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THE TREATMENT OF IMPLIED-IN-LAW AND IMPLIED-IN-FACT CONTRACTS AND PROMISSORY ESTOPPEL IN THE UNITED STATES CLAIMS COURT

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Under the Tucker Act,¹ the United States Claims Court has jurisdiction over actions involving express and implied-in-fact contract claims made by private parties against the United States Government. The court, however, has repeatedly stated that it does not have jurisdiction over actions arising under implied-in-law contracts.² As a result, the distinction between implied-in-fact and implied-in-law contracts can be decisive.

Unfortunately, the Claims Court has failed to distinguish clearly these two types of implied contracts. At times, the court, as well as its predecessor court, the United States Court of Claims, and its reviewing court, the United States Court of Appeals for the Federal Circuit, have granted implied-in-fact contract relief when only implied-in-law contract relief seemed available. This situation generally occurs when a contractor renders performance pursuant to what is believed to be a valid government contract but which is subsequently determined to be invalid because the Government had no authority to enter into such an agreement.³

At other times, the court has dismissed cases for lack of jurisdiction on the basis that the claims at issue involve implied-in-law contracts when, in fact, viable implied-in-fact contract claims exist. This type of situation arises in the context of promissory estoppel. The Claims Court customarily dismisses claims based on promissory estoppel on the ground that such claims are

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1. 28 U.S.C. § 1491(a) (1988).

2. *See, e.g.,* City of El Centro v. United States, 922 F.2d 816, 823 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 2851 (1991).

3. *See infra* text accompanying notes 48-98.

based on implied-in-law contracts, although promissory estoppel is very similar to an implied-in-fact contract and has very little in common with an implied-in-law contract.⁴

The purpose of this Article is to describe and evaluate the Claims Court's handling of implied-in-law contract and promissory estoppel claims. The Article first describes the differences between implied-in-fact and implied-in-law contracts.⁵ The Article next considers the origins of the prohibition on the court's assertion of jurisdiction over implied-in-law contract claims.⁶ The Article then reviews cases in which the courts have, nevertheless, found the Federal Government liable for implied-in-law contracts.⁷ The majority of these cases were decided by the United States Court of Claims and the United States Court of Appeals for the Federal Circuit. These decisions are binding precedent on the Claims Court⁸ and therefore are instructive in understanding the Claims Court's position. The Article recommends that the Tucker Act⁹ be amended expressly to provide relief under the doctrine of implied-in-law contract.¹⁰ Finally, the Article reviews the manner in which the Claims Court applies the doctrine of promissory estoppel.¹¹ The Article argues that promissory estoppel is akin to a contract implied-in-fact and therefore urges the court to exercise its jurisdiction to hear claims based on promissory estoppel.¹²

I. IMPLIED-IN-FACT VERSUS IMPLIED-IN-LAW CONTRACTS

The Claims Court often states that an implied-in-fact contract is an agreement comprised of the same elements required in an express agreement: (1) mutuality of intent to contract, (2) unambiguous offer and acceptance, (3) consideration, and (4) the relevant governmental officer has actual authority to bind the Federal Government.¹³

Implied-in-fact and express contracts differ in the nature of the evidence used to prove their existence. Whereas an express agreement requires an

4. See *infra* text accompanying notes 113-33.

5. See *infra* text accompanying notes 13-27.

6. See *infra* text accompanying notes 28-46.

7. See *infra* text accompanying notes 47-98.

8. See *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982); United States Claims Court General Order No. 1 (Oct. 7, 1982).

9. Ch. 359, § 1, 24 Stat. 505 (1887) (current version at 28 U.S.C. § 1491 (1988)).

10. See *infra* text following note 99.

11. See *infra* text accompanying notes 128-33.

12. See *infra* text accompanying notes 113-27.

13. See *Yachts Am., Inc. v. United States*, 779 F.2d 656, 661 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 832 (1986); *Russell Corp. v. United States*, 537 F.2d 474, 482 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 1073 (1977); *Nitol v. United States*, 7 Cl. Ct. 405, 415 (1985); *Prevado Village Partnership v. United States*, 3 Cl. Ct. 219, 223 (1983).

express oral or written manifestation of assent by the parties to the contract,¹⁴ there is no express offer or acceptance required in the formation of an implied-in-fact contract.¹⁵ Instead, the necessary elements of a binding implied-in-fact contract agreement are inferred from the parties' conduct in light of the surrounding circumstances.¹⁶

Unlike a contract implied-in-fact, a contract implied-in-law need not involve such an agreement,¹⁷ therefore, there is no requirement to demonstrate mutuality of intent or mutual assent.¹⁸ “[It] is but a duty imposed by law

14. See *Chavez v. United States*, 18 Cl. Ct. 540, 545 (1989).

15. See *Chavez*, 18 Cl. Ct. at 544; see also *Yachts American*, 779 F.2d at 661 (“A Claims Court implied contract must be implied in fact, *i.e.*, the legal requisites of an express contract, offer, acceptance, agreement, consideration, etc., must be provided, though in part by implication only.”); *Brannan v. United States*, 7 Cl. Ct. 399, 404 (1985) (“An implied-in-fact contract is a real contract in the usual sense, although the parties involved may not have used specific words of agreement.”).

16. See *Fincke v. United States*, 675 F.2d 289, 295 (Ct. Cl. 1982); *Chavez*, 18 Cl. Ct. at 545; *OAo Corp. v. United States*, 17 Cl. Ct. 91, 99 (1989); *City of El Centro v. United States*, 16 Cl. Ct. 500, 506, *reh'g denied*, 17 Cl. Ct. 794 (1989), *rev'd on other grounds*, 922 F.2d 816 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 2851 (1991).

The Supreme Court has stated that “[a] contract implied in fact is one inferred from the circumstances or acts of the parties; but an express contract speaks for itself and leaves no place for implications.” *Klebe v. United States*, 263 U.S. 188, 192 (1923); see also *Eliel v. United States*, 18 Cl. Ct. 461, 467 (1989) (quoting *Klebe*), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990), *reh'g denied*, No. 90-5036, 1990 U.S. App. LEXIS 14566 (Fed. Cir. Aug. 22, 1990). RESTATEMENT (SECOND) OF CONTRACTS § 4 comment a, explains the differences between implied and express contracts as follows:

Express and implied contracts. Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.

RESTATEMENT (SECOND) OF CONTRACTS § 4 comment a (1981). The United States Court of Appeals for the Federal Circuit has described an implied-in-fact contract as:

A contract implied in fact is not created or evidenced by explicit agreement of the parties, but is inferred as a matter of reason or justice from the acts or conduct of the parties. However, all of the elements of an express contract must be shown by the facts or circumstances surrounding the transaction—mutuality of intent, offer and acceptance, authority to contract—so that it is reasonable, or even necessary, for the court to assume that the parties intended to be bound.

Prudential Ins. Co. v. United States, 801 F.2d 1295, 1297 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

17. See *Travelers Indem. Co. v. United States*, 16 Cl. Ct. 142, 149 (1988). An implied-in-fact contract should also not be confused with an implied covenant of good faith and fair dealing. Such a covenant does not create a contract, but rather is an obligation or promise that is implicitly contained in an existing contract. See *id.*

18. *Id.*

and treated as a contract for the purposes of a remedy only.'"¹⁹ An implied-in-law contract exists where one party has conferred a benefit on another party and *equity* requires that there be compensation.²⁰ The Court of Claims has stated that "a contract implied in fact is a *promise implied* by the law," whereas "a contract implied in law is an *obligation imposed* by the law."²¹

A key factor in distinguishing between the two types of contracts is often whether the parties intended to be bound by an agreement. The Court of Claims made the distinction that:

[A] contract implied in fact is an implied contract in which the intention is ascertained and enforced, while a contract implied in law is a mere fiction, the intention being disregarded, and the quasi contractual obligation being imposed by law to bring about justice, without regard to the intention of the parties.²²

An implied-in-law contract, rather than an implied-in-fact contract, appears to arise, however, when the parties intend to be bound by an agreement and performance is rendered, but a statute or regulation prohibits the Federal Government from entering into the agreement.²³

19. *Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1255-56 (Ct. Cl. 1970) (quoting 17 C.J.S. *Contracts* § 4 (1963)); *Travelers Indem. Co.*, 16 Cl. Ct. at 149.

