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Jurisdiction, Practice, and Procedure

Chapter 22
Limitations Periods

Matthew H. Solomson

Bloomberg BNA

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Summary Table of Contents

22

Limitations Periods*

*F. Greg Bowman, Edward C. Reddington, and C. Bryan Wilson, Williams & Connolly LLP.

I. Introduction

As detailed in other chapters of this book, the U.S. Court of Federal Claims (COFC) has nationwide jurisdiction over numerous categories of monetary claims against the United States including, for example, claims pertaining to tax payments,[1] federal takings of private property for public use,[2] pay of military personnel and federal civilian employees,[3] claims brought by Native American tribes,[4] contract disputes,[5] bid protests and challenges to procurement procedures,[6] patents and copyright infringement,[7] matters referred by congressional reference,[8] wrongful

[1]28 U.S.C. §1491(a)(1); see Chapter 12 (Tax Claims).

[2]*Id.;* see Chapter 9 (Fifth Amendment Takings Claims).

[3]*Id.;* see Chapter 10 (Military Pay Claims) and Chapter 11 (Civilian Pay Claims).

[4]28 U.S.C. §1505; see Chapter 14 (Indian Claims).

[5]28 U.S.C. §§1491(a)(1), 1494, 1499; 41 U.S.C. §§7102 *et seq.*; see Chapter 6 (Tucker Act Contract Claims) and Chapter 7 (Contract Disputes Act Claims).

[6]28 U.S.C. §1491(b)(1); see Chapter 8 (Bid Protest and Procurement-Related Claims).

[7]28 U.S.C. §1498; see Chapter 13 (Intellectual Property Claims).

[8]28 U.S.C. §1492; see Chapter 19 (Congressional Reference Cases).

imprisonment,[9] and the National Vaccine Injury Compensation Program,[10] among others.[11] This chapter discusses the deadlines for bringing such claims in the COFC.

Section 2501 of Title 28 is the starting point for this discussion. The Supreme Court has explained that the limitations period of Section 2501 was intended "'to place an outside limit on the period within which all suits might be initiated'" although "'Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment.'"[12] Thus, the first paragraph of Section 2501 supplies the general limitations period for claims against the United States in the COFC. Nevertheless, all pertinent statutory provisions—including those that (1) confer jurisdiction and/or waive sovereign immunity and (2) create the cause(s) of action being pursued—must be reviewed to determine whether Congress enacted yet additional limits on the time period in which any particular claims may be brought in the COFC.

This chapter begins by discussing the general limitations period of Section 2501 and issues that arise in its application—such as determining filing and accrual dates, and the circumstances in which the limitations period is tolled—and then turns to a number of different limitations periods enacted for particular categories of claims, beginning with claims under the Contract Disputes Act (CDA).[13]

II. The Limitations Period for Claims Under 28 U.S.C. §2501

A. *The COFC Lacks Jurisdiction Unless a Petition Is Filed Within Six Years After a Claim First Accrues*

Section 2501 of Title 28 supplies the general limitations period for claims brought in the COFC. Section 2501 provides:

> [1] Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.
>
> [2] Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

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[9]28 U.S.C. §1495; see Chapter 15 (Claims for Unjust Conviction and Imprisonment).

[10]42 U.S.C. §§300aa-1 *et seq.*; see Chapter 18 (Vaccine Injury Claims).

[11]*See, e.g.*, 28 U.S.C. §§1494, 1496, 1497; see Chapter 16 (Other Statutory Claims).

[12]United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 8, 128 S. Ct. 1511 (2008) (quoting United States v. A.S. Kreider Co., 313 U.S. 443, 447, 61 S. Ct. 1007 (1941)).

[13]41 U.S.C. §§7102 *et seq.*

> [3] A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.
>
> [4] A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.[14]

The first paragraph of this provision provides that "[e]very claim . . . shall be barred" unless filed within six years of accrual. This six-year limitations period applies generally to claims brought under the Tucker Act and several other provisions of law. The second paragraph contains an example of a shorter limitations enacted by Congress to govern claims by oyster growers for damages from dredging operations.[15] The third paragraph sets forth circumstances under which claims in the COFC are tolled.[16] The fourth and final paragraph pertains to suits for "fees of an officer of the United States."

It is well settled that the six-year limitations period of Section 2501 is jurisdictional. In *John R. Sand & Gravel Co. v. United States*,[17] the petitioner appealed an adverse COFC judgment to the Federal Circuit.[18] Although the United States had not raised the issue, the Federal Circuit reasoned that because Section 2501 is jurisdictional, the court must consider sua sponte whether the petitioner's claims were timely filed.[19] The Supreme Court, consistent with its longstanding precedent,[20] affirmed that Section 2501's six-year limitations period is jurisdictional.[21]

As a consequence of the jurisdictional nature of Section 2501, the burden of proof for demonstrating timely filing rests with the plaintiff,[22] and the six-year limitations period cannot be waived by the United States.[23]

What does it mean to file a petition within six years after such claim first accrues? When is a petition "filed"? When does a claim "first

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[14]28 U.S.C. §2501.

[15]See Section III.D of this chapter.

[16]See Section II.D.1 of this chapter.

[17]457 F.3d 1345, 63 ER Cases 1033 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130, 65 ER Cases 1481 (2008).

[18]457 F.3d at 1353–60.

[19]*Id.*

[20]*See, e.g.*, United States v. Wardwell, 172 U.S. 48, 52, 19 S. Ct. 86 (1898) ("[Section 2501's predecessor] is not merely a statute of limitations, but also jurisdictional in its nature, and limiting the cases of which the court of claims can take cognizance."); Kendall v. United States, 107 U.S. 123, 125, 2 S. Ct. 277 (1883).

[21]*John R. Sand & Gravel*, 552 U.S. at 133–34.

[22]Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir. 1998).

[23]*See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 130, 65 ER Cases 1481 (2008).

accrue"? Under what circumstances is the limitations period tolled? Are there other important considerations in applying the limitations period? Each of these questions is addressed in turn in the following subsections.

B. When Is a Petition "Filed"?

A petition is "filed" for purposes of Section 2501 when a complaint is filed with the COFC.[24] The COFC permits complaints to be filed in paper form and mailed or delivered to the clerk of the court in Washington, D.C., or—if the plaintiff is not appearing pro se—electronically through the Case Management/Electronic Case Files (CM/ECF) system.[25]

1. What Is the Filing Date When a Case Is Filed in the COFC?

Papers are filed with the COFC by delivering them to the clerk.[26] In general, the filing date is the date that the complaint is received by the clerk and not the date mailed. The clerk must not refuse to file a paper solely because it is not in the form prescribed by the Rules of the U.S. Court of Federal Claims (RCFC).[27]

In some circumstances the court will adjust the filing date recorded by the clerk. In *LaFont v. United States*,[28] the plaintiff's counsel sent a letter and unsigned complaint to the clerk. The letter was dated January 18, 1989 and was received by the clerk on January 19, 1989. The clerk returned the unsigned complaint to the plaintiff's attorney, noting that it was "'not signed.'"[29] The clerk's office received the corrected, signed complaint on January 25, 1989, and that date was stamped on the complaint as the "'filed'" date.[30] The Court of Claims held that "justice and reason support the issuance of a corrective order changing the filing date of the complaint in this case from January 25, 1989 to January 19, 1989, the date when the January 18, 1989 letter enclosing the unsigned complaint was received."[31]

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[24]R. Ct. Fed. Cl. 3.

[25]R. Ct. Fed. Cl. 5.5(d)(1); *see also* Instruction Sheet for the Preparation of a Complaint, http://www.uscfc.uscourts.gov/sites/default/files/20140611%20Information%20Sheet%20for%20Filing%20a%20Complaint.pdf (visited Jan. 24, 2016).

[26]R. Ct. Fed. Cl. 5(d)(2)(A). A paper may also be filed by delivering it to a judge "who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk." *Id.*

[27]R. Ct. Fed. Cl. 5(d)(4).

[28]17 Cl. Ct. 837 (1989).

[29]*Id.* at 840.

[30]*Id.*

[31]*Id.* at 841. An earlier version of the rules was in effect when this decision issued, but the court's interpretation is consistent with the current version of RCFC 5.5(d)(1)(A).

Under certain limited circumstances, a plaintiff may be able to establish that a complaint was "filed" before actually being received by the clerk. In *Charlson Realty Co. v. United States*,[32] the Court of Claims held that "a letter which is properly sealed, stamped, addressed, and deposited in the United States Mails is presumed to reach the addressee and be received by him in due course of the mails."[33] Thus, it is possible for the presumption of arrival in due course of the mails to overcome the filing date stamped on the complaint if the plaintiff shows that (1) the complaint was sent by registered or certified mail, properly addressed to the clerk and with return receipt requested; (2) it was deposited in the mail sufficiently in advance of the filing deadline to provide for receipt by the clerk on or before such date in the ordinary course of the mail; and (3) the party plaintiff as sender exercised no control over the mailing between the deposit of the complaint in the mail and its delivery.[34] In the event that the plaintiff makes this showing, the burden shifts to the defendant to prove with direct evidence that the complaint was nonetheless not timely filed.[35]

Former RCFC 3 codified the ruling in *Charlson*. The Rules Committee Notes to the 2002 Revision of Rule 3 explain that this part of the rule was deleted for two reasons: (1) to achieve greater uniformity with the corresponding Federal Rule of Civil Procedure, and (2) because it was inappropriate to include a rule of decision as part of a procedural rule. But the COFC has continued to apply *Charlson*'s holding.[36]

2. *What Is the Filing Date When a Case Is Transferred to the COFC?*

What if the plaintiff files in district court a complaint that should have been filed in the COFC, and the filing deadline passes while the case is pending in the wrong court?

Section 1631 of Title 28 states:

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court in which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.[37]

Thus, a case transferred to the COFC for want of jurisdiction under Section 1631 is timely "filed" in the COFC if filed in the transferor court

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[32]384 F.2d 434 (Ct. Cl. 1967).

[33]*Id.* at 442.

[34]Langan v. United States, 111 Fed. Cl. 654, 657 (2013).

[35]*Id.* at 656.

[36]*See Langan*, 111 Fed. Cl. 654 (finding a plaintiff's complaint to be untimely, but analyzing the issue by applying the test set out in *Charlson*) (referencing Charlson Realty Co. v. United States, 384 F.2d 434 (Ct. Cl. 1967)).

[37]28 U.S.C. §1631; *see* Stockton E. Water Dist. v. United States, 62 Fed. Cl. 379, 389 (2004).

within the limitations period—even if the COFC received the transferred complaint after the expiration of the limitations period. (But if a district court fails to transfer the case under Section 1631, the date the complaint was actually filed in the COFC is determinative.)[38] The COFC is not bound by the transferor court's view of whether the original petition was timely filed.[39] But if the COFC determines that the case was untimely when filed in the transferor court, the transfer under Section 1631 cannot make it timely.

