

Vol. 27

Issue No. 1

Summer 2017

# BCA BAR JOURNAL

*A Publication of the Boards of Contract Appeals Bar Association, Inc.*

## The President's Column

Dear BCABA Members:

The BCABA kicked off 2017 with our Executive Policy Forum on March 5, 2017. Laura Semple of Smith Pachter McWhorter, PLC led an informative panel discussion regarding E-Discovery issues. The panel featured Judge Kenneth Woodrow, ASBCA; Judge Harold Lester, CBCA; Scott Felder, Wiley Rein; and Allison Stanton, Director of E-Discovery, FOIA, and Records for the DOJ, Civil Division. The panelists shared their views on a range of topics, including the recent changes to the Federal Rules of Civil Procedure on preservation and how these changes may influence Board preservation policies. Additionally, the panelists offered best practice tips on ways to ensure that the discovery sought and provided by both sides is proportional. They also discussed the Board judge's role when there is a discovery dispute between the parties over electronically stored information.

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## PRESIDENT'S COLUMN (*cont'd*)

On May 3, 2017, the BCABA and the George Washington University (GW) Law School Government Contracts Program held the Annual Trial Practice Seminar. This year's topic was "Practice Pointers for Litigating before the Boards." Cherie Owen of Jones Day brought together an esteemed group of BCA judges, specifically, Judge Reba Page, ASBCA; Judge Marie Collins, FAA ODRA; Judge Peter Pontzer, PSBCA; and Judge Marian Sullivan, CBCA. The judges shared information regarding various Board procedures, including intake, case assignments, and E-filing. They also provided observations and candid feedback regarding the use of motions practice, appeal files (*e.g.*, ASBCA Rule 4 files), case law and appeal record citations, direct and cross-examination, protective orders, and ADR. A theme that resonated throughout the discussion was the importance of professional integrity and credibility when practicing before the Boards.

On June 6, 2017, we co-hosted the BCABA and GW Law School colloquium. The event was a lively discussion of the Trump administration's impact on the federal acquisition community. Christopher Yukins, Professor and Co-Director of the Government Procurement Law Program, GW Law School, and Terry Elling of Holland & Knight LLP chaired the event. They were joined by Jean Heilman Grier, Principal Trade Consultant, Djaqhe, LLC; Antonia Tzinova, Partner, International Trade, Holland & Knight LLP; Carl Hahn, VP and Global Compliance Officer, Northrop Grumman Corp.; Rob Burton, Partner, Crowell & Moring LLP (former Acting and Deputy Administrator, Office of Federal Procurement Policy, OMB); Rodney Grandon, Managing Director, Affiliated Monitors, Inc. (former Suspension and Debarment Official, U.S. Air Force); and David Black, Partner, Holland & Knight LLP. There were two panel discussions. The first covered developments in U.S. Domestic Preferences and International Trade. The second provided a range of perspectives on Trump administration policies, challenges, and potential opportunities for positive change in federal procurements.

On July 12, 2017, we plan to hold a Board of Governors meeting. The meeting is open to the full BCABA membership. We welcome anyone wishing to become more involved in the organization to attend. Immediately following the meeting, the BCABA will again host its Annual Judges Social. The event will start with "Speed Networking," providing an opportunity for practitioners to talk to BCA judges in a relatively informal setting. The event will conclude with ice cream and light refreshments. This year's Judges Social will be held from 4:30 to 5:45 pm at Dentons US LLP, 1500 K Street, NW, Washington, DC. Stay tuned for additional details!

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BCABA Judicial Division Chair Judge Scott Maravilla, FAA ODRA, and Vice Chair Judge Marian Sullivan, CBCA, report that the Judicial Division continues to meet regularly. Last fall, the Judicial Division held an “Ask the ADR Gurus” forum where judges from the Boards discussed ADR techniques and shared experiences. The forum featured Judge John Dietrich, FAA ODRA; Judge Cheryl Scott, ASBCA; Judge Allan Goodman, CBCA; and Judge Patricia Sheridan, CBCA. The Judicial Division held its spring meeting at the FAA, which featured a presentation by Jim Eck, FAA Assistant Administrator for NextGen, regarding air traffic modernization.

Our final event for the year will be the BCABA Annual Program. The program is tentatively set for Wednesday, October 25, 2017 with a confirmation and save-the-date to follow soon. Please contact Daniel Strouse or me if you want to help with planning or day-of activities for the program.

Thank you to all of you for your continued dedication to this bar. We appreciate your involvement, the expertise that you share, and the time that many of you donate. If you would like to become more involved in the BCABA, please contact me at [kgriffin@smithpachter.com](mailto:kgriffin@smithpachter.com) or (703) 847-6300. I look forward to seeing you at upcoming BCABA events.

Best regards,  
Kathryn T. Muldoon Griffin  
President  
BCABA, Inc.

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# PREDICTABILITY OF OUTCOMES IN DISCOVERY DISPUTES AT CBCA IMPROVES OVER CBCA’S FIRST TEN YEARS WITH TREND TOWARD PUBLICATION OF DISCOVERY ORDERS

*By Bryan M. Byrd\**  
*Justin M. Ganderson\*\**  
*Jason N. Workmaster\*\*\**

## Introduction

Ten years ago, Congress consolidated eight civilian agencies’ boards of contract appeals to create the U.S. Civilian Board of Contract Appeals (“Civilian Board” or “Board”).<sup>1</sup> The Civilian Board is charged under the Contract Disputes Act (“CDA”) to hear and decide government contractors’ appeals of contracting officer final decisions arising from or related to a civilian agency contract.<sup>2</sup> Specifically, the Civilian Board’s jurisdiction to hear contract disputes extends to all agencies of the federal government except the Department of Defense, the National Aeronautics and Space Administration, the U.S. Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority.<sup>3</sup>

Based on our review of all Civilian Board decisions issued during its first ten years, among other trends outside the scope of this article, we identified a notable increase in the number of published decisions containing substantial discussions of discovery issues.<sup>4</sup> Indeed, we identified 24 published decisions opining on discovery issues, and *more than half of those were published since 2014*. Instead of issuing its findings orally or through summary orders, the Board chose to publish these discovery decisions, thereby providing important guidance to practitioners who may be faced with the same (or similar) discovery issues in the future. We believe that this trend toward publication should generally result in more predictability of outcomes in discovery disputes, and therefore should facilitate the resolution of potential discovery disputes more efficiently.

In this article, we focus on three interesting decisions that illustrate this recent development in Board practice. Specifically, these cases pit certain statutory requirements related to the disclosure/production of information – the Privacy Act, the Inspector General Act, and the Freedom of Information Act, respectively – against the bounds of permissible discovery before the Board. These three decisions should provide a relatively high degree of outcome predictability in similar cases



because of the rigid statutory requirements at issue.<sup>5</sup>

The bottom line: the Board's apparent increased willingness to publish discovery-related decisions should better equip practitioners to assess the acceptable bounds of (and expectations related to) discovery, thereby allowing parties to spend less time sidelined by discovery issues and more time focused on the underlying substantive merits of the appeal.

### **Privacy Act Cannot Be Used to Shield Relevant Information from Disclosure in Litigation**

In *Kepa Servs., Inc. v. Dep't of Veterans Affairs*, the Department of Veterans Affairs' ("VA") objected to the appellant's request for copies of several agency employees' personal employment files (including, but not limited to, all performance evaluations for each employee) and the names and last known duty stations of certain employees' supervisors, arguing that the information was protected under the Privacy Act.<sup>6</sup> After delineating the scope of the Privacy Act's non-disclosure obligations with regard to civil discovery and analyzing the relevance of the information sought to the contract dispute pending before it, the Board rejected the appellant's request, in part, through a February 2015 published decision.<sup>7</sup>

The Board began by recognizing that the Privacy Act "does not create an evidentiary privilege precluding disclosure in litigation."<sup>8</sup> Then, the Board noted that, even if the Privacy Act did create such an evidentiary privilege, an agency's presentation of relevant material to an administrative tribunal, such as the Board, during the conduct of civil litigation would be a "routine use" of protected information, an exception to the Privacy Act's nondisclosure obligations.<sup>9</sup> The Board emphasized that "[n]evertheless, before the routine use exception will apply, the material has to be relevant to the matters pending before" it.

The underlying substantive claims involved work performed under a contract for gravesite expansion and cemetery development at the Abraham Lincoln National Cemetery. In support of its alleged right to discover VA employee performance evaluations, the appellant argued that such records were necessary for it to prove "a pattern of persistent VA interference, negligent administration, harassment of personnel, and obstructive project oversight."<sup>10</sup> However, characterizing "this type of broad request for employee personnel files [as] more like a fishing expedition for information to embarrass or harass the employees at issue," the Board failed to see the relevance of the requested information and ruled that the VA withholding such information was appropriate.<sup>11</sup> Although the Board recognized that disclosure of the evaluations was not barred by the Privacy Act, the Board concluded that the appellant failed to "explain[] how a broad and wholesale review of VA employee



personnel files” was relevant to the pending dispute.<sup>12</sup>

Regarding the appellant’s ability to discover the names and last known duty stations of certain employees’ supervisors, the Board determined that such information was relevant and that the VA mistakenly attempted to assert the Privacy Act as a basis for its nondisclosure.<sup>13</sup> The Board generally noted that, “[a]lthough it seem[ed] that a list of particular employees’ supervisors [was] of limited relevance and value in the circumstances” of the pending dispute, the Board could not “say that it [was] so far outside the realm of permissible discovery that the VA should not have to produce those names and last-known VA duty station addresses.”<sup>14</sup> More pointedly, based on legislative history, the Board declared that “Congress did not intend the Privacy Act to prohibit the disclosure to the public of information such as ‘names, titles, salaries, and duty stations of most Federal employees.’”<sup>15</sup>

This decision puts parties on notice that the Board most likely will not treat the Privacy Act as an evidentiary privilege precluding disclosure of relevant information in pending litigation.

### **Without a Subpoena, Inspector General Act Cannot Be Used to Sidestep Discovery Rules**

Two months later, again in *Kepa Servs., Inc. v. Dep’t of Veterans Affairs*, the Civilian Board confronted the appellant’s request for the Board “to stop, or at least place limits upon, an audit being conducted by” the VA’s Office of Inspector General (“VA OIG”) because the OIG’s requests for information were not directed through counsel, in contravention of discovery rules. As one basis for its authority to conduct the audit without going through appellant’s counsel, the VA asserted the Inspector General Act (“IG Act” or “Act”). Based on the plain language of the Act, however, the Board determined that the VA, in the absence of a subpoena directing the production of materials responsive thereto, improperly relied upon the IG Act as authority for the audit its OIG was conducting on the appellant’s claims.<sup>16</sup>

The VA OIG was attempting to conduct the audit at issue through administrative audit letters. However, while recognizing that the VA may have been carrying out the main purpose of the IG Act, which “is to ensure that the OIGs have the power to ferret out fraud, waste, and abuse in federally funded programs,” the Board interpreted the Act to require only *by subpoena* the production of information responsive to an audit request.<sup>17</sup> Therefore, the Board concluded: “Unless and until the VA OIG issue[d] subpoenas to Kepa and its subcontractors, the VA OIG [had] no ability under the IG Act to take any action against Kepa to compel compliance.”<sup>18</sup> Accordingly, the Board concluded that the administrative audit



letters “at best, request[ed] voluntary compliance by the recipient.”<sup>19</sup>

In the absence of another source of authority, the Board concluded that its discovery rules were the only means the VA had to compel compliance with audit requests.<sup>20</sup> Thus, citing to Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, which provides that a lawyer cannot “communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so,” the Board emphasized that “the VA must run” any audit requests through the appellant’s counsel.<sup>21</sup>

This decision emphasizes that, when not preempted by an agency’s statutory authority to discover information related to a pending dispute, the Board’s discovery rules will normally control. The process for obtaining information based on such statutory authority will likely be strictly enforced at the Civilian Board.

### **Prior Disclosure Under Freedom of Information Act Waives Ability to Protect Documents During Litigation**

In *Golden Key Grp., LLC v. Dep’t of Veterans Affairs*, the agency moved to exclude several exhibits from the appeal record or, in the alternative, to place those documents under a protective order limiting their distribution.<sup>22</sup> In a March 2016 published order, the Civilian Board denied the agency’s motion because the documents sought to be excluded or protected had been produced to the appellant through the procedures outlined in the Freedom of Information Act (“FOIA”).<sup>23</sup> In its motion, the VA argued that the documents sought to be excluded or protected were covered either by the attorney-client, the investigative files/law enforcement, or the deliberative process privileges.<sup>24</sup> However, the Board concluded that the VA waived those privileges when it previously chose to release the documents at issue to the public through FOIA.<sup>25</sup>

The Board began by recognizing that the asserted privileges are all “available to government agencies in appropriate circumstances.”<sup>26</sup> Regarding FOIA’s non-disclosure obligations, the Board concluded that “[e]xemptions 5 and 7 . . . are essentially coextensive with these privileges and permit agencies ‘to withhold from disclosure [in response to a FOIA request] documents that would be ‘privileged in the civil discovery process.’”<sup>27</sup> However, the Board concluded that “[e]ach of these privileges is waived . . . when an agency voluntarily and intentionally discloses to a third party the material covered by [them].”<sup>28</sup>

Indeed, recognizing that “[t]he exemptions are permissive, and an agency may voluntarily release information that it would be permitted to withhold under the



FOIA exemptions,”<sup>29</sup> the Board found that the VA exercised its discretion to release the subject documents under FOIA.<sup>30</sup> To the Board, “it [was] clear that they were produced through FOIA, as virtually all of them contain[ed] redactions marked with a specific FOIA exemption number.”<sup>31</sup> The Board thus concluded that the VA “elected to release the allegedly privileged documents at issue to Golden Key in response to a FOIA request.”<sup>32</sup>

Therefore, pursuant to FOIA, the Board held that such release made the documents “available to the public” and not properly subject to the VA’s claim of privilege.<sup>33</sup> The Board explained that, “[o]nce it voluntarily made these documents available to the public through FOIA, the VA waived any . . . privilege claims that it had over the portions of the documents released.”<sup>34</sup> Similarly, regarding the VA’s alternative request that the documents be placed under a protective order, the Board concluded that the VA could not show good cause to have the documents so protected because the documents had already been released to the public.<sup>35</sup>

This decision betters the predictability of outcomes in discovery disputes over the privileged nature of documents previously produced in response to a FOIA request. Parties are on notice that the voluntary disclosure of documents pursuant to a FOIA request should negate a later attempt to protect such documents at the Civilian Board.<sup>36</sup>

## Concluding Thoughts

The Civilian Board’s recent trend of publishing more rulings on discovery issues should have a lasting positive impact on the efficiency of proceedings. With these discovery decisions in hand, attorneys who litigate disputes before the Board on behalf of contractors and the Government should be better equipped to assess likely outcomes of discovery disputes and engage accordingly. As we look ahead to the next 10 years of Board practice, we are hopeful that the Civilian Board will continue the trend of publishing meaningful discovery-related decisions.

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## Endnotes

- <sup>1</sup> Specifically, the General Services Board of Contract Appeals, the Department of Transportation Board of Contract Appeals, the Department of Agriculture Board of Contract Appeals, the Department of Veterans Affairs Board of Contract Appeals, the Department of the Interior Board of Contract Appeals, the Department of Energy Board of Contract Appeals, the Department of Housing and Urban Development Board of Contract Appeals, and the Department of Labor Board of Contract Appeals were consolidated to form the Civilian Board. National Defense Authorization Act of 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391-393 (2006) (later codified at 41 U.S.C. § 7105(b) (2012)).
- <sup>2</sup> 41 U.S.C. § 7105(e)(1)(B).
- <sup>3</sup> *Id.*
- <sup>4</sup> Other trends that we identified include: (1) that the Civilian Board, when interpreting its discovery rules, appears to be more regularly providing parallel cites to – and federal court analysis regarding – analogous Federal Rules of Civil Procedure; and (2) that most published decisions (including orders indicating that a case has been settled and is dismissed) from the Civilian Board seem to relate to contracts entered into by the General Services Administration and the Department of Veterans Affairs.

- 5 Other recent published decisions opining on discovery issues include: (1) *Lynchval Sys. Worldwide, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 3466, 14-1 BCA ¶ 35,792 (denying Government’s motion to strike declaration of contractor’s Chief Financial Officer (“CFO”) for failure to disclose CFO as a person with relevant knowledge before discovery closed because “[a]lthough [contractor] waited until after the close of discovery, it did supplement its interrogatory response to put [the Government] on notice that the CFO was a person with knowledge”); (2) *Yates-Desbuild Joint Venture v. Dep’t of State*, CBCA 3350, et al., 15-1 BCA ¶ 36,027 (impressing upon the interested parties “their burden to consider vigilantly the need for protection of each document” under a blanket protective order because of the inefficiency that results from wholesale branding of documents as protected); and (3) *Bryan Concrete & Excavation, Inc. v. Dep’t of Veterans Affairs*, CBCA 2882, 16-1 BCA ¶ 36,339 (denying as premature appellant’s motion to compel because “[t]here [was] no indication that the parties . . . attempted to resolve [the] discovery issues before appellant filed its motion,” as required by Civilian Board Rule 13(f)(2)).
- 6 CBCA 2727, et al., 15-1 BCA ¶ 35,889.
- 7 *Id.*
- 8 *Id.* (citing *Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987)).
- 9 *Id.* (citing 5 U.S.C. § 552a(b)(3)). The Civilian Board explained that “[n]umerous agencies [including the respondent agency, the Department of Veterans Affairs (78 Fed. Reg. 76,897, 76,898-99 (Dec. 19, 2013))] have defined presentation of relevant material to administrative tribunals, which would include [the] Board, during the conduct of civil litigation as a ‘routine use’ of information that falls within the exception, sometimes even expressly mentioning the agency’s ability to produce such information to opposing counsel in response to civil discovery before such tribunals (so long as the agency determines that the information is relevant).” *Id.* (citing 80 Fed. Reg. 4637, 4638 (Jan. 28, 2015) (Dep’t of the Treasury); 80 Fed. Reg. 239, 239-40 (Jan. 5, 2015) (Dep’t of Homeland Security); 79 Fed. Reg. 78,839, 78,840 (Dec. 31, 2014) (Bureau of Consumer Financial Protection); 79 Fed. Reg. 70,181, 70,183 (Nov. 25, 2014) (Federal Housing Finance Agency); 79 Fed. Reg. 61,599, 61,600 (Oct. 14, 2014) (Dep’t of Commerce)).
- 10 15-1 BCA ¶ 35,889.
- 11 *Id.*
- 12 *Id.*



13 *Id.*

14 *Id.*

15 *Id.* (citing H.R. Rep. No. 93-1416, at 13 (Oct. 2, 1974)); *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 82 (D.C. Cir. 1982); *Nat'l Western Life Ins. Co. v. United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (“It cannot be seriously contended that postal employees have an expectation of privacy with respect to their names and duty stations.”)).

16 CBCA 2727, et al. 15-1 BCA ¶ 35,942.

17 *Id.* (quoting 5 U.S.C. app. 3 § 6(a)(4)). Circumscribing its authority with regard to IG subpoenas, the Civilian Board noted that “[t]o the extent that an entity wants to challenge a subpoena that an OIG issues under the purported authority of the IG Act, or to the extent that an OIG wants to enforce such a subpoena, the IG Act specifically provides that such subpoenas are ‘enforceable by order of any appropriate United States district court.’ 5 U.S.C. app. 3 § 6(a)(4). Pursuant to that provision, the United States district courts have exclusive jurisdiction to decide whether to enforce, as well as whether to quash, an IG subpoena.” *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 CBCA 5092, 16-1 BCA ¶ 36,318.

23 *Id.*

24 *See id.*

25 *Id.*

26 *Id.* (citing *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2321 (2011) (attorney-client privilege is available to the Government); *Confidential Informant 59-05071 v. United States*, 108 Fed. Cl. 121, 131-32 (2012) (discussing the Government’s deliberative process and investigatory files privileges)).

27 *Id.* (quoting *Mehl v. U.S. EPA*, 797 F. Supp. 43, 47 (D.D.C. 1992) (quoting *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)); *Sears,*



*Roebuck*, 421 U.S. at 150 (discussing deliberative process privilege under FOIA Exemption 5); *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977) (discussing attorney-client privilege under FOIA Exemption 5); *Mehl*, 797 F. Supp. at 47 (discussing investigative files privilege under FOIA Exemption 7)).

28 *Id.* (citing *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (“release of a document waives . . . [executive privilege (including the deliberative process privilege)] for the document or information specifically released”); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (“any voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege”); *Clark v. Powe*, No. 07-C-1616, et al., 2008 WL 4686151, at \*4 (N.D. Ill. May 30, 2008) (discussing investigative files privilege waiver through disclosure to third parties)).

29 *Id.* (quoting *Mobil Oil Corp. v. United States Environmental Protection Agency*, 879 F.2d 698, 700 (9th Cir. 1989) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 290-94 (1979))).

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* (citing 5 U.S.C. § 552(a)).

34 *Id.* (citing *Melendez-Colon v. United States*, 56 F. Supp. 2d 142, 145 (D.P.R. 1999) (“[T]he Report has already been produced by the Department of the Navy, in part, under the FOIA. The Court finds that the prior disclosure of the Report pursuant to the FOIA waives Defendant’s privilege argument regarding the use of the Report in the instant case.”); *U.S. Student Ass’n v. Central Intelligence Agency*, 620 F. Supp. 565, 570 (D.D.C. 1985) (document “cannot be withheld if it has been the subject of prior ‘official and documented disclosure’” (quoting *Afshar v. Dep’t of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983))).

35 *Id.*

36 *See also* Justin M. Ganderson & Kevin T. Barnett, *The Contractor’s Secret Weapon: Using FOIA When Asserting a Claim*, THE PROCUREMENT LAWYER, Volume 50, Number 2 (Winter 2015) (discussing how contractors can use FOIA to their advantage when prosecuting a claim against the federal government).

## CASE DIGESTS

*Edited by Heidi L. Osterhout*

*Case Digests offer snapshot summaries of the most interesting, topical, and hopefully useful decisions from the boards of contract appeals over the past several months.*

***Any opinions expressed by the authors are the opinions of the authors and not the opinions of their employers.***

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**Lockheed Martin Integrated Systems, Inc., ASBCA Nos. 59508-09**

Dec. 20, 2016 | Judge O'Sullivan

*By Michelle D. Coleman | United States Air Force*

Following an audit of LMIS's incurred costs submission, the Army asserted \$116,789,631 in claims for breach of contract relating to Lockheed Martin's ("LMIS") subcontract management. The Armed Services Board of Contract Appeals ("ASBCA") granted LMIS's motion to dismiss all of the Army's claims for failure to state a claim upon which relief can be granted.

**Facts**

In 2003, the Army awarded LMIS an IDIQ contract for contingency operation support services. The IDIQ contemplated time-and-material (T&M) task orders and incorporated the T&M clause (FAR 52.232-7), which required LMIS to provide invoices substantiated by evidence of actual payment, daily timecards, or other documents. Under the clause, the Army would remit payment for supplies and services purchased by LMIS for the contract when: (1) LMIS made payments for supplies or services; or (2) when LMIS would make payments in accordance with the terms and conditions of a subcontract or invoice; and (3) within 30 days of LMIS's request for payment.

The T&M clause also addressed audits. Under the clause, the contracting officer could request an audit of LMIS's invoices and substantiating material. If an amount previously invoiced was not properly paid, the clause permitted the contracting officer to make payment adjustments.

In 2006, the Army awarded a second IDIQ contract with the T&M clause to LMIS. The Army issued numerous task orders under both IDIQs.

In 2014, the Defense Contract Audit Agency ("DCAA") began auditing the allowability of LMIS's incurred costs for task orders under both IDIQ contracts. DCAA focused its audit efforts on LMIS's fiscal year ("FY") 2007 incurred costs. In 2016, DCAA issued audit reports for both contracts. DCAA questioned \$103,272,918 direct costs attributable to LMIS's subcontracts (\$102,294,891 for the 2003 contract, and \$978,026 for the 2006 contract).

The report stated that the questioned amounts were the result of LMIS's failure to comply with a FAR clause not contained in the contract: FAR 42.202, ASSIGNMENT OF CONTRACT ADMINISTRATION. Specifically, DCAA disallowed the costs based on three reasons: (1) there were discrepancies between the prime contractor proposed amount and the amount claimed in subcontractors' reports and memorandums; (2) LMIS had not properly managed its subcontractors and violated FAR 42.202, *viz.*, LMIS allegedly failed to maintain the documents necessary to prove that it reviewed resumes to ensure that subcontractor personnel were properly categorized and the hours invoiced were actually worked; and (3) that FAR 42.202 allegedly required LMIS to act "on behalf of" the Government and serve as the extension of the contracting officer for subcontracts awarded under flexibly priced contracts. DCAA alleged that under this requirement, LMIS had to audit or request audit assistance of its subcontractors incurred cost submission.

LMIS responded to the audit report by explaining that it could not comment on the questioned subcontractor costs because LMIS was not privy to its subcontractor's audit submissions and DCAA considered the data proprietary and refused to release it. LMIS disputed DCAA's characterization that a prime contractor's general responsibility to manage its subcontractors gave rise to an onerous obligation to negotiate access to the subcontractor's specific audit results. LMIS argued that it had vigilantly followed internal controls to ensure that LMIS's invoiced costs were allowable, allocable and reasonable.

LMIS disputed DCAA's argument that FAR 42.202 made LMIS responsible for the contents of its subcontractors incurred cost submission because its responsibility to manage subcontractors related to the subcontractors' cost and performance and not submission of incurred cost proposals. A prime complied by simply flowing-down to subcontractors the requirement to submit incurred cost submissions to DCAA. LMIS noted that neither the FAR nor the DCAA Audit Manual required prime contractors to assume responsibility for subcontractor incurred cost submissions.

In 2014, the contracting officer issued final decisions for each IDIQ contract that mirrored DCAA's allegations. The CO alleged that LMIS breached its contractual duties by failing to properly manage its subcontractors and for noncompliance with FAR 42.202, *i.e.*, failing to review or request DCAA's assistance with auditing its subcontractors incurred cost proposals. The CO also alleged that LMIS breached by invoicing for costs that were unallowable under FAR 31.201-2(a)(4). In addition to the \$103,272,918 that DCAA questioned, the CO tacked on an additional \$13,516,714 disallowance relating to "unresolved costs." LMIS timely appealed both claims.

## **ASBCA Decision**

To decide the motion to dismiss for failure to state a claim, the Board looked to the final decision and the complaint, which the Board had directed the Army to file in support of its affirmative claim.

First, the complaint alleged that \$18M of direct subcontract costs were unallowable based on assist audit reports that it received from 29 subcontractors under the contract. The complaint stated that DCAA questioned those costs based upon its review of the reports, memorandums and rate agreement letters and because in some instances LMIS's proposed amounts did not match the subcontractors' actual amounts. LMIS attacked this portion of the complaint arguing that it could not respond to the complaint because it was vague and devoid of factual or legal basis. The Government countered that under notice pleading, the Government's allegations that LMIS overbilled the Government is enough to overcome the motion to dismiss.

The Board disagreed with the Army, finding that the complaint failed to provide a legal theory and allegations of facts to support the \$18M disallowance. The facts that the Army alleged were conclusory assertions that did not explain the grounds for questioned costs nor explained the discrepancy between the costs LMIS proposed and the subcontractor's actual costs.

Second, the Judge similarly rejected the Army's allegations of breach of FAR 44.202(e)(2) and FAR 31.201-2(a)(4). LMIS argued that the Army did not establish an obligation arising out of the contract because neither FAR 44.202 nor FAR 31.201-2(a)(4) were incorporated into the contract. LMIS cannot breach a duty that is not imposed. LMIS also argued that the Army's damages did not relate to the alleged breach because the Army failed to allege that the services were either unacceptable or not rendered. The Army countered that FAR 44.202 is an "implied duty" and that FAR 31.201-2(a)(4) was implicated because a portion of costs were billed under the "material" portion of the T&M CLIN.

The Board disagreed, finding that the Army's claim and complaint failed to point to a contract term giving rise to the duties it sought to impose on LMIS. The Board determined that FAR 44.202 did not impose any such requirement on prime contractors to review (or submit for DCAA's review) subcontractors' incurred cost submissions, nor to manage subcontractors as intrusively as the Army alleged. The Board noted that there was support for the Army's arguments, just not in FAR 44.202. For example, the Army could have used FAR 52.232-7 to support its argument that LMIS had a duty to review resumes and time sheets to ensure

compliance with contract terms. Because the Army’s breach claim relied on duties that did not exist, the Army’s complaint failed to state claim upon which relief could be granted.

## Conclusion

This case is noteworthy for two reasons: (1) it clarifies the scope of a prime contractor’s duties to manage subcontractors, and (2) it is rare for the Board to dismiss a claim over \$100M at the pleading stage. This decision may assist future COs when seeking to recover costs that were questioned during a DCAA audit. A CO’s claim can better withstand a motion to dismiss if the claim explains the reasons behind the audit findings and ties the questioned costs (and breach) to an actual contract requirement.



### ***ABS Development Corp., ASBCA Nos. 60022 et al.***

Nov. 17, 2016 | Judge McIlmail

*By Malcolm Langlois | United States Air Force*

In this case, the ASBCA held that a typewritten claim certification signature (in handwriting font) did not constitute a CDA-cognizable “signature,” which rendered the certification defective and necessitated dismissal for lack of jurisdiction. The ASBCA also held that the individual certifying a claim only has to have authority to bind the contractor – there is no requirement that the individual be employed by the contractor.

## Facts

In 2010, ABS received a \$27M contract for construction work at a shipyard in Haifa, Israel. The contract specified “[t]his procurement is restricted to United States firms only[.]” ABS was a U.S. subsidiary of an Israeli corporation named Ashtrom Group Ltd. (“Ashtrom”). ABS’s president, Dan Gueron, signed the contract on behalf of ABS. ABS indicated to USACE that all project managers were ABS employees and that any Ashtrom employees would report to the ABS project managers.

