

2006 YEAR IN REVIEW: ANALYSIS OF SIGNIFICANT FEDERAL CIRCUIT GOVERNMENT CONTRACTS DECISIONS

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I. INTRODUCTION

The Federal Circuit's decisions in 2006 suggest some mixed benefits for the Government and various classes of plaintiffs. In most cases, the holdings were not surprising. However, in at least one government contracts case, *Richlin Security Service Co. v. Chertoff*,¹ the holding was unexpected. The 2006 decisions highlight the diversity of matters brought before the Federal Circuit and the expertise and time required to respond to complex financial, technical, and legal issues.

A series of decisions resulting from the events at issue in the seminal 1996 case, *United States v. Winstar Corp.*,² added to a growing body of federal damages law by refining the limits and viability of claims for reliance, expectancy, and restitution damages. The *Winstar* decisions demonstrate the expertise that the Federal Circuit has developed in dealing with contract damages issues, arguably the most complex issues in contract law. This expertise has been recognized by other courts, including other federal circuits, and has been cited in cases involving commercial contract disputes.

For example, in *Old Stone Corp. v. United States*,³ the court addressed a significant barrier to recovery of restitution damages. First, the court noted that restitution is available only when there is a total breach of a contract. Then, the court held that the nonbreaching party was not entitled to restitution because it had treated the breach as a partial breach and had continued to perform after the breach.

The Federal Circuit gave government contractors and other plaintiffs some comfort in another *Winstar* case, *Local Oklaboma Bank, N.A. v. United States*.⁴ In this case, the Federal Circuit reaffirmed its holding in *Centex*

1. 437 F.3d 1296 (Fed. Cir. 2006).

2. 518 U.S. 839 (1996).

3. 450 F.3d 1360 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 1831 (2007).

4. 452 F.3d 1371 (Fed. Cir. 2006).

Corp. v. United States,⁵ where it found that a *Winstar* plaintiff could recover contract damages based on the Government's breach of its implied duty of good faith and fair dealing. In the same vein, in *Jacobs Engineering Group, Inc. v. United States*,⁶ a case where a cost-sharing contract was terminated for convenience, the Federal Circuit looked to the objective intent of the parties in entering into the contract. The Federal Circuit held that Jacobs was entitled to the full costs of performance and not just its share of the costs of performance because, among other things, the early termination of the contract denied Jacobs the potential benefits of the contract. The Federal Circuit noted that "it seems unfair to Jacobs to deny it full reimbursement for the costs of its performance."⁷ This explicit consideration of fairness was noteworthy.

Several 2006 Federal Circuit cases also highlight the jurisdictional distinctions that still exist between the boards of contract appeals and the Court of Federal Claims (COFC) and under the Contract Disputes Act (CDA)⁸ and Tucker Act.⁹ For example, in *Wesleyan Co., Inc. v. Harvey*,¹⁰ the Federal Circuit noted that while the Armed Services Board of Contract Appeals (ASBCA) lacked jurisdiction to consider breach of agreements and transactions unrelated to procurement, specifically unsolicited proposals and bailments, the plaintiff could have recovered in the COFC under the broader jurisdiction of the Tucker Act.¹¹

The Federal Circuit also addressed several cases that demonstrate the fine line between ambiguous language and unambiguous language. The court addressed ambiguous language in *Kimco Realty Corp. v. United States*,¹² in which the court remanded the case to the lower court for a determination of facts. The court addressed unambiguous language, in which parol evidence should not be considered, in *Applied Cos. v. Harvey*.¹³

One 2006 Federal Circuit opinion, however, injected uncertainty into recovery of interest, a seemingly well-established area of law under the CDA, and is likely to lead to increased litigation. In *Richlin Security Service Co. v. Chertoff*, the court bypassed the plain language of the CDA interest statute, 41 U.S.C. § 611, which grants interest "on amounts found due contractors on claims," in favor of questionable legislative history, to require a contractor to demonstrate that it advanced capital during litigation for the amounts claimed in order to recover CDA interest.¹⁴ In doing so, the court changed

5. 395 F.3d 1283 (Fed. Cir. 2005).

6. 434 F.3d 1378 (Fed. Cir. 2006) (opinion by Friedman, S.J., with Mayer & Bryson, JJ.).

7. *Id.* at 1381.

8. See 41 U.S.C. §§ 607 (providing jurisdiction to the boards of contract appeals), 609 (providing jurisdiction to the U.S. Court of Federal Claims) (2007).

9. 28 U.S.C. § 1491 (2007).

10. 454 F.3d 1375 (Fed. Cir. 2006).

11. *Id.* at 1380.

12. 187 F. App'x 986, 2006 WL 1813911 (Fed. Cir. 2006).

13. 456 F.3d 1380 (Fed. Cir. 2006).

14. 41 U.S.C. § 611 (2007); see *Richlin Sec. Serv. Co. v. Chertoff*, 437 F.3d 1296, 1301–02 (Fed. Cir. 2006).

the application of CDA interest from a routine, predictable, and mechanical exercise to add yet another hurdle and potential area for dispute.

In a related matter by the same name, *Richlin Security Service Co. v. Chertoff*,¹⁵ the Federal Circuit decided that payments for paralegal services are not a subset of attorney fees, but must be recovered as expenses of the attorney, at cost. That result is contrary to on-point precedent in the Eleventh Circuit.¹⁶ The majority's opinion also reached a different conclusion than a similar case decided by the Supreme Court, *Missouri v. Jenkins*,¹⁷ which held that fee-shifting language providing for "reasonable attorney's fees" in a different statute included paralegal fees.

Several of the cases also demonstrate the length of time it may take to fully litigate federal government contract cases before boards and courts, as well as the complexity of the litigation. In *Wynne v. United Technologies Corp.*,¹⁸ twenty-two years passed between the time the contractor submitted its Truth in Negotiations Act certificate and the Federal Circuit's decision affirming denial of the Government's defective pricing claim. Five years elapsed between the last contracting officer's final decision in *Wynne* (there were three in the case) and the Federal Circuit's decision. In *Richlin Security Service Co. v. Chertoff*,¹⁹ the contractor had to wait twelve years to be awarded its back wages. Certainly, the doggedness of the litigation plays a role in the length of cases. *Wynne* was the subject of two ASBCA decisions²⁰ before it reached the Federal Circuit. In *Bluebonnet Savings Bank, F.S.B. v. United States*,²¹ the Federal Circuit issued its third and likely final decision, having twice before remanded to the lower court.²²

This article addresses the 2006 Federal Circuit cases by subject matter. Within each subject, the summaries explain whether the appeal was from a board or a court.

II. CONTRACT DISPUTES ACT CASES

A. *Jurisdiction Under the Contract Disputes Act*

Contractors seeking to obtain monetary relief or other relief from the Federal Government must understand the jurisdictional limitations and risks

15. 472 F.3d 1370 (Fed. Cir. 2006), *reh'g denied*, 482 F.3d 1358 (Fed. Cir. 2007).

16. *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988), *aff'd on other grounds*, *INS v. Jean*, 496 U.S. 154 (1990).

17. 491 U.S. 274, 274 (1989).

18. 463 F.3d 1261 (Fed. Cir. 2006) (opinion by Clevenger, S.J., with Newman & Schall, JJ.).

19. 437 F.3d 1296 (Fed. Cir. 2006) (opinion by Dyk, J., with Mayer, S.J. & Rader, J.).

20. *See United Techs. Corp.*, ASBCA Nos. 51410, 53089, 53349, Feb. 27, 2004, 04-1 BCA ¶ 32,556; *United Techs. Corp.*, ASBCA Nos. 51410, 53089, 53349, Jan. 19, 2005, 05-1 BCA ¶ 32860.

21. 466 F.3d 1349 (Fed. Cir. 2006) (opinion by Bryson, J., with Newman and Rader, JJ.).

22. *See Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348 (Fed. Cir. 2001) (*Bluebonnet App. I*); *Bluebonnet Sav. Bank, F.S.B. v. United States*, 339 F.3d 1341 (Fed. Cir. 2003) (*Bluebonnet App. II*).

of the forum they select. Although the CDA²³ provides jurisdiction over contract disputes over express or implied contracts in either the COFC or the boards of contract appeals, the scope of jurisdiction within those forums varies, as highlighted in *Wesleyan Co., Inc. v. Harvey*.²⁴

In *Wesleyan*, the Federal Circuit reversed and remanded a decision of the ASBCA, which held that the CDA did not confer subject matter jurisdiction over portions of Wesleyan's claim.²⁵ The CDA grants the boards subject matter jurisdiction over "any express or implied contract . . . entered into by an executive agency for—(1) the procurement of property, other than real property in being."²⁶ Wesleyan alleged that the Army "improperly disclosed proprietary data" relating to Wesleyan's hydration system to "non-governmental third parties, and that [this data] was subsequently incorporated into the CamelBak™ [hydration] system."²⁷ The CamelBak™ hydration system was subsequently purchased by the Army for use in the Land Warrior/Modular Lightweight Load Carry Equipment system in 1998.²⁸ Wesleyan had provided these data initially through unsolicited proposals, then through a bailment agreement, and finally through purchase orders.²⁹ The key jurisdictional issue was which of those submissions fell within the meaning of "procurement" under the CDA.³⁰

The Federal Circuit defined "procurement" as "'the acquisition by purchase, lease or barter, of property or services for the *direct benefit or use* of the Federal Government.'"³¹ It ruled that the purchase orders constituted procurement contracts because they "involve the exchange of property for money, and thus involve 'procurement.'"³² Thus, the court concluded that the ASBCA had subject matter jurisdiction to hear Wesleyan's claims based on breach of the purchase orders.³³ The court also ruled, however, that the unsolicited proposals and bailment agreement were "donative in nature" because they did not involve "acquisition . . . by such means as . . . renting [or] leasing."³⁴ The Federal Circuit did not elaborate further on why an unsolicited proposal might be considered "donative."

23. 41 U.S.C. §§ 607 (providing jurisdiction to the boards of contract appeals), 609 (providing jurisdiction to the U.S. Court of Federal Claims) (2007).

24. 454 F.3d 1375 (Fed. Cir. 2006); *see also* KAREN MANOS, 2 GOVERNMENT CONTRACT COSTS & PRICING 89:B Intro. (2007).

25. *Wesleyan Co.*, ASBCA No. 53896, 05-1 BCA ¶ 32,950; *see also Wesleyan*, 454 F.3d at 1378, 1381.

26. 41 U.S.C. § 602(a) (2007).

27. *Wesleyan*, 454 F.3d at 1378.

28. *Id.* at 1377.

29. *Id.* at 1376–77.

30. *Id.* at 1378.

31. *Id.* (quoting *New Era Constr. v. United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989)) (emphasis in original).

32. *Id.*

33. *Id.* at 1379.

34. *Id.* at 1378.

The court concluded that the ASBCA did not have jurisdiction under the CDA to entertain Wesleyan's claims under its unsolicited proposals and bailment agreement, stating:

[T]he unsolicited proposals and prototype submitted pursuant to the bailment agreement do not fall within the Board's jurisdiction. To succeed, then, Wesleyan must prove [on remand] that the Army obtained the confidential information that it later disclosed improperly not from the unsolicited proposals, nor from the bailment, but solely from the prototypes purchased and evaluated.³⁵

Moreover, the Federal Circuit held that Wesleyan also must show that the purchase orders themselves "incorporate by reference" the confidentiality provisions that had been executed at the time of the unsolicited proposals and bailment.³⁶

The court highlighted Wesleyan's strategic mistake in pursuing relief at the board by noting that if Wesleyan had decided to file its claims at the COFC, that court, under the broader jurisdiction of the Tucker Act,³⁷ would have been able to hear Wesleyan's claims related to the unsolicited proposals and the bailment.³⁸ Because the Tucker Act grants jurisdiction over "any express or implied contract with the United States,"³⁹ the court held that "unlike the CDA, the Tucker Act does not require that the contract with the United States relate to procurement."⁴⁰ Of course, Wesleyan's selection of the board for its appeal only became a mistake when the court determined that an unsolicited proposal and a bailment were "donative" and not procurements, a result that was not required and from which Judge Newman dissented.⁴¹

In dissent, Judge Newman stated that the CDA gave the ASBCA the authority to consider the entirety of Wesleyan's claim.⁴² Noting that many procurements begin with the submission of unsolicited offers, followed by a prototype, and then a full evaluation, Judge Newman was concerned that the "majority's ruling... parses the various stages at which the offeror provided confidential information, when all of these stages are part of one overall supply proposition, and are part of one overall claim."⁴³ Judge Newman reasoned that "[t]he confidentiality provisions herein are part of an integrated procurement, and the Contract Disputes Act gives the board jurisdiction over disputes arising anywhere in the process."⁴⁴

The dissent has the better view. A proposal that is competitively solicited serves the same function as a proposal that is unsolicited—both serve as

35. *Id.* at 1380.

36. *Id.* at 1381.

37. 28 U.S.C. § 1491 (2007).

38. *Wesleyan Co., Inc. v. Harvey*, 454 F.3d 1375, 1380 (Fed. Cir. 2006).

39. 28 U.S.C. § 1491(a)(1).

40. *Wesleyan*, 454 F.3d at 1380; *accord* *Sweetwater, A Wilderness Lodge LLC v. United States*, 72 Fed. Cl. 208, 226 (2006).

41. *See Wesleyan*, 454 F.3d at 1378.

42. *Id.* at 1381 (Newman, J., dissenting).

43. *Id.* (Newman, J., dissenting).

44. *Id.* at 1382 (Newman, J., dissenting).

offers, which the Government may accept or reject, and both are necessary in a procurement. The Federal Circuit did not elaborate on why an unsolicited proposal might be considered “donative.”⁴⁵

*B. Contract Interpretation at COFC—Not a Matter of Law
Where Contract Is Ambiguous*

In an unpublished decision, the court in *Kimco Realty Corp. v. United States*⁴⁶ held that the COFC’s grant of summary judgment on a contract interpretation issue was improper where the terms of the lease were ambiguous.⁴⁷

The Federal Circuit partially affirmed and partially vacated and remanded a decision by the COFC concerning Kimco Realty Corporation’s (Kimco) claims under a lease agreement.⁴⁸ Kimco, the landlord, argued that the Government owed additional funds under a lease between Kimco and the U.S. Postal Service. Kimco argued that two provisions of the lease, one dealing with common area maintenance (CAM) charges and one covering reimbursement for building-value taxes, entitled it to additional compensation from the Government.⁴⁹ With regard to the CAM issue, Kimco argued that the Government was required to pay 3 percent of the CAM charges attributable to the entire shopping center, while the Government argued that it was only responsible for 3 percent of the CAM charges for the shopping center’s general parking area.⁵⁰

Relying on the terms of the lease, the COFC granted summary judgment in favor of the Government on this issue.⁵¹ On the issue of reimbursement for building-value taxes, the COFC found, after a trial on the documentary record, that the Government had, in fact, overpaid Kimco under the lease provisions because the local tax assessor had never included the value of the post office building in the taxes assessed to Kimco.⁵² The COFC found that the Government was entitled to recover these overpayments.⁵³

The Federal Circuit affirmed the COFC’s decision on the reimbursement of building-value taxes, finding that because the post office building was tax exempt, the Government was only required to reimburse Kimco for a percentage of the taxes assessed for the value of the shopping center land alone.⁵⁴ With respect to the CAM issue, however, the Federal Circuit found that the relevant terms of the lease were not unambiguous and that Kimco’s interpretation of the lease provision was reasonable.⁵⁵ Because the terms were

45. *Id.* at 1378.

