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CONTRACT SUIT PRACTICE AND PROCEDURE IN THE UNITED STATES COURT OF CLAIMS

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I. Introduction

Everyone today is aware of the enormous scope of the federal government's contract activities. Its business endeavors are the nation's largest, employing, consuming, and contracting on an unequalled scale. The sheer size of its undertakings is matched by their diversity. The federal government contracts for every imaginable type of goods and services found in the private sector and for a great variety of complicated and costly items, such as those relating to space exploration and national defense, where there are no private sector counterparts. Often these undertakings are at the very limits of technology. Moreover, the federal contract process is highly formalized, statute-, regulation-, and rule-ridden. Considerations other than those which may motivate the formation of private commercial transactions—labor surplus programs, small-business set-asides, and buy-American programs, to name a very few — are added factors. In such an environment it is a truism to state that disputes are inevitable. Further complications arise because one of the parties to the dispute is the sovereign, historically amenable to suit only with its permission. Since 1855 Americans and aliens, under appropriate circumstances, have been allowed to assert certain types of claims against the federal government, as a matter of right, in the United States Court of Claims. The types of claims which may be brought include in addition to contract cases, tax refund, civilian and military pay, patent infringement, Indian claims, fifth amendment "taking" cases, congressional reference cases, and cases resulting from special jurisdictional statutes.

Practice before the Court of Claims reflects the special nature of the suits brought before it — generally ones in which the United States is defending against claims seeking money damages. Court of Claims practice also reflects the impact of statutes and case law which delineate the means by which contract suits are brought to the court and define the court's contract jurisdiction. The court's rules are lengthy, complex, and thorough; moreover, they are not fully intelligible without an understanding of other factors which affect contract practice before the court.

It is the authors' intent to describe contract suit and contract-related practice in the Court of Claims, meshing the court's rules and other dominant factors which affect that practice. The discussion includes the types of cases which may be brought, how they are taken to the court, how counsel should proceed once there, and what to do if not satisfied with the court's decision.

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A. *Jurisdiction Over Contract Matters: When Is the Court of Claims Available?*

As a general rule, the Court of Claims is the forum for "any 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."[1] For claims greater than $10,000, the Court of Claims is the only forum, but if for less than $10,000, a choice is available between the appropriate United States District Court and the Court of Claims.[2]

However, whether a contract suit may be brought *de novo* in the Court of Claims or the attempt must first be made to resolve the claim before an administrative agency depends on the parties' contract (whether or not it contains a "Disputes" clause) and the nature of the claim ("breach of" or "arising under" the contract). Thus the Court of Claims's jurisdiction over "claims founded upon any express or implied contract" embraces two distinct types of claims—*disputes clause claims* and *breach of contract claims*. The court's role varies according to which of these two types of claims is involved. For disputes clause claims, the court reviews decisions appealed by contractors from administrative boards of contract appeals.[3] By contrast, in breach of contract suits, the court is the trial court hearing the case from its beginning. This article is primarily concerned with these two types of contract claims. For purposes of analysis, the two types of claims are analyzed separately as if easily distinguishable. In reality, however, the line between the two is not distinct. This creates the problems discussed below.

II. Types of Cases—General Discussion

A. *Breach of Contract Cases*

1. Types of Breach Suits

Certain breach of contract fact patterns recur frequently. Often breach suits are brought to recover for delays resulting from the Government's failure to perform an act required of it. Damages will be allowed for delaying the contractor from the commencement of performance.[4] Other common examples of breach actions include suits against the Government for unreasonable delay in rejecting delivered goods,[5] unreasonable delay in approving certain components,[6] bad faith interpretation of the contract by the contracting officer,[7] and

1 28 U.S.C. § 1491 (1970). This is the so-called Tucker Act of March 3, 1887, 24 Stat. 505, now principally in 28 U.S.C. §§ 1491 and 1346 (a) (2). For specific questions of jurisdiction, see TITLE 28, UNITED STATES CODE. Sections pertaining to the Court of Claims are generally found in 28 U.S.C. §§ 171-175, 1491-1506 and 2501-2521 (1970), the latter sections being the procedures for the court.

2 28 U.S.C. §§ 1346, 1491 (1970).

