

Preserving damage claims against the United States; the trap of 28 USC § 1500

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When one has a claim for money damages against the United States, the judicial forum for that claim is generally the United States Court of Federal Claims.

However, often litigation with the Federal government may seek results other than compensation for damages that have already been suffered, and in that situation, the proper court for the potential plaintiff is a United States District Court.

But once such a case is pending in a District Court, the claimant runs a substantial risk that a later Court of Federal Claims damage action will be jurisdictionally barred.¹

That situation is epitomized in a litigation captioned *Nycal Offshore Development Corp. v. The United States*.²

The *Nycal* opinion explores the boundaries of this doctrine: what is a “suit or process” in an action pending in a district court, and what claims are “for or in respect to” the claims asserted in the later-filed Court of Federal Claims action.

In a lengthy and scholarly opinion, Judge Holte of that court recently examined the jurisdictional implications of such dual litigation.

THE JURISDICTIONAL ISSUE

28 United States Code sec. 1500 provides that “The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.”

This statute was enacted shortly after the end of the Civil War in response to a slew of litigations by plaintiffs who sought compensation for cotton that had been seized from them by the Union forces.

The federal government had been successful in defending claims against it in the predecessor court to the Court of Federal Claims, because many of the plaintiffs were unable to establish, as required by the applicable federal law, that they had “given no aid or comfort to participants in the rebellion.”

These plaintiffs had also brought tort claims against federal officers for converting their property; those claims were in various district courts.

At the time, a decision in favor of the federal officer in a district court was not binding against the plaintiff under the doctrine of res judicata in the Court of Claims.

What is now section 1500 was enacted to require such plaintiff to elect to sue the government in the Court of Claims, or the officer in the district court. The history is exhaustively analyzed by Judge Holte.³

Whether or not appropriate in light of this unusual history, section 1500 remains alive and well, with the effect that it “became a flat prohibition on the maintenance of two suits against the United States.”⁴

The *Nycal* opinion explores the boundaries of this doctrine: what is a “suit or process” in an action pending in a district court, and what claims are “for or in respect to” the claims asserted in the later-filed Court of Federal Claims action.⁵

THE NYCAL FACTS

Nycal⁶ was the owner of interests in oil and gas leases in federal land offshore of California.

In 2001, further activities toward putting these leases into production were halted by the United States District Court for the Northern District of California, which held that the Department of the Interior had not adequately complied with various environmental requirements

Nycal, together with other lessees, sought damages in the Court of Federal Claims, alleging that the government’s inability to meet these requirements had effectively breached the leases.

The oil companies won, and were awarded restitution damages measured by their original payments to the federal government for

their lease interests. Nycal, alone amongst the oil company litigants, sought lost profits damages.

At trial, the Court of Federal Claims found that Nycal would have been unable to recover hydrocarbons from its lease because it could not have met various environmental restrictions imposed by state and local authorities even if the federal government had not breached its leases.

In 2014, the dismissal of the Nycal lost profits claim was affirmed by the Federal Circuit.

In 2013, the Department of the Interior moved in the original Northern District of California case to essentially have the Nycal lease interests terminated.

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Nycal did not participate in those proceedings, allegedly because it was not notified of them. In the summer of 2013 the Department allegedly notified Nycal of the termination of its lease rights.

In 2017, Nycal moved in the Northern District case to intervene in order to press its allegations that its lease interests had never been legally terminated. Nycal's motion was denied as untimely in January of 2019, and Nycal filed a notice of appeal.

In April of 2019, Nycal filed a damage action in the Court of Federal Claims, alleging that the government had terminated its lease rights illegally.

The United States moved to dismiss the Court of Federal Claims action, alleging, among other defenses, that because Nycal's appeal from the denial of its motion to intervene was pending when the Court of Federal Claims action was filed, that second action was barred by 28 USC 1500.

It is that motion that is addressed by Judge Holte's opinion.

THE RULING OF THE COURT OF FEDERAL CLAIMS

Judge Holte held that the pendency of an appeal is "process" in connection with a "suit" such that Nycal would have been barred from maintaining its Court of Federal Claims action were Nycal a party to the Northern District case.

Thus, had the Northern District granted Nycal's motion to intervene, Nycal would have been unable to press its damage claim in the Court of Federal Claims. This despite that Nycal, in its intervention application, sought not damages but rather a declaration that its lease rights remained intact.

However, because the Northern District denied the motion to intervene, Nycal was nothing more than a "prospective intervenor,"⁷ who did not yet have a "claim" against the United States in that court. "Since Nycal did not become party to

the preexisting 'suit', it therefore could not have a pending 'process', as 'process' under the meaning of section 1500 first requires the existence of, and plaintiff's participation in, a 'suit'."⁸

Judge Holte went on to hold that the appeal of the denial of the motion to intervene was not a claim "based on the same operative facts as this case."⁹ Therefore, the Court of Federal Claims has jurisdiction to entertain Nycal's damages claims.

LESSONS FROM THE OPINION

Because of the limited jurisdiction of the Court of Federal Claims, clients with disputes arising out of government contracts or leases often need to seek equitable or declaratory relief in a district court and monetary damages in the Court of Federal Claims.

Contrast the procedure in states like New York, where equitable damages are often available against government defendants in the highest court of general jurisdiction, which in New York is the Supreme Court.

The *Nycal* opinion teaches that if one seeks relief other than money damages from the federal government, the prudent approach is to file the damage claim in the Court of Federal Claims, then file in the district court and seek a stay of the Court of Federal Claims proceeding.

Had the Northern District granted Nycal's motion to intervene, Nycal would have been unable to press its damage claim in the Court of Federal Claims.

Such a stay application is pending in the *Nycal* litigation. The general statute of limitations for claims that must be tried in the Court of Federal Claims is six years, 28 USC § 2501, and it is jurisdictional; typically equitable tolling does not apply.

There are also a variety of shorter time limitations on Court of Federal Claims actions, so often, as was true in *Nycal*, the damage action must be commenced before there has been a resolution of any equitable or declaratory claims.

If a stay is not available or is denied, the claimant's only recourse may be a full discontinuance of the district court action.

Notes

¹ The same doctrine would apply were the pending case venued in a state court, but it would be odd, and often jurisdictionally barred, for a case to be brought against the Federal government or a Federal officer other than in a Federal District Court.

² *Nycal Offshore Development Corp. v. United States*, No. 19-505, 2020 WL 1699906 (Fed. Cl. Apr. 7, 2020). Hereinafter "Op." and page number. Anderson Kill PC represented the plaintiff in this litigation.

³ Op at *5-*7.

⁴ Op. at *7.

⁵ Op. at *7.

⁶ The history of prior Nycal litigation is recited in Op. at *1-2, with copious citation.

⁷ Op. at *14.

⁸ *Id.*

⁹ Op. at *15.

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