [Williams, J.]

The Court addressed on cross-motions for summary judgment whether the government effected a taking of several plaintiffs' properties after it converted an inactive railroad right-of-way in Indiana into a recreational trail pursuant to the National Trails System Act Amendments of 1983 ("Trails Act"). The plaintiffs in this rails-to-trails action contended that each of their predecessors granted to the Evansville & Richmond Railroad easements for operating a railroad and those easements expired when the railroad ceased using the rights-of-way for railroad operations. According to the plaintiffs, the government, through the Trails Act, eliminated their reversionary interests under Indiana law by creating a new easement for recreational use over the previous railroad easement.

Addressing whether the Evansville & Richmond Railroad acquired easements or fee simple estates, the Court analyzed under Indiana law the late-nineteenth century deeds at issue. It determined that the totality of the language in four of the plaintiffs' deeds established conveyances of easements rather than full ownership of the affected property. The Court also found that use of the land for any recreational trail fell outside the scope of these easements, meaning that the government effectuated a taking of the

properties. Addressing one conveyance for which the parties could not locate the original deed, the Court concluded under Indiana law that the interest that the railroad acquired by adverse possession constituted an easement for railroad purposes. The Court, therefore, granted summary judgment to five sets of plaintiffs.

But the Court declined the cross-motions for summary judgment on the takings claim brought by a sixth set of plaintiffs because it was unclear how a subdivision plat treated the railroad right-of-way with respect to the defined lots. This uncertainty was exacerbated by a "partially illegible notation on the railroad's centerline on the plat." As a result, the Court concluded that there existed genuine issues of material fact as to whether these particular plaintiffs owned land subject to the easement.

Read the decision here.

Court Finds No Regulatory Taking When Plaintiff Did Not Exhaust Administrative Process Required To Access Its Land Over Federal Land. *Bassett, New Mexico LLC v. United States*, 136 Fed. Cl. 81 (Jan. 26, 2018), *on appeal*, No. 18-1726 (Fed. Cir. filed Mar. 28, 2018) [Campbell-Smith, J.]

Plaintiff is the owner of 66 acres of unimproved land surrounded by federal land that was designated as a national monument. Plaintiff contended that the alleged denial of access to its land constituted a taking. Plaintiff had commenced, but not completed, an application to the Bureau of Land Management (BLM) to access its property over the federal land. The Court found that plaintiff's claim was properly analyzed as a regulatory taking because there was no allegation that a physical barrier preventing access had been erected by the government or even that there had been a government action that dissuaded access. Analyzed as a regulatory taking, plaintiff's claim was unripe because plaintiff did not submit a completed application for access to BLM. In reaching this conclusion, the Court concluded that the threshold inquiry into the ripeness of a regulatory takings claim is properly conducted under RCFC 12(b)(1), not RCFC 12(b)(6). The Court also noted that "[e]ven when an applicant faces a likely denial, the applicant's takings claim does not become ripe before the administrative process is exhausted."

Read the decision here.

TAX

Court Rules that Plaintiffs Were Not Entitled to a Theft-Loss Deduction, Citing the Duty of Consistency. *Shields v. United States*, Fed. Cl. No. 15-1081 T, 136 Fed. Cl. 37 (Jan. 18, 2018) [Sweeney, J.]

In their complaint, plaintiffs sought to deduct over $600,000 in loans they had extended (and on which the borrower had defaulted) as a theft loss. Plaintiffs sought to deduct a portion of these losses in 2010 and to carry back the remaining deductible losses to 2007, resulting in claimed overpayments for both years.

The Government argued that the Court lacked jurisdiction over plaintiffs' claim for 2010, because plaintiffs failed to file a timely refund claim for that year. The Court agreed and dismissed plaintiffs' claim for 2010 for lack of jurisdiction. Jurisdiction remained, however, over plaintiffs' 2007 tax year because plaintiffs' refund claim for that year—based on a net operating loss carryback from 2010—was timely under § 6511(d)(2)(A).

With respect to 2007, however, the Court agreed with the Government that plaintiffs' attempt to deduct their defaulted loans as a theft loss in 2010 that could be carried back to 2007 constituted a

violation of the duty of consistency. As explained by the Court, all three of the prerequisites to apply the duty of consistency were met. First, plaintiffs had originally deducted the defaulted loans (as a capital loss) in different tax years, namely, 2008 and 2009. Second, the IRS had relied on that position, and had given plaintiffs refunds for 2008 and 2009. Finally, in the present case, which involves 2010 and 2007, plaintiffs sought to deduct the same defaulted loans on which they had relied to obtain refunds for 2008 and 2009, and they attempted to do so after the Commissioner's period of time for assessing deficiencies for 2008 and 2009 had expired. Accordingly, the Court granted the Government's motion for summary judgment.

Read the decision here.

Court Rejects Plaintiff's $47 Million Claim for Its Open-Loop Bio-Mass Electrical Facility. *WestRock Virginia Corp. v. United States*, Fed. Cl. No. 15-355C, 136 Fed. Cl. 267 (Feb. 9, 2018) [Griggsby, J.]

Under the American Recovery and Reinvestment Act ("ARRA") § 1603 (grants in lieu of credits), which was enacted as part of the Stimulus Plan, a party making certain qualified investments in renewable energy property is entitled to a cash grant—in lieu of a tax credit—from the Treasury Department equal to 30% of the applicant's eligible cost basis. Plaintiff owns an open-loop biomass electrical co-generation facility located in Covington, Virginia. Plaintiff's complaint sought to recover $47 million, which represented the amount by which Treasury reduced plaintiff's § 1603 payment to account for the facility's "process steam" production, a non-qualifying activity.