3 For procedures before the board, see Briefing Paper No. 70-4, *Contract Claims Before the ASBCA* (August 1970).

4 Dale Construction Co. v. United States, 168 Ct. Cl. 692 (1964).

5 Cudahy Packing Co. v. United States, 109 Ct. Cl. 833 (1948).

6 Specialty Assembling & Packing Co., Inc. v. United States, 174 Ct. Cl. 153, 355 F.2d 554 (1966).

7 Needles v. United States, 101 Ct. Cl. 535 (1944).

unwarranted exercise of control over contract performance by a government inspector.[8] On the other hand, the Government is not responsible for delays not caused by it,[9] and even government-caused delays must be separable from contractor-caused delays for a contractor's breach action to be successful.[10] From such cases evolves the basic premise of successful breach suits—the Government is under an obligation not to hinder the contractor's performance and will be responsible in damages for any act of omission or commission that unreasonably delays or disrupts the contractor's performance.

2. Suits Based on Implied Contracts

The court also has jurisdiction over contracts *implied in fact* which occur when the conduct of the parties shows mutual tacit agreement and a meeting of the minds. Circumstances must be found from which it can be inferred—"implied"—that the parties in fact did enter into an agreement.[11] However, the court does *not* have jurisdiction over contracts *implied in law,* or *quasi-contracts.* As an example, a contractor cannot sue the United States for unjust enrichment, claiming to have conferred a benefit upon the United States under a defective contract.[12]

3. Subcontractor Suits

Subcontractors have no right to bring suit against the United States because they are not in privity with the Government.[13] Nevertheless, it is possible for a subcontractor to obtain recovery indirectly through a suit in the Court of Claims by the prime contractor on behalf of its subcontractor.[14] Suits so brought are of the same wide scope as described above for suits by a prime contractor allowing, as an example, unpaid laborers and materialmen to join with a subcontractor in intervening where the United States has become a mere stakeholder.[15] The prime contractor may *not* recover for its subcontractor where the prime contractor will not be liable to the subcontractor, as where the subcontract contains an exculpatory clause. However, a subcontract making the prime contractor liable only to the extent the Government is found liable is not considered exculpatory and permits the prime to recover on behalf of the subcontractor. This is the so-called *Severin* doctrine.[16]

8 Roberts v. United States, 174 Ct. Cl. 940, 357 F.2d 938 (1966).
9 Dale Construction Co. v. United States, 168 Ct. Cl. 692 (1964).
10 Commerce Int'l Co., Inc. v. United States, 167 Ct. Cl. 529, 543 (1964).
11 Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592 (1923).
12 Sutton v. United States, 256 U.S. 575 (1921).
13 Continental Ill. Nat'l Bank & Trust Co. v. United States, 112 Ct. Cl. 563 (1949).
14 United States v. Blair, 321 U.S. 730, 737-38 (1944); *see, e.g.,* C. B. Ross Co., Inc. v. United States, 109 Ct. Cl. 690 (1947).
15 Hadden v. United States, 132 Ct. Cl. 529 (1955).
16 Severin v. United States, 99 Ct. Cl. 435 (1943), *cert. den.* 322 U.S. 733 (1944); for a more complete discussion see Creyke & Lewis, *Construction Subcontract Claims Procedures,* Briefing Paper No. 65-3 (June 1965).

B. *Review of Disputes Clause Cases*

This section deals with the court's function of reviewing determinations made by administrative boards of contract appeals (BCA's), pursuant to a disputes clause. These are the cases which *arise under* the contract.

1. Background

The court's review jurisdiction is the result of contractual agreement which divests the court of its trial function and for it substitutes a procedure in which the role of the Court of Claims is appellate in nature. Almost immediately after the Court of Claims was established, the Supreme Court upheld the validity of a contract provision giving a government official the right to determine finally any dispute arising in the performance of the contract, his decision not being reviewable except for fraud or gross mistake.[17] Such dispute clauses thereafter were frequently included in government contracts and became standardized. These clauses then began to include contractor rights of appeal from the Contracting Officer's (C.O.'s) decision to the head of a procuring agency. Usually a fact-finding board was appointed by the agency head to act on his behalf; the board's determinations were not judicially reviewable except for fraud or gross mistake until such review was enlarged in 1954 by the Wunderlich Act[18] (discussed in detail below). Effectively, then, the statutorily granted right of contractors to take contract disputes directly to the Court of Claims was reduced significantly by the disputes clauses and an administrative stage was permanently inserted *before* a contractor may bring many of his contract claims to the Court of Claims.

