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Focus

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FEATURE COMMENT: Reports Of The Death Of The Duty To Cooperate And Not To Hinder Have Been Greatly Exaggerated

Scott Timber Co. v. U.S., 692 F.3d 1365 (Fed. Cir. Sept. 5, 2012), rehearing and rehearing en banc denied, 499 Fed. Appx. 973 (Fed. Cir. Feb. 22, 2013) (unpublished)

The implied covenant of good faith and fair dealing is inherent in every Government contract. E.g., *Centex Corp. & CTX Holding Co. v. U.S.*, 395 F.3d 1283 (Fed. Cir. 2005); *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283 (Fed. Cir. 2000); 42 GC ¶ 364. This covenant "imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." E.g., *Centex Corp.* 395 F.3d at 1304 (citations omitted).

The duty also is known commonly as the "implied duty not to hinder and the implied duty to cooperate." *Scott Timber Co. v. U.S.*, 692 F.3d 1365, 1372 n.2 (Fed. Cir. 2012); 54 GC ¶ 297. See also *Essex Electro Eng'rs*, 224 F.3d at 1291 ("Every contract, as an aspect of the duty of good faith and fair dealing, imposes an implied obligation 'that neither party will do anything that will hinder or delay the other party in performance of the contract.' ")

For decades, the U.S. Court of Appeals for the Federal Circuit employed a "reasonableness" test to determine whether the Government breached this duty. See, e.g., *C. Sanchez & Son, Inc. v. U.S.*, 6 F.3d 1539 (Fed. Cir. 1993) ("The government must avoid actions that unreasonably cause delay or hindrance to contract performance.") (citing *Malone v. U.S.*, 849 F.2d 1441 (Fed. Cir. 1988); 36 GC ¶ 32; *Lewis-Nicholson, Inc. v. U.S.*, 550 F.2d 26 (Ct. Cl. 1977); 19 GC ¶ 116; *George A. Fuller Co. v. U.S.*, 69 F. Supp. 409 (Ct. Cl. 1947)). See also *Metric Constr. Co., Inc. v. U.S.*, 68 Fed. Cl. 804 (2008) ("Whether the government has breached an implied duty to cooperate is determined by the reasonableness of its actions under the circumstances."). The Federal Circuit confirmed this standard in *Scott Timber Co. v. U.S.*, 333 F.3d 1358 (Fed. Cir. 2003) (*Scott Timber I*), although it did not specifically mention the duty to cooperate or not to hinder.

Then in 2010, the Federal Circuit created confusion when it issued *Precision Pine & Timber, Inc. v. U.S.*, 596 F.3d 817 (Fed. Cir. 2010); 52 GC ¶ 97 (*Precision Pine*). In that decision, the Federal Circuit stated that a breach of this duty occurs where the Government's actions "specifically targeted" the contractor and "reappropriate[d] any 'benefit' guaranteed by the contracts," but it did not address how this finding related to the well-established standard that the Federal Circuit had confirmed in *Scott Timber I*. Id. at 829. See also Graham, Ward and Smith, Feature Comment, "Fed. Cir. Resets Standard For Breach Of The Duty To Cooperate And Not To Hinder," 52 GC ¶ 97 (hereinafter "Graham et al.").

This decision prompted some in the Government contracts bar to predict a more difficult future for contractors. E.g., Nash, "Postscript: Breach of the Duty of Good Faith and Fair Dealing," 24 N&CR ¶ 22 ("The troublesome language in the decision bodes ill for Government contractors.") (hereinafter "Nash").

In 2012, the Federal Circuit was given an opportunity in *Scott Timber Co. v. U.S.,* 692 F.3d 1365 (Fed. Cir. 2012) (*Scott Timber II*) to clarify the relationship of the reasonableness standard affirmed in *Scott Timber I* and the language of *Precision Pine* stating that a breach of the implied duty oc-

curs when the Government's actions are "specifically targeted."

