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ARTICLES

TORTIOUS GOVERNMENT CONDUCT AND THE GOVERNMENT CONTRACT: TORT, BREACH OF CONTRACT, OR BOTH?

*Brian R. Levey**

Each year, the federal government enters into millions of contracts worth billions of dollars.¹ Unfortunately, the sheer number, size, and complexity of the contracts and the goods and services procured inevitably give rise to tortious conduct by government employees relating to those contracts. Such tortious conduct may occur throughout the procurement cycle, and may take many forms, ranging from simple negligence to intentional misrepresentation. In addition, such tortious activity may constitute a breach of an implied or express term of a contract, commonly referred to as a tortious breach of contract. Thus, in many cases it is possible to maintain an action in either tort or contract.

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1. According to the General Services Administration, in fiscal year 1991, the federal government entered into 20,152,308 contract awards, modifications, and other actions worth \$210,689,057,000. FEDERAL PROCUREMENT DATA CENTER, U.S. GENERAL SERVICES ADMIN., FEDERAL PROCUREMENT REPORT 2 (1992). These contracts are for products as diverse as messenger services and monorail systems. See Marshall J. Doke, Jr., *The Scope of Government Contracts*, 28 PUB. CONT. NEWS 26 (1992) (citing Loop to Loop Messenger Serv., Comp. Gen. B-241068, 90-2 CPD ¶ 519 (1990) (messenger services); *Kimmins Contracting Corp.*, 91-2 B.C.A. (CCH) ¶ 23,914 (1991) (monorail system)).

In a suit between private parties, the victim of a tortious breach of contract typically pleads both contract and tort theories together in the same action. The goal of this strategy is to recover punitive damages, which are not available in actions brought solely for breach of contract. A different set of considerations arises, however, when the alleged tort-feasor is a government employee, the allegedly tortious conduct relates to a federal government contract, and the complaining party is a federal government contractor. In such cases, the contractor must confront the doctrine of sovereign immunity and the anomalies created by Congress in its limited waivers of that immunity.² Most significantly, the contractor may not bring tort and contract claims against the federal government in the same forum. More specifically, a tort claim may be brought only in federal district court, while a contract claim may be heard only in the United States Claims Court or before the various agency boards of contract appeals.

This Article attempts to guide the government contractor through the jurisdictional maze created for suits filed against the sovereign so that the contractor may bring an actionable claim in the proper forum. In order to achieve this goal, this Article first briefly explores the distinctions between tort and contract claims at common law. This Article then presents an overview of the jurisdictional scheme for tort and contract claims against the federal government. Next, this Article analyzes factors that the various federal forums have identified for distinguishing between tort and contract claims. Finally, this Article examines how the forums apply these factors to specific types of actions brought against the government.

I. COMMON LAW TORT CONTRACT DISTINCTIONS

A. Historical Overview

Historically, actions in contract³ developed out of tort theory.⁴ The earliest origins of both actions can be traced to the writ of trespass proper, under which the plaintiff could recover in cases where the defendant directly inter-

2. For example, punitive damages are not available in contract or tort actions against the federal government. *See, e.g.*, The Federal Tort Claims Act, 28 U.S.C. § 2674 (1988) (providing that the United States shall not be liable for punitive damages in tort actions); *Garrett v. United States*, 15 Cl. Ct. 204 (1988) (denying punitive damages in a contract action against the United States).

3. WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS* 469 (7th ed. 1982). *See, e.g.*, The Federal Tort Claims Act, 28 U.S.C. § 2674 (1988) (providing that the United States shall not be liable for punitive damages in tort actions); *Garrett v. United States*, 15 Cl. Ct. 204 (1988) (denying punitive damages in a contract action against the United States).

4. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 92, at 658 (5th ed. 1984).

ferred with the plaintiff's body, land, or goods.⁵ Out of trespass proper emerged the action of trespass on the case, under which the plaintiff could recover where the plaintiff voluntarily entrusted his person or his goods to the defendant.⁶ Such cases typically arose in the context of "the rendition of services on the part of those engaged in a public trade or calling."⁷

At first, liability for trespass on the case was based on the tort theory—breach of a legal duty to render services with some degree of skill and care.⁸ In time, courts also began to base liability on the defendant's implied promise, or "assumpsit," to render the service with reasonable skill and care.⁹ Thus, in cases of misfeasance, where the defendant failed to exercise reasonable care,¹⁰ the defendant could be held liable in tort or contract. Subsequently, contract liability expanded to include nonfeasance, i.e., situations where the defendant failed to perform at all.¹¹

B. *Modern Distinctions*

Out of the historic origins of tort and contract liability arose distinctions that remain meaningful both in defining the causes of action and in determining when tort and contract actions may exist simultaneously.¹² Today, although the line between tort and contract has become blurred,¹³ tort liability still is said to be imposed by law and is generally limited to misfeasance.¹⁴ Contract liability, on the other hand, is premised on an individual's promise and extends to both misfeasance and nonfeasance.¹⁵ Generally, then, where

5. FRIEDRICH KESSLER & GRANT GILMORE, *CONTRACTS: CASES AND MATERIALS* 26 (2d ed. 1970) (citing Stroud F.C. Milsom, *Trespass from Henry III to Edward III*, 74 L.Q. REV. 195, 407, 561 (1958)).

6. KESSLER & GILMORE, *supra* note 5, at 26.

7. KEETON, *supra* note 4, at 658; *see also* KESSLER & GILMORE, *supra* note 5, at 26.

8. KEETON, *supra* note 4, at 658; *see also* KESSLER & GILMORE, *supra* note 5, at 26.

9. KEETON, *supra* note 4, at 658 (citing 3 THOMAS A. STREET, *FOUNDATIONS OF LEGAL LIABILITY* 173 (1906)); *see also* KESSLER & GILMORE, *supra* note 5, at 26.

10. KEETON, *supra* note 4, at 658.

11. KESSLER & GILMORE, *supra* note 5, at 26-27.

12. *See, e.g.*, KEETON, *supra* note 4, at 658-59; PROSSER, *supra* note 3, at 469; 1 CHITTY ON CONTRACTS 8-9 (26th ed. 1989).

13. *See, e.g.*, "Hello Partner": *Lender Liability and Equitable Subordination*, in 1 ADVANCED BANKRUPTCY WORKSHOP 1990, at 14-15 (PLI Commercial Law & Practice Course Handbook Series No. 601, 1992) ("As business becomes more complex and the social demands increase, tort duties and damage compensation have been applied to contract matters.").

14. *See* KEETON, *supra* note 4, at 656-58; PROSSER, *supra* note 3, at 469-70. *Compare* Rawson v. United Steel Workers of Am., 726 P.2d 742 (Idaho 1986), *vacated mem. on other grounds*, 482 U.S. 901 (1987) (holding that a union's actual performance of an inspection in a negligent manner is an act of misfeasance that gives rise to an action in tort) *with* Carroll v. United Steel Workers of Am., 692 P.2d 361 (Idaho 1984) (holding that a union's failure to perform a safety inspection is an act of nonfeasance that, even if it amounted to willful neglect to perform a contract, is insufficient to give rise to an action in tort).

15. *See* KEETON, *supra* note 4, at 656-58; PROSSER, *supra* note 3, at 469-70.

the actionable conduct involves misfeasance, both causes of action may lie.¹⁶ However, where the conduct, or more typically lack of conduct, involves nonfeasance, only an action in contract will lie.¹⁷

The most significant consequences of the remaining common law tort/contract distinctions arise in the area of damages.¹⁸ It is well established that damages for breach of contract are limited to those that the defendant had reason to foresee when he entered into the contract.¹⁹

By contrast, the defendant to a tort action may be held liable for damages beyond those he had reason to foresee.²⁰ In tort, foreseeability generally is relevant only as to the question of whether the defendant is liable and not as to the measure or amount of that liability.²¹

A second and increasingly more important distinction concerns the availability of punitive damages. It is well settled that "[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."²² The

16. See KEETON, *supra* note 4, at 656-58; PROSSER, *supra* note 3, at 469-70.

17. See KEETON, *supra* note 4, at 656-58; PROSSER, *supra* note 3, at 469-70. Of course, like most general rules, there are exceptions. As Prosser notes:

One is that a common carrier, or other public utility, which has undertaken the duty of serving the public, becomes liable in tort when it fails to do so, whether or not it has made a contract. Another is that a defendant who makes a contract without the intention to perform it is regarded as committing a form of misrepresentation, or fraud, for which a tort action of deceit will lie. The special relation of landlord and tenant is held by some courts to give rise to a tort obligation when the landlord makes a covenant to repair the premises and does not do so.

PROSSER, *supra* note 3, at 469 (citations omitted).

18. An additional consequence of the remaining tort/contract distinctions is the potential for differing statutes of limitations. See, e.g., *Hudson v. Parvin*, 582 So. 2d 403 (Miss. 1991) (analyzing whether medical malpractice action sounds in tort or contract for purposes of statute of limitations); see also KEETON, *supra* note 4, at 664 n.76; PROSSER, *supra* note 3, at 470 (citing *Webber v. Herkimer & Mohawk St. R.R.*, 16 N.E. 358 (N.Y. 1888)).

19. See, e.g., 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1019 (1964). Damages also may be expressly limited in the contract by disclaimer or warranty provisions. *Id.*

20. *Id.*

21. *Id.*; see also EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 1076-77 (2d ed. 1977). Of course, in strict liability cases, foreseeability is actually irrelevant to liability. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

22. RESTATEMENT (SECOND) CONTRACTS § 355 (1979); see also *Brink's, Inc. v. City of New York*, 717 F.2d 700, 704 (2d Cir. 1983) (holding that although punitive damages are not available for "mere breach of contract," New York law does not preclude award of punitive damages where conduct that gives rise to contract action also is tortious); *Schaefer v. Miller*, 587 A.2d 491, 492 (Md. 1991) (prohibiting punitive damages in "pure action for breach of contract," although punitive damages have been permitted in torts arising out of contracts in cases of tortious interference and conversion where actual malice was demonstrated). Additional exceptions exist; courts have awarded punitive damages in the following contract actions: (1) breach of a promise to marry, HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 11.03[1], at 11-13 (1986) (citing *Goldstein v. Young*, 23 So. 2d 730 (Fla. 1945); *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791); LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF

general lack of recoverability of punitive damages in contract flows from the historical belief that “[b]reaches of contract . . . do not in general cause as much resentment or other mental and physical discomfort as do the wrongs called torts and crimes.”²³ Thus, the plaintiff in a suit between private parties involving a tortious breach of contract typically pleads both contract and tort actions together in the same action with the goal of obtaining punitive damages in addition to those available solely for actions in contract.

II. OVERVIEW OF SOVEREIGN IMMUNITY

When the plaintiff is a victim of a tortious breach of contract committed by the government, as opposed to a private party, a broad range of additional issues arise over the extent to which the government has waived its

CONTRACTS § 195, at 394 (2d ed. 1965)); (2) breach of a contract whose performance is a public duty (e.g., breach by a public utility or common carrier, HUNTER, *supra* (citing Trout v. Watkins Livery & Undertaking Co., 130 S.W. 136 (Mo. App. 1910)), (3) breach of a fiduciary duty, HUNTER, *supra* (citing PSG Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 417 F.2d 659 (9th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970); Brown v. Coates, 253 F.2d 36 (D.C. Cir. 1958)), and (4) breach of a contract with malice or fraud, CORBIN, *supra* note 19, § 1077, at 178-81 (Supp. 1992) (citing Glidden v. Skinner, 458 A.2d 1142 (Vt. 1983); Vernon Fire & Cas. Ins. Co. v. Sharp, 349 N.E.2d 173, 180 (Ind. 1976); Jones v. Abriani, 350 N.E.2d 635 (Ind. App. 1976)); *see also* 22 AM. JUR. 2D *Damages* §§ 753-54 (1988) (granting punitive damages where “special relationships,” such as fiduciary duties, existed and where the breach included fraud or abusive behavior); JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 14-4, at 521 (2d ed. 1977) (awarding punitive damages where the breach “involves the malicious or wanton violation of a fiduciary duty”).

23. CORBIN, *supra* note 19, § 1077. In cases where the facts give rise to both contract and tort actions, and where issues such as applicable damages and statutes of limitations arise, the plaintiff at some point in the proceedings may be forced to choose which cause of action to pursue. *See generally* 1 AM. JUR. 2D *Actions* § 32 (1962) (discussing “[e]lection between actions ex delicto and actions ex contractu”). Courts have generally adhered to one of two views. The first allows the plaintiff to elect or choose his cause of action, the second permits courts themselves to determine the gravamen of the claim and “elect” for the plaintiff. *See* KEETON, *supra* note 4, § 93 at 666. Unfortunately for potential plaintiffs, there is little consistency among courts as to which approach will be followed. At least one commentator has ventured to generalize courts’ application of these two views as follows:

Where the particular point at issue is one of adjective law only, affecting the suit or its procedure, but not the merits of the cause of action, the courts have tended to be quite liberal in giving the plaintiff his freedom of choice, and have upheld his action of tort of contract as he has seen fit to bring it. Likewise where the point is one affecting substantive rights, but the claim is one for damages to property or to pecuniary interests only, the tendency has been, with some occasional dissent, to allow the election. But when the claim is one for personal injury, the decision usually has been that the gravamen of the action is the misconduct and the damage, and that it is essentially one of tort, which the plaintiff cannot alter by his pleading. This has the odd result that the negligence of an attorney will survive the death of his client, while that of a physician is oft interred with his patient’s bones. Actually, the courts appear to have preserved a great deal of flexibility, and to have been influenced in their decisions by their attitude toward the rule of law in question.

Id. at 666-67 (citations omitted).

immunity as sovereign. Historically, the United States has been immune from suit except where Congress has waived that immunity and specifically consented to certain limited types of actions.²⁴ Unfortunately, Congress has chosen to waive its tort and contract immunity in a piecemeal fashion. Consequently, when the federal government subjects a contractor to a tortious breach of contract, the contractor must weave through a complex jurisdictional maze in order to identify the forum in which to bring its claim. Three forums may be available: (1) the federal district courts;²⁵ (2) the United States Claims Court;²⁶ and (3) the various agency boards of contract appeals.²⁷ Jurisdiction, however, is limited: tort claims may be brought only in district court, while contract claims generally may be brought only in the Claims Court or before an agency board.²⁸

Confronted with forums of limited jurisdiction, contractors face the daunting task of distinguishing between tort and contract actions, or perhaps equally as often, demonstrating that a single set of facts might give rise to a cause of action in both tort and contract. This task includes an analysis of the jurisdictional standards articulated by each of the three forums. To determine whether a claim sounds in tort, the federal district courts look to state law and to whether there is a breach of a specific contractual obligation.²⁹ To determine whether an action lies in contract, the Claims Court examines whether the claim alleges a breach of a primarily contractual undertaking or a tort independent of the contract,³⁰ while the agency boards examine whether the claim alleges a breach relating to a contract.³¹ Finally, the contractor must be aware that the choice of whether to characterize the claim as a tort or contract may have significant consequences.³²

A. *The Court of Claims Act*

American courts began to apply the doctrine of sovereign immunity early in the history of this country, deriving the theory from the English principle

24. See *Feres v. United States*, 340 U.S. 135, 139 (1950) (holding the government not liable under the Federal Tort Claims Act for injuries occurring to serviceman arising from their course of duty).

25. 41 U.S.C. § 609(a)(2) (1988).

26. *Id.* § 609(a)(1). Effective January 1, 1993, the United States Claims Court is known as the United States Court of Federal Claims. See Federal Courts Improvement Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506 (1992).

27. 41 U.S.C. § 607(d) (1988).

28. *But see infra* notes 43-45 and accompanying text (discussing the Little Tucker Act, under which the district courts retain concurrent jurisdiction over certain contract claims under \$10,000).

29. See *infra* part III.

30. See *infra* part IV.

31. See *infra* part V.

32. See *infra* part II.F (discussing election and foreclosure under 28 U.S.C. § 1500).

that the King could do no wrong.³³ Thus, from the passage of the Constitution through the mid-1850s, private citizens had no judicial remedy for tort or contract claims against the federal government.³⁴

As early as 1792, however, the United States offered compensation for its wrongs in the form of private relief bills.³⁵ This arrangement proved unmanageable, however, for by 1832 Congress was spending fully half of its time adjudicating private bills of one kind or another.³⁶ By 1848, the flood of requests for relief reached crisis proportions, prompting Congress to consider nine different bills between 1849 and 1855 for the creation of judicial bodies to address claims.³⁷

Unfortunately, when Congress finally did take action, it addressed only half of the problem. By the Act of February 24, 1855, Congress created the Court of Claims to "hear and determine all claims . . . upon any contract, express or implied."³⁸ The Act was silent as to jurisdiction over tort claims, leading the Supreme Court to conclude that the Court of Claims should have no such jurisdiction.³⁹ In this vein, the Supreme Court merely perceived

33. *Feres v. United States*, 340 U.S. 135, 139 (1950).

34. For historical overviews of the claims process, see 2 LESTER S. JAYSON, *HANDLING FEDERAL TORT CLAIMS* §§ 51-60 (1991); PETER S. LATHAM, *GOVERNMENT CONTRACT DISPUTES* chap. 2 (1986); Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985), reprinted in 22 *YEARBOOK OF PROCUREMENT ARTICLES* 590 (1985).