46. 187 F. App’x 986, 2006 WL 1813911 (opinion by Bryson, J., with Michel, C.J. & Plager, J.).

47. *See id.* at 987.

48. *See id.*

49. *Id.*

50. *Id.*

51. *See id.* at 988.

52. *Id.*

53. *Id.* at 988, 989.

54. *Id.* at 989.

55. *Id.* at 990.

ambiguous, the Federal Circuit ruled that it was inappropriate for the COFC to grant the Government's summary judgment motion.⁵⁶ Nevertheless, the Federal Circuit stated that it would be equally inappropriate to direct the entry of summary judgment for Kimco, as Kimco had urged.⁵⁷ The COFC's grant of summary judgment on the CAM issue was thus vacated and the case was remanded for further proceedings.⁵⁸

C. Contract Interpretation—Review of Board Cases

In *Medlin Construction Group, Ltd. v. Harvey*,⁵⁹ the court interpreted two portions of a contract specification together to allow the contractor to choose between two types of material, reversing the decision of the ASBCA.⁶⁰

Medlin Construction Group, Ltd. (Medlin) entered into a fixed-price contract for the construction of a vehicle maintenance facility at Fort Hood, Texas.⁶¹ The contract specifications allowed the contractor to choose between two types of material for fiber void retainers: polystyrene rigid insulation and precast concrete.⁶² A contract drawing sequence, however, showed an arrow pointing to the retainer and text, indicating precast concrete and specifying dimensions for such.⁶³ The Government's interpretation of these two portions of the contract was that the drawing served to narrow the contractor's choices, requiring Medlin to use the more expensive precast concrete void retainers to complete the contract.⁶⁴ The ASBCA denied Medlin's claims for the increased costs of performance, adopting the Government's interpretation that the drawing and specification were not in conflict and that the drawing merely narrowed the options available to the contractor.⁶⁵

On appeal, the Federal Circuit reversed the ASBCA's decision.⁶⁶ The court started with the general rule of contract interpretation that a "reasonable interpretation must 'assure that no contract provision is made inconsistent, superfluous, or redundant.'"⁶⁷ The court held that Medlin's interpretation of the contract, which read the specification as allowing the use of either material and which read the drawing-specified dimensions to be used *if* the contractor chose to use precast concrete, was the only interpretation that gave meaning to all parts of the contract.⁶⁸ Correspondingly, the court rejected the

56. *Id.* at 990–91.

57. *Id.* at 991.

58. *Id.*

59. 449 F.3d 1195 (Fed. Cir. 2006) (opinion by Prost, J., with Linn & Dyk, JJ.).

60. *See id.* at 1200.

61. *Id.* at 1196.

62. *Id.* at 1196–97.

63. *See id.* at 1197.

64. *See id.* at 1197, 1198.

65. *See id.* at 1198–99; *see generally* *Medlin Constr. Group, Ltd.*, ASBCA No. 54772, 05-1 BCA ¶ 32,939.

66. *Medlin Constr. Group, Ltd. v. Harvey*, 449 F.3d 1195, 1204 (Fed. Cir. 2006).

67. *Id.* at 1200 (quoting *Lockheed Martin IR Imaging Sys. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997) (internal citations omitted)).

68. *Id.* at 1200.

Government's interpretation of the contract as unreasonable since it eliminated the express terms of the specification allowing for the use of polystyrene rigid insulation.⁶⁹

The court distinguished the cases on which the board had relied, holding that drawings that narrow a contractor's options are not in conflict with a specification where they provide particularization or additional detail.⁷⁰ For example, the board relied on *Caddell Construction Co., Inc.*,⁷¹ in which the contract specifications only specified one pipe configuration, but incorporated by reference a brochure that included two different configurations.⁷² In that case, the brochure "indicated that the configuration would be limited to that which would match the work that was to be attached to it."⁷³ The board did not read the brochure to offer choices, but rather to provide detail regarding the configuration specified.⁷⁴ The court noted that in contrast to the situation in *Caddell*, "Medlin's Contract specifications . . . did not indicate that the retainer type was . . . limited by other structural requirements of the Contract . . . [n]or were the Contract drawings expressly incorporated into the specifications in their entirety."⁷⁵

The court also distinguished the decision in *A.R. Mack Construction Co., Inc.*,⁷⁶ in which the specifications had merely required "unit heaters with stationary or rotating air deflectors, without specifying any particular number of either type, while the contract drawing required a specific number of each type."⁷⁷ The court noted that the Government's interpretation under the facts of *Medlin* eliminated express provisions of the specifications, a result not reached in *A.R. Mack*.⁷⁸ Consequently, the court found Medlin entitled to an equitable adjustment for the extra costs associated with providing concrete retainers instead of the less-expensive polystyrene.⁷⁹

In *Cities of Burbank, Glendale, and Pasadena, California v. Bodman*,⁸⁰ the cities of Burbank, Glendale, and Pasadena, California (collectively, Cities) brought a claim against the Bonneville Power Administration (BPA) over rates charged to the Cities pursuant to various power distribution contracts.⁸¹ At issue was the method BPA used to calculate the Cities' rates, which were required to be greater than rates charged to BPA's local customers.⁸² The Department of

69. *Id.* at 1201.

70. *Id.* at 1199, 1202.

71. ASBCA No. 32641, 87-1 BCA ¶ 19,359.

72. *Medlin Constr. Group, Ltd. v. Harvey*, 449 F.3d 1195, 1202 (Fed. Cir. 2006).

73. *Id.* at 1202-03.

74. *Id.*

75. *Id.*

76. ASBCA No. 49526, 97-1 BCA ¶ 28,742.

77. *Medlin*, 449 F.3d at 1203 (describing the contract in *A.R. Mack*).

78. *Id.*

79. *Id.* at 1204.

80. 464 F.3d 1280 (Fed. Cir. 2006) (opinion by Rader, J., with Gajarsa & Newman, JJ.).

81. *Id.* at 1283-84.

82. *See id.* at 1282.

Energy Board of Contract Appeals (EBCA) denied the Cities' claims and the Cities appealed the EBCA's decision to the Federal Circuit.⁸³

The Cities presented two issues to the Federal Circuit: (1) that the revised method of calculation, which itemized or unbundled the charges, led to incorrect calculations of the local rate (Priority Firm rate) to which the Cities' rates were tied (Unbundling Issue)⁸⁴ and (2) that the use of a rate referred to as the "Exchange rate" was also inappropriate in determining the rates charged to the Cities (Exchange Rate Issue).⁸⁵ The court rejected the Cities' contentions and held that the EBCA correctly interpreted the pricing provisions of the contracts, affirming the board's decision.⁸⁶

With regard to the Unbundling Issue, the court sought an understanding of the parties' intent at contract formation and concluded that the EBCA was correct in determining "that it was proper for BPA, when calculating rates under [the contracts] to re-bundle [the newly itemized charges] to arrive at a rate comparable to the [Priority Firm] rates paid by local customers in previous years."⁸⁷ The court continued that "[a]ny other approach would result in an apples-to-oranges ratio completely disconnected from the parties' intent in the Agreements."⁸⁸

Concerning the Exchange Rate Issue, the Cities argued that the contract language was ambiguous and extrinsic evidence would demonstrate that the Cities "never intended to include the Exchange rate in the [Priority Firm] rate calculation."⁸⁹ The court found that the contracts were not ambiguous, but rather discussed the use of averaging rates in the event that more than one was used.⁹⁰ The court found this language persuasive because it discussed the existence of multiple rates, as well as a procedure for their use "[b]ecause that section contemplated the possibility of multiple... rates in the future, the Cities ignorance of the number of... rates [was] irrelevant."⁹¹

In *Applied Cos. v. Harvey*,⁹² the court interpreted a value engineering change clause to apply only to the contractor's products and not to extend to other commercial models the Government might purchase under other contracts.⁹³ Applied Companies (Applied) entered into a contract with the U.S. Army Troop Support Command to supply a specific type of air conditioner.⁹⁴ The contract included a Value Engineering (VE) clause that permitted the contractor to share 50 percent of any savings realized by the Government as a

83. *Id.* at 1284.

84. *Id.*

85. *Id.* at 1285.

86. *Id.* at 1285–86.

87. *Id.* at 1284, 1285.

88. *Id.* at 1285.

89. *Id.*

90. *Id.* at 1286.

91. *Id.*

92. 456 F.3d 1380 (Fed. Cir. 2006) (opinion by Michel, CJ., with Newman and Rader, JJ.).

93. *See id.* at 1382, 1386.

94. *Id.* at 1381.

result of a contractor's value engineering change proposal (VECP).⁹⁵ Pursuant to this clause, Applied submitted a VECP suggesting that certain parts in Applied's air conditioner could be "replaced with commercial parts at significant savings."⁹⁶ Although the VECP that the Government accepted was limited to the type of air conditioner manufactured by Applied, a fact that Applied conceded, the contractor claimed that it was entitled to share in the savings of all air conditioner models bought by the military that incorporated the same basic concept proposed by Applied in its VECP.⁹⁷ The Army's contracting officer denied Applied's claim for failure to prove entitlement to future savings.⁹⁸ Subsequently, the ASBCA denied most of the claim, limiting Applied's award to the savings realized on the Applied-manufactured air-conditioning units.⁹⁹

On appeal, the Federal Circuit affirmed the ASBCA's decision.¹⁰⁰ Looking to the language of the VE clause, the court pointed out that the scope of the savings to be shared is governed by the agreement of the parties, as stated in an accepted VECP.¹⁰¹ The VECP clause at issue provided in relevant part:

Part (b) of the VE clause defines Acquisition savings as savings resulting from the application of a VECP to contracts awarded by the same contracting office or its successor...for essentially the same unit. It defines Unit as the item or task to which the Contracting Officer and the Contractor agree the VECP applies. Part (c) of the VE clause, which discusses VECP preparation, instructs that the Contractor "shall include in each VECP...(3) Identification of the unit to which the VECP applies."¹⁰²

In this case, the court found the VECP to be unambiguous, in that it specifically applied only to Applied's air-conditioning unit.¹⁰³ The court also found that both the Government's conditional and unconditional acceptances of the VECP were likewise unambiguous.¹⁰⁴ The acceptances specifically provided that there would be no future sharing of contract savings, thereby precluding the award of savings relating to any air conditioners other than Applied's.¹⁰⁵ As a result of finding the parties' agreement unambiguous, the court refused to consider parol evidence indicating that the parties intended to include additional air-conditioning models within the scope of the VECP.¹⁰⁶

Finally, the court rejected Applied's argument that, although its VECP was directed only toward the Applied air-conditioning units, the contractor should get to share in the savings realized by applying the concept of replacing

95. *Id.*

96. *Id.*

97. *Id.* at 1381-82.

98. *Id.* at 1382.

99. *Id.*

100. *Id.* at 1386.

101. *Id.* at 1382-83.

102. *Id.*

103. *Id.*

104. *Id.* at 1383.

105. *Id.*

106. *Id.* at 1384.

source-controlled items with commercial items to other air-conditioning units.¹⁰⁷ The Federal Circuit had previously held that a VECP for a particular application does not generally entitle the contractor to share in contract savings from other government applications of the “concept” and found Applied’s argument unpersuasive.¹⁰⁸

D. Cost Issues

1. Taxes a Shareholder Pays in an S Corporation Are Not Allowable Costs of the Corporation

In *Information Systems & Networks Corp. v. United States*,¹⁰⁹ the Federal Circuit concluded that the taxes a shareholder pays in an S corporation are not the taxes of the corporation for the purpose of determining whether such taxes are allowable costs under Federal Acquisition Regulation (FAR) cost principle 31.205-41.¹¹⁰

The Federal Circuit reversed a decision by the COFC regarding allowable costs in a cost-reimbursement contract between Information Systems & Networks Corp. (ISN) and the Government.¹¹¹ ISN was an S corporation with one shareholder.¹¹² Traditional subchapter C corporations are subject to double taxation, where the corporation pays income tax on its corporate income and its shareholders also pay income tax on any dividend income received.¹¹³ By contrast, an S corporation is only taxed once—the corporation does not pay income tax on the income it generates at the corporate level, but its shareholders must pay income tax on any dividend income received.¹¹⁴ The Defense Council Audit Agency (DCAA) denied all of ISN’s requests for reimbursement for the state income tax payments of ISN’s sole shareholder.¹¹⁵ The contracting officer’s final decision agreed with the DCAA and ISN appealed the decision to the COFC.¹¹⁶

The COFC analyzed the language of FAR 31.205.41 and concluded that state income taxes incurred by a shareholder of an S corporation were allowable costs in a cost-reimbursement contract and granted ISN’s summary judgment motion.¹¹⁷ The COFC reasoned that ISN, “as an S corporation, is not relieved of state tax liability, but is simply required to pass its liability on its corporate income to” its sole shareholder.¹¹⁸ Thus, the taxes paid by

107. *Id.*

108. See *M. Bianchi of Cal. v. Perry*, 31 F.3d 1163, 1168 (Fed. Cir. 1994).

109. 437 F.3d 1173 (Fed. Cir. 2006) (opinion by Prost, J., with Rader & Linn, JJ.).

110. See *id.* at 1177.

111. *Id.* at 1178.

112. *Id.* at 1174.

113. *Id.* at 1175.

114. See *id.*

115. *Id.*

116. *Id.* at 1175–76.

117. *Id.* at 1176.

118. *Info. Sys. & Networks Corp. v. United States*, 48 Fed. Cl. 265, 270 (2000).

the sole shareholder were the transferred liability of the corporation.¹¹⁹ The Government appealed the decision to the Federal Circuit.¹²⁰

The Federal Circuit held that the COFC had misinterpreted the language of FAR 31.205-41 and reversed and remanded the case.¹²¹ In particular, the court found fault with the COFC's conclusion that tax abatements and tax reductions were the only two types of exemptions that could result in costs not being allowable under subpart (b) of the regulation.¹²² In addition, the court disagreed with the COFC's interpretation of subpart (a) of the regulation to reach the conclusion that taxes paid by ISN's shareholder were allowable when claimed by ISN.¹²³ The court ruled that relevant portions of subpart (a) of the regulation only applied to taxes paid by the *contracting entity*, not a shareholder of the contracting entity.¹²⁴ In conclusion, the court found:

The plain language of 48 C.F.R. § 31.205-41(b) states that taxes from which the contracting entity is exempt are not allowable costs. This is the case here. ISN is free from taxation on [the shareholder's] income derived from ISN's corporate dividends. Therefore, in its cost-reimbursement contract [the shareholder's] state income tax payments themselves cannot be an allowable cost for ISN.¹²⁵

2. Truth in Negotiations—Reliance Is a Required Element of the Government's Case, Even Prior to the 1986 Amendments to the Truth in Negotiations Act

In *Wynne v. United Technologies Corp.*,¹²⁶ the Federal Circuit held that reliance on defective data is a necessary element of the Government's defective pricing claim under the Truth in Negotiations Act (TINA),¹²⁷ even for contracts entered into before 1986.¹²⁸ The Federal Circuit affirmed a decision of the ASBCA denying the Air Force's claims based on allegations that United Technologies Corporation (UTC) furnished defective cost and pricing data.¹²⁹ The Federal Circuit found that, because the Air Force did not establish that it relied upon defective cost or pricing data to its detriment, it was not entitled to a price reduction under the TINA.¹³⁰

119. Karen L. Manos, *Part II. Cost Principles, Chapter 48. FAR 31.205-41, Taxes, B. Case Law Interpretation*, 1 GOVERNMENT CONTRACT COSTS & PRICING 48:B:1 (2007).