20. See, e.g., *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830, 834 (2d Cir.), *cert. denied*, 434 U.S. 859 (1977).

The United States Supreme Court has distinguished implied-in-fact and implied-in-law contracts as follows:

The "implied[-in-fact] agreement" . . . is not an agreement "implied in law," more aptly termed a constructive or *quasi* contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement "implied in fact," founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.

Baltimore & O.R. Co. v. United States, 261 U.S. 592, 597 (1923).

21. *J.C. Pitman & Sons, Inc. v. United States*, 317 F.2d 366, 368 (Ct. Cl. 1963) (emphasis in original).

22. *Algonac*, 428 F.2d at 1255-56 (quoting 17 C.J.S. *Contracts* § 4 (1963)). See also *Chavez v. United States*, 18 Cl. Ct. 540, 545 (1989) ("An implied-in-fact contract may be created through the acceptance of benefits with the knowledge that the supplier expects to be compensated."); *Nitol v. United States*, 7 Cl. Ct. 405, 415 (1985) ("Implied-in-fact contracts differ from contracts implied-in-law (quasi-contracts), where a duty is imposed by operation of law without regard to the intent of the parties. Such arrangements are treated as contracts for purposes of remedy only."); *Wertz v. United States*, 2 Cl. Ct. 45, 52 (1983) (same).

23. See *infra* text accompanying notes 47-98; see also *Hickman v. United States*, 135 F. Supp. 919, 922 (W.D. La. 1955) (A written instrument executed between parties is not necessarily determinative of whether there is an implied-in-fact or implied-in-law contract. "The true criterion is that a contract 'implied in fact' rests upon *consent* implied from facts and circumstances showing a mutual intention to contract, whereas in one 'implied in law' *consent is lacking*, being forced upon the parties by law, sometimes even in the teeth of their express contract.") (emphasis in original), *reh'g denied*, 140 F. Supp. 759 (W.D. La. 1956).

Implied-in-fact and implied-in-law contracts also differ in the remedies they offer. Whereas the measure of recovery for an implied-in-fact contract is usually based on reliance damages,²⁴ recovery for an implied-in-law contract generally is limited to restitution²⁵ and relief is only available if the other party has been "unjustly enriched."²⁶ As such, it is similar to recovery under a tort theory.²⁷

II. THE CLAIMS COURT'S LACK OF JURISDICTION OVER CLAIMS INVOLVING IMPLIED-IN-LAW CONTRACTS

The Tucker Act,²⁸ the fundamental jurisdictional statute of the Claims Court, does not expressly prevent the court from adjudicating implied-in-law contract claims against the Federal Government.²⁹ The Act simply states:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or *implied contract* with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.³⁰

A reasonable interpretation of the above statutory provision could include jurisdiction over an implied-in-law contract because such a contract is, by its name, an "implied contract."³¹

24. See *OAD Corp. v. United States*, 17 Cl. Ct. 91 (1989).

25. See *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986); *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147, 1154-55 (Fed. Cir. 1983).

26. *Amdahl*, 786 F.2d at 393.

27. See Note, *Government Contracts: Quasi-Contractual Recovery Against the Government: Hickman v. United States*, 135 F. Supp. 919 (W.D. La. 1955), 42 CORNELL L.Q. 278, 282-83 (1957).

28. Ch. 359, § 1, 24 Stat. 505 (1887) (current version at 28 U.S.C. § 1491 (1988)).

29. See also The Contract Disputes Act of 1978 § 3(a), 41 U.S.C. § 602(a) (1988) ("[T]his Act applies to any express or implied contract . . ."). For history on the Tucker Act and the Court of Claims, see *United States v. Mitchell*, 463 U.S. 206, 212-16 (1983); Richardson, *History, Jurisdiction, and Practice of the Court of Claims of the United States*, reprinted in 17 Ct. Cl. 3 (1882); J.A. Hoyt, *Legislative History*, reprinted in 1 *United States Court of Claims Digest* xiii - xxviii (1950); W. Cowen, P. Nichols, Jr. & M. Bennett, *The United States Court of Claims: A History*, reprinted in 216 Cl Ct. 1, 35 (1978); Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387 (1968).

30. 28 U.S.C. § 1491(a)(1) (1988) (emphasis added). Prior to the enactment of the Tucker Act, the Organic Act of 1855, and the Amendatory Act of 1863, gave the Court of Claims jurisdiction to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States . . . ; and also all claims which may be referred to said court by either house of Congress." Act of February 24, 1855, ch. 122, 10 Stat. 612; Act of March 3, 1863, 12 Stat. 765. See also Richardson, *supra* note 29, at 16.

31. The statute might also be interpreted as providing that the Claims Court shall have jurisdiction over claims based on "an express or implied contract with the United States . . .

Indeed, interpretations of the Tucker Act have permitted the use of equity doctrines to arrive at pecuniary judgments.³² Thus, the Court of Claims determined that it had jurisdiction to review equitable claims seeking rescission based on mutual mistake or frustration of a contract.³³ It also heard class actions even where the court's rules did not provide for such.³⁴ The Court of Claims stated:

This court has always construed the [current] version of the Tucker Act as continuing the previously established use of equitable doctrines. . . . Often, the court has awarded (or denied) a money judgment based upon an equitable theory, without even discussing its jurisdiction. . . . This continued assumption that we can properly use equitable theories in passing upon suits for monetary awards is grounded firmly on the Tucker Act's history, on unquestioned Supreme Court cases and on Court of Claims decisions.³⁵

Because recovery under implied-in-law contract involves the use of an equitable doctrine to arrive at a pecuniary judgment, it is arguably within the court's jurisdiction under the Tucker Act.³⁶

not sounding in tort." See Note, *supra* note 27, at 278-79 (noting that one problem in construing the statute is determining whether the exclusion of cases "sounding in tort" is applicable to all actions brought under the Tucker Act or limited to actions based on liquidated or unliquidated damages). But see *Dooley v. United States*, 182 U.S. 222, 224 (1901) (the Supreme Court specifically determined that words "not sounding in tort" found in the Tucker Act are terms referable only to the fourth jurisdictional claim—actions for liquidated or unliquidated damages). The Supreme Court has taken the position that claims based on an implied-in-law contract are not claims based on "express or implied contract" but rather claims based on "liquidated or unliquidated damages" that are "sounding in tort." See *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 275 (1869) ("The language of the statutes which confer jurisdiction upon the Court of Claims, excludes, by the strongest implication, demands against the Government founded on torts."); see also *infra* text accompanying footnotes 39-43.

32. See *Passaro v. United States*, 774 F.2d 456, 459 (Fed. Cir. 1985) ("Equity, to the extent that it can be administered by the Claims Court, exists as an incident of general jurisdiction under the Tucker Act when that Act is invoked . . ."), *cert. denied*, 476 U.S. 1114 (1986).

33. See *Pauley Petroleum, Inc. v. United States*, 591 F.2d 1308, 1316 (Ct. Cl.), *cert. denied*, 444 U.S. 898 (1979).

34. See *Quinault Allottee Ass'n v. United States*, 453 F.2d 1272, 1274 & n.1 (Ct. Cl. 1972), *cert. denied*, 416 U.S. 961 (1974); see also *Klamath and Modoc Tribes and Yahooskin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 488 (1966) (use of accounting to aid in rendering money judgments).

35. *Pauley Petroleum*, 591 F.2d at 1316; see also *1776 K Street Assoc. v. United States*, 602 F.2d 354, 356 (Ct. Cl. 1979) ("Despite the well publicized exclusion of equitable relief from the remedies available here, a claim for money is not barred merely because it rests on equitable grounds."), *cert. denied*, 447 U.S. 905 (1980), *reh'g denied*, 453 U.S. 928 (1981).