35. See WILLIAM B. WRIGHT, *THE FEDERAL TORT CLAIMS ACT 2* (1957) (indicating that the first tort claim granted by a private bill was for relief for damages caused to premises occupied by United States troops).

36. See Shimomura, *supra* note 34, at 644.

37. *Id.* at 649-50.

38. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

39. As the Supreme Court noted:

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. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.

Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1869) (indicating that a government officer who allegedly pressured a defendant into renewing a contract may be guilty of the tort of duress over which the Court of Claims has no jurisdiction). In *Gibbons*, the Supreme Court also established that artful pleading which seeks to invoke the Court of Claims' jurisdiction would not be tolerated:

But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.

Id. at 274. *But see* *United States v. Palmer*, 128 U.S. 262 (1888) (expressing no opinion as to whether a patentee may waive any infringement by the government and sue upon an implied contract); *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U.S. 59 (1885) (explaining that

itself to be implementing the will of Congress consistent with Congress' limited waiver of sovereign immunity, noting that "in establishing a court in which the United States may primarily be sued as defendants, [Congress] proceeded slowly and with great caution."⁴⁰

B. *The Tucker Act*

If any doubt remained as to whether the Court of Claims had tort jurisdiction, Congress, with the passage of the Tucker Act in 1887, made its position clear: "the Court of Claims shall have jurisdiction to hear and determine . . . [a]ll claims founded upon . . . any contract, express or implied, with the Government of the United States . . . *in cases not sounding in tort*."⁴¹ Subsequent Supreme Court decisions consistently enforced Congress' express exclusion.⁴²

While the Tucker Act expressly limited the jurisdiction of the Court of Claims, section 2 of the Act expanded the jurisdiction of the district courts and courts of appeals to include contract claims against the United States.⁴³ This provision was commonly referred to as the "Little Tucker Act" because it placed jurisdictional dollar limits on such claims.⁴⁴ Like the Tucker Act,

when the government uses a patented invention for its benefit, and the right of the patentee is acknowledged, the government has created an implied-in-fact contract); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884) (establishing that when the government seizes admittedly private land for public use, the government has created an implied contract to compensate the owner). Throughout the 1880s, the government was still enjoying sovereign immunity from its torts.

40. *Langford v. United States*, 101 U.S. 341, 344 (1880) (explaining that government officers who seized private property, wrongfully claiming it to be government property, were guilty of a tort over which the Court of Claims had no jurisdiction).

41. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (emphasis added).

42. *See, e.g., Harley v. United States*, 198 U.S. 229, 234 (1905). In *Harley*, the Supreme Court noted:

We held in *Russell v. United States*, that in order to give the Court of Claims jurisdiction, under the act of March 3, 1887, defining claims of which the Court of Claims had jurisdiction, the demand sued on must be founded on "a convention between the parties—a coming together of minds." And we excluded, as not meeting this condition, those contracts or obligations that the law is said to imply from a tort.

Id. (citations omitted).

43. Section 2 of the Act stated as follows:

That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

Act of Mar. 3, 1887, ch. 359, 24 stat. 505.

44. *See id.* For references to the "Little Tucker Act," *see, e.g., Franchi v. Manbeck*, 972 F.2d 1283, 1290 (Fed. Cir. 1992); *Bobula v. United States Dep't of Justice*, 970 F.2d 854, 856

however, the Little Tucker Act did not afford relief to victims of tortious government conduct.⁴⁵

C. *The Federal Tort Claims Act*

While the Court of Claims Act and the Tucker Act perhaps initially afforded Congress some relief from the adjudicative burden of private relief bills, that relief was incomplete. Congress still faced the task of resolving tort claims through consideration of private relief bills. As the role of the federal government continued to expand over time, so inevitably did the tortious conduct of its employees.⁴⁶ Unfortunately, the use of private relief bills to seek relief from this ever-increasing tortious conduct proved to be “notoriously clumsy,” overburdening Congress to such an extent that by the 1940s Congress was considering up to 2,300 bills per term.⁴⁷

In order to remove the burden of administering private relief bills, Congress passed the Federal Tort Claims Act (FTCA).⁴⁸ The FTCA substituted the federal district courts for Congress as the adjudicators of the tort liability of the United States.⁴⁹ As a general proposition, the Act makes the United

(Fed. Cir. 1992); *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1022 (Fed. Cir. 1992), *cert. granted sub. nom. Keene Corp. v. United States*, 113 S. Ct. 373 (1992).

45. *See, e.g., Hill v. United States*, 149 U.S. 593 (1893) (indicating that, under the Act of March 3, 1887, chapter 359, the circuit court of the United States has no jurisdiction over a claim for damages for unauthorized use of property by the government because it is a case sounding in tort).

46. *See* JAYSON, *supra* note 34, § 58, at 2-51.

47. *See* H.R. REP. NO. 1287, 79th Cong., 1st Sess. 2 (1941), *quoted in Dalehite v. United States*, 346 U.S. 15, 25 n.9 (1953).

48. Legislative Reorganization Act of 1946, title IV, Pub. L. No. 79-601, 60 Stat. 812. As the Supreme Court stated in *Dalehite*:

[The FTCA] was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work. . . . Some simplified recovery procedure for the mass of claims was imperative. This Act was Congress' solution, affording instead easy and simple access to the federal courts for torts within its scope.

Dalehite, 346 U.S. at 24-25.

49. Title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812. The FTCA also granted authority to the head of each federal agency to adjudicate tort claims of less than \$1,000. *Id.*

Today, the jurisdictional statement provides that:

[T]he district courts . . . shall have exclusive jurisdiction . . . on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1988).

It is worth noting that there is no intrinsic logic in giving tort jurisdiction to courts of general jurisdiction while reserving contract jurisdiction for a specialized court. Indeed, earlier

States liable in tort to the extent that a private party would be liable under the law of the state where the tortious conduct occurred.⁵⁰

Although the FTCA "waives the Government's immunity from suit in sweeping language,"⁵¹ Congress expressly excluded several types of actions from the FTCA's coverage.⁵² Most notable among these exclusions are: (1) the discretionary function exception, which excludes claims based upon any act or omission of a federal employee exercising due care in the execution of a statute or regulation, or upon the performance or failure to perform a discretionary function;⁵³ and (2) the intentional tort exception, which excludes "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."⁵⁴ Finally, the FTCA expressly states that the United States shall not be liable for punitive damages.⁵⁵

D. *The Contract Disputes Act*

While the Court of Claims and federal district courts enjoyed express statutory authority to hear contract and tort claims respectively, historically the boards of contract appeals operated under no such statutory mandate. Rather, the boards gradually evolved over time, based on agencies' authority to resolve certain claims under the disputes clause contained in federal government contracts.⁵⁶ During the nineteenth century, the first disputes clause provided that "[i]f any doubts or disputes arise as to the meaning of anything in the contract, drawings, plans, or specifications . . . the matter shall be at

bills had conferred jurisdiction over tort claims on the district courts, on the Court of Claims, and on both concurrently. See JAYSON, *supra* note 34, § 59.03, at 2-60.

Congress has revised the FTCA several times since its enactment in 1946. In 1948, Congress reorganized Title 28 of the United States Code, Judiciary and Judicial Procedure, including the jurisdictional statement of the FTCA. Pub. L. No. 80-773, 62 Stat. 646 (codified at 28 U.S.C. § 1346(b) (1988)). The 1948 revisions maintained the authority of the agency heads to adjudicate claims. Congress again amended the FTCA in 1966, revising the FTCA so that, under 28 U.S.C. § 2675, all claims must be filed with an administrative agency for disposition prior to filing in district court. Act of November 8, 1965, Pub. L. No. 89-348, 79 Stat. 1310 (repealing 28 U.S.C. § 2673).

50. 28 U.S.C. § 1346(b).

51. *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951).

52. See 28 U.S.C. § 2680 (1988).

53. See *id.* § 2680(a).

54. *Id.* § 2680(h).

55. *Id.* § 2674.

56. For historical overviews of the evolution of the boards of contract appeals, see PETER S. LATHAM, *GOVERNMENT CONTRACT DISPUTES* 11-21 (1980); Austin G. Roe, *Lincoln: The First Board of Contract Appeals*, 8 PUB. CONT. L.J. 179 (1976).

once referred to the Secretary of the Navy.”⁵⁷ By World War I, however, the volume of contract claims became too large for the various department secretaries to address.⁵⁸ Consequently, the individual departments created boards of contract appeals to adjudicate contract claims arising under the disputes clause.⁵⁹ These boards gradually evolved into today’s “highly developed quasi-judicial institutions specially designed to hear and decide claims which arise during performance of government contracts.”⁶⁰

Because the boards’ authority to decide disputes arose from the disputes clause, their “jurisdiction” was limited by the express language of the clause to claims “arising under the contract;” thus, the boards had jurisdiction over “cases only when the contract contained a clause providing for the remedy requested by the contractor.”⁶¹ Such clauses included the changes clause and suspension of work clause.⁶² However, the boards had no authority to hear claims “relating to the contract”; thus, breach of contract claims over which there were no remedy-granting clauses fell outside the scope of the disputes clause.⁶³ Consequently, the boards consistently denied jurisdiction to contractor claims alleging tortious breach of contract.⁶⁴

57. F. Trowbridge vom Baur, *Fifty Years of Government Contract Law*, 29 FED. B.J. 305, 311 (1970) (alterations in original), *reprinted in* 8 YEARBOOK OF PROCUREMENT ARTICLES 1, 9 (John W. Whelan, ed., 1971).

58. See LATHAM, *supra* note 56, at 13.

59. *Id.*

60. Roe, *supra* note 56, at 179.

61. See JOHN CIBINIC, JR. & RALPH C. NASH, JR., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 898 (2d ed. 1985) (citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966)).

62. See CIBINIC & NASH, *supra* note 61, at 898.

63. *Id.* at 898-99.

64. See, e.g., *Helicopter Servs., Inc.*, 80-1 B.C.A. (CCH) ¶ 14,190, at 69,851 (1979) (“If there is any claim against the Government it would have to be a tort claim which is outside the jurisdiction of this Board under 7 CFR 24.4(a) and the Disputes clause of the contract.”); *Delphi Indus.*, 78-1 B.C.A. (CCH) ¶ 13,058, at 63,756 (1978) (“There is no provision in the contract under which relief from torts can be granted, and ‘the Board’s power to grant relief must be found within the “four corners” of the contract.’”) (citations omitted); *George DeBarros*, 80-1 B.C.A. (CCH) ¶ 14,229, at 70,102 (1980) (“[A]n award of damages for breach of contract is a remedy which is not available under the specific provisions of the contract . . . it is also well established that a claim for relief sounding in tort is outside the jurisdiction of this Board under 7 CFR 24.4(a) and the Disputes clause. . . .”); *Lenoir Wood Finishing Co.*, 1964 B.C.A. (CCH) ¶ 4111, at 20,061 (1964) (“This Board has repeatedly held that cases which sound in tort or purely in breach of contract are beyond its authority to adjust. In many instances factual situations which otherwise would be regarded as contractual breaches may be adjusted within the framework of a contract because the instrument itself anticipated and therefore provided for such. . . . Absent such a clause, the Board is without authority to grant relief.”) (citations omitted); *Joseph F. Monsini, Jr.*, 61-2 B.C.A. (CCH) ¶ 3197, at 16,570 (1961) (“We are limited in this instance to the enforcement of such rights as are provided by the contract itself. . . . The gravamen of the complaint is the misrepresentation of the Mess Officer. The contract does not provide compensation for such an act.”); *Gas Equip. & Air*

By contrast, the Court of Claims enjoyed jurisdiction over breach claims under the Tucker Act.⁶⁵ This jurisdictional distinction between the boards and the Court of Claims was one of many that had evolved through an ad hoc combination of legislation and judicial decisions.⁶⁶ With the passage of the Contract Disputes Act of 1978 (CDA), however, Congress for the first time, comprehensively revised the disputes process.⁶⁷ As part of this reorganization, Congress expanded the boards' jurisdiction, vesting the boards with the authority to adjudicate claims "relating to a contract," and with the power to grant relief in contract claims consistent with that of the Claims Court.⁶⁸ The CDA obviated the need for a remedy-granting clause where a plaintiff sought to invoke a board's jurisdiction.⁶⁹ Thus, the CDA vested the boards, for the first time, with jurisdiction over breach of contract claims.⁷⁰

Conditioning Co., 58-2 B.C.A. (CCH) ¶ 1826, at 7220 (1958) ("This is not a claim cognizable under the contract but sounds in tort.").

65. See *supra* notes 41-45 and accompanying text.

66. See JOHN W. WHELAN, *CASES AND MATERIALS ON FEDERAL GOVERNMENT CONTRACTS* 668-72 (1985).

67. Pub. L. No. 95-563, 92 Stat. 2383-91 (codified at 41 U.S.C. §§ 601-13 (1988 & Supp. II 1990)).

68. 41 U.S.C. § 607(d) (1988). However, boards and the Court of Claims were still not on totally equal footing in the sense that decisions of the boards were appealable to the Court of Claims. Moreover, the scope of the CDA was limited to contracts, express or implied, for: "(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or, (4) the disposal of personal property." 41 U.S.C. § 602(a). In contrast, the Tucker Act vested the Court of Claims with jurisdiction over any claim against the United States founded "upon *any* express or implied contract with the United States." 28 U.S.C. § 1491(a)(1) (1988) (emphasis added). The CDA also limited the jurisdiction of the federal district courts under the Little Tucker Act by providing that "the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States . . . which [is] subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978." 28 U.S.C. 1346(a)(2).

Congress specifically provided that:

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

41 U.S.C. § 607(d).

69. See *CIBINIC & NASH*, *supra* note 61, at 898-99; see also 41 U.S.C. § 605(a) ("All claims by a contractor against the government *relating to a contract* shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor *relating to a contract* shall be the subject of a decision by the contracting officer.") (emphasis added); Federal Acquisition Regulations, 48 C.F.R. § 52.233-1 (1992) ("[D]isputes arising under or *relating to this contract* shall be resolved under this clause.") (emphasis added).

70. See *Paragon Energy Corp. v. United States*, 645 F.2d 966, 975 (Ct. Cl. 1981), *aff'd*, 230 Ct. Cl. 884 (1982).

E. *The Federal Courts Improvement Act*

Congress further refined the disputes process by enacting the Federal Courts Improvement Act of 1982.⁷¹ The Act abolished the Court of Claims and in its place established the United States Claims Court.⁷² The Act placed the Claims Court and boards on largely equal footing in the disputes process, granting contractors the right to appeal final decisions of contracting officers to either forum, and an additional right of appeal from either forum to the also newly created United States Court of Appeals for the Federal Circuit.⁷³ Thus, today both the boards and the Claims Court enjoy statutory jurisdiction to hear contractor claims for breach of contract, including tortious breach of contract, with the Federal Circuit as an additional arbiter of that jurisdiction.⁷⁴

F. *Election of Remedies: 28 U.S.C. § 1500*

Finally, when attempting to choose a forum in which to pursue its claim, the victim of a tortious breach of contract committed by the government must be aware of the terms of 28 U.S.C. § 1500 and the significant jurisdictional limits they place on claims filed with the Claims Court. Congress originally enacted § 1500 in 1868.⁷⁵ Today, the statute places procedural limits on the Claims Court's jurisdiction by providing that "[t]he United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff . . . has pending in any other court any suit . . . against the United States or any person who . . . was . . . acting . . . under the authority of the United States."⁷⁶ The purpose of the statute "was to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time."⁷⁷ Thus, the provision requires an election between a suit filed in the Claims Court and one brought in another court against the United States or its agent.⁷⁸

Although judicially-carved exceptions to § 1500 had allowed a plaintiff to pursue simultaneously a case in the Claims Court and in another forum when the plaintiff had filed first in the Claims Court,⁷⁹ the Federal Circuit

71. Pub. L. No. 97-164, 96 Stat. 25 (1982).

72. *Id.*

73. *Id.*

74. *Id.*

75. Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77.

76. 28 U.S.C. § 1500 (1988).

77. *Frantz Equip. Co. v. United States*, 98 F. Supp. 579, 580 (Ct. Cl. 1951); *see also* *Wessel, Duval & Co. v. United States*, 124 F. Supp. 636, 637-38 (Ct. Cl. 1954).

78. *National Cored Forgings Co. v. United States*, 132 F. Supp. 454, 458 (Ct. Cl. 1955) (citing *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932)).

79. *See* *Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965) (holding that a plaintiff may not use § 1500 to disrupt the jurisdiction of the Court of Claims), *cert. denied*,

recently closed such loopholes by issuing its decision in *UNR Industries, Inc. v. United States*.⁸⁰ In *UNR Industries*, the court set forth the following rules:

[I]n accordance with the words, meaning, and intent of section 1500: 1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply.⁸¹

Courts have consistently held that contract and tort claims arising out of the same operative facts are the "same" claim for purposes of § 1500 and thus fall under its prohibitions.⁸² Consequently, the Claims Court will dismiss a contract claim when a tort claim is pending that arose from the same facts.⁸³ Finally, an important distinction for the potential plaintiff is that § 1500 does not apply to the boards of contract appeals.⁸⁴ Thus, a contractor may file a contract action with a board after unsuccessfully having pursued the same matter as a tort claim in federal district court.⁸⁵ Moreover, a contrac-

382 U.S. 976 (1966); David Schwartz, Symposium, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 GEO. L.J. 573, 596 (1967).

