

Analysis

Contracts

Recovering Money Damages Against the United States: A New Landscape That Is More Favorable to Plaintiffs

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President Bush recently announced that the federal government has reached an agreement to settle a breach of contract lawsuit brought by Chevron U.S.A. Inc., Conoco Inc., and Murphy Exploration & Production Co. involving nine oil and gas leases off the coast of Florida (the “Destin Dome” suit). The United States agreed to pay the three companies \$115 million, while permitting Murphy Oil to retain ownership of two of the leases. The settlement reflects the ongoing evolution of the law governing claims against the federal government, which has made the United States increasingly vulnerable to very large claims.

Until recently, the government had been able to rely on a number of defenses not available to private parties to defeat many contract claims. However, in a series of cases, the U.S. Supreme Court has now firmly established that when the government enters into a contract, “its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”¹ Although the Supreme Court has not done away with the government’s “special” defenses altogether, it has scaled them back significantly, effecting “sweeping changes in . . . the law

dealing with government contracts.”²

This transformation is particularly significant in an era in which the government frequently “contracts out” its traditional functions to private entities, and private parties are increasingly successful in characterizing government policies, regulations, and statutes as violating pre-existing contractual rights.

The Government as Sovereign: The Unmistakability And Sovereign Acts Doctrines

Under the doctrine of sovereign immunity, the federal government is not subject to the jurisdiction of the courts, including for the purpose of enforcing contracts against it, unless it has explicitly consented to be sued.³ The United States has, however, waived its immunity for suits based on implied or express contracts, which, with few exceptions, must be brought in Washington D.C. in the U.S. Court of Federal Claims.⁴

² *United States v. Winstar Corp.*, 518 U.S. 839, 924 (1996) (Rehnquist, J., dissenting).

³ See *Lynch v. United States*, 292 U.S. 571, 580–81 (1934) (“The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.”).

⁴ See Tucker Act, 28 U.S.C. § 1491.

Despite this waiver, the federal courts have traditionally drawn a sharp distinction between suits against the government and private contract disputes, frequently relying on “special rules not generally applicable to private contracts” to dispose of the claims against the government.⁵ The two most prominent of these “special rules” are the unmistakability doctrine and the sovereign acts doctrine, both of which derive from the government’s dual role as the sovereign responsible for making and enforcing the laws, on the one hand, and contractor, on the other.⁶

The unmistakability doctrine is a canon of contract construction that the government’s surrender of its sovereign authority, including the power to tax or to regulate, must appear in “unmistakable terms.”

[W]e have declined in the context of commercial contracts to find that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in the contract. Rather, we have emphasized that without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.⁷

Thus, in its original form, the doctrine essentially provided that, absent a clear indication to the contrary, a party contracting with the government assumed the risk that the government might make a change in public policy that would alter the terms of their agreement.

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⁵ *Winstar*, 518 U.S. at 860.

⁶ See *Deming v. United States*, 1 Ct. Cl. 190, 191 (1865) (“The United States as a contractor are not responsible for the United States as lawgiver.”).

⁷ *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986).

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The classic statement of the sovereign acts appears in *Horowitz v. United States*:⁸ “It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.”⁹ Thus, if the legislative or executive act alleged to breach the agreement did not specifically target a contractor or a particular group of contractors, the government was in the clear.

United States v. Winstar Corp. Beginning of the Retrenchment

The Court took its initial step in scaling back these twin defenses in *United States v. Winstar Corp.*¹⁰ *Winstar* was a breach of contract suit stemming from a statute known as FIRREA, which eliminated the favorable treatment the government had previously granted financial institutions in the wake of the savings and loan crisis. The Court held that the statute breached the government’s agreements with the financial institutions, and that the unmistakability and sovereign acts doctrines did not bar the contracts’ enforcement. *Winstar*, however, was a plurality decision, and the Court divided on the correct application of the unmistakability and sovereign act doctrines.

Writing for a plurality, Justice Souter concluded that the unmistakability doctrine was inapplicable because the plaintiffs did not seek to bind Congress from enacting regulatory measures such as FIRREA, but rather sought only money damages. In a concurring opinion, Justice Scalia concluded that the unmistakability doctrine was applicable, but that its requirements were met.