36. While the Claims Court repeatedly has stated that it lacks jurisdiction to adjudicate implied-in-law contract disputes, the court has made an express exception where a claim of implied-in-law contract is asserted by the Federal Government in a counter-claim for money damages. See *BLH, Inc. v. United States*, 13 Cl. Ct. 265, 275 (1987) (citing *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536 (1946); *Shippen v. United States*, 654 F.2d 45 (Ct. Cl.

Unlike other types of equitable doctrines underlying pecuniary judgments, however, the Supreme Court has expressly stated that the Tucker Act does not permit jurisdiction over implied-in-law contract claims against the United States.³⁷ Thus, a distinction has emerged between pecuniary recovery under the doctrine of implied-in-law contract and other equitable doctrines.³⁸

In *Merritt v. United States*,³⁹ the Supreme Court stated that the "Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law."⁴⁰ The Supreme Court's statement evolved from a line of decisions in which the Court interpreted the Tucker Act and its predecessor acts as continuing a prohibition against implied-in-law claims against the United States that existed prior to their enactment.⁴¹ Specifi-

1981)). Remarkably, the court finds its jurisdiction over such claims under another section of the Tucker Act that simply provides "[t]he United States Claims Court shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court." 28 U.S.C. § 1503.

37. See *United States v. Mitchell*, 463 U.S. 206, 218 (1983); *Army and Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 738 n.10 (1982); *Hatzlachh Supply Co., Inc. v. United States*, 444 U.S. 460, 465 (1980); *United States v. Algoma Lumber Co.*, 305 U.S. 415, 418-19 (1939); *Alabama v. United States*, 282 U.S. 502, 507 (1931); *Goodyear Tire & Rubber Co. v. United States*, 276 U.S. 287, 293 (1928); *Merritt v. United States*, 267 U.S. 338, 340 (1925); *Sutton v. United States*, 256 U.S. 575, 581 (1921); see also text accompanying notes 39-46.

38. See *Schwartz v. United States*, 16 Cl. Ct. 182, 185 (1989) ("Although the Tucker Act confers jurisdiction upon this Court [sic] over 'express and implied contracts', the cases have uniformly interpreted the term 'implied contracts' to mean only contracts implied-in-fact.').

39. 267 U.S. 338 (1925).

40. *Id.* at 341.

41. See *Harley v. United States*, 198 U.S. 229, 234 (1905); *Russell v. United States*, 182 U.S. 516, 530 (1901); *Langford v. United States*, 101 U.S. 341, 345 (1880); *Whiteside v. United States*, 93 U.S. 247, 256 (1876).

Citing two previous decisions, *Gibbons v. United States*, 75 U.S. (8 Wall.) 269 (1869) and *Nichols v. United States*, 74 U.S. 122 (1869), the Supreme Court in *Langford* stated that the question of whether an implied-in-law claim could be brought against the Federal Government was not a new question. 101 U.S. at 345. Prior to the enactment of legislation giving citizens rights to bring actions against the United States, citizens, as defendants in actions brought by the United States, were entitled to assert certain claims by way of set-off. In asserting such claims, the citizens were precluded from making any claims based on implied contract arising out of a tort. See *Hughes Transp. Inc. v. United States*, 121 F. Supp. 212, 222-26 (Ct. Cl. 1954) (summarizing the history of the court's prohibition on implied-in-law claims).

The Court in *Langford* clearly thought that Congress's prohibition of implied contracts based on tort was a continuation of sound policy. The Court stated:

This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

cally, the Court found these acts to provide jurisdiction over claims founded on "a convention between the parties—a 'coming together of minds.'"⁴² The Court found "those contracts or obligations that the law is said to imply from a tort" as "not meeting this condition."⁴³ This stated understanding of the Court can be viewed as a limitation on jurisdiction over the majority of situations in which implied-in-law contract claims might arise. However, this interpretation does not exclude those implied-in-law contract situations in which there is some semblance of "a coming together of minds."

The judicially-created restriction on the Claims Court's implied contract jurisdiction also appears to be based on the standard that the waiver of sovereign immunity is to be narrowly construed in favor of the Federal Government. The Claims Court has stated that the Tucker Act, acting as a waiver of sovereign immunity, greatly limits the court's jurisdiction.⁴⁴ Consequently, "the court must exercise not only the traditional reluctance of federal courts to act absent specific statutory authorization, . . . but an additional measure of restraint growing from the principle that waivers of sovereign immunity must be narrowly construed."⁴⁵ In view of this position, and given that an implied-in-law contract is not a contract at law, the Claims Court may be further reluctant to find that the term "implied contract" as used in the Tucker Act encompasses implied-in-law contracts.⁴⁶

Id. at 345.

42. *Harley*, 198 U.S. at 234 (quoting *Russell*, 182 U.S. at 530).

43. *Id.* In support of its interpretation, the Court relied on a previous decision, *Schillinger v. United States*, 155 U.S. 163 (1894), in which the Court, in interpreting both the Tucker Act and the predecessor Organic Act, stated: "Under neither of these statutes had or has the Court of Claims any jurisdiction of claims against the government for mere torts; some element of contractual liability must lie at the foundation of every action." *Id.* at 167. See also *Langford*, 101 U.S. at 345 ("There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.").

44. *Schuhl v. United States*, 3 Cl. Ct. 207, 210 (1983) (quoting *Connolly v. United States*, 554 F. Supp. 1250, 1252 (Cl. Ct. 1982), *aff'd in part, rev'd in part*, 716 F.2d 882 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984)); see also *United States v. King*, 395 U.S. 1, 4 (1969) ("[T]he Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and . . . such a waiver cannot be implied but must be unequivocally expressed."); *Kabua v. United States*, 546 F.2d 381, 385 (Cl. Ct. 1976) ("However, our jurisdiction is always strictly construed because it depends on the consent of the sovereign to be sued, and is not to be extended by implication."), *cert. denied*, 434 U.S. 821 (1977).

45. See *Schuhl*, 3 Cl. Ct. at 210 (quoting *Connolly*, 554 F. Supp. 1250 (Cl. Ct. 1982) (omission in original)).

46. *Id.*; accord *Biagioli v. United States*, 2 Cl. Ct. 304, 308 (1983); see *supra* text accompanying notes 17-23.

III. RECOVERY UNDER IMPLIED-IN-LAW CONTRACTS

A. *Court of Claims and Federal Circuit Court of Appeals Precedent*

Both the United States Court of Claims and the United States Court of Appeals for the Federal Circuit have held the Federal Government liable for contractual damages when the only type of contractual relief available seems to be based on implied-in-law contract.⁴⁷ These situations usually arise when the Federal Government benefits from work performed by a contractor pursuant to an invalid contract.

1. *The Court of Claims*

In *New York Mail and Newspaper Transportation Co. v. United States*,⁴⁸ the Federal Government entered into a ten-year contract for the rental of pneumatic tubes for the transportation of mail. After using the services provided under the contract for three years, however, the Federal Government closed down the tube service.⁴⁹ The Federal Government notified the contractor that it considered the contract null and void because the proper competitive bidding process had not been employed.⁵⁰

The Court of Claims, while agreeing that the contract was invalid, determined that the contractor was nevertheless entitled to recover for the services rendered.⁵¹ While not specifically stating that the Federal Government was liable under an implied contract, the court inferred as much by relying on an 1877 Supreme Court case, *Clark v. United States*,⁵² in which a party performing under an unenforceable oral contract was held entitled to re-

47. See generally Wall & Childres, *The Law of Restitution and the Federal Government*, 66 NW. U. L. REV. 587, 618 (1971) ("In private law, we now have a well developed and clear distinction between implied in fact and implied in law contracts. But that distinction is rarely being used by the courts to determine jurisdiction to sue the United States."); Note, *Dealing with a Not-So-Benevolent Uncle: Implied Contracts with Federal Government Agencies*, 37 STAN. L. REV. 1367, 1375 (1985) ("Several courts have ignored the distinctions between implied in fact contracts and implied in law contracts in order to find an implied in fact contract and allow recovery."); Note, *The Application of Common-Law Contract Principles in the Court of Claims: 1950 to Present*, 49 VA. L. REV. 773, 845 (1963) ("Where the plaintiff has rendered the Government a service in reliance on a contract which the Government could not lawfully make, therefore, the Court of Claims has been quite liberal in permitting recovery. Such recovery has been allowed despite the fact that its basis is quasi-contractual."); Note, *supra* note 27, at 279 ("[I]mplied in law relief is actually granted in some cases, sometimes under the guise of an implied in fact contract and at other times without any contractual support.").