80. 962 F.2d 1013, 1020-22 (Fed. Cir. 1992), cert. granted sub nom., Keene Corp. v. United States, 113 S. Ct. 373 (1992).

81. *Id.* at 1021 (overruling *Tecon*).

Prior to the Federal Circuit's decision in *UNR Industries*, when the Claims Court did dismiss an action because a claim was pending in district court, the plaintiff was free to refile its contract claim in the Claims Court if the district court had dismissed the action on jurisdictional grounds, see *Connecticut Dep't of Children & Youth Servs. v. United States*, 16 Cl. Ct. 102, 106 (1989), and if the plaintiff refiled within the statute of limitations, see *id.*; see also *Winston Bros. v. United States*, 371 F. Supp. 130, 134 (D. Minn. 1973) (stating that plaintiff's filing of an action in the Court of Claims did not toll the statute of limitations in district court). In light of the *UNR Industries* decision, however, this opportunity appears to be foreclosed. See *Hardwick Bros. Co. v. United States*, 26 Cl. Ct. 884, 887 (1992) (citing *UNR Indus.*, 962 F.2d at 1021) ("[P]laintiff's prior dismissal of its tort action in the district court did not effect reestablishment of the Claims Court's jurisdiction.").

82. See, e.g., *Beauregard Parish Police Jury v. United States*, 16 Cl. Ct. 344 (1989); *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), cert. denied, 498 U.S. 1066 (1989); *Dwyer v. United States*, 7 Cl. Ct. 565 (1985); *British Am. Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), cert. denied, 310 U.S. 627 (1940).

83. *National Union Fire Ins. Co. v. United States*, 19 Cl. Ct. 188 (1989); *Beauregard Parish*, 16 Cl. Ct. at 344.

84. *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 412 (Fed. Cir. 1988).

85. *Id.* at 412, 414-15. In *Fort Vancouver*, the plaintiff, Fort Vancouver, entered into a contract with the government for the purchase of timber. *Id.* at 410. After Fort Vancouver

tor may file actions concurrently before a federal district court and a board, although the board may suspend the contract claim pending the outcome of the tort claim.⁸⁶

had felled and bucked the timber, but before Fort Vancouver had scaled and paid for it, the Forest Service started a slash burning fire which accidentally destroyed the timber. *Id.* Fort Vancouver filed claims concurrently under the CDA and FTCA, the denial of which Fort Vancouver appealed to the Agriculture Board of Contract Appeals and United States District Court for the Western District of Washington, respectively. *Id.* at 411. "In view of the FTCA claim, the Board dismissed the appeal without prejudice subject to reinstatement by either party within three years. *Id.* The district court litigation was ultimately unsuccessful because Fort Vancouver had never gained title to the timber and therefore had no interest protected by law. *Id.* (citing *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547 (9th Cir. 1984), later proceeding, 804 F.2d 145 (9th Cir. 1986)).

Fort Vancouver subsequently sought reinstatement of its appeal before the board. *Id.* The government filed a motion to dismiss, which the board granted based on a theory of comity and judicial efficiency. *Id.* (citing *Fort Vancouver Plywood Co.*, 88-1 B.C.A. (CCH) ¶ 20,289, at 102,650 (1988), *aff'd in part and rev'd in part on other grounds*, 860 F.2d 409 (Fed. Cir. 1988)). Fort Vancouver appealed and the Federal Circuit reversed, stating:

Clearly, the board did not give effect to the decision of the Ninth Circuit, as that decision rejected a wholly different theory of recovery from the claim which was before the board. Fort Vancouver's appeal based in contract cannot justly or rationally be disposed of by giving effect to a decision denying relief in tort. The board exercised appropriate comity when it deferred consideration of the contract issue pending resolution of the tort claim. The facts of this case simply do not afford a present opportunity to exercise comity. . . .

The judicial efficiency aspect of the policy considerations identified by the board is also an improper basis for dismissal. Although dismissal of Fort Vancouver's claim certainly promotes judicial efficiency by reducing the caseload by one case, a claim otherwise meritorious cannot be dismissed on this basis alone, unless by a tribunal having certiorari-type jurisdiction, which a BCA is not.

Id. at 412.

The Federal Circuit also rejected the government's argument, raised on appeal, that the doctrine of election of remedies precluded Fort Vancouver from refileing with the board:

With the enactment of the Federal Rules of Civil Procedure, the traditional election doctrine was relaxed.

In the present case, Fort Vancouver was not presented with a true election of remedies. The contract and tort claims could not be presented in the same forum. Therefore, Fort Vancouver did not make an *election* of remedies, as there was only one possible course of action to take for each claim. Fort Vancouver was required to file separate actions seeking recovery in tort and contract due to the jurisdictional scheme of our court system, and it should not be penalized for the unwieldy organization Congress has devised for our courts. One of our predecessor courts has held that the election of remedies doctrine does not justify placing "plaintiff under a greater handicap simply because of the bifurcated nature of the procedures under which those contracting with the Government must seek relief."

Id. at 4-15 (quoting *Petrofsky v. United States*, 488 F.2d 1394, 1405 (Ct. Cl. 1973)) (citations omitted).

86. While the Federal Circuit did note in *Fort Vancouver* that the "board exercised appropriate comity when it deferred consideration of the contract issue pending resolution of the tort claim," *id.* at 412, the issue of whether contract and tort actions may proceed simultaneously was not before the court. Indeed, it would appear to be entirely proper for a contractor to proceed with its breach of contract claim before a board while a related tort claim is pending

III. EXERCISE OF TORT JURISDICTION BY THE FEDERAL DISTRICT COURTS OVER CLAIMS INVOLVING FEDERAL GOVERNMENT CONTRACTS

A. Tort Jurisdiction

Since the enactment of the FTCA in 1946, courts have examined at least two related factors in asserting tort jurisdiction over claims involving federal government contracts. Specifically, courts examine: (1) whether there is no specific, express clause in the contract governing the alleged conduct; and (2) whether state law indicates that the conduct constitutes a "classic tort," which also may give rise to a cause of action in contract, and thus allows the plaintiff to elect the cause of action. Reliance on these factors will assist the contractor in successfully pleading an action in tort.

1. Absence of a Specific Contract Clause

In *Nicholson v. United States*,⁸⁷ an early case interpreting the FTCA, the plaintiff sought damages for the loss of his barn due to a fire. The plaintiff had entered into a contract for prisoner-of-war labor and alleged that the fire

in federal district court, for under the CDA the contractor has the right "to a prompt board of contract appeals consideration of and decision on its claims." *Todd Shipyards Corp.*, 88-1 B.C.A. (CCH) ¶ 20,509, at 103,682 (1988) (quoting *Fidelity Constr. Co.*, 80-2 B.C.A. (CCH) ¶ 14,819 (1980) (citation omitted); see 41 U.S.C. § 607(e) (1988) (providing that "[a]n agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes").

In *General Dynamics Corp.*, 92-1 B.C.A. (CCH) ¶ 24,657, at 123,003 (1991), such an issue was before the board. The appellant concurrently filed a tort claim under the FTCA and a contract claim under the CDA, alleging professional malpractice (negligent auditing) and breach of the implied duty of due care under the audit clause, respectively. The board, in recognizing the appellant's jurisdictional predicament, stated that:

Although the statutory scheme required appellant to seek recovery in tort and alternatively under the contract in two separate forums, the existence of the tort claim in court does not *ipso facto* preclude the contract claim before the Board, as argued by the Government. The harm done may be considered both a breach of an implied promise under the DIVADS contract and a breach of a duty imposed by law.

Id. at 123,006 (citations and footnote omitted).

The board, however, suspended the breach claim pending the outcome of the tort claim, stating that:

The right to an expeditious hearing and decision under the Contract Disputes Act is not absolute. A Board is mandated by the Act to provide "to the fullest extent practicable, informal, expeditious and inexpensive resolution of disputes." It would be neither practical, efficient, nor inexpensive to proceed with these appeals. Where the factors favoring a stay outweigh each party's right to timely resolution, we need not proceed with the appeal. This situation exists where, as here, issues directly relevant to the breach claim before the Board are placed before the court.

Id. at 123,007 (quoting 41 U.S.C. § 607(d)) (emphasis omitted).

87. 177 F.2d 768 (5th Cir. 1949).

resulted from the negligence of the prisoners and their guard.⁸⁸ In response, the government filed a motion for summary judgment asserting that the plaintiff was precluded from any recovery under the terms of the contract.⁸⁹ While the district court granted the government's motion for summary judgment, the Fifth Circuit reversed, holding that the terms of the contract did not address the type of claim for which the plaintiff was seeking damages.⁹⁰ The Fifth Circuit, finding no specific contract provision governing the claim, held that it would be appropriate for the district court to exercise jurisdiction under the FTCA.⁹¹

More recently, the Ninth Circuit applied similar reasoning in *Walsh v. United States*.⁹² In *Walsh*, the plaintiffs sold to the government an easement for the construction of a highway across the plaintiffs' land, which the plain-

88. *Id.* at 768.

89. Specifically, the government quoted paragraph seven of the contract, which provided that:

In case it is found by the Government that the contractor has suffered damages to his property or property for which he is responsible to a third party, uncompensated by insurance, arising out of the employment of prisoners of war, and not due to fault or negligence of the contractor, which are in excess of those normally occasioned by civil workers, or the same class or classes with like experience at the job, the Government (without prejudice to any other rights which the contractor may have) will allow the amount of such excess damages as a credit against payments otherwise due from the contractor hereunder; but no such credit shall be taken without the specific approval of the Government, nor shall the liability of the Government under this paragraph for any such excess damages exceed the amount of payments due from the contractor to the Government under the terms of this contract.

Id. at 769 n.2.

90. *Id.* As the Fifth Circuit further explained:

The invoked contract provision . . . is specifically confined to peculiar classes or kinds of damages, those "which are in excess of those normally occasioned by civil workers of the same class or classes with like experiences at the job". Even as to these, the allowance to be made by the government is "without prejudice to any other rights which the contractor may have". Though, therefore, it is not clear just exactly what kind of damages paragraph 7 is aiming at, it is quite clear that it has no relation to and does not affect a tort claim of the kind sued on here.

Id.

91. *Id.* One year later, in *United States v. Scrinopskie*, 179 F.2d 959 (5th Cir. 1950), the Fifth Circuit again focused on the presence or absence of governing contract language to assess whether the plaintiff's claim was actionable in tort. In *Scrinopskie*, the plaintiff had purchased used welding machines from the government. *Id.* at 959. The claim alleged that the machines were damaged during transport due to the government's negligent failure to fasten the machines during loading. *Id.* at 960. The court reasoned that:

Even though whatever duty the United States owed to the Plaintiffs in this case arose out of a contract . . . nevertheless, counsel for the Government conceded in oral argument that since the breach was of an *implied obligation*, as distinguished from the breach of a *specific promise* in the contract, the Court had jurisdiction under the Federal Tort Claims Act.

Id. at 960.

92. 672 F.2d 746 (9th Cir. 1982).

tiffs used for grazing cattle.⁹³ In their FTCA action, the plaintiffs alleged that the government negligently failed to maintain the cattle guards constructed along the highway, resulting in the loss of plaintiffs' livestock.⁹⁴ The government filed a motion to dismiss, which the district court granted, contending that the plaintiffs based their complaint on contract theory, and that the Court of Claims had exclusive jurisdiction.⁹⁵ However, on appeal, the Ninth Circuit reversed, again focusing on the language of the contract.⁹⁶ The Ninth Circuit noted that the terms of the conveyance did not expressly place a duty of repair on the state and that in any event the language of the conveyance did not change the state's common law tort duty to repair the cattle guards.⁹⁷ Thus, when an examination of the contract terms reveals the absence of a specific, express contractual duty, an action will lie in tort.⁹⁸

2. State Law Recognizes Conduct as a "Classic Tort"

An action in tort also will lie when applicable state law recognizes the alleged conduct as a "classic tort." For example, in *New England Helicopter Service, Inc. v. United States*,⁹⁹ the plaintiff entered into a contract to rent a helicopter to the government.¹⁰⁰ Shortly thereafter, the helicopter crashed while being operated by a government employee.¹⁰¹ As a result of the crash, the plaintiff was forced to perform extensive repairs to the helicopter and to forego additional rental opportunities while performing those repairs.¹⁰² Subsequently, the plaintiff filed a claim for \$15,000 under the FTCA for the cost of repairs and loss of use and profit.¹⁰³ The United States moved to

93. *Id.* at 747.

94. *Id.*

95. *Id.*

96. *Id.* at 749-50. Specifically, the court reasoned that:

[T]he terms of the conveyance do not unambiguously place a duty of repair upon the grantee of the easement. The language may as easily be construed as assuring only the privilege of going upon the easement to repair and maintain it. It is also obvious that the language of the conveyance does not add to, detract from or change in any way the common law privilege and duty of the owner of the easement to repair and maintain it, a duty which arises *ex delicto* and which exists if the deed of conveyance is wholly silent on the subject.

Id.

97. *Id.*

98. See also *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984) (holding that the contract in question did not specifically provide for liability under the circumstances presented); *Aetna Ins. Co. v. United States*, 327 F. Supp. 865 (E.D. La. 1971) (holding that action sounded in tort where no specific contract adjustment provision addressed claims of the nature asserted).

99. 132 F. Supp. 938 (D.R.I. 1955).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

dismiss, contending that the court could not hear a contract case in which the claim exceeded \$10,000.¹⁰⁴ The court looked to common law to assess whether a cause of action would lie in tort and, recognizing that the action alleged a bailment, applied the general rule that, in a mutual benefit bailment, the bailor may sue in tort or contract.¹⁰⁵ The court rejected the government's argument that a different rule should apply in suits against the government, i.e., that because the Tucker Act provides relief in actions for breach of contracts of bailment, no alternative tort remedy should be allowed.¹⁰⁶ In so ruling, the court reasoned that the United States is to be treated as a private person under the FTCA and that nothing in the Act limits the liability of the United States in tort simply because the United States may also be guilty of a breach of contract.¹⁰⁷

In *Martin v. United States*,¹⁰⁸ the Ninth Circuit again relied on the "classic tort" theme to assert jurisdiction. *Martin* involved a claim for damages resulting from personal injury due to the negligent repair of a house.¹⁰⁹ The court, however, focused not only on the duty breached, but also on the nature of the injury suffered and damages sought.¹¹⁰ The Ninth Circuit appar-

104. *Id.* at 938-39.

105. *Id.* at 939. Specifically, the court noted that:

It is the general rule that where a bailee for mutual benefit fails to exercise proper care of the property bailed and it is damaged thereby, the bailor may sue him in assumpsit or in an action on the case. The bailor has this election of remedies because the bailee's violation of the duty imposed upon him by the bailment is not only a breach of his contract but also a tort.

Id.

106. *Id.*

107. *Id.* The Third Circuit employed similar reasoning in *Aleutco Corp. v. United States*, 244 F.2d 674 (3d Cir. 1957), where the plaintiff filed an FTCA claim for conversion. *Id.* at 675. In *Aleutco*, the court recognized that although Aleutco could have filed a complaint for breach of contract in the Court of Claims, "there is no policy in the law which requires that the forum of the district court be denied a plaintiff who pleads and proves a classic case in tort." *Id.* at 679. A federal district court arrived at a similar conclusion in *Palomo v. United States*, 188 F. Supp. 633 (D. Guam 1960), where the court concluded that: (1) the plaintiff's claim for waste could be asserted as a tort or a breach of contract under state law; (2) the United States is liable under the FTCA if a private person would be liable under state law; (3) therefore, the plaintiff could maintain the action in tort or contract against the United States. *Id.* at 637.

108. 649 F.2d 701 (9th Cir. 1981).

109. *Id.*

110. *Id.* at 705. As the court noted:

The tort alleged here arises from an unsafe condition leading to a personal injury. It is a classic tort. If the claim arising out of the breach of contract were for expectation damages, i.e., asking for the installation of a good spout, it would be more characteristic of a contractual action. However, this is a personal injury action arising from breach of a duty of care arising out of a contract. It would be improper to limit the plaintiff to a purely contract remedy.

Id.; see also *Love v. United States*, 915 F.2d 1242 (9th Cir. 1989) (holding that the district court had jurisdiction over a claim by borrowers against the government for liquidation of

ently relied heavily on the fact that the plaintiff had not sought contractual expectation damages such as "loss of profit or other purely economic harm."¹¹¹ Thus, where the plaintiff alleges a classic tort and seeks corresponding tort damages the federal district courts will assert jurisdiction under the FTCA.

B. No Tort Jurisdiction

Federal courts will assert FTCA jurisdiction where the contract does not address the specific conduct or injury at issue or where the conduct or injury constitutes a classic tort. As one might expect, the converse applies as well. Federal district courts will not exercise jurisdiction under the FTCA where the activity at issue: (1) is governed by the terms of the contract; and/or (2) does not give rise to an action in tort under state law. In addition to examining these issues, courts, when finding that no tort jurisdiction exists, have sought to advance a government-contract-specific policy goal, namely, the maintenance of a uniform body of federal law governing federal government contracts.