In 2015, Ashtrom's Gil Gueron sent an email to the CO, ostensibly on behalf of ABS, claiming \$10M for "the unjustified effective disallowance of a large group ... of third country nationals ... hired by [ABS]." A second email from Ashtrom's Gueron contained another ostensible claim from ABS for \$5M to address "material delays[.]" Both claims included the CDA required certification language. The certifications were signed by Gil Gueron, listed as "Director." The CO did not respond to the claims, which were deemed denied.

In July 2015, ABS presented five additional claims for a total of \$2,741,469. Despite including the correct certification language, the certification "Signature" line contained only typed names. On the first line was the name "Yossi Carmely" in an electronic font that resembled handwriting. The line below contained the same name but printed in Times New Roman font. Yossi Carmely was listed as "Project Manager." These claims were likewise deemed denied.

USACE moved to dismiss the five latter claims for lack of jurisdiction. Specifically, USACE argued that the typed name of Yossi Carmely was not a CDA-cognizable "signature," and thus the claims were essentially uncertified. ABS replied that the typed names were "electronic signatures" that were sufficient to bind ABS under ASBCA precedent. Alternatively, ABS offered to cure any potential defect by re-submitting replacement claims with "wet ink" signatures.

For the first two email claims, USACE argued that Ashtrom's Gil Gueron lacked the authority to certify claims on behalf of ABS because he was not an employee of ABS. In response, ABS provided a declaration from ABS's president, Dan Gueron, stating that Gil Gueron was a Director for ABS who at all times was authorized to bind ABS. ABS submitted Delaware state annual franchise tax reports listing Gil Gueron as one of ABS's Directors.

### **ASBCA Decision**

First, the Board upheld the Government's argument that the five latter claims were not properly certified. The Board reiterated the general rule that an unsigned certification is a defect that cannot be cured. Turning to the specific question of whether typed words in handwriting-font constitute a "signature," the Board cited an earlier decision to explain that a signature is "a discrete, verifiable symbol that is sufficiently distinguishable to authenticate that the certification was issued with the purported author's knowledge and consent or to establish his intent to certify, and, therefore, cannot be easily disavowed by the purported author." *Teknocraft, Inc.*, ASBCA No. 55438, 08-1 BCA ¶ 33,846.

Based on that controlling definition, the Board extended *Teknocraft* and held that “a typewritten name, even one typewritten in Lucida Handwriting font, cannot be authenticated, and, therefore, is not a signature.” The Board further explained that “anyone can type a person’s name; there is no way to tell who did so from the typewriting itself.” Concluding that the typewritten signatures essentially rendered the certifications “unsigned,” the Board dismissed the defectively certified claims for lack of jurisdiction.

Second, the Board rejected the Government’s argument regarding Gil Gueron’s authority to bind ABS on the first two claims. The Board held that FAR 33.207(e) provides only that “[t]he certification may be executed by *any person* authorized to bind the contractor with respect to the claim” (emphasis added). The FAR does not further require that the person also be an “employee” of the contractor.

## Conclusion

This clarifies the rule that typewritten names do not constitute a CDA-cognizable “signature” for the purposes of execution under FAR 33.207(e). The ASBCA clearly distinguishes typewritten words, which cannot be authenticated, from a digital or electronic signature which includes unique characteristics that would allow for some level of authentication.



## ***Agility Defense & Government Services, Inc. v. United States,***

Federal Circuit No. 2016-1068

Feb. 6, 2017 | Judges Moore, Wallach, and Taranto

By Heather M. Mandelkehr | *United States Air Force*

The Federal Circuit reversed the Court of Federal and sided with the contractor in finding that the Government had provided inadequate workload estimates to offerors during the solicitation of an overseas scrap metal disposal contract, despite the Government’s provision of accurate historical workload data during bidding.

## **Facts**

DLA's Defense Reutilization and Marketing Service ("DRMS") is responsible for disposing of surplus military property at Defense Reutilization and Marketing Offices ("DRMOs") after the military departs an area of operations. In 2006, DRMS determined that it could not sustain its workload without outside contractors and sought contract performance of DRMO activities for up to five years.

In the course of the solicitation, DRMS issued amendments relevant to anticipated workload and costs, including reference to a website with DRMS's historical workload at each site by line item (the number of military property items received for processing) and scrap weight (the amount of scrap processed). DRMS also provided a document (Amendment 007 Chart) projecting for scrap sales that it anticipated a stable workload for the first two years of the contract followed by "workload declines" for option years three through five. That amendment also specified that contractors would be entitled to keep all of the scrap proceeds without any reduction in payments. DRMS provided no other information relating to estimates.

Additionally, an amendment to the solicitation added clause H.19, "DRMO Workload Changes," which outlined a process by which the parties could renegotiate the contract price in the event that the contractor experienced an increased workload 150% above the workload it experienced in the previous three months performing under the contract.

Shortly after commencing performance in March 2008, Agility discovered that the workload was substantially higher than predicted at each of the DRMO locations except one. The contract was terminated for convenience in June 2010.

## **Procedural History**

Following the termination, Agility submitted claims for over \$6M in increased costs on the basis that DRMS provided inaccurate or insufficient workload estimates during the solicitation process. The CO denied most of the claimed amount, finding that Agility had not satisfied the requirements of clause H.19 (which had been modified by the parties) and that Agility had received an offset from its scrap sales.

At the trial court, Agility pursued recovery on three theories: (1) constructive change of contract, (2) negligent estimate, and (3) breach of warranty of reasonable accuracy. The Court of Federal Claims denied Agility's claims on the ground that

DRMS's conduct was not negligent because it provided Agility with reasonably available historical data. The court did not reach the issue of any impact that clause H.19 had on Agility's claims, but did reference the revenue that Agility received in its scrap sales to hold that the equities did not weigh in Agility's favor. The Court also held that Agility had pointed to no "specific cause-and-effect links to isolate its damages."

## Discussion

The Federal Circuit reversed. The Court held that the trial court was clearly erroneous in concluding that DRMS did not negligently/inadequately estimate its needs during the solicitation process. First, pursuant to FAR 16.503, the Government is required to provide offerors with a "realistic" *estimate* of workload. The trial court had analyzed the accurate DRMS-provided *historical* data but not the Amendment 007 Chart. The Court found that the Chart constituted an "estimate" because it contained a projection that scrap would first remain stable and then decline. As such, the Court found that the trial court committed clear error by failing to treat the Chart as an estimate.

Second, the Federal Circuit distinguished its ruling in *Medart, Inc. v. Austin*, 967 F.2d 579 (Fed. Cir. 1992) on the ground that DRMS possessed information regarding its anticipated requirements above and beyond its historical requirements – specifically, that DRMS was aware of planned troop movement and a surge of equipment and material that would be turned over to DRMS as units depart. Because DRMS anticipated increased workload, simply providing offerors with historical workload was not "the most current information available" sufficient to provide a realistic estimate under FAR 16.503, and DRMS should have based its estimate on this anticipated surge in workload.

The Federal Circuit also held that the Court of Federal Claims clearly erred in finding that Agility had not pointed to specific cause-and-effect links to isolate its damages, as it was apparent that Agility relied on the scrap projections in Amendment 007, as well as the historical data on DRMS's website, in formulating its proposal.

Additionally, the Federal Circuit concluded that the inclusion of clause H.19 (the clause allowing for the parties to adjust the contract price based on specified changes in actual workload) in Agility's contract did not preclude Agility from recovering on its negligent estimate theory. According to the court, the "limited subject" of the H.19 clause (workload entirely during the performance period of the

contract) is not relevant to Agility's claim, which related to DRMS's pre-contract estimates.

Finally, the Federal Circuit held that Agility's receipt of scrap sales did not mitigate or preclude its recovery on its negligent estimate theory. According to the solicitation and the clear terms of the contract, the only impact that the receipt of scrap sales were to have on the contract were to offset Agility's proposal price, and Agility was entitled to whatever scrap proceeds it obtained regardless of the contract workload.



***Ahtna Environmental Inc., CBCA No. 5456***

Dec. 22, 2016 | Judges Sullivan, Lester, and O'Rourke

*By Rosamond Xiang | Department of Housing and Urban Development*

In a contract involving the Federal Highway Administration ("FHWA"), the CBCA denied the agency's motion for summary judgment and found that the agency's special final payment and release clause did not bar the claim of the contractor, Ahtna Environmental, Inc. ("AEI").

**Background**

The contract was awarded as a small-business set-aside on March 18, 2013, for bridge removal and various construction services at the Denali Park in Alaska. In addition to incorporating FAR 52.232-5 ("Payments under Fixed-Price Construction Contracts" clause, the contract also contained a special final payment clause under Section 109.09 ("Section 109.09" or "Final Payment clause") that provided for the Government to present a final voucher for payment and draft release after an audit of the contractor's cost, unlike the customary practice whereby the contractor usually would present the Government with the final voucher for payment and draft release under FAR 52.232-5(h).

Under this special Final Payment clause, unless the contractor notified FHWA of any potential claims against the Government within 90 days of receiving the final voucher and draft release from FHWA, the release would be deemed to be executed so as to bar future claims.

AEI began performance in April 2013 and completed performance in October 2014. In addition to the primary contracting officer (CO) responsible for overall contract administration, a Construction Operations Engineer (COE) also assisted and held a warrant with authority in matters up to \$150,000. In February 2015, the COE executed a unilateral contract modification that deducted \$48,568.92 to compensate for purportedly non-conforming work. About two months later, AEI submitted a Request for Equitable Adjustment (REA) to challenge the deduction as well as \$25,000 in retainage. In March 2015, FHWA mailed out the draft final voucher and release of claims document but AEI did not receive the package until April 10, 2015. The agency advised in writing that failure to execute and return the voucher and release within 90 days would be deemed to release Government from all claims under the contract.

Instead of returning the release by the 90-day deadline, in June 2015 AEI notified the agency of its refusal to execute the forms and intent to file an REA instead for condition changes and withholding of funds by FHWA, among other grounds. About 10 days later, the CO responded that AEI “was past the time to submit an REA” and reiterated potential forfeiture of claims if AEI failed to execute the voucher and release. However, the letter was never distributed to AEI management despite a signed return by the receptionist.

In December 2015, AEI submitted an REA in the amount of about two million dollars claiming Government-caused changes and delays, and improper assessments of liquidated damages for delays outside of AEI’s control. The COE denied the majority of the REA on the merits and did not indicate that AEI presumably should have released its claims, but agreed that the REA preparation costs might be recoverable. Peculiarly, the FHWA did not issue final payment to AEI until April 26, 2016.

Two days later, AEI submitted a certified claim, converted from the prior REA, to the COE. The COE forwarded the claim to the CO, who explained to AEI that the COE lacked authority to respond to AEI’s December 2015 REA. CO denied the claim on the ground that AEI failed to reserve its right to file a claim within the 90 days as required by the release. In the appeal of the decision, the Government reiterated the argument that AEI’s failure to reserve specific claims amounted to affirmative release of all claims. The CO denied AEI’s entire claim because of the effect of the release and also denied the REA preparation cost for lack of sufficient information.

## CBCA Decision

As a threshold matter, CBCA addressed the purpose of the Final Payment clause under Section 109.09. While the Board acknowledged that parties under the CDA could contractually agree to a term limiting a contractor's right to bring claims to a period less than the statutory six-year period, CBCA found that the Final Payment clause is a de facto waiver of the contractor's ability to maintain claims and not enforceable because the time limit for reserving claims is shorter than the statute of limitations. (The Board also suggested in dicta the "deemed executed and delivered" release language of the Final Payment clause might be inconsistent with the "presentation" requirement of FAR 52.232-5 and therefore "is typically unenforceable.")

Turning to the merits, CBCA addressed the effectiveness of AEI's purported waiver of claims through the following: 1) whether the purported release covered AEI's claim; 2) whether the failure to execute and return the lease barred AEI's claim; and 3) whether the Government's continuing consideration of the REA/claim belied that the claim was still active.

First, the CBCA found that, even absent strict compliance with the final payment clause, AEI's written notice to the agency was adequate notice informing the agency of AEI's intent to reserve claims and the Government suffered no prejudice from AEI's failure to list its reserved claims on the final payment voucher. To insist on notice strictly through the standard form, CBCA noted, would elevate form over substance and overlook the FHWA's "actual knowledge of AEI's anticipated claims."

Second, the CBCA found that AEI's failure to return the executed release and attempt to extend the time limit did not bar its claim. The CBCA rejected FHWA's argument in reliance of *Mingus Constructors v. United States*, 812 F.2d 1387 (Fed. Cir. 1987), that AEI's attempt to reserve its claim in June 2015 would because it failed to specify the dollar amounts of potential claims. The CBCA distinguished the instant case from *Mingus* in that unlike Mingus Constructors, AEI did not sign or present a release to the FHWA and sought to negotiate time with the FHWA before submitting a final claim. Since AEI had not even submitted a progress payment request for much of its work, the CBCA concluded that it would be unreasonable for FHWA to unilaterally start the clock on final payment and release when the full scope of anticipated claims was yet to be ascertained.

Lastly, the CBCA found that FHWA's continuing consideration of AEI's REA (and eventual claim), even after the "deemed" execution of the release, suggested

that the claim was not barred. This was especially true when the COE considered the AEI's December 2015 REI without mentioning the effect of the release. Even though the COE lacked sufficient authority to consider the REA and the CO, so argued the agency, was not aware that the contractor in question was AEI, the CBCA charged the supervising CO with contemporaneous knowledge of such events and found the CO's failure to "connect the dots" was no defense to the agency's continual consideration of the claim.

For the foregoing reasons, the CBCA denied the Government's motion for summary judgment.



***A-T Solutions, Inc.***, ASBCA No. 59338

Feb. 9, 2017 | Judge O'Sullivan

*By Kristine R. Hoffman | U.S. Army Corps of Engineers*

On a matter of first impression, the Board sided with the contractor in interpreting FAR 31.205-26 and permitting the contractor to recover commercial catalog prices (rather than merely costs) for interorganizational transfers of training equipment under an Army contract. The Board determined that the Government failed to carry its burden of proof to justify disallowance under FAR 31.205-26(e).

**Background**

In 2009, The U.S. Army awarded a contract to A-T Solutions, Inc. ("ATS") to provide professional training services and materials to train on improvised explosive devices. Performance was to take place both within the U.S. and overseas. The cost-plus-fixed-fee ("CPFF") contract was awarded for a base year and up to four option years.

ATS held the prior contracts (awarded in 2007 and 2008) with the Army for these services and training materials. The 2007 contract was awarded sole source as a firm-fixed-price contract; the 2008 contract was competitively awarded pursuant to the GSA schedule. Under both of these contracts, ATS provided the training materials and equipment as commercial items and was paid for them at its catalog prices.

In ATS's 2009 proposal, the narrative portion of its cost/price section spelled out assumptions upon which its proposal was based. With respect to training materials and equipment, ATS indicated that it is a manufacturer, distributor, and supplier of training products to a wide variety of customers. ATS further indicated that training materials and equipment listed in the proposal are priced at the ATS commercial catalog price per FAR 52.215-21(a)(ii)(2)(B) and FAR 31.205-26. ATS provided a complete set of product catalogs with their proposal.

At a kick off meeting following award of the contract, ATS received Government approval to invoice for the training materials and equipment separately from the training services. ATS invoiced for the training materials and equipment at catalog prices and the Government paid the invoices in full.

### **DCAA Audit**

In 2010, DCAA reviewed and approved ATS's labor costs and then requested to review ATS's material costs. ATS's position was that it need not provide cost information for items that had been proposed and accepted at price. Because the Army deferred to DCAA, ATS suspended its billing for the training materials and equipment in February 2010, while continuing to provide all required services and equipment. ATS resumed billing for training aids and devices at direct material cost in September 2010. In mid-2013, ATS began billing for delivered training materials at fully burdened cost.

DCAA finalized and issued its audit report on 7 July 2011 and concluded that ATS's accounting system was inadequate for accumulating and billing costs under Government contracts. DCAA determined that the contractor was not billing material at cost as required under a cost reimbursable contract and recommended the Government pursue suspension of a percentage of reimbursement of costs in accordance with DFARS 242.7502.

### **ATS's Argument**

ATS argued that the Government agreed to pay commercial item catalog prices for its training materials by accepting its offer to provide those items at its catalog prices and incorporating its proposal into the contract. ATS further asserted its material billings were in accordance with FAR 31.205-26(e), which allows for material costs to be billed at price when costs are transferred and recorded between company segments at price. When a sale is made, ATS asserts that their Training division orders the materials from their Logistics and Production division which then transfers the items at catalogue price.

## **Government Argument**

The Government presented no testimony or other evidence regarding whether the Government agreed to pay ATS's commercial prices for its training materials, but contended that ATS cannot be paid for its training materials at its commercial catalog prices because the solicitation and resulting contract were unambiguously cost-plus-fixed-fee (CPFF) and ATS submitted a CPFF proposal. Therefore, the Government had to pay ATS for its training materials at cost – unless ATS met the requirements of FAR 31.205-26(e) for billing at price.

The Government argued that ATS failed to meet those requirements because (1) its interdivisional transfers of training materials were mere physical transfers lacking economic substance and thus did not qualify as interorganizational transfers under FAR 31.205-26(e), or (2) even if the transfers qualified as interorganizational transfers under FAR 31.205-26(e), the transfers were recorded at cost, not price.

## **ASBCA Decision**

The Board rejected the Government's assertion that FAR 31.205-26 requires that the transfers in question have economic substance. The Government failed to establish the existence of such a requirement or to suggest how a court or Board could tell if such a requirement had been met in a particular case.

The Board determined that ATS witnesses testified credibly about the transfer of assets from one division to another at price, and that the training materials never left the Logistics and Production division at anything other than commercial catalog price, whether on a direct sale to a customer or as part of a sale of training service. The Board pointed out that the Government relied on a negative – what ATS's 2007-2008 accounting records do not show. The Board categorized those records as the product of an unsophisticated small business accounting software application which did not provide visibility into transactions at the divisional level. ATS began using a more sophisticated accounting software in January 2009 which provided visibility into transactions at the business unit level, but could not convince DCAA to review these records. The Board found great weight in the fact that training materials never left the Logistics and Production division at anything other than price and that there were valid business reasons for crediting that division with a sale at commercial price whether the transaction was external or internal.

## Conclusion

The Board found that ATS's training materials were transferred between ATS divisions within the meaning of the cost principle and that the transfers were recorded by the transferring division at price, thus satisfying FAR 31.205-26(e). The Government did not meet its burden of proof to justify the disallowance.



### ***Attenuation Environmental Co., CBCA Nos. 4920, 5093***

October 13, 2016 | Judge Richard C. Walters

*By: Libbi J. Finelsen | United States Air Force*

Attenuation Environmental Company ("AEC") filed two appeals related to its environmental consultant services contract. The Nuclear Regulatory Commission ("NRC") successfully moved to dismiss the first because AEC filed the appeal before providing its claim certification. The Board denied the second appeal, which sought lost profits in connection with NRC's failure to exercise an option.

## Procedural History

In 2010, the NRC awarded an IDIQ contract for technical assistance in developing environmental and safety documents to AEC. The contract, which included the option clause at FAR 52.217-9, had an initial one year term and two one-year options. The NRC exercised the first option, but never exercised the second option. NRC thereafter acquired these services from other vendors.

In 2015, AEC filed a claim seeking \$652,199 in lost profits plus legal fees and interest, but inadvertently neglected to include the signed certification. After appealing from a deemed denial, AEC forwarded the missing certification to the CO. Subsequently, the CO issued a final decision denying the claim. AEC then appealed the final decision to the CBCA.

## Claim Certification Required for CDA Jurisdiction

The Board stated that it lacked jurisdiction over the first (deemed denied) appeal because AEC's initial claim was not certified as required by the Contract Disputes Act. Thus, the appeal was dismissed.

## Option Exercise under IDIQ Contracts

Regarding the subsequent appeal, AEC advanced four arguments in support of its claim for lost profits arising out of the Government's non-exercise of the second option year. The Board denied the appeal because the contract was an IDIQ contract and, as such, the Government is free to purchase additional supplies or services from any source once it purchases the contract's minimum quantity. The guaranteed minimum under the AEC contract was \$500,000. NRC paid AEC over \$1.5M for the work performed for the three task orders issued under the contract. Therefore, NRC satisfied its legal obligations and was free to not exercise the option and obtain services from other vendors.

The Board then proceeded to reject each of AEC's theories for recovery. After dispensing with the first three allegations (abuse of CO discretion, equitable estoppel, and bad faith), the Board held that NRC failure to perform an analysis before determining not to exercise the second option did not violate the implied duty of good faith and fair dealing. The Board clarified that a contractor has no relief for an agency's non-exercise of an option absent a showing of bad faith or abuse of discretion. As a result, there was no violation of the NRC's duties under the contract.



### ***Avant Assessment, LLC***, ASBCA No. 58866

Sept. 28, 2016 | Judge McIlmail

*By Locke Bell | Morrison & Foerster LLP*

No good deed goes unpunished, or at least so some Army contracting personnel must have thought after the Board's recent decision and its 2015 predecessor (ASBCA No. 58867, 15-1 BCA ¶ 36,067). In both cases, on separate contracts, the Army and Avant executed a modification providing that "any items that are still required by the contract but not accepted by the Government shall automatically be descoped from the contract." And in both cases, the Board interpreted this language to allow Avant to deliver however many items that it wished, acceptable or unacceptable on inspection, without recourse of default.

The Board's recent decision sets forth limited facts. In 2011, Avant and the Army entered into a contract for the development and delivery of 1,300 foreign-language test items. A year later, the parties executed Modification No. P00003 to

the contract, which included the language quoted above. Then, another year later, the Government terminated Avant's contract for default when Avant failed to deliver 1,300 acceptable foreign-language test items.

Looking to its previous decision in the 2015 decision, the ASBCA quickly granted summary judgement to Avant and converted the default termination into one for convenience. The Board held that, in both cases, the "descoping" language in the modifications "reduced the number of acceptable items that the contract required that Avant deliver from [the number stated in the contract] to however many acceptable items the Government determined Avant had ultimately delivered." Accordingly, the Government no longer could terminate the contract for default on the ground that Avant failed to deliver "the requisite number" of acceptable test items.

In a departure from the 2015 case, the Government in the recent case attempted to justify its termination for default on the additional ground that Avant allegedly failed to adhere to a delivery schedule identified in Modification P00003. Yet, the Government could not identify any such schedule or submit any specific evidence to support its contention. The Board pointed out that some of the Government's arguments suggested even that the Government currently did not have evidence Avant failed to meet a delivery schedule – evidence the Board felt the Government should be able to substantiate on its own.

The *Avant Assessment* decisions serve as a reminder that the plain reading of contract language matters, even if the language is tucked into one modification of many that may be regularly issued throughout performance.



***Bryant Commercial Postal, LLC***, PSBCA No. 6633

Sept. 9, 2016 | Judges Shapiro, Pontzer, and Mego

*By Cara L. Lasley | Wiley Rein LLP*

The Postal Service Board of Contract Appeals ("PSBCA") sustained the appeal and held that the Postal Service's exclusive possession of a building required it to perform routine maintenance and remediate any vandalism.

## **Facts**

Bryant Commercial Postal, LLC (“Bryant”) leased the Buechel Station Post Office in Louisville, Kentucky to the Postal Service for twenty years. The lease included a Maintenance Rider, which provided that the lessor shall, except for damage resulting from the negligence of the Postal Service, maintain the premises in “good repair and tenantable condition.” The Rider also provided that the lessor would repaint the interior and exterior at least once every five years any at any other time that painting was necessary as a result of fire or other casualty.

On June 16, 2011, the Postal Service vacated the Buechel station, but the Postal Service kept the keys and has continued to pay rent. After the Postal Service left, homeless people regularly slept outside the property, leaving trash. After the trash accumulated and graffiti was painted on the building, Bryant requested that the Postal Service remove the trash and the graffiti. The Postal Service refused to remove the trash and graffiti, so Bryant paid to do so and submitted a claim with the contracting officer. The contracting officer denied the claim, concluding that the Maintenance Rider required Bryant to paint to cover the graffiti. The contracting officer’s final decision did not address the trash removal.

Bryant appealed the final decision, arguing that its contractual responsibility to paint did not require it to paint areas that were not intended to be painted, such as the brick upon which the graffiti was painted. Bryant also argued that the Postal Service was required to keep the property secure after vacating, and allowing homeless people on the property constituted negligence within the meaning of the Maintenance Rider, and thus Bryant was not responsible for the costs.

## **PSBCA Decision**

The PSBCA granted Bryant’s appeal, finding that the Postal Service was responsible for removing the trash and the graffiti. While the lease did not specifically allocate responsibility for trash removal or for the costs of damage from vandalism, the lease contemplated exclusive possession by the Postal Service. Because the Postal Service had exclusive possession, it was responsible for routine housekeeping functions, such as trash removal. Had the Postal Service removed trash consistent with its responsibilities, the trash would not have accumulated. Thus, the PSBCA found that the Postal Service was liable for the trash removal.

The PSBCA also held that the Postal Service was liable for the graffiti removal. In doing so, the PSBCA relied on precedent in which it has held that cosmetic repairs are outside the lessor’s normal maintenance obligations. Further,

because the Postal Service did not take any security precautions after it vacated the premises, its actions increased the likelihood of graffiti. The PSBCA also found that removal of the graffiti was not covered by the Maintenance Rider because the graffiti was on surfaces that would not have been covered by the painting obligation. Therefore, the Postal Service was liable for the costs of covering the graffiti.



**Colonna's Shipyard, Inc., ASBCA Nos. 59987 *et al.***  
**October 6, 2016 | Judge D'Alessandris**  
*By Cara L. Lasley | Wiley Rein LLP*

In this case, the ASBCA held that it had jurisdiction to hear claims related to inaccurate CPARs. In doing so, the Board identified the boundaries of its jurisdiction: the Board has jurisdiction to hear claims involving disputes with CPAR ratings, but does not have jurisdiction to hear such claims to the extent that they request an injunction, are based on a constructive debarment, or are stand-alone constitutional claims.

### **Facts**

Colonna's Shipyard, Inc. ("Colonna") was awarded a contract to dry dock and repair the U.S Navy Dry Dock *Dynamic* and the berthing barge. After the contract was completed, the Navy issued a Contractor Performance Assessment Report ("CPAR") that assigned Colonna unsatisfactory ratings. Colonna objected to the ratings because it believed the CPAR contained numerous errors. The Navy amended the CPAR, but it still contained factual errors. Colonna filed a claim with the contracting officer and requested that the contracting officer withdraw the CPAR and file a CPAR that contained correct information. The Navy again amended the CPAR, repeating the same factual errors. Colonna submitted a second claim to the Navy, essentially repeating its earlier claim.

Colonna appealed the deemed denial of its claims. Colonna's complaint contained six counts. Count one alleged a due process violation in the preparation of the CPAR because it did not have the opportunity to hear and respond to the negative comments. Count two argued that the Navy failed to meet the ASBCA standard for processing a CPAR. Count three argued breach of contract. Count

four alleged that the contracting officer improperly delegated his obligation to issue a proper CPAR to an unqualified subordinate. Count five contained a request to have all CPAR information stricken for the contract. In counts two through five, Colonna requested that the CPARs be vacated from the Navy's past performance evaluation system and a new CPAR be issued that reflected accurate facts. Count six sought EAJA fees. The Board dismissed count six as premature.

Colonna filed a motion for partial summary judgment, seeking summary judgment on the Board's jurisdiction over the dispute. Colonna also requested summary judgment that the Navy must undertake efforts to issue a factually correct CPAR. The Navy moved to dismiss. According to the Navy, count one should be dismissed because the Board does not have jurisdiction to hear constitutional claims or claims of constructive debarment. The Navy also asserted that counts two through five should be dismissed because the Board lacks jurisdiction to grant the specific performance and injunctive relief requested.

### **ASBCA Decision**

The Board first addressed the Navy's arguments that counts two through five should be dismissed because they requested specific performance that was not within the jurisdiction of the Board. The Board first recognized that these counts – which generally alleged that the CPAR was not performed in accordance with the terms of the contract – stated a claim within the meaning of the Contract Disputes Act ("CDA"). Because "a performance evaluation relates to performance under the contract," Colonna's disagreement with the CPAR constituted a claim within the CDA jurisdiction of the Board.

The Board then turned to the Navy's argument that Colonna was requesting specific performance. Acknowledging that a request for specific performance was not within the jurisdiction of the Board, the Board denied the Navy's request for dismissal because Colonna was not asking the Board to direct the Navy to include any specific language in the CPAR, and thus was not seeking specific performance. The Board did, however, strike language from the complaint that could be read to request specific performance, such as "be ordered to" from "the Contracting Officer should be ordered to issue a new CPAR that is fair and accurate."

The Board also struck count five in its entirety, which had requested that "all CPAR information now and in the future relating to this contract should be stricken and not exist in any Navy record." The Board held that such language could not be construed as anything other than a request for injunctive relief.

The Board then turned to count one, in which Colonna alleged that its due process was violated in the preparation of the CPAR. The Board granted the motion to dismiss, finding that the claim was a constitutional claim and a claim for constructive debarment, neither of which was within the Board's jurisdiction. Although Colonna argued that it was not seeking relief based solely on a constitutional violation, but rather was asserting that the CPAR's procedural deficiency resulted in a constitutional violation, the Board held that the plain language of the claim made clear that it was a constitutional claim. Further, because Colonna argued that the CPAR was "clearly designed to bar Colonna's from future Government contracts," Colonna was seeking review of a constructive debarment. Accordingly, the Board dismissed count one.

Finally, the Board turned to Colonna's motion for summary judgment. Because the Board had already found that it had jurisdiction, it denied Colonna's request for summary judgment on the issue of jurisdiction as moot. The Board also denied Colonna's motion for summary judgment that the Navy must undertake efforts to issue a factually correct CPAR because there are genuine disputes as to the material facts. As support for its motion for summary judgment, Colonna asserted that the Navy committed procedural errors in issuing the CPARs and that the CPARs continued factual errors pertaining to, among other things, the period of performance, the value of the contract, and Colonna's technical performance. Colonna, however, did not support any of its factual allegations with citations to the record or additional evidence. Colonna's failure to support its allegations, combined with the Navy's disputes with the facts that were supported by a declaration, led the Board to find that there were genuine disputes of material facts. Thus, the ASBCA denied Colonna's motion for partial summary judgment.