3. When Does a Claim Relate Back to an Earlier Filing?

The rule in the COFC for determining whether an amended complaint relates back to an earlier-filed complaint is consistent with the rule followed in district courts:

> An amendment to a pleading relates back to the date of the original pleading when: (A) the law that provides the applicable statute of limitations allows relation back; (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if RCFC 15(c)(1)(B) is satisfied and if the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.[40]

In determining whether a new claim arises out of the conduct, transaction, or occurrence set out in the original pleading, the COFC adheres to the test in *Vann v. United States*:[41] the new claims relate back to the date of the original complaint if "the general fact situation or the aggregate of the operative facts underlying the claim for relief in the first petition gave notice to the government of the new matter."[42]

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[38]Texas Peanut Farmers v. United States, 409 F.3d 1370, 1374–75 (Fed. Cir. 2005) ("[A]bsent transfer, applicable statutes of limitations may bar [plaintiffs] from adjudicating otherwise legitimate claims."); *see also* Brown v. United States, 84 Fed. Cl. 400, 406 (2008) ("[B]ecause this case was not transferred pursuant to 28 U.S.C. §1631, this court cannot substitute the date on which the [complaint] was filed in [district court] . . . [but rather] may only look to the date on which the [c]omplaint was filed in this court . . . to determine whether the claim is barred by the six-year statute of limitations."); Holmes v. United States, 92 Fed. Cl. 311, 320 n.12 (2010) (declining to apply the filing date in district court where the case was not transferred under 28 U.S.C. §1631), *rev'd on other grounds*, 657 F.3d 1303 (Fed. Cir. 2011).

[39]Awad v. United States, 301 F.3d 1367, 1375 (Fed. Cir. 2002).

[40]R. Ct. Fed. Cl. 15(c)(1)(A)–(C).

[41]420 F.2d 968 (Ct. Cl. 1970) (per curiam).

[42]*Id.* at 974; *see, e.g.*, Intrepid v. Pollock, 907 F.2d 1125, 1130, 12 ITRD 1401 (Fed. Cir. 1990) (quoting *Vann*); Moore v. United States, 42 Fed. Cl. 595, 597 (1998) (same); Case, Inc. v. United States, 25 Cl. Ct. 379 (1992) (where relation back applies, a claim that might otherwise be time-barred is considered timely); *see also* Construction Equip. Lease Co. v. United States, 17 Cl. Ct. 628 (1989) (addition of real party in interest relates back to original timely complaint).

Similarly, in *Stockton East Water District v. United States*,[43] the plaintiff's takings claims were transferred under Section 1631 of Title 28, but his breach of contract claims were not.[44] The COFC held that (1) the plaintiff's original district court complaint provided "sufficient notice of a breach of contract claim," (2) the breach of contract claim arose "out of the same conduct, transaction, or occurrence that was pleaded in support of the takings claim," and (3) "all operative facts for both legal theories were made apparent."[45] Accordingly, the court held that plaintiff's breach of contract claims related back to the initial filing date for the takings claims for purposes of the limitations period of Section 2501.

But, where claims are not legally and factually intertwined, there is no relation back. In *Renda Marine, Inc. v. United States*,[46] a contractor sought damages arising from differing site conditions. Following trial, the contractor moved to amend its complaint to add a claim for unpaid contract earnings based on testimony adduced at trial. This additional claim was based not on differing site conditions, but instead on items billed in conjunction with work done at the construction site, but allegedly not paid for by the government. The court held that it lacked jurisdiction over the additional claim for unpaid contract earnings because it was not the subject of a certified claim submitted to the contracting officer, and there was no relation back. With regard to relation back, the court noted that although the contractor's claims for differing site conditions and unpaid contract earnings arose under the same contract, they were "predicated upon different facts and analyzed under different precedent."[47] The court further noted that the contractor's entitlement to relief on one claim did not depend on the other.

C. When Does a Claim First Accrue?

Under Section 2501, a claim against the United States in the COFC is barred unless the brought within six years after such claim "first accrues." But what does it mean for a claim to "first accrue"?

1. General Rules for Determining When a Claim Accrues

For purposes of Section 2501, "[a] claim accrues when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action."[48] Accrual of a claim is "'determined

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[43]62 Fed. Cl. 379 (2004).

[44]*Id.* at 389.

[45]*Id.* at 392.

[46]65 Fed. Cl. 152 (2005), *aff'd*, 509 F.3d 1372 (Fed. Cir. 2007).

[47]*Renda Marine,* 65 Fed. Cl. at 162.

[48]Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994); *see also* Barclay v. United States, 443 F.3d 1368, 1379 (Fed. Cir. 2006) ("In general, a takings claim accrues when all events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." (internal quotation marks omitted)).

under an objective standard'" and the plaintiff "does not have to possess actual knowledge of all the relevant facts in order for a cause of action to accrue."[49] Damages need not be "complete and fully calculable" before the cause of action accrues.[50] The proper focus "is upon the time of the [defendant's] acts, not upon the time at which the consequences of the acts became most painful."[51]

For a breach of contract action, the claim accrues at the time of the breach.[52] In *Franconia Associates v. United States*,[53] the Supreme Court considered the timeliness of such claims filed against the United States under the Tucker Act. The petitioners were property owners who participated in a federal program to promote the development of affordable rental housing in areas not traditionally served by conventional lenders. In exchange for low-interest mortgage loans issued by a governmental instrumentality, the petitioners agreed to devote their properties to low- and middle-income housing and to abide by restrictions during the life of the loans. The petitioners alleged that Congress, in enacting subsequent legislation, abridged their contractual rights to prepay the loans at any time and thereby gain release from the federal program's restrictions. The petitioners brought their claims more than six years after this legislation was enacted, but within six years of the denial of their attempt to prepay the loans.

The United States argued that the petitioners' claims were untimely because they accrued upon the enactment of the legislation that allegedly abridged the petitioners' contract rights. The Federal Circuit held the petitioners' claims time barred under Section 2501 of Title 28 because, in its view, the legislation constituted an immediate breach of the loan agreements.

The Supreme Court reversed, holding that the legislation "effected a repudiation" of the loan agreements, not an immediate breach, meaning that unless the petitioners opted to treat the legislation "as a present breach by filing suit prior to the date indicated for performance, breach would occur when a borrower attempted to prepay, for only at that time would the Government's responsive performance become due."[54] The Supreme Court rejected the argument of the United States that the term "first accrues" in Section 2501 "convey[s] Congress' intent to guard the sovereign against claims that might be deemed timely under statutes of limitations applicable to private parties."[55] The Court made clear

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[49]Walker v. United States, 117 Fed. Cl. 304, 318 (2014) (quoting FloorPro, Inc. v. United States, 680 F.3d 1377, 1381 (Fed. Cir. 2012)), *aff'd*, 587 F. App'x 651 (Fed. Cir. 2014).

[50]Fallini v. United States, 56 F.3d 1378, 1382 (Fed. Cir. 1995).

[51]Delaware State Coll. v. Ricks, 449 U.S. 250, 258, 24 FEP Cases 827 (1980) (emphases and internal quotation marks omitted).

[52]Petro-Hunt, LLC v. United States, 90 Fed. Cl. 51, 67 (2009).

[53]536 U.S. 129, 122 S. Ct. 1993 (2002).

[54]536 U.S. at 143.

[55]*Id.* at 144.

that limitations principles—including accrual rules—"generally apply to [claims against] the Government in the same way that they apply to private parties."[56]

A takings claim accrues when the government's actions alleged to constitute a taking occur.[57] This is illustrated in *Navajo Nation v. United States*,[58] which involved a dispute between the Navajo Nation and the Hopi Tribe about the development of certain reservation lands. In 1980, Congress legislated that certain portions of reservation land shall be developed only "'upon the written consent of each tribe.'"[59] But in 1982, the Hopi imposed a moratorium on all further Navajo construction.[60] The Navajo Nation filed a takings claim against the United States in the COFC in 1988, more than six years after the legislation was enacted, but within six years of the Hopi's moratorium. The Federal Circuit held that the claim was untimely. In so doing, the Federal Circuit explained that a takings claim "must be predicated on actions undertaken by the United States, not the Hopi Tribe."[61]

For a military discharge claim, a "cause of action for back pay accrues at the time of the plaintiff's discharge."[62] Claims for nonpayment of military incapacitation pay, however, accrue "when all the events occurred which were necessary to enable the plaintiff to bring suit, the [first] date of non-payment."[63]

2. The Continuing Claim Doctrine

The statute of limitations may not bar certain continuing claims, if "the plaintiff's claim[s] [are] inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages."[64] But a claim "based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim."[65]

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[56] *Id.* at 145 (internal quotation marks omitted).

[57] Navajo Nation v. United States, 631 F.3d 1268, 1273–74 (Fed. Cir. 2011) (citing Goodrich v. United States, 434 F.3d 1329, 1333 (Fed. Cir. 2006) and Northwest La. Fish & Game Pres. Comm'n v. United States, 446 F.3d 1285, 1289 (Fed. Cir. 2006)).

[58] 631 F.3d 1268 (Fed. Cir. 2011).

[59] *Id.* at 1271 (quoting 25 U.S.C. §640d-9(f) (1980)).

[60] *Id.*

[61] *Id.* at 1274.

[62] MacLean v. United States, 454 F.3d 1334, 1336, 11 WH Cases 1131 (Fed. Cir. 2006) (internal quotation marks omitted).

[63] Walker v. United States, 117 Fed. Cl. 304, 320 (2014); *accord* Joseph v. United States, 62 Fed. Cl. 415, 417 (2004) ("It is well settled that '[a] Tucker Act claim for back pay accrues all at once at the time of discharge; the claim for back pay is not a 'continuing claim' that accrues each time a payment would be due throughout the period that the service member would have remained on active duty.'" (quoting Martinez v. United States, 333 F.3d 1295, 1303 (2003) (en banc)).

[64] Brown Parks Estates Fairfield Dev. Co. v. United States, 127 F.3d 1449, 1456 (Fed. Cir. 1997).

[65] *Id.*

The continuing claim doctrine does not revive a claim of lingering damages for the past commission of a wrong, and only permits a recovery for damages within the six years before the initiation of a suit.[66]

In *Brown Parks Estates Fairfield Development Co. v. United States*,[67] the plaintiffs—owners of rental properties—alleged that the government owed them for the failure to properly adjust rates under Section 8 housing contracts.[68] They claimed that these initial breaches caused later years' rents to be too low, as adjustments were always based on the previous year's rent. The plaintiffs sued more than six years after the last of the allegedly improper adjustments, contending that the continuing claim doctrine applied. The Federal Circuit held that the continuing claim doctrine did not apply, reasoning that this was not a case of "recurring, individual actionable wrongs" because the asserted wrongs within the six-year period flowed from the original breach of contract before the six-year period.[69]

3. The Accrual Suspension Rule

The accrual of a claim against the United States under Section 2501 is suspended if the plaintiff can show either that "the defendant has concealed its acts with the result that plaintiff was unaware of their existence or . . . that its injury was inherently unknowable at the accrual date."[70] This is sometimes described as the "concealed or inherently unknowable test" and includes an "intrinsic reasonableness component."[71] In an early application of the rule, the Court of Claims provided the example of a defendant delivering the wrong fruit tree to the plaintiff: "the wrong cannot be determined until the tree bears fruit. In this situation the statute will not begin to run until the plaintiff learns or reasonably should have learned of his cause of action."[72] This "accrual suspension" rule is narrowly applied.[73] Absent active concealment, accrual suspension requires "what is tantamount to sheer impossibility of notice."[74]

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[66] *See* Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1580–81 (Fed. Cir. 1988).