1. Failure to Plead an Actionable State Law Tort

In *Aktiebolaget Bofors v. United States*,¹¹² an early FTCA case, the plaintiff granted a license to the United States for the use of a secret manufacturing process for an anti-aircraft gun.¹¹³ The claim alleged that the United States improperly furnished the gun to its allies, constituting "an illegal use of the secret process in excess of the limitation of the license."¹¹⁴ The court easily dismissed the claim by relying on the well-recognized rule established by the *Restatement of Torts* that it is the improper procurement of the trade secret, rather than the mere use of that secret, that gives rise to an action in tort.¹¹⁵ There was simply no basis in state law for finding that the complained-of activity constituted a tort.

Similar results are found in *Wooldridge Manufacturing Co. v. United States*,¹¹⁶ in which the plaintiff, an unsuccessful bidder on a government contract, alleged that the contracting officer "negligently, tortiously and ille-

cattle under a security agreement where such conduct constituted a conversion under state law); *Green Constr. Co. v. Williams Form Eng'g Corp.*, 506 F. Supp. 173 (W.D. Mich. 1980) (holding that the district court had jurisdiction over a claim for indemnity where applicable law provided that tort liability may arise out of negligent performance or nonperformance of a contract).

111. *Martin*, 649 F.2d at 705.

112. 93 F. Supp. 131 (D.D.C. 1950), *aff'd*, 194 F.2d 145 (D.C. Cir. 1951).

113. *Id.* at 132.

114. *Id.*

115. *Id.* at 133 (citing RESTATEMENT OF TORTS § 757 cmt. a (1939)).

116. 235 F.2d 513 (D.C. Cir. 1956) (*per curiam*).

gally entered into the contract with Caterpillar [plaintiff's competitor]."¹¹⁷ Unfortunately for the plaintiff, state law simply did not recognize any tort action governing the specific wrong at issue, and thus the court dismissed the case.¹¹⁸ More recently in *Nichols v. Block*,¹¹⁹ the court dismissed the plaintiff's tort claim, which was premised on violations of federal statutes and regulations relating to loans administered by the Farmers Home Administration (FmHA), because the plaintiff "fail[ed] to point to the existence of a specific duty under Montana law analogous to the obligation imposed upon the FmHA by the statutes and regulations at issue."¹²⁰ Thus, the absence of a tort under applicable state law will prove fatal to the plaintiff's claim under the FTCA.

2. *Breach of a Promise Made in a Contract*

Where the alleged conduct is primarily a breach of a contractual undertaking, i.e., a specific promise made in a contract, the plaintiff's claim under the FTCA also will fail for want of jurisdiction. In *Woodbury v. United States*,¹²¹ the Ninth Circuit addressed the plaintiff's action under the FTCA for breach of fiduciary duty by the Housing and Home Finance Agency (HHFA). The plaintiff obtained financing from the HHFA for the construction of prefabricated housing for naval and civilian personnel at Kodiak Naval Base in Alaska.¹²² The loan was insured by the Federal Housing Administration (FHA) and the Federal National Mortgage Association (FNMA).¹²³ The plaintiff met with financial difficulties, which brought construction to a halt.¹²⁴ After much negotiation, the parties reached an agreement providing for the completion of the project and the payment of creditors.¹²⁵ Upon completion, 341 of 343 units passed FHA require-

117. *Id.* at 514.

118. More specifically, the D.C. Circuit stated:

One of the essential elements of a cause of action in negligence is that the conduct complained of invaded some interest of the plaintiff which, by virtue either of statute or of the common law, is entitled to protection as against the defendant. Otherwise expressed, the rule is that the plaintiff must allege facts which show that the defendant breached some legally imposed duty owed to the plaintiff. The Federal Tort Claims Act provides that the Government shall be liable under circumstances where it, if a private person, would be liable. We think the complaint in the case at bar did not allege facts constituting a tort, because it failed to show that any legally protected right belonging to the plaintiff was invaded.

Id. (footnotes omitted).

119. 656 F. Supp. 1436 (D. Mont. 1987).

120. *Id.* at 1445.

121. 313 F.2d 291 (9th Cir. 1963).

122. *Id.* at 292.

123. *Id.* at 293.

124. *Id.*

125. *Id.*

ments.¹²⁶ However, the HHFA filed a foreclosure action against the plaintiff's company in district court alleging: (1) that the company still owed outstanding advances of over \$4 million and accrued interest of \$211,105.65; (2) that FHA and FNMA commitments to insure had lapsed; and (3) that no permanent individual mortgages had been taken out on any of the 341 units.¹²⁷

Subsequently, Woodbury filed its action under the FTCA and alleged that the HHFA breached its fiduciary relationship with Woodbury by refusing to adopt a "financing plan that considered the claims of all the parties interested in the completion agreement and instead by proceeding to satisfy and prefer its own interests as a creditor from the assets of the project to the exclusion of the interests of said other persons."¹²⁸ In analyzing the claim, the Ninth Circuit focused on the source of the promise or duty allegedly breached:

Many breaches of contract can also be treated as torts. But in cases such as this, where the "tort" complained of is based entirely upon breach by the government of a promise made by it in a contract, so that the claim is in substance a breach of contract claim, and only incidentally and conceptually also a tort claim, we do not think that the common law or local state law right to "waive the breach and sue in tort" brings the case within the Federal Tort Claims Act.¹²⁹

Since the Ninth Circuit's decision in *Woodbury*, a steady stream of cases have held that the federal district courts do not have jurisdiction under the FTCA over claims based on the government's alleged failure to perform essentially contractual obligations.¹³⁰

126. *Id.* (explaining that the remaining two units were not acceptable to the FHA due to problems with the foundation).

127. *Id.* at 294; *see also* *United States v. Aleutian Homes, Inc.*, 193 F. Supp. 571 (D. Alaska 1961) (providing an account of the HHFA's foreclosure action against Aleutian Homes which was organized by Woodbury).

128. *Woodbury*, 313 F.2d at 294 (quoting *Woodbury v. United States*, 192 F. Supp. 924, 933 (D. Or. 1961)).

129. *Id.* at 295. The court continued:

We do not mean that no action will ever lie against the United States under the Tort Claims Act if a suit could be maintained for a breach of contract based upon the same facts. We only hold that where, as in this case, the action is essentially for breach of a contractual undertaking, and the liability, if any, depends wholly upon the government's alleged promise, the action must be under the Tucker Act, and cannot be under the Federal Tort Claims Act.

Id. at 296.

130. *See, e.g.*, *Eddleman v. United States*, 729 F. Supp. 81, 83 (D. Mont. 1989) (holding that a claim for failure to transfer title to horses or compensate plaintiffs for feeding them was not a tort); *Darko v. United States*, 646 F. Supp. 223, 228 (D. Mont. 1986) (concluding that a claim for breach of fiduciary duty for failure to approve lease did not sound in tort); *Blanchard*

3. *Uniform Body of Federal Government Contract Law*

While *Woodbury* and its progeny have focused primarily on the source of the obligation allegedly breached in order to determine whether the action sounds in tort, these courts have also been motivated by a desire to maintain a uniform body of federal law governing federal government contracts.

In *Woodbury*, the Ninth Circuit explained the statutory scheme of the FTCA and the Tucker Act as applied to tort claims and contract claims against the federal government.¹³¹ In so doing, the court made a distinction as to the applicable law under each statute.¹³² The court stated that "the law to be applied in construing or applying provisions of government contracts is federal, not state law."¹³³ On the other hand, under the FTCA, "state law, not federal law, controls."¹³⁴

In holding against the exercise of jurisdiction, the court concluded that:

The notion of such waiver of breach and suit in tort is a product of the history of English forms of action; it should not defeat the long established policy that government contracts are to be given a uniform interpretation and application under federal law, rather than being given different interpretations and applications depending upon the vagaries of the laws of fifty different states.¹³⁵

v. St. Paul Fire & Marine Ins. Co., 341 F.2d 351, 357 (5th Cir.) (concluding that a contractor's claim for wrongful termination did not sound in tort since the sole relationship between the parties was wholly contractual in character), *cert. denied*, 382 U.S. 829 (1965); *Herder Truck Lines v. United States*, 335 F.2d 261 (5th Cir. 1964) (finding that the claim for conversion was actually a claim for breach of bill of lading). While the focus in such cases is generally on the type of activity prescribed or prohibited, at least two cases analyzed the injury flowing from the activity to determine whether an exclusively contractual obligation has been breached. In *Petersburg Borough v. United States*, 839 F.2d 161 (3d Cir. 1988), the court noted that the claim was "for breach of a promise by the [Farmers Home] Administration to close timely, a default leading to purely economic harm. No person suffered any personal injury . . . nor was property damaged." *Id.* at 163. In *Helena Joint City-County Airport Bd. v. United States*, 256 F. Supp. 792 (D. Mont. 1966), a contract clause specifically covered "damage to runways, taxiways or other facilities." Thus, the court concluded that a claim alleging damage to these areas did not sound in tort, but rather arose out of contractual obligations. *Id.* at 793. *But see infra* note 233 and accompanying text (discussing *Love v. United States*, 915 F.2d 1242 (9th Cir. 1989) (holding that the presence of a specific contractual obligation does not appear to be dispositive of jurisdiction where state law gives rise to a separate tort duty)).

131. *Woodbury*, 313 F.2d at 295.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

For the Ninth Circuit, there was no other tenable result.¹³⁶ Thus, the maintenance of a uniform body of federal procurement law is an important policy consideration for the potential plaintiff under the FTCA.¹³⁷

IV. EXERCISE OF CONTRACT JURISDICTION BY THE CLAIMS COURT OVER TORTIOUS BREACH OF CONTRACT CLAIMS

A. Contract Jurisdiction

Unfortunately for the plaintiff whose tort claim is dismissed by a federal district court for lack of jurisdiction, that dismissal is not the equivalent of a finding that the Claims Court does have jurisdiction.¹³⁸ Rather, the Claims Court will perform its own independent analysis of the claim in light of the statutes granting it jurisdiction over contract claims.¹³⁹ More specifically, the Claims Court will exercise jurisdiction when it determines that a tortious breach of contract has occurred, i.e., that the wrong alleged is actually derived from the government's contractual undertaking and thus is not a tort independent of the contract.¹⁴⁰

In the frequently cited case of *Chain Belt Co. v. United States*,¹⁴¹ the Court of Claims set forth the analysis for determining whether a plaintiff's claim sounds in contract. In *Chain Belt*, the plaintiff entered into a contract for the purchase of a manufacturing plant from the government.¹⁴² At the time of the purchase, there were machines still affixed to the realty which were not included in the sale.¹⁴³ Consequently, the contract contained a clause granting the government access to the premises for purposes of selling and removing the machinery.¹⁴⁴

After much delay, the government finally contracted with a moving company for the removal of the machinery.¹⁴⁵ After the removal began, the plaintiff noted that the manner in which the company was removing the machinery caused excessive damage to the factory flooring.¹⁴⁶ After repeated and unsuccessful complaints, negotiations, and administrative claims,

136. *Id.* ("[T]o permit the result here sought would give to the plaintiff not only a choice of forum (district court rather than Court of Claims where over \$10,000 is sought), but also a choice of law.").

137. *But see infra* note 234 and accompanying text (noting that the goal of uniformity does not appear to be dispositive of jurisdiction).

138. *See Jeppesen Sanderson, Inc. v. United States*, 19 Cl. Ct. 233, 237 (1990).

139. *Id.*

140. *Id.*

141. 115 F. Supp. 701 (Ct. Cl. 1953).

142. *Id.* at 705.

143. *Id.*

144. *Id.*

145. *Id.* at 705-06.

146. *Id.* at 706.

the plaintiff filed an action in the Court of Claims for the damage caused to the floor.¹⁴⁷

The government contended, *inter alia*, that the plaintiff's claim was beyond the court's jurisdiction because it sounded in tort.¹⁴⁸ In response, the court noted that "an action may be maintained in this court which arises primarily from a contractual undertaking regardless of the fact that the loss resulted from the negligent manner in which defendant performed its contract."¹⁴⁹ The court further explained that a tortious breach of contract does not constitute an independent tort that precludes filing suit under the Tucker Act.¹⁵⁰ The court thus concluded that the allegedly wrongful conduct was a result of the Government's contractual duty to use ordinary care in the removal of the machinery from the factory.¹⁵¹

The Court of Claims consistently relied on its analysis in *Chain Belt* throughout the 1960s and 1970s.¹⁵² In 1980, the Supreme Court, while not specifically citing *Chain Belt*, applied similar reasoning in the context of an implied-in-fact contract.¹⁵³ As the Court stated:

Without more, neither the existence of a tort remedy nor the lack of one is relevant to determining whether there is an implied-in-fact contract of bailment upon which the United States is liable in the Court of Claims pursuant to its waiver of sovereign immunity contained in the Tucker Act.¹⁵⁴

Since their inception, both the Federal Circuit and Claims Court have consistently recognized that the existence of a tort is not relevant to whether there is a contract claim; rather, the only relevant inquiry is whether there was a breach of a primarily contractual undertaking.¹⁵⁵ Finally, in its most

147. *Id.* at 706-07.

148. *Id.* at 711-12.

149. *Id.* at 711-12 (citing *Chippewa Indians v. United States*, 91 Ct. Cl. 97, 130, 131 (1940)).

150. *Id.* (citing 28 U.S.C. §§ 1346, 2401, 2402 (1988); *United States v. Huff*, 165 F.2d 720, 723 (5th Cir. 1948)).

151. *Id.*

152. A progression of cases reaffirm the decision in *Chain Belt*. See *Bird & Sons v. United States*, 420 F.2d 1051, 1054 (Ct. Cl. 1970) (stating that "where an alleged 'negligent' act constitutes a breach of a contractually created duty, the Tucker Act does not preclude relief"); *Burt v. United States*, 176 Ct. Cl. 310, 314 (1966); see also *Fountain v. United States*, 427 F.2d 759 (Ct. Cl. 1970) (citing *Burt*, 176 Ct. Cl. at 314, for the proposition that "[i]f contractual relations exist, the fact the alleged breach is also tortious does not foreclose Tucker Act jurisdiction"), *cert. denied*, 404 U.S. 839 (1971).

153. *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980).

154. *Id.* at 466.

155. See, e.g., *San Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 960 (Fed. Cir. 1989); *H.H.O., Inc. v. United States*, 7 Cl. Ct. 703, 706-07 (1985); *Travelers Indem. Co. v. United States*, 16 Cl. Ct. 142, 146, 149-50 (1988); *Juda v. United States*, 6 Cl. Ct. 441, 453 (1984).

recent decisions, the Claims Court has spoken in terms of finding a "direct connection" or "nexus" between the contractual obligations and tortious conduct in order to conclude that a claim establishes a tortious breach of contract.¹⁵⁶

B. No Contract Jurisdiction

An analysis of decisions issued by the Court of Claims, Claims Court, and Federal Circuit, holding that no contract jurisdiction exists over contract claims that also involve tortious conduct, reveals the courts' general failure to provide any detailed analysis. Instead, the decisions merely set forth, either explicitly or implicitly, a simple, conclusory syllogism: (1) the court does not have jurisdiction over tort claims; (2) the plaintiff's claim alleges a tort; and (3) therefore, the court has no jurisdiction over the plaintiff's claim.¹⁵⁷ This appears to be due to the fact that in most cases it is obvious,

156. See *Summit Contractors, Inc. v. United States*, 22 Cl. Ct. 54, 57 (1990) (finding a sufficient nexus between the alleged tort and the parties' contractual obligations for the claim to come within the Tucker Act), *summary judgment granted on other grounds*, 23 Cl. Ct. 333 (1991); *Jeppesen Sanderson, Inc. v. United States*, 19 Cl. Ct. 233, 237 (1990) (reaffirming the need for a close connection between contract provisions and the alleged tortious conduct in order for the Court of Claims to exercise jurisdiction); *Hartle v. United States*, 18 Cl. Ct. 479, 483 (1989) (stating that "there appears to be a direct connection between HUD's contractual obligations and the alleged tortious conduct"), *complaint dismissed on other grounds*, 22 Cl. Ct. 843 (1991).

157. See, e.g., *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989); *Radioptics, Inc. v. United States*, 621 F.2d 1113, 1130 (Ct. Cl. 1980); *Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1249 (Ct. Cl. 1970); *Fort Sill Gardens, Inc. v. United States*, 355 F.2d 636, 637-38 (Ct. Cl. 1966).

The Claims Court provided a somewhat more extensive analysis in *C.B.C. Enters. v. United States*, 24 Cl. Ct. 1 (1991), where the plaintiff alleged that the government's unwarranted investigation and unfair recommendation for disbarment constituted a breach of the government's "duty to act in good faith and deal fairly, to cooperate and not to hinder, to evaluate claims for equitable adjustment fairly, to administer the contract with due care, and to not actively interfere." *Id.* at 3 (footnotes omitted). In concluding that the claim sounded in tort and was independent of the contract, the court stated:

The contract duties which plaintiff claims were breached are not express but implicit in any contract. But such generalized obligations as, not interfering with the other party's performance, or failure to act in good faith, must have a contract performance referent to have any relevance. While obviously having more force than mere precatory language, good conduct obligations are not self enforcing. A generalized pattern of obnoxious behavior may have some bearing on whether one party's discretionary assessment of the other's performance is entitled to deference. Or a party claiming hindrance for example, might allege some result of that hindrance in contract terms, for instance, that non-performance should be excused, or that delays resulted. But here there is simply no nexus alleged between the Government's allegedly tortious breach of these implicit conduct obligations and any express term of the contract.