***HCS, Inc.***, ASBCA No. 60533

April 6, 2016 | Judge Hartman

*By Benjamin Kohr, Esq. | Sikorsky Aircraft Corporation*

In a case that will likely be well-received by Government contractors, the Armed Services Board of Contract Appeals ("ASBCA") recently affirmed that, although the Government may unilaterally reduce a contractor's price due to a reduction in work scope, the burden to demonstrate the adequacy of the reduction rests squarely on the Government. As the Board held: "We are aware of no

authority allowing the Navy to delete work from a contract after work performance and then refuse to pay for the work initially specified and performed, and the Navy cites us no legal authority for such action[.]”

## **Facts**

The underlying facts of the case began in July 2015, when the Navy requested quotes from small businesses to “isolate, drain, excavate . . . selectively demolish, and remove up to three twenty foot” section of 8” diameter steel water line located along “Avenue C” at Naval Air Station Corpus Christi. The impetus for the work was a leak that was believed to be caused by the identified 8” pipes. On September 3, 2015, the Navy awarded a contract for the pipeline repair work to HCS, Inc. (HCS), a small business located in Waco, Texas.

Upon beginning work in December, HCS isolated, drained, and excavated the identified section of pipe and discovered a separate 4” pipe that intersected the 8” pipe in a joint near the leak. Based upon the lack of a leak in the 8” pipe, HCS excavated a ten foot section of the 4” pipe and discovered a leak in that line. HCS notified the Contracting Officer that the leak was occurring in a different pipe and sought direction. The Contracting Officer, after consultation with the Navy’s field engineering representative, instructed HCS to “cap” the 4” pipe line between its intersection with the 8” line and the leak to resolve the issue. HCS completed the remained of the work specified in the original Statement of Work and capped the 4” pipe, which the Navy subsequently pressure tested and accepted the repairs.

After completion of the work, the Contracting Officer unilaterally adjusted the statement of work to remove all reference to work on the 8” pipe and requested an equitable adjustment from HCS to reflect the adjusted scope. The Contracting Officer further requested that HCS provide a detailed cost break-down to support its proposed credit. HCS responded that its contract was firm-fixed price and thus the Government was only entitled to costs related to the “extra work” performed. The Contracting Officer subsequently issued a unilateral modification decreasing the funded amount by over 50%. The Navy rejected HCS’s resulting claim and HCS appealed.

## **ASBCA Decision**

On appeal, the Navy argued that the reduced price reflected its estimate of the work actually performed and that HCS failed to provide any supporting documentation to justify its claim for the original price. The ASBCA noted that FAR 52.242-1, Changes, does require the price to be adjusted downward due to a

decrease in the scope of work performed; however, “[t]he Government has the burden of proving the amount of cost savings due to deletion of work.” As a consequence, a contractor “is entitled to receive its contract price, unless the Government demonstrates the Government is entitled to a price reduction for deleted work.”

Here, HCS performed all of the requirements of the initial statement of work (isolate, drain, excavate and “selectively demolish . . . as necessary” the 8” pipe), except the installation of a part to stop the leak on the 8” pipe, and the Navy did not challenge the reasonableness of any of the dollar amounts presented by HCS. Thus, the Navy failed to meet its burden of demonstrating an entitlement to a price reduction and therefore had no justification to “delete work from [the] contract after work performance and then refuse to pay for the work initially specified and performed.” It is also worth noting that HCS did not submit a request for equitable adjustment to compensate it for the additional costs incurred performing the repairs on the 4” pipe but the Board strongly implied that HCS may be entitled to such amounts if claimed.



***K-Con, Inc.***, ASBCA Nos. 60686, 60687

Jan. 12, 2017 | Judge Woodrow

*By Rosamond Xiang | Department of Housing and Urban Development*

In *K-Con, Inc.*, the ASBCA held that performance and payment bonding requirements, even when omitted from the solicitation, are included as a matter of law under the *Christian* doctrine.

**Facts**

The dispute involved two Army construction contracts for construction of laundry facilities and a communications equipment shelter. When issuing the solicitations, the contracting officer mistakenly used the solicitation form for commercial items/services SF-1449, which lacked the contract clauses for payment and performance bonding.

Before K-Con, Inc. (K-Con) began performance on October 10, 2013, the Army requested that K-Con obtain payment and performance bonding. After protracted

negotiations with the Army, K-Con finally obtained the bonding and began performance in 2015. As a result of the two-year delay, K-Con incurred extra costs in labor and materials. K-Con sought two REAs under the contracts, totaling \$116,336.56, on the basis that the solicitation did not require payment and performance bonding and K-Con incurred the extra costs solely because of the Army's insistence on obtaining bonding. The Army rejected the REAs under the theory that bonding is a requirement by law even absent explicit provision in the contract.

### ASBCA Decision

The ASBCA found that the FAR's bonding provisions satisfied the two requirements of the *Christian* doctrine. Under the *Christian* doctrine, a mandatory contract clause that "expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law." *G.L. Christian & Associates v. United States*, 320 F.2d 345 (Ct. Cl. 1963). The ASBCA addressed the two familiar requirements for applying the *Christian* doctrine: (1) the contract clause must be "mandatory," and (2) must represent a "significant public procurement policy."

First, the ASBCA ruled that FAR 52.228-15 for performance and payment bonding is a "mandatory" clause required by FAR 28.102-1 for all construction contracts exceeding \$150,000. FAR 28.102-1 in turn implements the requirements of the Miller Act (40 U.S.C. §§ 3131-34). The ASBCA concluded that FAR 28.106-4 does not render the Miller Act inapplicable to construction contracts, even if they were solicited as commercial items contracts.

Second, the ASBCA found that the bonding requirement was a "significant component of public procurement policy." The ASBCA specifically noted the policy purpose of the payment bond to protect the subcontractor from the risk of non-payment by the prime, since the remedy of a mechanic's lien would be unavailable on federal contracts. As to the performance bond, the ASBCA noted the protection such a bond provides against performance risks or default by the prime contractor, so as to "assure that the Government has a completed project for the agreed contract price." For the foregoing reasons, the ASBCA denied K-Con's appeal.

## King Aerospace, Inc., ASBCA No. 57057

July 26, 2016 | Judge McIlmail

By Todd M. Garland | Smith Pachter McWhorter

The ASBCA sustained a contractor's claim for repair and maintenance costs where the Government misrepresented the condition of aircraft the contractor was required to maintain. The Board also sustained the contractor's appeal of a final decision denying its claim for failure to deliver Government furnished property.

### *Facts*

The U.S. Army Aviation & Missile Command ("Government") awarded King Aerospace, Inc. ("King") a fixed-priced contract to maintain a fleet of aircraft. The request for proposal provided that "[t]he Government will provide access to the aircraft records and will allow inspection of each aircraft to the offeror's [sic] planning to submit a proposal." Before offerors submitted bids, the Government conducted an "industry day" tour. The Government, however, only permitted attendees to review one aircraft, *i.e.*, "the trainer" aircraft. The Government also limited the review to "a 15-minute walk around [of] that aircraft," during which offerors were prohibited from opening the trainer's access panels or boarding the trainer. With respect to maintenance and other records, the Government limited the available records to records for the trainer aircraft -- and only permitted attendees to review the records for two hours, "which was not enough time for King to determine the trainer's condition."

In the contract, the Government represented that the aircraft had been maintained "to FAA standards," specifically stating the aircraft were maintained in accordance with Federal Aviation Administration ("FAA") regulation Part 91, Part 43, and Part 145.

When King began performance, it discovered "conditions reflecting that the aircraft had not been properly maintained, causing King to have to perform unexpected work." "In addition, when King began performance, it was not provided all the aircraft records and drawings, in part because the Government did not possess all those records and drawings. King had to spend time in the effort to acquire such drawings and information required to assure the airworthiness of individual aircraft."

King submitted a claim asserting that its bid would have been "grossly higher" had King known the aircraft's actual condition before bidding. King alleged the predecessor contractor "had left the fleet in a defective maintenance condition."

According to King, the Government failed to disclose “known conditions of the aircraft,” leading King to believe the aircraft had been properly maintained -- and King had “a reasonable right to assume the aircraft had been maintained up to the standard required by the request for proposals.”

King’s claim also sought additional compensation because the Government failed to deliver Government furnished property (“GFP”). During the bid phase, the Government stated that GFP would be at “stock levels” and “in serviceable condition.” When King began to perform, however, the promised GFP was missing or being repaired off site.

### **ASBCA Decision**

The Board sustained King’s appeal based on the Government’s misrepresentations, holding King was “entitled to additional compensation because the condition of the aircraft when King commenced contract performance was inferior to that represented in the contract.” To prevail on a claim for misrepresentation in a Government contract, “the contractor must show that the Government made an erroneous representation of a material fact that the contractor honestly and reasonably relied on to the contractor’s detriment.” King met this test.

According to the Board, the contract misrepresented the aircraft’s condition, specifically that the aircraft had been maintained according to FAA regulations. Although the contract did not directly incorporate language from the FAA regulations, the Board reviewed the regulations, including “Part 43, which governs aircraft maintenance, preventative maintenance, rebuilding, and alteration.” Based on language in the FAA regulations, the Board interpreted King’s contract to include “a representation that work on the aircraft was completed in accordance with accepted industry practices, and that the condition of the aircraft and its components was at least equal to its original or properly altered condition.” Contrary to that representation, when King began to perform, it discovered that the fleet was not maintained in accordance with accepted industry practices, nor were the aircraft in an original or properly altered condition.

The Board also found that the misrepresentations were material. Statements that aircraft were maintained according to FAA regulations “would have been likely to induce a reasonable person to manifest his assent to take over the responsibility of maintaining and repairing that aircraft.” In addition, King relied on the reference to the FAA regulation and King’s “bid would have been higher if King had known the actual, substandard condition of the aircraft before bidding.” The Board

found that King's reliance to be reasonable because there was no other representation to contradict the representation that the aircraft had been maintained according to FAA regulations.

King was damaged by the misrepresentations in the form of repairs and maintenance King performed on aircraft that were in substandard condition. The Board held: "[U]pon taking over, King was left holding a bag of maintenance and repair issues that were inconsistent with the aircraft condition represented in the contract. Therefore, we find that King is entitled to compensation for having to deal with those issues . . . ."

Additionally, King was entitled to an equitable adjustment due to unavailable and unserviceable GFP. "When King took over . . . , the aircraft drawings and historical records were incomplete, and King spent time attempting to acquire drawings and other information required to assure the airworthiness of the aircraft. Because that effort entailed costs, King is entitled to additional compensation." King also incurred costs to "redo' maintenance or repair work that it would have had to perform only once if all the listed items had been available and serviceable when King first attempted to perform the work."

The Board rejected two additional bases under which King sought to recover. First, King asserted that the Government negligently underestimated the number of mechanics required to maintain each aircraft. The ASBCA lacked jurisdiction over the claim, which King failed to present to the contracting officer. Second, King asserted the Government made "excessive" changes to flight schedules and hindered King's performance by excluding King from flight scheduling meetings. The ASBCA denied this claim because the contract lacked any requirement to include King in the flight scheduling process.



### **Military Aircraft Parts, ASBCA No. 60699**

Nov. 17, 2016 | Judge Paul

*By Malcolm Langlois | United States Air Force*

In this case, the ASBCA denied Military Aircraft Parts' claim on summary judgment, holding that DLA had established both affirmative defenses of release of claims and accord and satisfaction.

## Facts

In 2011, Military Aircraft Parts (“MAP”) obtained an FFP contract to produce two first article test samples of aircraft “stringers” (structural components). The contract required the test samples to be delivered by December 2011. However, MAP did not submit the first articles until June 2012. Later in 2012, the Government rejected the articles due to deviations from the contract’s requirements.

In February 2013, MAP disputed the deviations and asked the Government to grant conditional approval for continued work. The Government then sent the contractor a show cause notice. A few months later the Government sent a second show cause notice and rebutted MAP’s February letter.

In September 2013, the parties agreed on a no-cost cancellation of the contract and executed a bilateral modification to memorialize the agreement. The modification stated:

(a) This supplemental agreement modifies the contract/order to reflect a no-cost settlement agreement with respect to Contractor's email, dated 6 SEP 2013.

(b) The parties agree as follows: The Contractor unconditionally waives any charges against the Government because of the cancellation of the contract/order and releases it from all obligations under the contract/order due to its cancellation. The Government agrees that all obligations under the contract/order are concluded.

In 2016 – 2.5 years after the cancellation – MAP submitted a claim for the full contract value. The Contracting Officer denied the claim in its entirety, responding that MAP already released all claims – and/or extinguished its disputes via accord and satisfaction – as memorialized in the bilateral modification.

## ASBCA Decision

The Board reaffirmed that release and accord and satisfaction are two separate affirmative defenses, but stated a single document such as a contractual modification may satisfy the requirements of both doctrines.

The language of the modification was found to be “clear and unambiguous” and the unconditional waiver of any charges against the Government, included in

the cancellation of the contract, released the Government from all obligations under the contract.

The Board reiterated the standards for accord and satisfaction by indicating “the Government must demonstrate: proper subject matter, competent parties, a meeting of the minds, and consideration.” *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965). The Board found the plain language of the modification satisfied all the elements.

With determinations that the plain language of the modification met the requirements of both of the affirmative defenses, the Board found that summary judgment was appropriate and denied the claim.

## Conclusion

Because this single contract modification sufficiently established multiple affirmative defenses, contracting professionals may refer to this language to insulate future bilateral terminations from subsequent claims.



### ***Perry Bartsch Jr. Construction Co.***, CBCA Nos. 4865, 5071

Dec. 8, 2016 | Judge O’Rourke

*By Hellia Kanzi | Deloitte Advisory*

The CBCA denied the Government’s summary judgment motion where it was not plainly evident that a modification’s release language created a clear and unambiguous release of all claims. In combination with the case digest immediately above, this case offers valuable guidance in understanding the scope of a release and when release language can constitute accord and satisfaction of a claim.

## **Contract Performance and Modifications**

In March 2010, the National Park Service awarded Perry Bartsch Construction Co. (“Bartsch”) a \$4.4 million contract to renovate the visitor center complex at Mammoth Cave National Park in Kentucky. Renovation consisted of selective demolition, alteration of the original visitor center, and the extension of new building systems. The completion date was September 20, 2011.

Bartsch encountered numerous problems during renovation, including asbestos and lead paint abatement and soil replacement. Multiple change orders were issued by the Contracting Officer in the course of performance reflecting \$1.3 million in additional work. The agency later incorporated these changes into the contract by executing 15 modifications. Six of those modifications were bilateral and contained standard, general language releasing “any and all claims or demands whatsoever arising out of or from this [m]odification.” These six modifications also reserved the contractor’s right to seek potential time impact damages.

Modification 0014, however, contained the following, far more expansive, release language:

[T]he contractor hereby remises, releases, and forever discharges the United States, its officers, agents, and employees, of and from all manner of debts, dues, liabilities, obligations, accounts, claims and demands whatsoever, in law and in equity, under or by virtue of said contract with no exceptions.

The first page of Modification 0014 described its purpose as incorporating settlement agreements and various changes to the scope of work and providing an extension to the contract completion date. It contained four separate lists of changes with only Category B referencing changes stemming from a “global settlement.”

Following contract completion, the contractor filed a certified claim alleging various changes and Government-caused delay. The CO denied all claims on the theory of accord and satisfaction. Bartsch appealed.

### **CBCA Decision**

The National Park Service filed a motion for summary relief on the basis of release and accord and satisfaction, alleging that Modification 0014 contained a global release of all claims, including any time impact claims previously reserved. The Motion reasoned that both parties intended for the negotiation and execution of Modification 0014 to settle all contract issues and release the Government from any claims. It relied on the “Global Settlement” title of Category B to support its position.

The contractor argued that the release in Modification 0014 was ambiguous and that there was no “meeting of the minds” regarding its global nature. Bartsch furthered argued that the release in Modification 0014 was contemplated to occur in

the future, subsequent to contract completion, and that no discussions were held regarding the release of potential time impact claims.

The Board, distinguishing the case from *Bell BCI Co. v. United States*, analyzed the release language and found it ambiguous for three reasons:

- First, the “whereas . . . now therefore” language in Modification 0014 presented an ambiguity where it suggested substantial completion when, in fact, performance continued subsequent to its execution.
- Second, the release referenced a departmental Release of Claims contract clause requiring the contractor to submit a separate, final release of all claims after contract completion.
- A third ambiguity existed where the record reflected numerous exceptions to previous releases taken by Bartsch and its intention to claim additional time in the future.

The Board reasoned that a “clear and manifest intent to waive these claims [was] not evident in the release, particularly when [Modification 0014 was] tied to forty-four pages of unrelated technical changes and [made] no mention of the earlier exceptions.”

After finding that the intent of Modification 0014’s release language was not plainly evident, the Board considered extrinsic evidence in an attempt to ascertain its meaning and confirm a meeting of the minds. It examined Modification 0014’s supporting documentation and the Contracting Officer’s memorandum describing its purpose and scope. The extrinsic evidence lacked any meaningful mention of a global settlement, causing the Board to have “doubts about the global nature of the release – doubts which must be resolved in favor of the non-movant.” Equally compelling was the fact that the parties continued to negotiate a release of claims subsequent to the execution of Modification 0014.

Given the ambiguous nature of the release language and extrinsic evidence that raised serious questions about its scope, the Board denied the Government’s motion because Modification 0014 did not unequivocally constitute an accord and satisfaction sufficient to discharge Bartsch’s claims.

## Takeaway

This decision signals the Board’s reluctance to interpret a release as waiving all future claims under a contract unless the language does so with precise specificity. It also reiterates that an ambiguity analysis is not limited to the release

language itself; the contract and any previous modifications are also relevant in making this determination. Parties should be careful when negotiating modifications to note the scope and applicability of any release (i.e., whether it is limited to the subject modification or all future claims; whether certain claims are exempt) and put in place measures to clearly record purpose and intent during performance.



***Public Warehousing Co. K.S.C., ASBCA No. 59020***

Jan. 12, 2017 | Judge Thrasher

*By Locke Bell | Morrison & Foerster LLP*

Prudent defense attorneys constantly fear the unknown piece of evidence lying in wait to undermine, at the worst possible moment, the defendant's theory in a case. Some have developed clever, if wily, methods for uncovering the other side's evidence, including bringing a tangentially related claim in a forum that may provide broader discovery. It is unclear if this was the case in *Public Warehousing Co.*, or if the Government merely appropriated this concern to push back daunting discovery deadlines. Either way, the Board's concern that discovery for the Prompt Payment Act claim before it would compromise a parallel criminal fraud case arising out of the same contracts led the Board to stay the claim for one year to allow time for the criminal case to proceed.

In 2005, a *qui tam* relator brought a civil False Claims Act case against Public Warehousing Company K.S.C. for allegedly defrauding the Government under three DLA contracts to provide food to U.S. military personnel in Iraq and Kuwait. The Government intervened and eventually filed its own complaint. In November 2009, Public Warehousing was indicted on six counts: conspiracy to defraud the United States, conspiracy to commit major fraud, major fraud, wire fraud, and abetting wire fraud.

As these civil and criminal fraud cases proceeded, in 2011, Public Warehousing filed a certified claim with DLA for over five million dollars in interest penalties allegedly due on thousands of invoices Public Warehousing submitted for payment under the same three contracts. Upon denial, Public Warehousing appealed its claim to the Board in December 2013, where the claim survived a motion to partially dismiss for lack of jurisdiction and a motion for summary judgement. Following these losses, the Government filed an amended answer with

the Board asserting affirmative defenses including fraud in the inducement, first material breach, and payment. Three weeks later, the U.S. District Attorney overseeing Public Warehousing's criminal case sent a letter to DLA requesting that it file a motion to dismiss the ASBCA claim without prejudice pending resolution of the ongoing criminal proceedings.

In its decision, the Board laid out four factors it reviews when exercising its discretion to stay or dismiss a case in such circumstances: (1) whether the facts, issues, and witnesses in both proceedings are substantially similar; (2) whether the on-going investigation or litigation would be compromised by going forward with the case before the board; (3) the extent to which the proposed stay could harm the non-moving party; and (4) whether the duration of the requested stay is reasonable.

Under the first factor, the Board concluded that, although issues did not precisely align in the two proceedings—*e.g.*, most of the Government's affirmative defenses required finding only a material breach, not specific intent, as required by the criminal statutes—the facts, witnesses, and issues nevertheless would be substantially similar. Thus, this factor weighed in favor of the Government.

The Board then turned to the second factor, to which it devoted significant thought. The Government, through both DLA and the responsible District Attorney, argued that Public Warehousing would gain an inappropriate advantage in the criminal proceedings if allowed to use the more liberal discovery process at the Board to circumvent more limited criminal discovery in federal district court. DLA went so far as to accuse Public Warehousing of a history of attempting to use the Board's discovery process to obtain information for use in other forums, citing two prior Board decisions chastising Public Warehousing for such practices. The Board found these examples to indicate the possibility that Public Warehousing would use discovery in the claim appeal to its inappropriate advantage in the criminal proceedings. This factor also weighed in favor of the Government.

The last two factors, however, militated against awarding dismissal or an indefinite stay. Under these, the Board recognized Public Warehousing's concern that evidence would become stale or lost and that witnesses' memories would fade with a prolonged stay or dismissal period. This concern, coupled with the desire for judicial efficiency, persuaded the Board to grant a stay of one year, with the caveat that, should the criminal case be resolved within this time, the parties must file a status report within two weeks thereof.

Issues related to Government contracts have a tendency to weave their way through diverse fora—courts, administrative tribunals, agency proceedings—often creating tension between them across subsequent or parallel proceedings. As the

Board recognized in *Public Warehousing*, it focuses on providing informal, expeditious, and inexpensive resolution of contract disputes, while leaving determinations of fraud to the courts. Where discovery at the Board might compromise a parallel criminal proceeding, as seen in *Public Warehousing*, the Board likely will step aside, if only temporarily.



### **Ricoh USA, Inc., ASBCA No. 59408**

April 6, 2016 | Judge Paul

*By Benjamin Kohr, Esq. | Sikorsky Aircraft Corporation*

Although contracting with the U.S. Government certainly carries unique requirements and potential pitfalls for contractors, it does not amend the foundations of contractual interpretation that underpin all contracts in the United States. The ASBCA revisited these foundations in Ricoh USA's appeal, which arose out of a dispute over the Government's ability to cancel orders under a multi-year requirements contract.

#### **Facts**

In 2011, the Army issued a Request for Quotations ("RFQ") for the lease and flat rate maintenance of new Multifunctional Devices ("MFDs") at Fort Steward, Georgia. The RFQ provided for a 1-year base period and four 12-month option periods, with an estimated requirement of 820 MFDs. The RFQ requested only a quote to perform the identified statement of work and did not request technical proposals or other documentation. In addition, the RFQ explicitly noted in several places that the Government expected to add or remove an undetermined number of MFDs as requirements changed and that the quantities listed were not guaranteed. The RFQ also included a Discontinuance of Service clause that clarified that there would be no early termination fee, penalty or cost associated with the Government's decision not to exercise options.

In response to the solicitation, Ricoh requested that the Army remove the language stating that early termination fees would not be permitted as a result of the Government's decision not to exercise an option, arguing that this language was in conflict with the FAR's termination for convenience clause and common commercial practices. The Army declined Ricoh's request, responding that the

clause only applied to the exercise of options and not the termination of the contract. Based upon the Army's response, Ricoh provided a response to the solicitation; however, Ricoh quoted a single 60-month period of performance. Ricoh's response also included a "Technical Proposal Response" that contradicted the RFQ's Discontinuance of Service clause and imposed a termination ceiling charge that would be applied in the event the Government removed MFDs during the period of performance. The Army notified Ricoh in 2012 that it was determined to be the low bidder and the parties entered into a requirements contract based upon Ricoh's schedule of prices. The contract did not incorporate Ricoh's technical proposal.

The Army issued five delivery orders during the course of performance. As a result of sequestration, the Army's funding reduced significantly and it removed 208 MFDs from the contract during the first option period but continued to exercise options and order additional MFDs. In 2013, Ricoh submitted a certified claim for \$771,131.03, arguing that the reduction in quantity constituted a partial termination for convenience. The Army subsequently denied Ricoh's claim and Ricoh appealed.

### **ASBCA Decision**

The fundamental dispute revolved around issues of contract interpretation and whether the contract allowed for the imposition of penalties or fees for the removal of MFDs during performance. ASBCA undertook a detailed analysis of the various contractual provisions at issue and determined that, as a requirements contract, the contract gave the Army significant flexibility to add or remove MFDs as its requirements changed. Ricoh was fully aware of this as a result of both the Discontinuance of Service clause in the RFQ and the Army's response to its request for clarification. Ricoh's argument rested squarely on the language in its technical proposal; however, the ASBCA found that the RFQ did not request such a proposal and that the resulting contract clearly incorporated only Ricoh's pricing schedule. Therefore, Ricoh's proposed language was not incorporated and did not undermine the otherwise clear language of the RFQ and resulting contract. The ASBCA consequently denied Ricoh's appeal and underlined for both the Government and Government contractors that the basics of contractual interpretation remain pivotal to determining the parties' intent at the time of contracting.

## ***Sea Shepherd Conservation Society*, CBCA Nos. 5254, 5255**

Nov. 21, 2016 | Judge Daniels

*By Steven A. Neeley | Husch Blackwell, LLP*

In this case, Sea Shepherd Conservation Society (“SSCS”) submitted two claims seeking reformation of a contract for the purchase of two decommissioned sea vessels in a GSA auction. SSCS claimed that the vessels’ purchase price was improperly “bid up” by a non-eligible bidder. The CBCA rejected the argument and granted summary relief in GSA’s favor.

### **Facts**

In December 2014, SSCS participated in auctions on GSAAuction.gov to purchase two decommissioned United States Coast Guard (“USCG”) vessels, the USCGC Pea Island and the USCGC Block Island. The terms and conditions of the auction, which each bidder was required to accept, warned that although bidders did not have to be U.S. citizens to submit a bid, some items could only be sold to U.S. citizens. The Pea Island and the Block Island were two such items. The auction catalog for each specified that the winning bidder would have to sign an End-Use Certificate, which required the bidder to acknowledge awareness of the fact that the vessels could not be transferred, sold, or given to a foreign country or a non-U.S. citizen.

Only three bidders participated in the auctions for the vessels. Bidder #1 did not meet the \$75,000 reserve price and was excluded from further bidding. Bidder #2 met the reserve price, but was initially outbid by SSCS, who offered \$100,000 for each vessel. SSCS and Bidder #2 continued to bid against each other; ultimately, each won one vessel. SSCS was the higher bidder on the Pea Island with a bid of \$275,800. Bidder #2 was the high bidder on the Block Island with a bid of \$155,100.

SSCS completed the purchase of the Pea Island on December 5, 2014. That same day, GSA notified SSCS that Bidder #2 was not a U.S. citizen and therefore could not purchase the Block Island. GSA offered the Block Island to SSCS at Bidder #2’s bid price of \$155,100. Believing that Bidder #2’s ineligibility rendered the bid prices unfair, SSCS asked GSA to sell the Block Island for SSCS’s initial bid of \$100,000. GSA refused and advised SSCS that it could refuse to accept the offer to purchase the Block Island. Not wanting to miss out, SSCS paid the \$155,100 bid price, but later claimed that its payment was made “under protest.”

Ten months later, in October 2015, SSCS submitted claims on both vessel purchases to recoup the amounts they paid above their initial bid prices of \$100,000 (i.e., \$175,800 on the Pea Island, and \$55,100 on the Block Island). SSCS argued that the auctions on each vessel were “unjustifiably inflated” by Bidder #2. The GSA CO denied both claims on the grounds that even if Bidder #2 was an ineligible *purchaser*, it was still an eligible *bidder*. The CO also noted that SSCS willingly increased its bid on the Pea Island to win the auction, and voluntarily revived its bid and paid the higher price on the Block Island, even after being advised that it could decline GSA’s offer. SSCS appealed both decisions.

### **CBCA Decision**

GSA filed a motion to dismiss the appeals for lack of jurisdiction, and both parties filed cross motions for summary relief. The Board denied the motion to dismiss but granted summary relief in GSA’s favor.

#### ***GSA’s Motion to Dismiss***

In its motion to dismiss the appeals, GSA argued that the Board lacked jurisdiction because SSCS’s claims essentially challenged irregularities in the selection and award process, which could only be addressed via a bid protest, not the claims process. The Board rejected GSA’s argument and denied the motion to dismiss. In its view, the Contract Disputes Act (“CDA”) gives the Board jurisdiction to decide any appeal from a CO decision that relates to the underlying contract. SSCS’s claims, which sought reformation of the purchase contracts for the Pea Island and the Block Island, fell well-within that jurisdictional scope.

#### ***Cross Motions for Summary Relief***

In addition to GSA’s motion to dismiss, the parties also filed cross motions for summary relief. Relying on the statutes and regulations that authorize GSA to sell surplus property, SSCS argued that because Bidder #2 could not *buy* the vessels, its bid was not responsive and should not have been considered. SSCS further argued that allowing participation of a nonresponsive bidder was contrary to notions of fairness and openness, and violated GSA’s statutes and regulations, which were intended primarily for the benefit of contractors.

The Board accepted SSCS’s summary of GSA’s statutes and regulations, but rejected SSCS’s argument that Bidder #2’s bids were nonresponsive. The Board explained that GSA’s auction rules expressly warned that non-citizens were allowed to *bid*, but that they may not be able to *buy* certain items. Despite those warnings,

SSCS willingly participated in the auctions. In the Board's view, such circumstances did not amount to the type of grave error, mutual mistake, or changed circumstances that would justify reformation of the contracts.