[67] 127 F.3d 1449 (Fed. Cir. 1997).

[68] *Id.* at 1455.

[69] *Id.* at 1457–59.

[70] Young v. United States, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (internal quotation marks omitted).

[71] Holmes v. United States, 657 F.3d 1303, 1320, 113 FEP Cases 395 (Fed. Cir. 2011).

[72] Japanese War Notes Claimants Ass'n v. United States, 373 F.2d 356, 359 (Ct. Cl. 1967) (citation omitted).

[73] *See* Martinez v. United States, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc) (internal quotation marks omitted).

[74] Rosales v. United States, 89 Fed. Cl. 565, 578 (2009) (citing *Japanese War Notes*, 373 F.2d at 359 ("An example of [an inherently unknowable injury] would be when defendant delivers the wrong type of fruit tree to plaintiff and the wrong cannot be determined until the tree bears fruit."); Roberts v. United States, 312 F. App'x 340, 342 (Fed. Cir. 2009) (affirming dismissal of plaintiffs' claims as untimely under §2501, where plaintiff failed to demonstrate that his military service records were wholly unavailable)).

The Federal Circuit similarly has held, in a case against the Navy, that the accrual of claims for breach of a settlement agreement were suspended where the agreement required the Navy to expunge a suspension from a sailor's record of service and provide a neutral reference.[75] In that case, the Navy represented that it had complied with these requirements, and the plaintiff was able to find other employment, further leading him to believe that the Navy had in fact complied. He later discovered, however, that the Navy had not complied. Given the Navy's representation, the presumption that government officials act in good faith, and the absence of facts that would have alerted the plaintiff to the breach, the accrual of the claim was delayed until the plaintiff learned that the Navy's representation was inaccurate.[76]

D. When Is the Limitations Period Tolled?

1. Statutory Tolling Provisions

Section 2501 of Title 28 provides that the general six-year limitations period is tolled if the petitioner is under "legal disability or beyond the seas at the time the claim accrues."[77] "Legal disability is 'a condition of mental derangement which renders the sufferer incapable of caring for his property, of transacting business, of understanding the nature and effects of his acts, and of comprehending his legal rights and liabilities.'"[78] The claims of the petitioner may be filed within three years after the "disability ceases."[79] This provision was intended "to provide relief from some personal handicap or impediment affecting the individual litigant and preventing him from bringing a timely suit."[80] Ignorance of the right to bring suit is not a legal disability that tolls the limitations period.[81]

A claimant must show that his disability existed at the time when the claim accrued and need not show that he suffered from the disability continually during the period in which the statute is to be tolled.[82] But the limitations period begins to run if, subsequent to the onset of disability, the plaintiff experiences a period in which the disability is lifted.[83] And if the petitioner relapses into legal disability, the statute of limitations continues to run.[84]

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[75] *Holmes*, 657 F.3d at 1321.

[76] Holmes v. United States, 657 F.3d 1303, 1321, 113 FEP Cases 395 (Fed. Cir. 2011).

[77] 28 U.S.C. §2501.

[78] Tansil v. United States, 113 Fed. Cl. 256, 264 (2013) (quoting Goewey v. United States, 612 F.2d 539, 544 (Ct. Cl. 1979) (per curiam)).

[79] *Id.*

[80] *Goewey*, 612 F.2d at 544.

[81] Dean v. United States, 92 Fed. Cl. 133, 148 (2010), *aff'd*, 416 F. App'x 908 (Fed. Cir. 2011).

[82] Ware v. United States, 57 Fed. Cl. 782, 788 (2003).

[83] Bond v. United States, 43 Fed. Cl. 346, 349 (1999).

[84] *Dean*, 92 Fed. Cl. at 148 (citing *Bond*, 43 Fed. Cl. at 349).

2. *Judicial/Equitable Tolling*

Until the Supreme Court's 1990 decision in *Irwin v. Department of Veterans Affairs*,[85] the Court's rulings on the availability of equitable tolling for claims against the government were viewed as inconsistent and lacking predictability. For example, the Supreme Court in *Soriano v. United States*[86] held that the limitations period of Section 2501was not suspended by war, reasoning that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."[87] But, in 1985, the Supreme Court in *United States v. Locke*[88] explained that it was leaving open the general question whether principles of equitable tolling, waiver, and estoppel apply against the government when the case involves a statutory filing deadline.[89] And in *Bowen v. City of New York*,[90] the Supreme Court explained that "we must be careful not to assume the authority to narrow the waiver that Congress intended, or construe the waiver unduly restrictively."[91]

In *Irwin v. Department of Veterans Affairs*,[92] the Supreme Court took the "opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the government."[93] The Supreme Court rejected the argument that because waivers of sovereign immunity are traditionally construed narrowly, the jurisdictional limitations period for such actions cannot be subject to equitable tolling. The Court explained that continuing to decide congressional intent with regard to the availability of equitable tolling on an ad hoc basis:

> would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.[94]

The Court adopted a new approach: "[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so."[95] The Court explained that federal courts have

> typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his

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[85]498 U.S. 89, 54 FEP Cases 577 (1990).

[86]352 U.S. 270, 77 S. Ct. 269 (1957).

[87]*Id.* at 275–77, 77 S. Ct. at 269.

[88]471 U.S. 84, 105 S. Ct. 1785 (1985).

[89]471 U.S. at 94, n.10.

[90]476 U.S. 467, 106 S. Ct. 2022 (1986).

[91]476 U.S. at 479 (citations and internal quotation marks omitted).

[92]498 U.S. 89, 54 FEP Cases 577 (1990).

[93]498 U.S. at 95.

[94]*Id.*

[95]498 U.S. at 95–96.

> judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.[96]

In *Martinez v. United States*,[97] the Federal Circuit, sitting en banc, noted that it had followed the Supreme Court's lead in *Irwin* in deciding whether certain limitations periods were subject to equitable tolling.[98] The Federal Circuit explained that in making such decisions, it considered "the language and context of the particular limitation statute at issue."[99] The Court also noted that, since *Irwin*, it had not yet decided whether equitable tolling applies with respect to the general statute of limitations of Section 2501, and it again declined to decide the issue.[100]

In *John R. Sand & Gravel Co. v. United States*,[101] the Supreme Court decided the issue on which the Federal Circuit reserved judgment in *Martinez*: the Court held that the six-year limitations period of Section 2501 of Title 28 is jurisdictional and *not* subject to equitable tolling.[102] More recently, the Supreme Court reaffirmed in dicta that it would adhere to this rule as a matter of stare decisis, even if a different result would obtain under *Irwin*'s reasoning.[103]

3. Class Actions

The filing of a class action complaint tolls the running of the six-year limitations period for individual claims of putative members until class certification is denied, under the class action tolling doctrine established by the Supreme Court in *American Pipe & Construction Co. v. Utah*.[104]

In *Bright v. United States*,[105] the Federal Circuit was presented with the question whether, in an opt-in class action, the limitations period of

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[96] *Id.*

[97] 333 F.3d 1295 (Fed. Cir. 2003) (en banc).

[98] *Id.* at 1318.

[99] *Id.*

[100] *Id.*

[101] 552 U.S. 130, 128 S. Ct. 750 (2008).

[102] 552 U.S. at 133–34. *But see* Young v. United States, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (stating in a decision issued after *John R. Sand & Gravel Co.* that the accrual suspension rule "is distinct from the question whether equitable tolling is available" under Section 2501) (internal quotation marks omitted); see Section II.C.3 of this chapter (discussing accrual suspension rule).

[103] United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1634, 191 L. Ed. 2d 533 (2015) ("[T]his Court repeatedly held that [the Tucker Act's] 6-year limit [is] jurisdictional and thus not subject to equitable tolling.").

[104] 414 U.S. 538, 94 S. Ct. 756 (1974). *See id.*, 414 U.S. at 553–54; Bright v. United States, 603 F.3d 1273, 1284–90 (Fed. Cir. 2010); Stone Container Corp. v. United States, 229 F.3d 1345, 1352–55 (Fed. Cir. 2000); Askins v. United States, 113 Fed. Cl. 283, 285 (2013).

[105] 603 F.3d 1273 (Fed. Cir. 2010).

Section 2501 is tolled by the filing of an opt-in class action complaint.[106] The Federal Circuit noted a split of authority and "agree[d] with the courts holding that class action tolling is available under an opt-in scheme. In our view, such a result is most consistent with the objectives which class action procedures are meant to achieve."[107]

The United States had argued that because RCFC 23—under which such actions are certified to proceed on a class basis—is not statutory, it cannot toll the jurisdictional limitations period of Section 2501. The Federal Circuit rejected this argument. In the court's view, "the fact that equitable tolling is barred under section 2501 does not mean that class action statutory tolling also is barred. The two concepts are different."[108] The court noted that the petitioner moved for class certification before the expiration of the limitations period.[109] The Federal Circuit was unwilling to create a regime in which prospective class action plaintiffs would "be charged with the task of forecasting when, during the pendency of a class action proceeding, the class certification process and opt in period would be completed so that section 2501 would be satisfied."[110]

E. Other Issues

1. Laches

The equitable doctrine of laches operates as an affirmative defense that bars claims that are unreasonably delayed.[111] But laches generally is not applied to shorten a statutory period for actions at law absent a showing of sufficient prejudice.[112]

The leading modern Federal Circuit case on laches is *Cornetta v. United States*.[113] In that case, a retired Marine officer brought a wrongful discharge claim against the government nearly seven years after he was separated from the Marine Corps.[114] Although the plaintiff's claim was not barred by the statute of limitations, based on his post-discharge service in the Coast Guard (which tolled the statute under the Soldiers' and Sailors' Civil Relief Act), the court held that subsequent service did not affect the laches analysis.[115] The Federal Circuit clarified that laches was an available defense to the government in a military pay case and remanded the case for further consideration under the test announced

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[106]*Id.* at 1281.

[107]*Id.* at 1285.

[108]*Id.* at 1287.

[109]*Id.* at 1288.

[110]Bright v. United States, 603 F.3d 1273, 1288 (Fed. Cir. 2010).

[111]*See* Katzin v. United States, 120 Fed. Cl. 199, 209–10 (2015).

[112]*Id.* at 209.

[113]851 F.2d 1372 (Fed. Cir. 1988).

[114]*Id.* at 1378.

[115]*Id.*

therein (which is described further below).[116] The laches defense has been considered and successfully invoked by the government in a diverse range of other cases in the COFC, including cases brought under the Contract Disputes Act,[117] a claim by a foreign plaintiff under the reciprocity provision in Section 2502(a) of Title 28,[118] and congressional reference cases.[119]

As explained in *Cornetta* and confirmed in subsequent decisions, for the government to prevail on an affirmative defense of laches in the COFC, the government must demonstrate that: (1) "the plaintiff delayed filing suit for an unreasonable and inexcusable length of time from the time the plaintiff knew or reasonably should have known of its claim against the defendant"; and (2) "the delay [by the claimant] operated to the prejudice or injury of the defendant."[120]

The mere passage of time does not by itself constitute prejudice.[121] To demonstrate prejudice, the government must show that it is "impaired from successfully defending itself from suit given the passage of time" (such as through loss of records, destruction of evidence, fading memories, or unavailability of witnesses) or that "the costs to the defendant have significantly increased due to the delay."[122]

2. *The Limitations Period Is Not Tolled by a Petition for Permissive Administrative Relief*

Permissive application to a military records correction board does *not* toll the statute of limitations.[123] A service member may apply to correct

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[116]*Id.* at 1378, 1380.