48. 154 F. Supp. 271 (Ct. Cl.), *cert. denied*, 355 U.S. 904 (1957).

49. *Id.* at 272.

50. *Id.*

51. *Id.* at 276.

52. 95 U.S. 539 (1877).

cover the fair value of his property or services rendered upon an "implied contract" for *quantum meruit*.⁵³

The implied contract contemplated by the Court of Claims in *New York Mail* could not have been an implied-in-fact contract. As stated above, an implied-in-fact contract, like an express contract, requires that the relevant Federal governmental official have authority to enter into an agreement.⁵⁴ In *New York Mail*, because the Federal Government lacked authority to enter into such an agreement, by necessity there was no governmental official who had authority to enter into any type of implied-in-fact agreement. As a result, the "implied contract" contemplated in *New York Mail* was necessarily an implied-in-law contract.⁵⁵

The Court of Claims' acceptance of implied-in-law contract claims in limited situations was highlighted in *Prestex, Inc. v. United States*.⁵⁶ While the Court of Claims in *Prestex* denied recovery to a contractor,⁵⁷ it recognized

53. *Id.*; see also *Crocker v. United States*, 240 U.S. 74 (1916) (quasi-contractual recovery allowed); *Douglas Aircraft Co. v. United States*, 95 Ct. Cl. 140 (1941) (same); *Wheeler v. United States*, 5 Ct. Cl. 504 (1869) (same).

54. Thus, many implied-in-fact cases are dismissed because the relevant governmental official lacks authority. See, e.g., *New Am. Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1081 (Fed. Cir. 1989); *EWG Assocs., Ltd. v. United States*, 231 Ct. Cl. 1028, 1029 (1982); *Jascourt v. United States*, 207 Ct. Cl. 955, 955-56, *cert. denied*, 423 U.S. 1032 (1975); *Porter v. United States*, 496 F.2d 583, 591 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975); *Kilmer Village Corp. v. United States*, 153 F. Supp. 393, 396 (Ct. Cl. 1957); *Horton v. United States*, 57 Ct. Cl. 395, 402 (1922); *United Food Servs., Inc. v. United States*, 19 Cl. Ct. 539, 548 (1990), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991); *Elie v. United States*, 18 Cl. Ct. 461, 466 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir.), *reh'g denied*, No. 90-5036, 1990 U.S. App. LEXIS 14566 (Fed. Cir. Aug. 22, 1990); *OAo Corp. v. United States*, 17 Cl. Ct. 91, 100 (1989); *Marks v. United States*, 15 Cl. Ct. 609, 613 (1988); *Pollack v. United States*, 15 Cl. Ct. 46, 49 (1988); *Miles Farm Supply, Inc. v. United States*, 14 Cl. Ct. 753, 756-58 (1988); *Truckee-Carson Irrigation Dist. v. United States*, 14 Cl. Ct. 361, 370, *aff'd*, 864 F.2d 149 (Fed. Cir. 1988); *Pasco Enterprises v. United States*, 13 Cl. Ct. 302, 306-07 (1987); *De Roo v. United States*, 12 Cl. Ct. 356, 361 (1987); *Gratkowski v. United States*, 6 Cl. Ct. 458, 461 (1984); *Pacific Gas & Elec. Co. v. United States*, 3 Cl. Ct. 329, 339-40 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984); *Wertz v. United States*, 2 Cl. Ct. 45, 52 (1983).

55. See also Note, *supra* note 47, at 843 ("These damages [in *New York Mail*] are restitutionary in nature . . . and it seems plain that the theory underlying them is quasi-contractual."); accord *Grismac Corp. v. United States*, 556 F.2d 494, 499 (Ct. Cl. 1977) (stating that where Federal Government officials, "high or low," lacked authority to make an express contract, "it was not legally possible for them to make implied contracts enforceable").

56. 320 F.2d 367 (Ct. Cl. 1963).

57. In *Prestex*, the plaintiff submitted a bid for a contract for white duck cloth to be used in making uniforms. In submitting its bid, the contractor made a "pen and ink exception" to the requirements contained in the invitation for bids. *Prestex*, 320 F.2d at 369. The contract was nevertheless awarded to the contractor. After having the opportunity to test the cloth, the Federal Government rejected it on the basis that it did not meet its requirements. *Id.* at 370.

It was requested that the Comptroller General review the situation. He determined that because of the contractor's "pen and ink exception," there was no valid contract between the

that if the Federal Government was unjustly enriched, equity would dictate a quasi-contractual recovery. The court stated:

Even though a contract be unenforceable against the Government, because not properly advertised, not authorized, or for some other reason, it is only *fair and just* that the Government pay for goods delivered or services rendered and accepted under it. In certain limited fact situations, therefore, the courts will grant relief of a *quasi-contractual* nature when the Government elects to rescind an invalid contract. No one would deny that *ordinary principles of equity and justice* preclude the United States from retaining the services, materials, and benefits and at the same time refusing to pay for them on the ground that the contracting officer's promise was unauthorized, or unenforceable for some other reason. However, the basic fact of legal significance charging the Government with liability in these situations is its retention of benefits in the form of goods or services.⁵⁸

The court's focus on providing quasi-contractual relief when the Federal Government retains the benefits of a contractor's work clearly indicates the court's willingness to grant relief under the doctrine of implied-in-law contract.

In *Yosemite Park and Curry Co. v. United States*,⁵⁹ the Court of Claims apparently granted relief under an implied-in-law contract theory without expressly acknowledging it. In *Yosemite Park*, the National Park Service (NPS) and a contractor entered into an agreement whereby the contractor was given the right to establish certain public facilities and accommodations, which included lodging, food and beverage services and other merchandizing operations in Yosemite Park.⁶⁰ Additionally, the contractor agreed to provide transportation for park visitors.⁶¹ In exchange, the contractor was entitled to charge reasonable rates for these goods and services.⁶²

When it became apparent that a significant amount of pollution could be avoided by banning cars in the park, the NPS and the contractor revised their agreement to have the contractor provide transportation services to the visitors free of charge in exchange for the Government's reimbursement of

parties. *Id.* at 370-71. The contractor brought an action seeking recovery for its work. The Court of Claims denied the contractor relief on the basis that the Federal Government had not been unjustly enriched and that the contract was invalid due to the contractor's error. *Id.* at 374.

58. *Id.* at 373 (emphasis added).

59. 582 F.2d 552 (Ct. Cl. 1978).

60. *Id.* at 554.

61. *Id.*

62. *Id.*

the contractor's expenses and a payment of a profit.⁶³ After four years of performance under the revised contract, the Federal Government determined that the agreement was illegal and, therefore, null and void because of the types of expenses reimbursed and profit paid.⁶⁴ The contractor brought suit to recover expenses incurred in providing the transportation service for the park. The Court of Claims determined that the contract was null and void, but concluded that the contractor was entitled to a *quantum meruit* recovery for the reasonable value of the services received by the Federal Government.⁶⁵

In reaching its decision, the Court of Claims inferred that some type of binding implied-in-fact agreement existed. The court maintained that the Federal Government "bargained for, agreed to pay for, and received the benefit of [the contractor's] services" and that the contractor "operated under the belief and on the representation of the NPS that the Agreement was valid."⁶⁶ Nevertheless, this case presents another situation in which there could be no implied-in-fact contract because the Federal Government lacked authority to enter into the contract contemplated by the parties. The relief, therefore, seems to be based on implied-in-law contract.⁶⁷

2. *The Court of Appeals for the Federal Circuit*

When faced with a situation in which the Federal Government benefitted from work performed by a contractor under an invalid contract, the United States Court of Appeals for the Federal Circuit has also deemed relief appropriate without stating that such relief is granted under the doctrine of implied-in-law contract.⁶⁸ In *United States v. Amdahl Corp.*,⁶⁹ the United States Court of Appeals for the Federal Circuit ruled that a contractor could recover against the Federal Government even if there was a legally unenforceable agreement.