***Sparton DeLeon Springs, LLC***, ASBCA No. 60416

Dec. 28, 2016 | Judge McIlmail

*By Todd M. Garland | Smith Pachter McWhorter*

The ASBCA sustained Sparton DeLeon Springs, LLC's ("Sparton") appeal of a Government claim demanding reimbursement of alleged overpayments. According to the Government, Sparton submitted interim vouchers that were "insufficiently supported." The ASBCA granted summary judgment to Sparton, holding the CDA's six-year statute of limitations barred the Government's overpayment claim. The Government's claim accrued when Sparton submitted its final indirect cost rate proposal, which did not include the costs sought in the interim vouchers.

**Facts**

Sparton contracted with the Government to perform sonar and acoustic work. By January 10, 2007, the Government had paid Sparton's interim vouchers, which included costs incurred at its Jackson, Michigan plant (plant costs). On March 5, 2007 and January 29, 2008, Sparton submitted its final indirect cost rate proposals for FYs 2006 and 2007. Neither proposal included the plant costs. On August 25, 2011 and July 30, 2013, Sparton revised the proposals, again failing to include the plant costs.

In September 2013, DCAA issued audit reports for Sparton's FYs 2006 and 2007 proposals, noting Sparton's failure to include the plant costs in the proposals. In response to an August 12, 2014 CO's request for additional supporting documentation, Sparton submitted final vouchers and "other documents" that included the plant costs that Sparton had invoiced as part of its interim vouchers – interim vouchers against which the Government had already paid. On October 26, 2015, the CO issued a final decision demanding that Sparton repay \$577,415.36 for the plant costs. According to the CO, the plant costs "were insufficiently supported." The CO contended that there was "no proof whatsoever" Sparton was

billed for the work or that Sparton paid the costs in connection with any Government contract.

### **ASBCA Decision**

Under the CDA, all claims must be brought within six years after accrual of the claim. 41 U.S.C. § 7103(a)(4)(A). A claim accrues “when all events . . . that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known.” FAR 33.201. The Government demanded repayment on October 26, 2015. Therefore, the Government’s claim would be barred if it accrued earlier than October 26, 2009.

The Board found that the Government should have known of the discrepancy regarding the plant costs by January 29, 2008. By that date, Sparton had submitted its final indirect cost rate proposals for FYs 2006 and 2007, and neither proposal included the plant costs.

The Board further found that the Government should have known about the plant costs on January 10, 2007 when the Government paid Sparton’s interim vouchers, which included information related to the costs. Additionally, the Government should have known by January 29, 2008, that Sparton failed to include the costs in its final indirect cost rate proposals. Sparton’s later revisions to the proposals did not “change that basic picture.” Accordingly, the Board found that the Government’s claim accrued by January 29, 2008, because as of that date, all events that fixed Sparton’s alleged liability, and permitted assertion of the Government’s overpayment claim, were known or should have been known.

The Government asserted that the plant costs were “insufficiently supported” and that there was no proof Sparton paid the costs. Even assuming the Government was correct, both bases for its claim existed on January 10, 2007, when the Government paid Sparton’s interim vouchers. Any insufficiency “of support for [the plant] costs would have been as evident from the interim vouchers as from the final vouchers provided in response to the contracting officer’s 2014 request.”

The ASBCA also rejected the Government’s argument that its audit rights under FAR 52.216-7, the Allowable Cost and Payment clause, prevented the claim from accruing. According to the Government, the clause permits the CO to adjust prior overpayments, and the Government paid Sparton’s interim vouchers before performing an audit. The Government, however, was on notice that it had a potential claim when it paid the interim vouchers. The Board rejected the Government’s contention “that FAR clause 52.216-7(g) limits the applicability or

availability of the CDA's six-year statute of limitations in appeals from Government overpayment claims," stating that the "clause does not even address the statute of limitations." The Board also held that the Government's failure to audit the interim vouchers did not provide the Government any relief because "delay by a contracting party assessing the information available to it does not suspend the accrual of its claim."

The Government was also mistaken in relying on *Public Warehousing Co., K.S.C.*, ASBCA No. 59020, 16-1 BCA ¶ 36,366, in which the ASBCA rejected the Government's argument that the CDA's six-year statute of limitations barred a contractor's claim. In *Public Warehousing*, the Government failed to "introduce invoice-specific facts" to establish when the contractor's claims accrued. In *Sparton*, however, there was no genuine dispute regarding (1) the date Sparton submitted the interim vouchers, which included the plant costs that allegedly lacked support; (2) the date Government paid the interim vouchers; (3) the date Sparton submitted its final indirect rate proposals that did not include the plant costs; and (4) the date the Government asserted its claim.

Finally, the ASBCA rejected the Government's argument that discovery was necessary to determine whether Sparton's interim vouchers were sufficiently supported. The Government, on its own, should have been able to substantiate whether Sparton's vouchers included necessary supporting documentation. Moreover, a finding that Sparton's interim vouchers lacked sufficient support would confirm that the Government's claim "accrued no later than the payment for those costs." A finding that Sparton's interim vouchers included adequate support for the plant costs would also be fatal to the merits of the Government's overpayment claim. Either way, discovery was unnecessary. Accordingly, the ASBCA granted summary judgment to Sparton.



***Volmar Construction, Inc.*, ASBCA Nos. 60710-910**

Oct. 7, 2016 | Judge Stempler

*By Steven A. Neeley | Husch Blackwell, LLP*

In this case, the ASBCA directed a CO to issue a decision on a series of claims well in advance of the date previously announced by the CO as the date for a final decision. Although the current CO had no prior knowledge of the claims and was

required to retain an outside scheduling expert, the Board rejected the Government's argument that such internal staffing issues the CO reasonably required more than 10 months to issue a final decision.

## **Facts**

Volmar Construction, Inc. ("Volmar") held a contract with the United States Army Corps of Engineers ("USACE"), Louisville District to repair and renovate various buildings on Joint Base McGuire-Dix-Lakehurst in New Jersey. The contract was awarded in September 2012.

On May 19, 2016, Volmar submitted eight different claims to the CO seeking additional money and extensions of time for various issues that arose during construction. The claims included: (i) \$930,584.74 for loss of an electrical subcontractor and canopy modifications; (ii) \$663,600 for extended office overhead; (iii) \$516,356.63 for delays and impacts associated with peeling ceiling paint; (iv) more than \$84,000 for additional asbestos abatement, heating, and water issues; (v) \$76,676.14 for additional costs to install booster fans; (vi) \$59,208.28 for kitchen equipment; (vii) a time extension for smoke seals; and (viii) an extension of time for railings.

The Government responded to the claims sixty days later, on July 18, 2016, with two separate letters. The first letter was a final decision from the CO granting the \$59,208.29 kitchen equipment claim. The second letter, from a Government attorney, stated that the CO would issue a final decision on the remaining claims by March 31, 2017 (more than 10 months after Volmar's initial claims were submitted).

Unhappy with the Government's announced deadline, on July 23, 2016, Volmar petitioned the Board for an order directing the CO to issue a decision within a reasonable time but before March 31.

## **ASBCA Decision**

The Board began its decision by reciting the familiar deadlines for CO final decisions under the CDA. For claims under \$100,000, the CO must issue a decision within 60 days of receipt of the claim (if the claim requests that a decision be issued within that time period). For claims over \$100,000, the CO must – within 60 days of receipt of the claim – either issue a decision or notify the contract when a decision will be issued.

But the Board noted that the CDA does not necessarily give a CO unlimited time to decide a claim over \$100,000. Although the decision may take longer than 60 days, it must still be issued “within a reasonable time . . . taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor.” The Board noted, however, that identifying whether a decision is issued within a “reasonable time” is a case-by-case determination.

With respect to Volmar’s claims, the Government argued that 10 months was a reasonable amount of time for a decision because the current CO (issuing the decision) was not previously involved with the claims and was not familiar with the issues the Volmar raised. The Government also argued that the CO would have to locate and retain an outside scheduling expert to examine Volmar’s impact and delay damages.

The Board rejected both arguments. The Board explained that the CO’s lack of prior involvement did not justify the delay because “[w]hile brining on a CO who has had no exposure to the issues can be time-consuming, internal staffing matters are not one of the factors used to determine a reasonable time under the CDA.”

The need for an expert also did not justify a delay because, by the Government’s own admission, the scheduling expert could have issued a report by mid-October 2016 at the latest. In the Board’s view, it was not reasonable for the CO to require an additional five months (from mid-October 2016 through March 2017) to consider the expert’s analysis and issue a final decision. Accordingly, the Board held that the CO’s announced March 31 deadline for a final decision represented undue delay, and it ordered the CO to issue a final decision no later than January 13, 2017.



***ABC Data Entry Systems, Inc.***, ASBCA No. 59865

Nov. 10, 2016 | Judge McIlmail

*By Michelle D. Coleman | United States Air Force*

Because the parties agreed that their contract was properly construed as an indefinite-quantity contract, the ASBCA denied ABC Data Entry Systems, Inc.’s (“ABC”) negligent estimate claim because, unlike a FFP or requirements contracts,

as a per se rule indefinite-quantity contracts are not susceptible to negligent estimate claims.

## Facts

In November 2008, the General Services Administration (“GSA”) awarded ABC a schedule contract to provide scanning and other document conversion services. The contract included various indefinite quantity contract clauses including FAR 52.216-22, INDEFINITE QUANTITY (DEVIATION I), a minimum guarantee clause, and FAR 52.211-16, VARIATION IN QUANTITY.

In July 2013, ABC entered into a Delivery Order for \$50,375 with the U.S. Army Corps of Engineers to provide scanning services under the schedule contract. The Government estimated that ABC would scan 900,500 pages. The order included line items that provided quantities and unit prices for scanning. At completion, the Government paid ABC \$13,692.31 for scanning 454,608 pages of documents.

In November 2014, ABC filed a claim with the contracting officer seeking \$36,250 because the Government “failed to provide the required number of documents to be scanned.” ABC complained that the 50% difference between the Government’s estimated quantity and the actual quantity of pages scanned increased ABC’s overhead resulting in a contract loss. The claim never used the term “breach.” In February 2015, the contracting officer denied the claim and ABC appealed to the ASBCA. During briefing, ABC claimed that the Government violated FAR 52.211-16 and provided a negligent estimate.

## ASBCA Decision

Before getting to the substance of the appeal, the Board asked the parties to address whether the order’s GSA schedule contract provisions affected the Board’s jurisdiction in light of the Court of Appeals for the Federal Circuit’s decision in *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013). The Government’s response was two fold. First, that the Board could not entertain a “breach of contract or negligent estimate claim.” Second, that ABC abandoned its argument that the Government violated FAR 52.211-16, VARIATION IN QUANTITY and now solely relies on its negligent estimate argument.

The ASBCA has jurisdiction to decide an issue involving a GSA schedule contract provided the Board is not asked to interpret a GSA schedule contract provision. See *Sharp Electronics*, 707 F.3d at 1734. The Board exercised

jurisdiction here because FAR 52.211-16 was no longer at issue and the parties did not dispute the meaning—nor did the Board see a need to interpret—the Indefinite-Quantity and Guaranteed Minimum clauses.

The Government also disputed whether the Board had jurisdiction to decide ABC's breach of contract claim because ABC's claim did not use the term "breach of contract." The Board found that ABC's failure to properly label the claim as a breach claim was not a bar to the Board's jurisdiction when ABC sought the same relief and relied upon the same operative facts.

Regarding the merits, the Board held that there was no basis for relief. The parties did not dispute the fact that the contract was an indefinite-quantity contract and indefinite-quantity contracts are not subject to negligent estimate claims.

## Conclusion

This case is a simple reminder that it is always best to research whether a valid cause of action exists before filing a claim.



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# WRONG FROM THE START: WITHHOLDING IMPLIED-IN-LAW CONTRACT JURISDICTION FROM THE COURT OF CLAIMS

*By Frederick W. Claybrook, Jr.\**

[Reprinted with permission. This article originally appeared in the Public Contract Law Journal, 46 Pub. Cont. L.J. 1 (Fall 2016)]

## I. INTRODUCTION

One early morning in 1985, U.S. Immigration and Naturalization Service (INS) Border Patrol agents spotted a suspicious van near the border with Mexico.<sup>1</sup> Soon afterwards, as the van was traveling on California Highway 8, the agents caught up with it and turned on their lights and sirens.<sup>2</sup> Instead of stopping, the driver of the van attempted to shake the agents in a high-speed chase.<sup>3</sup> At the top of an exit ramp, the driver lost control.<sup>4</sup> The van crashed over a barrier, rolled, and caught fire.<sup>5</sup> The pursuing agents quickly arrived at the scene, extinguished the fire, and called for emergency help.<sup>6</sup> It came too late for the driver and two passengers, who died at the scene; fourteen other illegal aliens were taken to a local hospital.<sup>7</sup>

One of the Border Patrol agents was sent to the hospital ahead of the aliens' arrival.<sup>8</sup> The agent informed the hospital staff of the situation and that the aliens were being brought there.<sup>9</sup> The agent responded to a question from a hospital administrator that "the taxpayers" would pay for the treatment and set up procedures whereby the aliens were admitted (with the agents signing forms as "guardians" for those aliens who could not sign their own forms), photographed by Border Patrol, and monitored.<sup>10</sup> The agents instructed the hospital to release the aliens only into Border Patrol custody, which the hospital did, except for the one patient who had "escaped."<sup>11</sup> The government stipulated that it was "responsible for the care of individuals taken into custody or detained by the United States Border Patrol as suspected aliens."<sup>12</sup>

Trouble started when the hospital presented the bill for medical services to Border Patrol.<sup>13</sup> It refused to pay, contending that the agents who had communicated with the hospital employees did not have authority to contract and so an

implied-in-fact contract never came into being.<sup>14</sup> While the U.S. Claims Court found ratification by the superiors of the agents,<sup>15</sup> a majority of the U.S. Court of Appeals for the Federal Circuit, over a dissent, found no support in the record for ratification of the agents' actions.<sup>16</sup> The majority frankly admitted the equities of the case rested strongly with the hospital and that in a case involving private citizens, the hospital would have had a cause of action under an implied-in-law contract theory providing it damages; it is implied by law that a person will pay for goods and services provided, especially in an emergency situation by a common provider.<sup>17</sup> However, the majority noted implied-in-law contract jurisdiction had always been found unavailable in the Claims Court and its predecessor the U.S. Court of Claims, concluding "[e]ven when as harsh a result is called for as this seems to be, it is not for us to reverse that long-standing doctrine....If a remedy is to be had in cases such as this, it must be provided by a branch of government empowered to grant it."<sup>18</sup>

The proposition advanced in this article is that the "long-standing doctrine" disallowing actions based on implied-in-law contracts was wrong from the start. In the initial act passed in 1855, Congress gave the Court of Claims jurisdiction over actions founded on "any contract, express or implied"<sup>19</sup>--language that has been effectively retained to this day.<sup>20</sup> Congress did not write "any contract, express or implied-in-fact" or otherwise state that actions sounding in implied-in-law contracts were excluded from the jurisdictional grant.

The questions, therefore, are (1) whether, when Congress created the Court of Claims, were claims based on implied-in-law contracts a recognized contractual cause of action; and (2) whether the Supreme Court properly established what is now the "long-standing rule" that Congress had implicitly excluded implied-in-law contract claims from the Court of Claims' jurisdiction. The short answers are that (1) the implied-in-law, *ex contractu* cause of action was well established by the time Congress created the Court of Claims;<sup>21</sup> and (2) the Supreme Court was fearful that a literal reading of the statute would go too far and so rejected it, misstating the existing state of the common law and manipulating cases to get to its preferred, "wiser" approach that eliminated implied-in-law contract jurisdiction.<sup>22</sup>

The reader should not confuse this subject, which deals with whether the Court of Federal Claims (in its current manifestation) has *jurisdiction* over an implied-in-law contract *cause of action*, with the related but distinct issue of whether the court, once having jurisdiction, may recognize contractual *duties and remedies* implied by law (i.e., not expressly stated in the contract itself). The Supreme Court mixed up these concepts in *Hercules, Inc. v. United States*,<sup>23</sup> sowing confusion in the lower courts in its wake, as a recent commentator in this journal has amply documented.<sup>24</sup> But even that perceptive commentator simply repeated the prior refrain of the Supreme Court and other commentators that Congress did not intend

to grant jurisdiction for a cause of action founded on an implied-in-law contract, sometimes called, now as then, a “quasi-contract.”<sup>25</sup> The thesis of this article certainly lends support to that commentator’s admonition that the important distinction between *jurisdiction*, on the one hand, and *duties* and *remedies*, on the other, be kept in sharp focus, as the Supreme Court did prior to *Hercules*; there is certainly no reason to look askance at implied-in-law contractual duties and remedies if Congress also originally intended the court to have implied-in-law contract jurisdiction. Even if the thesis of this article is mistaken—and the author freely admits that he is whistling into a substantial headwind of prior precedent and commentary—it does nothing to undercut the need for application of implied-in-law contract duties and remedies in breach and other suitable situations.

## II. HOW IT ALL STARTED: THE NEED FOR THE COURT OF CLAIMS

In the early days of the republic, if one had a claim against the government, he had to bring it to Congress itself, and each house of Congress set up a general standing Committee of Claims with other committees handling claims as well.<sup>26</sup> By 1855, when Congress first created the Court of Claims, the right of citizens to petition for redress of grievances<sup>27</sup> was gumming up the legislative works, and petitions were getting wholly inadequate treatment.<sup>28</sup> Studies of the 22nd, 23rd, and 24th Congresses, which met in 1832 through 1837, disclosed 14,602 claims presented, but only 5,891 (forty percent) received any consideration at all, let alone final disposition.<sup>29</sup> Of the over 17,000 private claims presented to Congress from 1838 to 1848, only about half were acted on in any way and only about five percent were approved by both houses.<sup>30</sup> In 1848, the House Committee of Claims criticized the congressional claims process of which it was an integral part as “a system of unparalleled injustice, and wholly discreditable to any civilized nation.”<sup>31</sup> John Quincy Adams, who after his term as President returned to the House of Representatives for several terms until his death in 1848,<sup>32</sup> voiced his exasperation with the process in his diary:

There ought to be no private claims business before Congress. There is a great defect in our institutions by the want of a Court of Exchequer or a Chamber of Accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative Assembly is the worst of all tribunals for the administration of justice.<sup>33</sup>

Even worse, allegations of bribery were frequently floated.<sup>34</sup>

The situation became intolerable. Earlier, special temporary commissions had

been set up to handle claims arising from the War of 1812 and the Mexican-American War.<sup>35</sup> But by the 1850s, the crush of claims work at Congress resulted in multiple bills being proposed over a number of years for a more permanent solution that would relieve Congress of its petitions workload.<sup>36</sup> The act that eventually passed in 1855 set up the Court of Claims with three, full-time judges appointed for life by the President with the advice and consent of the Senate.<sup>37</sup> The 1855 Act gave jurisdiction to the court to hear “all claims founded upon...any contract, express or implied, with the government of the United States.”<sup>38</sup>

### III. WHAT CONGRESS KNEW AND INTENDED: IMPLIED-IN-LAW CONTRACTS IN 1855 AND THEREAFTER

The language “any contract, express or implied” did not receive direct discussion in the recorded debates.<sup>39</sup> Rather, the debates were dominated by the desire to relieve the pressure on Congress to review and dispose of such claims and the need to provide equity and prompter resolution to claimants.<sup>40</sup> So, for our purposes, to determine whether Congress intended “any implied contract” to include implied-in-law contracts, we must examine the text itself, the context in which it was created, and related enactments.

#### A. The Text Covers Implied-in-Law Contracts

With a dearth of legislative history, we must look first to the text of the statute to answer the question of whether the 1855 Act’s phraseology included implied-in-law contracts. As long as implied-in-law contracts were a known specie of implied contract in 1855 (which we will examine in the next subpart),<sup>41</sup> the analysis from the text is straightforward.

First, Congress in the 1855 Act specified that the Court of Claims would have jurisdiction over “any” contract.<sup>42</sup> The meaning of “any” has not varied since 1855,<sup>43</sup> and its significance often has been adjudicated. The Supreme Court repeatedly has observed the word “any” is “plain and unambiguous”; “any” is “expansive, unqualified language” with a “wide reach” and a “sweeping” meaning.<sup>44</sup> The Court observed in *Harrison v. PPG Industries, Inc.*<sup>45</sup> that there is “no uncertainty” in the word; “any” is “expansive language” that offers no indication whatsoever that Congress intended to limit the class it defines in any respect.<sup>46</sup> Thus, the 1855 Act on its face includes any and all types of contracts that were then known.<sup>47</sup>

Second, Congress reinforced its expansive incorporation of “any” type of contract with a further, reinforcing phrase: “express or implied.”<sup>48</sup> This encompassed all types of contracts, as express and implied covered the gamut.<sup>49</sup> (As discussed below, implied-in-law contracts were alternatively called “quasi-contracts”;

quasi-contracts were not different from implied-in-law contracts.<sup>50</sup>) The 1855 Act is appropriately understood as granting the Court of Claims jurisdiction over “any” implied contract,<sup>51</sup> as the term “implied contract” was then used.

Third, assuming, as will be shown in the next section, that implied-in-law contracts were a type of implied contract well known in 1855, a literal reading of the text commands inclusion of implied-in-law contracts. When statutory language is used without exclusion, no limitation should be assumed just because a single type of the problem addressed may have been foremost in the legislators’ mind.<sup>52</sup> If a carve-out were intended, Congress easily could have stated an exclusion for implied-in-law contracts, but it did not.<sup>53</sup> Thus, the reading compelled by the text of the statute itself, assuming implied-in-law contracts were known at the time, is that such contracts were included in the court’s jurisdictional grant of “any contract, express or implied.”<sup>54</sup>

The commentators who have spoken approvingly of the long-standing rule that Congress, when including all claims foundation “any contract, express or implied,” did *not* intend to include implied-in-law contracts are wholly unpersuasive. For example, in a 1971 article, while arguing for a revision to the Court of Claims’ jurisdictional grant to include implied-in-law contracts by expressly recognizing claims for the unjust enrichment of the United States,<sup>55</sup> Donald A. Wall and Robert Childres simply state,

It is not evident from the debates what construction Congress intended of “implied contracts.” The term was not used during the debates, and its meaning was not in issue. Since contracts were based on parties’ intentions rather than legal obligations, the debates almost certainly would have contained some mention of implied in law duties had Congress intended the act to include them.<sup>56</sup>

But from the legislative history’s silence, it can just as easily be argued—indeed, more persuasively argued—that there was no need to discuss it because everyone knew that “any contracts, express or implied,” included all *ex contractu* causes of action and that statutory formulation is simply a rearticulation of the Latin phraseology. Moreover, Wall and Childres turn normal statutory interpretation principles on their head. If a legislative body does not add limitations to the text, the normal presumption is that they intended none,<sup>57</sup> especially when the legislative body uses expansive terminology such as *all* and *any*, as Congress did in the 1855 Act.<sup>58</sup>

To add more support to their contrary conclusion, Wall and Childres also assert “[t]he term ‘contracts, express or implied’ had been in use for many years prior

to the passage of the Court of Claims [1855] Act, and contracts implied in law were not considered to be true contracts.”<sup>59</sup> These assertions, even if accurate, do not prove that Congress did not include implied-in-law contracts in its jurisdictional grant. First, Wall and Childres provide no support for the proposition that the language “contracts, express or implied” had a widespread usage and a generally accepted meaning prior to 1855.<sup>60</sup> That implied-in-law contracts were not considered contracts in the purest sense of requiring mutual assent and consideration may be accurate,<sup>61</sup> but that does not mean that in 1855 implied-in-law contracts were not considered to give rise to contractual causes of action (*ex contractu*) rather than tort actions (*ex delicto*), or that a victim could not choose between a contractual or tort cause of action on the same facts. Third, even if it were understood that implied-in-law contracts were not “true” contracts, it does not mean that Congress was somehow eliminating implied-in-law contracts in its terminology of “any contract, express or implied.”<sup>62</sup> To reach that conclusion overriding the literal language, one would have to show that in 1855 Congress did not itself grant petitions based on unjust enrichment and implied-in-law contracts; precedent gave the language used a generally accepted understanding that excluded “implied-in-law” contracts from “implied contracts”; or despite its name, the implied-in-law contract causes of action based on unjust enrichment exclusively sounded in tort, not *ex contractu*.

As will be discussed in more detail in the next part, none of these propositions is accurate. Instead, commentators have projected backwards into the mid-1800s, the late nineteenth, and early twentieth century movement by academics, including luminaries such as Yale’s Arthur Linton Corbin and Harvard’s Samuel Williston, to “clean up” the terminology in the field as the necessity of form pleading began to wane with the advent of more civil actions.<sup>63</sup> The academics argued for “implied-in-law contract” terminology to be scuttled, for “quasi-contract” to be used exclusively, and for “unjust enrichment” to be recognized as a separate cause of action arising in restitution.<sup>64</sup> Their purpose was not to restrict recoveries, but rather to expand them further as justice required.<sup>65</sup> The movement was nascent in 1855, but succeeded in splitting off quasi-contracts into a separate Restatement of Restitution in 1937 as a field of law separate from that reported in the Restatement of Contracts a few years earlier.<sup>66</sup> But it has not succeeded in stamping out use of the term “implied-in-law contract,” even to this day.<sup>67</sup> The proper question, though, is whether implied-in-law contracts were included or excluded from the field of implied contracts in 1855 when Congress gave the new Court of Claims jurisdiction over “any contract...implied.”<sup>68</sup> To that we now turn.

## **B. The Context in 1855 Supports That Congress Included Implied-in-Law Contract Jurisdiction**

The *particular* context enveloping the passage of the 1855 Act was the problem

Congress was seeking to ameliorate. The *general* context was the state of the law of contracts of which the legislators must be presumed to have had knowledge when they acted. Both the particular and the general context support the conclusion that Congress intended to give the Court of Claims jurisdiction over implied-in-law contract claims.