2. Review Defined

Today, three factors define the court's role in reviewing BCA decisions and determine the standards of review to be applied to such contract cases: (1) the standard disputes clause found in most government contracts; (2) the Wunderlich Act; and (3) a series of Supreme Court decisions which interpret that Act.

a. The Disputes Clause: This clause contains the procedure for resolving disputes based on "a question of fact arising under this contract. . . ."[19] All of the contractor's avenues of review and the order in which they are to be followed are described. First, the dispute may be "disposed of by agreement."[20] If the parties do not agree, the C.O. issues a "decision." If the contractor accepts the C.O.'s decision, he need do nothing—that decision becomes final if appeal is not taken by the *contractor* within 30 days.[21] If the contractor disagrees, he appeals

17 Kihlberg v. United States, 97 U.S. 398 (1878).
18 41 U.S.C. §§ 321, 322 (1970).
19 41 C.F.R. § 16.901-32 (1972), *Standard Form 32*: General Provisions (Supply Contract), ¶ 12 for Supply Contracts; for Construction Contracts, see 41 C.F.R. § 16.901.23-A (1972), *Standard Form 23-A*: General Provisions (Construction Contract), ¶ 6.
20 *Id.*
21 *Id.*

to "the Secretary" who himself (rarely) or through "his duly authorized representative for the determination of such appeals" (usually—the "representatives" are the Boards of Contract Appeals) tries the case. If the contractor disagrees with the BCA decision he may appeal to the Court of Claims.[22]

b. Standard of Review—Wunderlich Act: If the contractor appeals to the Court of Claims, the types of issues that may be reviewed are defined in the Wunderlich Act.[23] A board's *conclusion of law* can always be appealed.[24] Challenge to an administrative *finding of fact,* however, is more limited, the test being whether the administrative decision is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."[25]

c. Bianchi and Other Cases: The extent of judicial review permitted under the disputes clause and the Wunderlich Act has been given more precise definition by a series of Supreme Court decisions.[26] They limit judicial review of factual findings to the administrative record and do not permit a new trial in the Court of Claims. This is true even of those factual issues which are common to both claims for breach of contract and those arising under the contract. The court may not substitute its judgment for that of the Board. The court's role is limited to review of the board record (pleadings, hearing transcripts, documentary evidence, and the board's final decision) according to the Wunderlich Act standards quoted above, usually to determine whether the facts found by the board are supported by substantial evidence.

C. *The Difficulty in Distinguishing between the Two Types of Contract Claims*

The supposed clear distinction between the two types of contract claims has proven illusory and has produced an inordinate amount of procedural confusion, delays, and even loss of substantive rights by contractors. The test is clear enough, *viz.,* "Is there a contract clause through which the BCA can grant the contractor complete relief?" If there is, the claim is "under the contract" and *must* be decided pursuant to the disputes clause. If the contract does not contain a clause sufficient for the provision of complete relief, the claim *must* be brought in the Court of Claims.[27] The difficulty of making such a determination is increased by the recent propensity of BCA to interpret contract provisions liberally in order to provide a wider administrative remedy, and by the Court of Claims' adherence to the traditional tendency of common-law courts to construe narrowly contract provisions purporting to deny their jurisdiction.[28]

22 S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972).
23 41 U.S.C. §§ 321, 322 (1970); the usual disputes clause contains closely analogous language as well. *See* 41 C.F.R. § 1601-32, n.3 (1972).
24 41 U.S.C. § 322 (1970).
25 41 U.S.C. § 321 (1970).
26 United States v. Anthony Grace & Sons, 384 U.S. 424 (1966); United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963).
27 Edward R. Marden Corp. v. United States, 194 Ct. Cl. 799, 442 F.2d 364 (1971); *see* Utah Constr. & Mining Co., 384 U.S. 394 (1966).
28 *See, e.g.,* Edward R. Marden Corp. v. United States, 194 Ct. Cl. 799, 442 F.2d 364 (1971); Air-A-Plane Corp. v. United States, 187 Ct. Cl. 269, 408 F.2d 1030 (1969); Appeal of Harrington & Richardson, ASBCA No. 9839, 72-2 BCA 9507 (1972).