[117]LaCoste v. United States, 9 Cl. Ct. 313, 316 (1986) (dismissing case on laches grounds based on contractor's five-year delay in bringing suit, given the diminished number of government personnel familiar with the case due to "death, retirement or transfer").

[118]Mexican Intermodal Equipment, S.A. de C.V. v. United States, 61 Fed. Cl. 55, 72 (2004) (dismissing case on summary judgment based on the plaintiff's approximately four-and-a-half-year delay in raising concerns with the agency and nearly six-year delay before filing suit, and on the resulting prejudice to the government to defend itself given the death of one central witness and the likely unavailability of another key witness).

[119]Land Grantors in Henderson, Union, and Webster Counties v. United States, 86 Fed. Cl. 35, 50 (2009) (holding that the government sustained its burden to prove that laches bars a decades-old case for legal or equitable relief for land sold to the government for use as a military training camp during World War II); Kanehl v. United States, 40 Fed. Cl. 762, 771–72 (1998) (holding that, by waiting 16 years after the approval of a settlement agreement that otherwise barred such claims, laches barred the plaintiff from asserting equitable claims and other claims based on alleged diminution in value of company).

[120]Katzin v. United States, 120 Fed. Cl. 199, 210 (2015) (alteration in original; internal quotation marks omitted).

[121]Abernethy v. United States, 108 Fed. Cl. 183, 190 (2012).

[122]*Id.* (citing Cornetta v. United States, 851 F.2d 1372, 1378 (Fed. Cir. 1988); Lankster v. United States, 87 Fed. Cl. 747, 755–56 (2009)).

[123]*See* Chambers v. United States, 417 F.3d 1218, 1224 (Fed. Cir. 2005); Martinez v. United States, 333 F.3d 1295, 1304 (Fed. Cir. 2003) (en banc); Walker v. United States, 117 Fed. Cl. 304, 321–22, *aff'd*, 587 F. App'x 651 (Fed. Cir. 2014); White v. United States,

or challenge a wrongful discharge or other adverse pay determination through a correction board, such as the Army Discharge Review Board or the Army Board for Correction of Military Records. The Federal Circuit and the COFC have held, however, that if such an application is permissive rather than mandatory—and is not required before filing suit in the COFC—the statute of limitations is not suspended pending those proceedings.[124] A plaintiff pursuing permissive corrective action should be mindful that the six-year statutory deadline in the COFC is running and file suit in advance of the deadline even if the corrective action has not yet been resolved.

3. "Half-a-Legal-Loaf" Doctrine

The half-a-legal-loaf doctrine refers to the situation in which an administrative body finds that a claimant has been aggrieved, but awards less relief than necessary and appropriate to compensate the claimant.[125] Failure of the administrative body to grant full relief "results in . . . a new cause of action or continuing claim[,] which revives the limitations period," on the theory that once the board decides that relief is proper, it cannot arbitrarily give half a legal loaf.[126] The COFC has applied this doctrine in the context of relief awarded by military corrections boards.[127]

4. Suspension of Limitations Periods During Military Service

The COFC has held that back pay claims by service members are tolled by the Servicemembers Civil Relief Act [formerly the Soldiers' and Sailors' Civil Relief Act].[128] That Act provides:

> (a) *Tolling of statutes of limitation during military service.* The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department,

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101 Fed. Cl. 673, 677 (2011) ("Plaintiff stopped receiving active duty pay when he was discharged from the Navy on November 22, 1988. Consequently, Plaintiff's claim for back pay arose on that date, and his subsequent invocation of administrative procedures did not stop the 6 year statute of limitations from running. Nor did the [Board of Correction of Naval Records'] denial of Plaintiffs' request to correct his military records create a second cause of action.").

[124] *Chambers*, 417 F.3d at 1224; *Walker*, 117 Fed. Cl. at 322.

[125] *See* Teichman v. United States, 65 Fed. Cl. 610, 617 (2005), *aff'd*, 162 F. App'x 977 (Fed. Cir. 2006); Rumph v. United States, 228 Ct. Cl. 855, 857 (1981); Eurell v. United States, 566 F.2d 1146, 1149 (Ct. Cl. 1977) (per curiam) ("Once an administrative body has made a decision that relief is proper, then it has a duty to grant thorough and fitting relief." (internal quotation marks omitted)); Homcy v. United States, 536 F.2d 360, 364 (Ct. Cl. 1976).

[126] *Homcy*, 536 F.2d at 364 (internal quotation marks omitted).

[127] *Teichman*, 65 Fed. Cl. 610; *Rumph*, 228 Ct. Cl. 855; *Eurell*, 566 F.2d 1146; *Homcy*, 536 F.2d 360.

[128] *See* Lowe v. United States, 79 Fed. Cl. 218, 224–26 (2007).

> or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.[129]

The Act defines "period of military service" as "the period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service."[130] The statute applies only to active military service and not to service in a reserve component.[131] Courts have held that this provision "make[s] certain that the tolling of the statute of limitations is unconditional"[132] during periods of active military service.

III. Different Limitations Periods for Particular Categories of Claims

This section addresses a number of different limitations periods enacted for particular categories of claims, beginning with claims under the Contract Disputes Act.

A. Limitations Periods Under the Contract Disputes Act

1. The Six-Year Presentment Requirement

Contract claims by or against the federal government under express and implied executive agency contracts are brought in the COFC pursuant to the Contract Disputes Act (CDA).[133] A claim is a written demand by one of the contracting parties seeking the payment of money as a matter of right.[134] Contract claims against the government are submitted by presenting a signed claim in writing to the contracting officer.[135] Affirmative contract claims by the government against a contractor must be the subject of a written decision by the contracting officer.[136] A claim by

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[129]Servicemembers Civil Relief Act, Pub. L. No. 108-189, §206, 117 Stat. 2835, 2844 (2003) (codified as amended at 50 U.S.C. app. §526).

[130]50 U.S.C. app. §511(3).

[131]*See* Walker v. United States, 117 Fed. Cl. 304, 321–22 (2014).

[132]Bickford v. United States, 656 F.2d 636, 639 (Ct. Cl. 1981) (en banc); *see also* Conroy v. Aniskoff, 507 U.S. 511, 514, 113 S. Ct. 1562 (1993) (interpreting a different provision within the same section of the Act and holding that "[t]he statutory command . . . is unambiguous, unequivocal, and unlimited"); Romualdo P. Eclavea, *Tolling Provision of Soldiers' and Sailors' Civil Relief Act (50 App. U.S.C.A. §525)*, 36 A.L.R. Fed. 420 (2007) (collecting case law from various jurisdictions recognizing the mandatory nature of the Act's tolling provision and construing this provision liberally in accordance with the Act's remedial nature).

[133]41 U.S.C. §7102.

[134]48 C.F.R. §2.101.

[135]41 U.S.C. §7103(a)(1), (a)(2).

[136]41 U.S.C. §7103(a)(3).

the government is submitted when the contracting officer renders a final decision to the contractor.[137]

To be timely under the CDA, a claim must be submitted within six years after accrual of the claim.[138] The parties may also agree to a time period shorter than six years.[139] The six-year time limit does not apply to claims by the federal government based on contractor fraud[140] or to contracts awarded prior to October 1, 1995.[141]

For submitted claims of $100,000 or less, the contracting officer shall issue a written decision within 60 days of receipt.[142] For submitted claims in excess of $100,000, the contracting officer shall, within 60 days of receipt of a certified claim, either issue a decision or notify the contractor of the time within which a decision will be issued.[143] A denial of a claim may be appealed by the contractor to the COFC.[144] A failure by the contracting officer to issue a decision within the required time period may be deemed by the contractor to be a denial of the claim, thereby authorizing the contractor to appeal the decision.[145] However, a contractor may instead choose to await decision by the contracting officer rather than proceeding on the basis of a deemed denial, and this will not affect the timeliness of appeal.[146]

In 2014, the Federal Circuit held in *Sikorsky Aircraft Corp. v. United States*[147] that the limitations period in Section 7103 is not jurisdictional. Instead, the statute of limitations under the CDA is an affirmative defense in which the burden is on the moving party to prove by a preponderance of the evidence that the defense applies. The *Sikorsky* decision departed from prior precedent characterizing the CDA statute of limitations as jurisdictional,[148] finding such precedent had been effectively overruled by intervening Supreme Court decisions.[149] For a contractor asserting

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[137]Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1320 (Fed. Cir. 2014) (citing United States v. T&W Edmier Corp., 465 F.3d 764, 766 (7th Cir. 2006); Malone v. United States, 849 F.2d 1441, 1443 (Fed. Cir.), *modified*, 857 F.2d 787 (Fed. Cir. 1988)).

[138]41 U.S.C. §7103(a)(4)(A).

[139]48 C.F.R. §33.206(a).

[140]41 U.S.C. §7103(a)(4)(B); 48 C.F.R. §33.206(b).

[141]48 C.F.R. §33.206(a).

[142]41 U.S.C. §7103(f)(1).

[143]41 U.S.C. §7103(f)(2).

[144]41 U.S.C. §7104(b)(1).

[145]41 U.S.C. §7103(f)(5).

[146]System Planning Corp. v. United States, 95 Fed. Cl. 1 (2010).

[147]773 F.3d 1315 (Fed. Cir. 2014).

[148]*See, e.g.*, System Dev. Corp. v. McHugh, 658 F.3d 1341, 1347 (Fed. Cir. 2011); Arctic Slope Native Ass'n v. Sebelius, 583 F.3d 785, 793, 800 (Fed. Cir. 2009); England v. Swanson Grp., Inc., 353 F.3d 1375, 1379 (Fed. Cir. 2004).

[149]*See* Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013) (noting statutory time limits were not to be construed as jurisdictional unless explicitly stated so by Congress); Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 131 S. Ct. 1197 (2011); *see also* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 38 Media L. Rep. 1321, 93 USPQ 2d 1719 (2010); Arbaugh v. Y&H Corp., 546 U.S. 500, 97 FEP Cases 737 (2006).

the defense against the government, the contractor must show that the government had actual or constructive knowledge of the government's claim more than six years before the contracting officer issued a final decision.[150] And to assert the defense against a contractor, the government would have to show that the contractor had actual or constructive knowledge of its claim more than six years before submitting a written demand to the contracting officer.[151]

2. The 12-Month Limitations Period Following Receipt of Final Decision

Assuming the six-year presentment requirement is met, a contractor must file an action in the COFC within 12 months of the date of receipt of the contracting officer's final decision.[152] The 12-month limitations period displaces the six-year statute of limitations for claims under 28 U.S.C. Section 2501.[153] This time period is calculated on the basis of 12 calendar months, not 365 days.[154] To prevail on a statute of limitations defense, the burden is on the government to prove—through objective indicia—that the contractor or his representative physically received the final decision more than 12 months before filing a petition in the COFC.[155]

3. Accrual Under the Contract Disputes Act

A claim is a written assertion by one of the contracting parties seeking, as a matter of a right, a sum certain, an adjustment of contract terms, or other relief arising under the contract.[156] Claims do not need to be submitted in any particular form, but must be in writing to the contracting

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[150] *See Sikorsky Aircraft Corp.*, 773 F.3d at 1320 ("A claim is submitted by the government when the contracting officer renders a final decision to the contractor."); *see also* Motorola, Inc. v. West, 125 F.3d 1470 (Fed. Cir. 1997); 48 C.F.R. §33.206(b).