Id. at 5.

at least to the court, that the complaint alleges a tort and not a breach of contract.¹⁵⁸

Perhaps the most noteworthy feature of Claims Court decisions that deny jurisdiction is the court's occasional focus on the type of damages sought in order to determine whether the action lies primarily in tort or in contract.¹⁵⁹ For example, in *Olin Jones Sand Co. v. United States*,¹⁶⁰ the plaintiff alleged that the government had improperly delayed making payments under a contract, resulting in the inability of the plaintiff to make payments to employees, subcontractors, and suppliers.¹⁶¹ The plaintiff further alleged that the government had made false statements to the plaintiff's bonding company, impairing the plaintiff's ability to obtain bonding on future contracts.¹⁶² The plaintiff sought \$500,000 in consequential and resulting damages.¹⁶³

In ruling on the government's motion for summary judgment, the court first turned to the question of allowable contract damages.¹⁶⁴ The court noted that while it may allow direct or foreseeable damages, it only may allow consequential damages when they are the natural and probable consequence of a breach and not when they are remote and speculative.¹⁶⁵ The court then turned to the jurisdictional issue and chose to exercise jurisdiction

158. See *Radioptics*, 621 F.2d at 1130 (dismissing a claim of misappropriation of a trade secret because it constituted a tort); *Algonac*, 428 F.2d at 1249 (dismissing a claim because the allegations constituted wrongful prosecution, libel, defamation, and institution of wrongful civil proceedings); *Williamson v. United States*, 166 Ct. Cl. 239, 244-45 (1964) (dismissing a claim alleging that government security officials released derogatory information to the plaintiff's employer without the plaintiff's permission, resulting in termination of employment, because these allegations constituted a claim for interference with a contract). However, at times the courts have been somewhat vague and less obvious in identifying what the tort is. See, e.g., *Pinkston v. United States*, 6 Cl. Ct. 263, 265, 267 (1984) (dismissing a claim alleging that the government's extensive, investigation was an unlawful interference with business resulting in "constructive, unlawful suspension, debarment [sic] or blacklisting," because the plaintiff asserted jurisdiction under a tort theory previously not recognized by the Court); *Somali Dev. Bank v. United States*, 508 F.2d 817, 820 (Ct. Cl. 1974) (holding that, even though the court "had difficulty in analyzing plaintiffs' legal arguments . . . [it] concluded that . . . their cause of action sound[ed], in substance and in reality, in tort").

159. See *Frawley v. United States*, 14 Cl. Ct. 766, 767 (1988) ("Plaintiff is reminded that a claim for damage to reputation is a claim sounding in tort over which this court has no jurisdiction."); *Malnak v. United States*, 223 Ct. Cl. 783, 786 (1980) ("[D]amages claimed . . . are clearly special damages recoverable only under a tort claim for relief."); *Transcountry Packing Co. v. United States*, 568 F.2d 1333, 1338 (Ct. Cl. 1978) (stating that "the very nature of . . . damages claimed by plaintiff . . . clearly reflects that plaintiff's petition is in tort"). In the above-cited cases, however, the *type* of damages sought appears to be merely an indication of the type of claim alleged and ultimately not dispositive of the issue.

160. 225 Ct. Cl. 741 (1980).

161. *Id.* at 742.

162. *Id.*

163. *Id.*

164. *Id.* at 742-43.

165. *Id.* at 743-44.

over the alleged breach, but carefully limited the scope of recovery to allowable contract damages.¹⁶⁶

Thus, the Claims Court will focus on whether the breach is of a primarily contractual undertaking in making its jurisdictional determination. In addition, the court will look at the type of damages sought as further evidence of the type of claim alleged.

V. EXERCISE OF CONTRACT JURISDICTION BY THE BOARDS OF CONTRACT APPEALS OVER TORTIOUS BREACH OF CONTRACT CLAIMS

A. *Contract Jurisdiction*

Predictably, because the CDA "authorized" the boards of contract appeals "to grant any relief that would be available . . . in the . . . Claims Court,"¹⁶⁷ the boards very closely follow the analysis set forth in Claims Court precedent when asserting jurisdiction over a breach of contract claim that also involves tortious conduct. This analysis typically includes an examination of whether the claim alleges a breach that is primarily of a contractual undertaking. Focusing on the language of the actual jurisdictional grant of the CDA, however, the boards often pose the issue of jurisdiction as a question of whether the appeal alleges a violation "relative to a contract."¹⁶⁸ Finally, at least one board has looked to the Uniform Commercial

166. More specifically, the court stated:

Insofar as plaintiff's references to defendant's alleged misrepresentations are merely another way of asserting that a breach of contract occurred, the sixth claim is not barred simply because it might also be stated as a tort. However, damages arising from defendant's alleged breach must still be limited to compensation for those injuries directly related to completion of the contract in question, as opposed to any remote or speculative effects the misrepresentations might have had on obtaining bonding for other contracts. The damages must be proper contract damages.

Id. at 745; *see also* C.B.C. Enters. v. United States, 24 Cl. Ct. 1 (1991). Looking to the type of damages sought, the court noted:

The non-contractual nature of the claim is further highlighted by the type of damages sought. Plaintiff seeks reimbursement of attorney's fees and internal expenses for defending itself against the criminal investigation and possible debarment. Counsel fees and other litigation expenses are not recoverable as breach of contract damages absent a specific authorization.

Id. at 5.

Finally, the Claims Court has held that punitive damages are not available in contract actions. *See, e.g.,* Garrett v. United States, 15 Cl. Ct. 204 (1988), where the court dismissed the plaintiff's punitive damages claim for bad faith and false representation, because "[c]laims sounding in tort are beyond this court's jurisdiction. *A fortiori*, this court is without jurisdiction to award punitive damages." *Id.* at 208 (citations omitted).

167. 41 U.S.C. § 607(d) (1988).

168. *Id.*

Code (UCC) for guidance in its determination of whether a contractual obligation exists.¹⁶⁹

1. *Following Claims Court Precedent*

In *Goodfellow Bros.*,¹⁷⁰ the Agriculture Board of Contract Appeals was confronted with a lessor's claim that alleged, *inter alia*, that the government had damaged the leased property, a camp, by negligently allowing the water system to freeze. The board began its analysis by questioning whether it had jurisdiction over the type of legal issue presented and relief sought.¹⁷¹ The board then observed that under the CDA,¹⁷² it had subject-matter jurisdiction equivalent to that of the Court of Claims, and that tort claims are expressly excluded from the jurisdiction of the Court of Claims under the Tucker Act.¹⁷³

However, the Board then recognized that in certain situations the Court of Claims exercises jurisdiction over contract claims that also involve tortious conduct.¹⁷⁴ The Board then noted that the Court of Claims had specifically held that the court had jurisdiction over a breach of an express covenant in a lease "to restore the premises to the condition that existed when the lease was executed."¹⁷⁵ Finally, the Board examined the contract terms and, finding a clause that required the government to leave the premises in good repair, asserted jurisdiction over the claim.¹⁷⁶ Thus, because a board's jurisdiction is largely equivalent to that of the Claims Court, a board

169. See *infra* notes 188-91 and accompanying text.

170. 81-1 B.C.A. (CCH) ¶ 14,917, at 73,798 (1981).

171. *Id.* at 73,805.

172. 41 U.S.C. § 607(d).

173. 28 U.S.C. § 1491 (1988).

174. *Goodfellow*, 81-1 B.C.A. (CCH) at 73,805 (citing *Fountain v. United States*, 427 F.2d 759 (Ct. Cl. 1970), *cert. denied*, 404 U.S. 839 (1971); *Fort Sill Gardens, Inc. v. United States*, 355 F.2d 636 (Ct. Cl. 1966); *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741 (1980); *Burt v. United States*, 176 Ct. Cl. 310 (1966)). As the *Goodfellow* court noted:

Although the Court has recognized that it lacks jurisdiction of tort claims, it has also recognized that an action could be maintained which arises primarily from a contractual undertaking even though the loss may have resulted from the negligent manner in which the contract was performed. Similarly the Court has held that while a party may not bring a tort claim within the jurisdiction of the Court by framing it in terms of an implied contract, an action for breach of an enforceable contract is not outside the Court's jurisdiction simply because elements of tort are present in the claim.

Goodfellow, 81-1 B.C.A. (CCH) at 73,805 (citation omitted).

175. *Id.* (citing *San Nicolas v. United States*, 617 F.2d 246 (Ct. Cl. 1980)).

176. *Id.* A board employed similar reasoning in *Kolar, Inc.*, 84-1 B.C.A. (CCH) ¶ 17,044, at 84,854 (1983); see also *Marangos Constr. Corp.*, 90-1 B.C.A. (CCH) ¶ 22,309, at 112,027, 112,028 (1989) (holding that the board has jurisdiction to hear a claim alleging a breach of an implied contractual obligation in order to protect jobsite materials that were destroyed by fire).

will examine the contract in order to determine, in the vernacular of the Claims Court, whether the breach is of a primarily contractual undertaking.

2. *Looking to Claims Relating to a Contract*

In addition to following Claims Court precedent, the boards often focus on whether the allegations "relate to" the contract in dispute, because the language in the CDA that specifically grants jurisdiction is phrased in terms of "jurisdiction to decide any appeal . . . relative to a contract."¹⁷⁷ For example, in *Jones, Inc.*,¹⁷⁸ the appellant filed a claim alleging that its gearbox, which appellant used to store equipment and material for a construction project, was missing from the storage space assigned by the government. The contracting officer denied the claim, stating that the contractor failed to store the gearbox in the designated storage area, and thus the government could not be held liable for its disappearance.¹⁷⁹

On appeal, the government filed a motion to dismiss, which the board denied.¹⁸⁰ The government renewed its motion, however, asserting three related arguments: (1) "Appellant has not presented a claim arising under the contract but rather generally sought refuge in tort principles for his claim;" (2) "no relevant contract provision has come to light shifting to the Government the burden of protecting or preserving Appellant's property;" and (3) "as a general proposition, Boards of Contract Appeals may not exercise jurisdiction in matters sounding in tort."¹⁸¹ The board then examined its jurisdiction under the CDA in light of the government's arguments, and concluded that the board had jurisdiction over the subject matter of the dispute where the claim related to the contract and was predicated on the CDA rather than on general tort law.¹⁸² The board then concluded that the terms of the agreement were in dispute and consequently constituted matters relat-

177. 41 U.S.C. § 607(d) (1988).

178. 84-3 B.C.A. (CCH) ¶ 17,608, at 87,723 (1984).

179. *Id.* at 87,725. The contractor denied the contracting officer's finding, asserting that it did place the gearbox in the designated area, from which it was subsequently stolen. *Id.*

180. *Id.*

181. *Id.* at 87,725-26.

182. *Id.* at 87,726.

ing to the contract.¹⁸³ Accordingly, the board denied the government's motion to dismiss.¹⁸⁴

More recently, in *Liquid Carbonic*,¹⁸⁵ the board addressed a claim for "loss of use" of medical gas cylinders that were furnished to the government under a blanket purchase agreement ("BPA"), but were not returned to the contractor. The government filed a motion to dismiss, contending that the appellant's original claim had no basis under the BPA provisions and sounded in tort over which the board had no jurisdiction.¹⁸⁶ In response, the board focused on its grant of jurisdiction by the CDA over any express or implied contract and concluded that the absence of an express contractual obligation would not defeat that jurisdiction.¹⁸⁷

183. *Id.* Although the board chose to exercise jurisdiction, it could not find for the contractor. *See id.*

A similar statement of the law is found in *Marangos Constr. Corp.*, 90-1 B.C.A. (CCH) ¶ 22,309, at 112,027 (1989), where the appellant entered into a contract with the government to perform roof repairs. The appellant stored roofing construction materials at the worksite in accordance with the contract's "Operations and Storage Areas" clause. *Id.* When a fire destroyed the materials, the appellant filed a claim for, *inter alia*, the replacement of the materials. *Id.* On appeal to the board, the government filed a motion to dismiss, which the board denied on the ground that while the government correctly stated the law, it mischaracterized the claim:

The Government argues that this appeal sounds in tort and "any alleged wrongs by the Government are independent of the contractual obligations of the parties." The Contract Disputes Act of 1978 (CDA), does not confer upon the Board jurisdiction over disputes sounding in tort. Further in *Alfred Bronder*, the Board stated that: "[i]n order for a purported 'tort' claim to be cognizable under the Act, it must relate to or arise out of an express or implied contractual obligation."

The Government, however, mischaracterizes appellant's claim. In the 11 March 1988 claim, appellant alleged, among other things, that the Government breached an implied contractual obligation to protect the materials, failed to make payments under the PAYMENTS TO CONTRACTORS clause, and directed appellant to clean up debris from the fire.

This Board has jurisdiction to decide liability for damages and associated costs for replacing materials when responsibility and liability are to be determined by the contractual obligations of the parties. Appellant's allegations confer jurisdiction of the Board.

Id. at 112,028 (citations omitted). Thus, the boards will recognize an implied duty to protect a contractor's materials, a duty that was breached in *Marangos* but not in *Jones*.

184. *Id.*

185. 91-2 B.C.A. (CCH) ¶ 24,040, at 120,333 (1991).

186. The government asserted, correctly, that there was "no clause in the BPA requiring the Government to reimburse appellant for the loss of cylinders." *Id.* at 120,334.

187. *Id.* (citing *Alfred Bronder*, 86-3 B.C.A. (CCH) ¶ 19,102, at 96,554 (1986), *aff'd*, *Bronder v. United States*, 824 F.2d 980 (Fed. Cir. 1987)). The board then examined whether the evidence supported the existence of such an implied-in-fact obligation:

While appellant contends that a bailment relationship existed between the parties, it appears to us that it is, in effect, alleging that, as a result of the nature of the contract performance, in which appellant's cylinders were accepted by the Government filled with gas and, for the most part, returned empty, there resulted a contract implied in

Thus, the boards, like the Claims Court, will focus on the presence of an express or implied contractual obligation. However, the boards will use this finding to determine whether the claim relates to the contract under the terms of the CDA, while the Claims Court will use the existence of a contractual obligation to determine whether the breach is primarily of a contractual undertaking. Although the methods differ, the results are the same.

3. *Looking to the UCC*

Finally, at least one board has looked to the UCC to determine whether there is a breach of contractual duty which confers jurisdiction. In *Noodles by Leonardo, Inc.*,¹⁸⁸ the Agriculture Board of Contract Appeals was faced with a claim alleging that the government had caused infestation of the appellant's pasta, which the government subsequently rejected.¹⁸⁹ After quoting extensively from the jurisdictional analysis set forth in *Goodfellow*,¹⁹⁰ the Board focused on the particular contractual obligation allegedly breached by the government and, in asserting jurisdiction, noted that the UCC would place a duty of due care on the government in such circumstances.¹⁹¹ Thus, the existence of a contractual duty under the UCC may help to establish jurisdiction.

fact that the empty cylinders would continue to be returned after Government receipt. If appellant is to recover on its claim here, it must, among other things, establish the existence of such an implied contract. We will provide it with the opportunity to do so and will not dismiss the appeal.

Id.

188. 85-3 B.C.A. (CCH) ¶ 18,488, at 92,853 (1985).

189. *Id.* More specifically, the appellant alleged that the government included a shipment of another producer's infested pasta in the shipment of appellant's pasta, resulting in the infestation of appellant's pasta. Appellant claimed such damages as "infestation of the properly returned pasta, expenses and lost profits of shutting down Appellant's plant, and fumigation expenses." *Id.* at 92,856. The case presents a close and difficult question. Appellant did not complain that the Government wrongfully rejected the pasta, nor that the Government's rejection of the pasta caused the alleged damages. Rather, Appellant alleged that the Government included, in its shipment to the Appellant, infested pasta of another producer, which resulted in damages to the Appellant. Such damages included infestation of the properly returned pasta, expenses and lost profits of shutting down Appellant's plant, and fumigation expenses. *Id.* at 92,855.

190. 81-1 B.C.A. (CCH) ¶ 14,917, at 73,798 (1981).

191. *Noodles*, 85-3 B.C.A. (CCH) at 92,856. Specifically, the court reasoned that:

While there is no specific contract provision regarding the Government's obligations with respect to the rejected pasta, such an obligation can be implied as a result of the bailment relationship that arises. Further, under Uniform Commercial Code (UCC) Sections 2-602 and 2-603, the Government owes Appellant a duty to reasonably care for the rejected goods. Therefore, to the extent that the Government may have breached this duty through negligence or otherwise by causing infestation of the rejected pasta if no infestation was already present, the Board has jurisdiction over that portion of the appeal relating to the claimed damages to the rejected product.

Id.