1. Why It Is Important to Distinguish between the Two Types of Claims

a. Timeliness of Action: Under the "Disputes" clause, if a contractor does not appeal from the contracting officer's final decision on a claim under the contract within 30 days after its receipt, it will become *final* and not subject to review. (There is a conflict between the Court of Claims and the Armed Services Board of Contract Appeals on this point.)[29] On the other hand, a contractor may bring suit in the Court of Claims for breach of contract anytime within six years after the claim first arose.[30] A mistake of taking a breach claim to a BCA does not prejudice the claim except that the contractor will incur unnecessary costs and may later find himself unable to attack the BCA's lack of jurisdiction. A mistake of taking a claim arising under the contract to the court, on the other hand, may be fatal because the contractor failed to appeal to the BCA within the required 30 days. As a practical matter, a contractor should appeal any decision of a contracting officer to the BCA except in the most clear-cut breach situations. Then if he wants the BCA to have jurisdiction his chances of a favorable ruling would be enhanced by requesting a jurisdictional decision from the BCA. If the contractor desires the opposite result his chances of success are increased by filing suit in the Court of Claims and obtaining a ruling there. Note that the jurisdictional issue is one of law and therefore the court is not bound by a BCA determination of jurisdiction.[31]

b. Fragmentation of Remedies: It sometimes occurs that a contractor will have both types of claims resulting from performance of a single contract and be required to obtain relief from *both* the court and the BCA. This situation, called "fragmentation of remedies," creates problems.[32] The court may refuse to hear the breach case until the BCA proceedings are complete and a decision made as to whether to appeal the BCA decision to the court on the theory that a contractor may not split his causes of action. If the two claims have some common facts, the court may refuse to proceed until completion of the BCA proceedings because it may decide that the BCA factual findings on the common facts are binding on it. If the court does proceed before the BCA case is completed the contractor has difficulties associated with litigation in two places at the same time involving many of the same documents. There also is the possibility of inconsistent results. On the other hand, if "Justice delayed is Justice denied," it is unsatisfactory to hold up judicial remedies for breach awaiting a BCA decision. There is no present solution to these problems.

D. *Renegotiation Act Cases*

Since July 1, 1971, the Court of Claims has been given new and important

29 Disputes Clause, 32 C.F.R. § 103.12 (1972); *see* discussion at 15 Gov't Contractor ¶ 188 and cases cited therein.

30 28 U.S.C. § 2501 (1970).

31 41 U.S.C. § 322 (1970).

32 *See,* Shedd, *Fragmentation of Remedies,* 28 FED. B. J. 185 (1968); Cuneo, G. and Anthony, D., *Beyond* Bianchi: *The Impact of* Utah *and* Grace *on Judicial Review of Contract Appeals Boards' Decisions,* 55 GEO. L. J. 602 (1967).

government contract jurisdiction—over renegotiation cases.[33] Created to recover "excessive profits" of some contractors during World War II, renegotiation has evolved into the means by which the Government challenges, as excessive, profits made by government contractors.[34] Contractors with the Department of Defense and other enumerated agencies[35] are brought into the renegotiation process by contract clauses required to be placed in contracts by the Secretary of the Contracting Department; their contracts are statutorily deemed to contain these same provisions if they are not actually inserted.[36] These contractors' profits are reviewed by the Renegotiation Board, whose determinations are appealable by the contractor to the Court of Claims.