[151] *See* Environmental Safety Consultants, Inc. v. United States, 97 Fed. Cl. 190 (2011) (noting CDA claims accrue at time a contractor knows or should have known of events giving rise to government liability).

[152] 41 U.S.C. §7104(b)(3).

[153] System Planning Corp. v. United States, 95 Fed. Cl. 1, 3 (2010); S&M Mgmt. Inc. v. United States, 82 Fed. Cl. 240, 245 n.6 (2008); Pathman Constr. Co. v. United States, 817 F.2d 1573, 1580 (Fed. Cir. 1987); LaCoste v. United States, 9 Cl. Ct. 313, 314 (1986); Board of Governors of Univ. of N.C. v. United States, 10 Cl. Ct. 27 (1986); Kasler/Cont'l Heller/Fruin Colnon v. United States, 9 Cl. Ct. 187 (1985).

[154] Quillen v. United States, 89 Fed. Cl. 148, 151 (2009) (noting that although other federal courts often construe a year as constituting 365 days, §7104 specifically references 12 months); *see also* Catel, Inc. v. United States, No. 05-1113 C, 2012 WL 3104366 (Ct. Cl. July 30, 2012).

[155] Riley & Ephriam Constr. Co. v. United States, 408 F.3d 1369, 1371–72 (Fed. Cir. 2005); Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991); *see also* Brickwood Contractors, Inc. v. United States, 77 Fed. Cl. 624 (2007) (finding confirmation sheet of final decision transmitted by facsimile insufficient to establish physical receipt by contractor).

[156] Newtech Research Sys., LLC v. United States, 99 Fed. Cl. 193, 203 (2011), *aff'd per curiam*, 468 F. App'x 985 (Fed. Cir. 2012); 48 C.F.R. §52.233-1(c).

officer and provide adequate notice of the basis for the claim.[157] For purposes of the six-year presentment requirement, a claim accrues as of the date by which all events that fix the alleged liability of the government or the contractor—thereby permitting assertion of a claim—either were known or should have been known.[158] For liability to be fixed, some injury must have occurred, though monetary damages need not have been incurred.[159] Thus, a claim accrues under the CDA when a claimant knew or should have known of events alleged to give rise to liability.[160]

The 12-month period in which a CDA action must be commenced begins to run from physical receipt of the contracting officer's final decision denying a claim, not from the date the contracting officer's letter was opened or the date any particular person reviewed the decision.[161] Receipt of a termination notice identified as a final decision triggers the 12-month period in which a contractor may appeal.[162] In some circumstances, receipt by an agent of the claimant will trigger the running of the 12-month period.[163] However, if a claim must be certified and is not, a contracting officer's action on the uncertified claim may not trigger the 12-month period for appeal.[164]

4. Filing and Relation Back Under the Contract Disputes Act

In general, a CDA claim is "filed" when a petition is filed in the COFC or when a case is filed in a district court and subsequently transferred to the COFC under Section 1631 of Title 28.[165]

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[157]Contract Cleaning Maint., Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987).

[158]Sikorsky Aircraft Corp. v. United States, 773 F.3d 1315, 1320 (Fed. Cir. 2014); 48 C.F.R. §33.201.

[159]*Sikorsky Aircraft Corp.*, 773 F.3d at 1320; 48 C.F.R. §33.201.

[160]Environmental Safety Consultants, Inc. v. United States, 97 Fed. Cl. 190 (2011).

[161]Riley & Ephriam Constr. Co., Inc. v. United States, 408 F.3d 1369 (Fed. Cir. 2005); Uniglobe Gen. Trading & Contracting Co. v. United States, 107 Fed. Cl. 423 (2012) (12-month period began to run on date contracting officer emailed final decision to organization); Newtech Research Sys., LLC v. United States, 99 Fed. Cl. 193 (2011) (claim of assignee accrued on date original contractor received final decision), *aff'd per curiam*, 468 F. App'x 985 (Fed. Cir. 2012); Borough of Alpine v. United States, 923 F.2d 170, 172 (Fed. Cir. 1991) (physical receipt, not actual notice, triggers 12-month time period); Policy Analysis Co. v. United States, 50 Fed. Cl. 626, 629 (2001), *aff'd per curiam*, 61 F. App'x 705 (Fed. Cir. 2003); Kenney Orthopedic, LLC v. United States, 88 Fed. Cl. 688, 702 (2009).

[162]Educators Assocs., Inc. v. United States, 41 Fed. Cl. 811 (1998); K&S Constr. v. United States, 35 Fed. Cl. 270 (1996), *aff'd*, 121 F.3d 727 (Fed. Cir. 1997).

[163]*Policy Analysis Co.*, 50 Fed. Cl. at 633 (commercial mailroom clerk where previously authorized); Hamza v. United States, 36 Fed. Cl. 10 (1996) (receipt by attorney); Structural Finishing, Inc. v. United States, 14 Cl. Ct. 447, 449–50 (1988) (same); *Alpine*, 923 F.2d at 173 (receipt by mayor of borough). *But see Riley*, 408 F.3d at 1374 (receipt by post office not receipt since post office not agent).

[164]H.H.O. Co. v. United States, 12 Cl. Ct. 147, 159–60 (1987); United Constr. Co. v. United States, 7 Cl. Ct. 47, 51 (1984) (submission of an uncertified claim required to be certified is a legal nullity).

[165]See Sections II.B.1 & II.B.2 of this chapter.

Under the CDA, relation back is not automatic for all claims arising under a single contract.[166] Instead, whether a claim in the COFC relates back is a fact-specific inquiry. The court has observed that, in making this assessment, "the key issue is one of notice to the defendant of the claim itself."[167] Allegations concerning claimed damages may relate back to the date of the original petition if the original allegations were specific enough to put the government on notice of the substance of the amended claims.[168] If the requirements of FCFC 15 are met, the newly added claim or party can relate back to the original court filing date, even if the case was filed in a state court or a federal district court and transferred to the COFC.[169] But claims do not relate back if they are (1) new claims not presented to a contracting officer or (2) not legally and factually intertwined such that demand for relief under one would be demand for relief under the other.[170]

5. Tolling Under the Contract Disputes Act

a. Judicial/Equitable Tolling

Unlike the general six-year limitations period of Section 2501, the six-year time limit for submitting a claim to the contracting officer under Section 7103(a)(4)(A) is subject to equitable tolling in appropriate circumstances.[171] But equitable tolling is a narrow doctrine only applied for compelling reasons in the COFC.[172] The court has not applied the doctrine if the claimant has or could have discovered a cause of action.[173] Excusable neglect is not enough to establish equitable tolling.[174] The court has applied the doctrine where a claimant has actively pursued a judicial remedy by filing a defective pleading during the statutory period, or the claimant was tricked or induced by his adversary's misconduct into allowing the deadline to pass.[175] Circumstances falling short of these

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[166]AAAA Enters., Inc. v. United States, 10 Cl. Ct. 191, 193 (1986) (noting that claims presented separately to a contracting officer and subject to discrete final decisions can be distinct).

[167]Moore v. United States, 42 Fed. Cl. 595, 597 (1998).

[168]Vann v. United States, 420 F.2d 968, 974 (Ct. Cl. 1970) (per curiam).

[169]*See* Arakaki v. United States, 62 Fed. Cl. 244, 248–54 (2004).

[170]Renda Marine, Inc. v. United States, 65 Fed. Cl. 152, 161–62, *aff'd*, 509 F.3d 1372 (Fed. Cir. 2007).

[171]*See* Arctic Slope Native Ass'n v. Sebelius, 583 F.3d 785, 798 (Fed. Cir. 2009), *overruled by Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750 (2016).

[172]Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 54 FEP Cases 577 (1990); Environmental Safety Consultants, Inc. v. United States, 97 Fed. Cl. 190, 200–201 (2011); Janicki Logging Co. v. United States, 36 Fed. Cl. 338 (1996), *aff'd*, 124 F.3d 226 (Fed. Cir. 1997).

[173]*Environmental Safety Consultants*, 97 Fed. Cl. at 200–201; Barney v. United States, 57 Fed. Cl. 76, 87–88 (2003).

[174]*Environmental Safety Consultants*, 97 Fed. Cl. at 201; Roth v. United States, 73 Fed. Cl. 144 (2006); *Janicki Logging Co.*, 36 Fed. Cl. at 342–43 (equitable tolling not available if the claimant filed in the wrong court).

[175]*Environmental Safety Consultants*, 97 Fed. Cl. at 200–201; *Irwin*, 498 U.S. at 96; *Janicki Logging Co.*, 36 Fed. Cl. at 342–43.

requirements will not toll the CDA limitations period. Thus, for example, an alleged gross mistake or lack of independence by a contracting officer will not excuse a contractor's failure to appeal a claim within 12 months of denial.[176] Even if a contracting officer makes an incorrect statement to the claimant concerning the time period in which the contractor could appeal to the COFC, equitable tolling may not apply in the absence of detrimental reliance and prejudice.[177]

In *Menominee Indian Tribe of Wisconsin v. United States*,[178] the Supreme Court held that equitable tolling was not warranted because the Tribe could not establish two distinct elements: (1) that it had diligently pursued its rights, and (2) that some extraordinary circumstance stood in its way.[179] The Tribe had relied upon a mistaken understanding that a pending putative class action excused it from filing claims with the contracting officer. Under those circumstances, the Supreme Court found that the Tribe could not establish that an extraordinary obstacle beyond its control prevented it from complying with the filing deadline.[180] The Supreme Court's decision in this case overruled the Federal Circuit's decision in *Arctic Slope Native Association* v. *Sebelius*,[181] which reached the opposite result.[182]

b. Circumstances Affecting the 12-Month Period to Appeal a Final Decision

In general, courts strictly apply the 12-month time limit in which a claimant may appeal a final decision of a contracting officer to the COFC under 41 U.S.C. §7104(b)(3).[183] However, this 12-month time period may not be triggered or may be tolled in some circumstances.

i. Deemed Denial

If the contracting officer has not issued a decision on a claim within 12 months of its submission, the claimant may continue to await a decision rather than proceeding on the basis of a deemed denial.[184] Accordingly, the 12-month limitations period does not begin to run until

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[176]Renda Marine, Inc. v. United States, 71 Fed. Cl. 782 (2006) (barring judicial review of non-appealed final decision of a contracting officer in favor of government counterclaims even though those counterclaims were the "mirror image" of claims brought by the contractor against the government), *aff'd*, 509 F.3d 1372 (Fed. Cir. 2007).

[177]Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).

[178]136 S. Ct. 750 (2016).

[179]*Id.* at 752–53.

[180]*Id.*

[181]583 F.3d 785 (Fed. Cir. 2009), *cert. denied*, 511 U.S. 1026 *and* 562 U.S. 835 (2010), *subsequent proceedings at* 699 F.3d 1289 (2012).

[182]583 F.3d at 791–97.

[183]Thomas v. United States, 34 Fed. Cl. 619, 622 (1995), *aff'd per curiam*, 101 F.3d 714 (Fed. Cir. 1996).

