



Don't Forget Contract Claims! **Another Possible Theory of Recovery in Cases Against the United States**

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Recovery claims against the United States typically are presented and pursued under the Federal Tort Claims Act (FTCA), however, if a written or oral contract, agreement or lease is at issue or gives rise to a duty at issue, insurers may be able to pursue a contract claim against the United States in the U.S. Court of Federal Claims in Washington, D.C. Indeed, if a contract or warranty claim is easier to prove, this may be a more efficient avenue of recovery to consider. In order to do so, recovery professionals need to be mindful of the requirements and pitfalls of the Contract Disputes Act, 41 U.S.C. § 7101, et seq., 1 and the statute limiting the jurisdiction of the U.S. Court of Federal Claims (USCFC), 28 U.S.C. § 1500.

At the inception of a recovery matter when there is a contract, agreement or lease involving a loss that may have been caused by the United States or its agents, an insurer should consider whether down the road there may be a basis to bring a contract or warranty claim under the Contract Disputes Act (CDA). The CDA allows contract related claims to be brought in the USCFC, which has exclusive jurisdiction over contract disputes with the government. See 28 U.S.C. § 1491(a)(1). If there is a possible contract claim under the CDA, in addition to a possible tort claim under the FTCA, you have to be cognizant of the presuit requirements for making a demand and filing a complaint with a contract related cause of action in addition to a tort claim to preserve the ability to choose which theory to pursue.

As with a tort claim, all administrative remedies for a contract claim against the United States must be exhausted before such a claim can be filed in the USCFC. This requires, among other things, providing a notice of the contract claim within six years from accrual, submitting a written demand for payment to the contract officer in charge, submitting a certification in support of the demand if the claim is

\$100,000 or greater, and waiting for a final decision from the contracting officer. Once a final decision is handed down from the government, insurers have one year from the date of receipt of the final decision to file a claim in the USCFC or 90 days to appeal the decision to the administrative board. The deadlines and requirements are outlined in 48 CFR 33.206 and Sections 7103 and 7104 of the CDA, however, you should consult with recovery counsel about the intricacies of making a claim and explore whether other portions of the statute need to be followed.

In addition to meeting the presuit requirements for a contract claim mentioned above, recovery professionals also need to consider the order in which they file a complaint for a contract claim and a complaint for a tort claim. Tort claims filed under the FTCA must be filed in the U.S. district courts, whereas a contract claim against the United States needs to be filed in the USCFC. See 28 U.S.C. § 1491(a)(1); see also, e.g., *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1564 (Fed. Cir. 1988). The order in which the claims are filed in the different courts dictates whether you have the ability to pursue a contract claim. See, e.g., *United States v. Cook, III*, 170 F.3d 1084, 1091 (Fed. Cir. 1999).

Although the USCFC has jurisdiction over contract claims, 28 U.S.C. § 1500 is a statute that provides the court does not have any jurisdiction over a contract related claim that a plaintiff already has "pending" against the United States in any other court. This is significant because, if the tort claim is filed first in the district court and the substance of the facts relied upon for the tort claim and the relief sought, e.g., money damages, are the same as those for the contract claim filed in the USCFC, the earlier filing of the tort claim will cause the USCFC to find that the plaintiff has already elected their remedy and the contract claim cannot proceed because there is a pending claim. See, e.g., *Johns-Manville*

Corp. v. United States, 855 F.2d 1556, 1562 & 1566 (Fed. Cir. 1988). There are myriad cases discussing what qualifies as “pending” for purposes of the statute and one should consult with counsel about the specific facts of any given case in order to evaluate the application of the statute, as it is strictly construed by the courts with virtually no exceptions.

The inability to file a contract related claim can result if one is not mindful of the deadlines, statutes of limitations and the timing of filing complaints, which may require pursuing a dual recovery tract against the United States – tort and contract – in order to ensure you have the option to file a contract claim and avoid the harsh results of 28 U.S.C. § 1500. One can avoid this result by adhering to the requirements and consider filing a contract claim in the USCFC prior to filing a tort claim in the district courts. See *Hardwick Bros. Co. v. United States*, 72 F.3d 883, 886 (Fed. Cir. 1995) (Finding a later filed district court case does not divest the court of claims of jurisdiction). However, filing the contract claim before a tort claim may not always save you, as the facts of the case and substance of the claims may preclude the dual filings. It is therefore recommended that you consult with recovery counsel to address the best course of action.

Recovery professionals should consider the possibility of a contract claim at the inception of a loss involving the United States where there is an oral or written contract, agreement or lease even if the possible theory is weaker than pursuing a tort, because one can lose the ability to pursue a contract claim in the USCFC and be stuck with only a tort claim if the case law and statutes are not followed. In some situations, proving and pursuing a contract claim may be easier or more efficient. Therefore, recovery professionals should consult the law in this area and thoroughly evaluate the prospects of a possible contract or warranty claim against the United States at the inception of an investigation to protect all avenues.

Cozen O’Connor is available to assist in evaluating recovery in cases against the United States by assisting with an early case evaluation, ensuring proper documentation and presentation of the claim.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact Joseph F. Rich at jrich@cozen.com or 215.665.7285