As will be discussed below, Judge Dyk, writing for the majority in *Scott Timber II*, attempted to harmonize the tests discussed in these two cases while leaning heavily on the language of *Precision Pine*. In the dissenting opinion, Judge Wallach concluded that *Scott Timber I* and *Precision Pine* were irreconcilable, and asked the Federal Circuit to resolve this issue en banc so that the reasonableness test from *Scott Timber I* could prevail.

Earlier this year the Federal Circuit decided not to take Judge Wallach's suggestion and denied plaintiff's petition for panel rehearing and rehearing en banc. *Scott Timber Co. v. U.S.*, 499 Fed. Appx. 973 (Fed. Cir. Feb. 22, 2013) (unpublished). However, despite Judge Wallach's fears, *Scott Timber II* did not chloroform the duty to cooperate and not to hinder (under the implied covenant of good faith and fair dealing). Rather, as discussed more fully below, the duty is alive and well, as is substantiated by a handful of Court of Federal Claims decisions issued both before and after *Scott Timber II*.

Underlying Facts of *Scott Timber II*—The U.S. Forest Service held oral auctions in October 1998 related to the sale of timber in southern Oregon's Umpqua National Forest. Before the auction, the Forest Service informed bidders that "the sale is currently under [environmental] litigation and award may be delayed." On July 8, 1999, the Forest Service awarded Scott Timber Co. the contracts for the Pigout, Jigsaw and Whitebird plots. The harvesting periods for these contracts were between 2000 and 2003.

Due to risks associated with the ongoing and impending environmental litigation, the Forest Service included certain provisions in its timber harvesting contracts to allow it to suspend contract performance to comply with court orders stemming from the litigation and general environmental issues. Section CT6.01 of Scott's contract required Scott to "interrupt or delay operations ... upon the written request of Contracting Officer: ... (b) To comply with a court order, issued by a court of competent jurisdiction."

In the event such a suspension resulted in an interruption or delay, Scott's "sole and exclusive remedy shall be ... [a] Contract Term Adjustment ... plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision." "[O]ut-of-pocket expenses" were defined to exclude "lost profits, attorney's fees, replacement of timber, or any other anticipatory losses suffered by [Scott]" as a result of such a suspension.

In early July 1998, a year prior to the award of Scott's contracts, the Oregon Natural Resources Council Action (ONRCA) sued the U.S., claiming that the Forest Service violated the Northwest Forest Plan (the Plan) and applicable statutes when it awarded various timber sale contracts without first conducting certain environmental surveys. The ONRCA plaintiffs argued that the Forest Service's interpretation of the Plan—that various timber sales were not subject to the Plan—was flawed, but they did not reference specific timber sales in their complaint. During settlement discussions after the lawsuit was filed, the ONRCA plaintiffs informed the U.S. that various timber sales (including the Pigout, Jigsaw and Whitebird contracts) were "at risk." The Forest Service failed to notify Scott of this development prior to awarding Scott the contracts.

Ultimately, the U.S. District Court for the Western District of Washington determined that the Forest Service's interpretation was improper, and that the Forest Service should have performed the environmental surveys prior to awarding the timber sale contracts. Less than two months after the Forest Service awarded the timber contracts to Scott, the district court issued a preliminary injunction enjoining the Pigout, Jigsaw and Whitebird sales. The Forest Service suspended Scott's timber contracts at the end of August 1999.

In November 1999, the Forest Service entered into a settlement agreement with the plaintiffs from the ONRCA lawsuit, and agreed to "continue th[e] suspension of current operations" under certain timber harvesting contracts, including all three of Scott's contracts, until it completed the requisite environmental surveys. The district court ordered the parties to comply with this settlement agreement through a stipulation.

The surveys commenced in September 1999. The Jigsaw and Whitebird surveys were completed in the fall of 2000; the Pigout survey was completed in August 2001. Despite the surveys being completed, the Forest Service continued to suspend Scott's timber contracts.