[184]System Planning Corp. v. United States, 95 Fed. Cl. 1, 4 (2010); United Partition Sys., Inc. v. United States, 59 Fed. Cl. 627 (2004); Vincent Schickler TMD U.S.A., Inc. v. United States, 54 Fed. Cl. 264, 271 (2002).

the contracting officer issues a written decision on the claim,[185] and in the absence of a decision by the contracting officer within the 12-month period, a contractor could commence suit more than 12 months after submitting a claim.[186]

ii. Request for Reconsideration to the Contracting Officer

A timely request for reconsideration of a contracting officer's final decision may suspend the finality of the action until the request for reconsideration is acted upon.[187] A request for reconsideration that is acted upon by an agency is presumptively timely,[188] even if the decision ultimately is not changed.[189] No magic words are needed to request reconsideration—post-decision communications that could reasonably be interpreted to be a request for reconsideration are sufficient.[190] In considering if the contractor made a timely reconsideration request, the court considers whether the contracting officer reasonably understood that the contractor intended to seek reconsideration and whether the contracting officer actually reconsidered the final decision.[191]

iii. Appeal

In some circumstances, the CDA's 12-month time limit to appeal the final decision of a contracting officer will be affected by an appeal. For example, in one case, the time period for the government to request an equitable adjustment was not triggered until the Federal Circuit affirmed the COFC's denial of a contractor's request to amend his complaint to

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[185]Pathman Constr. Co. v. United States, 817 F.2d 1573 (Fed. Cir. 1987); Uniglobe Gen. Trading & Contracting Co. v. United States, 107 Fed. Cl. 423 (2012) (contracting officer's issuance of a contract modification not a final decision on claim).

[186]Dawco Constr., Inc. v. United States, 12 Cl. Ct. 445, 446 (1987).

[187]Summit Contractors v. United States, 15 Cl. Ct. 806, 808–09 (1988) (distinguishing a request for reconsideration as suspending finality and noting other courts have found permissive administrative remedies do not toll the statute of limitations) (citing Gregory Lumber Co. v. United States, 229 Ct. Cl. 762, 763 (1982); Bonen v. United States, 666 F.2d 536, 539 (Ct. Cl. 1981); Eurell v. United States, 566 F.2d 1146, 1148 (Ct. Cl. 1977) (per curiam)); Arono, Inc. v. United States, 49 Fed. Cl. 544, 549 (2001) (explaining that if a plaintiff timely submits a request for reconsideration, the time for appeal under the CDA does not commence until the disposition of the request for reconsideration).

[188]*Summit Contractors*, 15 Ct. Cl. at 808 ("It is implicit in the agency's decision to reconsider its initial decision that the motion was timely.").

[189]Guardian Angels Med. Serv. Dogs, Inc. v. United States, 809 F.3d 1244, 1250 (Fed. Cir. 2016) (contracting officer's request, in response to a reconsideration request, for additional documentation tolled the 12-month time period for appealing even though contracting officer later advised that she would not reconsider and would not await the documentation to be supplied); Vepco of Sarasota, Inc. v. United States, 26 Cl. Ct. 639, 646 (1992), *aff'd per curiam*, 6 F.3d 786 (Fed. Cir. 1993) ("[T]ime spent reviewing a request for reconsideration would suspend the finality of the decisions regardless of whether the contracting officer ultimately reconsidered the decisions.").

[190]Metrotop Plaza Assocs. v. United States, 82 Fed. Cl. 598, 601–02 (2008).

[191]*Id.*

challenge a contracting officer's final decision not to award the entire amount claimed by the contractor.[192]

iv. Stay in Collateral Proceedings

The 12-month time period for appealing a contracting officer's final decision to the COFC has been found not to have run where a federal district court stayed the running of the statute of limitations in collateral litigation.[193] In *International Air Response v. United States*,[194] a federal district court had issued a stay order in a False Claims Act (FCA) case in which the United States had intervened. This stay order was issued to prevent duplicative litigation and tolled the running of the statute of limitations for the contractor's CDA claim arising under the same contract as did the FCA action. Later, the contractor filed a CDA action in the COFC. The CDA action was filed more than 12 months after the contracting officer's final decision on the contractor's claim and would have been untimely but for the district court's stay order. The COFC dismissed the contractor's complaint as untimely, finding the district court lacked jurisdiction to issue the prior stay over the CDA claim. The Federal Circuit reversed and held that the government was barred by res judicata from collaterally attacking the prior order of the district court in the later proceeding in the COFC. The Federal Circuit reasoned that because the government had conceded that the district court had authority to issue the stay in the prior FCA action, the government was foreclosed from challenging that authority later in the COFC.

B. Tax Refund Claims

The Internal Revenue Code (IRC) requires that taxpayers seeking a refund of taxes unlawfully assessed comply with tax refund procedures set forth in the IRC. "Under those procedures, a taxpayer must file an administrative claim with the Internal Revenue Service before filing suit against the Government."[195] The period in which to file an administrative claim, set forth in Section 6511 of Title 26, in general is "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid."[196] This limitations period is subject to the numerous exceptions and qualifications set forth

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[192]United States v. Renda Marine Inc., 750 F. Supp. 2d 755 (E.D. Tex. 2010), *aff'd*, 667 F.3d 651 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1800 (2013).

[193]International Air Response v. United States, 302 F.3d 1363, 1369 (Fed. Cir. 2002) (finding the government was barred by res judicata from arguing the district court lacked authority to issue the stay and declining to reach whether equitable estoppel applied).

[194]302 F.3d 1363 (Fed. Cir. 2002).

[195]United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 4, 128 S. Ct. 1511 (2008); *see* 26 U.S.C. §7422(a).

[196]26 U.S.C. §6511(a).

in Section 6511, but is not subject to equitable tolling.[197] A timely administrative claim is necessary for a taxpayer to bring a civil suit for refund.[198]

The limitations period within which a taxpayer must bring suit for a refund is set forth in Section 6532(a) of Title 26, which provides:

> (a) Suits by taxpayers for refund.
>
> (1) General rule. No suit or proceeding under [IRC] section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.[199]

Under this provision, a suit brought by taxpayers on such claims must be brought within two years of the date of mailing by the Secretary of a notice of disallowance.[200] The COFC has held that this limitations period is jurisdictional.[201] But this period may be extended if agreed in writing by the taxpayer and the Secretary.[202] If the requirement of a notice of disallowance is waived, the two-year period begins on the date such waiver is filed.[203] Reconsideration of the notice of disallowance does not affect the running of the two-year period.[204] In bankruptcy proceedings, Section 505(a)(2) of Title 11 governs.[205]

As for suits by other than the taxpayer, no such suit "under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action,"[206] unless a request is made for the return of property described in Section 6343(b). In that case, the nine-month period may be extended as provided in Section 6532(c)(2).[207]

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[197]United States v. Brockamp, 519 U.S. 347, 354, 117 S. Ct. 849 (1997).

[198]*See* United States v. Dalm, 494 U.S. 596, 602, 110 S. Ct. 1361 (1990) ("Read together, the import of these sections is clear: unless a claim for refund of a tax has been filed within the time limits imposed by §6511(a), a suit for refund . . . may not be maintained in any court."); *see also Clintwood Elkhorn Mining*, 553 U.S. at 14 (reaffirming that the plain language of §§7422(a) and 6511 of Title 26 "requires a taxpayer seeking a refund for a tax assessed in violation of the Export Clause, just as for any other unlawfully assessed tax, to file a timely administrative refund claim before bringing suit against the Government.").

[199]26 U.S.C. §6532.

[200]*See* RHI Holdings, Inc. v. United States, 142 F.3d 1459, 1460 (Fed. Cir. 1998) ("[T]he taxpayer has two years from the date the notice of disallowance of the refund claim is mailed to file suit.").

[201]*See* Langan v. United States, 111 Fed. Cl. 654, 655 (2013).

[202]26 U.S.C. §6532(a)(1).

[203]*Id.* §6532(a)(3).

[204]*Id.* §6532(a)(4).

[205]*Id.* §6532(a)(5).

[206]*Id.* §6532(c)(1).

[207]*Id.* §6532(c)(2).

C. Accounts of Officers, Agents, or Contractors

Pursuant to Section 1494 of Title 28, the COFC has jurisdiction to determine amounts due on "unsettled account[s]" of "officers, agents, or contractors" under certain circumstances.[208] Jurisdiction under this provision requires (1) that the claimant or the person he represents has applied to the proper department of the government for settlement of the account, (2) three years have elapsed from the date of such application without settlement, and (3) no suit upon the same has been brought by the United States.[209] A civilian employee of the Department of the Army has been held to be an agent for these purposes.[210]

This basis of jurisdiction originally was enacted as section three of the Tucker Act.[211] The COFC recently explained that "[p]rior to enactment of section three of the Tucker Act, claims of indebtedness to the United States could be adjudicated only in suits brought by the United States in the United States District Courts, resulting in prejudice to individuals forced to wait indefinitely to have their accounts settled."[212] This provision was intended to change that rule.

D. Oyster Growers' Claims

Section 2501 requires claims under Section 1497—by oyster growers for damages from dredging operations—to be filed within two years of termination of the river and harbor improvements operations on which they are based.[213]

E. Copyright Claims

Section 1498 of Title 28 provides:

> Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of

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[208] 28 U.S.C. §1494.

[209] *Id.*

[210] Striplin v. United States, 100 Fed. Cl. 493, 498 (2011).

[211] *See* Standard Dredging Co. v. United States, 71 Ct. Cl. 218, 239 (1930) (explaining that section three of the Tucker Act was enacted "to provide for the speedy disposition of claims by the United States against its officers and agents, and against those having contracts with it, by giving to such persons the right to come into this court and compel the United States to answer and have its claim determined").

[212] *Striplin*, 100 Fed. Cl. at 496 (citing *Standard Dredging*, 71 Ct. Cl. at 239–40).

[213] 28 U.S.C. §2501.

> mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.[214]

Under this provision, copyright actions against the United States brought in the COFC must in general be filed within three years of the copyright infringement.

F. Liquidated Damages Withheld From Contractors

Claims under Section 3703 of Title 40 must be initiated by administrative appeal within 60 days of the allegedly unlawful withholding and filed in the COFC within 60 days of a final order by either the agency head (or Mayor of the District of Columbia) or the Secretary of Labor.[215]

G. Native American Claims

Section 1505 of Title 28 provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.[216]

These claims are subject to the general six-year limitations period of Section 2501. But, since 1990, Congress consistently has provided in appropriations acts for the Department of Interior that the statute of limitations on Indian trust mismanagement claims shall not run until the affected tribe has been given an appropriate accounting.[217] The relevant provision is the Indian Trust Accounting Statute (ITAS),[218] which was part of the Department of the Interior and Related Agencies Appropriation Act, and provides in relevant part:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation

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[214]28 U.S.C. §1498(b).

[215]40 U.S.C. §3703(d).

[216]28 U.S.C. §1505.

[217]*See* United States v. Tohono O'odham Nation, 563 U.S. 307, 131 S. Ct. 1723, 1731 (2011) (citing as examples Pub. L. No. 111-88, 123 Stat. 2904, 2922 (2009); Pub. L. No. 101-512, 104 Stat. 1915, 1930 (1990)).