In *Amdahl*, an award of a contract for computers was successfully challenged by a bidder not awarded the contract, but by the time the award was

63. *Id.* Among other things, the new agreement provided reimbursement of the contractor's federal income taxes and a 12 percent profit.

64. *Id.* at 555. The Government argued that by reimbursing federal income taxes and allowing a profit in excess of what was permitted by statute, the contract was illegal.

65. *Id.* at 558.

66. *Id.* at 560.

67. *Id.* at 558.

68. *See, e.g., United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986); *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147 (Fed. Cir. 1983).

69. 786 F.2d 387 (Fed. Cir. 1986).

overturned, the awardee already had delivered the computers to the Federal Government.⁷⁰

The Court of Appeals for the Federal Circuit determined that where a contract is unenforceable, it is "only fair and just that the Government pay for goods delivered or services rendered and accepted under it."⁷¹ Relying on *Prestex, Inc. v. United States*, the court reasoned that "in many circumstances it would violate good conscience to impose upon the contractor *all* economic loss from having entered an illegal contract."⁷² The court maintained that when the Government benefits by accepting services or goods, "a contractor may recover *at least* on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods or services *received* by the government prior to the rescission of the contract for invalidity."⁷³ The court stated that in such circumstances "the contractor is not compensated *under* the contract, but rather under an implied-in-fact contract."⁷⁴

Just as with the contracts at issue in *New York Mail* and *Yosemite Park*, the Federal Government was not authorized to enter into the agreement at issue in *Amdahl*. Thus, the formation of an implied-in-fact contract was impossible.⁷⁵ Furthermore, the "implied-in-fact contract" recovery under *Amdahl* was limited to the value of the benefit received by the Federal Government.⁷⁶ If the Federal Government had not benefitted from the contractor's performance, then the contractor would have recovered nothing.⁷⁷ Recovery under an implied-in-fact contract, however, is not necessarily determined by the amount of the benefits conferred on the Federal Government.⁷⁸

In sum, the Court of Claims and the Federal Circuit Court of Appeals allow *quantum meruit* or *quantum valebant* recovery in situations where there is a contractual arrangement that has benefitted the government, but is invalid because of the Federal Government's lack of authority to enter into

70. *Id.* at 390-91.

71. *Id.* at 393 (quoting *Prestex, Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963)).

72. *Id.* (emphasis in original).

73. *Id.* (footnote omitted) (emphasis added).

74. *Id.* (emphasis in original).

75. In the alternative, the court stated that a contractor might recover under an express contract if the illegality was not plain. *Id.* at 393-95. Still, even if the illegality was plain, the court was willing to grant relief under *Prestex*. *Id.* at 393.

76. *Id.*

77. *Id.*; see also *Toyo Menka Kaisha, Ltd. v. United States*, 597 F.2d 1371 (Ct. Cl. 1979); *Schoenbrod v. United States*, 410 F.2d 400 (Ct. Cl. 1969); *Prestex, Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963).

78. See, e.g., *OAO Corp. v. United States*, 17 Cl. Ct. 91, 101 (1989); see also Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 223 (1987).

such an arrangement. No implied-in-fact contract can exist because there is no authority on the part of *any* governmental official to enter into an agreement. The requirement that there be an invalid contractual relationship that benefitted the government, therefore, should be viewed only as a limitation on the types of implied-in-law contracts for which the Federal Government will be held liable.⁷⁹

B. *The Claims Court's Interpretation of Case Precedent*

One Claims Court judge has had difficulty reconciling the decision in *Amdahl* with the court's jurisdictional limitations. In *Chavez v. United States*,⁸⁰ the Claims Court was faced with a claim where, based on *Amdahl*, an implied-in-fact contract existed for the repair and replacement of an irrigation pipeline despite the fact that the governmental official who allegedly agreed to the implied contract lacked authority to bind the Federal Government.⁸¹ The court rejected *Amdahl's* application on both legal and factual grounds.⁸²

Analyzing the *Amdahl* decision, the court found that the concept of "fairness or equity" embraced by the United States Court of Appeals for the Federal Circuit was "inapposite to the long-established principle that contracts must be awarded in accordance with the law and regulations, and that only an agent expressly authorized to bind the United States contractually may do so."⁸³ The court concluded that the theory of contract expounded in *Amdahl* fit more properly under the definition of contract implied-in-law than contract implied-in-fact.⁸⁴

The *Chavez* court interpreted *Amdahl* as providing an "equitable" exception to the law granting relief to a plaintiff under contracts "implied-in-fact" if the Federal Government received and kept a benefit from plaintiff's labor even though the contracts were actually implied-in-law.⁸⁵ The court reasoned that the Court of Appeals for the Federal Circuit, because it is an Article III court, may provide such an equitable exception.⁸⁶ The *Chavez*

79. This limitation on the type of situations in which implied-in-law contract recovery is available against the United States is consistent with the Supreme Court's notion that the Tucker Act does not confer jurisdiction over "those contracts or obligations that the law is said to imply from a tort" and that lack "a convention between the parties—'a coming together of minds.'" See *supra* text accompanying notes 40-43.

80. 18 Cl. Ct. 540 (1989).

81. *Id.* at 545.

82. *Id.* at 544-47; see also *infra* note 88.

83. *Chavez*, 18 Cl. Ct. at 546.

84. *Id.*

85. *Id.* at 547.

86. *Id.*

court determined, however, that because the Claims Court is an Article I court, and thus lacks jurisdiction to provide equitable relief, it could not follow *Amdahl*.⁸⁷ The court stated that:

Because the Court of Appeals for the Federal Circuit is an Article Three court of the United States Constitution, its exercise of equitable power in *Amdahl* was within its jurisdictional mandate. However, [the Claims Court] is an Article One court with very specific jurisdiction granted by the congress. This legislative grant of equitable jurisdiction is to be strictly construed. Consequently this court believes itself devoid of equitable jurisdiction in this area of the law. As such, we have no equity jurisdiction to redress contracts implied-in-law.⁸⁸

Despite the problems identified by the *Chavez* court in *Amdahl*, other Claims Court judges appear ready to interpret *Amdahl* as authority for contractual relief when an unenforceable contract is in fact entered into by persons usually authorized to bind the Federal Government. In *H. Landau & Co. v. United States*,⁸⁹ the court was faced with an implied-in-fact contract claim in which the relevant governmental officials lacked authority to bind the Federal Government to a contract. The contractor argued that it was entitled to recover under *Amdahl*. In denying the claim, the court interpreted *Amdahl* as "hold[ing] that equitable relief may be granted under certain circumstances when a contractor has entered into an illegal contract with the Government."⁹⁰ The court, however, did not state that such recovery was based on the doctrine of implied-in-law contract, thereby continuing the confusion between implied-in-law and implied-in-fact contract doctrines created by *Amdahl* and other similar precedent.⁹¹

In a recent decision, *Ocean Technology, Inc. v. United States*,⁹² a contractor performed work under a contract option. The Federal Government argued, among other things, that it was not liable under the option. According

87. *Id.*

88. *Id.* (citation omitted). In the alternative, the court held that *Amdahl* was limited to situations when an unenforceable contract was in fact entered into by persons authorized to bind the Federal Government. *Id.* at 547-48.

89. 16 Cl. Ct. 35 (1988), *vacated on other grounds*, 886 F.2d 322 (Fed. Cir. 1989).

90. *Id.* at 38.

91. The court stated that a distinction had to be made between situations where a governmental official has no authority to enter into a contract and where a governmental official has contracting authority but the terms of a contract are illegal. *Id.* The court reasoned that such a distinction was necessary because (1) the "potential for abuse is obviously much greater" when a governmental official lacks any authority to enter into an arrangement, and (2) the overwhelming array of precedent has not permitted recovery where a governmental official lacked authority. *Id.* As shown above, such a distinction does not adequately explain how implied-in-fact contracts can be found to exist in cases such as *Amdahl*.