The Forest Service ultimately lifted the suspension on the Pigout contract in June 2002. The Jigsaw and Whitebird contracts were on a slightly different path. The Forest Service suspended these two con-

tracts longer due to an additional litigation filed in March 2001 directly relating to the environmental assessments for lands including the Jigsaw and Whitebird plots. In May 2003, the Ninth Circuit affirmed in relevant part the district court's dismissal of this litigation, and the Forest Service authorized Scott to resume its work on the Jigsaw and Whitebird contracts in June 2003. (No injunctive relief was ever ordered in this litigation.)

After submitting a certified claim pursuant to the Contract Disputes Act (then codified at 41 USCA § 601 et seq.), Scott filed a complaint at the COFC in June 2005, claiming that the Forest Service wrongfully suspended and breached the Pigout, Jigsaw and Whitebird timber sale contracts.

The COFC Decision in *Scott Timber II*—After an eight-day trial, the COFC determined that the Forest Service breached Scott's three timber sale contracts. Relying partially on the Federal Circuit's decision in *Scott Timber I*, Judge Lettow found first that " 'relative to the circumstances surrounding why the suspension occurred and the degree of knowledge held by the Government at certain times,' it was *unreasonable* for the Forest Service to have awarded these contracts to [Scott] without informing Scott of the specific risks to its contracts from the [ONRCA] litigation." (Emphasis added).

He explained that the "unreasonable actions also amounted to a breach of [the Forest Service's] implied duty to cooperate." Notably, the judge commented that "[a]lthough [Scott] pleads its case under the rubric of superior knowledge, its claims are more properly evaluated in terms of whether or not the Forest Service was reasonable in awarding contracts in the face of the [ONRCA] litigation."

Under this framework, Scott was

> not required to demonstrate that the Forest Service was acting with express malice or bad faith in this regard; rather, the Forest Service's violation of this duty can be inferred from its knowledge of certain risks, its failure to pass on this knowledge to its contracting partner, and the resulting deprivation to [Scott] of a "substantial measure of the fruits of the contract."

An "inquiry into the reasonable exercise of discretion can extend to actions that were performed prior to, or at, the contract award, and is not limited to an evaluation of the duration of the contract suspension."

Judge Lettow concluded also that the Forest Service unreasonably delayed its completion of the requisite environmental surveys for the Pigout, Jigsaw and Whitebird locations, thereby inappropriately lengthening the suspension of Scott's performance. Finally, the COFC held that the Forest Service unreasonably continued its suspensions of the Jigsaw and Whitebird contracts after the surveys were completed. Although another environmental lawsuit was filed, Judge Lettow commented that the "lack of a court order [in that case] eliminates any reasonable contractual basis for extending the suspensions at issue here, and renders the Forest Service liable for breach of contract due to its actions in unreasonably delaying the suspensions."

The U.S. appealed this decision.

The Fed. Cir. Decision in *Scott Timber II*: The Majority Opinion—Writing for the majority in a two-to-one decision, Judge Dyk reversed the COFC's decisions and tackled the application of the duty to cooperate, among other issues. Citing the Restatement (Second) of Contracts and opinions from sister U.S. circuit courts of appeal, the majority determined that the Forest Service "could not have breached the covenant of good faith and fair dealing by its pre-award conduct because the covenant did not exist until the contract was signed." However, Judge Dyk acknowledged that pre-contract actions by the U.S. can "bear on the question of whether the government has complied with its obligations that are eventually imposed by the contract" after the contract is awarded.

More importantly, the Federal Circuit disagreed with the COFC's analysis of the duty to cooperate. Judge Dyk stated that the COFC should have employed the specifically targeted test stated in *Precision Pine*. In *Precision Pine*, the Forest Service "suspended timber-harvesting under contracts with identical suspension clauses in order 'to comply with a court order.' " There, the Federal Circuit rejected the notion that the implied duty of good faith and fair dealing was breached because the Forest Service's "actions during the suspensions 'were (1) not 'specifically targeted,' and (2) did not reappropriate any 'benefit' guaranteed by the contracts, since the contracts contained no guarantee that ... performance would proceed uninterrupted.' "