120. *Info. Sys. & Networks Corp. v. United States*, 437 F.3d 1173, 1176 (Fed. Cir. 2006).

121. *Id.* at 1178.

122. *Id.* at 1177.

123. *See id.*

124. *Id.*

125. *Id.* at 1177-78.

126. 463 F.3d 1261 (Fed. Cir. 2006) (opinion by Clevenger, S.J., with Newman & Schall, JJ.).

127. 10 U.S.C. § 2306(f).

128. *See Wynne*, 463 F.3d at 1266 (in 1986, Congress codified the requirement to show reliance and the legislative history demonstrates that Congress recognized that reliance was a requirement and "considered and rejected amendments to TINA that would have eliminated the reliance requirement") (citing H.R. Rep. No. 99-718, at 260 (1986), and National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 952, 100 Stat. 3816, 3945-49 (codified at 10 U.S.C. § 2306a(d)(2) (2000))).

129. *Id.* at 1262.

130. *Id.* at 1262, 1265-66.

The case grew out of a \$10 billion Air Force competition between Pratt & Whitney (a United Technologies Corporation subsidiary) and General Electric Corporation (GE) for out-year F-15 and F-16 production engine requirements for versions of the F100 and F110 engines, which has been dubbed "The Great Engine War."¹³¹ The Air Force claimed that UTC furnished defective cost or pricing data with its best and final offer (BAFO) and sought a \$299 million price reduction.¹³²

The Government audited the data submitted with UTC's initial price proposal but did not audit UTC's BAFO, on which the defective pricing claims were based.¹³³ In its initial decision, the ASBCA recognized that the Air Force had rejected DCAA's request for a post-award audit because "[t]he contracts were awarded solely on a competitive basis consistent with the decision made by the Source Selection Authority in accordance with the criteria set forth in Section M of the AFE Request for proposal."¹³⁴ However, the ASBCA also held that data reviews by the life cycle cost panel and a statement in the Record of Acquisition Action that cost or pricing data were adequate demonstrated that the Air Force had relied on the data.¹³⁵ Despite its finding that the Air Force had relied on the data, it concluded that "the contract price reductions to which the Air Force was entitled were exceeded by the offsets to which [UTC] was entitled."¹³⁶

The Air Force requested reconsideration.¹³⁷ UTC cross-moved for reconsideration, explaining that the documents relied upon by the board were reviews of the initial proposal and not the BAFO and arguing that because the Air Force's defective pricing claims were based on the BAFO, it had to show reliance on the BAFO.¹³⁸ On reconsideration, the ASBCA found that "neither the Defense Contract Audit Agency (DCAA), the [Air Force] price analyst, the contracting officer (CO) nor the cost panel reviewed the BAFO cost or pricing data prior to award."¹³⁹ For the initial contract year, the Air Force failed to provide evidence that any government official had even reviewed UTC's cost or pricing data included in its BAFO.¹⁴⁰ For subsequent years, the ASBCA determined that "the Air Force did not exercise its options under the same terms and conditions contained within the BAFO, but instead sought more advantageous offers from [UTC] and a competitor each year."¹⁴¹

131. David Z. Bodenheimer, *Feature Comment: Government's Defective Pricing Claim in the Great Engine War Flames Out at the Federal Circuit*, 48:36 GOV'T CONTRACTOR ¶ 338 (Oct. 4, 2006).

132. United Techs. Corp., ASBCA Nos. 51410, 53089, 53349, Feb. 27, 2004, 04-1 BCA ¶ 32,556, at 161,020.

133. *Wynne v. United Techs. Corp.*, 463 F.3d 1261, 1263 (Fed. Cir. 2006).

134. *United Technologies Corp.*, 04-1 BCA ¶ 32,556, at 161,013, 161,017.

135. *Id.* at 161,026.

136. *Wynne*, 463 F.3d at 1263.

137. United Techs. Corp., ASBCA Nos. 51410, 53089, 53349, Jan. 19, 2005, 05-1 BCA ¶ 32,860.

138. *Wynne*, 463 F.3d at 1263.

139. *Id.* (quoting *United Techs. Corp.*, 05-1 BCA ¶ 32,860, at 162,812).

140. *Id.* at 1263-64.

141. *Id.* at 1264.

The contracting officer did not review the cost or pricing data for the BAFO in any of these years and instead made award decisions based upon a market competition between the competitors.¹⁴² On these facts, the ASBCA concluded that UTC had rebutted the presumption that its defective cost or pricing data had caused an overstated price by demonstrating that the Air Force did not in fact rely upon the allegedly defective cost or pricing data.¹⁴³

The Air Force appealed the ASBCA's reconsideration decision.¹⁴⁴ Instead of contesting the factual finding of no reliance, the Air Force argued that the ASBCA erred in requiring the Air Force "to establish that it relied upon the defective cost or pricing data to its detriment."¹⁴⁵ According to the Air Force, it was only required to show that the contract price offered by UTC "was calculated using the defective cost or pricing data."¹⁴⁶ Thus, the Air Force tried to convert a statute that had generally governed the Government's reliance into an argument that the contractor necessarily relied on the data in calculating its BAFO.¹⁴⁷

Relying on earlier decisions and the text and legislative history of TINA, the court held that although the Air Force "was entitled to a rebuttable presumption that any defective cost or pricing data . . . actually caused an increase in the contract price . . . once [UTC] rebutted this presumption of causation, the Air Force was required to establish that it actually relied on the defective data to its detriment."¹⁴⁸

The Federal Circuit found that, as the Air Force did not establish reliance on the defective data, the ASBCA did not err in its reconsideration decision.¹⁴⁹

The Government's appeal of the ASBCA's reconsideration decision to the court to advance a position that was contrary to the text of the statute, legislative history, existing case law, and Department of Defense's existing regulations¹⁵⁰ for a potential \$299 million payout drew criticism from commentators.¹⁵¹

142. *Id.*

143. *Id.* at 1263.

144. *Id.*

145. *Id.* at 1265, 1267.

146. *Id.* at 1265.

147. While the court's decision does not squarely address the Government's assertions on appeal that, under TINA, a contractor must actually use current cost or pricing data in drafting its proposal, its affirmation of the ASBCA's decision on reconsideration constitutes a rejection of that argument. See Bodenheimer, *supra* note 131.

148. *Id.* at 1267.

149. *Id.*

150. See Bodenheimer, *supra* note 131 (quoting DAR 3-807.10(a)(2)) ("[T]he Defense Acquisition Regulation (DAR) in effect during the Fighter Engine Competition foreclosed defective pricing liability if the data 'were not relied upon.'").

151. *Id.* ("[T]he Air Force's . . . action to launch the biggest defective pricing litigation in TINA history is, at best, puzzling, especially when the contemporaneous source selection record and the Government trial admissions demonstrated beyond dispute on appeal that no one relied on—or even looked at—the cost data at issue. Even more inexplicable is the Government's pursuit of an appeal in which the central argument—reliance is not an element of TINA—is crosswise with the Air Force's position 20 years ago before Congress."); Ralph C. Nash, *Postscript II: Truth in Negotiations*, 20:11 NASH & CIBINIC REP. ¶ 56 (Nov. 2006) ("[T]he Government's position was so far fetched that it is not even clear why the case was appealed to the Federal Circuit.").

The decision confirmed what most commentators believed was a well-established principle of law—the government must establish reliance.¹⁵² The board decisions below and the court's decision serve as a good primer on the basics of cost or pricing data. The factual background, however, also serves as a cautionary tale of the dangers of requiring cost or pricing data where it is not clearly needed. While the ASBCA determined that the contracting officer was justified in determining prior to award that there was not adequate price competition that would have provided an exemption, during the procurement the Air Force in fact relied on the competition, not the data.

E. *Terminations—Termination Converts Cost-Sharing Contract to Cost Contract*

In *Jacobs Engineering Group, Inc. v. United States*,¹⁵³ the Federal Circuit recognized that it would be unfair to apply the cost-sharing terms of a contract in the context of a termination for convenience.¹⁵⁴

A predecessor company of Jacobs Engineering Group, Inc. (Jacobs) entered into a cost-sharing contract with the Government.¹⁵⁵ The contract provided that the Government would pay 80 percent and Jacobs 20 percent of the contract's cost.¹⁵⁶ The contract's termination for convenience clause (termination clause) stated, however, that the Government would "pay the contractor '[a]ll costs reimbursable' under the contract."¹⁵⁷ The Government eventually terminated the contract pursuant to the termination clause and reimbursed Jacobs 80 percent of the cost.¹⁵⁸ Jacobs sought relief from the contracting officer (CO) for the remaining 20 percent.¹⁵⁹ The CO rejected the proposal, which Jacobs in turn challenged in the COFC.¹⁶⁰ On cross-motion for summary judgment, the COFC granted the Government's motion, denying Jacobs recovery of the 20 percent.¹⁶¹ Jacobs appealed the decision to the Federal Circuit.¹⁶²

The Federal Circuit reversed the COFC's decision, concluding "that the term 'all cost reimbursable' defines the type or kind of costs for which the contract provides reimbursement and not the amount of such costs."¹⁶³ In fact, the court recognized that the contract language was "designed to incorporate the contract's division between reimbursable and non-reimbursable costs."¹⁶⁴ The court further provided that "to the extent there is an ambiguity

152. See Bodenheimer, *supra* note 131.

153. 434 F.3d 1378 (Fed. Cir. 2006) (opinion by Friedman, S.J., with Mayer & Bryson, JJ.).

154. *Id.* at 1381.

155. *Id.* at 1379.

156. See *id.* at 1379.

157. *Id.* at 1380.

158. *Id.*

159. *Id.*

160. *Id.* (citing *Jacobs Eng'g Group, Inc. v. United States*, 63 Fed. Cl. 451 (2005)).

161. *Id.*

162. See *id.*

163. *Id.*

164. *Id.* at 1381.

on the point, it must be resolved in favor of Jacobs, the non-drafter of the contract.”¹⁶⁵ Finally, quoting FAR 16.303(b), the court believed its decision was in accord with the spirit of cost-sharing contracts—“‘[a] cost-sharing contract may be used when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits’”—in this case patent rights.¹⁶⁶ However, since Jacobs was denied these patent rights by the invocation of the termination clause, the court recognized that it would be unfair to deny Jacobs the full reimbursement for its performance.¹⁶⁷

This case is remarkable in several respects. Although the court clearly based its conclusion on the plain language of the termination for convenience clause, it also looked at the objective intent of the parties in entering into a cost-sharing contract and found that to apply a cost share in a termination situation would be unfair.¹⁶⁸ Under the language of the clause, the court could have defended a different result,¹⁶⁹ but it chose the fair one. While cost-sharing contracts themselves are not common vehicles, agreements in which contractors voluntarily agree to forgo a portion of their costs, such as by capping indirect rates, are more common. Absent an express provision stating that the cap applies even in the event of a termination, the logic in *Jacobs* might be applied in such agreements.

F. CDA Interest—Only Available Where a Contractor Advances Capital, Even When Amounts Are Due

In *Richlin Security Service Co. v. Chertoff*,¹⁷⁰ the court arguably overruled prior precedent that granted contractors CDA interest once amounts were found due and held that a contractor was required to show that it had advanced capital.

In the early 1990s, Richlin Security Service Company (Richlin) entered into two contracts to provide security guard services to the Immigration and Naturalization Service (INS).¹⁷¹ Richlin’s employees were misclassified at a lower wage level than was proper under the Service Contract Act (SCA) as a result of mutual mistake.¹⁷² Richlin then entered into an agreement with the Department of Labor to place the amount of wages owed to the employees into an escrow account in order to resolve the SCA compliance action.¹⁷³

165. *Id.*

166. *Id.* (quoting FAR 16.303(b)).

167. *Id.*

168. *See id.*

169. Vernon J. Edwards, *Termination of Cost-Reimbursement Contracts: A Novel Interpretation of the Termination Clause*, 20:4 NASH & CIBINIC REP. ¶ 17 (April 2006) (“The Federal Circuit’s reading of the phrase ‘[a]ll costs reimbursable’ as referring only to the nature (‘type or kind’) of a cost, but not to its amount, appears to be a novel interpretation of the ‘Termination’ clause and an erroneous one.”).

170. 437 F.3d 1296 (Fed. Cir. 2006) (opinion by Dyk, J., with Mayer, S.J. & Rader, J.).

171. *See id.* at 1297.

172. *Id.*

173. *See id.* at 1298.

Richlin then presented a claim to the INS contracting officer, which was denied.¹⁷⁴ Richlin appealed the denial to the Department of Transportation Board of Contract Appeals (DOTBCA) and, after more than twelve years of litigation, Richlin was finally awarded the back wages, along with taxes associated with the distribution of the back wages.¹⁷⁵

Richlin then sought interest on its award under the CDA, section 611,¹⁷⁶ which states, “[i]nterest on amounts found due contractors on claims shall be paid to the contractor from the date the Contracting Officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof.”¹⁷⁷ The DOTBCA rejected Richlin’s interest claim, finding that Richlin did not cover the wages shortfall from its own funds and that the award was not found due to Richlin, but rather to Richlin’s employees and the tax authorities.¹⁷⁸ On appeal, Richlin argued that the plain meaning of section 611 required that it be paid interest on Richlin’s award of back wages and taxes because these items were “amounts found due” under the CDA.¹⁷⁹

In addressing Richlin’s argument, the court dedicated a section of its decision to reviewing precedent, without expressly recognizing that its decision effectively overrules such precedent. Before *Richlin*, interest was treated as mechanical entitlement that the contractor earned as long as it would eventually incur the costs for which the damages were found due.¹⁸⁰ The *Richlin* court recognized that, in *Servidone Construction Corp. v. United States*,¹⁸¹ it had held that section 611 “sets a single, red-letter date for interest on all amounts found due by a court *without regard to when the contractor incurred the costs*.”¹⁸²

The court also discussed its holding in *Raytheon Co. v. White*,¹⁸³ stating that “[w]e have never held that section 611 permits interest to accrue on costs that . . . were never actually incurred by the contractor.”¹⁸⁴ As the *Richlin* court recognized, *Raytheon* involved estimating the increased cost to complete in a termination for convenience and, thus, assessed damages for costs that would never be incurred.¹⁸⁵ *Raytheon* stands for the proposition that a contractor

174. See *id.* at 1297–98.

175. *Id.*

176. See 41 U.S.C. § 611 (2007).

177. *Id.*

178. See *Richlin Sec. Serv. Co. v. Chertoff*, 437 F.3d 1296, 1299 (Fed. Cir. 2006) (citing *Richlin Sec. Servs. Co.*, 04-2 BCA ¶ 32,670 (DOTBCA 2004) (*Richlin IX*)).