Renegotiation cases are unique in the Court of Claims. Contrary to all other types of cases in the Court of Claims, the contractor is generally not seeking to recover a money judgment against the Government. In essence, the contractor is *defending* against government allegations that the contractor must pay alleged excessive profits.[37]

In practice the difference between renegotiation and other cases is recognized in significant ways. Most importantly, the court has held that the overall burden of proof is on the Government to demonstrate that the contractor's profits *are excessive*—the Tax Court decisions holding the opposite are not being followed.[38] The contractor, on the other hand, has the "burden of going forward" —establishing a prima facie case that his financial data are accurate, that renegotiable business is segregated, and that his cost allocations satisfy accepted accounting principles; he must also demonstrate the existence of the so-called "statutory factors" upon which he relies.[39] In addition, in the proceedings before the Renegotiation Board, the Government must provide the contractor with all pertinent information releasable under the Freedom of Information Act to enable him to defend himself, under penalty of having the board proceedings stayed until such information is produced.[40] There are indications that the Court of Claims will be as strict in requiring the Government to provide information.[41]

As promulgated at the time of the writing of this article, the court's rules do not account specifically for the shift in the Government's role from defendant to plaintiff in Renegotiation Act cases. Certain procedures, unique to Renegotiation Act cases, however, are defined in the rules. For example, to ensure that payment will be made of any profits determined to be excessive, a bond equal to 100% of the claimed excessive profits is required[42] which may be increased at

33 Act of July 1, 1971, Pub. L. No. 92-41 § 3, 85 Stat. 97, 98 (1971), amending the Renegotiation Act of 1951, 50 U.S.C. App. §§ 1191, 1211 *et seq.* (1970).

34 *See generally* Bruce, *Reform of the Renegotiation Process in Government Contracting,* 39 Geo. Wash. L. Rev. 1141 (1971).

35 50 U.S.C. App. § 1213(a) (1970).

36 50 U.S.C. App. § 1214 (1970).

37 *See,* Lykes Bros. Steamship Co., Inc. v. United States, 198 Ct. Cl. 312, 459 F.2d 1393 (1972).

38 *Id.*

39 *Id.* at 13.

40 Bannercraft Clothing Co., Inc. v. United States, 466 F.2d 345 (D.C. Cir. 1972), *cert. granted,* 410 U.S. 907 (1973).

41 Court of Claims Order No. 594-71, June 2, 1972, ¶ 3.

42 Ct. Cl. R. 26 (hereinafter cited as "Rule"); *see* Appendix E, Forms of Bonds and Powers of Attorney in Renegotiation Cases.

the discretion of the commissioner.[43] If the contractor is bankrupt and insolvent the court may waive the bond requirement.[44] The absence of a bond does not prevent the redetermination of excessive profits but means that the Government is free to collect while the redetermination proceeding is pending.[45] A "judgment," under the court's rules, is "deemed to include an order in a renegotiation case determining the amount, if any, of excessive profits."[46] However, in spite of the reversal of the parties' roles, the contractor remains technically the plaintiff and the United States is the defendant as in other Court of Claims cases.[47]

At present, contractors are also required to respond to special renegotiation pretrial accounting orders which require detailed answers to financial questions about the contractor's profits. Compliance with these orders is most difficult and expensive. It is the authors' understanding that the court, through its Rules Committee, is reviewing Renegotiation Act practice before the court, including the possible promulgation of special rules for this unique practice. In the meantime, the contractor must practice under rules which are geared toward the plaintiff/contractor having the burden of proof, as in all other Court of Claims suits.

E. *Fifth Amendment "Taking" Cases*

A cousin to contract claims is the court's jurisdiction in "taking" cases arising under the fifth amendment to the Constitution. That amendment provides that "private property [shall not] be taken for public use, without just compensation."[48] The court's basic jurisdictional statute includes "any claim against the United States founded . . . upon the Constitution. . . ."[49] Thus, the right of the Government to appropriate property is recognized, as is its attendant responsibility to compensate the party from whom the property is taken.[50] Only since 1946, however, has "taking" been held to be a constitutional question encompassing seizures whether or not tortious.[51] Similarly, the presence or absence of a "contract" theory—an implied promise to pay for the property taken—is of no consequence to the court's fifth amendment jurisdiction.[52] Nor does the fact that a nominal "sale" exists change the applicability of the doctrine.[53] The doctrine of taking is no longer construed narrowly and includes any direct Government interference with or disturbance of property rights.[54]

