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Does The APA Still Apply To Government Contractors?

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For non-tort civil actions, there are two primary statutes that permit suit against the Government: the Tucker Act and the Administrative Procedure Act. While the line between these two statutes has never been clear, recent decisions by the U.S. Court of Appeals for the Federal Circuit make one wonder whether the Tucker Act has completely subsumed the APA. The issue is of more than academic interest. Unlike federal district courts acting under the APA, the U.S. Court of Federal Claims lacks authority to grant injunctive relief except in the context of a bid protest. Consequently, closing the doors of district courts deprives Government contractors of a remedy available to all other litigants against the Government.

The Tucker Act and the APA

The Tucker Act grants the COFC jurisdiction over non-tort claims for money damages against the U.S. founded upon the Constitution, a federal statute, or an express or implied contract.[1] The so-called "Little Tucker Act" grants federal district courts concurrent jurisdiction over such claims not exceeding $10,000, but has an exception for "any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978."[2] The exception thus precludes federal question jurisdiction when both of the following criteria are met: (1) the plaintiff's action is founded upon an express or implied contract with the U.S. and (2) that contract is subject to the CDA.[3]

The APA grants district courts jurisdiction over claims against the U.S. for other than money damages by persons adversely affected by agency action for which there is no other adequate remedy.[4] There are three potential limitations inherent in the APA. Section 702 provides, "Nothing herein (1) affects the other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." Somewhat more directly, § 704 provides that agency actions subject to review under the APA are only those "made reviewable by statute and final agency action for which there is no other adequate remedy in a court."

Although the APA does not itself provide an independent grant of subject matter jurisdiction, district courts have authority to hear APA cases under the general federal question jurisdictional statute.[5] Federal question jurisdiction exists if a federal statute creates the cause of action or the plaintiff's right to relief depends on a substantial question of federal law.[6] The U.S. Supreme Court has held that in amending the federal question statute in 1976, Congress conferred jurisdiction on federal district courts to review agency action under the APA, "subject only to preclusion-of-review statutes created or retained by Congress."[7] Consequently, in drawing

the line between the Tucker Act and the APA, the appropriate question is not whether the COFC has jurisdiction over an action, but whether the COFC has *exclusive* jurisdiction, thereby *precluding* the district court's APA jurisdiction.[8]

Bowen v. Massachusetts

In *Bowen v. Mass.*,[9] the Supreme Court blurred the distinction between monetary claims, which previously were thought to be within the exclusive province of the COFC,[10] and nonmonetary claims redressable in federal district court under the APA. The *Bowen* decision also cast doubt on the conventional wisdom that the COFC has exclusive jurisdiction over Tucker Act claims of more than $10,000. The Court stated:

> It is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000. (Title 28 U.S.C. § 1346(a)(2) expressly authorizes concurrent jurisdiction in the district courts and the Claims Court for claims under $10,000). That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court. If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief—other than traditional "money damages"—as an incident to the complete relief that it is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not a sufficient reason to bar that aspect of the relief available in a district court.[11]

The dispute in *Bowen* arose from a disallowance of costs under the Medicaid program. The Commonwealth of Massachusetts filed suit in federal district court to challenge a final order by the Department of Health and Human Services refusing to reimburse the state for certain types of expenditures. In the suit, Massachusetts asked the district court to set aside the final order and sought declaratory and injunctive relief to enjoin HHS from refusing to reimburse the costs or from recovering costs previously reimbursed. The district court granted the requested relief, and the Government appealed, arguing that the district court lacked jurisdiction. The U.S. Court of Appeals for the First Circuit agreed with the Government that the district court lacked authority to order HHS to pay money to the state, but held that the district court had jurisdiction to review the HHS disallowance decision and to grant declaratory and injunctive relief. Before the Supreme Court, the Government argued that the district court lacked jurisdiction under the APA because the state's claim was not an action "seeking relief other than money damages," and, even if it were, 5 USCA § 704 barred relief because the state had an adequate remedy in the COFC.[12] The Supreme Court disagreed on both points.

Regarding the first point, the Court drew a distinction between compensatory claims for "money damages" and actions for specific relief when money is "the very thing" to which a party is entitled. As the Court explained:

> Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." Thus, while in many instances an award of money is an award of damages, "[o]ccasionally a money award is also a specific remedy."[13]

The Court held that while compensatory claims for money damages are excluded by the APA, actions for specific relief are within district court jurisdiction, even if the specific relief happens to require one party to pay money to another.