The Government argued that, under § 1603 and the applicable Treasury Guidance, plaintiff was required to reduce its eligible cost basis by the amount reasonably allocable to process steam production and that none of plaintiff's proposed allocation methodologies made a reasonable allocation. The Court agreed. In holding that § 1603 requires allocation, the Court afforded deference to the Treasury Guidance under *Skidmore v. Swift & Co*. Further, given that the parties had already completed extensive fact and expert discovery and several rounds of briefing and supplemental briefing, the Court determined that neither additional discovery nor a trial would change the result.

Read the decision here.

Plaintiffs' "Returns" Reporting Zero Dollars for Nearly Every Number (Including Income and Wages), But Not for Amounts Withheld, Were Not Valid Claims for Refund. *Meissner v. United States*, Fed. Cl. No. 17-928 T, 136 Fed. Cl. 763 (Mar. 8, 2018). [Horn, J.]

For the tax years at issue, 2014 and 2015, the IRS was able to obtain W-2s showing that plaintiffs had received wages of $133,000 in 2014 and $216,000 in 2015. Plaintiffs, however, filed tax returns for those years reporting zero dollars for nearly every number, including income and wages, but reporting that $26,000 for 2014 and $42,000 for 2015 had been withheld, and seeking refunds of those amounts. In their complaint, plaintiffs alleged that they were entitled to a refund because their wages were not subject to federal income taxation using common tax-defier arguments.

The Government moved to dismiss on the grounds that plaintiffs' "zero returns" did not constitute valid income tax returns and therefore could not form the basis for a valid claim for refund. The Court agreed, holding that by failing to report their wages, plaintiffs did not submit sufficient information to be

considered a valid return. And, by concealing their wages from the IRS, the Court found that plaintiffs did not make an honest and reasonable attempt to satisfy the requirements of the tax laws.

Read the decision here.

Court Rules for the Government in Alternative-Fuel-Mixture Credit and Excessive-Credit Penalties Case *Alternative Carbon Resources, LLC v. United States*, Fed. Cl. No. 15-155 T, 2018 WL 1440567 (Mar. 22, 2018). [Sweeney, J.]

This suit involved federal excise taxes assessed under I.R.C. § 6206 totaling $20 million, and penalties assessed for excessive credits under I.R.C. § 6675 totaling $39.5 million. Plaintiff Alternative Carbon Resources, LLC ("ACR") made small payments that it claimed were attributable to each refund form it filed with respect to the assessed taxes and penalties, and the Government counterclaimed for the $59 million unpaid balance. ACR alleged that in 2011, it purchased food products and wastes, mixed those substances with taxable diesel fuel, and sold the resulting mixtures to wastewater treatment plants for use in anaerobic digesters. ACR alleged that some of the wastewater treatment plants burned the resulting methane to produce electricity. In finding that ACR did not qualify for the alternative fuel mixture credit under I.R.C. § 6426(e), the Court found that there must be a net production of energy, and that plaintiff could not prove there was a net production of energy or that its mixtures were responsible for any increased bio-gas production at a wastewater treatment plant in Des Moines. The Court also found that ACR did not *sell* its alternative fuel mixtures to wastewater treatment plants in that it paid "tipping fees" to the plants to take the mixtures.

The Court next found that ACR did not have reasonable cause to avoid the excessive claims penalty under I.R.C. § 6675, because it did not reasonably rely on advice regarding the "sale" or "use as a fuel" elements of the credit. The Court pointed out that ACR's main adviser, an attorney, repeatedly told ACR in e-mails that he did not understand all of the facts of its operations. The Court also found that ACR could not rely on the IRS's approval of ACR's excise tax registration. ACR filed an appeal to the Federal Circuit on May 10, 2018.

Read the decision here.

VACCINE

Federal Circuit Affirms; Holds that the Special Master did not Abuse his Discretion when Considering Epidemiological Evidence and deciding the Case without an Evidentiary Hearing. *D'Tiole v. HHS*, Fed. Cir. No. 2017-1982, ___ F. App'x ___, 2018 WL 1750619 (Apr. 12, 2018) [Linn, J.]

The Federal Circuit affirmed the judgment of the Court of Federal Claims, sustaining the decision of Special Master Brian H. Corcoran denying compensation in this case brought under the Vaccine Act, 42 U.S.C §§ 300aa-1 to -34. The petitioner alleged that he developed narcolepsy with cataplexy as a result of a FluMist vaccine. The parties submitted seven expert reports in total. After reviewing the expert reports and considering evidence, Special Master Corcoran denied compensation without a hearing because the petitioner had failed to establish preponderant evidence that the vaccine caused his condition. On review, Judge Edward J. Damich sustained the Special Master's decision.

The petitioner appealed, arguing that the Special Master had raised the burden of proof by *de facto* requiring epidemiological evidence, in contravention of the Vaccine Act, and that the Special Master

abused his discretion by deciding the case without holding an evidentiary hearing. The Federal Circuit rejected these arguments. First, the Federal Circuit determined that the Special Master's consideration of the epidemiological evidence reflected the Special Master's assessment of the record presented and the Special Master was not required to ignore probative epidemiological evidence that undermined petitioner's theory. Likewise, the Federal Circuit concluded that the Special Master did not abuse his discretion in deciding the case without an evidentiary hearing because the statute does oblige the Special Master to hold a hearing and in this case, the petitioner was provided a full and fair opportunity to present his case.

Read the decision here.