Judge Dyk found that *Precision Pine* controlled the analysis related to the portion of the suspensions resulting from the court order:

> As a panel, we are obliged to follow *Precision Pine* if the cases are consistent. The two cases

> are easily reconcilable. The timber contracts in *Scott I* were initially suspended in order to comply with a temporary restraining order. But the suspensions were continued under contract provision C6.01(a) after the expiration of the order "to prevent serious environmental degradation or resource damage." We found that the "serious environmental degradation" clause only authorized suspensions for a "reasonable" period of time. We held that if the suspension continued for an unreasonable period, there was a breach of the contract, and remanded for a determination of whether the prolonged suspensions were unreasonable. *Precision Pine*, as here, dealt with the "court order" clause, which does not require that the court order—issued by an independent court—be limited to a reasonable period of time. Despite the scope of the "court order" clause, *Precision Pine* argued that the implied duty of good faith and fair dealing required that actions ordered by the court be completed in a reasonable period. As our predecessor court ruled in *David Nassif Assocs. v. United States*, 644 F.2d 4, 12 (Ct. Cl. 1981), "the assertion of a legitimate contract right cannot be considered as violative of a duty of good faith and fair dealing." Significantly, here, as in *Precision Pine*, the obligation to comply with the injunction is not owed to the timber company but to the court that issued the injunction and the party that sought the injunction. There is no basis for redefining the concept of good faith and fair dealing to include a requirement of diligence in complying with obligations imposed by another tribunal in a separate case. The only basis here to find liability would be if the government's purpose in delaying compliance with the injunction was to specifically target the plaintiff and reappropriate a benefit guaranteed by a contract with the plaintiff. ... *Precision Pine* and *Scott I* are not inconsistent.

(Citations and footnote removed.)

Scott did not demonstrate that it was specifically targeted "because there is no evidence that any delays in completing the surveys were incurred 'for the purpose of delaying or hampering [Scott's] contracts.' " Like in *Precision Pine*, the suspension clauses here "expressly qualified Scott's bargained-for harvesting rights, and uninterrupted performance cannot be considered a 'benefit' guaranteed by the contracts.'" Accordingly, the Forest Service's "actions while conducting the required surveys did not breach [the Forest Service's] implied duty of good faith and fair dealing."

That being said, Judge Dyk clarified in footnote four that the analytical framework presented in *Precision Pine* is "applicable *only* in the period governed by the [court] order, *not in the period after* the order expired, as to which the government sought to justify the delay on other grounds." (The opinion touched briefly on this issue in the following context: whether the Forest Service breached the duty to cooperate by suspending Scott's contracts due to other environmental litigation where no injunctive relief was entered. However, the majority did "not reach the issue of whether the Forest Service had the authority to continue the suspensions here, because ... Scott has failed to establish that it suffered any damages.")

The Fed. Cir. Decision in *Scott Timber II*: The Dissenting Opinion—Writing a vigorous and passionate dissent, Judge Wallach found that the reasonableness standard of *Scott Timber I* and the specifically targeted test of *Precision Pine* were "irreconcilable" and "squarely opposed." On the basis of this finding, Judge Wallach argued that the reasonableness standard of *Scott Timber I* should be employed when analyzing whether a breach of the duty to cooperate has occurred, and implored the Federal Circuit to "take the case en banc to resolve the conflict the two cases present."

Judge Wallach concluded that the majority's attempt to distinguish *Scott Timber I* and *Precision Pine* amounted to pointing out distinctions "without a difference":

> The majority states that [*Scott Timber I*] and *Precision Pine* are reconcilable because [*Scott Timber I*]'s timber contracts were suspended, after the expiration of a temporary restraining order, "under contract provision C6.01(a) ... to prevent serious environmental degradation or resource damage," whereas *Precision Pine*'s timber contracts were suspended pursuant to the "court order" clause of the contracts. ... This is a distinction without a difference. We cannot reconcile these cases based on whether or not the suspension is pursuant to a court order because federal agencies, like the Forest Service, are required by statute to suspend affected timber sales under these circumstances.