43 RULE 26(e).
44 Sandnes' Sons, Inc. v. United States, No. 800-71 (Ct. Cl. July 14, 1972) (no dismissal for failure to post bond where contractor bankrupt and insolvent). O'Brien Gear & Mach. Co. v. United States, Ct. Cl. No. 105-72, Order, Oct. 27, 1972 (dismissal where contractor fails to post bond but is not bankrupt and insolvent).
45 Sandnes' Sons, Inc. v. United States, No. 800-71 (Ct. Cl. July 14, 1972).
46 RULE 148.
47 RULE 34(a).
48 U.S. CONST., AMEND. V.
49 28 U.S.C. § 1491 (1970); *see* 28 U.S.C. § 1346(a)(2) (1970).
50 *See, e.g.*, United States v. Carmack, 329 U.S. 230, 241-42 (1946).
51 United States v. Causby, 328 U.S. 256 (1946); *see generally* D. SCHWARTZ [Commissioner, United States Court of Claims] & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT (1970), chapter XI.
52 *See* R. J. Widen Co. v. United States, 174 Ct. Cl. 1020, 1025-26 and n. 8 (1966), and cases cited therein.
53 *See, e.g.*, Dore v. United States, 119 Ct. Cl. 560, 97 F. Supp. 239 (1951).
54 R. J. Widen Co., 174 Ct. Cl. 1020, 1027 *et seq.* (1966).

Although there exists no substantial theoretical impediment to damages, the doctrine has not yet been construed so broadly as to convert claims of mere government interference, regardless of arbitrariness, to fifth amendment taking cases.[55]

F. *Congressional Reference*

The commissioners of the Court of Claims are charged with a congressional reference function which gives the court a unique role in the federal judicial system. Either house of Congress may refer a bill (except for pensions) to the Chief Commissioner of the Court of Claims for a report as to whether a claimant has a legal or equitable right to relief including waiver by the United States of defenses to the claim.[56] Contrary to the usual function of a court, the report of the commissioners does not result in a judgment. It is merely advisory to the Congress. Relief, if any, is made by Congress in the form of a private bill.

The congressional reference function is performed solely by the commissioners—there is no appeal to the judges of the court as in other cases; the judges do not participate in the process in any manner.[57] As defined by statute[58] and implemented in the court's rules,[59] the commissioners perform both trial *and* review functions. Under this procedure cases are referred by Congress to the Chief Commissioner, who designates a trial commissioner to determine the facts and applicable law.[60] The Chief Commissioner simultaneously appoints a review panel of three other commissioners to review the trial commissioner's decision.[61] The decision reached is not limited to the parties' purely legal rights, but also considers the overall equity of the claimant's position.[62]

Although congressional reference cases vary widely in content, "[i]t is the equity of the situation that really counts. . . ."[63] As a general rule, there must be a "clear equitable reason" to decide in favor of the claimant.[64] Common examples include situations in which the Government has been benefited and should be required to pay for that which has been rendered,[65] and where cause exists to waive a statute of limitations which has run, "legally" precluding suit.[66] The trial commissioner has access to the full facilities of the court to perform the

55 J. L. Simmons Co., Inc. v. United States, 188 Ct. Cl. 684, 734, 412 F.2d 1360, 1389 (1969).

56 *See* 28 U.S.C. §§ 1492, 2509 (1970); Zadeh v. United States, 124 Ct. Cl. 650, 111 F. Supp. 248 (1953); *see generally* Bennett [then Chief Commissioner, now Associate Judge, U.S. Court of Claims], *Private Claims Acts and Congressional References,* 9 A.F.J.A.G. L. Rev. (1967).

57 28 U.S.C. § 2509(b) (1970).

58 28 U.S.C. § 2509 (1970).

59 Rules, Appendix D.

60 28 U.S.C. § 2509(b) (1970); Rules, Appendix D, § 6.

61 *Id.*

62 Burkhardt v. United States, 113 Ct. Cl. 658, 667, 84 F. Supp. 553, 559 (1949); *see* Bennett, *supra* note 56, at 9 & n. 4.

63 Bennett, *supra* note 56, at 16.

64 *Id.*

65 *See, e.g.,* Gay St. Corp. v. United States, 130 Ct. Cl. 341, 350, 127 F. Supp. 585, 590-91 (1955); Bennett, *supra* note 56, at 16, n. 29 and cases cited therein.