179. *Id.* at 1300.

180. See, e.g., *Servidone Constr. Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991) (cited in *Richlin*, 437 F.3d at 1300).

181. 931 F.2d 860 (Fed. Cir. 1991).

182. See *Richlin*, 437 F.3d at 1300 (quoting *Servidone*, 931 F.2d at 862) (emphasis added in *Richlin*); see also *Caldera v. J.S. Alberici Constr. Co.*, 153 F.3d 1381, 1383 (Fed. Cir. 1998) (cited in *Richlin*, 437 F.3d at 1300).

183. 305 F.3d 1354 (Fed. Cir. 2002).

184. *Richlin Sec. Serv. Co. v. Chertoff*, 437 F.3d 1296, 1300 (Fed. Cir. 2006) (quoting *Raytheon*, 305 F.3d at 1365).

185. *Id.*

cannot recover interest on costs it will never incur, i.e., which can never be “found due contractors” under section 611.¹⁸⁶

The *Richlin* court attempted to analogize its conclusion with that in *Raytheon* by explaining that “[t]he award of back wages did not compensate Richlin for any past, present or future out-of-pocket expense.”¹⁸⁷ The court overreached to fit the facts in *Richlin* into the *Raytheon* analysis and, in doing so, confused *who physically possessed the money* with *whether the cost was incurred by the contractor*. The cost of paying Richlin’s employees was clearly a legal, allowable cost incurred by Richlin in the performance of its contract, even though Richlin never physically touched the money. However, it was undisputed that Richlin did not finance the award of back wages, which the *Richlin* court expressly held is a requirement for CDA interest. In this respect, *Richlin* adds a requirement that a contractor who has incurred the costs also must show that it has actually financed those costs.

The court concluded that section 611 required proof that the contractor had advanced capital. In reaching this conclusion, the court did not rely on precedent or the plain language of the statute but instead on the legislative history of section 611. The legislative history on which the court relied stated:

The rights of Government contractors who prevail upon claims against the Government are unique since they have been required by language of the contract . . . to perform the work directed by the Government without stopping to litigate. . . . Since the contractor has been compelled to perform the work with its own money—in the total absence of contract payments or progress payments—there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. *The cost of money to finance this additional work while pursuing the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.*¹⁸⁸

The court found that this language contemplated interest payments only in a case where a contractor has had to advance capital while it litigated.¹⁸⁹ It rejected Richlin’s argument that Congress had specifically rejected this legislative history when it altered section 611 “to require that interest accrue from the date the claim is filed with the Contracting Officer.”¹⁹⁰ It agreed with the board’s decision below that because of this legislative history, “interest is allowable only when the contractor has incurred a ‘cost of money to finance [the] additional work.’”¹⁹¹

Perplexingly, the court spent little time discussing the plain language of section 611, which would appear on its face to allow interest since the amounts at issue were literally “due [the] contractor[.]”¹⁹² Accordingly, the court affirmed the board’s decision denying Richlin’s interest claim on the basis

186. See *id.* (citing *Raytheon*, 305 F.3d at 1365).

187. *Id.* at 1302.

188. *Id.* at 1301 (quoting S. REP. NO. 118, at 32 (1978) (emphasis added in *Richlin*)).

189. *Id.*

190. *Id.* at 1301 n.3.

191. *Id.* (quoting *Richlin Sec. Servs. Co.*, 04-2 BCA ¶ 32,670 (DOTBCA 2004)).

192. See 41 U.S.C. § 611 (2007).

that Richlin had not incurred any past, present, or future out-of-pocket expenses.¹⁹³

This decision has the potential to spawn additional litigation after amounts are found due a contractor. Prime contractors who do not pay subcontractors amounts owed until a claim is granted may not be able to show that they financed the effort, although their subcontractors did.¹⁹⁴

G. *In the Federal Circuit Under the Equal Access to Justice Act, Paralegal*

Services Are Not Recoverable as Fees, but as Expenses at Cost to the Attorney

The Federal Circuit was not finished with Richlin. In *Richlin Security Service Co. v. Chertoff*,¹⁹⁵ the court affirmed a decision of the DOTBCA that ruled that, under the Equal Access to Justice Act (EAJA),¹⁹⁶ paralegal services may only be reimbursed at the cost to the attorney and not at the market rate.¹⁹⁷ At the conclusion of a series of cases involving airport security, Richlin submitted an application under the EAJA for reimbursement of attorney fees, expenses, and costs.¹⁹⁸ Richlin included in this application fees for paralegal services used in connection with the underlying litigation and in preparing the EAJA application.¹⁹⁹ With some exceptions, Richlin applied for reimbursement of paralegal services at the rate its attorney billed Richlin for the paralegal's time.²⁰⁰ The DOTBCA awarded Richlin its attorney fees, but the board concluded that paralegal services could be reimbursed at reasonable cost to Richlin's attorney, not at the market rate it was billed by its attorney.²⁰¹ The board reached this decision after noting that the EAJA does not expressly provide for the reimbursement of paralegal services at the market rate, the common definition of "attorney" did not include paralegals, and the legislative history of the EAJA defined "expenses" to include "paralegal time (billed at cost)."²⁰²

On appeal, Richlin cited language in the EAJA providing that "'fees and expenses' includes the reasonable expenses of expert witnesses...and reasonable attorney or agent fees."²⁰³ Richlin argued that this language allowed courts to include market rate fees for paralegal services under the category of "attorney's fees."²⁰⁴ After examining the statutory language, however, the Federal Circuit ruled that the EAJA only contemplates reimbursement of

193. See *Richlin Sec. Serv. Co. v. Chertoff*, 437 F.3d 1296, 1302 (Fed. Cir. 2006).

194. Ralph C. Nash, *Interest on Claims: A New Wrinkle*, 20:3 NASH & CIBINIC REP. ¶ 13 (Mar. 2006).

195. 472 F.3d 1370 (Fed. Cir. 2006) (opinion by Dyk, J., with Rader, J.; dissent by Plager, S.J.), *reh'g denied*, 482 F.3d 1358 (Fed. Cir. 2007).

196. 5 U.S.C. § 504 (2000).

197. *Richlin*, 472 F.3d at 1371.

198. *Id.* at 1372.

199. *Id.*

200. *Id.* at 1373.

201. *Id.* at 1373–74 (lacking information in the record about cost, the board took judicial notice of paralegal salaries as reflected on the Internet).

202. *Id.* at 1373.

203. 5 U.S.C. § 504(b)(1)(A) (2000) (emphasis added in *Richlin*).

204. *Richlin Sec. Serv. Co. v. Chertoff*, 472 F.3d 1370, 1374 (Fed. Cir. 2006).

expert, agent, and attorney fees.²⁰⁵ In considering whether paralegal fees fell under the specific category of attorney fees, the court examined the statute's language, purpose, and legislative history and also distinguished several prior cases involving EAJA's provisions and similar provisions in the Civil Rights Attorney's Fees Awards Act.²⁰⁶ Consequently, the court ruled that, under EAJA, "paralegal services are not recoverable as fees, but are only recoverable as expenses at the cost to the attorney."²⁰⁷

In particular, the court distinguished the Supreme Court's decision in *Missouri v. Jenkins*,²⁰⁸ in which the Supreme Court held:

a reasonable attorney's fee cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of...others whose labor contributes to the work product for which an attorney bills her client....²⁰⁹

The Federal Circuit distinguished *Jenkins* by noting that the statutory scheme in that case, the Civil Rights Attorney's Fees Awards Act,²¹⁰ differed from EAJA in several important respects.²¹¹ Significantly, section 1988 does not provide for the recovery of expenses; it only provides for the recovery of attorney fees.²¹² Had the Court in *Jenkins* not interpreted the term "attorney's fees" to include fees for paralegal services, the plaintiff would have been denied recovery.²¹³ In contrast, EAJA provides for expenses, so that the actual costs of paralegals may be recovered as expenses, rather than as fees.²¹⁴ Moreover, the court relied on the fact that "the goals and objectives" of section 1988, which were "to encourage litigation protecting civil rights," differed from "the goals and objectives" of EAJA, which were to defray the expense of correcting the Government's error.²¹⁵ The court also rejected contrary precedent on point in the Eleventh Circuit²¹⁶ as unpersuasive.²¹⁷

Judge Plager dissented, finding the EAJA statute "of little help in answering the question of whether and how an award for paralegal services may be compensated."²¹⁸ Judge Plager found the majority's opinion "at variance with established Supreme Court law" in *Jenkins*.²¹⁹ The difference in result

205. *Id.* at 1375.

206. *Id.* at 1375–81.

207. *Id.* at 1381.

208. 491 U.S. 274 (1989).

209. *Id.* at 285.

210. 42 U.S.C. § 1988 (2000).

211. *Richlin Sec. Serv. Co. v. Chertoff*, 472 F.3d 1370, 1378–79 (Fed. Cir. 2006).

212. *Id.* at 1379.

213. *See id.* (citing *Jenkins*, 491 U.S. at 297 (Rehnquist, C.J., dissenting)).

214. *Id.*

215. *Id.* (citing *Kay v. Ehler*, 499 U.S. 432, 436 (1991)).

216. *See Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988), *aff'd on other grounds*, *INS v. Jean*, 496 U.S. 154 (1990).

217. *Richlin Sec. Serv. Co. v. Chertoff*, 472 F.3d 1370, 1377 (Fed. Cir. 2006).

218. *Id.* at 1381 (Plager, S.J., dissenting).

219. *Id.* (Plager, S.J., dissenting).

under the majority and dissenting opinions is driven by the extent to which each construed the applicability of *Jenkins*. Judge Plager noted: "The same question now before us was before the Court in *Missouri v. Jenkins*: does a fee-shifting statute that provides for 'a reasonable attorney's fee' authorize 'compensating the work of...paralegals...at the market rates for their services, rather than at their cost to the attorney.'"²²⁰ He concluded that it did. However, the majority concluded that it did not.

H. *Service Contract Act (SCA)—Increases in Costs of Defined Benefit Level Are Compensable Under the SCA Price Adjustment Clause*

In *Lear Siegler Services, Inc. v. Rumsfeld*,²²¹ the court held that increases in the costs of providing a defined health and welfare benefit pursuant to a collective bargaining agreement (CBA) were compensable under FAR 52.222-43²²² (FAR 52.222-43 or the Price Adjustment Clause).

Lear Siegler Services, Inc. (LSI) competed for and was awarded a firm, fixed-price contract to provide aircraft maintenance at Sheppard Air Force Base, Texas.²²³ LSI's contract incorporated the terms of the SCA and the Price Adjustment Clause, which required the Government to compensate LSI for increases in applicable fringe benefits made to comply with the applicable CBA or wage determination, respectively.²²⁴ The CBA that LSI inherited from the predecessor contract required the contractor to provide employees with a "defined-benefit health plan."²²⁵ Under this plan in the CBA, LSI was obligated to spend whatever was necessary to provide employees with the "agreed-upon level of benefit."²²⁶ After more than a year of performance, LSI submitted a request for a price adjustment for Option Year 2003, seeking reimbursement for its increased costs in the amount of \$1.3 million from providing its employees with the defined-benefit health plan.²²⁷ "The Air Force denied the request, and LSI appealed to the [ASBCA]."²²⁸

The ASBCA distinguished between an increase in benefits and an increase in an employer's costs of providing benefits.²²⁹ The ASBCA held that the Price Adjustment Clause addressed increases in benefits and was not triggered by an increase in an employer's costs of providing benefits.²³⁰ The ASBCA granted summary judgment in favor of the Government and further "rejected LSI's course-of-dealing argument, holding that a course of dealing cannot alter the meaning of an unambiguous contract term."²³¹

220. *Id.*

221. 457 F.3d 1262 (Fed. Cir. 2006) (opinion by Gajarsa, J., with Linn & Newman, JJ.).

222. FAR 52.222-43 (Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts)).

223. *Lear Siegler*, 457 F.3d at 1265.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

On appeal, the Federal Circuit found that the ASBCA committed legal error, reversed both holdings, and entered summary judgment in favor of LSI. The court, relying on the language of the Price Adjustment Clause itself, found “no merit in the argument that the Price Adjustment Clause is triggered only by enlarged benefits rather than enlarged costs of providing those benefits.”²³² FAR 52.222-43(d) states, “[t]he contract price or contract unit price labor rates will be adjusted to reflect the Contractor’s actual increase or decrease in applicable wages and fringe benefits...”²³³ The court recognized that this language references increases or decreases in “fringe benefits,” not “requirements,” which logically refer to costs of benefits.²³⁴

The court further considered that its interpretation was consistent with the regulations implementing the SCA. For example, the “successor contractor rule” provides that a contractor can provide “equivalent” benefits by making a cash payment, thereby measuring “equivalency” in terms of monetary cost to the contractor.²³⁵ Finally, the court analogized the defined benefit health plan to the vacation benefits plan in *United States v. Service Ventures, Inc.*,²³⁶ for which the contractor was found to be entitled to an adjustment when a “greater number of employees were entitled to vacation benefits under the language of the wage determination,” even though the benefits had not changed.²³⁷

One commentator has argued that this ruling might significantly increase costs to agencies and will allow offerors to shift the cost risk of fringe benefits until contract performance begins.²³⁸ However, in submitting their proposals, contractors “warrant” under FAR 52.222-43 that their prices do not include “any allowance for any contingency to cover increased costs for which adjustment is provided under this clause.”²³⁹ Thus, a contractor should not obtain relief for a price for which it already forecasted an increase.

III. TUCKER ACT JURISDICTION

A. *The COFC Has Tucker Act Jurisdiction to Decide Contract Appeals Related to Contracts Entered into Under the Nuclear Waste Policy Act of 1982*

In *PSEG Nuclear, L.L.C. v. United States*,²⁴⁰ the Federal Circuit held that the COFC had subject matter jurisdiction to consider contract appeals related to contracts entered into under the Nuclear Waste Policy Act of 1982 (NWPA).²⁴¹ The Federal Circuit reversed a decision of the COFC,²⁴² which

232. *Id.* at 1268.

233. FAR 52.222-43(d).

234. *Lear Siegler Servs., Inc. v. Rumsfeld*, 457 F.3d 1262, 1268 (Fed. Cir. 2006).

235. *Id.*

236. 899 F.2d 1 (Fed. Cir. 1990).

237. *Lear Siegler*, 457 F.3d at 1268.

238. Vernon J. Edwards, *Price Adjustments Under the Service Contract Act: A New Take on an Old Problem*, 20:10 NASH & CIBINIC REP. ¶ 48 (October 2006).

239. FAR 52.222-43(b).

240. 465 F.3d 1343 (Fed. Cir. 2006) (opinion by Prost, J., with Lourie and Rader, JJ.).

241. 42 U.S.C. §§ 10101–10270 (2000).