### **1. The Particular Context Supports That Congress Intended to Grant Implied-in-Law Jurisdiction to the Court of Claims**

The particular context of the passage of the 1855 Act includes what Congress itself was doing with respect to petitions based on implied-in-law contract (or quasi-contract) prior to a passage of the act and what ills it was trying to remedy. The latter question is easy to answer: Congress was trying to relieve itself of the duty to address and resolve many of the petitions for redress of grievances by setting up the Court of Claims.<sup>69</sup> Thus, the impetus naturally would have been to relieve itself of as much of the business on its plate as possible. There was pushback to this, however, based on constitutional scruples.<sup>70</sup> Some congressmen read Article I, Section 9 of the U.S. Constitution, which requires federal money to be paid only “in Consequence of Appropriations made by Laws,”<sup>71</sup> to mandate that Congress itself handle petitions for redress of grievances.<sup>72</sup> This delayed the passage of the bill for several years, but the press of claims that were going unaddressed in any timely fashion forced the compromise of the 1855 Act, which granted the new court jurisdiction over contract claims (*ex contractu*), but not tort claims (*ex delicto*), as all civil claims were then divided.<sup>73</sup>

Did Congress, then, have presented to it petitions founded on implied-in-law, quasi-contractual obligations? While there is no catalogue of pre-1855 petitions of which this author is aware, it seems certain there would have been such petitions among the tens of thousands filed. And, of course, there is no record that Congress dismissed such petitions out of hand simply because they were founded on implied-in-law contracts.<sup>74</sup> Thus, the most reasonable assumption is that, if these implied-in-law petitions were considered “implied assumpsit” or *ex contractu* claims, Congress intended to give the Court of Claims jurisdiction over them.<sup>75</sup> It did not carve out this type of contract claim, but, instead, as Congress literally said, gave jurisdiction over “*any*” claim based on implied contract.<sup>76</sup>

### **2. The General Context Supports That Congress Intended to Grant Implied-in-Law Contract Jurisdiction to the Court of Claims**

Were implied-in-law contracts categorized as contracts in 1855? Indeed they

were. This is proven, in part, by the push of the academics in the late nineteenth and early twentieth centuries to carve implied-in-law (or quasi-) contracts out of the law of contracts and move them into their own category of restitution because the “mutuality” was not by actual agreement but was constructive, i.e., the mutuality was implied as a legal duty and measured not by an agreed price but by *quantum valebant*<sup>77</sup> or *quantum meruit*.<sup>78</sup> Indeed, Corbin went so far as to argue that implied-in-fact contracts were actually not implied contracts at all, properly considered: “In reality a contract implied in fact is an express contract, for intentions can be *expressed* as clearly by actions as by words.”<sup>79</sup> Taking this argument to its logical conclusion, assuming Congress had agreed in 1855 with this proposition Corbin later expressed, the *only* meaning Congress could have had when it gave jurisdiction over implied contracts were contracts implied in *law*.<sup>80</sup>

**a.     *The Advance of the Common Law by 1855 Recognized Implied-in-Law Contracts***

It is not necessary to take the argument that far, of course. It is enough if implied-in-law contract claims were typically considered as contract (or *ex contractu*) claims in 1855.<sup>81</sup> This they indisputably were. Harvard’s Dean J.B. Ames, in the second volume of his school’s law review, wrote an influential, two-part article on the history of express and implied assumpsit.<sup>82</sup> Ames outlined the common law and its movement from a highly formalistic cause of action that had its origin in tort causes of action (*ex delicto*) to a more liberal cause of action in contract (*ex contractu*) that often overlapped with tort causes of action:

Both in equity and at law, therefore, a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was in several instances distinguished from contract. By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*.<sup>83</sup>

This “natural transition” then moved to *implied* assumpsit. As Ames explained,

It was only by degrees that the scope of the action was enlarged. The extension was in three directions. In the first place, *Indebitatus Assumpsit* became concurrent with Debt upon a simple contract in all cases. Secondly, proof of a promise implied in fact, that is, a promise inferred from circumstantial evidence, was at length deemed sufficient to support an action. Finally, *Indebitatus Assumpsit* became the appropriate form of action upon constructive obligations, or quasi-contracts for the payment of money.<sup>84</sup>

The second implied assumpsit category to overlay tort remedies, implied-in-*fact* contract actions was first recognized, along with a right to recover in *quantum meruit*, in 1609.<sup>85</sup>

With respect to the third category, the one of primary concern to us because it is the equivalent of an implied-in-*law* contract cause of action, Ames traced the roots of quasi-contracts back to Roman law.<sup>86</sup> While he espoused the view, later championed by other academics, that a contract implied in law is not a “true contract” since “[n]either mutual assent nor consideration is essential to its validity,” he continued,

It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ from obligations, the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *quasi ex contractu* than by our ambiguous “implied contracts.”<sup>87</sup>

The first case recognizing implied-in-law *indebitatus assumpsit* based on a customary duty that Ames found was for scavenging work done without express promise in 1676.<sup>88</sup> There was some initial resistance, but the new action continued to be more widely recognized.<sup>89</sup> Implied assumpsit was allowed upon a foreign judgment in 1705, and the “metaphysical notion” of a promise implied in law became fixed in the common law.<sup>90</sup> The British courts allowed the writ for debts even earlier:

By means of the fiction of a promise implied in law *Indebitatus Assumpsit* became concurrent with Debt, and thus was established the familiar action of Assumpsit for money had and received to recover money paid to the defendant by mistake. *Bonnel v. Fowke* (1657) is, perhaps, the first action of the kind.<sup>91</sup>

Implied-in-law actions on the writ of account were recognized about the same time:

Assumpsit soon became concurrent with Trover, where the goods had been sold. Finally, under the influence of Lord Mansfield, the action was so much encouraged that it became almost the universal remedy where a defendant had received money which he was “obliged by the ties of natural justice and equity to refund.”<sup>92</sup>

And toward the end of the eighteenth century, Ames reported, it had been established that “the law would imply a request whenever the plaintiff paid, under legal compulsion, what the defendant was legally compellable to pay.”<sup>93</sup> It is no surprise then that Blackstone, in the second volume of his *Commentaries*, published circa 1770, expressly defined implied contracts to include those implied-in-law: “This contract or agreement may be either [express] or implied....*Implied* are [such] as [reason] and [justice] dictate, and which therefore the law [presumes] that every man undertakes to perform.”<sup>94</sup>

Ames concluded his article by noting the power of the common law to adapt and that many tort actions now had overlapping contract counterparts:

The main outlines of the history of Assumpsit have now been indicated. In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded Debt, became concurrent with Account, with Case upon a bailment, a warranty, and bills of exchange, and competed with Equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment. Surely it would be hard to find a better illustration of the flexibility and power of self-development of the Common Law.<sup>95</sup>

**b.     *The States Recognized Implied-in-Law Contracts by 1855***

This development in the common law to embrace implied-in-law (or quasi-) contracts as an *ex contractu* cause of action was well recognized in the courts in the United States prior to 1855. For instance, in *Brackett v. Norton*,<sup>96</sup> the Connecticut Supreme Court, citing Blackstone, explained, “[a]n implied contract is that which reason and justice dictate, and which, therefore, the law presumes a person has contracted to perform.”<sup>97</sup> In *Proprietors of Turnpike v. Taylor*,<sup>98</sup> the New Hampshire Supreme Court held that the law implied a promise to pay a toll for use of a turnpike, even though the user had denied liability and had refused payment.<sup>99</sup> And the U.S. Supreme Court in 1863, while holding that Congress by statute had changed the result that otherwise would have obtained under the common law, described the common law then in place as follows:

Prior to the passage of that act [of March 3, 1839], it had frequently been held that an action of assumpsit would lie against a collector to recover

back duties illegally exacted by him of the importer....*Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfil that obligation.<sup>100</sup>

Most pointedly, the New York Court of Appeals actually had construed the phraseology “contract, express or implied” as it appeared in the state’s civil procedure code section regarding attachments to enforce judgments. New York’s highest court in 1852 found the same language, used three years later in the 1855 Act, to include a contract implied by law, based on a legal duty imposed on the party against whom a judgment was entered to pay it.<sup>101</sup>

When Columbia’s William A. Keener wrote his article in 1893 classifying types of quasi-contracts, he began it by noting that the usual classification of simple contracts as then commonly understood was as follows: (1) express contracts, (2) contracts implied-in-fact, and (3) contracts implied-in-law.<sup>102</sup>

While Keener, like several of his contemporaries, advocated pulling quasi-contract out of the “contracts” categorization into one of its own, at the same time he admitted that implied-in-law contracts “are generally treated to-day as a species of simple contract.”<sup>103</sup>

Implied-in-law contracts were well entrenched in the jurisprudence of this country by 1855. The conclusion is inescapable that by 1855 implied-in-law contracts were widely recognized as a subset of actions founded on contract (i.e., an *ex contractu* cause of action), despite the fact that the mutual assent in such actions was constructive and imposed on the defendant by reason, justice, or legal duty.<sup>104</sup> Thus, when Congress passed the 1855 Act, it must be assumed Congress was well aware of that state of the law and, by its language granting jurisdiction to the Court of Claims of any claim founded on “any contract, express or implied,” it intended to include implied-in-law contracts.<sup>105</sup> Similarly, it must be assumed that, if it had intended otherwise, Congress would have made that intention explicit.<sup>106</sup>

### **C. The Act of July 4, 1864, Shows Congress Believed It Had Given the Court of Claims Implied-in-Law Jurisdiction**

The nation was in the throes of the turmoil leading up to the Civil War when Congress passed the 1855 Act; it was in the middle of that conflict when it passed the 1863 Act. The overriding purpose of the latter act was to make judgments of the Court of Claims final (Congress thought), rather than just advisory.<sup>107</sup> Congress in the 1863 Act reconfirmed the jurisdictional grant of the 1855 Act to that court.<sup>108</sup>

However, shortly after confirming the Court of Claim's jurisdiction over "any contract, express or implied," Congress passed an act, with that identical wording, that *withdrew* jurisdiction from the Court of Claims for claims relating to military actions in the war:

*Be it enacted...*, That the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof.<sup>109</sup>

If Congress had not believed it had given the Court of Claims implied-in-law contract jurisdiction, this statute (hereinafter referred to as the 1864 Act) would have been superfluous.<sup>110</sup> Claims arising from "destruction or appropriation of, or damage to, property" do not arise from mutual undertakings founded on express or implied-in-fact contracts. Such activity can be tortious, but, as Ames explained, the common law had by this time generated overlapping, *ex contractu*, implied-in-law actions for torts such as trespass, debt, and trover.<sup>111</sup> If a military officer had taken, for example, some horses and carts over the objection of its owner that were destroyed in the war, this appropriation obviously would not give rise to either an express or an implied-in-fact contract. But it would give the owner an action under an implied-in-law contract for the value of the property taken and used by the military, measured in *quantum valebant*. It was only such actions involving the military during the Civil War that Congress withdrew from the Court of Claims.<sup>112</sup> The implication is obvious that Congress believed it had, as a general matter, given the court jurisdiction over implied-in-law contract claims.<sup>113</sup>

#### IV. HOW THINGS GOT OFF-TRACK: THE SUPREME COURT THOUGHT GRANTING IMPLIED-IN-LAW CONTRACT JURISDICTION TO BE UNWISE LEGISLATION

Despite this confluence of the literal reading of the jurisdictional grant in the 1855 and 1863 Acts, the particular and general contexts, and Congress's own interpretation manifested in the 1864 Act, the Supreme Court, in a series of cases beginning in 1869, ruled that implied-in-law contracts were *not* covered by the jurisdictional grant to the Court of Claims. These early rulings were not founded on any type of analysis of the text and its context, and the 1864 Act was ignored. Rather, the early rulings rested on the stated concern of the justices that Congress would have been unwise to grant such jurisdiction to the Court of Claims. To reach this result, the Supreme Court twisted reason and misstated the common law.

**A. The Supreme Court Began Down the Wrong Path in *Gibbons v. United States***

The Supreme Court first announced its retrenchment of the Court of Claims' implied contract jurisdiction in 1869 in *Gibbons v. United States*.<sup>114</sup> The lengths it took to reach this result, as well as its own words, reveal its true motivation: the Court believed the legislation, to the extent it could be read to include implied-in-law claims, presented an unwise risk to the public fisc.

The case starts with the irony that Gibbons had a valid, express contract with the federal government.<sup>115</sup> He had agreed to deliver, and the army had agreed to accept, 200,000 bushels of oats at a specified price per bushel.<sup>116</sup> However, when he timely tendered delivery, the quartermaster refused to accept a large part of the oats.<sup>117</sup> Later, after the time specified in the contract for delivery had passed, the quartermaster sent an orderly to Gibbons who ordered him to report to the officer's quarters, which he considered to be an arrest.<sup>118</sup> The quartermaster then demanded that he complete his order at the agreed price.<sup>119</sup> Gibbons protested, but the quartermaster threatened to buy from another and hold back the difference in price from the amounts still owed for the oats Gibbons had delivered, at which point he relented.<sup>120</sup> Gibbons went back into the market, purchased the oats demanded to fulfill the contract, and delivered the oats to the army.<sup>121</sup> Gibbons then sued in the Court of Claims for the difference in the market price available during the contract term and when he was forced back into the market, which was somewhat higher than the agreed price.<sup>122</sup>

On these facts, the Court unanimously held, in an opinion by Justice Miller, that Gibbons had revived the express contract, despite its material breach and his right to have refused the quartermaster's demands; and Gibbons could not recover more than the agreed price because his suit for the difference was "under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer those acts being in themselves torts."<sup>123</sup> In reaching this latter conclusion, the Court made several obvious missteps.

In the first place, the case should have been resolved—differently—on express contract grounds. Once the Court had held that Gibbons had "consented to renew that agreement and proceed to its fulfillment,"<sup>124</sup> normal material breach theory controlled. The Court concurred that the initial refusal by the government to accept full tender was a material breach that permitted Gibbons to cancel the contract and perform no further.<sup>125</sup> Upon a finding that he had "consented to renew that agreement and proceed to its fulfillment,"<sup>126</sup> the law does not leave him without a remedy for the breach. Then, as now, in the face of a material breach, the innocent party has the option to cancel and cease performance *or* continue performance and be

compensated in damages for the extra cost of that performance occasioned by the breach.<sup>127</sup> The proper result would have been to allow Gibbons to prove what that damage was, if any, as a result of the breach of the express contract, without need for discussion of an implied contract.<sup>128</sup>

The Court also went out of its way to negate the suggestion of duress that might have undercut its determination that Gibbons voluntarily renewed his contract. The Court notes that while Gibbons had considered himself to be under arrest when taken by the orderly to the quartermaster, the Court of Claims did not find an arrest and Gibbons' petition did not claim "arrest, or force, or duress."<sup>129</sup> Regarding the threat of the quartermaster to withhold amounts already due Gibbons for oats delivered if the government had to return to the market and purchase the oats at a price higher than that agreed, the Court stated as follows:

That he feared the officer might buy the oats in the market and hold back the difference in price from the money due for oats already delivered, does not invalidate the contract which he consented to fulfill to avoid that result. He could still have refused, and the government would have paid him what it owed him.

The supposition that the government will not pay its debts, or will not do justice, is not to be indulged.<sup>130</sup>

This language is more than ironic in that the very purpose of the Court of Claims was to remedy the great injustice occasioned by the failure of Congress to handle claims promptly, consistently, and rationally.<sup>131</sup>

Having failed to apply the applicable contracts law, the Court used its misbegotten analysis as a springboard to reject implied-in-law jurisdiction for the Court of Claims. It began with these assertions:

[T]his case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.

In the language of Judge Story, "it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests."<sup>132</sup>

It is readily seen that this argument bases the conclusion desired on a false premise. Justice Story had simply stated that the government enjoys sovereign immunity.<sup>133</sup> That does not answer the question of whether Congress in the 1855 and 1863 Acts had waived its immunity, especially when the Constitution guarantees citizens a right to petition for redress of grievances,<sup>134</sup> a right that, presumably, encompasses the obligation on the part of the government to review and resolve those petitions honestly, timely, and reasonably. If Congress did, indeed, grant the Court of Claims jurisdiction to hear claims founded on implied-in-law contracts, then, at the same time, it made itself responsible for some unauthorized acts of its agents (but only if it benefitted thereby).

The central argument of the *Gibbons* Court that simply does not beg the question is its assertion that unauthorized acts by a government's agent are torts.<sup>135</sup> And it is certainly true that, as of that date, Congress had not given the Court of Claims (or any other court) jurisdiction over torts, requiring claimants to continue to petition Congress itself directly for claims founded *solely* on torts.<sup>136</sup> But even assuming that all unauthorized actions are torts, that does not mean that an aggrieved party may not sue either in tort or on an implied contract. Ames made this point repeatedly in his article,<sup>137</sup> and Corbin also noted that in the common law tort and contract remedies often overlap, e.g., in trespass, conversion, and money or property obtained by fraud or duress.<sup>138</sup> At common law, as Corbin further explained, a plaintiff could waive the tort and recover in assumpsit *ex contractu*, as measured by unjust enrichment to the guilty party, rather than by the harm to himself (as a tort remedy for the same conduct would provide).<sup>139</sup> Indeed, the original Restatement in 1937 gave priority to the contractual cause of action when it overlapped with a tort but requested a monetary remedy in restitution:

The appropriate proceeding in an action at law for the payment of money by way of restitution is:

- (a) in States retaining common law forms of action, an action of general assumpsit;
- (b) in States distinguishing actions of contract from actions of tort, an action of contract....<sup>140</sup>

It is not that the justices were unaware of this state of the common law in 1869. Justice Miller for the Court in *Gibbons* continued,

In the absence of adjudged cases determining how far the government may be responsible on an implied assumpsit for acts which, though unauthorized, may have been done in its interest, and of which it may have received the benefit, the apparent hardships of many such cases

present strong appeals to the courts to indemnify the suffering individual at the expense of the United States.<sup>141</sup>

It is obviously taking advantage of one's bootstraps to argue the Court of Claims cannot provide implied-in-law contract remedies that sounded in common law in implied assumpsit because there is a dearth of authority applying it to the United States government when Congress had only a few years previously established the court and granted it the power to do so.<sup>142</sup> The two cases the Supreme Court cited for the lack of any such power both related to laches (for which typically there would be no unjust enrichment involved) and predated the 1855 Act.<sup>143</sup>

The *Gibbons* Court also failed altogether to analyze the text of the statute. Instead, it mainly cited the act for its “novelty”: “The creation by act of Congress of a court in which the United States may be sued, presents a novel feature in our jurisprudence, though the act limits such suits to claims founded on contracts, express or implied, with certain unimportant exceptions.”<sup>144</sup> Notably, the Court did not even quote, much less deal with, the fact that Congress had given the Court of Claims power to adjudicate “any” implied contract claim.<sup>145</sup> But also striking is Justice Miller’s phrase “with certain unimportant exceptions.” What these were he did not specify, but there were no exceptions in the 1855 and 1863 Acts themselves to the jurisdictional grant for claims founded on “any contract, express or implied.”<sup>146</sup> The only exception at the time the Court decided *Gibbons* was articulated in the 1864 Act, which withdrew from the Court of Claims power to adjudicate implied-in-law claims arising out of the actions of the military during the Civil War.<sup>147</sup> As noted above, this exception is hardly “unimportant” to the issue the *Gibbons* Court was addressing.<sup>148</sup> To the contrary, it demonstrated in dramatic fashion that Congress had meant what it literally said when it granted jurisdiction over claims founded on any implied contract and that the term was understood at the time to include those of the implied-in-law variety.

The Supreme Court’s final paragraph summarizes why it decided as it did.<sup>149</sup> The Court simply did not think it wise for Congress to have granted implied-in-law contract jurisdiction, and so it could not believe Congress actually did it.

These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims.<sup>150</sup>

A “novel feature in our jurisprudence”; “[t]hese reflections admonish us to be cautious”; “Congress has wisely reserved the matter for its own determination.”<sup>151</sup> These emotions of reluctance, rather than a literal, logical, and consistent review of what Congress had actually done and why it had done it, dictated the Court’s conclusion that Congress “certainly has not conferred [jurisdiction to review claims founded on implied in-law contracts] on the Court of Claims.”<sup>152</sup>

**B. The Supreme Court Continued Down the Wrong Path in *Langford v. United States***

Justice Miller again spoke for a unanimous Court in *Langford v. United States*,<sup>153</sup> in which the Court reconfirmed its ruling in *Gibbons*.<sup>154</sup> *Langford*, unlike *Gibbons*, presented a true implied-in-law contract situation, but the Court repeated the subtle error of *Gibbons* by ignoring that the victim of a tort can waive tort remedies and recover for the same event on an *ex contractu* claim founded in implied assumpsit, i.e., on an implied-in-law (or quasi-) contract.<sup>155</sup>

Federal Indian agents had the false belief that a building constructed on a reservation belonged to the United States, and they needed the building for an arsenal.<sup>156</sup> The agents took possession of the building despite the objections of the true owners, Langford and the American Board of Commissioners for Foreign Missions.<sup>157</sup> When the missions board tried to retake lawful possession, the agents procured the assistance of the army to retain it.<sup>158</sup> The missions board sued to recover the value of the government’s beneficial use of the property.<sup>159</sup>

As the Court noted, these wrongful acts of the federal agents were torts; there was not mutual agreement, either express or implied-in-fact, for them to possess the property. The federal agents took it, for government purposes, under a mistaken belief that the United States had title to the mission board’s property.<sup>160</sup>

The missions board argued that its right to recover damages was supportable as a constitutional taking;<sup>161</sup> Justice Miller rejected this by arguing it was not a taking because, in a taking, the United States admits that the property it takes is owned by a private individual, rather than asserts its own, false right of title.<sup>162</sup> Justice Miller then rejected recovery under an implied contract, based again on the undisputed proposition that Congress has not granted the Court of Claims the power to grant relief based on tort remedies, continuing:

The reason for this restriction is very obvious on a moment’s reflection. While Congress might be willing to subject the government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the government acting under

lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the government who did or commanded them, Congress did not intend to subject the government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.<sup>163</sup>

Justice Miller then quoted from his decision *Gibbons* at length and “reaffirm [ed]” it.<sup>164</sup>

The problem with this analysis, as well as that of *Gibbons*, is that it does not recognize that the same facts can often (but not always) give rise, at a victim’s option, to a cause of action *either* in a tort (*ex delicto*) *or* in contract (*ex contractu*).<sup>165</sup> Once again, the Court did not deal with the facts that (1) Congress had, prior to 1855, heard claims in quasi-contract in petitions filed directly with it;<sup>166</sup> (2) Congress explicitly gave the Court of Claims power to hear “any” implied contract claims;<sup>167</sup> and (3) Congress in the 1864 Act had withdrawn from the court those claims based on military confiscation of property that, by definition, were tortious but would have been founded on implied-in-law contracts and were closely analogous to the facts of *Langford*.<sup>168</sup> And, once again, the Court’s articulated rationale is how “unwise” it would have been for Congress to allow the Court of Claims to grant claims based on implied-in-law contracts.<sup>169</sup>

The Supreme Court, in ignoring the plain text of the 1855 and 1863 Acts and the significance of the 1864 Act, simply exalted its view of wise legislation over what Congress and the common law had provided. The distinction between remedies in actions *ex delicto* and *ex contractu* were well established and would not be “frittered away” by allowing the Court of Claims to grant relief on contractual, but not tort, causes of action based on the same circumstances.

**C. But Even the Supreme Court Allowed Some Recoveries on Implied-in-Law Contracts When “Justice” Demanded It**

The Supreme Court did not hold a principled line in denying all implied-in-law contract jurisdiction to the Court of Claims during this early period. When it found the facts compelling enough, or the dangers of unauthorized actions exposing the

government to damages not too great, it walked its way around the implied-in-law exclusion it had annexed to Congress's jurisdictional grant of "all claims" founded upon "any contract, express or implied."<sup>170</sup>

The Supreme Court in *Clark v. United States*<sup>171</sup> initiated the ameliorating rule that the exclusion it had carved out for implied-in-law contracts does not apply when the express or implied-in-fact contract was illegal or unenforceable and there was partial performance under it.<sup>172</sup> The Court in *Clark* had before it an unfortunate owner whose steamer had sunk while the military had used it in trials, with the military supplying the captain and crew.<sup>173</sup> A quartermaster had orally promised the owner he would be reimbursed for any such mishap to the vessel, in addition to being paid for its use, and the owner sued for the steamer's value.<sup>174</sup> The government defended because a parol contract violated an applicable statute of frauds,<sup>175</sup> and the Court of Claims agreed and dismissed for lack of jurisdiction.<sup>176</sup> Justice Bradley, over the dissent of three justices, agreed with the Court of Claims that the oral contract was void and unenforceable.<sup>177</sup>

A key aspect of implied-in-law contract jurisprudence is to prevent unjust enrichment in situations in which an unenforceable contract has been partially performed.<sup>178</sup> One would have thought, then, that if the Court of Claims did not have any implied-in-law jurisdiction, the ship-owner was completely out of luck, as the Court of Claims had held.<sup>179</sup> But the Supreme Court was not so hard-hearted:

We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*. In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract.<sup>180</sup>

Under this implied bailment, the Court granted compensation for the military's use of the vessel for the eight days before it sank, but the Court withheld reimbursement for the loss of the steamer itself (a loss by which the government was not unjustly enriched).<sup>181</sup>

But if the original parol agreement was void under the statute of frauds, surely this oral bailment contract found by the Court, assuming it was implied-in-fact, was similarly void. This was not lost on the Court, but it sidestepped the issue by addressing it simply as a matter of pleading:

If objected that the petition contains no count upon an implied contract for *quantum meruit*, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived.<sup>182</sup>

At the end of the day, the *Clark* Court simply had constructed an implied-in-law contract, as it believed justice required it to do in this situation, under which it awarded the ship owner the vessel's fair rental value in *quantum meruit*.<sup>183</sup> The Court did not attempt to distinguish its decision a few years earlier in *Gibbons*, in which it had held that the 1855 and 1863 Acts did not allow claims based on implied-in-law contracts.<sup>184</sup> The Court did not even mention *Gibbons*, and it avoided using the term "implied-in-law."<sup>185</sup>

In *United States v. State Bank*,<sup>186</sup> decided in 1878, two years before *Langford*, federal agents had defrauded the bank and the tainted funds had come into the possession of the government.<sup>187</sup> The bank sued the United States to recover the funds, but it was obvious the bank had no contract with the government supported by an express or implied mutual agreement.<sup>188</sup> Thus, the bank was pressing a claim founded on an implied-in-law (or quasi-) contract, one established under the common law as an implied assumpsit.<sup>189</sup> For this case, the Court's interest in "natural justice and equity" trumped its resolution in *Gibbons* and *Langford* that Congress had decided to move slowly and to disallow implied-in-law contracts and claims that could also be founded on tort causes of action: "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial."<sup>190</sup> Of course, it is "natural justice and equity" that substitutes for the lack of mutuality of agreement in implied-in-law contract actions.<sup>191</sup> In fact, the Supreme Court in *State Bank* (without direct attribution) copied the term "natural justice and equity" from a celebrated 1760 case recognizing the validity of *ex contractu* claims of implied assumpsit under implied-in-law contracts, a decision penned by Lord Mansfield, Chief Justice of the King's Bench (a law, not an equity, court).<sup>192</sup> Continuing, the *State Bank* Court stated,

But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.<sup>193</sup>

It is certainly true that it was well established by the mid-1800s that a situation such as that in *State Bank* stated a cause of action for monetary relief. What the Court did not feel the need to articulate in *State Bank* was that this was a cause of action based on an implied-in-law contract with damages based on unjust enrichment.<sup>194</sup> Nor did it see any need to refer to its *Gibbons* decision.<sup>195</sup> And the Court did not acknowledge that it was quoting Lord Mansfield's formulation for an *ex contractu* remedy based on implied-in-law concepts of "natural justice and equity" when it wrote the decision in *State Bank*.<sup>196</sup>

This double-minded pattern continued two years later, as the Supreme Court in *Langford* did not try to distinguish its decision in *State Bank*.<sup>197</sup> But the case of justice and equity is just as strong in *Langford* as it is in *State Bank*.<sup>198</sup> Elemental justice and equity as much demand that the United States pay for what it needs and uses as it does that it disgorge what does not belong to it, as the common law had long provided.<sup>199</sup>

It is obvious that the true distinction between the results in *Gibbons* and *Langford*, on the one hand, and *State Bank*, on the other, was not a principled one regarding the Court of Claims' jurisdiction over claims founded on implied-in-law contracts. It was that, in *State Bank*, the money was never really the federal government's, even though it was reposed in its coffers.<sup>200</sup> Thus, the concern of the justices that Congress had overstepped the bounds of wisdom and would have jeopardized the financial condition of the country if they allowed implied-in-law contract jurisdiction was mitigated in *State Bank*.<sup>201</sup>

The Supreme Court next cut back on the application of *Langford*. In *United States v. Great Falls Manufacturing Co.*,<sup>202</sup> the Supreme Court held in 1884, prior to passage of the Tucker Act, that if the government when taking property *knew* it was privately owned, *Langford* did not apply and there was an implied contract to pay just compensation.<sup>203</sup> While it could be argued the implied contract in such a situation was one implied-in-fact, by far the better reasoning, given the non-consensual taking of the property, was that the mutuality was supplied in law by the duty imposed by the Constitution for the government to provide just compensation.<sup>204</sup>

The operative passage in the *Great Falls* decision again exposes that, in refusing to acknowledge expressly the Court of Claims' jurisdiction over implied-in-law contract claims, the Supreme Court was not acting based on an evenhanded application of the rules of textual interpretation but on other, pragmatic considerations that are mainly the province of legislators:

The making of the improvements necessarily involved the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the constitution--upon which question we express no opinion—*there is no sound reason why the claimant might not waive that right*, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation....In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. *The law will imply a promise to make the required compensation*, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. *Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract*, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded “upon any contract, express or implied, with the government of the United States.”<sup>205</sup>

Thus, in this case, the Supreme Court both acknowledged that a plaintiff may elect different causes of action and remedies against the government for the same events (unlike the Court's refusal to recognize the significance of that in *Gibbons* and *Langford*)<sup>206</sup> and openly found “implied contract” jurisdiction under the 1855 and 1863 Acts when the promise supplying mutuality was not an agreement, but a duty implied by law and “common justice.”<sup>207</sup> The distinction the Court made between this case and *Langford* where the federal agents thought the government owned the property<sup>208</sup> related to a concern of the Court that Congress might not have agreed to the taking in *Langford*, while it had already appropriated funds for the taking in *Great Falls*,<sup>209</sup> and so the Treasury was less at risk. The legal basis for both claims was the same: they were both claims founded on implied-in-law contracts and, in that respect, were identical for purposes of the 1855 and 1863 Acts and their grant of jurisdiction to the Court of Claims.<sup>210</sup>

## V. CONGRESS TRIED AGAIN, BUT THE SUPREME COURT STILL THOUGHT THE LEGISLATION TO BE UNWISE

When Congress in the 1880s again considered revision to the jurisdictional statute of the Court of Claims, it had before it fractured case law from the Supreme

Court with regard to implied-in-law contracts claims.<sup>211</sup> As just discussed, in some cases, the Supreme Court had expressly denied Congress had intended to allow claims based on implied-in-law contracts.<sup>212</sup> In other cases, the Court held exactly the opposite on the facts, allowing recovery under implied-in-law contract claims but not acknowledging that these decisions were in conflict with others of its decisions.<sup>213</sup> Congress acted to affirm those cases allowing recovery, but the Supreme Court refused to overturn its prior precedent because it still believed the legislation to be unwise.

**A. Congress in the Tucker Act Affirms the Court of Claims' Jurisdiction to Award Unjust Enrichment Damages**

Congress in 1887 passed what has become known as the Tucker Act.<sup>214</sup> It added an express provision for claims “founded upon the Constitution.”<sup>215</sup> It also specifically addressed the scope of relief that could be provided for “[a]ll claims founded...upon any contract, express or implied,” specifying that the court could handle “[a]ll claims...for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable.”<sup>216</sup>

This language directly addressed the issue of whether the Court of Claims could provide unjust enrichment in contract claims. Part of the history of the growth of contractual causes of action in the common law was to expand the jurisdiction of the courts of law to mirror that provided by courts of equity.<sup>217</sup> With respect to contracts, it was the equity courts that first heard cases asking for unjust enrichment damages in what became the prototypical implied-in-law contract cases.<sup>218</sup> Congress by this added language clearly expressed its intent that the Court of Claims would not have to parse where the lines were drawn between relief available in law and equity courts, but could grant all relief available in either.<sup>219</sup> Thus, from this addition to the statute, the logical conclusion was that Congress sought to validate those Supreme Court cases confirming implied-in-law damages relief, such as *Clark*,<sup>220</sup> *State Bank*,<sup>221</sup> and *Great Falls*,<sup>222</sup> and to repudiate those cases that denied such relief, such as *Gibbons*<sup>223</sup> and *Langford*.<sup>224</sup>

This interpretation is reinforced by Congress incorporating the substance of the 1864 Act into the Tucker Act with these words: “*Provided, however, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as ‘war claims.’*”<sup>225</sup> As previously discussed with respect to the 1864 Act,<sup>226</sup> the “war claims” due to military confiscation and use of private property would have been needed to be excepted from the act’s coverage only if Congress had

understood that it had granted the Court of Claims jurisdiction to resolve claims founded in implied-in-law contracts and award damages based on unjust enrichment.<sup>227</sup> Congress specifically withheld from the Court of Claims the power to award damages for tort causes of action,<sup>228</sup> but its withholding in that regard did not mean that the same events that potentially gave rise to a tort action could not alternatively support an implied contract action--with contract damages to be awarded instead of tort damages. But that straightforward reading of the statute was not the one adopted by the Supreme Court.