The Court also rejected the Government's argument that the action was barred by § 704, holding that "the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court."[14] The Court noted that in contrast to a district court, the COFC has no power to grant prospective relief, and, indeed, cannot grant any equitable relief.[15] The Court observed, "A district court has jurisdiction both to grant such relief and to do so while the funds are still on the State's side of the ledger (assuming administrative remedies have been exhausted); the Claims Court can neither grant equitable relief …, nor act in any fashion so long as the Federal Government has not yet offset the disallowed amount from a future payment."[16] The Court stated that it is not "willing to assume, categorically, that a

naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties."[17]

Defining the Jurisdictional Boundary

In determining whether an action falls within the exclusive jurisdiction of the COFC and, therefore, outside the district court's APA jurisdiction, the Fourth, Sixth, Ninth and D.C. Circuits have applied the following two-part rights-and-remedies test first articulated by the D.C. Circuit in *Megapulse, Inc. v. Lewis*: "The classification of a particular action as one which is or is not 'at its essence' a contract action depends both [1] on the source of the rights upon which the plaintiff bases its claims, and [2] upon the type of relief sought (or appropriate)."[18]

In *Megapulse*, a Government contractor filed a district court action seeking to enjoin the Government from disclosing data delivered pursuant to the terms of the plaintiff's Government contracts. The plaintiff argued that disclosure of the data would violate the Trade Secrets Act, 18 USCA § 1905, while the Government argued that disclosure was permitted under the plaintiff's contracts.[19] The district court dismissed the case, concluding it was a contract action within the exclusive jurisdiction of the COFC because determining whether the contractor had rights in the data was a question of contract interpretation.[20] The D.C. Circuit reversed, holding that the "action was properly brought under the APA, and injunctive relief, preliminary or permanent, is available in the district court."[21] Turning first to the source of the rights upon which the plaintiff based its claims, the D.C. Circuit observed:

> Contract issues may arise in various types of cases where the action itself is not founded on a contract. A license, for example, may be raised as a defense in an action for trespass, or a purchase contract may be raised to counter an action for conversion. But the mere fact that a court may have to rule on a contract issue does not, by triggering some mystical metamorphosis, automatically transform an action based on trespass or conversion into one on the contract and deprive the court of jurisdiction it might otherwise have.[22]

The court further observed that, "It is not at all unusual for a court to find it necessary in the course of deciding a dispute over which it does have jurisdiction to decide an issue which would be outside its jurisdiction if raised directly."[23] The court concluded that "Megapulse's claims against the Government [were] not 'disguised' contract claims" because Megapulse was not claiming a breach of contract, seeking monetary damages, or seeking specific performance of its contract.[24]

Turning to the second part of the rights-and-remedies test, the *Megapulse* court found that the availability of money damages in the COFC was not an "adequate remedy" sufficient to preclude review under the APA.[25] In reaching this conclusion, the *Megapulse* court specifically rejected the Government's argument that the district court was precluded from granting the requested injunctive relief because such relief is implicitly forbidden by the Tucker Act. The court stated:

> It is one thing to rely on the generally recognized rule that a plaintiff cannot maintain a contract action in either the district court or the Court of Claims seeking specific performance of a contract. It is quite another to claim, as the Government does in this case, that an agency action may not be enjoined, even if in clear violation of a specific statute, simply because that same action might also amount to a breach of contract.[26]

Although *Megapulse* involved pre-1978 contracts outside the applicability of the CDA, the post-CDA *Megapulse* line of cases has continued to apply precisely the same rights and remedies test. For example, in *Commercial Drapery Contractors, Inc. v. U.S.*, following indictment of a Government contractor and its president, the General Services Administration terminated the contract and then suspended the contractor.[27] The contractor and its president brought suit in U.S. district court, claiming that GSA's cancellation and suspension decisions "violated multiple government procurement statutes and regulations, and constituted 'de facto debarment' or 'blacklisting,' thereby depriving them of due process."[28]

The D.C. Circuit, in addressing its jurisdiction, noted that the court "cannot hear claims 'founded upon any express or implied contract with the United