242. *PSEG Nuclear, L.L.C. v. United States*, No. 01-551C, slip op. (Fed. Cl. Apr. 22, 2005).

ruled that it lacked subject matter jurisdiction over breach of contract claims filed by PSEG Nuclear, L.L.C. and Public Service Electric and Gas Company (collectively PSEG). PSEG's claims related to a term in the Department of Energy's (DOE) Standard Contract governing the collection and storage of radioactive waste and spent nuclear fuel (SNF).²⁴³ Under NWPA, the DOE was authorized to enter into contracts for the collection and storage of SNF with companies that generate or hold SNF, provided that the companies pay into a fund that DOE would use to develop and maintain an SNF storage facility.²⁴⁴ The DOE, using an administrative hearing process, created a single Standard Contract with the companies for use on this SNF program.²⁴⁵ The NWPA mandated that the DOE begin collecting SNF by January 31, 1998, and the Standard Contract contained a provision requiring the DOE to begin collecting the material by this statutorily mandated date. The NWPA also contained a provision granting original and exclusive jurisdiction to the courts of appeals "for review of any final decision or action of the Secretary, the President, or the Commission under this part..."²⁴⁶ After it became clear that the DOE would not begin collecting material by January 31, 1998, and after paying over \$540 million to the fund since 1983, PSEG brought suit in the COFC for breach of contract. Similar suits were brought by other companies that had signed Standard Contracts with the DOE.

After one judge at the COFC dismissed four such cases on her docket (including PSEG's claims) on the basis that the COFC lacked the subject matter jurisdiction to hear the plaintiffs' claims,²⁴⁷ the four cases were reassigned to other judges at the COFC. In three of these cases, on motions for reconsideration, the new judges reversed the prior holding that the COFC lacked jurisdiction.²⁴⁸ In the case of PSEG, however, the judge denied PSEG's motion for reconsideration on the basis that no new evidence or law had been presented to justify reconsideration of the dismissal.²⁴⁹

PSEG appealed and the Federal Circuit ruled that the NWPA did not strip the COFC of its subject matter jurisdiction under the Tucker Act to hear PSEG's claims.²⁵⁰ According to the court, "PSEG's claims are for breach of the Standard Contract's provision requiring that the Government begin SNF collection by the statutorily mandated date. It does not challenge an agency action taken under the agency's statutory mandate."²⁵¹ While the contract term at issue—the January 31, 1998, date for beginning SNF collection—was statutorily mandated, no damages for failure to meet this obligation were

243. *PSEG Nuclear*, 465 F.3d at 1348.

244. *Id.* at 1344.

245. *Id.*

246. *Id.* at 1344 n.5 (quoting NWPA § 119(a)(1)).

247. *Id.* at 1348.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 1349.

provided for by statute.²⁵² Thus, the Federal Circuit ruled that the claims at issue involved only whether the DOE breached its contractual obligations and, if so, what damages were available to PSEG.²⁵³ Because such issues are not within the DOE's statutory obligations under the NWPA, the Federal Circuit concluded that the NWPA's jurisdictional provision did not deprive the COFC of its Tucker Act jurisdiction over PSEG's claims.²⁵⁴ In addition, contrary to the COFC decision dismissing the four related cases, the Federal Circuit ruled that PSEG's claims could not be resolved by resorting to the administrative record created during the administrative hearing process that created the terms of the Standard Contract.²⁵⁵ The court held that any damages analysis will require extensive factual findings beyond what may exist in the administrative record and "[w]here damages for breach are not within the administrative record, jurisdiction properly lies within the COFC, which is equipped to hear evidence and determine such damages."²⁵⁶

B. COFC Lacked Jurisdiction Where Proper Defendant Was Not the Federal Government

In *Board of Trustees of Bay Medical Center v. Humana Military Healthcare Services, Inc.*,²⁵⁷ the court held that plaintiffs' contract claims against a managed care support provider for the Department of Defense (DoD) Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) were not claims against the Government for money damages and, therefore, were not within jurisdiction of the COFC under the Tucker Act.²⁵⁸

The Federal Circuit affirmed a decision by the U.S. District Court for the Northern District of Florida denying Humana Military Healthcare Services, Inc.'s (Humana) motion to dismiss or transfer the complaint to the COFC²⁵⁹ and denying its motion for reconsideration.²⁶⁰ In 1996 Humana entered into a contract with the DoD to provide managed care support services for beneficiaries within a certain geographical region.²⁶¹ Humana then subcontracted with the plaintiff-appellee hospitals to provide these healthcare services.²⁶² Prior to October 1999, Humana paid the hospitals the contractually agreed-upon reimbursement rates for the outpatient nonsurgical services rendered.²⁶³ Subsequently, Humana unilaterally reduced these payments through

252. *Id.* at 1350.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 1351.

257. 447 F.3d 1370 (Fed. Cir. 2006) (opinion by Lourie, J., with Clevenger & Bryson, JJ.).

258. See 28 U.S.C. § 1491(a)(1) (2000).

259. *Bd. of Trs. of Bay Med. Ctr.*, 447 F.3d at 1370.

260. *Bd. of Trs. of Bay Med. Ctr. v. Humana*, No. 5:03-CV-144, 2004 WL 3314946 (N.D. Fla. Mar. 16, 2004) (*Transfer Decision*); *Bd. of Trs. of Bay Med. Ctr. v. Humana*, No. 5:03-CV-144, (N.D. Fla. July 1, 2005) (*Reconsideration Decision*).

261. *Bd. of Trs. of Bay Med. Ctr.*, 447 F.3d at 1372.

262. *Id.*

263. *Id.*

application of government-approved maximum payment guidelines.²⁶⁴ After Humana had already reduced its reimbursement payments to the hospitals, the Government's TRICARE Management Authority issued a policy statement approving application of the maximum payment guidelines to institutional providers.²⁶⁵ The hospitals filed suit seeking damages for breach of contract against Humana and seeking a declaratory judgment that the Government's policy statement was void.²⁶⁶

The district court granted the Government's motion to dismiss the hospitals' declaratory judgment claim based on a lack of standing.²⁶⁷ Humana, arguing that the Government was the real party in interest on the hospitals' breach of contract claims, also filed a motion to dismiss the contract claims or, alternatively, to transfer the case to COFC. The district court denied this motion and, eventually, denied Humana's motion for reconsideration of this ruling. Humana appealed the denial of its motions to the Federal Circuit.²⁶⁸

The Federal Circuit upheld the decision of the district court, ruling that the proper defendant for the breach of contract claims was Humana, not the Government,²⁶⁹ and, thus, the COFC lacked jurisdiction over those claims.²⁷⁰ The Federal Circuit ruled that the hospitals' pleadings clearly state that the only damages the hospitals sought were from Humana.²⁷¹ In addition, the contracts at issue were "private agreements between the Hospitals and Humana. The government was not a party to these contracts, and the Hospitals have no direct relationship with the government."²⁷² Further, the court found that simply because Humana might be able to seek reimbursement from the Government for any damages awarded to the hospitals "does not mean that the government is the 'real party in interest' on the Hospitals' contract claims."²⁷³ The Federal Circuit ruled that the district court did not abuse its discretion in denying Humana's motion for reconsideration because there was no evidence of any intervening change in the law following the district court's initial decision.²⁷⁴

IV. WINSTAR DAMAGES

A. *The Limits of Equity in Recovery of Damages*

In 2006 the Federal Circuit continued to refine analysis of *Winstar*²⁷⁵ damages, for thrifts whose contracts were breached as a result of the enactment

264. *Id.*

265. *Id.* at 1373.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* at 1375.

270. *Id.* at 1375, 1377.

271. *Id.* at 1372.

272. *Id.* at 1375.

273. *Id.*

274. *Id.* at 1377.

275. *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

of the Federal Institutions Reform, Recovery and Enforcement Act of 1989²⁷⁶ (FIRREA) and similar savings and loan legislation. This refinement has brought new attention to restitution and reliance damages in government contract cases and, as noted above, has relevance for understanding these remedies in the commercial context.²⁷⁷

In *Old Stone Corp. v. United States*,²⁷⁸ the Federal Circuit identified a significant limitation on restitution damages—they are not available to a non-breaching party that elects to continue performance. It further reaffirmed the difficulty in showing that reliance damages from a breach are foreseeable and proximate.²⁷⁹

In the mid-1980s, Old Stone Corporation (OSC) acquired two thrifts, Citizens Federal (Citizens) and Rhode Island Federal (RIF), in cooperation with the Federal Savings and Loan Insurance Corporation (FSLIC).²⁸⁰ Pursuant to these transactions (Citizen Agreement and RIF Agreement, respectively), OSC contributed \$118 million in assets, while FSLIC contributed other monies and agreed to permit OSC to record the thrifts' deficit net worth as "supervisory goodwill" and FSLIC's cash contributions as "capital credits" as in other *Winstar* scenarios.²⁸¹ OSC and FSLIC terminated the Citizens Agreement in December 1987 (December Agreement), pursuant to a termination provision.²⁸² Then, in 1989, Congress enacted FIRREA, which caused OSC's thrift to fail one of the Government's regulatory capital requirements.²⁸³ Attempting to rectify the situation, OSC sold several of its assets, including the assets formerly owned by Citizens.²⁸⁴ In 1993 the thrift was seized.²⁸⁵ Three years later, OSC and its thrift sued the Government in the COFC for breach of the OSC-FSLIC agreements.²⁸⁶ After OSC prevailed on a summary judgment motion, the COFC held a trial on damages.²⁸⁷ The COFC awarded OSC \$74.5 million for the post-breach payments it made to bring its companies into compliance with federal capital requirements under restitution and mitigation theories and awarded OSC an additional \$118 million for its contributions to the thrift acquisitions under restitution and reliance theories.²⁸⁸

On appeal to the Federal Circuit, the Government challenged the amounts awarded to OSC. The Federal Circuit upheld the \$74.5 million

276. Pub. L. No. 101-73, 103 Stat. 183 (1989).

277. See Andrew Kull, *Rescission and Restitution*, 61 Bus. Law. 569 (Feb. 2006).

278. 450 F.3d 1360, 1362 (Fed. Cir. 2006) (opinion by Dyk, J., with Linn & Prost, JJ.), *cert. denied*, 127 S. Ct. 1831 (2007).

279. *Id.* at 1375.

280. *Id.* at 1363–64.

281. *Id.* at 1364.

282. *Id.*

283. *Id.*

284. *Id.* at 1365.

285. *Id.* at 1366.

286. *Id.*

287. *Id.*

288. *Id.* at 1367.

award, rejecting the Government's contention that the Government's promise regarding regulatory forbearance was eliminated by the December Agreement and holding instead that the December Agreement served only to terminate the *executory* part of the contract (i.e., financial assistance).²⁸⁹ The court further rejected the Government's argument that OSC lost the right to enforce the Citizens Agreement when OSC sold Citizens' assets, concurring with COFC that the sale of these assets was caused by the enactment of FIRREA. The court also rejected the Government's claim that only the \$36 million capital deficiency created by FIRREA was recoverable and held instead that OSC's mitigation actions were reasonable under the circumstances.²⁹⁰

The Federal Circuit then reversed the COFC's \$118 million award for OSC's contributions to the thrift acquisitions under both restitution and reliance theories.²⁹¹ The Federal Circuit endorsed the concept that the primary purpose of restitution is "to restore the non-breaching party to the position it would have been in had there never been a contract to breach."²⁹² However, it held that restitution is available only in cases of total breach and that, by continuing to perform after FIRREA, OSC had elected to treat the breach as a partial breach.²⁹³

The Federal Circuit also rejected OSC's claim based on reliance damages. The court recognized that "[t]he purpose of reliance damages is to compensate the plaintiff 'for loss caused by reliance on the contract.'"²⁹⁴ However, in order to be recoverable as reliance damages, losses must be both foreseeable to the parties at the time of contracting and proximately caused by the breach.²⁹⁵ The court acknowledged that, in this particular case, it viewed the requirements for foreseeability and proximate cause as "not meaningfully distinct."²⁹⁶ The COFC had found that "the need for additional replacement capital infusions from OSC to the thrift as a result of the breach was foreseeable."²⁹⁷ The Federal Circuit held that while the infusion of extra assets was a foreseeable result of a breach of the agreements, the ultimate failure of the thrift was not.²⁹⁸ Indeed, the thrift had survived FIRREA, only to succumb several years later to financial difficulties that were only partially caused by FIRREA. The court distinguished its prior rulings that the "need to replace regulatory capital, or the failure of a thrift due to deficiency in regulatory capital," were foreseeable results of FIRREA because the instant case required it to assume not only that lost profits were foreseeable, but that those profits would have resolved

289. *Id.* at 1369.

290. *Id.* at 1370.

291. *Id.* at 1367.

292. *Id.* at 1371 (quoting *Cal. Fed. Bank, F.S.B. v. United States*, 245 F.3d 1342, 1350–51 (Fed. Cir. 2001)).

293. *Id.* at 1371.

294. *Id.* at 1374.

295. *Id.* at 1375.

296. *Id.*

297. *Id.* at 1376.

298. *Id.*

financial problems not caused by FIRREA.²⁹⁹ As a result, the Federal Circuit's denial of reliance damages in *Old Stone* should not be construed to eliminate reliance damages as a possible remedy in *Winstar* cases.³⁰⁰

Finally, without much discussion, the court held that the restitution or reliance damages would have been "duplicative" and resulted in an "unfair windfall" where plaintiff had already recovered the \$75.4 million to replace the capital that the breach eliminated.³⁰¹

In *LaSalle Talman Bank, F.S.B. v. United States*,³⁰² the court upheld the award of expectancy damages. In *LaSalle*, Talman Home Federal Savings and Loan Association of Illinois (Talman), a predecessor to LaSalle Talman Bank, F.S.B. (LaSalle), was formerly a stockholder-owned association.³⁰³ In 1982, Talman and several other Illinois thrifts were failing or had failed.³⁰⁴ As discussed in various other *Winstar* cases, the Federal Home Loan Bank Board consolidated failing or failed thrifts into associations that were more efficient and received significant assistance from the Government, including the authorization to use a purchase accounting system whereby assets and liabilities would be revalued at market price and the net liability would be recorded as an asset called supervisory goodwill.³⁰⁵ With this assistance, Talman reached a state of profitability in 1986 and was able to distribute dividends to shareholders in 1988 and 1989. The enactment of the FIRREA ended the thrifts' ability to count supervisory goodwill and Talman was not able to meet FIRREA's new stringent capital requirements.³⁰⁶ On the brink of federal receivership, Talman's outstanding common stock was purchased by ABN AMRO for \$97 million.³⁰⁷ ABN AMRO also infused Talman with an additional \$300 million so that Talman could meet FIRREA's capital requirements and provided another \$800 million between 1993 and 1998 so that Talman could continue to expand and be profitable.³⁰⁸ During the same period of time, Talman distributed dividends to ABN AMRO totaling \$417.8 million.³⁰⁹ Like many other

299. *Id.* at 1377.