### **B. The Supreme Court Continues to Refuse a Literal Interpretation of What It Considers Unwise Legislation**

The initial case interpreting the new language in the Tucker Act that provided jurisdiction to the Court of Claims over all claims for any damages that a private party could obtain in a court of law or equity did not involve implied-in-law contract jurisdiction, but it foreshadowed the result for those cases. At issue in *United States v. Jones*<sup>229</sup> was whether specific performance could now be granted by the Court of Claims in an appropriate case when that relief would be available against a private party.<sup>230</sup> The Supreme Court in *Jones*, two years after passage of the Tucker Act, ruled that Congress still intended to restrict the Court of Claims to monetary damages only, pointing textually to the fact that Congress had not modified the appeal rights from judgments of the Court of Claims to the Supreme Court, which still read from “where the amount in controversy exceeds \$3000.”<sup>231</sup> But the real concerns of the majority, as in *Gibbons*<sup>232</sup> and *Langford*,<sup>233</sup> related not to the text of the statute, but to policy.<sup>234</sup> The majority of the Court in 1889 recoiled from the thought that the judiciary could specify what the executive must do:

[W]e should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belong so appropriately to the political department, had been cast upon the courts-- which it surely would have been, if such a wide door had been opened for suing the government to obtain patents and establish land claims, as the counsel for the appellees in these cases seems to imagine. We are satisfied that the door has not yet been thrown open thus wide.<sup>235</sup>

Justice Miller, the author of *Gibbons* and *Langford*, joined by Justice Field, dissented. Justice Miller appropriately noted that the majority had just read out of the Tucker Act the text Congress had specifically added to allow the Court of Claims to grant *any* relief against the United States that could be granted against a private party:

The manifest purpose of this new act was to confer power which the Court of Claims did not previously have, and to authorize it to take jurisdiction of a class of cases of which it had not cognizance before. To say that under such circumstances the new statute is to be crippled and rendered ineffectual in the only new feature which it has, in regard to the jurisdiction of that court, is, in my mind, a refusal to obey the law as made by Congress in the matter in which its power is undisputed.<sup>236</sup>

Or, as Judge Nichols of the Courts of Claims politely put it almost a century later, “[i]f [the *Jones* majority] was right as to congressional intent, it might seem Congress chose unhappy language to express it, but the decision has stood.”<sup>237</sup> While this new language of the Tucker Act regarding the court’s jurisdiction to provide all contractual relief available to a private party was never expressly revoked,<sup>238</sup> after this restrictive reading in *Jones*, it basically became meaningless—so much so that in later codifications it was simply omitted as surplusage, as Justice Miller had warned the majority was making it.<sup>239</sup>

The entrenchment of the Supreme Court in the view that, even after the Tucker Act, Congress had not provided the Court of Claims with implied-in-law contract jurisdiction, as foreshadowed in *Jones*, was effected in *Bigby v. United States*<sup>240</sup> in 1903. In *Bigby*, a passenger riding in an elevator maintained and operated by the federal government in a post office was hurt by its defective operation.<sup>241</sup> He expressly waived a tort cause of action and claimed instead the government had breached an implied contract to carry him safely in its elevator, but still sought compensation for the injuries he had suffered (a tort remedy).<sup>242</sup> In denying his claim, the Court reached the right result, but unnecessarily and improperly adopted its prior rulings in which it had found that the 1855 and 1863 Acts had not granted implied-in-law contract claim jurisdiction to the Court of Claims. After quoting large swaths of *Gibbons*, *Langford*, and other cases, the *Bigby* Court noted that Congress in the Tucker Act had expressly withheld power for the Court of Claims to award tort damages<sup>243</sup> and that the negligence alleged by the elevator passenger was a textbook definition of a tort.<sup>244</sup> Completely ignored in the Court’s analysis were the provisions of the Tucker Act making the government liable for all other damages a court of law or equity could award against a private party and the exclusion of Civil War claims.<sup>245</sup> The Court then juxtaposed these sentences:

It is a case “sounding in tort,” because it had its origin in and is founded on the wrongful and negligent act of the elevator manager. There is in it no element of contract as between the plaintiff and the Government; for, as we have said, no one was authorized to put upon the government a liability for damages arising from the wrongful, tortious act of its employee. The plaintiff therefore cannot by the device of waiving the tort

committed by the elevator operator make a case against the Government of implied contract. A party may in some cases waive a tort; that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort.<sup>246</sup>

This passage by itself disproved the propriety of the Supreme Court's restrictive reading of the implied contract jurisdiction Congress bestowed in the 1855 and 1863 Acts and rearticulated and emphasized in the Tucker Act.<sup>247</sup> In its last sentence quoted above, the Court recognized some events can give rise to *either* tort *or* contract causes of action and remedies "where the matter out of which his claim arises has in it elements both of contract and tort."<sup>248</sup> But in acknowledging the fact that the events could also sound in tort did *not* prevent a party from suing on contract for the same matter, the Court also acknowledged that, just because a tort action could technically be pled, it does not eliminate the contract action or the Court of Claims' ability to grant relief under it.<sup>249</sup> That being so, the fact that Congress withholds tort remedies<sup>250</sup> cannot logically show Congress's intent to eliminate implied-in-law contract remedies for situations that give rise to both contract and tort causes of action.

To the extent the Court in *Bigby* and prior cases read the Tucker Act (and its predecessor acts) to foreclose implied-in-law contract claims if they could also be founded in tort, the Court obviously overread the act, as the its own language in *Bigby* showed.<sup>251</sup> It also ignored the common law, as summarized in the original Restatement:

Certain actions, however, are classified as tort actions, although they are restitutionary in that they restore the plaintiff to his former position by taking from the defendant what he had wrongfully acquired, or its value....However, in all of these cases a typical quasi-contractual situation exists and even though the tort actions normally produce results which are similar to those produced by the quasi-contractual actions, the fact that the defendant was a wrongdoer does not limit the injured party to a tort action.<sup>252</sup>

The real concern of the Court in *Bigby* remained its policy determination that Congress could not have intended to be bound by the unauthorized acts of its agents—even if the government received and retained benefits from those acts and had not paid for them—and that Congress should continue to resolve any such petitions for redress of grievances itself.

*Bigby* could have been properly, and more narrowly, disposed of in two ways. First, the facts related to the negligent operation of the elevator did not state an

implied-in-law contract situation.<sup>253</sup> The facts *only* stated a tort cause of action.<sup>254</sup> Second, just as fundamentally, Bigby was seeking tort damages (injuries to his person), not contract damages (benefit to the government, of which there was none in this case).<sup>255</sup> But *Bigby*, and a series of cases following it, locked in the pre-Tucker Act rulings of *Gibbons* and *Langford* that the Court of Claims could not provide relief for an implied-in-law (or quasi-) contract claim.<sup>256</sup> The Supreme Court once again rebuffed Congress's grant of such jurisdiction on policy grounds, despite the statutory text stating otherwise.<sup>257</sup>

## VI. HOW TO MINIMIZE THE DAMAGE: LEGISLATION CLARIFYING ORIGINAL INTENT, EXPANSIVE TREATMENT OF RATIFICATION, AND RESISTANCE TO INCURSIONS ON IMPLIED-IN-LAW REMEDIES

Three ways to mitigate the harm occasioned by the Supreme Court's refusal to acknowledge the jurisdiction of the Court of Claims over claims based on implied-in-law contracts suggest themselves. First, Congress should enact clarifying language. Second, the courts should adopt an expansive reading of ratification in quasi-contract situations. Third, the courts should firmly resist any invitation to expand the reach of the long-standing, but mistaken, ruling that the Court of Claims (and now its successor Court of Federal Claims) lacks implied-in-law contract jurisdiction, particularly by improperly limiting implied-in-law remedies related to contracts express or implied in fact.

### A. Congress Should Adopt Clarifying Language to Reaffirm Its Original Statutory Intent

Whether or not one agrees with the thesis of this article that Congress in the 1855 Act, the 1863 Act, and the Tucker Act gave the Court of Claims jurisdiction over claims founded upon implied-in-law contracts, a persuasive case can be made that Congress should expressly clarify now that it intends to do so. As the law now stands, an illogical gap exists in the coverage of private citizens against injuries caused by their government.

When the three acts of the 1800s were passed, Congress had not yet consented to allow itself to be sued for torts.<sup>258</sup> However, in 1946 Congress passed the Federal Torts Claim Act (FTCA),<sup>259</sup> revising and replacing it in 1948 in largely its current form.<sup>260</sup> The FTCA, with certain exceptions, provides the "United States shall be liable...relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances."<sup>261</sup> Together with the Tucker Act's original provision that the United States would be liable "for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party

would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable,”<sup>262</sup> this would cover the field of potential actions against the United States, one would think, as all civil causes of actions under the common law were divided into either tort (*ex delicto*) or contract (*ex contractu*).<sup>263</sup>

But there is now a hole in the coverage. Even though the federal government now is liable for most torts,<sup>264</sup> because of the fear of the late nineteenth and early twentieth century justices that it would be “unwise” and a potentially serious drain on the Treasury to allow quasi-contractual relief in unjust enrichment,<sup>265</sup> the federal government is not liable when it takes and benefits from goods or services of a private citizen without an express or implied-in-fact contract. Passage of the FTCA substantially undercut these concerns expressed by the justices over one hundred years ago since Congress has now seen fit to make the government liable for most torts.<sup>266</sup>

Moreover, the concerns that the early justices expressed about the potential for substantial raids on the public fisc, even if not overblown at the time, have long been outdated. Our federal government now routinely has trillion-dollar budgets. The likelihood of an unjust remedy judgment in anything but a relatively trivial amount in comparison to the federal budget and debt is remote.

The law of implied-in-law contracts (alternatively called quasi-contracts or unjust enrichment) also has many limiting principles that protect against unrestrained liabilities and limit reimbursement to benefits actually needed and used. Such a discussion must start with the definition of *implied-in-law contract* (or *quasi-contract*) itself. Corbin defines it as follows: “A quasi-contract is a legal obligation, not based upon agreement, enforced either specifically or by compelling the obligor to restore the value of that by which he was unjustly enriched.”<sup>267</sup> This definition centers on a major limiting principle: a quasi-contractual remedy, unlike a tort remedy, does *not* focus on the harm to the injured party.<sup>268</sup> Rather, damages are assessed as the benefit to the defendant--the amount by which it has been unjustly enriched.<sup>269</sup> As contrasted in Restatement (Third), “[t]he law of torts identifies those circumstances in which a person is liable for injury inflicted, measuring liability by the extent of the harm; the law of restitution identifies those circumstances in which a person is liable for benefits received, measuring liability by the extent of the benefit.”<sup>270</sup> Thus, the government would never have to pay more than the value it gained if it were liable in implied-in-law contract actions.

A case demonstrating this limiting principle is *Eastern Extension, Australasia & China Telegraph Co. v. United States*.<sup>271</sup> There, the company entered into an agreement with Spain prior to the Spanish-American War to lay telegraph cable in

the Philippines.<sup>272</sup> In addition to usage rates, it had negotiated a capital subsidy to be paid in installments, which Spain had honored until it lost possession of the island nation.<sup>273</sup> After the war, the U.S. government left the telegraph cables and business solely in the company's hands, with the full control over service rates charged, which the federal government had paid when it had used the company's service.<sup>274</sup> But the United States refused to pay the remaining subsidy installments, and the company sued for them in the Court of Claims.<sup>275</sup> The Supreme Court found that in these circumstances the United States had not assumed Spain's contractual obligation and no implied obligation arose "on the principle of undue enrichment or of advantage obtained" because the government had paid the full rate the company had set.<sup>276</sup>

A further, long-standing limitation is that an implied-in-law contract remedy cannot override a valid express or implied-in-fact contract that already exists.<sup>277</sup> Implied-in-law contract theory provides no sanction for a court to rewrite a preexisting agreement of the parties for the purpose of setting a "fairer" compensation or otherwise.<sup>278</sup> This limiting principle was at work in *Coleman v. United States*,<sup>279</sup> in which private parties hired the plaintiffs to investigate title to certain property that involved the federal government as well.<sup>280</sup> The plaintiffs-investigators also obtained permission from the Attorney General to investigate in the name of the United States as special district attorneys, but only on the understanding that the United States would not pay anything for their services.<sup>281</sup> When it appeared, as a result of the investigations, that the United States would be the primary beneficiary, the private parties reneged on payment and the investigators sought compensation, which the Attorney General refused and at which point terminated the relationship.<sup>282</sup> The Supreme Court properly refused the investigators compensation from the government for their past services because an implied-in-law contract cannot override an express or implied-in-fact contract, which in this case provided the investigators would *not* be compensated by the federal government.<sup>283</sup>

Another important limitation is that recovery cannot be imposed upon a person by a volunteer. In other words, a person cannot take it into his own hands to supply the government with something the government has not requested and then demand payment.<sup>284</sup> In a similar vein, implied-in-law contract theory does not give any relief for benefits conferred without request when there is no need for the goods or services.<sup>285</sup> Providing necessities to a minor incapable of contracting states an action in quasi-contract,<sup>286</sup> but not when the goods or services provided are not really needed because the circumstances of the particular situation did not dictate it or because it was probable that the parents or guardian would have provided them in a timely fashion.<sup>287</sup> In other words, the plaintiff must supply the service or goods in good faith.<sup>288</sup>

This dispenses with the bug-a-bear raised by the Supreme Court in *Gibbons* that providing relief under implied-in-law contracts would lead to individuals running amok without any controls, committing the government, and bankrupting the Treasury.<sup>289</sup> An aircraft manufacturer cannot just land a new jet at a military base, park it, and demand payment, even if it thought the government needed one. The company knows the military has significant resources already and that it purchases new aircraft through a procurement system with authorized Contracting Officers. Obligations cannot be forced on the government under implied-in-law contract remedies.<sup>290</sup> The remedies available only require compensation for property wrongfully held and for value actually received by demand or in an emergency.

The common law also puts a limitation on unjust enrichment remedies under illegal contracts, disallowing relief when it would violate the purpose of the law making the contract illegal or unenforceable.<sup>291</sup> As demonstrated in *Clark*,<sup>292</sup> unenforceability due to a statute of frauds normally will not prevent relief in unjust enrichment,<sup>293</sup> but an applicable statute of limitations normally will do so.<sup>294</sup> A restitution claim also can be “foreclosed by the claimant’s inequitable conduct.”<sup>295</sup>

The Restatement (Third) summarizes the “Limiting Principles” for unjust enrichment as follows:

- (1) The fact that a recipient has obtained a benefit without paying for it does not of itself establish that the recipient has been unjustly enriched.
- (2) A valid [express or implied-in-fact] contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.
- (3) There is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant’s intervention in the absence of contract.
- (4) Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay for a benefit that the recipient should have been free to refuse.<sup>296</sup>

These limiting principles adequately protect the U.S. Treasury. The policy reasons that motivated the early Supreme Court decision, i.e., the relative size of the potential liabilities<sup>297</sup> and Congress’s reluctance to cover tort liability,<sup>298</sup> are no longer applicable and should no longer prevent reimbursement for legitimate claims for implied-in-law contract liability and unjust enrichment damages.

In *United States v. Emery, Bird, Thayer Realty Co.*,<sup>299</sup> Justice Holmes stated it to be an “inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye.”<sup>300</sup> Unfortunately, that is exactly the premise the Court itself acted upon when finding that Congress, *sub silentio*, intended to exclude implied-in-law contracts from “contracts, express or implied.”<sup>301</sup> It is not too late for the Court to rectify its own errors.<sup>302</sup> Indeed, the Supreme Court, when it comes to takings jurisdiction under the Tucker Act, still espouses a broad interpretation of jurisdiction:

The proper inquiry is not whether the statute “expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,” but rather “whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the [Claims Court] to hear a suit involving the [statute] ‘founded...upon the Constitution.’”<sup>303</sup>

There is no logical reason to apply a different interpretational rationale to claims “founded upon...any express or implied contract.”<sup>304</sup> But more realistically, when it comes to contract jurisdiction, it calls for Congress to clarify its original intent.

## **B. The Courts Should Take an Expansive View of Ratification in Implied-in-Law Contract Situations**

The objection to implied-in-law jurisdiction under the Tucker Act is often addressed in terms of the government has no duty to pay when such a duty has not been authorized by one of the fiscal gatekeepers for government contracts, who are typically called “Contracting Officers.”<sup>305</sup> To recover under the terms of an express or implied-in-fact contract, it is necessary for the agreement to have been authorized.<sup>306</sup> By definition, this is unnecessary for implied-in-law contract relief, but that is not currently available according to the Supreme Court’s precedent.<sup>307</sup> Still, it is possible to convert an unauthorized agreement or an implied-in-law contract situation into an authorized express or implied-in-fact agreement through actual or constructive ratification by an authorized government representative.

The Federal Acquisition Regulation (FAR) provides for express ratification of “unauthorized commitments” when goods or services “have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment,”<sup>308</sup> in other words, for unjust enrichment. Ratification converts the unauthorized commitment into an authorized one for which the government is liable for the value received.<sup>309</sup> While these provisions provide some relief to those who enrich the government, the FAR does not cover all unjust enrichment situations,<sup>310</sup> and the courts have found other circumstances to be a ratification, converting an otherwise

unauthorized obligation into one that is reimbursable under unjust enrichment principles.

The harm imposed by the Supreme Court's improper withholding of implied-in-law contract jurisdiction from the current Court of Federal Claims can be ameliorated by a liberal use of ratification theory. Some precedent supports a liberal application, while other manifests a highly stringent use. But despite the more stringent case law, there is ample play in the joints for the Court of Federal Claims and the Federal Circuit to find ratification when "natural justice and equity" counsel that they do so.<sup>311</sup> This could be enhanced by more explicit expansion of ratification authority in the FAR.

### 1. Emergency Situations Are Suitable for Ratification

Emergency situations in which a party assists to meet a legitimate need are prototypical implied-in-law contract situations.<sup>312</sup> To some extent, emergency situations call out the loudest that "natural justice and equity" require compensation, but they obviously leave little or no time to call authorized Contracting Officers to the scene if they are not already there. Ratification can appropriately bridge this gap.

In *Philadelphia Suburban Corp. v. United States*,<sup>313</sup> two tankers collided, causing an oil fire. A U.S. Coast Guard officer directed the firefighting effort, including ordering the use of foam owned by the local, private firefighting company and promising payment; after the incident, the Coast Guard took with it several cans of the company's foam.<sup>314</sup> When the owner requested reimbursement, the government refused because the Coast Guard personnel at the scene did not have contracting authority.<sup>315</sup> The Court of Claims held, however, that "it may turn out, when the facts and circumstances are fully canvassed, that it was inherent or implied in the authority of the federal personnel acting in such emergency firefighting situations to procure and use on the spot the necessary or appropriate fire-fighting supplies."<sup>316</sup> While stated in terms of implied authority,<sup>317</sup> the court also could have labeled it ratification or, even more accurately, implied ratification.<sup>318</sup> And instead of remanding for further factual development,<sup>319</sup> the court could have decided in the foam owner's favor on the facts already known.

"Ratification occurs when a ratifying official has actual or constructive knowledge of an unauthorized agreement and expressly or impliedly adopts the agreement."<sup>320</sup> Under a proper implied ratification theory, it should be assumed that, if a reasonable Contracting Officer had been present in an emergency situation similar to that in *Philadelphia Suburban*,<sup>321</sup> she undoubtedly would have approved the transfer of the benefit to the government, i.e., there was a constructive

ratification. Put colloquially, if no one in his right mind would have said “no,” then an implied or constructive ratification properly can be found. Getting to the same place by another route, a court also could hold that, in such a situation, the agency would have abused its discretion to have refused ratification.

## 2. Protracted Situations Are Suitable for Ratification

*Jankowsky v. United States*<sup>322</sup> illustrates the other side of the spectrum, i.e., a non-emergency situation that carries on for a fair length of time. FBI agents used the Jankowskys’ business as a front to ferret out organized crime for several years, knowing that the owners insisted on indemnification for their business for the FBI to do so.<sup>323</sup> The Court of Federal Claims dismissed the Jankowskys’ claim because an agreement had not been formally approved by an individual with contracting authority, but the Federal Circuit reversed because a fact issue remained as to “whether the agency ratified the proposed contract with the Janowskys by allowing the sting operation to continue and by receiving the benefits from it.”<sup>324</sup>

*Jankowsky* is suitable precedent to find “constructive” or “institutional” or “implied” ratification whenever there is a situation in which the agency allows a situation to continue, accepting benefits, for a period of any reasonable length. It should be assumed that the authorized personnel within the agency had been made aware of the relevant facts by those cognizant of the situation and that by their silence they acquiesced in and ratified the arrangement, making the government liable under its initially unauthorized arrangement or, at a minimum, if price terms were not agreed upon, for the value of the goods and services received. Again in the alternative, the court could base such a decision on a duty of the knowledgeable government representatives to notify authorized personnel of their actions on which private citizens were relying and it being an abuse of discretion for the agency not to ratify when justice demands it. Such a result is consistent with and buttressed by the legal presumption of regularity and good faith conduct, i.e., that government agents are assumed to carry out their assigned responsibilities with timely and appropriate diligence.<sup>325</sup> In situations in which the government is accepting benefits over an extended period, the presumption of regularity naturally leads to the conclusion that government agents aware of the situation will inform those with authority to approve or disapprove of the circumstances and that the authorized agent will act promptly to halt the arrangement if there is no intent to pay. Otherwise, acquiescence should be deemed to result in “constructive” or “implied” or “institutional” ratification.<sup>326</sup>

## 3. Hybrid Situations Are Suitable for Ratification

Some cases fall in between the emergency situation and that involving a protracted period. Ratification is often appropriate for them as well.

An example of a hybrid case is *Silverman v. United States*,<sup>327</sup> in which a court reporter, acting as a subcontractor, was requested by an official at the agency to provide transcripts for which the subcontractor had not been paid by the prime contractor, the prime being in financial distress.<sup>328</sup> The court found the agency official and the subcontractor had made their own, implied-in-fact contract,<sup>329</sup> but there was a problem: the official “was not a contracting officer...with expressly delegated authority to make contracts for the Government.”<sup>330</sup> Citing *Philadelphia Suburban*, the court found ratification based on the agency conduct: “the FTC retained and utilized the transcripts which the plaintiff released to the FTC on the basis of the official’s promise. By accepting the benefits flowing from the senior FTC official’s promise of payment, the FTC ratified such promise and was bound by it.”<sup>331</sup> This situation involved “institutional,” “constructive,” or “implied” ratification because the court cited no evidence that any individual Contracting Officer had authorized or ratified the implied-in-fact contract between the agency and the subcontractor.<sup>332</sup> It was obviously the correct result since the facts showed that the agency needed the transcripts of its hearing and “it obviously would have been inconvenient and expensive to reschedule the particular hearings in order to obtain new transcripts.”<sup>333</sup> Thus, this easily fits in the category of “no Contracting Officer in her right mind would have refused to authorize the deal.”<sup>334</sup>

This returns us to the case with which we introduced this article, *City of El Centro v. United States*,<sup>335</sup> in which the INS Border Patrol requested a city hospital to care for several illegal immigrants it had caught after their van had crashed, with the hospital visits lasting several weeks.<sup>336</sup> The government defended on the grounds that the agent who had checked the injured immigrants into the hospital was not an authorized Contracting Officer.<sup>337</sup> The Claims Court rejected this defense, relying on implied authority in an emergency situation<sup>338</sup> and ratification because INS had had ample opportunity to tell the hospital it was not going to pay but did not until after the hospital had discharged the immigrants and sent a bill for their care.<sup>339</sup> The Claims Court concluded, “[s]uch behavior can spell only acquiescence and ratification by silence and inaction as well as by conduct.”<sup>340</sup>

On motion for reconsideration in *El Centro*, the government complained the Claims Court had not identified any particular Contracting Officer who had ratified the transaction.<sup>341</sup> The court in response relied on *Silverman*, holding that “[i]nstitutional ratification occurred in this case.”<sup>342</sup> The court also noted there is ample other precedent for the proposition stated in *Silverman* that ratification can be shown by acceptance of benefits.<sup>343</sup>

The majority of the Federal Circuit panel in *El Centro* reversed, finding no effective ratification.<sup>344</sup> It first said the situation was “not one in which emergency action must be taken by government agents to protect life and property,” such that

implied authority could be found.<sup>345</sup> The majority then rejected institutional ratification in the circumstances.<sup>346</sup> The majority distinguished *Silverman* on the grounds that, in that case, the agency official with whom the reporter had talked had authority to approve invoices submitted for payment, concluding, “[b]y contrast, in the case before us there was no promise, certainly no express promise, by an official empowered to bind the Government to pay for the care rendered.”<sup>347</sup> But, of course, this is really no distinction at all because the official in *Silverman* was *not* a Contracting Officer and had no personal contracting authority.<sup>348</sup> The fact that he basically served as a technical representative to the Contracting Officer can only have significance in that the person’s position and duties made it likely that he had ready access to the Contracting Officer and so should have informed her of the situation, further supporting a finding of acquiescence and “implied” or “institutional” ratification.<sup>349</sup>

A ratification should also have been found on the facts of *El Centro*, as the dissent argued and the Claims Court had held.<sup>350</sup> During the initial period of treatment, the hospital was responding to an emergency,<sup>351</sup> and no reasonable Contracting Officer, if on the scene, would have denied authorization of treatment. For the several weeks of continuing care, the agency had ample opportunity to have allowed the hospital to discharge the immigrants into the agency’s own custody, but it did not do so.<sup>352</sup> (The hospital had sought reassurances of payment during this period.<sup>353</sup>) And, if the Border Patrol had taken that route, it would have had to have found another facility to provide health care for the immigrants, so the benefits received were real and not “officious,” in the initial *Restatement*’s terminology.<sup>354</sup>

*El Centro* was wrongly decided, but fortunately, it has largely been limited to its facts.<sup>355</sup> In *Jankowsky*, the government attempted to apply the *El Centro* majority’s reasoning to undercut other cases finding institutional ratification. The *Jankowsky* court unanimously explained *El Centro* based on its alternative holding that the government had not been conferred any benefit because the Border Patrol was not responsible for the illegal immigrants (despite their being effectively in INS custody).<sup>356</sup> The Federal Circuit in *Jankowsky* reaffirmed the concept of “institutional” ratification, and it should be used freely in appropriate cases, not viewed with a jaundiced eye, especially in circumstances like those in *El Centro* when the government received benefits it sorely needed and retained.<sup>357</sup> To do otherwise is to allow the government to be unnecessarily, improperly, and unjustly enriched at the expense of its citizens.

### C. The Courts Should Beware of Expanding the Existing Jurisdictional Limitation to Appropriate Contract Remedies

Commentator W. Stanfield Johnson in his 2015 article in this journal noted

that the Supreme Court in *Hercules, Inc. v. United States*<sup>358</sup> had committed a “conspicuous error.”<sup>359</sup> The error was in Chief Justice Rehnquist for the Court rejecting, on *jurisdictional* grounds, the contractor’s claims that its express contract with the government contained an implied warranty and indemnification:

Each material term or contractual obligation, as well as the contract as a whole, is subject to this jurisdictional limitation [on implied-in-law contracts]....Perhaps recognizing the weakness of their legal position, petitioners plead “simple fairness,”...and ask us to “redress the unmistakable inequities.”....But in any event we are constrained by our limited jurisdiction and may not entertain claims “based merely on equitable considerations.”<sup>360</sup>

This view seemed to be short-lived because soon thereafter the majority of the Court in *United States v. Winstar*<sup>361</sup> found implied duties in an express contract,<sup>362</sup> rejecting Chief Justice Rehnquist’s dissent criticizing the majority for its doing so and, in support, citing his *Hercules* opinion.<sup>363</sup> Johnson went on to analyze and criticize, however, the Federal Circuit’s use of the *Hercules* misstep in various decisions in which implied terms and duties should have been accepted, including the implied warranty of adequate specifications provided by the government,<sup>364</sup> the implied duties of good faith and fair dealing,<sup>365</sup> and the implied warranty of fitness for intended purpose.<sup>366</sup> He suggested several helpful ways to mitigate the harm by limiting *Hercules* to its facts.<sup>367</sup> For the proper controlling precedent, Johnson recommended reliance on *United States v. Mitchell*,<sup>368</sup> in which the Court observed that “[g]overnment liability in contract is viewed as perhaps ‘the widest and most unequivocal waiver of federal immunity from suit.’”<sup>369</sup> Indeed, the Federal Circuit in *Slattery v. United States*<sup>370</sup> followed *Mitchell*: “We affirm the guidance of *Mitchell*...that ‘[i]f a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit’; exceptions require an unambiguous statement by Congress.”<sup>371</sup>

The Court of Federal Claims and the Federal Circuit should continue to traverse the path set before it by *Mitchell* and *Slattery*,<sup>372</sup> along with many other precedents, rather than the aberrational language of *Hercules*.<sup>373</sup> This is especially so in light of the fact that the Supreme Court has in theory, and largely in practice, improperly foreclosed relief on implied-in-law contract claims. That error should be minimized, rather than expanded, by a robust appreciation of the fact that express and implied-in-fact contracts always have at least some terms and remedies implied in law (e.g., good faith duties and breach damages) and may have others implied as the circumstances warrant.

## VII. CONCLUSION

This author is not under the illusion that this article will cause the Supreme Court to revisit its long-standing jurisprudence and reinterpret the jurisdictional grant of what is now the Court of Federal Claims, despite its prior, *sub silentio* grant of implied-in-law claims in certain situations. Perhaps a sufficient retort is that Congress has had over one hundred years to correct the situation if it had wanted to, but has not.<sup>374</sup> However, that does not diminish that the Supreme Court's historical block to the Court of Claims providing relief under contracts implied in law violates the congressional charter granting jurisdiction to that court (and its successors) of *any* implied contract claim.<sup>375</sup> This improper block often withholds "natural justice and equity"<sup>376</sup> from the very litigants Congress sought to assist in the redress of their grievances.

Congress should remedy the situation by amending the statute, perhaps in the way proposed by Wall and Childres, to specify that the court may grant claims founded on "the unjust enrichment of the United States."<sup>377</sup> And the courts should give as limiting a reading to the mistaken Supreme Court precedent as possible in the meantime, including by giving an expansive reading to ratification theory when the government has received and retained benefits. The mistaken concept that the Court of Federal Claims does not have jurisdiction over implied-in-law contracts must be lived with for now, but its harm should be minimized and certainly not expanded to impinge on remedies and provisions that are implied by law in every contract, including in express and implied-in-fact contracts.<sup>378</sup>

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## Endnotes

- <sup>1</sup> See *City of El Centro v. United States*, 16 Cl. Ct. 500, 503, *recons. denied*, 17 Cl. Ct. 794 (Cl. Ct. 1989), *rev'd*, 922 F.2d 816, 817-18 (Fed. Cir. 1990).
- <sup>2</sup> *El Centro*, 16 Cl. Ct. at 501.
- <sup>3</sup> *Id.*

4        *Id.*

5        *Id.*

6        *Id.*

7        *Id.*

8        *Id.* at 502.

