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Preserving Damage Claims Against the United States: The Trap of 28 USC Section 1500

By Jeffrey E. Glen

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, litigation with the federal government often seeks results other than compensation for damages already suffered; in that situation, the proper court for the potential plaintiff is a U.S. District Court. But once such a case is pending in a District Court, the claimant runs the substantial risk that a later damage action will be jurisdictionally barred in the Court of Federal Claims.[1]

That situation is epitomized in the recent case *Nycal Offshore Development Corp. v. The United States.*[2] In a lengthy and scholarly opinion, Judge Ryan Holte examined the jurisdictional implications of such dual litigation.

The Jurisdictional Issue

28 U.S. Code section 1500 provides:

> 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 seeking compensation for cotton seized by Union forces. The federal government had successfully defended itself against claims in the predecessor to the Court of Federal Claims because many of the plaintiffs weren't able to establish, as required by the cited law, that they had "given no aid or comfort to participants in the rebellion." These plaintiffs also brought tort claims against federal officers in various District Courts, for converting their property. At the time, a decision in favor of a federal officer in a District Court was not binding against the plaintiff, under the doctrine of res judicata, in a later case brought against the

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federal government in the Court of Federal Claims for the same alleged damages. What is now section 1500 was enacted to require such plaintiff to elect to sue either the officer in the District Court or the government in the Court of Federal Claims. The history is exhaustively analyzed by Judge Holte.[4]

Whether or not it's appropriate in light of this unusual history, section 1500 remains alive and well, living on as a "flat prohibition on the maintenance of two suits against the United States."[5] 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.[6]

The *Nycal* Facts

Nycal[7] 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 U.S. 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 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. Nycal did not participate in those proceedings, allegedly because it was not notified of them. In the summer of 2013 the Interior 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 2019, and Nycal filed a notice of appeal. In April 2019, Nycal filed a damage action in the Court of Federal Claims, alleging the government had terminated its lease rights illegally. The United States moved to dismiss the 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 in 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 it 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"[8] that 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."[9]

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."[10] 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. 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 section 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; 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.

ENDNOTES

[1] *The same doctrine would apply were the pending case be 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] *Court of Federal Claims case no. 19-505. Anderson Kill represented the plaintiff in this litigation.*

[3] *2020 WL 1699906 (April 7, 2020) (hereinafter "Op." and page number).*

[4] *Op at *5-*7*

[5] *Op. at *7.*

[6] *Op. at *7.*

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

[8] *Op. at *14.*

[9] Id.

[10] *Op. at *15.*

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