300. In fact, in *Citizens Fed. Bank v. United States*, 474 F.3d 1314 (Fed. Cir. 2007), the Federal Circuit was careful to limit its holding in *Old Stone* to the particular facts, which it indicated had not supported a finding of foreseeability in that case. In *Citizens Fed. Bank*, the Federal Circuit rejected the Government's argument that *Old Stone* precluded a finding in another case that the replacement of capital credit and goodwill was foreseeable at the time of the contract. *Id.* at 1321–22. The COFC also has distinguished the holding in *Old Stone* and has found that reliance damages were foreseeable where the injury to the thrift was more direct and there was "specific, definite, and persuasive" evidence that the regulators foresaw the damages. *Fifth Third Bank v. United States*, 71 Fed. Cl. 56, 89 (2007) ("The sale of the Cincinnati division, and the premature conversion, were both caused directly by the breaching provisions of FIRREA and the need to replace goodwill capital lost by selling assets and infusing equity.").

301. *Old Stone Corp. v. United States*, 450 F.3d 1360, 1378 (Fed. Cir. 2006).

302. 462 F.3d 1331 (Fed. Cir. 2006) (opinion by Lourie, J., with Linn & Newman, JJ.).

303. *Id.* at 1333.

304. *Id.*

305. *Id.* at 1333–34.

306. *Id.* at 1334.

307. *Id.*

308. *Id.*

309. *Id.*

financial institutions affected by FIRREA, LaSalle filed suit in the COFC for breach of contract.³¹⁰

This appeal brought the LaSalle matter before the Federal Circuit a second time. The Government appealed from the COFC decision awarding LaSalle \$146.7 million in loss-of-replacement-capital damages.³¹¹ The Government argued that the COFC erred by not considering dividends that Talman would have continued to pay but for the FIRREA-induced breach and that, had the COFC properly considered the “but-for” dividends, there would have been no net damages because the dividends would have been greater than the dividends that Talman, and later LaSalle, actually paid to ABN AMRO.³¹²

The Federal Circuit found that the COFC accounted for the but-for dividends by instructing the parties to calculate damages by prorating the total sum of the dividends using the percentage of infused capital that the \$97 million stock purchase represented.³¹³ The Federal Circuit found that, furthermore, the COFC did not err in determining that the 1998 and 1989 dividends were not an accurate indicator of how Talman would have continued to distribute dividends in the future had there been no FIRREA-induced breach.³¹⁴ The court stated that “all capital...has a cost” and rejected the Government’s arguments that only regular, and not special, dividends should have been counted as a cost of replacement capital.³¹⁵ The Federal Circuit also affirmed the COFC’s “gross up” of the damages award to reflect a 39.5 percent tax rate, even though LaSalle’s taxes would be paid as part of ABN AMRO’s consolidated return.³¹⁶

B. The Frustrations of Parenthood—A Parent Company Cannot Recover for the Loss of Its Subsidiary’s Equity

In *American Capital Corp. v. FDIC*,³¹⁷ the Federal Circuit denied recovery by the parent company of a subsidiary whose value was drained by FIRREA’s elimination of the subsidiary’s regulatory capital where the parent was not contractually obligated to contribute or exchange its shares of the subsidiary in reliance on the Government’s promises. It also upheld the COFC’s grant of reliance damages. However, it held that capital losses had to be offset by capital gains and remanded for a damages determination.

In 1986 in response to an FSLIC search for a firm to acquire two failing financial institutions, Transcapital Financial Corporation (TFC) offered to merge its wholly owned subsidiary, Transohio, with the failing institutions. TFC, American Capital Corporation (ACC), and Transohio entered into an Assistance Agreement with FSLIC in which FSLIC made an immediate

310. *Id.*

311. *Id.* at 1335.

312. *Id.* at 1336.

313. *Id.*

314. *Id.*

315. *Id.* at 1335.

316. *Id.* at 1388.

317. 472 F.3d 859 (Fed. Cir. 2006) (opinion by Gajarsa, J., with Dyk, J.; Rader, J., dissenting).

cash contribution, purchased certain assets, indemnified plaintiffs, and agreed that \$50 million in supervisory goodwill arising from the transaction would count as regulatory capital in return for the promise of plaintiffs to maintain Transohio's net worth at specified levels for five years, and other promises.³¹⁸ The enactment of FIRREA, which prohibited thrifts from counting supervisory goodwill toward regulatory capital requirements, caused a "snowball effect" that led to the FDIC's seizure of Transohio in 1992.³¹⁹

ACC and TFC filed suit in the COFC for breach of contract and takings. Granting motions for summary judgment, the COFC found that the Government was liable for a breach of contract and that TFC was entitled to \$168.7 million in reliance damages, representing both the \$126.5 million book value of Transohio and the \$42.2 million that TFC infused into Transohio.³²⁰ The COFC then held an evidentiary hearing and determined that the primary award should be reduced by \$50.3 million for losses that would have been incurred regardless of the breach and \$9 million in dividends that TFC received from Transohio.³²¹

On appeal, the Federal Circuit agreed with the Government's argument that the parent, TFC, was not entitled to recover the equity value of its subsidiary, Transohio, because the Assistance Agreement did not require TFC to contribute its shares of Transohio to the merger and that Transohio, as a separate corporate entity, owned its own equity.³²² The Federal Circuit found that TFC did not have a direct interest so as to be able to recover as a shareholder under a breach of contract action.³²³

The Federal Circuit, however, rejected the Government's argument that TFC did not rely on the Government's promises before infusing \$42.2 million in funds into the post-merger Transohio. The court recognized that, in a breach under the reliance theory of damages, "the injured party has a right to damages . . . , including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed."³²⁴ TFC argued that even if there was evidence before the merger suggesting that it planned to infuse capital into Transohio, it would never have infused the cash in a post-merger Transohio absent the Government's promise of favorable accounting and regulatory benefits that allowed Transohio to remain solvent after it merged.³²⁵ The court found that even though the cash infusion was not specifically contemplated by the Assistance Agreement, it was foreseeable by the Government.³²⁶ While the Federal Circuit acknowledged

318. *Id.* at 863.

319. *Id.* at 864.

320. *Id.*

321. *Id.*

322. *Id.* at 865.

323. *Id.*

324. *Id.* at 867.

325. *Id.*

326. *Id.* at 868.

that TFC was planning to infuse funds into Transohio prior to the merger, the Federal Circuit agreed with the COFC that the cash infusion was made to leverage Transohio's regulatory net worth after the merger.³²⁷ In response to the Government's argument that the COFC improperly relieved ACC and TFC of the burden to prove that the breach caused the damages, the Federal Circuit reiterated that the breaching party bears the burden of proof under a reliance theory of damages.³²⁸

In *Caroline Hunt Trust Estate v. United States*,³²⁹ the Federal Circuit relied on its holding in *American Capital* to preclude a parent company from recovering on a claim based on loss of its subsidiary's equity. In this *Winstar* breach of contract case, the Government appealed the award of over \$14 million to plaintiff Caroline Hunt Trust Estate (CHTE) for the Government's breach of contract.³³⁰ CHTE cross-appealed on the magnitude of the damage award.³³¹

In reliance on incentives offered by the Government, CHTE, through its 90 percent owned subsidiary, Southwest Savings Association (SSA), acquired a number of insolvent thrifts in 1988.³³² As part of the transaction, CHTE submitted an application offering to use SSA to acquire the thrifts in return for various incentives.³³³ Determining SSA to be a suitable candidate, the Government adopted numerous resolutions containing the terms of the acquisitions as negotiated and approved.³³⁴ Contained therein was a release of CHTE from its statutory obligations to maintain SSA's net worth at a certain level, a \$307.5 million capital credit to ensure SSA's post-acquisition regulatory compliance, along with other forbearances.³³⁵ CHTE also contributed roughly \$21 million of subordinated debt to SSA's equity capital.³³⁶ However, as a result of Congress's enactment of FIRREA, the capital credit was eliminated and SSA was liquidated.³³⁷ CHTE then filed suit in the COFC alleging that Congress's enactment of FIRREA constituted a breach of CHTE's contract with the Government.³³⁸

The COFC concluded that a contract existed between CHTE and the Government, thereby conferring standing on CHTE.³³⁹ The COFC found that, although CHTE was merely a shareholder of SSA, CHTE's application constituted an offer, the terms of the Government's resolutions constituted an

327. *Id.*

328. *Id.*

329. 470 F.3d 1044, 1053–54 (Fed. Cir. 2006) (opinion by Linn, J., with Newman, J.; Gajarsa, J., dissenting).

330. *Id.* at 1046.

331. *Id.*

332. *Id.*

333. *Id.* at 1048.

334. *Id.* at 1047–48.

335. *Id.* at 1048.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Caroline Hunt Trust Estate v. United States*, 65 Fed. Cl. 271, 296 (2005); see *Caroline Hunt Trust Estate v. United States*, 470 F.3d 1044, 1049 (Fed. Cir. 2006).

acceptance, and consideration passed between CHTE and the Government (acting pursuant to valid contractual authority) in the form of a mutual agreement to use SSA to acquire failing thrifts that the Government sought to preserve.³⁴⁰ As a result of the Government's breach of the contract, the COFC awarded CHTE damages for the value of CHTE's subordinated debt contribution, along with the value of CHTE's equity in SSA, offset by the benefit to CHTE of the release of its obligations to maintain SSA's net worth.³⁴¹

On appeal to the Federal Circuit, the Government challenged (1) whether privity of contract existed between CHTE and the Government; (2) whether CHTE was entitled to recover the value of its equity in SSA; and (3) the size of the Government's offset.³⁴² The Federal Circuit affirmed the COFC's finding that privity of contract existed between CHTE and the Government.³⁴³ Although shareholders normally have no standing to recover for breaches affecting their corporation, the Federal Circuit found that, in this case, there had been an offer, acceptance, and consideration passed directly between CHTE (as shareholder) and the Government.³⁴⁴ The Federal Circuit then affirmed the COFC's factual determination that, without the release from its obligation to maintain SSA's net worth, CHTE faced a maximum exposure of roughly \$60 million, with a 15 percent likelihood of enforcement.³⁴⁵ This yielded a setoff of approximately \$9 million.³⁴⁶ Finally, the Federal Circuit found that the COFC erred in awarding CHTE its equity in SSA, citing its holding in *American Capital*.³⁴⁷ Thus, the Federal Circuit reduced CHTE's award by the value of its equity in SSA, approximately \$2.3 million.³⁴⁸

Judge Gajarsa dissented on the grounds that the majority failed to "recognize the corporate form and attendant corporate law limiting the liability and thereby the standing of shareholders."³⁴⁹ Judge Gajarsa concluded that there was no overarching contract between CHTE and the Government and, therefore, CHTE lacked standing to recover for the breach.³⁵⁰

C. *The Jury Is In—Jury Verdict Damages Upheld in Bluebonnet Savings Bank, F.S.B., et al. v. United States*

The Federal Circuit issued its third, and likely final, damages ruling in *Bluebonnet Savings Bank, F.S.B. v. United States*,³⁵¹ in which it sustained the

340. *Caroline Hunt Trust Estate*, 65 Fed. Cl. at 323; see *Caroline Hunt Trust Estate*, 470 F.3d at 1049.

341. *Caroline Hunt Trust Estate*, 470 F.3d at 1054.

342. *Id.* at 1049.

343. *Id.*

344. *Id.*

345. *Id.* at 1053.

346. *Id.*

347. *Id.* at 1054.

348. *Id.*

349. *Id.*

350. *Id.* at 1055.

351. 466 F.3d 1349 (Fed. Cir. 2006) (opinion by Bryson, J., with Newman & Rader, JJ.).

COFC's award of over \$96 million to plaintiff James Fail for the Government's breach of contract, calculated under a jury verdict method.³⁵²

In reliance on incentives offered by the Government, James Fail (along with his company, CFSB Corporation (CFSB)) acquired a number of insolvent thrifts in 1988.³⁵³ Pursuant to a series of agreements entered into with the FSLIC, Mr. Fail and CFSB agreed to invest over \$100 million in Bluebonnet, in return for \$3 billion of assistance to Bluebonnet and relief from otherwise-applicable regulatory requirements.³⁵⁴ As a result of Congress's enactment of FIRREA, Mr. Fail was forced to enter into unfavorable financing agreements, including an Economic Benefits Agreement (EBA) under which Mr. Fail offered 49 percent of future profits and the rights to proceeds in any sale of CFSB in return for long-term financing for CFSB's debt.³⁵⁵ In 1995, Mr. Fail and his associated companies brought suit against the Government for breach of contract.³⁵⁶

In the Federal Circuit's first decision in *Bluebonnet* (*Bluebonnet App. I*),³⁵⁷ it upheld the COFC's determination of liability but reversed the lower court's holding that Bluebonnet had failed to prove its damages with regard to the EBA with reasonable certainty.³⁵⁸ On remand, the COFC awarded damages totaling payments already made under the terms of the EBA and the entire value of the EBA debt, holding that it was "constrained by the mandate" of the Federal Circuit.³⁵⁹ In its second decision in the matter (*Bluebonnet App. II*),³⁶⁰ the Federal Circuit remanded to the COFC for a determination of costs the plaintiffs would have incurred in the absence of a breach.³⁶¹ The Federal Circuit encouraged the COFC to "use whatever means it deems appropriate, including reopening the record if necessary, to assess the net effects of the breach" and recommended, at a minimum, the employment of a jury verdict.³⁶²

At trial, both parties presented competing models approximating the quantum of EBA-related damages.³⁶³ After granting Mr. Fail summary judgment on liability, the COFC cited its prior findings, upheld at the Federal Circuit, that the Government's breach likely caused increased financing costs and that such damages were foreseeable.³⁶⁴ The COFC generally adopted the

352. The case took approximately eleven years to reach the Federal Circuit's third decision.

353. *Bluebonnet Sav. Bank, F.S.B.*, 466 F.3d at 1353.

354. *Id.*

355. *Id.* at 1354.

356. *Id.*

357. *Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348 (Fed. Cir. 2001).

358. *Id.* at 1358.

359. *Bluebonnet Sav. Bank, F.S.B. v. United States*, 52 Fed. Cl. 75, 77 (2002).

360. *Bluebonnet Sav. Bank, F.S.B. v. United States*, 339 F.3d 1341 (Fed. Cir. 2003).

361. *Id.* at 1342-43.

362. *Id.* at 1346.

363. *Id.* at 1355-56.

364. *Bluebonnet Sav. Bank, F.S.B. v. United States*, 67 Fed. Cl. 231, 234 (2005) (quoting *Bluebonnet Sav. Bank, F.S.B. v. United States*, 47 Fed. Cl. 156, 172 (2000)), *rev'd in part on other grounds*, 266 F.3d 1348 (Fed. Cir. 2001).