States … which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act.' "[29] However, even though the plaintiffs' action required interpretation of the termination clause in the contract, the court held that the action was not, at its essence, a contract action. The court reasoned:

> The basis of [plaintiffs'] claim is that GSA's repeated attempts to extricate the government from financial dealings with them constituted unlawful "blacklisting." The dispute[s] over the termination clause in their contracts is embedded within this broader claim, and is not an independent cause of action. This is presumably why [plaintiffs] seek only equitable relief, rather than damages for breach of contract. The claim and the type of relief requested thus reveal that this is not "at its essence" a contract action. Accordingly, we have jurisdiction.[30]

The Fourth Circuit decision in *U.S. v. J&E Salvage Co.* involved a Government claim against J&E Salvage regarding surplus shipping and storage containers it purchased from the Defense Reutilization and Marketing Organization. [31] Unbeknownst to J&E and DRMO, the containers stored four CH-46 helicopter transmissions.[32] J&E informed DRMO upon discovering the transmissions, but refused to return them. The Government brought suit in district court, alleging several causes of action, including rescission based on mutual mistake of fact, conversion and replevin. The Government's action in *J&E Salvage* did not satisfy either prong of the two-part rights-and-remedies test. First, the Fourth Circuit concluded that the action was founded entirely on contract:

> This action by the United States is essentially one of contract, despite the government's efforts to present it as a tort case. The crux of the case rests on a specific contract—the bill of sale between J&E and the DRMO. The merits [of the] question presented is one of contract interpretation, *i.e.*, did the bill of sale and the accompanying DRMO sales pamphlet allow a transfer of ownership of the hidden transmissions along with the containers purchased.[33]

Citing *Megapulse*, the Fourth Circuit stated that "the mere fact that a court has to decide some contract issues in the course of resolving a tort action does not automatically convert the claim into one sounding in contract if there is some independent basis for the tort claim."[34] Here, however, the Fourth Circuit found, "there is no independent basis for a tort. The contract between the parties is the alpha and omega of this dispute."[35]

The Government's action was no more successful on the remedies prong of the test. The Fourth Circuit concluded that the Government primarily was seeking contract remedies, and that only contract remedies were appropriate. The court stated:

> The district court also rejected the government's claim for punitive damages, which is another factor suggesting that the case was more an action in contract than in tort. Moreover, the principal remedy sought by the government and granted by the district court was rescission of the sale and the return of the transmissions. This was, of course, a contract remedy.[36]

A.E. Finley & Assocs., Inc. v. U.S., involved a Government claim that was not reduced to a contracting officer's final decision.[37] Three years after the claim was asserted, and with the $50,844 debt still unpaid, the contractor brought suit in district court seeking "a declaration that it could not be subjected to liability under the contract because the United States had exhausted its administrative and judicial remedies under the Contract Disputes Act."[38] The contractor argued that because of the CO's delay, the claim was deemed denied, and the CDA precluded further review.[39]

The Sixth Circuit held that the district court had federal question jurisdiction because the source of the plaintiff's rights was the CDA statutory disputes resolution procedures, not the plaintiff's Government contract. Although acknowledging that "[t]he relief Finley seeks may be available in the Claims Court," the Sixth Circuit found that "the source of Finley's rights in that court, like the source of its rights in the district court, would be statutory, not contractual."[40] Accordingly, the court held: "In sum, we conclude that Finley's claim is neither a claim against the United States for more than $10,000 nor one 'founded upon [a] contract' with the United States. It is therefore not within the exclusive jurisdiction of the Claims Court, and because it is not the district court had original jurisdiction under 28 U.S.C. § 1331."[41]

Consistently, in *Veda, Inc. v. U.S. Dep't of Air Force*, the Sixth Circuit held that the Tucker Act does not

divest district courts of jurisdiction if the gravamen of the case is injunctive relief, and not money damages.[42] In *Veda*, the Air Force awarded a contract to one of plaintiff's competitors, and refused to place any further orders under plaintiff's contract. The plaintiff brought an action in district court, seeking injunctive relief to prevent the Air Force from ordering services under the competitor's contract and a declaration that the plaintiff's contract was valid and the competitor's contract was unlawful. In effect, the plaintiff sought specific performance of its contract by requiring the Air Force to order services from plaintiff rather than its competitor.[43]