9        *Id.*

10       *Id.*

11       *Id.* at 503.

12       *El Centro*, 922 F.2d at 818, 824-25 (Rich, J., dissenting).

13       *See El Centro*, 16 Cl. Ct. at 503.

14       *Id.* at 508.

15       *Id.* at 509; 17 Cl. Ct. at 797-98.

16       *El Centro*, 922 F.2d at 821, 825-26 (Rich, J., dissenting).

17       *See id.* at 823-24.

18       *Id.* The majority also attempted in dicta to provide an alternative rationale for  
its holding, i.e., that the government had no responsibility to care for the aliens  
and so received no consideration for the medical treatment of the aliens. *Id.* at  
822-23. But that attempt was exploded by the government's stipulation quoted  
by the dissent and above. *See supra* note 17 and accompanying text.

19       Act of February 24, 1855, ch. 122, 10 Stat. 612, 612 (1855).

20       *See* 28 U.S.C. § 491(a)(1) (2012) ("The United States Court of Federal Claims  
shall have jurisdiction to render judgment upon any claim against the United  
States founded ... upon any express or implied contract with the United  
States.").

21       *See infra* Part III.

22       *See infra* Part IV.

23       516 U.S. 417, 423 (1996).

24       *See generally* W. Stanfield Johnson, *Hercules, Winstar, and the Supreme  
Court's Conspicuous and Potentially Consequential Error*, 44 PUB. CONT. L.J.

199 (2015).

<sup>25</sup> *Id.* at 207-11.

<sup>26</sup> See Collin D. Swan, *Government Contracts and the Federal Circuit: A History of Judicial Remedies Against the Sovereign*, 8 J. FED. CIR. HIST. SOC'Y 105, 106 (2014); Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 644 (1985); William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 392 (1968); WILSON COWEN, PHILIP NICHOLS, JR. & MARION T. BENNETT, THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II 8-11 (1978); see also *Slattery v. United States*, 635 F.3d 1298, 1301-04 (Fed. Cir. 2011) (en banc).

<sup>27</sup> See U.S. CONST. amend. I.

<sup>28</sup> Swan, *supra* note 26, at 106.

<sup>29</sup> Wiecek, *supra* note 26, at 392; COWEN, NICHOLS & BENNETT, *supra* note 26, at 9.

<sup>30</sup> COWEN, NICHOLS & BENNETT, *supra* note 26, at 9-10.

<sup>31</sup> Wiecek, *supra* note 26, at 392 (quoting H.R. REP. 30-498, at 2 (1st Sess. 1848)).

<sup>32</sup> See *John Quincy Adams*, U.S. HOUSE OF REPRESENTATIVES (2016), <http://history.house.gov/People/Detail/8312>.

<sup>33</sup> Wiecek, *supra* note 26, at 392 (quoting JOHN Q. ADAMS, MEMOIRS OF JOHN QUINCY ADAMS 480 (Charles Francis Adams ed., 1876)); see also CONG GLOBE, 33d Cong., 2d Sess. 70 (1854) ("Two days of every week--one third of the time, to say nothing of the time spent by committees--is set apart for the consideration of private bills and reports, and yet not much more than half are acted upon." (remarks of Sen. Brodhead)).

<sup>34</sup> See Wiecek, *supra* note 26, at 395. In 1857, bribery scandals involved three representatives, two of whom resigned, and the third did not run for reelection. *Id.* at 398.

<sup>35</sup> See *id.* at 390-91; COWEN, NICHOLS & BENNETT, *supra* note 26, at 7-8, 11-12.

<sup>36</sup> Shimomura, *supra* note 26, at 650; Wiecek, *supra* note 26, at 394-95; COWEN, NICHOLS & BENNETT, *supra* note 26, at 12-15.

<sup>37</sup> See Swan, *supra* note 26, at 107.

- 38 Act of February 24, 1855, ch. 122, 10 Stat. 612, 612 (1855); *see also* CONG GLOBE, 33d Cong., 2d Sess. 70-74, 105 (1854); *see generally* Swan, *supra* note 26, at 107.
- 39 *See* Donald A. Wall & Robert Childres, *The Law of Restitution and the Federal Government*, 66 NW. U. L. REV. 587, 599-600 n.48 (1971).
- 40 *See id.* at 599.
- 41 *See infra* Part III.B.
- 42 10 Stat. at 612.
- 43 *See* Collector v. Hubbard, 79 U.S. (12 Wall.) 1, 15 (1871) (determining that “any” is “quite clear” and includes all types); *Any*, WEBSTER’S DICTIONARY 1828, <http://www.webstersdictionary1828.com/Dictionary/any> [https://perma.cc/W2CA-6JZY] (last visited June 21, 2016); *see generally* ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 101 (2012) (“General terms are to be given their general meaning.”). The Supreme Court recently has cited the Scalia and Garner treatise approvingly. *See* Lockhart v. United States, 136 S. Ct. 958, 970 (2016) (Kagan, J., dissenting).
- 44 *See, e.g.*, Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 9-10 (2011) (“broad interpretation”); Boyle v. United States, 556 U.S. 938, 943-44 (2009) (“obviously broad”; “ensures ... a wide reach”); Iraq v. Beatty, 556 U.S. 848, 856 (2009) (“Of course the word ‘any’ ... has an ‘expansive meaning,’ ... giving us no warrant to limit the class.” (internal citation omitted)); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 218, 220 (2008) (“broad meaning”; “expansive language”); Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007) (“sweeping”; “of whatever stripe”); Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) (“expansive”); Salinas v. United States, 522 U.S. 52, 56-57 (1997) (“expansive, unqualified”); United States v. Gonzales, 520 U.S. 1, 5 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is ‘one or some indiscriminately of whatever kind.’” (quoting WEBSTER’S THIRD NEW INT’L DICT. 97 (1976))).
- 45 446 U.S. 578 (1980).
- 46 *Id.* at 588-89.
- 47 *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) (articulating the plain meaning rule of statutory interpretation); *see also* NORMAN J. SINGER & SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION*

146-47, 163 (7th ed. 2014).

48 Wall & Childres, *supra* note 39, at 589.

49 *Id.* at 590.

50 See RESTATEMENT (THIRD) OF RESTITUTION § 4 cmt. b (AM. LAW INST. 2011); see *infra* notes 62-63 and accompanying text.

51 Act of February 24, 1855, ch. 122, 10 Stat. 612, 612 (1855).

52 See *Comm'r of Internal Revenue v. Asphalt Prods. Co.*, 482 U.S. 117, 120-21 (1987) (per curiam) (refusing to add limiting language to unambiguous statutory text); see SCALIA & GARNER, *supra* note 43, at 93, 97-98 (identifying as canon of construction, “Nothing is to be added to what the text states or reasonably implies.”).

53 See, e.g., *Asphalt Prods. Co.*, 482 U.S. at 121 (comparing unlimited text with similar statutory provisions including limitations and, in face of government’s argument that a literal application of the unlimited text could lead to absurd results, stated, “It is not our assigned role to alter that disposition.”)

54 10 Stat. at 612.

55 Wall & Childres, *supra* note 39, at 622.

56 *Id.* at 599-600 n.48; see also Johnson, *supra* note 24, at 207-08

57 See generally SCALIA & GARNER, *supra* note 43, at 107-11; see, e.g., *United States v. South Half of Lot 7 & Lot 8, etc.*, 910 F.2d 488, 490 (8th Cir. 1990) (en banc) (rejecting limiting construction of phrase “any property”).

58 See, e.g., *United States v. Monsanto*, 491 U.S. 600, 606-07 (1989) (holding the phrase “any property” includes “all assets ... with no exception”); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872) (rejecting limiting construction of phrase “any person” in the Fourteenth Amendment); *South Half*, 910 F.2d at 489-91.

59 Wall & Childres, *supra* note 39, at 599 (internal footnote omitted).

60 The only decision they cite involving the same language is *People ex. rel. Dusenbury v. Speir*, 77 N.Y. 144, 144, 148-50 (N.Y. 1879); Wall & Childres, *supra* note 39, at 590-91 n.10, 599 & n.48. As discussed *infra*, a pre-1855 Act decision in New York held that “contract, express or implied,” included implied-in-law contracts. See *infra* notes 68-106 and accompanying text.

- 61 Wall & Childres, *supra* note 39, at 596 (illustrating implied-in-law contracts were not considered contracts in the purest sense).
- 62 *Id.* at 590-91 (illustrating the jurisdictional grant).
- 63 *See generally* William A. Keener, *Quasi-Contracts, Its Nature and Scope*, 7 HARV. L. REV. 57 (1893) (illustrating the backward academic movement).
- 64 *See generally id.*
- 65 *See, e.g.*, FREDERIC CAMPBELL WOODWARD, THE LAW OF QUASI CONTRACTS 5 (1913); Arthur Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533 (1912); Keener, *supra* note 63; *see also* SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS 41 (4th ed. 2007) (“Until the early 20th century, ... [t]hese obligations, imposed upon the defendant regardless of and occasionally in violation of his or her intention, came to be called ‘implied contracts.’ They are now generally known as ‘quasi-contracts.’”).
- 66 RESTATEMENT OF RESTITUTION (AM. LAW INST. 1937). While not a principal reporter, Williston served on the “Committee on Restitution” that prepared the Restatement. *Id.* at iii. The current version is the Restatement (Third), issued in 2011. Williston and Corbin were the Reporter and Special Advisor, respectively, for the original Restatement of Contracts, issued in 1932, five years before the Restatement of Restitution. *See* RESTATEMENT OF CONTRACTS vi (AM. LAW INST. 1932).
- 67 In the Restatement (Third), the Director of the American Law Institute crowed that the initial Restatement “created a field of law” revolving around unjust enrichment, while admitting that “almost no one of my generation or thereafter has had a course called Restitution,” but that it is typically covered in a course on remedies. RESTATEMENT (THIRD) OF RESTITUTION xiii (AM. LAW INST. 2011); *see also id.* § 1 cmt. a. Recent examples of the continued use of the term “implied-in-fact contract” abound. *See, e.g.*, *Hercules, Inc. v. United States*, 516 U.S. 417, 421-24 (1996) (applying federal law); *Marcatante v. City of Chicago*, 657 F.3d 433, 440 (7th Cir. 2011) (applying Illinois law); *Lumbermens Mut. Cas. Co. v. United States*, 654 F.3d 1305, 1316-17 (Fed. Cir. 2011) (applying federal law); *United Nat’l Ins. Co. v. SST Fitness Corp.*, 309 F.3d 914, 919 (6th Cir. 2002) (applying Ohio law); *Contship Containerlines, Inc. v. Howard Indus., Inc.*, 309 F.3d 910, 914 (6th Cir. 2002) (applying Michigan law). The original Restatement’s claim in 1937 that “of late the phrase [contracts implied in law] has largely fallen into disuse, the more descriptive term quasi contracts being substituted,” RESTATEMENT OF RESTITUTION

9, has not proven accurate. *Slick v. Reinecker*, 839 A.2d 784, 787 (Md. Ct. Spec. App. 2003).

<sup>68</sup> Act of February 24, 1855, ch. 122, 10 Stat. 612, 612 (1855).

<sup>69</sup> See Wiecek, *supra* note 26, at 395. In this, it was spectacularly unsuccessful with the 1855 Act, as the court served only as an advisory body to Congress, so that Congress still had to pass on the court's recommendations. This alleviated the task of Congress only minimally and put another costly hurdle in the path of petitioners. See Shimomura, *supra* note 26, at 649-50; Wiecek, *supra* note 26, at 397 (“[R]esort to the court was a pillar-to-post futility.”); COWEN, NICHOLS & BENNETT, *supra* note 26, at 20-25. This, combined with bribery scandals involving three House members in 1857, led to passage of the Act of March 3, 1863, ch. 92, 12 Stat. 765 (1863), which seemed to cure the problem by making the court's decisions final in one section, but then the Supreme Court held in *Gordon v. United States*, 69 U.S. 561, 561 (1864), that they were not final due to another section and so an appeal could not be taken to the Supreme Court. See Wiecek, *supra* note 26, at 402 n.27 (explaining in part the irregular reporting history of *Gordon*). Congress cured that perceived problem quickly by repealing the second section. Act of March 17, 1866, ch. 19, 14 Stat. 9, 9 (1866). There were some attempts to expand the Court of Claims jurisdiction to include torts in 1863, but the jurisdictional language of the 1855 Act was retained. See Wiecek, *supra* note 26, at 399. Nor was the jurisdictional language changed in the Tucker Act when Congress added takings jurisdiction to the court in 1887. See Act of March 3, 1887, ch. 359, 24 Stat. 505, 505 (1887). In the current recodification, the language is substantially identical, giving the court jurisdiction “upon any claim ... founded ... upon any express or implied contract with the United States.” 28 U.S.C. § 1491(a)(1) (2012).

<sup>70</sup> See Wiecek, *supra* note 26, at 393.

<sup>71</sup> U.S. CONST. art I, § 9, cl. 7.

<sup>72</sup> See *id.* at 393-96.

<sup>73</sup> See *infra* note 82 and accompanying text.

<sup>74</sup> In fact, Congress set up special commissions to handle claims arising out of the War of 1812 and the Mexican-American War—claims that undoubtedly were based in part on unjust enrichment. See generally Wiecek, *supra* note 26, at 390-91; COWEN, NICHOLS & BENNETT, *supra* note 26, at 7-8, 11-13.

<sup>75</sup> See SCALIA & GARNER, *supra* note 43, at 63 (“A textually permissible interpretation that furthers rather than obstructs the document's purpose

should be favored.”).

76 Act of March 3, 1863, ch. 92, 12 Stat. 765, 765 (1863).

77 For goods sold and delivered, it means “as much as they were worth.” BLACK’S LAW DICTIONARY 970 (2d ed. 1910). Implied-in-fact contract damages also are measured frequently by *quantum valebant* or *quantum meruit* because a price often has not been negotiated. *Id.*

78 Meaning “as much as he deserved.” *Id.* This was used mainly for recovery of the reasonable value of services. *Id.*

79 Corbin, *supra* note 65, at 547.

80 Not only academics noted that using the term “implied-in-law contract” sometimes was confusing, especially when it came to the proper remedy to apply, and argued for a different terminology, while in no way trying to cut back on the concept’s reach. *See, e.g.,* Sceva v. True, 53 N.H. 627, 632-33 (N.H. 1873) (“All confusion in this matter might be avoided, as it seems to me, by a suitable discrimination in the use of the term implied contract .... A better nomenclature is desirable.”).

81 “A statute that was a common-law term, without defining it, adopts its common-law meaning.” SCALIA & GARNER, *supra* note 43, at 320.

82 J.B. Ames, *The History of Assumpsit*, 2HARV. L. REV. 1, 1-19, 53-69 (1888); *see also* Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297, 303-09 (2005).

83 Ames, *supra* note 82, at 15 (internal footnotes omitted).

84 *Id.* at 54.

85 *Id.* at 58-59 (illustrating there was no cause of action for implied *quantum meruit* before 1609).

86 *Id.* at 64; *see also* Corbin, *supra* note 65, at 533.

87 Ames, *supra* note 82, at 63-64. Corbin criticized Ames’ positive versus negative distinction as not being accurate in all situations. Corbin, *supra* note 65, at 552-53.

88 Ames, *supra* note 82, at 65 (referencing *City of London v. Goree* (1676) 3 Keb. 677).

89 *See id.*

90 *Id.* at 66.

91 *Id.* (internal footnote omitted). An action for debt began as a tort action in the common law. *Id.* at 53-54.

92 *Id.* at 67-68 (internal footnote omitted) (quoting *Moses v. Macferlan* [1760] 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B.) (Mansfield, C.J.)). Trover, of course, sounds in tort. *See, e.g., Cross v. Berg Lumber Co.*, 7 P.3d 922 (Wyo. 2000); *Walton v. Johnson*, 83 S.E.2d 673 (Ga. 1954). Trover “is the technical name of the action to recover damages for a wrongful conversion.” 90 C.J.S. § 2 (2016).

93 Ames, *supra* note 82, at 69.

94 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at 443 (1770), [http://avalon.law.yale.edu/subject\\_menus/blackstone.asp](http://avalon.law.yale.edu/subject_menus/blackstone.asp) [<https://perma.cc/UC6K-KY5N>] (last visited Feb. 26, 2016). The Supreme Court remarked in 1904,

Blackstone’s Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it.

*Schick v. United States*, 195 U.S. 65, 69 (1904).

95 Ames, *supra* note 82, at 69; *see also* RESTATEMENT (THIRD) OF RESTITUTION § 4 cmt. b (AM. LAW INST. 2011) (“Causes of action that would be readily classified today as part of restitution came to be accepted in courts of law in the 17th and early 18th centuries, where they were pleaded as ‘implied assumpsit’ or on the ‘common counts’ (such as ‘money had and received,’ ‘money paid,’ or ‘quantum meruit.’”).

96 4 Conn. 517 (Conn. 1823).

97 *Id.* at 524.

98 6 N.H. 499 (N.H. 1834).

99 *Id.* at 499.

100 *Curtis’s Administratrix v. Fiedler*, 67 U.S. (2 Black) 461, 478 (1863).

- <sup>101</sup> Donnelly v. Corbett, 7 N.Y. 500, 506-07 (N.Y. 1852); *accord* Nazro v. McCalmont Oil Co., 36 Hun. 296, 297 (N.Y. App. Div. 1885); *see also* Taylor v. Root, 4 Keyes 335, 344-45 (N.Y. 1868). In *Taylor*, the Court of Appeals found that a set-off due to a judgment in a tort case stated a cause of action arising under contract:

The Code of Procedure, in declaring what may be allowed as a counterclaim, provides, that a defendant may set up, “in an action on contract, any other *cause of action* arising *also on contract*, and existing at the commencement of the action.”

It appears by the case, that the referee rejected the defendants’ claim on the ground that the judgment held by them against Hartshorne, was recovered in an action “founded *not on contract* but *on tort*, being for slanderous words spoken by the said Hartshorne” of and concerning the plaintiff therein.

This was erroneous ....

Contracts are of three kinds: simple contracts, contracts by specialty, and contracts of record. A judgment is a contract of the highest nature known to the law. Actions upon judgment are actions on contract .... [A]ny claim on the judgment is setting up a cause of action on contract. It is strictly an action *ex contractu* when set up as a counter claim.

*Taylor*, 4 Keyes at 344-45. As *Taylor* manifests, “contracts of record” based on judgments are constructive contracts, implied by law, not actual agreements between the parties. *See generally* RESTATEMENT OF RESTITUTION § 4(f) (AM. LAW INST. 1937).

- <sup>102</sup> Keener, *supra* note 63, at 57. This categorization still applies in most jurisdictions, despite the efforts of the academics. For example, the Ohio Supreme Court in *Legros v. Todd*, 540 N.E. 2d 257, 263 (Ohio 1989), stated that “it is well established that there are three classes of simple contracts: express, implied in fact, and implied in law.”
- <sup>103</sup> Keener, *supra* note 63, at 57.
- <sup>104</sup> *See* BLACKSTONE, *supra* note 94, at 443.
- <sup>105</sup> *See* SINGER & SINGER, *supra* note 47, at 164-70.
- <sup>106</sup> *See* Comm’r of Internal Revenue v. Asphalt Prods. Co., 482 U.S. 117, 120-21

(1987) (per curiam).

107 See *supra* note 69 and accompanying text.

108 Act of March 12, 1863, § 3, ch. 120, 12 Stat. 820, 820 (1863).

109 Act of July 4, 1864, ch. 240, 13 Stat. 381, 381 (1864). A similar provision was passed as the Act of February 21, 1867, ch. 57, 14 Stat. 397 (1867), and Congress included a corresponding exception in the Bowman Act of March 3, 1883, 22 Stat. 485 (1883), which granted the Court of Claims authority to adjudicate fact issues upon referral from Congress. § 3, 22 Stat. at 485.

110 The jurisdictional grant for the Court of Claims did not expressly include claims “founded upon the Constitution” to sanction takings claims until the Tucker Act in 1887. See Act of March 3, 1887, ch. 359, 24 Stat. 505, 505 (1887).

111 See Ames, *supra* note 82, at 63-69.

112 This exclusion was continued in the Tucker Act, which specifically excluded from the court “jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as ‘war claims.’” 24 Stat. at 505. Congress prior to the 1864 Act had given owners of “abandoned or captured property” in the rebellious states the power to collect proceeds from the federal sale of the seized property, less the government’s expenses, if they could prove ownership and that they had “never given any aid or comfort to the [then-]present rebellion.” Act of March 3, 1863, ch. 520, § 3, 12 Stat. 820, 820 (1863).

113 See SINGER & SINGER, *supra* note 47, at 190.

114 75 U.S. (8 Wall.) 269 (1868). The Supreme Court gave an indication of its concerns about the jurisdiction of the Court of Claims in *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1869), a case decided shortly before *Gibbons*. In *Nichols*, an importer sought to recover duties improperly exacted, as confirmed per a subsequent Supreme Court decision when he had not followed the prescribed method in the revenue laws to protest the exactions. The Supreme Court rejected his argument that he had a way to avoid that result by filing a petition in the Court of Claims under an implied-in-law theory, holding that the specific refund scheme provided by Congress controlled. *Nichols*, 74 U.S. (7 Wall.) at 123, 130-31. The Court also rejected recovery on an implied-in-law contract theory on the ground that, without making the prescribed protest, the importer acquiesced in the tariff and duties, and so by definition they were not illegally exacted. *Id.* at 129. But then the Court went on in dicta to voice its concern about the implications of implied-in-law jurisdiction that it basically repeated in *Gibbons*, as will be discussed *infra*:

The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the government does on its revenue to meet, not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with dispatch, and that the officers of the treasury should be able to make a reliable estimate of means, in order to meet liabilities. It would be difficult to do this, if the receipts from duties and internal taxes paid into the treasury, were liable to be taken out of it, on suits prosecuted in the Court of Claims for alleged errors and mistakes, concerning which the officers charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country, for, as there is no statute of limitations to bar these suits, it would be impossible to tell, in advance, how much money would be required to pay the judgments obtained on them, and the result would be, that the treasury estimates for any current year would be unreliable.

*Id.* at 129-30. Later Supreme Court cases chipped away at, and then repudiated, the holding in *Nichols*, finding jurisdiction as a claim founded on “law” or “regulation.” See *United States v. Emery*, 237 U.S. 28, 31-32 (1915).

115 *Gibbons*, 75 U.S. (8 Wall.) at 269.

116 *Id.* 272-73.

117 *Id.* at 272.

118 *Id.* at 273-74.

119 *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 273 (1868).

120 *Id.* at 270, 274.

121 *Id.* at 270, 273.

122 *Id.*

123 *Id.* at 273-74.

124 *Id.* at 270, 273.

125 *Id.* at 273 (stating “plaintiff was absolved” from further performances if he had wished).

126 *Id.*

- 127     RESTATEMENT OF CONTRACTS § 317(2) (AM. LAW INST. 1932);  
RESTATEMENT (SECOND) OF CONTRACTS § 236 (AM. LAW INST. 1979).
- 128     Gibbons claimed as damages the difference in price in the market for the oats,  
as the market price had significantly increased between the contractual  
delivery period and when the quartermaster demanded full performance and  
the contract was renewed. *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 270,  
273 (1868). The Court, however, raised and unsupported inference that  
Gibbons had been able to resell the originally refused oats in the market at a  
higher price and so posited “the presumption” that Gibbons “was benefited  
instead of injured by the refusal of the officer to accept the oats when offered.”  
*Id.* Of course, the government would have been free to prove this “presumption”  
at trial, but it was not appropriate to rest an appellate decision on it.
- 129     *Id.* at 274.
- 130     *Id.*
- 131     See Wiecek, *supra* note 26, at 398. Contrast the professed surprise of the  
Supreme Court that anyone would assert that “the government will not pay its  
debts, or will not do justice,” *Gibbons*, 75 U.S. (8 Wall.) at 274, with the 1832  
report of the House Select Committee that “the right of petitioning Congress  
virtually had become the right of having petitions rejected,” H.R. REP. NO.  
22-386, at 19 (1832) (quoted in Wiecek, *supra* note 26, at 394), and that of  
Representative Brown of Mississippi when arguing for establishment of the  
Court of Claims in 1853: “I want something practical; something that will give  
the claimants justice; something that will protect the Treasury against fraud.”  
CONG. GLOBE, 32d Cong., 2nd Sess. 96 (1853) (quoted in Wiecek, *supra* note  
26, at 395). The fraud that concerned Representative Brown was, of course,  
that attempted by petitioners to Congress when Congress was not as well  
suited as an adjudicatory body to ferret it out and possibly bribery of his fellow  
legislators. See Wiecek, *supra* note 26, at 395. The year after *Gibbons* was  
decided, the Court of Claims remarked on the prior state of affairs as follows:  
“That such a number of American citizens should have been left by their own  
government without a hearing, and to that extent at least without redress, was  
of itself a great and grievous wrong.” *Brown’s Case*, 6 Ct. Cl. 171, 191 (Ct. Cl.  
1870). It also seems unlikely that the duress issue would be treated the same  
today. See generally RESTATEMENT (SECOND) OF CONTRACTS § 174 (“If  
conduct that appears to be a manifestation of assent by a party who does not  
intend to engage in that conduct is physically compelled by duress, the conduct  
is not effective as a manifestation of assent.”); *id.* § 175 (contract is voidable).
- 132     *Gibbons*, 75 U.S. (8 Wall.) at 274 (quoting JOSEPH STORY,

- COMMENTARIES ON THE LAW OF AGENCY 431 (Charles C. Little & James Brown eds., 4th ed. 1851)).
- 133 See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 598 (1833). Justice Story published his treatise on agency, as well as other scholarly works, while serving on the Supreme Court. See, e.g., *id.*; R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985).
- 134 U.S. CONST. amend. I.
- 135 Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274-75 (1868).
- 136 *Id.* at 275 (“The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the government founded on torts.”).
- 137 See generally Ames, *supra* note 82 (discussing the overlap between tort and common law remedies).
- 138 Corbin, *supra* note 65, at 536-38.
- 139 *Id.* at 538.
- 140 RESTATEMENT OF RESTITUTION § 5 (AM. LAW INST. 1937).
- 141 Gibbons v. United States, 75 U.S. (8 Wall.) 269, 270, 275 (1868).
- 142 See Act of February 24, 1855, ch. 122, 10 Stat. 612, 612 (1855).
- 143 The Court cited *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720 (1824), and *Dox v. Postmaster-General*, 26 U.S. (1 Pet.) 318 (1828). *Kirkpatrick* and *Dox* refused to apply laches against the government due to tardy action of its agents. *Kirkpatrick*, 22 U.S. (9 Wheat.) at 735-37; *Dox*, 26 U.S. (1 Pet.) at 325-26.
- 144 *Gibbons*, 75 U.S. (8 Wall.) at 274.
- 145 Justice Miller applied appropriate interpretation principles three years later when construing the Civil War Amendments in the *Slaughter-House Cases*. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). There, for the Court Justice Miller rejected the argument that “all persons” in the Fourteenth Amendment was limited to the particular class of the negro just because the treatment of that the particular race was what specifically spawned the amendments, ruling that, by using “all persons,” the amendment “forbids any other kind of slavery, now or hereafter.” *Id.* at 72. But see *id.* at 81 (where

Justice Miller relapses again in a way long since repudiated).

146     *See generally* Act of February 24, 1855, ch. 122, 10 Stat. 612 (1855).

147     Act of July 4, 1864, ch. 240, 13 Stat. 381, 381 (1864).

148     *Id.*

149     *See* *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 270, 275-76 (1868).

150     *Id.*

151     *Id.* at 274-76.

152     *Id.* at 276.

153     101 U.S. (11 Otto) 341, 346 (1879).

154     *Id.*

155     *Id.* at 341, 344.

156     *Id.* at 342.

157     *Id.*

158     *Id.*

159     *Id.* at 341-42.

160     *Id.* at 342.

161     *See id.* at 342-43.

162     *Id.* at 343-44. Congress had not yet amended the 1855 and 1863 Acts to grant the Court of Claims jurisdiction for claims founded upon the Constitution, which it added in the Tucker Act. Act of March 3, 1887, ch. 359, 24 Stat. 505 (1887).

163     *Langford v. United States*, 101 U.S. (11 Otto) 341, 345 (1879).

164     *Id.* at 346.

165     *See supra* notes 153-164 and accompanying text.

166     WILLISTON & LORD, *supra* note 65, at 41.

167     Act of February 24, 1855, ch. 122, 10 Stat. 612, 612 (1855).

168     Instead, Justice Miller in *Langford* noted the history of a gradually expanding

grant of authority to the Court of Claims, a history mainly relating to the finality of the court's judgments, concluding from this that Congress had "proceeded slowly and with great caution." *Langford*, 101 U.S. (11 Otto) at 344-45.

169 *See id.* at 346. The Supreme Court in *Langford* could more properly have tried to base an argument denying recovery on the fact that the common law in England had not yet applied an *ex contractu* remedy of implied assumption based on the wrongful occupation of land. *See Ames, supra* note 82, at 68. As Ames pointed out, there was no reason not to apply the remedy to such a situation, and the common law was expanding the coverage of the contractual remedy in a steady march. *Id.* at 68-69. Similarly, Corbin wrote:

The distinction is one of substance, not of form, and depends upon the facts and the proof. A quasi-contract has been defined as a legal obligation enforced by contractual remedies. This is a correct statement, but it is not a definition for the reason that it does not enable us to know a quasi-contract when we see it. All obligations are legal obligations and all courts give contractual remedies. If it means "contractual remedies at common law," the definition is altogether too limited, and it would mean nothing in States that have adopted the civil action as the universal form. For many reasons, the definition of quasi-contract cannot be made to depend upon the form of pleading. Our courts, now that they have equitable jurisdiction and have the civil action at their command, must not refuse to enforce a quasi-contractual obligation merely because they cannot find a precedent in debt or assumpsit, or merely because some court of common law held that debt or assumpsit would not lie.