Government's model of damages but used the jury verdict to modify some of the assumptions in that model.³⁶⁵ The COFC specifically rejected the Government's expert's premise that CFSB would have retired Mr. Fail's debt for free, finding it "highly unlikely" that government regulators would have approved CFSB's assumption of the debt.³⁶⁶ The Government's model also had failed to consider the tax implications caused by the fact that one plaintiff was an individual and another was a corporation.³⁶⁷ The COFC awarded damages of over \$96 million.³⁶⁸ The Government moved for reconsideration and the COFC rejected it and criticized the Government for having "belatedly respond[ed] to plaintiffs' argument" regarding the issue of regulatory approval of CFSB's assumption of Mr. Fail's debt.³⁶⁹ The Government next appealed to the Federal Circuit, challenging the COFC's use of the jury verdict method of damage calculation, the COFC's finding that regulators would not have approved CFSB's "gratuitous assumption" of Mr. Fail's debt, and the reasonableness of the damage award.³⁷⁰

With regard to the jury verdict method, the Federal Circuit reaffirmed that the jury verdict method is appropriate where there was clear injury and no other reliable method of measuring damages.³⁷¹ The court specifically approved of the COFC's tailoring of competing economic models to guide its discretion.³⁷² The Federal Circuit also rejected the Government's challenge to the finding that regulators would not have approved CFSB's gratuitous assumption of Mr. Fail's debt.³⁷³ The Federal Circuit found that the Government waived this argument by not asserting it prior to its motion for reconsideration and was unable to show the manifest injustice required to excuse its waiver.³⁷⁴ Finally, the Federal Circuit rejected the Government's argument that the damage award should not be accepted due to the COFC's alleged failure to adequately describe why the award was a reasonable approximation of plaintiff's damages.³⁷⁵ The court referenced exhibits from plaintiff's experts showing total cumulative equity surrender in the amount awarded and noted that the Government had not provided any calculation of its own and instead had simply dismissed the statements of plaintiffs' expert.³⁷⁶

365. *Id.* at 242.

366. *Id.* at 246.

367. *Bluebonnet Sav. Bank, F.S.B. v. United States*, 466 F.3d 1349, 1361 (Fed. Cir. 2006).

368. *Bluebonnet Sav. Bank, F.S.B.*, 67 Fed. Cl. at 251.

369. *Bluebonnet Sav. Bank, F.S.B.*, 466 F.3d at 1358 (quoting *Bluebonnet Sav. Bank, F.S.B. v. United States*, No. 95-532C (Fed. Cl. Sept. 7, 2005) (order denying motion for reconsideration)).

370. *Id.* at 1364.

371. *Id.* at 1359.

372. *Id.* at 1361.

373. *Id.* at 1362.

374. *Id.* at 1364.

375. *Id.*

376. *Id.* at 1365.

D. Centex Again Reaffirmed

In *Local Okla. Bank N.A. v. United States*,³⁷⁷ the Federal Circuit again³⁷⁸ reaffirmed its ruling in *Centex Corp. v. United States*,³⁷⁹ in which it found that the Government breached an implied promise of good faith and fair dealing when Congress passed legislation that retroactively removed favorable tax treatment for covered asset losses of acquired thrifts.³⁸⁰

The facts in *Local Oklahoma* were “virtually identical” to those in *Centex*.³⁸¹ Local Oklahoma Bank (Local) purchased a failing savings and loan institution in 1988 in exchange, in part, for the opportunity to claim covered asset loss tax deductions.³⁸² The terms and conditions of the acquisition were set forth in an Assistance Agreement between Local and FSLIC and provided for the sharing of covered asset loss tax deductions and other tax benefits between Local and FSLIC and required Local to make sharing payments to FSLIC thirty days after Local filed its tax returns.³⁸³ In 1993 Congress enacted the “Guarini legislation” as section 124 of the Omnibus Budget Reconciliation Act of 1993, which eliminated the favorable tax treatment for covered asset losses of acquired thrifts.³⁸⁴ Thereafter, Local ceased making “tax sharing payments” to FSLIC.³⁸⁵ In September 1996, Local filed suit in the COFC seeking damages for breach of contract arising from the Guarini legislation.³⁸⁶ The Government counterclaimed, seeking to recover from Local the withheld tax sharing payments plus interest.³⁸⁷

In *Local Am. Bank of Tulsa v. United States (Local I)*,³⁸⁸ the COFC granted Local’s motion for summary judgment on liability.³⁸⁹ In December 2002, Local and the FDIC entered into a Termination Agreement that terminated the Assistance Agreement and settled the Government’s counterclaims by requiring Local to pay \$7,718,893 in unpaid tax benefit sharing and interest; however, Local’s breach of contract claim remained unresolved. In *Local Okla. Bank, N.A. v. United States (Local II)*,³⁹⁰ the COFC ruled for Local on cross-motions for summary judgment based on the precedent in *Centex*.³⁹¹ The COFC awarded Local \$5,883,296 in lost tax benefits and interest offset.³⁹²

377. 452 F.3d 1371 (Fed. Cir. 2006) (opinion by Lynn, J., with Michel, C.J. & Lourie, J.).

378. The Federal Circuit also reaffirmed its ruling in *Centex* in *First Heights Bank v. United States*, 422 F.3d 1311, 1314 (Fed. Cir. 2005).

379. 395 F.3d 1283 (Fed. Cir. 2005).

380. *Id.* at 1374–75.

381. *Id.* at 1375.

382. *Id.* at 1374.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* at 1374–75.

387. *Id.* at 1375.

388. 52 Fed. Cl. 184 (2002).

389. *Id.* at 192.

390. 59 Fed. Cl. 713 (2004).

391. *Id.* at 720; see *Local Okla. Bank, N.A. v. United States*, 452 F.3d 1371, 1375 (Fed. Cir. 2006).

392. *Local Okla. Bank, N.A.*, 452 F.3d at 1376.

The Government appealed the summary judgment decisions as to both liability and interest offset.³⁹³ Local cross-appealed the calculation methodology for the interest offset.³⁹⁴ The Federal Circuit affirmed the lower court decisions.³⁹⁵ On liability, the Government argued that “*Centex* was wrongly decided.”³⁹⁶ The court rejected this argument, citing its duty “to follow controlling precedent.”³⁹⁷ The Government also argued that the parties “were aware of—and addressed—the possibility that covered asset loss tax deductions may be eliminated,” because it alleged that the Assistance Agreement provided an exclusive remedy.³⁹⁸ The court held that the Assistance Agreement “does not provide an exclusive remedy.”³⁹⁹ The Government argued that Local’s failure to obtain an express indemnification against changes in tax legislation absolved the Government of liability.⁴⁰⁰ The court rejected this argument, noting that it had rejected a similar argument in *Centex*.⁴⁰¹

On the issue of the interest offset, the court rejected the Government’s claim that it is immune from the award of offset interest and held that the offset interest in this case was not prejudgment interest, but, rather, the offset provides Local with the return of “excess money paid to the government as interest.”⁴⁰² The court also rejected Local’s argument that the COFC abused its discretion in accepting the Government’s methodology for calculating the interest offset.⁴⁰³

There is some evidence that the Government has received the message that *Centex* is good law. In *Nat’l Austl. Bank v. United States*,⁴⁰⁴ which was decided days before *Local Oklahoma*,⁴⁰⁵ the Government withdrew its challenge to liability based on *Centex* and challenged the award of expectancy damages to National Australia Bank (NAB) and the COFC’s determination of the sharing ratio/quantum.⁴⁰⁶ In the alternative, if the Federal Circuit found in favor of NAB, the Government requested reformation of either or both of the relevant agreements—the Assistance and Termination Agreements.⁴⁰⁷

NAB had entered into an “Assistance Agreement” with FSLIC in connection with NAB’s acquisition of a failing thrift that “provided for, among other things, ‘tax-sharing’ between NAB and FSLIC, such that NAB was required

393. *Id.*

394. *Id.*

395. *Id.* at 1377.

396. *Id.* at 1376.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.* (citing *Centex Corp. v. United States*, 395 F.3d 1283, 1306 (Fed. Cir. 2005)).

401. *Id.* at 1377.

402. *Id.* at 1378.

403. *Id.*

404. 452 F.3d 1321 (Fed. Cir. 2006) (opinion by Gajarsa, J., with Dyk & Prost, JJ.).

405. *Local Okla. Bank N.A. v. United States*, 452 F.3d 1371 (Fed. Cir. 2006) (decided on June 29, 2006).

406. *Nat’l Austl. Bank*, 452 F.3d at 1325.

407. *Id.* at 1330.

to share with FSLIC a percentage of the tax benefits received for covered asset losses.”⁴⁰⁸ After passage of the Guarini legislation, NAB was not permitted to deduct covered asset losses on its tax returns and, as a result, paid additional “taxes it would not have otherwise paid.”⁴⁰⁹ The parties disputed the exact percentage of taxes to be shared.⁴¹⁰ Also as a result of the legislation, the parties entered into an agreement terminating the Assistance Agreement (the Termination Agreement), which settled certain disputes and reserved NAB’s right to file a claim for damages arising out of the Guarini legislation.⁴¹¹

Below, the COFC found that the Government breached the implied covenant of good faith and fair dealing by the Guarini legislation that deprived NAB of one of its negotiated contract benefits, specifically certain tax benefits.⁴¹² The COFC also held that NAB had proved its expectancy damages with reasonable certainty and imposed a sharing ratio of seventy-five to twenty-five on all tax benefits arising from covered asset losses under which NAB received 75 percent while the Government received 25 percent of the benefits.⁴¹³

With regard to the availability of expectancy damages, the Federal Circuit disagreed with the Government that estimates were never sufficient to establish “reasonable certainty.”⁴¹⁴ It found that “the trial court did not ‘assume’ that the tax basis of the covered assets was equal to the book basis,” but rather that the COFC considered substantial evidence and heard testimony of several tax experts who reached the same conclusion, thus satisfying the “reasonable certainty” test.⁴¹⁵ As to the sharing ratio/quantum, the Federal Circuit concluded that the COFC erred when it held that the seventy-five to twenty-five ratio of the Assistance Agreement applied in all circumstances.⁴¹⁶ The court held that the Termination Agreement “contemplated the use of that Assistance Agreement ratio in some circumstances, [but that] it also contemplates the use of a different, unidentified ratio in other circumstances.”⁴¹⁷ Due to this ambiguity, the court reversed the COFC’s holding with respect to this issue and remanded the case to the COFC “for consideration of extrinsic evidence relevant to determining the true intentions of the parties.”⁴¹⁸ Finally, with regard to the Government’s reformation request, the court found that such an extraordinary remedy was inappropriate for the Assistance Agreement, because the parties had entered into the Termination Agreement to cure flaws in the “tax benefit sharing formula”

408. *Id.* at 1324.

409. *Id.* at 1325 (quoting *Nat’l Austl. Bank v. United States*, 63 Fed. Cl. 352, 353 (2004)).

410. *Id.* at 1324.

411. *Id.*

412. *Id.*

413. *Id.* at 1325.

414. *Id.*

415. *Id.* at 1326.

416. *Id.* at 1328.

417. *Id.*

418. *Id.* at 1328–29.

of the Assistance Agreement.⁴¹⁹ However, the court remanded the consideration of such a remedy for the Termination Agreement, which it held was ambiguous.⁴²⁰ The court held that extrinsic evidence of the parties' intent in drafting an agreement "is always admissible...to determine the need for reformation of an instrument."⁴²¹

V. A CONTRACT THAT VIOLATES STATUTE IS NOT NECESSARILY VOID AB INITIO

In *United Pacific Insurance Co. v. United States*,⁴²² the court refused to invalidate a contract that had already been performed even though the contract violated statutory prohibitions on the use of operations and maintenance funds for construction efforts.⁴²³

United Pacific Insurance Company, Reliance Insurance Company, and Reliance National (collectively United Pacific), as surety, issued a performance bond for Castle Abatement Corporation (Castle) under Castle's contract "to renovate three buildings at McGuire Air Force Base."⁴²⁴ When the Government terminated Castle for default, the Government demanded performance under United Pacific's bond.⁴²⁵ United Pacific and the Government entered into a written takeover agreement under which United Pacific would complete the remaining contract work.⁴²⁶ United Pacific then filed an equitable adjustment with the contracting officer in which it contended that the contract between Castle and the Government was illegal and, consequently, void ab initio.⁴²⁷ The contracting officer denied United Pacific's claim and United Pacific appealed to the ASBCA.⁴²⁸

In its initial decision, the ASBCA held that United Pacific lacked standing to pursue Castle's pre-takeover claim.⁴²⁹ On reconsideration, the ASBCA, in reliance on the Federal Circuit's decision in *Fireman's Fund Insurance Co. v. England*,⁴³⁰ held that it lacked jurisdiction because United Pacific, as a surety, was not a contractor within the meaning of the CDA for pre-takeover disputes.⁴³¹ The Federal Circuit affirmed the ASBCA's decision that the ASBCA lacked jurisdiction.⁴³²

419. *Id.* at 1330.

420. *Id.*

421. *Id.*

422. 464 F.3d 1325 (Fed. Cir. 2006) (opinion by Schall, J., with Linn & Dyk, JJ.).

423. *Id.* at 1333.

424. *Id.* at 1326.

425. *Id.*

426. *Id.*

427. *Id.* at 1326–27.

428. *Id.* at 1327.

429. *United Pac. Ins. Co.*, ASBCA No. 53051, 01-2 BCA ¶ 31,527, at 155,640.

430. 313 F.3d 1344 (Fed. Cir. 2002).

431. *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327 (Fed. Cir. 2006).

432. *United Pac. Ins. Co. v. Roche*, 380 F.3d 1352, 1358 (Fed. Cir. 2004).

Undaunted, United Pacific filed a complaint in the COFC under the broader jurisdiction of the Tucker Act.⁴³³ United Pacific argued that the Government voided the construction contract by illegally using operation and maintenance funds for new construction in violation of 10 U.S.C. §§ 2805, 2811.⁴³⁴ United Pacific reasoned that where the public policy was clearly violated, the contract was voided, thus entitling United Pacific to recover its excess costs of completion under *quantum meruit*.⁴³⁵ United Pacific urged the court to follow decisions in *United States v. Amadbl*⁴³⁶ and *Godley v. United States*,⁴³⁷ in which the court found contracts void for illegality and granted *quantum meruit* damages to compensate the contractor. The COFC dismissed the suit for failing to state a claim for which relief could be granted.

The Federal Circuit agreed with the COFC in rejecting United Pacific's reliance on *Amadbl* and *Godley*; found that neither section 2805 or 2811, nor their respective legislative histories, provided for the invalidation of a contract; and agreed with the Government's contention that the Federal Circuit's decision in *American Telephone & Telegraph Co. v. United States (AT&T)*⁴³⁸ controlled. In *AT&T*, the Federal Circuit held that the invalidation of a contract is not necessary when a statute has been violated, but, rather, must be considered in light of the statutory purpose.⁴³⁹ Further, the Federal Circuit reasoned in *AT&T* that invalidation of a contract that has been fully performed would not be favored, a position the court repeated in *United Pacific*.⁴⁴⁰ Finally, the Federal Circuit distinguished both *Amadbl* and *Godley* from *United Pacific* because in neither case did the Government pay for the work in full, as the Government had in *United Pacific*.⁴⁴¹ This holding reinforces the difficulty a contractor who has fully performed a contract faces in arguing that it should be entitled to invalidate the contract due to illegality.⁴⁴²

VI. SMALL BUSINESS INNOVATIVE RESEARCH—NO ENFORCEABLE ENTITLEMENT TO AWARD IN LATER PHASES

In *Night Vision Corp. v. United States*,⁴⁴³ the Federal Circuit held that under the Small Business Innovative Research (SBIR) program, agencies are not

433. *United Pac. Ins. Co. v. United States*, 68 Fed. Cl. 152, 154 (2005); *United Pac. Ins. Co.*, 464 F.3d at 1327.