The district court granted the Air Force's motion to dismiss, concluding that the action was within the exclusive jurisdiction of the COFC because the requested relief was the equivalent of a suit for monetary damages in excess of $10,000.[44] The Sixth Circuit reversed, stating that:

> Following the majority in *Bowen*, we hold that Veda's action is not one for monetary relief and properly may be heard in federal district court under 28 U.S.C. § 1331 and 5 U.S.C. § 702. The Federal Claims Court does not have the power of a district court to grant prospective, equitable relief. Throughout the litigation of this matter Veda has maintained that its primary objective is "to enforce, and thereby uphold the integrity of, the federal statutes and regulations governing the award of contracts by the Air Force." In addition, the complaint Veda filed in this case did not contain a prayer for monetary relief. It merely set forth a request for declaratory and injunctive relief only.[45]

The Federal Circuit in *Katz v. Cisneros*, applied a somewhat similar test in determining whether the COFC had exclusive jurisdiction over a contract-related action.[46] *Katz* case involved a contract for rehabilitation of public housing projects that were then to be rented to low-income families. The plaintiff, Hollywood Associates, brought suit in district court to compel the Department of Housing and Urban Development to compute the contract rent in accordance with HUD regulations.[47] The district court transferred the action to the COFC, holding that the COFC had exclusive jurisdiction "because Hollywood Associates' claims 1) are against the United States, 2) seek relief in excess of $10,000, and 3) are founded on a government contract."[48]

The contractor appealed to the Federal Circuit, which reversed the district court, stating that it "disagree[d] with HUD's contention that the essence of Hollywood Associates' suit is contractual and that money damages are the appropriate relief."[49] With regard to the source of the rights on which the action was based, the Federal Circuit held that inclusion of the regulations in the plaintiff's contract clauses does not mean the plaintiff's claims were founded on contract.[50] The court reasoned that:

> HUD argues that unlike [*Bowen*] this case involves a contract, which calls for another outcome. This distinction is not determinative. Merely because the challenged regulations are tracked in the language of the contract between Hollywood Associates and Housing Allowance does not mean that Hollywood Associates seeks a kind of relief different from that in *Bowen*—specific and prospective. "The answer to the sovereign immunity and jurisdiction questions depends not simply on whether a case involves contract issues, but on whether, despite the presence of a contract, plaintiff's claims are founded only on a contract, or whether they stem from a statute or the Constitution."[51]

The court concluded that this "is not a contract case. Hollywood Associates does not seek declaratory relief in the performance of a contract, but seeks judicial interpretation of a federal regulation."[52]

With regard to the remedy sought, the Federal Circuit again relied on *Bowen*, concluding that "the relief sought by Hollywood Associates is not money damages, but a declaratory judgment and other equitable relief."[53] The Federal Circuit stated:

> We see no significant distinction between the kind of relief sought by Massachusetts in *Bowen* and that sought by Hollywood Associates in this case. Like Massachusetts, Hollywood Associates seeks payments to which it alleges it is entitled pursuant to federal statute and regulations; it does not seek money as compensation for a loss suffered. It wants to compel HUD to perform the calculation of rents in accordance with 24 C.F.R. § 882.408 and other applicable regulations. That a payment of money may flow from a decision that HUD has erroneously interpreted or applied its regulation does not change the nature of the case.[54]

Falling Off the Track

When an APA action is brought in district court, the Government may—and, if the plaintiff is a Government contractor, typically does—file a motion to dismiss for lack of jurisdiction under 28 USCA § 1331, a motion to transfer to the COFC under 28 USCA § 1631 or both. If the district court dismisses the case for lack of jurisdiction, the plaintiff may appeal to the appropriate regional circuit court of appeals.[55] In that event, the chances are good that the appeal will be analyzed under the rights-and-remedies test discussed above, with appropriate deference to the Supreme Court's decision in *Bowen*. On the other hand, the Federal Circuit has exclusive jurisdiction over appeals from interlocutory orders granting or denying a motion to transfer an action to the COFC.[56] Despite the analysis in *Katz*, the Federal Circuit's more recent decisions have expressly rejected the rights-and-remedies test, and appear intent on following the *Bowen* dissent rather than the opinion of the six-justice majority.