Corbin, *supra* note 65, at 549 (internal footnotes omitted).

170 10 Stat. 612, 612.

171 95 U.S. (5 Otto) 539 (1877).

172 *Id.* at 543.

173 *Id.* at 539.

174 *Id.* at 539-40.

175 *Id.* at 541-42.

176 *Id.* at 540.

177 *Id.* at 542-43.

178 *See* RESTATEMENT OF RESTITUTION §§ 15-16 (AM. LAW INST. 1937);  
RESTATEMENT (THIRD) OF RESTITUTION §§ 31-33 (AM. LAW INST.  
2011).

179 *Clark v. United States*, 95 U.S. (5 Otto) 539 (1877).

180 *Id.* at 542.

181 *Id.* at 543.

182 *Id.*

183 *Id.* at 542-43. A more contemporary application of this is seen in the decision of Justice Reed, sitting by designation, in *New York Mail & Newspaper Transportation Co. v. United States*, 154 F. Supp. 271 (Ct. Cl. 1957). In that case, the court held that an express Postal Service contract was illegal and unenforceable, but still allowed restitution: “When an individual or the Government rescinds a contract, the parties are to be placed, as far as possible, in the position they would have occupied without the transaction.” *Id.* at 276 (citing *Neblett v. Macfarland*, 92 U.S. (2 Otto) 101, 103 (1876)); *Clark*, 95 U.S. (5 Otto) at 542; *see also* *Pan Am. Petrol. & Transp. Co. v. United States*, 273 U.S. 456, 500-10 (1927); *Urban Data Sys. Inc. v. United States*, 699 F.2d 1147, 1150 (Fed. Cir. 1983) (allowing *quantum meruit* when the contract had an illegal price term); *Yosemite Park & Curry Co. v. United States*, 582 F.2d 552, 553-54 (Ct. Cl. 1978); *Prestex, Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963) (allowing implied-in-law relief when contract was unenforceable due to bidding irregularity). In *Crocker v. United States*, 240 U.S. 74, 79-81 (1916), the contract was performed but illegal because it was tainted by fraud; the Court noted the availability of *quantum valebant* relief but denied it due to failure of proof. 240 U.S. at 81-82. In *Goodyear Tire & Rubber Co. v. United States*, 276 U.S. 287, 291 (1928), the government paid for its holdover after its lease expired but was excused from paying for a full rollover year for which appropriations had not been made. *Goodyear*, 276 U.S. at 292-93.

184 *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 274 (1869).

185 *See generally* *Clark v. United States*, 95 U.S. (5 Otto) 539 (1877).

186 96 U.S. (6 Otto) 30 (1878).

187 *Id.* at 31.

188 *Id.*

- 189 See Ames, *supra* note 82, at 66 (noting that this contractual remedy was in place for recovery of money paid to defendant by mistake since 1657).
- 190 *State Bank*, 96 U.S. (6 Otto) at 35. *But see* United States v. Minn. Mut. Inv. Co., 271 U.S. 212 (1926) (finding no cause of action for interest earned on funds deposited in court escrow when regulation required the interest to be paid to the United States Treasury).
- 191 See generally Corbin, *supra* note 65, at 533-34; Keener, *supra* note 63, at 57-60; BLACKSTONE, *supra* note 94, at 443.
- 192 *Moses v. Macferlan* [1760] 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B.) (Mansfield, C.J.) (quoted in Ames, *supra* note 82, at 68). The *State Bank* Court did cite to its own decision in *Bayne v. United States*, 93 U.S. (3 Otto) 642 (1876), in which the Court used Lord Mansfield's phraseology of "natural justice and equity" and did cite to his decision in *Moses v. Macferlan*. 93 U.S. (3 Otto) at 643.
- 193 United States v. State Bank, 96 U.S. (6 Otto) 30, 36 (1878); see also Taylor's Case, 14 Ct. Cl. 339 (Ct. Cl. 1879) (finding an implied contract based on a statutory duty to refund money belong to the plaintiff).
- 194 *State Bank*, 96 U.S. (6 Otto) at 35.
- 195 See generally *id.*
- 196 *Id.* at 35.
- 197 See Langford v. United States, 101 U.S. (11 Otto) 341, 346 (1880).
- 198 Corbin expressed frustration with those who attempted to limit the logical reach of quasi-contractual remedies due to applications of law regarding special procedural writs whose time of utility had passed, calling upon the eminence of Lord Mansfield:

Of course, it is too much to expect that we shall have many judges like Lord Mansfield, with a vision broad enough to see the possibilities lying in the action of assumpsit or in the civil action under the codes, and with courage enough to keep the law abreast of the current ideas of morality and the needs of commerce. We must often be content, as best we may, with the little judges of narrow historical perspective and little grasp of principle, who tremble at a new decision and know no law for which cannot be found a precedent on all fours.

Corbin, *supra* note 65, at 540-49. The front piece of the Restatement (Third) has a picture of a portrait of Lord Mansfield, whom the Director describes as a “founding figure” of the American law of restitution. RESTATEMENT (THIRD) OF RESTITUTION at xiv (AM. LAW INST. 2011).

- 199 Wall and Childres canvassed a nonexhaustive list of ninety cases between the 1800s and 1972 and found frequent recovery in implied-in-law situations in the Supreme Court and the Court of Claims, although never admittedly under that theory. Most typically, the courts simply labeled as “implied-in-fact” contracts situations that clearly were, instead, implied-in-law contracts. *See* Wall & Childres, *supra* note 39, at 600-18.
- 200 United States v. State Bank, 96 U.S. (6 Otto) 30, 31 (1878).
- 201 *See generally id.*
- 202 112 U.S. 645 (1884).
- 203 *Id.* at 656-57.
- 204 *See* U.S. CONST. amend. V. When, after passage of the Tucker Act, the Court affirmed the remaining vitality of the *Langford* distinction between taking private property while claiming government ownership instead of acknowledging private ownership, Justice Shiras wrote a strong dissent that, while giving lip service to *Langford*, undercut it. *See* Hill v. United States, 149 U.S. 593, 600-03 (1893) (Shiras, J., dissenting).
- 205 *Great Falls*, 112 U.S. at 656-57 (emphasis added) (internal citation omitted) (quoting Act of March 3, 1863, ch. 92, 12 Stat. 765, 765 (1863)).
- 206 *Id.* at 656.
- 207 *Id.* at 656-57.
- 208 *See* Langford v. United States, 101 U.S. (11 Otto) 341, 342 (1880).
- 209 United States v. Great Falls Mfg. Co., 112 U.S. 645, 657-59 (1884).
- 210 *See id.* at 646; *Langford*, 101 U.S. (11 Otto) at 341.
- 211 Other issues litigated were whether Congress, as encouraged by the Court in *Langford*, 101 U.S. (11 Otto) at 343-44, should provide expressly for claims founded on the Constitution, i.e., takings claims (despite the Court in *Great Falls* finding that such claims could be brought as implied contract claims, *Great Falls*, 112 U.S. at 656-57), and whether the Court of Claims only could provide monetary relief, as the Supreme Court held beginning in *United States*

*v. Alire*, 73 U.S. (6 Wall.) 573 (1868); *see also* *United States v. Schurz*, 102 U.S. (12 Otto) 378, 404 (1881); *United States v. Gillis*, 95 U.S. (5 Otto) 407, 412 (1878); *Bonner v. United States*, 76 U.S. (9 Wall.) 156, 160-61 (1870). As the Court stated in *Bonner*, this ruling was based on the determination that “the Court of Claims has no equitable jurisdiction given it” and that Congress had “wisely” reserved such claims to itself. *Bonner*, 76 U.S. (9 Wall.) at 159.

212 *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 274 (1868).

213 *Great Falls*, 112 U.S. at 656 (1884).

214 Act of March 3, 1887, ch. 359, 24 Stat. 505 (1887).

215 *Id.*

216 *Id.* In a case involving an express contract in 1876, the Supreme Court stated, “The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.” *United States v. Bostwick*, 94 U.S. (4 Otto) 53, 66 (1876). This new language in the Tucker Act confirmed that ruling. *See generally* Shimomura, *supra* note 26, at 664.

217 Ames, *supra* note 82, at 14 (“Jealousy of the growing jurisdiction of the chancellors was doubtless a potent influence in bringing the common-law judges to the point of allowing the action of assumpsit.”); RESTATEMENT OF RESTITUTION 5-6 (AM. LAW INST. 1937) (“Gradually the common law judges became conscious of their omissions and jealous of the expanding power of the Court of Chancery, and with the invention of the action of assumpsit they found a means of expanding their jurisdiction.”).

218 Ames, *supra* note 82, at 64; Corbin, *supra* note 65, at 549.

219 Restatement (Third) explains in section 4(1), “Liabilities and remedies within the law of restitution and unjust enrichment may have originated in law, in equity, or in a combination of the two.” RESTATEMENT (THIRD) OF RESTITUTION § 4(1) (AM. LAW INST. 2011); *see also* RESTATEMENT OF RESTITUTION § 4 (AM. LAW INST. 1937).

220 *Clark v. United States*, 95 U.S. (5 Otto) 539 (1877).

221 *United States v. State Bank*, 96 U.S. (6 Otto) 30 (1877).

222 *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884).

223 *Gibbons v. United States*, 75 U.S. (8 Wall.) 269 (1868).

- 224 Langford v. United States, 101 U.S. (11 Otto) 341 (1879); *see supra* Part IV.
- 225 Act of March 3, 1887, ch. 359, 24 Stat. 505, 505 (1887).
- 226 Act of July 4, 1864, ch. 240, 13 Stat. 381 (1864).
- 227 *See supra* note 112 and accompanying text.
- 228 13 Stat. at 381.
- 229 131 U.S. 1, 2 (1889).
- 230 *Id.*
- 231 *Id.* at 17-19 (citing Act of March 3, 1887, § 15, 24 Stat. at 508). At this point, such a litigant had an appeal as of right to the Supreme Court.
- 232 Gibbons v. United States, 75 U.S. (8 Wall) 269 (1868).
- 233 Langford v. United States, 101 U.S. (11 Otto) 341 (1879).
- 234 *Jones*, 131 U.S. at 19.
- 235 *Id.*
- 236 *Id.* at 20 (Miller, J., dissenting).
- 237 *See* WILSON COWEN, PHILIP NICHOLS, JR., & MARION T. BENNETT, THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART§ II, SECTION TWO, 1887-1925 43 (1978).
- 238 As Scalia and Garner point out, language of the type used by Congress in the Tucker Act evinces on intent that the legal standard is to evolve as does the law related to private parties. SCALIA & GARNER, *supra* note 43, at 96 (discussing practically identical language to that in Tucker Act adopted in the Federal Tort Claims Act, 28 U.S.C. § 2674 (2012)).
- 239 COWEN, NICHOLS & BENNETT, *supra* note 237, at 43. The new damages language in the Tucker Act was retained in the initial Judicial Code of 1911. Act of March 3, 1911, ch. 231, § 24, ¶ 20, Pub. L. No. 61-475, 36 Stat. 1087, 1093 (1911). It was deleted in the recodification of 1948. *See* Act of June 25, 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 869, 940 (1948). Cowen, Nichols, and Bennett point out that the provision of equity jurisdiction in the Tucker Act has historically been relied on by the Court of Claims to allow it to reform a contract. COWEN, NICHOLS & BENNETT, *supra* note 237, at 42-43 (citing *S. Boston Iron Works v. United States*, 34 Ct. Cl. 174, 200 (Ct. Cl. 1899)). More recent cases relying on *Jones* are *United States v. King*, 395 U.S. 1 (1969), in

which the Court held that the Court of Claims did not have jurisdiction to grant declaratory relief solely, and *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962) (plurality opinion). The result in *King* has been legislatively overturned for contracts controlled by the Contract Disputes Act with respect to declaratory relief. *See* 28 U.S.C. § 1491(a)(2) (2012).

240 188 U.S. 400 (1903).

241 *Id.*

242 *Id.* at 401.

243 *Id.* at 404-07.

244 *Id.* at 408.

245 *See generally id.*

246 *Id.* at 409.

247 *Id.*

248 *Id.*

249 The same is true for *Great Falls*, in which the Court found that an implied contract remedy was appropriate, even though the facts would also give rise to an action sounding in tort. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-57 (1884).

250 *See Bigby v. United States*, 188 U.S. 400 (1903).

251 *Id.* at 409.

252 RESTATEMENT OF RESTITUTION 523 (AM. LAW INST. 1937).

253 *See Bigby*, 188 U.S. at 409.

254 *See id.*

255 *Id.* at 400.

256 *See, e.g., Tempel v. United States*, 248 U.S. 121, 131 (1918); *E. Extension, Australasia & China Tel. Co. v. United States*, 251 U.S. 355 (1920); *Sutton v. United States*, 256 U.S. 575 (1921); *Merritt v. United States*, 267 U.S. 338 (1925); *see generally Johnson, supra* note 24, at 214-19.

257 *Bigby v. United States*, 188 U.S. 400, 409 (1903).

- 258     *See generally id.*
- 259     Act of August 2, 1946, ch. 753, Pub. L. No. 79-601, 60 Stat. 842 (1946).
- 260     Act of June 25, 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 992 (1948) (codified at 28 U.S.C. §§ 2671 et. seq. (2012)).
- 261     28 U.S.C. § 2674. Exceptions are listed in § 2680.
- 262     Act of March 3, 1887, ch. 359, 24 Stat. 505 (1887).
- 263     *See Keener, supra* note 63, at 66 (“The only forms of action known to the common law were actions of tort and contract. If the wrong complained of would not sustain an action, either in contract or tort, then the plaintiff was without redress, unless the facts would support a bill in equity.”).
- 264     *See* Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1105 (2009).
- 265     *See* *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 129-30 (1869).
- 266     One exception that Congress placed in both the Tucker Act and the FCTA was for “war claims.” *Compare* 10 Stat. at 505, *with* 28 U.S.C. § 2680 (j) (2012).
- 267     Corbin, *supra* note 65, at 550.
- 268     Specific enforcement, such as return of money or goods improperly held, is also a remedy, as Corbin’s definition states. Also, the law can specify the damages to be paid, as the Constitution does for takings. *See* U.S. CONST. amend. V (requiring “just compensation”).
- 269     RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. d (AM. LAW INST. 2011).
- 270     *Id.*; *accord* RESTATEMENT (SECOND) OF CONTRACTS § 370 (AM. LAW INST. 1979).
- 271     251 U.S. 355 (1920).
- 272     *Id.* at 355.
- 273     *Id.* at 357.
- 274     *Id.* at 363.
- 275     *Id.* at 356-59.

- 276 *Id.* at 362-64. The Court went on to recite unnecessarily that the Court of Claims did not have implied-in-law contract jurisdiction. *Id.* at 366. In *Silverman v. United States*, 679 F.2d 865 (Ct. Cl. 1982), the court found an implied-in-fact contract with a subcontractor that had been denied reimbursement by the prime for direct delivery of transcripts to the agency, but the damages of the subcontractor were limited to the amounts not already paid by the agency to the prime. *Silverman*, 679 F.2d at 871. In other words, the damages paid by the United States were limited to the benefit received. *See also* *Clark v. United States*, 95 U.S. (5 Otto) 539, 543 (1877). (providing unjust enrichment remedy for rental for term of ship's use but denying compensation for loss of vessel); *United States v. Amdahl Corp.*, 786 F.2d 387, 398 (Fed. Cir. 1986) (requiring agency to pay for equipment retained).
- 277 RESTATEMENT OF RESTITUTION § 107 (AM. LAW INST. 1937); RESTATEMENT (THIRD) OF RESTITUTION § 2(4) (AM. LAW INST. 2011).
- 278 An exception is that a party may be entitled to disclaim the contract and be awarded damages under restitutionary principles when the other party has committed a material breach. *See* RESTATEMENT OF RESTITUTION § 108; RESTATEMENT (SECOND) OF CONTRACTS §§ 370 et seq. (AM. LAW INST. 1979).
- 279 152 U.S. 96 (1894).
- 280 *Id.* at 97.
- 281 *Id.*
- 282 *Id.* at 98-99.
- 283 *Id.* at 99-100.
- 284 *See* RESTATEMENT OF RESTITUTION §§ 2, 41, 112 (AM. LAW INST. 1937); RESTATEMENT (THIRD) OF RESTITUTION § 2(3) (AM. LAW INST. 2011).
- 285 *See* RESTATEMENT OF RESTITUTION § 2 (“A person who officiously confers a benefit upon another is not entitled to restitution therefor.”); RESTATEMENT (THIRD) OF RESTITUTION §§ 2(3), 30.
- 286 Even if the minor enters into an express contract, because the contract is void for lack of ability to form an agreement, damages will be measured under an implied-in-law contract in *quantum valebant* or *quantum meruit*. *See* Keener, *supra* note 63, at 72.
- 287 *Id.*; *see also* *Sawyer v. Lufkin*, 56 Me. 308, 309-10 (Me. 1868) (finding an

- implied-in-law contract when necessities furnished to insane individual).
- 288 *See* Sceva v. True, 53 N.H. 627, 633 (N.H. 1873).
- 289 *See* Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274 (1869) (explaining the Court’s concern that implied-in-law contracts “would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests”).
- 290 *See, e.g.,* Weinhouse v. Cronin, 68 Conn. 250, 252 (Conn. 1896) (holding that the brokerage fee be denied when owner was selling house himself ).
- 291 RESTATEMENT (THIRD) OF RESTITUTION §§ 31, 32 (AM. LAW INST. 2011). Section 32(2) states in relevant part, “Restitution will also be allowed, as necessary to prevent unjust enrichment, if the allowance of restitution will not defeat or frustrate the policy of the underlying prohibition.” *Id.* § 32(2).
- 292 *See* Clark v. United States, 95 U.S. (5 Otto) 539, 542 (1877).
- 293 RESTATEMENT (THIRD) OF RESTITUTION § 31(1).
- 294 *Id.* § 31(2).
- 295 *Id.* §§ 32(3), 63 cmt. c. *But see* United States v. Miss. Valley Generating Co., 364 U.S. 520, 566 & n.22 (1961) (allowing government to disaffirm contract tainted by illegal conflict of interest and finding no *quantum valebant* recovery appropriate because the government received nothing of value, suggesting that such recovery would otherwise have been required).
- 296 RESTATEMENT (THIRD) OF RESTITUTION § 2.
- 297 *See* Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274 (1869) (explaining the Court’s concern that implied-in-law contracts “would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.”)
- 298 *See* Loren A. Smith, *Why a Court of Federal Claims?*, 71 GEO. WASH. L. REV. 773, 780 (2003) (explaining that Congress was reluctant to cover tort liability because tort claims imposed “certain social norms with quasi-criminal aspects”).
- 299 237 U.S. 28 (1915).
- 300 *Id.* at 32.
- 301 Swan, *supra* note 26, at 109.

- 302 It seems likely that the Supreme Court would refuse to rectify its errors of interpretation on the ground that Congress has had ample opportunity to repudiate its interpretation, but has not done so. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (“[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change [an] interpretation of its legislation.”); *SINGER & SINGER*, *supra* note 47, at 110-29. Nonetheless, as addressed above, the Supreme Court precedent is inconsistent on the issue. *See supra* notes 237-242 and accompanying text.
- 303 *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 12 (1990) (quoting *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 126 (1974)); *see also* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 966, 1019 (1984) (requiring an “unambiguous intention to withdraw the Tucker Act remedy”); *United States v. Mitchell*, 463 U.S. 206, 215, 218 (1983) (finding Tucker Act to be a broad waiver of sovereign immunity in a statutory Indian trust claim but noting the refusal of the Court to extend jurisdiction to implied-in-law contracts, without attempting to harmonize its positions)
- 304 28 U.S.C. § 1491(a)(1) (2012). The Federal Circuit in *Slattery v. United States*, 635 F.3d 1298, 1303, 1309-10, 1321 (Fed. Cir. 2011), relied on such precedent from *Mitchell*, *Preseault*, *Monsanto*, and *Regional Rail Reorganization Cases* to abandon the long-standing NAFI doctrine that had for many years withheld jurisdiction from claimants having claims founded on contracts with non-appropriated fund instrumentalities.
- 305 Contracting Officers (COs) typically have warrants that specify the amount of their contracting authority. *See generally* FAR 1.602-1(a). COs are appointed and derive their authority from agency heads or their designees, who also possess unlimited contracting authority by statute or regulation. *See* FAR 1.603-1.
- 306 *See id.*
- 307 *See supra* note 256.
- 308 FAR 1.602-3(c)(1). This section also lists other requirements for regulatory ratification. *Id.*
- 309 FAR 1.602-3(a)-(b).
- 310 The FAR ratification process only applies to “an agreement that is not binding solely because the Government representative who made it lacked the authority” to do so. FAR 1.602-3(a).

- 311 See *United States v. State Bank*, 96 U.S. (6 Otto) 30, 35 (1878).
- 312 See generally RESTATEMENT (THIRD) OF RESTITUTION §§ 20-22 (AM. LAW INST. 2011).
- 313 217 Ct. Cl. 705, 706 (Ct. Cl. 1978).
- 314 *Id.* at 706.
- 315 *Id.* at 706-07.
- 316 *Id.* at 707.
- 317 Government employees hold implied authority to bind the government “when such authority is considered to be an integral part of the duties assigned to [them].” *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (quoting JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 43 (1982)). “Contracting authority is integral to a government employee’s duties when the government employee could not perform his or her assigned tasks without such authority and the relevant agency regulation does not grant such authority to other agency employees.” *Leonardo v. United States*, 63 Fed. Cl. 552, 557 (2005), *aff’d*, 163 F. App’x 880 (Fed. Cir. 2006) (quoting *Flexfab, LLC v. United States*, 62 Fed. Cl. 139, 148 (2004), *aff’d sub nom. Flexfab, L.L.C. v. United States*, 424 F.3d 1254 (Fed. Cir. 2005)); see also *Reliable Disposal Co.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895, at 119,717 (1991) (discussing implied authority in circumstances needing quick action).
- 318 The Court of Claims and the Federal Circuit have both interpreted *Philadelphia Suburban* as an “institutional ratification” case. See, e.g., *Silverman v. United States*, 679 F.2d 865, 870 (Ct. Cl. 1982); *Janowsky v. United States*, 133 F.3d 888, 892 (Fed. Cir. 1998).
- 319 *Phil. Suburban Corp.*, 217 Ct. Cl. at 708.
- 320 *Aero-Abre v. United States*, 39 Fed. Cl. 654, 657 (Fed. Cl. 1997) (emphasis supplied) (citing *Williams v. United States*, 127 F. Supp. 617, 623 (Ct. Cl. 1955)); see also *Reliable Disposal Co.*, 91-2 BCA ¶ 23,895, at 119,718 (internal paperwork suitable to demonstrate ratification).
- 321 *Phil. Suburban Corp. v. United States*, 217 Ct. Cl. 705, 707 (Ct. Cl. 1978).
- 322 133 F.3d 888 (Fed. Cir. 1998).
- 323 *Id.* at 889, 891.

324 *Id.* at 892.

325 *See, e.g.,* United States v. Armstrong, 517 U.S. 456, 465 (1996) (prosecutor); Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1238-40 (Fed. Cir. 2002) (contracting officials); *see generally* Tecom, Inc. v. United States, 66 Fed. Cl. 736, 757-69 (2005).

326 In *Jankowsky*, the government argued the Federal Circuit in *El Centro* had eliminated institutional ratification. The *Jankowsky* Court rejected that suggestion. *Jankowsky*, 133 F.3d at 891-92. The dissent in *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1349-50 (Fed. Cir. 2007) (Prost, J., dissenting), provides an example of an unduly restrictive reading of ratification theory.

327 679 F.2d 865 (Ct. Cl. 1982).

328 *Id.* at 867.

329 *Id.* at 871.

330 *Id.* at 870.

331 *Id.* (citing *Phil. Suburban Corp. v. United States*, 217 Ct. Cl. 705, 707 (Ct. Cl. 1978); *Prestex, Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963)).

332 *See id.* at 870-71.

333 *Id.* at 870.

334 Of course, the result in *Silverman* would have been the same on the merits if it had been considered an implied-in-law contractual obligation. The damages awarded might have been different, however. The court in *Silverman* found the agency had agreed only to pay the reporter its price to the prime, whereas a *quantum meruit* recovery may have awarded the amount set out in the prime's contract that the agency had agreed to pay, which more likely reflected the market value of the transcripts. *Id.* at 871.

335 922 F.2d 816 (Fed. Cir. 1990).

336 *Id.* at 817-18.

337 *City of El Centro v. United States*, 16 Cl. Ct. 500, 508 (Ct. Cl. 1989).

338 *Id.* at 508-09 (citing *Halvorson v. United States*, 126 F. Supp. 898, 901 (E.D. Wash. 1954)).

339 *Id.* at 509.

- 340 *Id.* (internal footnote omitted) (citing *Williams v. United States*, 127 F. Supp. 617, 623 (Ct. Cl. 1955); *Centre Mfg. Co. v. United States*, 392 F.2d 229, 236 (Ct. Cl. 1968)).
- 341 *City of El Centro v. United States*, 17 Cl. Ct. 794, 797-98 (Ct. Cl. 1989).
- 342 *Id.* at 798 (citing *Silverman v. United States*, 679 F.2d 865, 870 (Ct. Cl. 1982)).
- 343 *Id.* (citing *United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986); *Phil. Suburban Corp. v. United States*, 217 Ct. Cl. 705, 707 (Ct. Cl. 1978); *Prestex, Inc. v. United States*, 320 F.2d 367, 373-74 (Ct. Cl. 1963); *N.Y. Mail & Newspaper Transp. Co. v. United States*, 154 F. Supp. 271, 276 (Ct. Cl. 1957)).
- 344 The majority consisted of Circuit Judge Plager of the Federal Circuit and District Judge Duplantier of the Eastern District of Louisiana, sitting by designation. Federal Circuit Judge Rich dissented. *City of El Centro v. United States*, 922 F.2d 816, 817, 824 (Fed. Cir. 1990).
- 345 *Id.* at 821. The dissent retorted, “Clearly it was, and it should be treated accordingly.” *Id.* at 826 (Rich, J., dissenting).
- 346 *Id.* at 821.
- 347 *Id.*
- 348 *Silverman v. United States*, 679 F.2d 865, 869 (Ct. Cl. 1982).
- 349 *See id.* at 870.
- 350 *El Centro*, 992 F.2d at 826 (Rich, J. dissenting); *City of El Centro v. United States*, 16 Cl. Ct. 500, 509, *recons. denied*, 17 Cl. Ct. 794, 797-98 (Ct. Cl. 1989).
- 351 *City of El Centro v. United States*, 922 F.2d 816, 818 (Fed. Cir. 1990).
- 352 *El Centro*, 16 Cl. Ct. at 508.
- 353 *Id.* at 509 n.13.
- 354 RESTATEMENT OF RESTITUTION § 2 (AM. LAW INST. 1937).
- 355 *El Centro*, 992 F.2d at 821.
- 356 *Jankowsky v. United States*, 133 F.3d 888, 891-92 (Fed. Cir. 1998); *see El Centro*, 922 F.2d at 822-23.
- 357 *See Jankowsky*, 133 F.3d at 891.
- 358 516 U.S. 417 (1996).

359 Johnson, *supra* note 24.

360 *Hercules*, 516 U.S. at 423, 430 (internal citations omitted). The Court apparently had lost sight of the fact that the Tucker Act, as originally enacted, expressly provided that the Court of Claims could grant equitable, as well as legal, claims. Act of March 3, 1887, 24 Stat. 505, 505 (1887). The *Hercules* Court cited the decision in *United States v. Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926), for support, but that case found no express or implied-in-fact contract to have been in existence.

361 518 U.S. 839 (1996) (plurality opinion).

362 *Id.* at 868-69.

363 *Id.* at 930 (Rehnquist, J., dissenting) (“And the principal opinion’s reading of additional terms into the contract so that the contract contains an unstated, additional promise to insure the promisee against loss arising from the promised condition’s nonoccurrence seems the very essence of a promise implied in law, which is not even actionable under the Tucker Act, rather than a promise implied in fact, which is.” (citing *Hercules*, 516 U.S. at 423)).

364 Johnson, *supra* note 24, at 202-06 (citing *United States v. Spearin*, 248 U.S. 132, 135 (1918)).

365 *Id.* at 221, 242-56 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1979)) (analyzing *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 827 (Fed. Cir. 2010), and *Metcalf Const. Co. v. United States*, 742 F.3d 984, 987 (Fed. Cir. 2014), among other cases).

366 *Id.* at 224-31 (analyzing *Agredano v. United States*, 595 F.3d 1278, 1280 (Fed. Cir. 2010)).

367 *Id.* at 256-59.

368 463 U.S. 206 (1983).

369 *Id.* at 215 (quoting *Developments in the Law--Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 876 (1957)); see Johnson, *supra* note 24, at 259. *But see Mitchell*, 463 U.S. at 218 (noting without attempting to harmonize the general rule that the Tucker Act does not confer jurisdiction over claims founded on contracts implied in law).

370 635 F.3d 1298 (Fed. Cir. 2011) (en banc).

371 *Id.* at 1320-21 (citing *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 12 (1990)) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984)).

- (requiring “[an] unambiguous intention to withdraw the Tucker Act remedy”).
- 372 *Mitchell*, 463 U.S. 206; *Slattery*, 635 F.3d 1298.
- 373 *Hercules Inc. v. United States*, 516 U.S. 417, 421 (1996).
- 374 Act of March 3, 1887, ch. 359, 24 Stat. 505 (1887).
- 375 28 U.S.C. § 1491(a)(1) (2012).
- 376 *United States v. State Bank*, 96 U.S. (6 Otto) 30, 35 (1878); *Moses v. Macferlan* [1760] 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B.) (Mansfield, C.J.).
- 377 *Wall & Childres*, *supra* note 39, at 622. Ironically the language they propose is simply a subset of what Congress already stated in the language it added in the Tucker Act that the court has jurisdiction over all claims requesting damages available either in law or equity (other than tort damages). Act of March 3, 1887, 24 Stat. 505, 505 (1887).
- 378 *See generally* Johnson, *supra* note 24, at 219-59.