(Citations removed.) Rather, the

> suspension of the contracts at issue was initially pursuant to a district court order but then was

> pursuant to no court order at all, but pending litigation in a separate and unrelated case. *Precision Pine*, on the other hand, suspended pursuant to a court order. [*Scott Timber I*] suspended pursuant, initially, to a court order, and then pursuant to no court order at all.

(Citations removed.)

The Duty to Cooperate Is Still Alive—Since the Federal Circuit issued *Precision Pine* in 2010, some in the Government contracting community have been up in arms about the impact of this decision on the duty to cooperate and not to hinder. E.g., Graham et al. ("How this new standard will be applied in future cases is not entirely clear, but it will likely excuse a variety of objectively unreasonable conduct by one party to a Government contract that adversely impacts another."); Nash ("We desperately need the court to think through the impact of these generic rules that it is formulating and give assurance to contractors selling supplies and services to the Government that they can expect reasonable performance by the agency with which they deal.")

As mentioned above, prior to 2010 contractors and attorneys relied upon the well-established precedent that a breach of the duty to cooperate under the implied duty of good faith and fair dealing is reviewed solely under the reasonableness standard reinforced in *Scott Timber I*. And *Precision Pine* created doubt in the minds of some as to whether that standard had been supplanted by the specifically targeted test. See Graham et al. ("[T]he 'specifically targeted' standard suggests that a party must prove bad faith before succeeding on a claim of breach of the duty to cooperate and not hinder."). Judge Wallach's dissenting opinion in *Scott Timber II* only fueled this doubt.

In reality, however, the majority opinion in *Scott Timber II* actually limits the reach of *Precision Pine*. In footnote four, Judge Dyk declared that "*Precision Pine* [and its specifically targeted test] is held applicable only in the period governed by the [court] order [relating back to the contract provision allowing the suspension], *not in the period after the order expired*." *Scott Timber II*, 692 F.3d at 1375 n.4 (emphasis added). Although this footnote does not excuse the ill-informed specifically targeted test stated in *Precision Pine*, it does soothe the sting.

Moreover, reading *Precision Pine* narrowly is not new. Prior to *Scott Timber II*, myriad COFC decisions involving the implied duty to cooperate and not to hinder distinguished *Precision Pine*. In *Fireman's Fund Ins. Co. v. U.S.*, 92 Fed. Cl. 598, 675–76 (2010), Judge Miller found:

> The Government breaches [the duty to cooperate and the duty not to hinder] when it acts unreasonably under the circumstances, *viz*., if it unreasonably delays the contractor or unreasonably fails to cooperate. *Precision Pine*, the Federal Circuit's most recent explication of the implied duty of good faith and fair dealing, does not change the standards cited above.

(Citation omitted.)

Precision Pine was limited to "a situation where the Government's alleged wrongful conduct does not arise directly out of the contract, *i.e.*, key to the alleged breach are actions involving another government actor or a third party." Id. at 677 (citing *Bateson-Stolte, Inc. v. U.S.*, 305 F.2d 386 (Ct. Cl. 1962) (finding no breach of the Corps' duty of good faith and fair dealing because the Corps—as a separate Government agency—could not be charged with knowledge of location and wage-rate impact of unrelated project); 4 GC ¶ 389).

Judge Williams, in *Timber Products Co. v. U.S.*, 103 Fed. Cl. 225 (2011), took a similar view. In distinguishing *Precision Pine*, Judge Williams reviewed the Federal Circuit's underlying rationale in that decision:

> The "specifically targeted" standard in the cases relied upon by the *Precision Pin*e court—*First Nationwide* and *Centex*—was articulated in the context of analyzing whether the government action, there the Guarini legislation, was a sovereign act—a general and public act of broad application taken by the sovereign in its sovereign, governmental capacity—the type of act which would have defeated Government's liability. Under the sovereign acts doctrine, the Government cannot be held liable for an obstruction to the performance of a particular contract resulting from the Government's public and general acts as a sovereign.
>
> The sovereign acts doctrine attempts to "balance[ ] the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." ... Thus, the "specifically targeted" language in *First Nationwide* and *Centex* was articulated in the context of resolving the Government's sovereign acts defenses, and was not