92. 19 Cl. Ct. 288 (1990).

to the Federal Government, because the option was severable from the original contract, it was subject to appropriate competitive procedures for selection of a contractor. Because these procedures were not followed, the Federal Government argued that the option was null and void.⁹³

While agreeing that contracts that are neither subject to formal advertising and other competitive procedures nor fall under any statutory exception violate applicable regulations, the Claims Court held that under *Amdahl* the contractor was entitled to recover for the benefits the Federal Government had received.⁹⁴ The court did not expressly state that such relief was based on the doctrine of implied-in-law contract, but such a theory of relief seems apparent from the court's statements that "[i]t would be manifestly unfair, at this late date, for [the Federal Government] to retain the benefits of the [contractor's work] . . . while renouncing its contractual obligations."⁹⁵

The Claims Court in *Janowsky v. United States*,⁹⁶ another recent decision, recognized in dicta that under *Amdahl* and related cases, "where property has been delivered to the government, the government does not pay as agreed and damages for breach of contract are unavailable, courts have . . . based relief on *quasi-contract* theories."⁹⁷ The court, nevertheless, would not say that such recovery was pursuant to an implied-in-law contract. Instead, it said that "the *Amdahl* line recognizes relief under a rare species of 'implied-in-fact contract.'"⁹⁸

C. *The Need for an Amendment to the Tucker Act*

While the Claims Court states that it has no jurisdiction over implied-in-law contract claims, under *Amdahl* and other similar precedent, the court seems willing to grant such relief. Such recovery is, as the courts have re-

93. *Id.* at 293.

94. *Id.*

95. *Id.*

96. No. 90-3846C, 1991 U.S. Cl. Ct. LEXIS 346 (Aug. 6, 1991). In *Janowsky*, the plaintiffs brought an action against the Federal Government after the FBI had, with plaintiffs' consent, taken over plaintiffs' business for law enforcement purposes. The court's discussion concerning *Amdahl* and related cases arose in its consideration of plaintiffs' allegation that the Federal Government had taken their property without just compensation. The Claims Court rejected plaintiffs' taking argument as without merit, stating that in situations where the Government, pursuant to a property owner's consent, uses property, the cause of action against the Government is not one for just compensation, but for *quantum meruit* under a contract. *Id.* at *34-35.

97. *Id.* at *29-30 (emphasis added).

98. *Id.* at *33; see also *Green Hosp. v. United States*, 23 Cl. Ct. 393, 405 n.11 (1991) ("It is evident from cases such as *Yosemite Park* and *Amdahl* that *quantum meruit* is a basis for recovery in the court only under limited circumstances, and only when the court finds a contract implied-in-fact.").

peatedly found, clearly supported by public policy.⁹⁹ A contractor whose work directly benefits the Federal Government at the government's urging certainly should be compensated by the government. Still, the Claims Court, like the Court of Appeals for the Federal Circuit, views such relief as being awarded in the name of "implied-in-fact" contract, which makes the law of implied-in-fact contract confusing to both the court and its litigants.

To avoid further confusion between the doctrines of implied-in-law and implied-in-fact contract, recovery under implied-in-law contract should be expressly recognized. To do this, the Claims Court could expressly rule in favor of a plaintiff on the basis of an implied-in-law contract. Because Supreme Court, Court of Claims and Federal Circuit Court of Appeals precedent expressly concludes that implied-in-law contract claims are not within a court's Tucker Act jurisdiction, it is unlikely that the Claims Court is willing to make such an express ruling. Thus, an amendment to the Tucker Act will likely be necessary. The amendment should expressly provide that the Claims Court has jurisdiction to hear express, implied-in-fact and implied-in-law contract claims. Such an amendment would overrule those decisions rejecting the Claims Court's and Court of Claims' jurisdiction over implied-in-law contract claims.

IV. PROMISSORY ESTOPPEL

The Claims Court narrowly interprets its jurisdiction to exclude parties from raising affirmative claims based on promissory estoppel.¹⁰⁰ The Claims Court reasons that such claims are based on the doctrine of implied-in-law contract.¹⁰¹ This position, however, has no basis in either Court of Claims

99. See *Hirschmann v. United States*, 11 Cl. Ct. 338, 342 (1986) ("A contract implied in law is one where no agreement between the parties occurred but where a duty is imposed by the law to prevent injustice."); see also Note, *supra* note 47, at 845.

100. See *Knaub v. United States*, 22 Cl. Ct. 268, 276 (1991); *Hubbs v. United States*, 20 Cl. Ct. 423, 427 (1990), *aff'd*, 925 F.2d 1480 (Fed. Cir. 1991); *Eliel v. United States*, 18 Cl. Ct. 461, 470 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990), *reh'g denied*, No. 90-5036, 1990 U.S. App. LEXIS 14566 (Fed. Cir. Aug. 22, 1990); *American Maritime Transp., Inc. v. United States*, 18 Cl. Ct. 283, 292 (1989); *H. Landau & Co. v. United States*, 16 Cl. Ct. 35, 37 (1988), *vacated on other grounds*, 886 F.2d 322 (Fed. Cir. 1989); *Durant v. United States*, 16 Cl. Ct. 447, 450 (1988); *New Am. Shipbuilders, Inc. v. United States*, 15 Cl. Ct. 141, 144 (1988), *aff'd*, 871 F.2d 1077 (Fed. Cir. 1989); *McClary v. United States*, 14 Cl. Ct. 728, 731 n.3 (1988); *Pasternack v. United States*, 12 Cl. Ct. 707, 709 (1987); *Raines v. United States*, 12 Cl. Ct. 530, 534 (1987); *Metzger, Shadyac & Schwartz v. United States*, 10 Cl. Ct. 107, 108-10 (1986); *Pacific Gas & Elec. Co. v. United States*, 3 Cl. Ct. 329, 340 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984); *Schuhl v. United States*, 3 Cl. Ct. 207, 210 (1983); *Degnaars Co. v. United States*, 2 Cl. Ct. 482, 490 (1983); *Biagioli v. United States*, 2 Cl. Ct. 304, 307-08 (1983).

101. See, e.g., *Hubbs*, 20 Cl. Ct. at 427; *Eliel*, 18 Cl. Ct. at 469 ("An implied-in-law contract claim is often referred to as promissory estoppel."); *Schwartz v. United States*, 16 Cl. Ct. 182, 185 (1989) (because promissory estoppel operates in an equitable manner to bind one

or Federal Circuit Court of Appeals precedent. Promissory estoppel arguments are clearly distinguishable from implied-in-law contract arguments. Indeed, promissory estoppel claims are akin to implied-in-fact contract claims, which are, of course, within the Claims Court's jurisdiction.¹⁰²

A. Definition and Elements of Promissory Estoppel

The doctrine of promissory estoppel is based on detrimental reliance.¹⁰³ It normally involves a unilateral promise that the promisor knows or should know will induce action or forbearance on the part of the promisee, and the promisee does in fact detrimentally rely upon the promise. The Restatement (Second) of Contracts Section 90 defines promissory estoppel as: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."¹⁰⁴

The Court of Appeals for the Federal Circuit has stated that a party claiming promissory estoppel must first prove that there was a promise or representation made; second, that the promise or representation was relied upon by the party asserting the estoppel in such a manner as to change his

party to a promise made by him to another it is considered an implied-in-law contract); *Lichtefeld-Massarro, Inc. v. United States*, 17 Cl. Ct. 67, 71 (1989) ("Obligations based upon promissory estoppel are founded on contracts implied-in-law, where a duty is created by operation of law without regard to the intent of the parties."); *H. Landau & Co.*, 16 Cl. Ct. at 37 ("the theory of promissory estoppel is based on principles implied in law"); *New Am. Shipbuilders*, 15 Cl. Ct. at 144 ("promissory estoppel applies to contracts implied-in-law, over which this court does not have jurisdiction"); *Pacific Gas & Elec.*, 3 Cl. Ct. at 340 ("Obligations based upon promissory estoppel are founded on contracts implied-in-law (quasi contracts), where a duty is imposed by operation of law without regard to the intent of the parties.").

102. See *Promissory Estoppel: A Theory Without a Home in Government Contracts*, 3 The Nash & Cibinic Report 109-11 (July 1989).