[218]Pub. L. No. 101-512, 104 Stat. 1915, 1930 (1990).

> pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.[219]

The Federal Circuit has held that ITAS "defers the accrual of a cause of action" covered by the act until the accounting; therefore, even claims that would have been stale and barred by the statute of limitations before enactment of ITAS can be raised if they fall within the statute.[220] As explained by the COFC, ITAS "displaces Section 2501 and can resurrect otherwise barred claims."[221]

In *Shoshone Indian Tribe of Wind River Reservation v. United States*,[222] the Federal Circuit interpreted ITAS to permit a tribe to assert certain claims from August 14, 1946 onward because the tribe had never received an accounting, and therefore the claims had not yet accrued. (The tribe used August 14, 1946 as the start date to its lawsuit because, as explained at the outset of this section, Congress has disallowed claims accruing before that date.)[223] The court rejected the government's argument that claims that had been barred before passage of ITAS should be dismissed.[224] The court reasoned that "the combination of the phrases '[n]otwithstanding any other provision of law' and the directive that the statute of limitations 'shall not commence to run' on any claim until an accounting is provided from which the Tribes can discern whether any losses occurred" unambiguously delayed commencement of the statute of limitations.[225] The court viewed that reading consistent with the unambiguous text and structure of ITAS, and consistent with trust law principles, which underlie the government's obligations to the various tribes under various treaties and statutes.[226]

In examining the scope of claims that can rely upon the extended accrual period in the Act, the Federal Circuit held that ITAS "covers any claims that allege the Government mismanaged funds after they

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[219]Pub. L. No. 106-291, 114 Stat. 922, 939 (2000).

[220]Shoshone Indian Tribe of Wind River Reservation v. United States, 364 F.3d 1339, 1350 (Fed. Cir. 2004).

[221]Simmons v. United States, 71 Fed. Cl. 188, 193 (2006) (internal quotation marks omitted); *accord* Otoe-Missouria Tribe of Oklahoma v. Kempthorne, No. CIV-06-1436-C, 2008 WL 5205191, at *5 (W.D. Okla. Dec. 10, 2008) (interpreting the Act and explaining, "because Plaintiff asserts it has never received an accounting, its claims have not yet accrued"), *abrogated on other grounds by* Gilmore v. Weatherford, 694 F.3d 1160 (10th Cir. 2012).

[222]364 F.3d 1339 (Fed. Cir. 2004).

[223]*Id.* at 1343.

[224]*Id.* at 1344.

[225]*Id.* at 1346 (alteration in original).

[226]*Id.* at 1347–48 (citing, inter alia, United States v. Mitchell, 463 U.S. 206, 103 S. Ct. 2961 (1983), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8, 8 L. Ed. 25 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557, 8 L. Ed. 483 (1832)).

were collected, as well as any claims that allege the Government failed to timely collect amounts due and owing to the Tribes under its sand and gravel contracts."[227] ITAS, however, does not extend to claims based on the government's alleged mismanagement of sand and gravel *assets*.[228] This distinction was based on a prior Supreme Court decision that held the government "did not have a fiduciary or statutory duty to maximize the prices obtained under the leases entered into between the tribes and third parties" as well as an understanding of the limits of the information that the accounting might reveal.[229] In a subsequent decision in the same case, the Federal Circuit held that a claim based on the government's failure to secure optimal leases and failure to collect royalties likewise fell outside the scope of ITAS, as the claim was based on the mismanagement of trust assets—oil and gas rights—rather than trust funds.[230] The COFC has consistently applied that distinction.[231]

H. Vaccine Claims

The COFC has jurisdiction to hear claims under the National Vaccine Injury Compensation Program.[232] As explained by the Supreme Court, Congress enacted the National Childhood Vaccine Injury Act (NCVIA) in 1986 to "stabilize the vaccine market and facilitate compensation."[233] The Court explained that the Act:

> establishes a no-fault compensation program "designed to work faster and with greater ease than the civil tort system." *Shalala v. Whitecotton*, 514 U.S. 268, 269 (1995). A person injured by a vaccine, or his legal guardian, may file a petition for compensation in the United States Court of Federal Claims, naming the Secretary of Health and Human Services as the respondent. A special master then makes an informal adjudication of the petition within (except for two limited exceptions) 240 days. The Court of Federal Claims must review objections to the special master's decision and enter final judgment under a similarly tight statutory deadline. At that

[227]Shoshone Indian Tribe of Wind River Reservation v. United States, 364 F.3d 1339, 1351 (Fed. Cir. 2004).

[228]*Id.* at 1350.

[229]*Id.* (citing and discussing United States v. Navajo Nation, 537 U.S. 488, 123 S. Ct. 1079 (2003)).

[230]Shoshone Indian Tribe of Wind River Reservation v. United States, 672 F.3d 1021, 1035 (Fed. Cir. 2012).

[231]*See, e.g.*, Oenga v. United States, 83 Fed. Cl. 594, 609, 613 (2008) (rejecting claims for failure to collect proper oil and gas royalties and failure to collect "present fair annual rental" as claims related to trust assets, rather than funds, and therefore outside the scope of the Act); Rosales v. United States, 89 Fed. Cl. 565, 580 (2009) (deeming claims for breach of fiduciary duty outside the scope of the Act as they "center on parcels of land").

[232]42 U.S.C. §300aa-12(a).

[233]Bruesewitz v. Wyeth LLC, 562 U.S. 223, 131 S. Ct. 1068, 1073 (2011).

> point, a claimant has two options: to accept the court's judgment and forgo a traditional tort suit for damages, or to reject the judgment and seek tort relief from the vaccine manufacturer.[234]

Petitions filed in the COFC under the NCVIA are subject to the limitations periods laid out in the NCVIA.[235] The Act also specifies the limitations period applicable to civil actions under state law,[236] in circumstances under which such actions are permitted.

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[234] *Id.* (footnotes omitted).

[235] *See* 42 U.S.C. §300aa-16(a)–(b).

[236] *See* 42 U.S.C. §300aa-16(c); *Bruesewitz*, 131 S. Ct. 1068.

About the Contributors

Brian Dean Abramson has been a legal editor for Bloomberg BNA since 2013. From 2010 to 2012, he was a law clerk for the Honorable Pauline Newman of the U.S. Court of Appeals for the Federal Circuit, where he took an exceptional interest in the court's vaccine injury docket and assisted with most of the cases arising in that area assigned to chambers during his clerkship. Prior to his clerkship, Mr. Abramson received his J.D., summa cum laude, from the Florida International University College of Law in 2005, practiced intellectual property law with the firm of Lott & Friedland from 2005 to 2007, received an LL.M. in Intellectual Property Law, with highest honors, from The George Washington University Law School in 2009, and interned for the Honorable Susan G. Braden of the U.S. Court of Federal Claims in 2010.

Richard W. Arnholt is a partner in Bass, Berry & Sims PLC's government contracts practice. Richard advises companies, large and small, on the complex rules and regulations applicable to grants and contracts from federal and state governmental entities. He regularly assists clients with litigation, counseling, and transactional matters and has extensive experience working with companies and individuals faced with potential exclusion from federal contracting, advising them through suspension and debarment proceedings before various government agencies. Before joining private practice, Richard served as a law clerk for the Honorable Mary Ellen Coster Williams at the U.S. Court of Federal Claims. He is a graduate of the University of St. Andrews in Scotland (1997) and received his J.D. (2002) and LL.M. (2003) from Georgetown University Law Center.

J. Hunter Bennett is a special counsel with Covington & Burling LLP, where he regularly represents government contractors in bid protests before the U.S. Court of Federal Claims and the U.S. Government Accountability Office. He also counsels clients in a wide range of formation and disputes issues. Prior to entering private practice, he served as a trial attorney with the U.S. Department of Justice, where he was a member of the Department's bid protest team and defended the United States against all manner of cases filed in the Court of Federal Claims.

William C. Bergmann is a partner in Baker Hostetler's Washington, D.C., office. He focuses his practice on intellectual property litigation and counseling, including issues related to government contracts. He has litigated numerous intellectual property cases as lead attorney in several

district courts throughout the country, as well as the U.S. Court of Federal Claims, the International Trade Commission, and the U.S. Court of Appeals for the Federal Circuit. He previously worked as a trial and appellate attorney for 12 years at the U.S. Department of Justice, focusing on litigation in the Court of Federal Claims brought pursuant to 28 U.S.C. §1498. Bill has been named as a fellow of the Litigation Counsel of America, a trial lawyer honorary society composed of less than one-half of one percent of American attorneys, and has been recognized for his patent litigation skills by Chambers USA. He is currently secretary of the Court of Federal Claims Bar Association and co-chair of its Intellectual Property Committee. Bill is also registered to practice before the U.S. Patent and Trademark Office.

F. Greg Bowman is a partner of Williams & Connolly LLP. He has successfully defended individuals and companies in a diverse range of civil and criminal matters involving government contracting, national security, and other areas of civil litigation. Prior to joining the firm, he served on active duty in the U.S. Navy, first as a submarine officer and subsequently in the Navy Judge Advocate General's Corps. While on active duty, Mr. Bowman tried criminal cases and litigated civil cases in federal courts involving constitutional and administrative law. Mr. Bowman was awarded a J.D. from Yale Law School and a B.S. in Electrical Engineering from Duke University.

Daniel J. Cook is an associate in the government contracts group at DLA Piper in Washington, D.C. Daniel regularly works on government contracts litigation issues, including bid protests and contract disputes, and has represented clients before the U.S. Government Accountability Office, the U.S. Court of Federal Claims, the U.S. Small Business Administration's Office of Hearings and Appeals, and the Boards of Contract Appeals. Daniel also counsels companies on various government contracts issues, including subcontracting, contract bid and proposal reviews, and regulatory compliance.

David F. Dowd is a partner in the government contracts practice of Mayer Brown. He is an experienced litigator handling cases involving information technology, major defense weapon systems, engineering services, and health care. He litigates before the Boards of Contract Appeals, the U.S. Government Accountability Office, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit, and also appears in federal district courts in contract and subcontract disputes. In addition, his counseling practice involves commercial items, conflicts of interest, cost accounting and allowability issues, defective pricing, subcontracting and teaming, assignments and novations, leasing, and internal investigations. David is active in the American Bar Association Section of Public Contract Law, where he has served as chair of the Federal Division, co-chair of the Bid Protest Committee, and co-chair of the Teaming and Subcontracting Committee. He writes and speaks frequently on government contracting issues and is the co-editor of the Mayer Brown blog *Meaningful Discussions*.

Kyle J. Fiet is counsel in Sidley Austin LLP's Washington, D.C., office. Mr. Fiet is a member of the firm's government contracts group, where his practice includes a wide range of litigation, counseling, and transactional matters. Prior to joining Sidley, Mr. Fiet served as a law clerk to the Honorable Karen LeCraft Henderson at the U.S. Court of Appeals for the District of Columbia Circuit. He received his law degree, with high honors, from the University of North Carolina School of Law and was an articles editor for the *North Carolina Law Review*. Mr. Fiet earned his undergraduate degree in Chemical Engineering, with honors, from Brigham Young University.