B. No Contract Jurisdiction

Historically, the boards of contract appeals summarily dismissed claims involving tortious conduct because the boards had no authority under the disputes clause to decide claims for breach of contract, let alone tortious breach of contract.¹⁹² However, because the CDA vests the boards with authority to grant relief largely equal to that of the Claims Court, board cases that today deny jurisdiction over claims involving tortious conduct closely follow Claims Court decisions that also deny such jurisdiction. Using the language of the Claims Court, these board cases find that the breach, in the words of the Claims Court, is “independent of the contract,”¹⁹³ and likewise question whether, pursuant to the terms of the CDA, the claim “relates to” the contract.¹⁹⁴

192. See *supra* note 67.

193. More specifically, the boards typically begin their analysis by observing that under the CDA their jurisdiction is coextensive with that of the Claims Court and that while the Claims Court does not have jurisdiction over claims asserting torts independent of the contract, it does have jurisdiction over claims alleging tortious breach of contract. See, e.g., *Asfaltos Panamenos, S.A.*, 91-1 B.C.A. (CCH) ¶ 23,315, at 116,917 (1990); *Silangan Manpower Servs.*, 88-2 B.C.A. (CCH) ¶ 20,554, at 103,907 (1988). The boards next assert that in order to determine whether there has been a tortious breach of contract, they must examine whether there is a “direct” or “sufficient nexus” between the tortious conduct and obligations under the contract. *Asfaltos*, 91-1 B.C.A. (CCH), at 116,919 (citing *H.H.O., Inc. v. United States*, 7 Cl. Ct. 703, 706-07 (1985)); *Silangan*, 88-2 B.C.A. (CCH) at 103,909 (same). The boards then examine the express and implied terms of the particular contract and find no such nexus, i.e., no controlling contractual obligation. *Asfaltos*, 91-1 B.C.A. (CCH) at 116,919; *Silangan*, 88-2 B.C.A. (CCH) at 103,909. Of course, sometimes the analysis is wholly implicit. See, e.g., *Associated Contract Specialties Corp.*, 90-3 B.C.A. (CCH) ¶ 23,258, at 116,693 (1990).

194. See, e.g., *Alfred Bronder*, 86-3 B.C.A. (CCH) ¶ 19,102, at 96,554 (1986) (finding no contract clause or implied obligation governing loss of appellant’s shop due to fire), *aff’d mem.*, *Bronder v. United States*, 824 F.2d 980 (Fed. Cir. 1987); *Jay Rucker*, 80-2 B.C.A. (CCH) ¶ 14,513, at 71,533 (1980) (holding that “[i]t is clear from the record that there has been neither an express contract . . . for the sale of timber salvage rights . . . [nor] a contract implied in fact. . . . Since Appellant’s claim for the costs he incurred does not arise relative to a contract . . . but instead is based on alleged misrepresentation . . . his complaint would appear to sound in tort”); *Harvex Trading Co.*, 90-2 B.C.A. (CCH) ¶ 22,640, at 113,568 (1990) (ruling that a claim alleging collusion between government employees and the appellant’s competitors did “not concern matters arising under or relating to the subject contracts”), *appeal denied*, 92-3 B.C.A. (CCH) ¶ 25,027 (1992); *EDL Constr., Inc.*, 88-1 B.C.A. (CCH) ¶ 20,313, at 102,706 (1987) (alleging interference with business relationships and defamation resulting from contracting officer’s letter to Small Business Administration did not relate to the contract).

Finally, it is worth noting that like the Claims Court, see *supra* note 166, the boards have held that punitive damages are not available under the CDA because actions seeking such damages sound in tort and thus are actions over which the boards have no jurisdiction. See, e.g., *Land Movers, Inc.*, 91-1 B.C.A. (CCH) ¶ 23,317, at 116,927 (1990), *appeal denied*, 92-1 B.C.A. (CCH) ¶ 24,473 (1991); *Daiei Denki Co.*, 86-2 B.C.A. (CCH) ¶ 18,840, at 94,949 (1986).

VI. TORT AND CONTRACT JURISDICTION OVER SPECIFIC CAUSES OF ACTION

Having analyzed the various factors that the federal district courts, Claims Court, and boards examine in determining whether to exercise jurisdiction, this Article will now examine how these forums apply those factors to a series of commonly alleged causes of action in order to determine whether they sound in tort, contract or both. These specific causes of action are: (1) negligence; (2) conversion; and (3) breach of the duty of good faith and fair dealing.

A. Negligence Resulting in Damage to or Loss of Property

Perhaps the most common "wrong" that involves both tortious conduct and breach of contract is simple negligence resulting in damage to or loss of property. Factually speaking, this is true because the real or personal property of the contractor¹⁹⁵ is often involved in federal government contracts.¹⁹⁶ Legally speaking, this is true because the prerequisites for tort and contract jurisdiction are easily established in actions alleging negligent conduct resulting in damage to or loss of property. With respect to the exercise of tort jurisdiction by the federal district courts, a claim alleging negligence resulting in damage to or loss of property universally gives rise to a cause of action in tort under state law.¹⁹⁷ Moreover, there is almost never a specific contract adjustment provision governing such claims so as to preclude jurisdiction.¹⁹⁸

195. See, e.g., *Aetna Ins. Co. v. United States*, 327 F. Supp. 865 (E.D. La. 1971) (involving a tort claim for loss of equipment used in performance of hydrographic surveys for Army Corps of Engineers); *Palomo v. United States*, 188 F. Supp. 633 (D. Guam 1960) (involving a tort claim for damages to real property leased to government); *New England Helicopter Serv., Inc. v. United States*, 132 F. Supp. 938 (D.R.I. 1955) (involving a tort claim for damage to helicopters rented to the government).

196. It is important to note that the term "federal government contracts" is a generic term that is subject to differing jurisdictional coverage depending on the specific type of contract. See *supra* note 68 (comparing scope of the CDA and the Tucker Act).

197. See, e.g., *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547 (9th Cir. 1984); *Walsh v. United States*, 672 F.2d 746 (9th Cir. 1982); *United States v. Scrinopskie*, 179 F.2d 959 (5th Cir. 1950); *Nicholson v. United States*, 177 F.2d 768 (5th Cir. 1949); *Aetna Ins. Co.*, 327 F. Supp. at 865; *New England Helicopter Serv.*, 132 F. Supp. at 938; see also *Martin v. United States*, 649 F.2d 701 (9th Cir. 1981) (determining that an unsafe condition leading to personal injury is a classic tort). For additional cases discussing jurisdiction over personal injury claims in the government contract context, see *Ross v. United States*, 641 F. Supp. 368 (D.D.C. 1986); *Binney v. United States*, 329 F. Supp. 351 (D. Or. 1971), *aff'd*, 460 F.2d 263 (9th Cir. 1972); *Cline v. United States*, 273 F. Supp. 890 (D. Ariz. 1967), *aff'd*, 410 F.2d 1337 (9th Cir. 1969); *Galbraith v. United States*, 296 F.2d 631 (2d Cir. 1961); *Epps v. United States*, 187 F. Supp. 584 (E.D.S.C. 1960); *Rogow v. United States*, 173 F. Supp. 547 (S.D.N.Y. 1959).

198. See *supra* note 197. But see *United States v. Peter Kiewit Sons' Co.*, 345 F.2d 879 (8th Cir. 1965) (holding that the claim was covered by the disputes clause). *Kiewit*, however,

While the federal district courts rarely find that a specific contract clause governs negligence resulting in damage to or loss of property, the Claims Court and boards often interpret an express provision of a contract, or infer the existence of an implied condition of a contract, as governing the negligent conduct.¹⁹⁹ Perhaps the best example of this resulting overlap between the federal districts courts, the Claims Court, and the boards, is in the context of a bailment. In such cases, the plaintiff is free to allege an action in tort or contract.²⁰⁰

has been rejected in light of subsequent Supreme Court precedent. *See Aetna*, 327 F. Supp. at 866 (quoting *Bird & Sons, Inc. v. United States*, 420 F.2d 1051, 1054 (1970) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 402 (1966))).

In three other cases, the plaintiffs failed to obtain jurisdiction because their negligence claims for expenses incurred in fighting forest fires did not constitute money damages for injury or loss of property. *Idaho ex rel. Trombley v. United States Dep't of the Army*, 666 F.2d 444, 446 (9th Cir.), *cert. denied*, 459 U.S. 823 (1982); *California v. United States*, 307 F.2d 941 (9th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963); *Oregon ex rel. State Forester v. United States*, 308 F.2d 568 (9th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963). More recently, the reasoning that money expended due to the government's negligence does not constitute injury or loss of property has been applied in the context of environmental testing expenses resulting from the government's alleged negligence. *See Charles Burton Builders, Inc. v. United States*, 768 F. Supp. 160 (D. Md. 1991).

199. *See, e.g., Bird & Sons*, 420 F.2d at 1054 (holding that the government breached a duty to "return the rented property in as good condition as when received"); *Pan Arctic Corp. v. United States*, 8 Cl. Ct. 546, 549-50 (1985) (noting that plaintiff's use of the term "negligent" was meant "simply to describe a lack of ordinary skill, competence and diligence" under the contract); *Chain Belt Co. v. United States*, 115 F. Supp. 701, 712 (Ct. Cl. 1953) (noting that the "wrong actually derived from the Government's contractual undertaking to use ordinary care"); *Marangos Constr. Corp.*, 90-1 B.C.A. (CCH) ¶ 22,309, at 112,028 (1989) (noting that the "Government breached an implied contractual obligation to protect the materials" burned in fire); *Noodles by Leonardo, Inc.*, 85-3 B.C.A. (CCH) ¶ 18,488, at 92,856 (1985) (according to the UCC, the government owes "a duty to reasonably care for the rejected goods"); *Goodfellow Bros.*, 81-1 B.C.A. (CCH) ¶ 14,917, at 73,805 (1981) (noting that the contract clause "expressly provides that the Government shall leave the premises in good repair, normal wear and tear excepted"). Of course some contracts simply do not contain the requisite provisions, express or implied, to invoke contract jurisdiction. As the board said in *Asfaltos Panamenos*:

There is no indication here of an express or implied duty of the Government to protect appellant's employees' private property from damage caused by Government equipment not involved in the contract. The damage to the vehicle resulting from the helicopter backwash arose independently from the provisions or performance of the subject contract. Appellant has failed to show the necessary nexus between the requirements of the subject contract and the damages it seeks.

91-1 B.C.A. (CCH) ¶ 23,315, at 116,919 (1990). *See also Wieman v. United States*, 678 F.2d 207, 212 (Ct. Cl. 1982) (indicating that a claim arising from tortious conduct of government personnel "was outside the jurisdiction of the Board under the 'disputes' provision of the respective contracts"); *Helicopter Services*, 80-1 B.C.A. (CCH) ¶ 14,190, at 69,850 (holding that claim for damage to helicopter was outside disputes clause in contract which specifically allocated damage to helicopter to contractor).

200. *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980) (Tucker Act); *Keifer & Keifer Co. v. Reconstruction Fin. Corp.*, 306 U.S. 381 (1939) (Tucker Act); *Crouch v. United States*, 31 F.2d 211 (E.D.S.C. 1928) (Tucker Act); *Midland Nat'l Bank v. Conlogue*, 720 F.

B. Conversion

Conversion is another example of tortious conduct that also may constitute a breach of contract. While case law is not unanimous on this point, an examination of state law by the federal district courts, and of implied or express contractual obligations by the Claims Court and boards, typically results in the exercise of jurisdiction by all of these forums.

In order to determine whether to exercise jurisdiction under the FTCA, federal district courts examining allegations of conversion typically, if not universally, look to state law to determine whether a cause of action sounds in tort.²⁰¹ For example, in *Love v. United States*,²⁰² the plaintiffs were farmers who brought an action against the United States for conversion as a result of the government's liquidation of their livestock and farm equipment pursuant to a security agreement entered into with the Farmers Home Administration (FmHA). The Loves alleged that a court order interpreting 7 U.S.C. § 1981a precluded the FmHA from doing so without notice to the Loves.²⁰³ To determine whether this conduct constituted a tort, the court turned to Montana state law governing conversion.²⁰⁴ The court then concluded that since the government's actions satisfied the elements of conversion committed by a private party under Montana law, the plaintiffs could maintain a cause of action against the United States.²⁰⁵ The Court was undeterred by the fact that a cause of action might also lie in contract.²⁰⁶

Supp. 878 (D. Kan. 1989) (FTCA); *New England Helicopter Serv., Inc. v. United States*, 132 F. Supp. 938 (D.R.I. 1955) (FTCA); *Waschke Williams Olds Cadillac, Inc.*, 87-1 B.C.A. (CCH) ¶ 19,546, at 98,772 (1986) (CDA).

201. See, e.g., *Love v. United States*, 915 F.2d 1242 (9th Cir. 1989); *Cenna v. United States*, 402 F.2d 168 (3d Cir. 1968); *Aleutco Corp. v. United States*, 244 F.2d 674 (3d Cir. 1957). But see *Herder Truck Lines v. United States*, 335 F.2d 261, 263, (5th Cir. 1964) (concluding, with no analysis of state law, that the claim was "essentially founded upon contract, the government bills of lading"). In *Herder*, however, the plaintiff failed to deliver the full quantity of parts and equipment to the government pursuant to a contract to transport the parts and equipment. The government withheld the value of the undelivered parts from its payment to the plaintiff. Herder therefore sued for conversion, alleging that the parts had been converted or negligently lost by an agent of the government during loading on Herder's trucks. The court viewed this as a simple breach of the government's duty to pay Herder under their contract. At no time was Herder the owner of the converted or negligently lost property (Herder merely transported the property) and consequently no examination of state law was necessary. *Id.*

202. 915 F.2d 1242, 1244 (9th Cir. 1989).

203. *Id.* at 1244-45. The Loves were plaintiffs in a class action in which the FmHA was enjoined from liquidating assets without giving notice to the members of the plaintiff class. *Id.* at 1244. For further information on this class action suit, see *Coleman v. Block*, 580 F. Supp. 192 (D.N.D. 1983).

204. *Love*, 915 F.2d at 1245.

205. *Id.*

206. *Id.* at 1246 ("Here, the Loves' allegations could have been brought as a breach of contract claim, but they equally support a tort claim for conversion. Although a breach of

However, the overlap between a tort action alleging conversion and a contract action arising out of the same facts is not unlimited. The boundaries of each were explored in *Cenna v. United States*.²⁰⁷ In *Cenna*, the plaintiff provided the government with certain engineering drawings to correct a faulty air conditioning system in a new federal building. Despite an oral agreement between the plaintiff and the government stipulating payment for the work, the government refused to pay even after it used the plaintiff's plans to correct its air conditioning system.²⁰⁸ The plaintiff subsequently filed an action under the FTCA for conversion.²⁰⁹ The court looked to Pennsylvania law for the elements of the tort of conversion and found that it results from either a deliberate taking of the plaintiff's property without the plaintiff's consent, or with the plaintiff's consent but with the intent to use the property for another purpose.²¹⁰ The court concluded that because the government had used the plans for the consented to and intended purpose, the government's actions did not constitute conversion under Pennsylvania law.²¹¹ In the court's view, this result preserved an important "distinction between contract and tort claims mandated by the Tucker Act and the Federal Tort Claims Act."²¹²

Claims Court and board cases addressing contract claims that also might be characterized as a conversion confirm the significant, but not unlimited, overlap between these causes of action. For example, in *Summit Contractors, Inc. v. United States*,²¹³ the government terminated its contract with Summit Contractors, Inc. (Summit) to cut and remove timber and sold the timber that Summit had cut but not yet removed.²¹⁴ The government filed a

promise may be involved, the government's liability . . . depends in large part on the Loves' claim of ownership and possession of the property."). Similar results were reached by the Third Circuit in *Aleutco Corp.*, where it stated:

Aleutco's complaint is a sufficient statement of a cause in tort for conversion, and it would seem that Aleutco could have equally well made out a complaint for breach of contract. Aleutco has chosen to prosecute its action on the basis of tort in the District Court. That it failed to avail itself of an action in the Court of Claims is not a valid jurisdictional objection.

Aleutco Corp. v. United States, 244 F.2d 674, 678-79 (3d Cir. 1957) (footnote omitted).

207. 402 F.2d 168 (3d Cir. 1968).

208. *Id.* at 170.

209. *Id.*

210. *Id.* at 171.

211. *Id.*

212. *Id.* This distinction is consistent with the RESTATEMENT (SECOND) TORTS § 228 (1964), which states that "[o]ne who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated." *Id.*

213. 22 Cl. Ct. 54 (1990), *summary judgment granted*, 23 Cl. Ct. 333 (1991).

214. *Id.* at 55.

claim against Summit for Summit's failure to complete the contract.²¹⁵ Summit counterclaimed alleging, *inter alia*, that the government's sale of the timber was a conversion of Summit's property.²¹⁶ In exercising jurisdiction over the claim, the court was unpersuaded by the government's characterization of Summit's counterclaim of conversion as "a classic tort."²¹⁷ Instead, the court reasoned that the counterclaim was based on the timber sales contract between Summit and the government, and thus concluded that there was a sufficient nexus between the conversion claim and the contract to warrant proper Tucker Act jurisdiction over Summit's counterclaim.²¹⁸ Thus, while the Claims Court and boards will exercise jurisdiction over even "classic torts" like conversion, they will do so only when the parties can show a sufficient nexus between the conduct and a contractual obligation.²¹⁹

C. Breach of the Duty of Good Faith and Fair Dealing

The breach of the duty of good faith and fair dealing presents another example of the overlap between tort and contract jurisdiction, and is perhaps the most dramatic example of the federal courts' exercise of jurisdiction over what was historically a contractual duty. The duty of good faith and fair dealing was first clearly articulated in the UCC,²²⁰ and subsequently incorporated into the *Restatement (Second) of Contracts*.²²¹ Historically, recogni-

215. *Id.* at 56.