66 *See, e.g.,* S.N.T. Fratelli Gondrand v. United States, 166 Ct. Cl. 473 (1964); *see also* Bennett, *supra* note 56, at 17-18.

congressional reference function and the court can include these costs within its annual appropriations.[67]

G. *Special Jurisdictional Statutes*

In addition to its "traditional" judicial roles, the Court of Claims frequently has been given a variety of additional specific jurisdiction by Congress. The added jurisdiction ranges from rendering judgment on damage claims of oyster growers arising from congressionally authorized river and harbor improvements,[68] through hearing suits for recovery of reasonable costs of oil removal by the party responsible for its discharge in certain instances,[69] to determining compensation for land taken for the Redwood National Park.[70] Recently, contemplated additions to the court's jurisdiction have included jurisdiction to recompense cyclamate producers for losses incurred as a result of the governmental barring of the use of cyclamates.[71] Occasionally, the grant may be solely to the commissioners with no review by the judges as, for example, jurisdiction to determine and settle distribution of fees and expenses of certain Alaskan native land claims.[72]

H. *Torts*

The court's general jurisdictional statute specifically excepts cases "sounding in tort."[73] However, the Court of Claims does have jurisdiction to review final judgments by United States District Courts in cases under the Federal Tort Claims Act if written consent of all appellees is obtained.[74] The procedure so far is unused.

I. *Class Suits*

Class actions are permitted in the Court of Claims,[75] but the court's rules make only brief and tangential reference to such suits.[76] No procedural guidance equivalent to Federal Rule of Civil Procedure (FRCP) Rule 23 (Class Actions) is available; the court recently made the specific choice to deal with class suits on an *ad hoc* basis until sufficient experience is compiled to permit a rule to be drafted.[77] A contractor should expect that the Government will resist and attempt to restrict the scope of class action suits brought in the Court of Claims. In the absence of specific Court of Claims rules, a contractor may rely on FRCP Rule 23 criteria in prosecuting his case.[78]

67 28 U.S.C. § 2509(g) (1970).
68 28 U.S.C. § 1497 (1970).
69 33 U.S.C. § 1161(i) (1970).
70 16 U.S.C. § 79c(b)(2) (1970).
71 H.R. 13366, 92d Cong., 2d Sess. (1972) (Not reported out of Committee at end of session).
72 Alaska Native Claims Settlement Act, P. L. No. 92-203, 85 Stat. 688 (1971).
73 28 U.S.C. § 1491 (1970).
74 28 U.S.C. § 1504 (1970).
75 Quinalt Allottee Ass'n v. United States, 197 Ct. Cl. 134, 137, 453 F.2d 1272, 1275 (1972) and cases cited therein; *see generally* Iadarola, *Class Suits and the United States Court of Claims—Is the Court Now Ready for a Rule?* 31 FED. B. J. 225 (1972).
76 RULE 221(b).
77 Quinalt Allottee Ass'n v. United States, 197 Ct. Cl. 134, 140, 453 F.2d 1272, 1275-76 (1972).
78 *See id.*, 453 F.2d at 1276.

J. *Third-Party Practice*

Third-party practice in the Court of Claims is not as broad as it is in federal district courts and is limited to situations directly related to the bringing of suits for money damages against the United States. The third-party mechanism is used where third-party defendants have an interest in a plaintiff's claim against the Government, as a defense to the plaintiff's claim, and in situations where the United States might assert a claim against a third party with respect to the transaction or matter which is the subject of the suit before the court.[79] The rules describe in detail the procedures and mechanics for third-party practice.[80] Judgment may be rendered against third parties only where the Government claims money already paid to the third party in respect to the transaction which is the subject matter of the Court of Claims suit, or where the third party appears and asserts a claim or interest against the United States.[81]

A party is given the opportunity to appear before the court by one of two means—summons or notice. A summons informs a party that it has a definite interest which is being adjudicated, *i.e.*, the Government is asserting a claim or contingent claim for the recovery of money paid by the United States in respect to the transaction which is the subject matter of the suit.[82] Motion for the issuance of a summons is made by the *Government*. The court or any party may move to "notify any person . . . who appears to have an interest in the subject matter of any pending suit to appear as a party and assert his interest therein."[83] A person so noticed must decide whether he should make an appearance and/or participate in the court proceedings. The court's decision is binding on a third party whether summoned or noticed and whether or not he appears. He may not retry his interest at a later time.[84]