> broadly asserted as replacing the reasonableness standard for determining whether there was a breach of the implied duty of good faith and fair dealing. Given its reliance on *Nationwide* and *Centex*, *Precision Pine should not be interpreted as creating a wholly new standard, and displacing the well entrenched reasonableness standard for determining whether there was a breach of the implied duties*.
>
> *Precision Pine* did not purport to overrule or depart from [*Scott Timber I* and other cases].

Id. at 243–44 (citations omitted) (emphasis added). Not surprisingly, Judge Williams ultimately applied the reasonableness test because, unlike the scenario in *Precision Pine*, the Government's "obligations here ran directly to [the contractor] under [its] contract, not to a third party under a statute or a different contract, and the alleged breach directly impacted [the contractor's] ability to perform under this contract." Id. at 245.

More recently, in *D'Andrea Brothers LLC v. U.S.*, 109 Fed. Cl. 243 (2013); 55 GC ¶ 90, Judge Firestone also decided to limit the application of *Precision Pine*, in part, because *Scott Timber II* requires as much. Here, Judge Firestone reviewed the contractor's claims under the duty to cooperate through the reasonableness standard "because the government's actions that allegedly breached the implied covenant of good faith and fair dealing *arose in relation to the government's relationship with plaintiff under the* [contract]." Id. at 256 n.11 (emphasis added).

Relying on *Scott Timber II*'s footnote four in and influenced by Judge Miller's *Fireman's Fund* opinion, Judge Firestone placed *Precision Pine* in a box: "While the court originally applied the *Precision Pine* standard in its summary judgment opinion, the court notes that the Federal Circuit has since suggested that the *Precision Pine* standard applies to the specific facts of that case, which are not analogous to the situation before the court." Id. (citations omitted).

In addition to *Fireman's Fund*, *Timber Products*, and *D'Andrea Brothers*, other post-*Precision Pine* decisions also have distinguished between claims based on bad faith and those based on the implied duty of good faith and fair dealing—thus reinforcing that, in order to show a breach of the implied duty, it is not always necessary to show specific targeting. See *Catel, Inc. v. U.S.*, 2012 WL 3104366 (2012) (unreported) ("Defendant is correct that clear and convincing evidence is required to show that the Navy acted in bad faith, but this burden of proof does not apply to allegations that the Navy breached the implied duty of good faith and fair dealing.") (citations omitted); *Sigma Servs., Inc. v. Dept. of Hous. & Urban Dev.*, CBCA 2704, 12-2 BCA ¶ 35173 (finding that a claim for breach of implied covenant of good faith does not require a showing of bad faith).

Even so, a number of decisions from the COFC and the Armed Services Board of Contract Appeals have relied upon the *Precision Pine* specifically targeted test. E.g., *Century Exploration New Orleans, LLC & Champion Exploration, LLC*, 110 Fed. Cl. 148 (2013) ("Here ... there is no evidence that the government's actions targeted plaintiffs' lease for the purpose of re-appropriating any of plaintiffs' benefits under the lease."); *Westlands Water Dist. v. U.S.*, 109 Fed. Cl. 177 (2013); *ECC, Int'l*, ASBCA 55781, 13-1 BCA ¶ 35207.

Conclusion—In light of this abundant case law, and in light of the plain meaning of footnote four in *Scott Timber II*, it is now clear that the duty to cooperate and not to hinder (under the implied covenant of good faith and fair dealing) is anything but dead. This development is very positive for contractors because the reasonableness test provides more protection throughout the administration of a Government contract as compared to the specifically targeted test—it is easier to prevail under the former. So, contracting community, take heart—and do not always believe the latest rumor.

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