434. *United Pac. Ins. Co.*, 68 Fed. Cl. at 154.

435. *Id.* at 155.

436. 786 F.2d 387 (Fed. Cir. 1986).

437. 5 F.3d 1473 (Fed. Cir. 1993).

438. 177 F.3d 1368 (Fed. Cir. 1999) (*en banc*).

439. *Id.* at 1374.

440. *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1333 (Fed. Cir. 2006).

441. *Id.* at 1334.

442. See Ralph C. Nash, *Postscript II: Invalid Contracts*, 20:12 NASH & CIBINIC REP. ¶ 58 (Dec. 2006) (noting that contractor claims of invalidity appear to be treated differently than the Government's claims of invalidity).

443. 469 F.3d 1369 (Fed. Cir. 2006) (opinion by Friedman, S.J., with Gajarsa & Mayer, JJ.).

required to award later-phase contracts to the small business that developed the idea in earlier phases.

Night Vision Corp. (Night Vision), a small business concern, received Air Force contracts for the research and development of wide-field-of-view night-vision-goggles technology under the SBIR program.⁴⁴⁴ Night Vision successfully developed a prototype under its Phase I contract and later produced twelve prototypes under its Phase II contract.⁴⁴⁵ During Phase II, the Air Force indicated to Night Vision that it might receive a Phase III contract.⁴⁴⁶ Rather than award Night Vision a Phase III contract for production of the goggles, the Air Force elected to engage a competitive procurement.⁴⁴⁷ After unsuccessfully competing for the production contract, Night Vision filed a five-count complaint in the COFC that included claims that the Air Force had breached a contract (alternatively written, oral, or implied-in-fact) to award Night Vision a Phase III contract.⁴⁴⁸ Essentially Night Vision argued that once Night Vision had successfully completed the Phase I and Phase II contracts, the Air Force was obligated to award Night Vision a Phase III contract pursuant to its contract and the governing statute, Small Business Administration policy directives for the general conduct of small business innovation research programs.⁴⁴⁹ The COFC rejected all of Night Vision's claims.⁴⁵⁰ It held that "the statute plaintiff seeks to incorporate into the contract imposes no obligation or duty on either party to the contract" and further held that Night Vision had not introduced evidence that any authorized individual had entered into a contract for Phase II.⁴⁵¹

On appeal, Night Vision challenged only the dismissal of its claim that the Air Force breached a written contract by not awarding Night Vision a Phase III contract and the granting of summary judgment on its claims that the Air Force breached an oral contract and an implied-in-fact contract for the same reasons.⁴⁵² The Federal Circuit rejected Night Vision's argument that 15 U.S.C. § 638(j) should be read into its Phase I and Phase II contracts so as to require the Air Force to award Night Vision a Phase III contract upon successful completion of the prior contracts.⁴⁵³ The Federal Circuit found that the statutory provision only specifically required that the Small Business Administrator modify certain policy directives to encourage the use of Phase III awards and did not create any enforceable rights for private entities, noting that "Night Vision's position would seriously limit the Government's ability to select the form of procurement that it considers most

444. *Id.* at 1371.

445. *Id.*

446. *Id.* at 1372 (citing *Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 372 (2005)).

447. *Id.*

448. *Night Vision Corp.*, 68 Fed. Cl. at 370.

449. *Id.* at 371, 373 (citing 15 U.S.C. § 638(j) (2000)).

450. *Id.* at 371.

451. *Id.*

452. *Id.* at 375.

453. *Id.* at 374–75.

appropriate in the particular situation.”⁴⁵⁴ The court likewise affirmed the COFC’s grant of summary judgment on the oral contract and implied-in-fact contract, finding that Night Vision failed to produce evidence that a government representative with the actual authority to determine the type of procurement to be used made a contract with Night Vision.⁴⁵⁵

VII. PROTEST—CONTRACTOR MUST PLAY TO BE AN INTERESTED PARTY

In *Rex Service Corp. v. United States*,⁴⁵⁶ the court affirmed the COFC’s dismissal⁴⁵⁷ of a protest for lack of standing by a protester who had not submitted a bid and thus was not an interested party.

Rex Services Corporation (Rex) filed an agency protest alleging that proprietary data had been disclosed in a Request for Proposals (RFP) issued by the Defense Supply Center, Columbus (DSCC).⁴⁵⁸ DSCC rejected Rex’s allegation but canceled the RFP.⁴⁵⁹ DSCC issued a second RFP the following year.⁴⁶⁰ Rex filed a second agency protest alleging that DSCC violations of the Procurement Integrity Act, although not preventing Rex from bidding, prejudiced Rex and that any company who submitted a proposal using the data from the first RFP should be disqualified from bidding.⁴⁶¹ DSCC denied Rex’s protest, and Rex chose not to submit a bid.⁴⁶² Following contract award, Rex filed a protest in the COFC alleging that DSCC deviated from the process specified in the second RFP.⁴⁶³ The COFC dismissed the protest for lack of jurisdiction, holding that Rex was not an “interested party” within the meaning of the Tucker Act.⁴⁶⁴ Rex appealed to the Federal Circuit.⁴⁶⁵

The Federal Circuit affirmed the COFC’s decision, finding that the definition of “interested party” in related statutes, specifically, the Competition in Contracting Act⁴⁶⁶ and the Brooks Automatic Data Processing Act,⁴⁶⁷ applied to the Tucker Act.⁴⁶⁸ This reasoning required Rex to establish that it “(1) is an

454. *Night Vision Corp. v. United States*, 469 F.3d 1369, 1374 (Fed. Cir. 2006).

455. *Id.* at 1375.

456. 448 F.3d 1305 (Fed. Cir. 2006) (opinion by Mayer, J., with Gajarsa & Newman, JJ.).

457. *Id.* at 1306 (citing *Rex Serv. Corp. v. United States*, No. 05-CV-386 (Fed. Cl. June 6, 2005)).

458. *Id.*

459. *Id.* at 1307.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

466. 31 U.S.C. § 3551(2)(a) (2000) (“The term ‘interested party’, with respect to a contract or a solicitation or other request for offers described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.”).

467. 40 U.S.C. § 759 (repealed 1996).

468. *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006).

actual or prospective bidder, and (2) possesses the requisite direct economic interest.”⁴⁶⁹ With regard to the first prong, the Federal Circuit rejected Rex’s argument that it was a prospective bidder because Rex neither bid, nor was prevented from bidding, on the RFP.⁴⁷⁰ Further, the Federal Circuit held that the prejudice alleged by Rex was irrelevant because Rex still could have submitted a bid.⁴⁷¹ With respect to the second prong, the Federal Circuit held that Rex did not possess the necessary economic interest because “[t]o prove a direct economic interest . . . it is required to establish that it had a ‘substantial chance’ of receiving the contract” and in this case Rex did not bid and thus had “no chance of securing the contract.”⁴⁷²

VIII. TAKINGS—LATE IS LATE AND THE STATUTE OF LIMITATIONS FOR TAKINGS IS JURISDICTIONAL FOR THE MAJORITY OPINION

In *John R. Sand & Gravel Co. v. United States*,⁴⁷³ the court held that the statutory six-year period for bringing taking claims against the U.S. Government under 28 U.S.C. § 2501 (section 2501) was jurisdictional. In a dissenting opinion, Judge Newman concluded that section 2501 was an affirmative defense.⁴⁷⁴ This case highlights the debate over whether statutes of limitations are jurisdictional or an affirmative defense⁴⁷⁵—a debate that is settled for the moment at the Federal Circuit—“§ 2501 is jurisdictional.”⁴⁷⁶

In 1969 John R. Sand & Gravel Company (JRS&G) leased a large tract of land for a term of fifty years for the purpose of mining sand and gravel.⁴⁷⁷ Also located on this land was an operating landfill that had been illegally accepting hazardous waste.⁴⁷⁸ In 1984, the landfill was placed on the National Priorities List and, in 1992, as part of its remediation efforts, the Environmental Protection Agency (EPA) erected a fence on a portion of JRS&G’s leasehold.⁴⁷⁹ A second fence was constructed in 1994, which encompassed an “overwhelming portion of JRS&G’s leasehold interest.”⁴⁸⁰ In 1998, after much dispute with JRS&G, the EPA settled on a different fence configuration on the subject property.⁴⁸¹ Between 1992 and 1994, JRS&G’s counsel wrote several letters

469. *Id.*

470. *Id.* at 1308.

471. *Id.*

472. *Id.*

473. 457 F.3d 1345 (Fed. Cir. 2006) (opinion by Schall, J., with Lourie, J.; Newman, J., dissenting).

474. *Id.* at 1362.

475. See E. King Poor, *Jurisdictional Deadlines in the Wake of Kontrick and Eberhart: Harmonizing 160 Years of Precedent*, 40 CREIGHTON L. REV. 181 (2007).

476. See *John R. Sand & Gravel Co.*, 457 F.3d at 1353–54.

477. *Id.* at 1347.

478. *Id.*

479. *Id.* at 1347–48.

480. *Id.* at 1348.

481. *Id.* at 1349.

to the Government, asserting a right to just compensation for the alleged taking.⁴⁸²

In May 2002, JRS&G filed suit against the United States in the COFC claiming that its occupation and use of some of JRS&G's leasehold constituted a taking requiring just compensation.⁴⁸³ The Government argued that JRS&G's claim was barred due to the fact that it fell outside of the six-year statute of limitations period prescribed by section 2501.⁴⁸⁴ On separate occasions,⁴⁸⁵ the COFC rejected this claim, finding (in the second instance) that a physical taking did not occur until the Government completed its relocation of the perimeter fence in May of 1998.⁴⁸⁶ According to the COFC, until that time, the ongoing access disputes between JRS&G and the Government "precluded the Government from permanently and exclusively occupying the property."⁴⁸⁷ The COFC eventually denied JRS&G's claim on other grounds.⁴⁸⁸ JRS&G then appealed to the U.S. Court of Appeals for the Federal Circuit.⁴⁸⁹

On appeal, the Government did not raise a jurisdictional challenge based upon an allegation that JRS&G's claim fell outside of the six-year limitations period prescribed by section 2501.⁴⁹⁰ The court, however, allowed an amicus to raise the issue.⁴⁹¹ The court held that the Government's taking occurred in 1994 at the latest, when the Government substantially interfered with JRS&G's bundle of property rights (e.g., the right to exclude others) by erecting the second fence on JRS&G's leasehold.⁴⁹² The court found that this knowledge was evidenced by JRS&G's counsel's letters asserting an entitlement to just compensation.⁴⁹³

The court then held that "[t]he six-year statute of limitations set forth in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims."⁴⁹⁴ In reaching this holding, the court distinguished recent Supreme Court decisions finding that time limitations were not jurisdictional as dealing with "minor procedural requirements" and "claim processing rules" that did not address the statutory limitation that allowed for suit against the Government for money damages.⁴⁹⁵ For example, *Day v. McDonough*⁴⁹⁶ addressed the time

482. *Id.*

483. *Id.*

484. *Id.*

485. See *John R. Sand & Gravel v. United States*, 57 Fed. Cl. 182 (2003) (*Sand & Gravel I*); *John R. Sand & Gravel v. United States*, 60 Fed. Cl. 230 (2004) (*Sand & Gravel II*); *John R. Sand & Gravel v. United States*, 62 Fed. Cl. 556 (2005) (*Sand & Gravel III*).

486. *Sand & Gravel III*, 62 Fed. Cl. at 586.

487. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1351 (Fed. Cir. 2006).

488. *Sand & Gravel III*, 62 Fed. Cl. at 589.

489. *John R. Sand & Gravel Co.*, 457 F.3d at 1351.

490. *Id.* at 1352.

491. *Id.* at 1352 n.9.

492. *Id.* at 1353.

493. *Id.* at 1358.

494. *Id.* at 1354.

495. *Id.* at 1354–55.

496. 547 U.S. 198 (2006).

in which to file a habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 and was held not to be jurisdictional. *Kontrick v. Ryan*⁴⁹⁷ held that “a time limit for filing a complaint as a creditor in bankruptcy proceedings is not jurisdictional.”⁴⁹⁸ The court relied on longstanding precedent in *Kendall v. United States*⁴⁹⁹ and *United States v. Wardwell*,⁵⁰⁰ holding that the predecessor statute to section 2501 was jurisdictional in nature.⁵⁰¹

As JRS&G knew or had reason to know of the taking in 1994, and did not pursue a takings case within six years of that time, the court vacated the COFC’s decision and remanded the case to the COFC for dismissal for lack of jurisdiction.⁵⁰²

In a dissenting opinion, Judge Newman indicated that jurisdiction over takings was founded on the Constitution, not statute, and considered that the COFC had jurisdiction on that basis alone.⁵⁰³ Judge Newman considered section 2501 to be an affirmative defense, not a jurisdictional prerequisite.⁵⁰⁴ Judge Newman noted that the COFC’s own rules⁵⁰⁵ list the statute of limitations as an affirmative defense.⁵⁰⁶

IX. CONCLUSION

The Federal Circuit’s 2006 decisions spanned the wide reach of the court’s jurisdiction. Due to these diverse subject matter areas, it is difficult to draw any broad conclusions from the court’s decisions. Some law has been brought into sharper focus and some has faded back into uncertainty. Consequently, rather than trying to synthesize the cases into a single form, it is far more useful to focus on particular areas to see if there are common threads that link the decisions or give a hint of things to come.

Viewed in this context, the 2006 decisions of the Federal Circuit helped provide guidance in certain areas, such as the *Winstar* line of cases. In these cases, the court continued to work its way through the various possible scenarios that might arise out of the government policies that spawned *Winstar* and its progeny. These decisions help round out the principles that apply to this area, which has been intensely litigated over the last few years.

Outside of this area, however, some decisions seemed to foster possible confusion in future cases or, in one decision, *Richlin*, add an additional procedural

497. 540 U.S. 443 (2004).

498. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006).

499. 107 U.S. 123, 125 (1883).

500. 172 U.S. 48, 52 (1898).

501. *John R. Sand & Gravel Co.*, 457 F.3d at 1355.

502. *Id.* at 1360.

503. *Id.* at 1361 (quoting *United States v. Causby*, 328 U.S. 256, 267 (1946) (“If there is a taking, the claim is ‘founded upon the Constitution’ and within the jurisdiction of the Court of Claims to hear and determine.”)).

504. *Id.* at 1362.

505. FED. CL. R. 8(c).

506. 457 F.3d at 1362.

and factual requirement before statutory interest can be given. The *Richlin* decision described above creates an additional requirement and possible uncertainty in an area of law, interest under the CDA, that had previously been considered well settled. Contract and statutory interpretation continued to be a volatile area, with the court taking strikingly different legal approaches depending upon what appears to be narrow interpretations of the factual setting and perceived “fairness” issues. These cases, in fact, may be more disruptive to lower courts attempting to decide the approach to be used in a particular setting. Thus, the often different legal results and approaches found in the Court of Federal Claims will likely continue.

Finally, the diverse cases before the Federal Circuit in 2006 reflect the many different and complex issues and factual settings that arise in areas that were considered to be generally well settled. This only underscores the dynamic nature of the wide range of legal areas that fall within the Federal Circuit’s broad jurisdiction.