The Federal Circuit's recent decision in *Suburban Mortgage Assocs., Inc. v. HUD*[57] is difficult to reconcile with either *Bowen* or the Federal Circuit's decision in *Katz*. The case arose out of a federally insured loan that Suburban made to a nursing home and assisted-living facility, which defaulted on its mortgage. Under the National Housing Act and HUD implementing regulations, to collect insurance proceeds if a borrower defaults, the lender must first transfer its interest in the mortgage and mortgaged property to HUD. Accordingly, after the nursing home defaulted, Suburban notified HUD that it wished to exercise its contractual right to assign the defaulted mortgage to HUD. HUD refused to accept the assignment, and Suburban brought suit in federal district court. Among other things, Suburban's suit asked the district court to declare HUD's actions unlawful and to order HUD to perform its duties under the agreement.

The Government moved to dismiss or, in the alternative, to transfer to the COFC. Relying on *Bowen*, the district court found that Suburban was not seeking money damages; rather, the court found Suburban was seeking specific relief in the form of money to which it was entitled.[58] Turning to the second step of the analysis, the district court found that Suburban did not have an adequate remedy in the COFC because Suburban alleged that its entire existence as a going concern was threatened by HUD's action.[59] The court found it equally as important that Suburban was "looking to the court to provide equitable remedies; the Court of Federal Claims, even if it ruled in Suburban's favor, could not provide the relief sought."[60] The district court therefore denied the Government's motions, and the Government appealed the denial of its motion to transfer to the Federal Circuit.

The Federal Circuit began its analysis with a several-page critique of *Bowen* and the jurisdictional confusion it has caused. Rejecting as unworkable *Bowen*'s "linguistic distinctions between 'money damages' and a claim that happens to be for money," the Federal Circuit stated that its cases, and "Congress's purpose in giving this court jurisdiction over these interlocutory appeals, dictate that the better course is to ask first whether the cause is one over which the Court of Federal Claims has jurisdiction under the Tucker Act."[61] The court further stated:

> One reason for beginning the analysis with the "adequate remedy" issue is that its resolution often will be dispositive. If the suit is at base a claim for money, and the relief available through the Court of Federal Claims under the Tucker Act—a money judgment—will provide an adequate remedy, the inquiry is at an end.[62]

Turning to the adequacy of the remedy available at the COFC, the Federal Circuit completely brushed aside Suburban's claims that HUD's actions threatened to put the company out of business. The Federal Circuit stated:

> Nor are Suburban's concerns about possible bankruptcy, loss of reputation, and lost future profits a basis for saying that there is not an adequate remedy in the Court of Federal Claims. Those concerns can be alleged by any claimant seeking money from the Government for an allegedly wrongful failure to pay a claim; to the extent that they have merit in a given case, money usually can assuage the wrong.[63]

Thus, the Federal Circuit essentially has adopted a single-prong test that asks only whether an adequate remedy is available in the COFC and at the same time assumes the remedy available in the COFC—money damages—is always adequate. The result is that the COFC invariably will be the exclusive judicial forum available to Government contractors and the Tucker Act has completely swallowed the APA.

In addition to criticizing the *Bowen* decision and attempting to limit that decision to its facts, the Federal Circuit also had some advice for district courts:

> [F]or almost twenty years this court has been tasked by Congress to be the exclusive arbiter of the issue when it is brought to us in these interlocutory appeals. We are of course bound to follow our own circuit law. District courts, as well as counsel for the parties, would be better able to predict the outcome of such appeals if they follow the same law.

Conclusion

Notwithstanding the Federal Circuit's assertion that "money usually can assuage the wrong," money damages are obviously cold comfort for a company that has been forced out of business by the Government's actions. Indeed, the whole purpose of injunctive relief is to *prevent* the harm from occurring. If money damages were always an adequate remedy, there would be no need for the APA and injunctive relief. Moreover, even if money can assuage the wrong, it is unclear whether an adequate remedy is available in the COFC. For example, the Federal Circuit's decisions on damages in the *Winstar* line of cases may lead one to question whether a plaintiff can or will be adequately compensated for its loss in the COFC. Nevertheless, given the Federal Circuit's one-step analysis and its view that money damages *are* an adequate remedy for virtually all claims, it appears that the district courts effectively are closed to Government contractors.

v Endnotes

1 28 USCA § 1491(a)(1).