The Souter plurality also rejected the government’s appeal to the sovereign acts doctrine, refusing to allow “the government to avoid contractual liability merely by passing [a] regulatory statute”¹¹ Justice Scalia agreed that the doctrine provided the government no cover, observing that “the ‘sovereign acts’ doctrine adds little, if anything at all, to the ‘unmis-

takability’ doctrine, and is avoided wherever that one would be.”¹²

Writing for the dissent, Chief Justice Rehnquist believed that the financial institutions’ claims failed under both doctrines, objecting that “[t]he principal opinion works sweeping changes in two related areas of the law dealing with government contracts.”¹³

Beyond Winstar

A few years after *Winstar*, in a case in which the lead plaintiff was represented by Covington & Burling, the Supreme Court adopted by a clear majority the rule that the government is subject to the same breach of contract rules as private parties.¹⁴ Stressing that “[c]ontract law expresses no view about the wisdom of [the government’s action],” the Court held that the government had committed a material breach of oil leases by “deviating significantly” from the “procedures and standards” incorporated into the leases when they were issued, and by failing to carry out its own obligations relating to those leases in a “timely and fair” manner.¹⁵ The Court characterized the sovereign acts defense as a doctrine that merely “treats certain laws as if they simply created conditions of impossibility.”¹⁶

The government has not completely given up on the notion that it is “different.” That position, however, was further weakened in June when the Supreme Court flatly rejected the government’s contention that the statute of limitations in a breach of contract suit is governed by special principles when the government is the defendant.¹⁷ The Court affirmed, this time unanimously, that “principles of general contract law” govern disputes involving government contracts.¹⁸

Implications

The *Winstar*, *Mobil Oil*, and *Franconia* series of cases has significantly weakened the government’s defenses

in breach of contract suits. Perhaps as a result, a large number of such suits are now pending; over 100 *Winstar* cases are currently making their way through the Court of Federal Claims, as are a number of suits based on ELIHPA, the act involved in *Franconia*.

The suits, moreover, are not limited to the statutes involved in *Winstar* and *Franconia*.¹⁹ In fact, they are not limited to suits based on newly enacted statutes. Executive action, either in the form of rulemaking or regulatory oversight, can also serve as the basis for a breach claim against the government. For example, the *Destin Dome* suit was based upon a breach arising out of several federal agencies’ refusal to consider various permit applications in accordance with the regulations incorporated into the leases at the time they were issued.

The litigation against the United States often involves very large sums. As noted, the government has agreed to settle the *Destin Dome* suit for \$115 million, and the *Mobil Oil* plaintiffs recovered over \$400 million.

Moreover, there is no need for a specific appropriation to cover settlements or damages awards in these lawsuits. Rather, they are funded by the “Judgment Fund,” which serves as an unlimited, permanent appropriation separate and apart from any particular agency’s budget.²⁰ As described by the Department of Treasury website, the fund is “available for most court judgments and Justice Department compromise settlements of actual or imminent lawsuits against the government The Judgment Fund has no fiscal year limitations, and there is no need for Congress to appropriate funds to it annually or otherwise.”²¹

With the courts increasingly subjecting the government to the normal rules of contracts, and the Judgment Fund serving as a source of moneys for potential awards or settlements, large breach of contract suits against the government are likely to continue.

⁸ 267 U.S. 458 (1925).

⁹ *Id.* at 461.

¹⁰ 518 U.S. 839 (1996).

¹¹ *Id.* at 895.

¹² *Id.* at 923.

¹³ *Id.* at 924.

¹⁴ *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 624 (2000).

¹⁵ *Id.* at 620–21, 624.

¹⁶ *Id.* at 619.

¹⁷ *Franconia Assocs.*, 122 S. Ct. at 2003 (“We do not agree that [the limitations statute] creates a special accrual rule for suits against the United States.”).

¹⁸ *Id.* at 2001.

¹⁹ See, e.g., *General Dynamics Corp. v. United States*, 47 Fed. Cl. 514 (2000) (rejecting government’s unmistakability and sovereign acts defenses and holding statute capping allowable costs under defense contracts constituted breach).

²⁰ See 31 U.S.C. § 1304.

²¹ See <http://www.fms.treas.gov/judgefund/history.html> (updated June 18, 2002).