216. *Id.*

217. *Id.* at 57.

218. *Id.* (citing *Travelers Indemnity Co. v. United States*, 16 Cl. Ct. 142 (1985)). Unfortunately for Summit, while the court held that the contract contained a provision governing title to the timber, thus establishing a sufficient nexus between the claim and the contract, *id.* at 58, under that provision title to the disputed timber still resided with the government. Consequently, "no claim for conversion can ensue." *Id.*

219. See *Silangan Manpower Servs.*, 88-2 B.C.A. (CCH) ¶ 20,554, at 103,909 (1988) (holding that appellant's complaint lacked a "required direct nexus" between conduct and contractual obligation where a more definite statement of the complaint was needed). *But see* *Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1249 (Ct. Cl. 1970) (holding that federal courts have no jurisdiction over various tort claims, including conversion).

220. Ralph C. Nash & John Cibinic, *The Duty of Good Faith and Fair Dealing: An Emerging Concept?*, 3 NASH & CIBINIC REPORT ¶ 78 at 164-65 (Nov. 1989); see, e.g., U.C.C. § 1-203 (1978) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."); U.C.C. § 2-103(1)(b) (defining "good faith" for merchants as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade").

221. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."), *quoted in* Nash & Cibinic, *supra* note 220, ¶ 78. As Nash and Cibinic note:

The comments to this section give considerable additional guidance. Comment a. notes the UCC definitions and elaborates as follows:

. . . The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency

tion of federal tort claims asserting breaches of the duty of good faith and fair dealing has been slow in coming, apparently due to reliance on principles stated in adverse precedent such as *Woodbury v. United States*.²²² In *Woodbury*, the Ninth Circuit rejected the plaintiff's allegation that the government had breached its fiduciary duty because the government's breach was based entirely upon a promise made in contract, and because holding otherwise would not contribute to the maintenance of a uniform body of federal government contract law.²²³ However, the court failed to provide any analysis of whether the complaint alleged a tort under state law.

The approach set forth in *Woodbury* was consistently followed within the Ninth Circuit in cases involving a breach of fiduciary duty as well as breach of the duty of good faith and fair dealing,²²⁴ culminating with the decision in *LaPlant v. United States*.²²⁵ In *LaPlant*, the court specifically rejected an analysis that focused on whether state law would support a tort claim, and instead emphasized the importance of maintaining a uniform body of federal government contract law.²²⁶ The court reasoned that the invocation of state law to define the government's contractual obligations would undermine "[t]he Tucker Act's policy of ensuring uniformity in the interpretation and application of the obligations attaching to governmental contracts."²²⁷

with the justified expectations of the other party; it excludes a variety of types of conduct characterized as "bad faith" because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for the breach of the duty of good faith also varies with the circumstances.

Comment c. notes that the duty is not directly applicable to the formation of a contract—primarily because there are other rules covering this area. However, this comment states that the duty is applicable to the negotiation of modifications to a contract. Comment d. gives . . . guidance on the applicability of the duty to performance of the contract Comment e. provides . . . guidance in the enforcement area

Nash & Cibinic, *supra* note 220, ¶ 78 at 164-65.

222. 313 F.2d 291 (9th Cir. 1963). For an additional discussion of *Woodbury*, see *supra* notes 121-29 accompanying text.

223. 313 F.2d at 295.

224. See, e.g., *Darko v. United States*, 646 F. Supp. 223 (D. Mont. 1986) (characterizing the government's bad faith withholding of a mortgage approval as a contract, and thus not applicable under FTCA).

225. 872 F.2d 881 (9th Cir. 1989), *opinion withdrawn and replaced on reh'g*, 916 F.2d 1377 (9th Cir. 1990).

226. *Id.* at 884. The court reasoned:

[T]he Montana court's reasons for distinguishing between tort and contract actions have nothing to do with the Tucker Act's policy of generating a uniform body of federal law of government contracts. In determining whether appellants' "bad faith" action is tort-based or contractual for the purposes of the Tucker Act, then, we ignore the state law characterization of the claim and focus instead on the substance of appellants' suit.

Id. at 883.

227. *Id.* at 884.

Thus, the court concluded that “[s]tate law cannot, consistent with Tucker Act, be used to write terms into government contracts.”²²⁸

One week before the Ninth Circuit announced its decision in *LaPlant*, a different panel of the court had announced its decision in *Love v. United States*.²²⁹ In *Love*, the plaintiffs, who were similarly situated to those in *LaPlant*, sued the government for, *inter alia*, a breach of fiduciary duty and the duty of good faith and fair dealing.²³⁰ However, unlike the *LaPlant* panel, the *Love* court exercised tort jurisdiction and focused on whether Montana law imposed such an obligation in tort.²³¹ The court concluded that under Montana law, the breach of the duty of good faith alleged by the plaintiffs was a separate tort and was not, as concluded in *Woodbury*, “based entirely upon breach by the government of a promise made by it in a contract.”²³² In the light of the *Love* decision, the plaintiffs in *LaPlant* filed a petition for reconsideration, which was granted, but with the earlier opinion of the court withdrawn in favor of the Ninth Circuit’s decision in *Love*.²³³

Based on the *Love* and *LaPlant* decisions, it is reasonable to conclude that although the terms of a contract and the maintenance of a uniform body of federal contract law are important considerations in the federal courts, they are secondary to Congress’ express intent that the federal government should be held liable in tort if a private individual would be liable under state tort law. Thus, if a private party would be subject to an action in tort for breach of the duty of good faith and fair dealing under applicable state law, the government most likely will be subject to liability under the FTCA.²³⁴

228. *Id.*

229. 915 F.2d 1242 (1988).

230. *Id.* at 1244.

231. *Id.* at 1247-48. As the court noted:

The Loves allege . . . that the government breached an “implied covenant of good faith and fair dealing,” which Montana recognizes as a separate cause of action in tort. Although this duty arises between parties having a contractual relationship, “the duty exists apart from, and in addition to, any terms agreed to by the parties. . . . The duty is imposed by operation of law and therefore its breach should find a remedy in tort.” Montana courts imply this duty of good faith where contractual relations are characterized by adhesion or inequality in bargaining power.

Id. (quoting *Gates v. Life of Montana Ins. Co.*, 668 P.2d 213, 214-15 (Mont. 1983) (omission in original)) (citations omitted).

232. *Id.* at 1247 (citing *Woodbury*, 313 F.2d at 295).

233. See *LaPlant v. United States*, 916 F.2d 1377 (9th Cir. 1990) (citing *Love*, 915 F.2d at 1242).

234. See, e.g., *Meyer v. Fidelity Sav.*, 944 F.2d 562, 572 n.17 (9th Cir. 1991) (noting that breach of the implied covenant of good faith and fair dealing was not an actionable tort under the FTCA in that case because “under California law, it is established that ‘tort remedies are not available for breach of the implied covenant in an employment contract to employees who allege they have been discharged in violation of the covenant.’ Rather, ‘contractual remedies should remain the sole available relief’”) (citations omitted), *cert. granted*, 1993 U.S. LEXIS 2147 (1993); *Ackerley v. United States*, 741 F. Supp. 1519, 1521 (D. Wyo. 1990) (asserting

In contrast to actions under the FTCA, there has been relatively little analysis in Claims Court and board decisions addressing whether claims alleging a breach of the duty of good faith and fair dealing sound primarily in tort and are thus outside the court's and boards' jurisdiction.²³⁵ This apparently is due to the fact that by definition the duty "arises between parties having a contractual relationship."²³⁶ Consequently, the duty of good faith and fair dealing has gained wide acceptance in government contract law.²³⁷

that "[i]n suits against the United States, the law of the place where the act or omission occurred governs liability. . . . The complaint states claims for conversion, negligence, and breach of the duty of good faith and fair dealing, all of which are recognized in Wyoming law") (citations omitted).

235. For decisions analyzing the issue, see *Boehm v. United States*, 22 Cl. Ct. 511, 518-19 (1991) (noting that while tort claims do not fall under the Tucker Act, tortious breach of contract claims do and consequently, the Claims Court has jurisdiction over such claims); *Gregory Lumber Co. v. United States*, 9 Cl. Ct. 503, 526 (1986) (asserting that breach of "warranty of quantity" and "obligation to deal in good faith" do not fall "within the forbidden category of 'sounding in tort'"); *H.H.O., Inc. v. United States*, 7 Cl. Ct. 703, 708 (1985) (stating that the court lacked jurisdiction over claim characterized "as either '[d]efamation of reputation' or '[b]reach of contract conditions to properly inspect job and administer contract in good faith, to cooperate and to not interfere . . . by creating problems with Plaintiff's bonding company'" because "both characterizations are grounded in tort—defamation or tortious interference") (alterations in original); 6800 Corp., 81-2 B.C.A. (CCH) ¶ 15,388, at 76,237 (1981) (holding that failure to vacate a leased premises sounds both in contract and in tort); see also Ralph C. Nash & John Cibinic, *Bad Faith: The Dark Side*, 4 NASH & CIBINIC REPORT ¶ 46, at 107 (July 1990) (distinguishing between contractual bad faith, i.e., breach of the contractual duty of good faith and fair dealing, and the tort of bad faith, which requires intent to injure, malice, or ill will).

236. *Love*, 915 F.2d at 1247.

237. See Nash & Cibinic, *supra* note 220, ¶ 78, at 171 ("The duty of good faith and fair dealing is of such wide scope that it will be limited only by the imagination of the litigants, and by the views of the judges regarding the amount of restraint that is necessary in its application."); see, e.g., *Solar Turbines, Inc. v. United States*, 23 Cl. Ct. 142, 156 (1991) (citing *Eliel v. United States*, 18 Cl. Ct. 461, 470 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990), for the proposition that "every contract contains an implied covenant of good faith and fair dealing"), *summary judgment granted*, 26 Cl. Ct. 1249 (1992); 5 SAMUEL WILLISTON & WALTER H.E. JAEGER, *WILLISTON ON CONTRACTS* § 670 (3d ed. 1961) (explaining that breach of an implied promise sounds in contract). In *Solar Turbines*, the plaintiffs claimed that the Navy acted in bad faith by inducing plaintiff to invest funds in a contract beyond the contract's ceiling price so that such overruns ultimately would result in the plaintiff seeking termination. *Solar Turbines*, 23 Cl. Ct. at 156-57. This claim was adequate to survive the defendant's motion for summary judgment. *Id.*

Moreover, as the Federal Circuit has held, the duty is not subordinate to fiscal constraints. See *New England Tank Indus. v. United States*, 861 F.2d 685, 694 (Fed. Cir. 1988) ("Nor do we view the public fisc so sacrosanct in each and every case as to place its protection before the candor and fair dealing a free society is entitled to expect from its government."), *petition denied*, 865 F.2d 243 (Fed. Cir. 1989). In *New England Tank*, the Federal Circuit vacated and remanded the decision of the board in favor of the government, where the contractor sought equitable adjustment after it learned that the government agent had lacked authority to continue renewing the contract at below-market price. *Id.*

See also *Juda v. United States*, 6 Cl. Ct. 441 (1984) (examining whether the government may be liable in contract for a breach of fiduciary duty, regardless of the fact that the breach may

VII. CONTRACT JURISDICTION OVER ACTIONS SPECIFICALLY EXCLUDED FROM FTCA JURISDICTION

As sections III, IV, V, and VI of this Article demonstrate, there is a significant jurisdictional overlap between tort claims brought under the FTCA and contract claims asserted under the CDA and Tucker Act. Perhaps the most significant implication of this overlap becomes apparent when the contractor is the victim of tortious conduct that the FTCA expressly excludes from the district courts' jurisdiction.²³⁸ As the Supreme Court observed, "neither the existence of a tort remedy nor the lack of one is relevant to determining whether there is [a] . . . contract . . . upon which the United States is liable in the Court of Claims pursuant to its waiver of sovereign immunity contained in the Tucker Act."²³⁹ Consequently, contractors have had some success in asserting that the otherwise excluded tortious conduct also constitutes a breach of contract that is actionable under the CDA and Tucker Act.²⁴⁰ This tortious conduct includes: (1) misrepresentation; (2) tortious interference with contract rights; and (3) libel and slander.²⁴¹

also sound in tort). In *Juda*, the plaintiffs, who were inhabitants of the Marshall Islands, alleged that the United States had breached the fiduciary obligations of an implied-in-fact contract connected with the government's relocation of the islands for the purpose of conducting nuclear testing. *Id.* at 451-52. The government filed a motion to dismiss, contending, *inter alia*, that the plaintiffs' claim sounded in tort and therefore the court had no jurisdiction. *Id.* at 453. The Claims Court denied the motion, rejecting the government's contention that the breach of a fiduciary duty might also sound in tort. *Id.* The court noted that "where an enforceable contract is alleged, an action for breach is not beyond the scope of the Tucker Act simply because elements of tort are present." *Id.* *But see* *C.B.C. Enters. v. United States*, 24 Cl. Ct. 1, 5 (1991) (holding that there was no jurisdiction because "such generalized obligations as, not interfering with the other party's performance, or failure to act in good faith, must have a contract performance referent to have any relevance"). For further discussion of the duty of good faith, see *supra* note 158.

238. See 28 U.S.C. § 2680 (1988) (listing exemptions to the district court's jurisdiction).

239. *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 466 (1980) (holding that the United States may be liable under the Tucker Act for breach of an implied contract of bailment when goods held by the U.S. Customs Service are lost even though 28 U.S.C. § 2680(c) prohibits claims arising from the detention of merchandise by customs officials).

240. See generally 2 RALPH C. NASH, JR. & JOHN CIBINIC, JR., *FEDERAL PROCUREMENT LAW: CONTRACT PERFORMANCE* 2224 (3d ed. 1980). Nash and Cibinic state that:

As a practical matter the contractor has little to gain by characterizing the matter as sounding in tort because of the Federal Tort Claims Act's broad exceptions to the Government's waiver of immunity from liability in tort, 28 U.S.C. § 2680. Accordingly, contractors have usually been strongly motivated to have their claims characterized as sounding in contract, and remediable under the Tucker Act.

Id. (citations omitted).

241. See 28 U.S.C. § 2680(h) (1988), which provides:

§ 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to—

. . . .

A. *Misrepresentation*

Under 28 U.S.C. § 2680(h), the provisions of the FTCA do not apply to “[a]ny claim arising out of . . . misrepresentation.”²⁴² Unfortunately for victims of misrepresentation committed by the government, the federal district courts have broadly construed § 2680 to exclude “all actions for deceit and misrepresentations whether the misrepresentations were made deliberately, recklessly or negligently.”²⁴³ Thus, in spite of attempts at creative pleading by many contractors, the courts have consistently denied jurisdiction under the FTCA to any claim that involves any form of misrepresentation.²⁴⁴ As a result of this consistently adverse FTCA case law, contractors often have elected to pursue their claims for misrepresentation in contract. In determining whether to assert jurisdiction over such claims, the Claims Court and boards have focused on whether: (1) there is a relevant implied obligation under the contract; and (2) the claim seeks contract and not tort damages.²⁴⁵

It is a generally accepted premise that in order to prevail against the government in a case for misrepresentation, a contractor must demonstrate that: (1) the government made an erroneous representation; (2) the representation was material; (3) the representation induced the contractor into entering the contract; (4) the contractor had the legal right to rely on the representation; and (5) the contractor did rely on the representation to the contractor’s injury.²⁴⁶ This is consistent with the elements of the cause of action at com-

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights

Id.

242. *Id.*

243. *Covington v. United States*, 303 F. Supp. 1145, 1149 (N.D. Miss. 1969) (citing *Hall v. United States*, 274 F.2d 69 (10th Cir. 1959); *Jones v. United States*, 207 F.2d 563, 564 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954)).

244. *See, e.g., Leaf v. United States*, 661 F.2d 740, 742 (9th Cir. 1981) (barring under the exclusion, a claim by the owners of an aircraft that was leased by a DEA informant based upon misrepresentation as to its intended use, a drug smuggling operation), *cert. denied*, 456 U.S. 960 (1982); *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174, 177 (8th Cir. 1978) (barring a construction contractor’s claim for reformation of closing documents, where claim was essentially one for misrepresentation of developer’s ability to pay construction notes); *United States v. Croft-Mullins Elec. Co.*, 333 F.2d 772, 780 (5th Cir. 1964) (characterizing a contractor’s claim based on the government’s late delivery of materials as the government’s misrepresentation of its ability to provide materials and thus barring the claim under the exclusion), *cert. denied*, 379 U.S. 968 (1965); *Phillips Pipe Line Co. v. United States*, 299 F. Supp. 768, 772 (W.D. Okla. 1969) (barring claim for failure of government to give to the contractor the location of a pipeline that ruptured the pipeline during performance).

245. *See infra* notes 249-55 and accompanying text.