103. See *Schwartz*, 16 Cl. Ct. at 185.

104. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Comment b to § 90 elaborates on the factors considered in determining whether a party is entitled to recover under promissory estoppel:

The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, or its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

RESTATEMENT (SECOND) OF CONTRACTS § 90 comment b.

position for the worse; and third, that the promisee's reliance was reasonable.¹⁰⁵

It is important to distinguish between the doctrine of promissory estoppel and the doctrine of equitable estoppel. Promissory estoppel creates a contract that otherwise would not exist.¹⁰⁶ It creates a cause of action.¹⁰⁷ Equitable estoppel, on the other hand, operates to prevent the denial of a contract that has been made.¹⁰⁸ It is used to bar a party from raising a defense or objection, or instituting an action that would otherwise be available.¹⁰⁹ Accordingly, the courts often have used the analogy that promissory estoppel is a sword and equitable estoppel is a shield.¹¹⁰

The distinction between the doctrines of promissory estoppel and equitable estoppel has been decisive in the context of Federal Government contracts. The Claims Court, while denying jurisdiction over claims based on promissory estoppel, has recognized claims based on equitable estoppel.¹¹¹

105. See *Law Mathematics and Technology, Inc. v. United States*, 779 F.2d 675 (Fed. Cir. 1985), cert. denied, 476 U.S. 1106 (1986); accord *J. CALAMARI & J. PERILLO, CONTRACTS* § 6-1, at 272-73 (3d ed. 1987).

106. See *Lichtefeld-Massaró, Inc. v. United States*, 17 Cl. Ct. 67, 71 (1989).

107. *Id.*

108. *Id.*

109. *Id.*

110. See *Durant v. United States*, 16 Cl. Ct. 447, 450 (1988).

111. See *Pacific Gas & Elec. Co. v. United States*, 3 Cl. Ct. 329, 340 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984) ("The doctrine of equitable estoppel was applied by the Court of Claims, and will be applied by this court, in an appropriate case to prevent the United States from denying the existence of a contractual agreement."); Pitou, *Equitable Estoppel: Its Genesis, Development and Application in Government Contracting*, 19 PUB. CONT. L.J. 606, 611 (1990).

The United States Supreme Court recently cast doubt on the likelihood of an equitable estoppel claim succeeding against the Federal Government. See *Office of Personnel Mgmt. v. Richmond*, 110 S. Ct. 2465, 2471 (1990) ("We leave for another day whether an estoppel claim could ever succeed against the Government."). It should be noted that the Court was not addressing the situation in which the Federal Government acts in its contracting capacity and payment to the contractor is not barred by either a statute or a validly promulgated regulation. Still, the Court did observe that it has never upheld an estoppel claim against the Federal Government for the payment of money. *Id.* at 2470; see also *Jana, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1990) ("It is not entirely clear whether the defense of estoppel is still available against the Government in light of the Supreme Court's decision in *OPM v. Richmond*"); *Janowsky v. United States*, No. 90-3846C, 1991 U.S. Cl. Ct. LEXIS 346, at *33 (Aug. 6, 1991) ("Thus, detrimental reliance, or estoppel, can never form the basis for a money claim against the government."). But see *Knaub v. United States*, 22 Cl. Ct. 268, 276 (1991) (recognizing court's jurisdiction over equitable estoppel claims).

For more discussion concerning equitable estoppel, see McIntire, *Authority of Government Contracting Officers: Estoppel and Apparent Authority*, 25 GEO. WASH. L. REV. 162 (1957); Berger, *Estoppel Against the Government*, 21 U. CHI. L. REV. 680 (1954); Comment, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026 (1986); Comment, *Government Contracts: Apparent Authority & Estoppel*, 55 GEO. L. J. 830 (1967).

Assuming that the Claims Court has jurisdiction over promissory estoppel claims, private parties could seek recovery against the Federal Government for more than just the enforcement of gratuitous promises. The doctrine, which has been greatly expanded,¹¹² would be applicable in the following situation:

The Federal Government, through an authorized governmental official, promises a manufacturer of widgets that it will pay a specific amount upon delivery of a specified quantity of spare parts for widgets previously purchased from the manufacturer. Relying on the Federal Government's promise, the manufacturer begins producing spare parts. Prior to delivering a single spare part, however, the Federal Government rescinds its promise. Assuming that the contractor's reliance on the Federal Government's promise is reasonable, the Federal Government should be held liable under the doctrine of promissory estoppel.

B. Comparison of Promissory Estoppel with the Doctrines of Implied-In-Fact and Implied-In-Law Contracts

1. Promissory Estoppel v. Implied-In-Fact Contracts

In an express or implied-in-fact contract, there is consideration, *i.e.*, a promise is exchanged for a promise to act or a forbearance.¹¹³ In promissory estoppel, there is no consideration in the traditional sense. Instead, a promise is relied upon by a promisee through an act or forbearance.¹¹⁴ It is often stated that the major difference between promissory estoppel and an express or implied-in-fact contract is that reliance is substituted for consideration.¹¹⁵

While promissory estoppel is distinguishable from express and implied-in-fact contracts, there are several important similarities. In situations giving rise to promissory estoppel, a promisee can be seen as accepting an offer by performing. Similarly, in implied-in-fact contracts, which are formed not by explicit agreement but by the conduct of parties, acceptance can arise through performance.¹¹⁶ Furthermore, as with express or implied-in-fact contracts, promissory estoppel involves a mutual understanding or expectation of the parties that the promisee will respond to a promise by taking

112. J. CALAMARI & J. PERILLO, *supra* note 105, § 6-5, at 284; E. MURPHY & R. SPEIDEL, *STUDIES IN CONTRACT LAW* 386 (2d ed. 1977).

113. *See supra* text accompanying note 13.

114. *See* H. HUNTER, *MODERN LAW OF CONTRACTS* 8.02[1], at 18-16 -18-17 (1987).

115. *See, e.g.*, *American Maritime Transp., Inc. v. United States*, 18 Cl. Ct. 283, 292 (1989); H. HUNTER, *supra* note 114, 8.02[1], at 18-17; E. MURPHY & R. SPEIDEL, *supra* note 112, at 386.

116. *See* *OAO Corp. v. United States*, 17 Cl. Ct. 91, 101 (1989).

some type of action or forbearance.¹¹⁷ Finally, the doctrines of promissory estoppel and implied-in-fact contract are similar in the types of recovery they allow. Under both doctrines, recovery is usually based on reliance damages.¹¹⁸

Promissory estoppel exists in many situations in which an implied-in-fact, and even an express, contract may also exist.¹¹⁹ This is apparent in the example given above concerning the contractor who manufactures spare parts in reliance on the Federal Government's promise that it would purchase them. If the reliance, *i.e.*, the contractor's manufacturing of spare parts, is something the Federal Government desires, such reliance would likely constitute sufficient consideration and make an implied-in-fact contract binding once the contractor starts producing spare parts.¹²⁰

The doctrines of promissory estoppel and implied-in-fact contract are so closely related that the Claims Court, in determining the existence of an implied-in-fact or express contract, has set forth standards for such contracts that closely resemble promissory estoppel. In *OAO Corp. v. United States*,¹²¹ the Claims Court stated:

Particularly where the Government induced contract performance with knowledge that the contractor expected compensation, this court's predecessor [the Court of Claims] has imposed liability upon the Government.

Similarly, the Claims Court stated in *National Rural Utilities Cooperative Finance Corp. v. United States*:¹²²

There is ample case law holding that a contractual relationship arises between the government and a private party if promissory words of the former induce significant action by the latter in reliance thereon.

These statements made by the Claims Court are strong support for finding a binding agreement between the Federal Government and a contractor through the doctrine of promissory estoppel.

117. See *Padbloc Co., Inc. v. United States*, 161 Ct. Cl. 369, 379 (1963); *RESTATEMENT (SECOND) OF CONTRACTS* § 90; A. CORBIN, *CORBIN ON CONTRACTS* § 200, at 218 (1963).