Elizabeth T.M. Fitzpatrick is an associate in the general litigation group at Arnold & Porter in Washington, D.C. Ms. Fitzpatrick's practice includes advising and representing clients in a wide variety of litigation, national security, and compliance matters. Ms. Fitzpatrick has particular experience conducting internal investigations and advising companies on export enforcement and other international law enforcement issues. She also represents clients in civil antitrust matters and false claims/*qui tam* actions. Prior to law school, Ms. Fitzpatrick worked as a paralegal-specialist and treaty analyst in the Office of the Legal Adviser at the U.S. Department of State. She received her law degree, with honors, from Washington University School of Law, where she was editor-in-chief for the *Washington University Law Review*. Ms. Fitzpatrick earned her undergraduate degree, with honors, from the University of Pennsylvania and also received an M.Sc. degree from the London School of Economics and Political Science.

Travis A. Greaves is an attorney in Caplin & Drysdale's Washington, D.C., office. Mr. Greaves concentrates his practice on civil and criminal tax controversies at both the federal and state levels. He represents individuals, partnerships, and corporations through all stages of tax investigations and litigation, including voluntary disclosures, audits and examinations, audit reconsiderations, and negotiated resolutions with the Internal Revenue Service. In addition, Mr. Greaves is an adjunct professor at Georgetown University Law Center, where he teaches a course entitled "Tax Penalties and International Enforcement." Prior to joining Caplin & Drysdale, Mr. Greaves served as the tax and economic policy advisor to Louisiana Governor Bobby Jindal and as an attorney advisor at the U.S. Tax Court.

Marcia G. Madsen is chair of the government contracts practice at Mayer Brown. She has represented contractors in regulatory, policy, transactional, litigation, and investigative matters involving virtually every federal agency. Her clients include major defense contractors, information technology and systems integrators, telecommunications companies, engineering firms, insurers, and manufacturing companies. Ms. Madsen's litigation practice includes bid protests, claims and disputes before the U.S. Government Accountability Office, the Boards of Contract Appeals, and the U.S. Court of Federal Claims. She is a former chair of the American Bar Association Section of Public Contract Law. She is a member of

the Court of Federal Claims Advisory Council-Emeritus and a recipient of the Court's Golden Eagle award. She is a past president of the Board of Contract Appeals Bar Association. She was appointed by the Executive Office of the President to chair the Section 1423 Panel, which recommended revision of the acquisition laws. She speaks and writes frequently on government contracts and litigation topics.

Timothy G. McCormick is an active duty Marine Corps judge advocate. He currently serves as the victims' legal counsel aboard Marine Corps Base Hawaii-Kaneohe Bay. None of his writings or contributions represents the policy of the Marine Corps, the Department of Defense, or any other government agency. He previously served as a defense counsel, representing Marines and sailors at courts-martial. Before becoming a judge advocate, Captain McCormick was an artillery officer who deployed to Afghanistan and Africa. He graduated from the University of Maryland School of Law, cum laude, in 2014, and was the editor-in-chief of the *Maryland Journal of International Law*.

Nicole B. Neuman is an associate in the government contracts group at Arnold & Porter in Washington, D.C. Ms. Neuman's practice includes bid protests, claims, and False Claims Act litigation, as well as government investigations and corporate acquisitions. She has represented clients in a variety of industries, including defense, information technology, and health care before federal courts, the U.S. Government Accountability Office, the Boards of Contract Appeals, and federal agencies. Ms. Neuman's practice also includes counseling contractors on cost accounting standards, subcontracts, teaming agreements, and compliance. She received her law degree, with honors, from the University of Pennsylvania. Prior to law school, Ms. Neuman received her Masters and B.S. in Accounting from Washington University in St. Louis.

Todd R. Overman is chair of Bass, Berry & Sims PLC's government contracts practice. Todd has almost 15 years of experience advising companies on the unique aspects of doing business with the federal government. His practice includes a combination of regulatory and compliance advice, transactional issues, and litigation and dispute resolution for government contractors. Prior to entering private practice, Todd served as a law clerk for the Honorable Loren A. Smith of the U.S. Court of Federal Claims. Todd is a 1997 graduate of Duke University and a 2002 graduate of the Vanderbilt University Law School.

Edward C. Reddington is co-chair of Williams & Connolly's government contracts practice group. His practice focuses on complex civil and criminal litigation as well as internal and governmental investigations. Drawing on his prior experience in the U.S. Department of Defense, Mr. Reddington frequently represents federal contractors in matters that have a national security, aerospace, or government contracting component, including False Claims Act investigations and litigation, Foreign Corrupt Practices Act matters, government contract–related investigations and disputes, bid protests, and debarment. Mr. Reddington graduated from West Point in 1991 and received his J.D. in 1998 from the University of

Virginia School of Law, where he was a member of the Order of the Coif. In 2004, before leaving active duty, he earned his LL.M. in Military Law with a specialization in government contracts from the U.S. Army's Judge Advocate General's Legal Center and School, where he was an honor graduate. Mr. Reddington, who is a retired lieutenant colonel, has taught federal litigation and advocacy as an adjunct professor at the JAG School in Charlottesville, Va. He has represented clients in state and federal courts at both the trial and appellate levels, individuals in congressional investigations, entities and individuals in significant matters before the U.S. Department of Justice and the Securities and Exchange Commission, and contractors in debarment proceedings before federal agencies and the World Bank.

Charles M. Ruchelman is a member of the firm of Caplin & Drysdale, Chartered, in Washington, D.C. Prior to entering private practice, he was a tax litigator with the U.S. Department of Justice, Tax Division, U.S. Court of Federal Claims Trial Section. For his work representing the U.S. government in extended trials involving the leveraged corporate-owned life insurance as a tax shelter, Mr. Ruchelman received the U.S. Attorney General's Distinguished Service Award. Mr. Ruchelman has litigated many tax cases in the U.S. Court of Federal Claims, the U.S. Tax Court, and U.S. district courts. He also has an extensive administrative practice before the Internal Revenue Service Examination and Collection Divisions and the Internal Revenue Service Office of Appeals. Prior to his work at the U.S. Department of Justice, Mr. Ruchelman was a trial attorney with the Internal Revenue Service Office of Chief Counsel. Mr. Ruchelman received an LL.M. in Taxation from Georgetown University Law School in 1999 and a J.D. from the Syracuse College of Law in 1993. He is a past chair of the District of Columbia Bar Tax Audits and Litigation Subcommittee and former chair of the Tax Section of the Court of Federal Claims Bar Association.

Lauren Schlanger in an associate in the government contracts practice at Arnold & Porter LLP in Washington, D.C. Ms. Schlanger concentrates her practice in government contracts counseling and litigation, including matters involving contract disputes and claims, bid protests, and government investigations and audits. She has represented government contractors in numerous matters before the U.S. Government Accountability Office, the Boards of Contract Appeals, and the U.S. Court of Federal Claims. Prior to joining Arnold & Porter, Ms. Schlanger served as a law clerk to the Honorable Richard W. Roberts of the U.S. District Court for the District of Columbia. She received her law degree, with high honors, from The George Washington University Law School in 2008.

Dawn E. Stern is a senior associate in the government contracts group at DLA Piper LLP in Washington, D.C. Dawn focuses her practice on providing assistance on a range of government contract matters. Dawn assists clients at all stages of litigation in bid protests and Contract Disputes Act matters before the U.S. Government Accountability Office, the Boards of Contract Appeals, and the U.S. Court of Federal Claims. Dawn also

counsels clients on a variety of government contracts issues, including cost accounting, cybersecurity compliance, subcontracting, and regulatory compliance. Prior to joining DLA Piper, Dawn served as a trial attorney in the National Courts Section of the U.S. Department of Justice, where she litigated bid protest and Contract Disputes Act cases before the U.S. Court of Federal Claims and U.S. Court of Appeals for the Federal Circuit.

Collin Swan is counsel in the Office of Suspension and Debarment at the World Bank, where he assists the chief suspension and debarment officer in reviewing sanctions cases and determining whether to suspend the contracting eligibility of respondent firms and individuals. He is also an associate editor for the *Public Contract Law Journal* and has been a professorial lecturer in law at The George Washington University Law School since 2014, where he teaches courses on scholarly writing and government contracts. Prior to joining the World Bank, Mr. Swan worked as a government contracts associate at Wiley Rein LLP and served as a judicial law clerk for the Honorable Jimmie V. Reyna of the U.S. Court of Appeals for the Federal Circuit.

Ephraim "Eph" Unell is of counsel at Talos Law, representing clients in litigation and other matters. He came to Talos in 2015 after completing a clerkship for the Honorable William S. Greenberg, U.S. Court of Appeals for Veterans Claims. His prior legal experience and current practice encompass administrative, government contract, national security, and veterans law. Eph received his J.D. from Georgetown University Law Center and has completed coursework in The George Washington University's Government Contracts LL.M. program. He also holds an M.A. in Security Studies from Georgetown University.

Anuj Vohra is Special Counsel with Covington & Burling LLP, where he advises clients on issues of contract formation, internal and agency-led investigations, suspension and debarment issues, and disputes, including in bid protests before the U.S. Government Accountability Office and the U.S. Court of Federal Claims. Prior to joining Covington, he was a trial attorney in the U.S. Department of Justice's Commercial Litigation Branch, where he was a member of the bid protest team, and defended the United States in various bid protest and contract disputes before the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit.

Tara L. Ward is an associate in Wiley Rein LLP's government contracts group in Washington, D.C. Ms. Ward counsels and represents government contractors and subcontractors on a broad range of government contracting issues, including bid protests; contract claims and disputes; multiple award schedule contracting; cost allowability issues; subcontracting issues; and compliance with government investigations, audits, and ethics and procurement integrity laws. She has represented government contractors in matters before the U.S. Court of Federal Claims, the U.S. Government Accountability Office, the Armed Services Board of Contract Appeals, and the Civilian Board of Contract Appeals. Ms. Ward is managing editor

of the *Public Contract Law Journal* and has been a professorial lecturer in law at The George Washington University Law School since 2009, where she teaches courses on scholarly writing and government contracts. She received her law degree, with honors, from The George Washington University Law School, and her A.B., magna cum laude, from Princeton University.

C. Bryan Wilson is a partner at Williams & Connolly LLP. He has successfully represented government contractors in litigation before courts and administrative bodies, in bid protests, and in government investigations. He graduated magna cum laude from Duke University School of Law. Before joining the firm, he clerked for the Honorable Edith H. Jones on the U.S. Court of Appeals for the Fifth Circuit and the Honorable Lee H. Rosenthal on the U.S. District Court for the Southern District of Texas.

Professor **Christopher R. Yukins** serves as co-director of the government procurement law program at The George Washington University Law School. He previously served as a trial attorney at the U.S. Department of Justice, where he practiced primarily before the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit. He is an active member of the Public Contract Law Section of the American Bar Association and is a member of the Procurement Roundtable, an organization of senior members of the U.S. procurement community. He is a faculty advisor to the *Public Contract Law Journal*, is a member of the editorial board of the *European Procurement & Public-Private Partnership Law Review*, and is on the advisory board of *The Government Contractor*. He has contributed to many international training initiatives in procurement, and, as an advisor to the U.S. delegation, he worked for over a decade on reform of the United Nations Commission on International Trade Law (UNCITRAL) Model Procurement Law. In private practice, Professor Yukins has been an associate, partner, and counsel at leading national firms; he is currently counsel to the firm of Arnold & Porter LLP.