246. JOHN C. MCBRIDE, *GOVERNMENT CONTRACTS* § 13.30 (1990).

mon law.²⁴⁷ What is somewhat less well-articulated is the source of the contractor's legal right to rely on the representation. While the Claims Court and board cases generally are "remarkably silent"²⁴⁸ with respect to the source of this right, it apparently flows from the government's implied duty of good faith and fair dealing to those contractors from whom the government solicits its work.²⁴⁹

Although the source is not always articulated, the Claims Court and boards have recognized an implied contractual duty. In *American Ship Building Co.*,²⁵⁰ the plaintiff alleged a breach by misrepresentation by the government in the award of a contract to the plaintiff for construction of an oceanographic survey ship. The plaintiff alleged that the government had "special knowledge" that the mandatory terms of the plaintiff's bid solicitation were commercially impractical, i.e., that the ship could not be completed in 900 days, as contracted, due to known technical difficulties.²⁵¹ The plaintiff also alleged that the price bid was impractical because the government knew of the failures and overruns associated with construction contracts of three similar earlier oceanographic vessels.²⁵² The government filed a motion for summary judgment, requesting the court to dismiss the action as a tort claim.²⁵³ The court, however, denied the government's motion and

247. See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1979). The Restatement sets forth the requirements that must be shown in order to make a contract voidable due to misrepresentation: (1) there must have been a misrepresentation; (2) the misrepresentation must have been fraudulent or material; (3) the misrepresentation must have induced the recipient to make the contract; and (4) the recipient's reliance must have been justified. *Id.*

248. Michael J. Hoover, *Government Affirmative Misrepresentation in Federal Contracting*, 25 A.F.L. REV. 183, 183 (1985), reprinted in 23 YEARBOOK OF PROCUREMENT ARTICLES 187 (1986).

249. See *Gregory Lumber Co. v. United States*, 9 Cl. Ct. 503, 526 (1986) (asserting that in a contract claim alleging misrepresentation, the duty breached is "the obligation to deal in good faith"); see also Hoover, *supra* note 248, at 183 (citing *Oceanic S.S. Co. v. United States*, 586 F.2d 774 (Ct. Cl. 1978); *Bateson-Stolte, Inc. v. United States*, 172 F. Supp. 454, 457 (Ct. Cl. 1959); RESTATEMENT (SECOND) OF CONTRACTS § 161(b) (1979)); *CIBINIC & NASH*, *supra* note 61, at 184 (citing RESTATEMENT (SECOND) CONTRACTS § 205 (1981); UCC § 1-202 (1978) ("Government liability for nondisclosure of information is based on an implied duty to disclose information which is vital for the preparation of estimates or for contract performance. This implied duty is consistent with the general contract law concepts of good faith and fair dealing.")). See generally Alan Gould et al., *The Government's Duty To Communicate — An Expanding Obligation*, 18 NAT'L CONT. MGMT. J. 45 (1984), reprinted in 21 YEARBOOK OF PROCUREMENT ARTICLES 654 (John W. Whelan, ed., 1984); Gregory G. Sarno, Annotation, *Public Contracts: Duty of Public Authority to Disclose to Contractor Information, Allegedly in its Possession, Affecting Cost or Feasibility of Project*, 86 A.L.R.3d 182 (1978).

250. 207 Ct. Cl. 1002 (1975).

251. *Id.* at 1002-03.

252. *Id.*

253. *Id.* at 1003-04.

refused to dismiss the plaintiff's claim merely because it also sounded in tort.²⁵⁴

The Claims Court also recognizes that an implied duty exists in the pre-award time frame, before the parties even have entered into a contract.²⁵⁵ As long as there is a sufficient nexus between that contractual duty and the tortious conduct, the Claims Court will recognize an action in contract.²⁵⁶ Moreover, while apparently not a determinative factor, both the Claims Court and boards will exam the nature of the damages sought in order to determine whether the action sounds in contract.²⁵⁷ Thus, the contractor who falls victim to a government misrepresentation may find relief in the Claims Court and boards in spite of the FTCA's express exclusion.

B. *Tortious Interference*

Under § 2680(h), the provisions of the FTCA also do not apply to claims arising out of interference with contract rights.²⁵⁸ Like misrepresentation, the federal district courts have interpreted broadly the tortious interference exclusion. Unlike misrepresentation, however, there is generally no corresponding contract duty over which the Claims Court or boards may assert jurisdiction.

The FTCA does not define the phrase "interference with contract rights." At common law, "interference with contract rights" refers to a relatively broad spectrum of conduct involving intentional interference with current as well as future contracts.²⁵⁹ The federal district courts have recognized the

254. *Id.*

255. See *Gregory Lumber Co. v. United States*, 9 Cl. Ct. 503, 526 (1986) (citing *Florida Keys Aqueduct Auth. v. United States*, 231 Ct. Cl. 911, 912 (1982)).

256. *Hartle v. United States*, 18 Cl. Ct. 479, 483 (1989), *complaint dismissed*, 22 Cl. Ct. 843 (1991); cf. *Jay Rucker*, 80-2 B.C.A. (CCH) ¶ 14,512, at 71,533 (1980) ("Since Appellant's claim for the costs he incurred does not arise relative to a contract made by the Forest Service but instead is based on alleged misrepresentation or improper actions by Forest Service officials on which he relied to his detriment, his complaint would appear to sound in tort."). The boards historically did not have jurisdiction over tortious breaches of contract generally and misrepresentation specifically. See, e.g., *Delphi Indus., Inc.*, 78-1 B.C.A. (CCH) ¶ 13,058, at 63,752 (1978); *Cheves Constr. Co.*, 71-2 B.C.A. (CCH) ¶ 8,937, at 41,553 (1971); *Lenoir Wood Finishing Co.*, 1964 B.C.A. (CCH) ¶ 4,111, at 20,059 (1964); *Joseph F. Monsini, Jr.*, 61-2 B.C.A. (CCH) ¶ 3,197, at 16,569 (1961). The boards have recognized their authority under the CDA to hear such claims. See *Kolar, Inc.*, 84-1 B.C.A. (CCH) ¶ 17,044, at 86,856 (1983).

257. Compare *Kolar Inc.*, 84-1 B.C.A. (CCH) ¶ 17,044, at 84,856 (exercising contract jurisdiction where the "complaint does not use the word 'tort', nor does it claim tort damages In substance, appellant here seeks only contract damages") with *Transcounty Packing Co. v. United States*, 568 F.2d 1333, 1338 (Ct. Cl. 1978) (denying contract jurisdiction where "the very nature of the damages claimed by the plaintiff clearly reflected that the plaintiff's petition was in tort).

258. 28 U.S.C. § 2600(h) (1988).

259. See RESTATEMENT (SECOND) OF TORTS § 766 (1977) ("Intentional Interference with Performance of Contract by Third Person"); *id.* § 766A ("Intentional Interference with An-

correspondingly broad nature of the exclusion, for example, by declining to exercise jurisdiction over tort claims brought by government contractors who seek damages associated with the award of contracts.²⁶⁰ The results in the Claims Court and boards are no better for contractors alleging interference. Such cases are routinely dismissed because there simply is no applicable contractual obligation.²⁶¹ Thus, the contractor that falls victim to tortious interference by the government is generally without a remedy. Such an action is barred under the FTCA and generally does not give rise to the breach of a contractual provision so as to invoke CDA or Tucker Act jurisdiction.

C. Libel and Slander

Finally, § 2680(h) also expressly bars actions arising out of libel and slander. Like misrepresentation and interference, the exception is broadly applied to tortious conduct.²⁶² Unfortunately for contractors, like interference, there is no relevant contractual duty over which the Claims Court and boards may assert jurisdiction.²⁶³ In addition, like misrepresentation and interference, the FTCA does not define libel or slander, nor does it employ

other's Performance of His Own Contract"); *id.* § 766B ("Intentional Interference with Prospective Contractual Relation").

260. *See, e.g.,* *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1155 (D.C. Cir. 1985) (holding exclusion applies not only to interference with existing contract, but also to interference with prospective advantage); *Armstrong & Armstrong, Inc. v. United States*, 356 F. Supp. 514, 521 (E.D. Wash. 1973) (barring under exclusion, a claim alleging that government acted negligently in the award of a contract), *aff'd*, 514 F.2d 402 (9th Cir. 1975); *Taxay v. United States*, 345 F. Supp. 1284, 1286 (D.D.C. 1972) (barring under the exclusion, claim seeking damages resulting from the failure of the Federal Aviation Administration to renew the appointment of the plaintiff as a medical examiner, *aff'd mem.*, 487 F.2d 1214 (D.C. Cir. 1973).

261. *See, e.g.,* *Fort Sill Gardens, Inc. v. United States*, 355 F.2d 636, 639 (Ct. Cl. 1966) (barring a claim for ruinous competition); *H.H.O., Inc. v. United States*, 7 Cl. Ct. 703, 708 (1985) (claim alleging interference with performance "by creating problems with plaintiff's bonding company"); *Pinkston v. United States*, 6 Cl. Ct. 263 (1984) (barring a claim for interference and harassment leading to losses); *Williamson v. United States*, 166 Ct. Cl. 239, 245 (1964) (barring a claim alleging violations of constitution and regulations leading to termination); *Associated Contract Specialties Corp.*, 90-3 B.C.A. (CCH) ¶ 23,258, at 116,693 (1990) (barring a claim that a contractor lost the contract due to the wrongful acts of government); *EDL Constr., Inc.*, 88-1 B.C.A. (CCH) ¶ 20,313, at 102,707 (1987) (barring a claim alleging that the contracting officer interfered with contractor's business relationships by sending a defamatory letter to SBA). *But see* *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741 (1980), where a claim alleging that the government breached its contractual obligation to make timely payments resulting in the contractor's inability to get other work was not barred. Thus, the contractor's success in maintaining a claim may hinge on the ability to point to a contractual obligation.

262. *See, e.g.,* *Art Metal-U.S.A.*, 753 F.2d at 1151.

263. *See, e.g.,* *Algonac Mfg. Co. v. United States*, 428 F.2d 1241 (Ct. Cl. 1970); *EDL Constr., Inc.*, 88-1 B.C.A. (CCH) ¶ 20,313, at 102,707 (1987).

the more general term, defamation, which covers all manners of injuries to reputation.²⁶⁴ In spite of this arguably limiting language, the libel and slander exclusion has been broadly applied to include related torts that extend beyond the technical boundaries of libel, slander and defamation.²⁶⁵

Unfortunately for the contractor, there is no corresponding contractual duty that is breached by the government's libelous or slanderous acts. The results are equally dismal in the Claims Court²⁶⁶ and with the boards.²⁶⁷ Thus, as is the case with interference, the government contractor that is the victim of government libel and slander and related conduct is without an avenue for relief.

VIII. CONCLUSION

Perhaps the best evidence of the increasing overlap between the tort and contract jurisdiction of the federal district courts, Claims Court, and boards, respectively, is the judicial recognition that: (1) a traditionally contractual obligation, such as the duty of good faith and fair dealing, is actionable under the FTCA; and (2) a traditionally tortious action, such as misrepresentation, is available under the Tucker Act and the CDA. As the Ninth Circuit stated in *Love*, although the duty of good faith and fair dealing "arises between parties having a contractual relationship, 'the duty exists apart from, and in addition to, any terms agreed to by the parties. . . . The duty is imposed by operation of law and therefore its breach should find a remedy in tort.'"²⁶⁸ Likewise, as the Supreme Court stated in *Hatzlachh Supply*,²⁶⁹ "neither the existence of a tort remedy nor the lack of one is relevant to determining whether there is an implied-in-fact contract . . . upon which the United States is liable in the Court of Claims."²⁷⁰ Thus, it would appear that as long as the plaintiff can establish an action in tort under state law or establish an obligation under the contract, the plaintiff may successfully assert tort or contract jurisdiction, respectively, regardless of whether there also happens to be a corresponding contract or tort duty.

However, while the trend appears to be towards increasingly overlapping jurisdiction between the tort and contract forums, there are still too many

264. RESTATEMENT (SECOND) OF TORTS §§ 559-68A (1976).

265. See, e.g., *Art Metal-U.S.A.*, 753 F.2d at 1155 (barring a claim for "injurious falsehood" resulting in injury to and destruction of "standing, reputation, prestige, and goodwill").

266. See, e.g., *Frawley v. United States*, 14 Cl. Ct. 766 (1988); *H.H.O., Inc.*, 7 Cl. Ct. at 703; *Algonac Mfg.*, 428 F.2d at 1241; *Locke v. United States*, 283 F.2d 521 (Cl. Ct. 1960).

267. See, e.g., *EDL Construction, Inc.*, 88-1 B.C.A. (CCH) ¶ 20,313 (1987); *Adams*, 87-3 B.C.A. (CCH) ¶ 20,205 (1987).

268. 915 F.2d 1242, 1247-48 (9th Cir. 1989) (quoting *Gates v. Life of Montana Ins. Co.*, 668 P.2d 213, 214-15 (Mont. 1983)).

269. 444 U.S. 460 (1980).

270. *Id.* at 466.

jurisdictional pitfalls for the victim of a tortious breach of contract by the government. In *Manshul Construction Corp. v. United States*,²⁷¹ Judge Dearie summarized the unfortunate legacy that Congress has bequeathed to contractors who seek to redress wrongs committed by the federal government:

The King, it was held at English common law, could do no wrong. When "a long train of abuses and usurpations" by George III proved otherwise, events were set in motion that culminated in the formation of a government that, by the terms of its constitutive document, *could* do wrong if it exceeded its limited powers. That the rights of individuals against the government can meaningfully be vindicated *at all* in courts that are organs of that government is one of the miracles of American constitutional democracy.

The Framers' thaumaturgy, however, was less than complete: the hoary tradition endures that redress against the government can be had only by its consent, in the forum of its choice, and for only such relief to which it acquiesces. The immunity thus granted to the sovereign, whatever its virtues, has undeniably produced an uneven topography of standing and jurisdiction that leaves some litigants on terra firma while others languish in the twilight zone.²⁷²

It is not surprising then, that at least one "ancient philosopher" of the government contracts bar has gone so far as to call for the repeal of the CDA and Tucker Act, the abolition of the Claims Court and boards (at least in their present form), and the expansion of the jurisdiction for the federal district courts.²⁷³

271. 687 F. Supp. 60 (E.D.N.Y. 1988).

272. *Id.* at 60, quoted in *Quips & Quotes*, 4 NASH & CIBINIC REPORT ¶ 75 (Dec. 1990).

273. See Herbert L. Fenster, *The Fork in the Road—Which Route to Resolution? Poor Choices*, Address to the Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit at 3 (May 9, 1991) (transcript on file with the author). Mr. Fenster asserted that:

The current jurisdictional football game that is going on involving certification on the one hand and what constitutes a dispute on the other hand would be kindergarten comedy were it not for the fact that my clients' time and money is involved. It is simply a shabby and stupid distortion of the disputes process, utterly inexplicable to our lay clients—or ourselves for that matter.

....

I propose to you that the Contract Disputes Act should be repealed. Moreover, we should return to secretarial boards: the genuinely authorized representative of the secretary should resolve contract disputes. This should be an administrative process, not Article I judicial litigation.

If you think that proposal is revolutionary, I've got another for you: I oppose, vehemently, all specialized courts, whether they are Article I or Article III. Under the Constitution there is no accounting for them; they are anathema to our system of jurisprudence. They exist in my view ostensibly because Congress has written laws

While neither of these observations specifically address the scenario of the contractor that seeks to redress the government's tortious breach of contract, the remarks are equally apt in that context. Such a contractor must bear the burden of successfully navigating the jurisdictional labyrinth created through no fewer than six statutes governing litigation in three forums. Burdened by the additional cost and time associated with the administrative claims process that precedes *de novo* judicial review, the contractor becomes twice victimized: once by the tortious breach and once by the dispute resolution process itself.

The goal of this Article is to assist the contractor in bringing an actionable claim in the proper forum. Additionally, this exercise implicitly serves the purpose of demonstrating that reform is needed. Such reform might expand the jurisdiction of the federal district courts to include contract claims, so that victims of tortious breaches of contract by the government would be able to plead in the alternative, a right that Congress already generally has granted to plaintiffs against the government under the Federal Rules of Civil Procedure.²⁷⁴ Alternatively and less drastically, such reform might expand the jurisdiction of the Claims Court to include ancillary jurisdiction under the FTCA over tort claims that are related to claims already within the court's jurisdiction. In fact, legislation was introduced during the 102d Congress which would have granted the Claims Court this power.²⁷⁵

Regardless of the specific details of any particular legislative proposal, however, one thing is clear: Congress must act to save contractors, the government, the courts, and ultimately the taxpayers, from the needless expense of litigating where to litigate.²⁷⁶

too complex for lay people and judges to understand. In reality, they exist to give the government an advantage which it does not deserve in litigating cases against it.

For this reason, I believe that "appeals" from determinations of service boards should go, *de novo*, to the US District Courts. . . . I would, in the process, repeal the Tucker Act: It is my view that, once the government has waived its sovereign immunity to suits in contract and for takings, there is no excuse in law or equity for limiting the access of Americans to their courts of general jurisdiction.

I should tell you that my views are shared, in one manifestation or another, by a large percentage of my clients and by the aerospace and defense community.

Id. at 4-5.

274. FED. R. CIV. P. 8(e)(2).

275. See Court of Federal Claims Technical and Procedural Improvements Act, S. 2521, 102d Cong., 2d Sess., § 10 (1992) 138 CONG. REC. S4,830-32 (daily ed. Apr. 2, 1992).

276. See *Section-By-Section Analysis of the Claims Court Technical and Procedural Improvements Act of 1991*, 56 FED. CONT. REP. (BNA) at 645, 649 (Nov. 11, 1991) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting) ("Nothing is more wasteful than litigation about where to litigate . . .")).