118. See *Ah Moo v. A.G. Becker Paribas, Inc.*, 857 F.2d 615, 622 (9th Cir. 1988); *OAO Corp.*, 17 Cl. Ct. 91.

119. See, *e.g.*, *Padbloc*, 161 Ct. Cl. at 379; *George H. White Constr. Co. v. United States*, 140 F. Supp. 560, 563 (Ct. Cl. 1956) (discussed *infra* notes 138-46 and accompanying text); L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* 23 (4th ed. 1981).

120. See H. HUNTER, *supra* note 114, 8.02[1], at 18-16 n.48.

121. 17 Cl. Ct. 91, 101 (1989).

122. 14 Cl. Ct. 130, 137 (1988), *aff'd*, 867 F.2d 1393 (Fed. Cir. 1989).

2. *Promissory Estoppel v. Implied-In-Law Contracts*

Under the doctrine of implied-in-law contract, there is no requirement for a promise or any type of mutual understanding between the parties.¹²³ Instead, an implied-in-law contract requires only that one party confer a benefit upon another party and the latter be considered unjustly enriched.¹²⁴ In contrast, the focus for promissory estoppel is not on the benefit received by a party, but rather on whether the reliance by the other party was reasonable.¹²⁵ Indeed, very few promissory estoppel cases involve a situation in which there has been unjust enrichment.

The doctrines of promissory estoppel and implied-in-law contract also differ in the remedies they offer. As stated above, if a court finds promissory estoppel, it generally awards a contractor/promisee reliance damages.¹²⁶ On the other hand, under the doctrine of implied-in-law contract, recovery generally is measured by restitution and available only if the other party has been unjustly enriched.¹²⁷

C. *The Claims Court's Position on Promissory Estoppel*

The Claims Court tends to dismiss summarily promissory estoppel claims on the basis that such claims constitute implied-in-law claims.¹²⁸ The Claims Court has reached this conclusion based on its narrow interpretation of its jurisdiction over suits against the United States.¹²⁹ There is no Court of Appeals for the Federal Circuit or Court of Claims precedent to support the conclusion that the Tucker Act fails to provide the court with jurisdiction over promissory estoppel claims. The court has instead relied on a decision by the Ninth Circuit Court of Appeals, which is the only court of appeals to determine by published decision that it lacks jurisdiction under the Tucker Act to hear promissory estoppel claims against the United States.¹³⁰

In *Jablon v. United States*,¹³¹ the Ninth Circuit Court of Appeals, with very little discussion, stated that promissory estoppel "is not included within the parameters of the Tucker Act because it is not an 'express or implied-in-

123. See *supra* text accompanying note 17.

124. See *supra* text accompanying note 19.

125. See *supra* text accompanying notes 112-13, 117.

126. See *supra* text accompanying note 118.

127. See *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986); *Urban Data Sys., Inc. v. United States*, 699 F.2d 1147 (Fed. Cir. 1983).

128. See *supra* note 101.

129. See *Biagioli v. United States*, 2 Cl. Ct. 304, 307-08 (1983).

130. See *Jablon v. United States*, 657 F.2d 1064 (9th Cir. 1981). *But see* *Robbins v. Reagan*, 780 F.2d 37, 53 (D.C. Cir. 1985) (declining to confront the issue).

131. 657 F.2d 1064 (9th Cir. 1981).

fact contract' theory."¹³² The court's only support for this conclusion is its finding that (1) commentators differed on the question of whether promissory estoppel constitutes a contract, and (2) "no cases construing the Tucker Act . . . included awards based upon a promissory estoppel theory."¹³³ As shown below, the Ninth Circuit's assertion that no cases have construed the Tucker Act to encompass claims based on promissory estoppel is incorrect.

D. The Position of the Court of Claims and the Court of Appeals for the Federal Circuit on Promissory Estoppel Claims

The Court of Claims and the Court of Appeals for the Federal Circuit have never determined that they lack jurisdiction over promissory estoppel claims. In fact, these tribunals have recognized the doctrine's application in the government contract context.¹³⁴

In *Padbloc Co., Inc. v. United States*,¹³⁵ the Court of Claims expressly recognized the validity of the doctrine of promissory estoppel. The court found that the plaintiff turned over to the Federal Government confidential data concerning an invention involving bomb packaging in reliance upon the Federal Government's representation that it would purchase a certain number of packages from the plaintiff.¹³⁶ After the Federal Government failed to order the packages from the plaintiff and instead ordered the packages from competitors that had been given plaintiff's confidential data by the Government to build the packages, an action resulted. While the court held the Federal Government liable under an implied-in-fact contract in which

132. *Id.* at 1070.

133. *Id.*

134. *See Gay v. United States*, 356 F.2d 516, 524 (Ct. Cl.) *cert. denied*, 385 U.S. 898 (1966); *Himfar v. United States*, 355 F.2d 606, 609-10 (Ct. Cl. 1966); *Padbloc Co., Inc. v. United States*, 161 Ct. Cl. 369, 379 (1963); *George H. White Constr. Co. v. United States*, 140 F. Supp. 560, 563 (Ct. Cl. 1956); *see also Radium Mines, Inc. v. United States*, 153 F. Supp. 403 (Ct. Cl. 1957) (the court impliedly recognized the validity of promissory estoppel claims). On one occasion, the Court of Claims, in dicta, questioned whether it had jurisdiction over promissory estoppel claims. *See Radioptics, Inc. v. United States*, 621 F.2d 1113, 1129 (Ct. Cl. 1980) ("Although we have some reservation whether a claim based upon promissory estoppel is within this court's jurisdiction under 28 U.S.C. § 1491, the evidence in this case wholly fails to establish the elements of a claim on this basis."). Whatever questions the court may have had, however, seem resolved, because the United States Court of Appeals for the Federal Circuit, when faced with claims of promissory estoppel, has not dismissed such claims for lack of jurisdiction. *See Law Mathematics and Technology, Inc. v. United States*, 779 F.2d 675 (Fed. Cir. 1985), *cert. denied*, 476 U.S. 1106 (1986). Although the *Law Mathematics* court denied relief based on an argument of promissory estoppel, it did so on the basis that the plaintiff failed to establish the elements necessary to prove promissory estoppel. *Id.* at 679. It has not held that it lacks jurisdiction over such claims.

135. 161 Ct. Cl. 369 (1963).

136. *Id.* at 374-77.

the court found an offer, acceptance, and consideration, it supported its holding by relying upon the doctrine of promissory estoppel. It stated that:

A long-term trend in the modern law of contracts supports our finding of a binding promise by [the Federal Government]. . . . That trend looks toward holding, if justice so requires, one whose promissory words have induced significant action in reliance (even though there be no technical consideration in the narrow sense). Feeding both that development and the parallel readiness of present-day courts to infer an unexpressed promise from the total situation is the root conception that justified expectations arising from consensual transactions should normally be satisfied by the law—particularly in business contexts.¹³⁷

In *George H. Whike Constr. Co. v. United States*,¹³⁸ the Court of Claims expressly held that the Federal Government was liable under the doctrine of promissory estoppel. In *Whike Construction*, a contractor conditioned its bid on requiring additional compensation if the contractor was required to work a forty-eight hour work week instead of a forty-hour work week.¹³⁹ When presented with a contract document that provided that the Federal Government would not be held liable if a forty-eight hour work week were required by an Executive Order, the contractor objected.¹⁴⁰ The contractor subsequently signed the contract without modification after being assured by governmental officials that the qualifications set out in the bid would be controlling and the contractor would receive additional compensation if a forty-eight hour work week were required.¹⁴¹ After the contractor began performance of the contract, an Executive Order was issued requiring the contractor to impose a forty-eight hour work week.¹⁴²

After the Federal Government denied a claim for additional compensation to cover the contractor's costs for a forty-eight hour work week, the contractor brought an action against the Federal Government. The Court of Claims found that the contractor commenced performance in reliance on assurances made by governmental officials that the contractor would receive additional compensation if a forty-eight hour work week were required.¹⁴³ Finding the promissory estoppel rule given at RESTATEMENT (SECOND) OF CONTRACTS

137. *Id.* at 379 (footnote omitted).

138. 140 F. Supp. 560 (Ct. Cl. 1956).

139. *Id.* at 561.

140. *Id.* at 562.

141. *Id.*

142. *Id.* at 562-63.

143. *Id.* at 563.