2 28 USCA § 1346(a)(2).

3 See, e.g., *Commercial Drapery Contractors, Inc. v. U.S.*, 133 F.3d 1, 4 (D.C. Cir. 1998).

4 5 USCA §§ 702, 704.

5 28 USCA § 1331.

6 See *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 606-607 (4th Cir. 2002).

7 *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

8 See, e.g., *A.E. Finley & Assocs., Inc. v. U.S.*, 898 F.2d 1165, 1167 (6th Cir. 1990) ("if an action rests within the *exclusive* jurisdiction of the Claims Court under the Tucker Act, 28 U.S.C. §§ 1346 and 1491, the district court does not have jurisdiction regardless of other possible statutory bases") (emphasis added).

9 *Bowen v. Mass.*, 487 U.S. 879 (1988).

10 The COFC is referred to variously as the Court of Claims, Claims Court and Court of Federal Claims. Before 1982, the court was known as the Court of Claims. In October 1982, the court was recreated pursuant to Article I of the Constitution by the Federal Courts Improvement Act. From Oct. 1, 1982 until Oct. 28, 1992, the court was named the U.S. Claims Court. The court's name was changed to the U.S. Court of Federal Claims as part of the Federal Court Administration Act of 1992 (P.L. 102-572), 106 Stat. 4506 (1992).

11 487 U.S. 879, 910 n.48 (1988).

12 487 U.S. at 891.

13 487 U.S. at 894–95 (citation omitted).

14 487 U.S. at 902.

15 Id. at 905.

16 Id. at 907.

17 Id. at 905.

18 672 F.2d 959, 968 (D.C. Cir. 1982). See also *U.S. v. J&E Salvage Co.*, 55 F.3d 985, 987-88 (4th Cir. 1995); *Up State Fed. Credit Union v. Walker*, 198 F.3d 372, 375 (2d Cir. 1999); *Commercial Drapery Contractors, Inc.*, 133 F.3d at 4; *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1136 (6th Cir. 1996); *N. Star Alaska v. U.S.*, 14 F.3d 36, 37 (9th Cir. 1994).

19 672 F.2d at 962-63.

20 672 F.2d at 964-65 & n.15.

21 Id. at 971.

22 Id. at 968.

23 *Megapulse,* 672 F.2d at 968 (quoting *de Magno v. U.S.*, 636 F.2d 714, 724 (D.C. Cir. 1980)).

24 Id. at 969.

25 672 F.2d at 970.

26 672 F.2d at 971.

27 133 F.3d at 3.

28 Id.

29 133 F.3d at 4 (quoting 28 USCA § 1346(a)(2)).

30 Id. at 4.

31 55 F.3d at 985.

32 Id. at 986–87.

33 Id. at 988.

34 Id. at 989.

35 Id.

36 Id.

37 898 F. 2d at 1165.

38 Id. at 1167.

39 Id.

40 Id. at 1168.

41 Id.

42 111 F.3d 37, 38 (6th Cir. 1997).

43 111 F.3d at 39.

44 Id.

45 Id. at 40 (citation and footnote omitted).

46 16 F.3d 1204 (Fed. Cir. 1994).

47 16 F.3d at 1206.

48 16 F.3d at 1207.

49 Id.

50 16 F.3d at 1209.

51 Id. (quoting *Transohio Sav. Bank v. Dir., OTS*, 967 F.2d 598, 609 (D.C. Cir. 1992)).

52 Id.

53 Id. at 1208.

54 Id.

55 A district court decision denying a motion to dismiss is not subject to interlocutory appeal under 28 USCA § 1292.

56 See 28 USCA §1292(d)(4)(A).

57 *Suburban Mortgage Assocs., Inc. v. HUD*, 480 F.3d 1116 (Fed. Cir. 2007).

58 *Suburban Mortgage Assocs., Inc. v. HUD*, No. 05-00856, 2005 WL 3211563, at *6 (D.D.C. Nov. 14, 2005).

59 Id. at *7.

60 Id. at *8.

61 480 F.3d at 1125.

62 Id.

63 Id. at 1127 (footnote omitted).