III. Practice and Procedure

A. *Organization of the Court*

Understanding the court's organization is important to those trying contract claims before it. The court's composition and division of functions determine much of the way in which proceedings before it are conducted. The courthouse is located across Lafayette Park from the White House in Washington, D. C.[85] Although sitting in Washington, its jurisdiction is nationwide and evidence may be taken (almost always by commissioners) wherever witnesses reside.[86] The

79 *See* Rolls-Royce Ltd. v. United States, 176 Ct. Cl. 694, 698, 364 F.2d 415, 417-18 (1966) and cases cited therein; Rule 41(a); *see also* Lydon, *The 1969 Rules Revision for the United States Court of Claims,* 58 GEO. L. J. 317, 323 n. 31, 326 & n. 49 (1969).

80 *See* RULE 41.

81 *See, e.g.,* Bowser, Inc. v. United States, 190 Ct. Cl. 441, 420 F.2d 1057 (1970).

82 RULE 41(a)(2).

83 RULE 41(a)(1).

84 Bowser, Inc. v. United States, 190 Ct. Cl. 441, 420 F.2d 1057 (1970).

85 *See* 28 U.S.C. § 174 (1970); the court's address is 717 Madison Place, N.W., Washington, D.C. 20005.

86 *See* 28 U.S.C. § 2503 (1970) (taking of evidence by commissioner); 28 U.S.C. § 2505 (1970) (by judges).

court's term officially begins on the first Monday in October[87] and normally runs through the following June. There is no time limit, however, on the court's power "to do any act or take any proceeding."[88] For "filing proper papers, issuing and returning process, making motions, and issuing orders," the court is always open.[89] A quorum of four judges is required for the court to sit *en banc* and two judges for a decision when so sitting.[90] Arguments before the judges normally are heard during the first week of the month, October through June. The clerk of the court maintains a calendar which contains the anticipated issuance date of the court's decisions. A monthly calendar is also published and provided to attorneys with cases to be argued that month, setting forth the order in which cases are to be heard. From this the attorney can approximate the day on which his case will be argued. Out-of-town counsel are usually accommodated by having their cases set for a specific day.

1. Judges, Chief Judge

The court's seven judges constitute the Court of Claims.[91] Whether a contract case is tried *de novo* before the court or reaches it through review of administrative hearings, the court does not officially speak except through the judges. Since June 30, 1973, the judges have been authorized to sit in panels of three except in unusual circumstances.[92] This practice is a reversal of the long-established custom of hearing all argument *en banc* and has only been used in practice since the beginning of the October, 1973, term. No difficulties are anticipated as the three-judge panel procedure is quite similar to that of the United States Courts of Appeals. The judges have tenure,[93] are of equal status with federal Courts of Appeals judges, and frequently sit on Courts of Appeals.[94]

There are six associate judges and one chief judge, whose role differs from that of the other judges in that he is charged with additional administrative duties including the assignment of opinions and responsibilities as a member of the Judicial Conference of the United States.[95]

2. Commissioners

Fifteen commissioners "serve as the trial judges and constitute the trial division of the court. . . ."[96] They are appointed, and have their duties defined,

87 RULE 6(b); *see* 28 U.S.C. § 174 (1970).
88 *Id.*
89 RULE 6(a).
90 28 U.S.C. § 175(e) (1970).
91 28 U.S.C. § 171 (1970).
92 28 U.S.C. § 175 (1970); RULE 7 as amended by GENERAL ORDER No. 1 of 1973.
93 28 U.S.C. § 173 (1970).
94 28 U.S.C. § 293(a) (1970); *see* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).
95 28 U.S.C. § 331 (1970).
96 RULE 13(a); *see* 28 U.S.C. § 792(a) (1970). *But see* COURT OF CLAIMS GENERAL ORDER No. 2 of 1973:

> Except as the use of the statutory designation of "commissioner" may be required, the commissioners of this court shall, in the performance of their duties and the exercise of their functions, be known and referred to by the title of "Trial Judge." Such title shall be deemed to be substituted for that of "commissioner" in all appropriate places in the rules of this court. Amendments, changes and revisions of the

by the judges.[97] The court delegates to them authority to act upon cases referred to them in accordance with the court's rules,[98] but they may not issue an order which is dispositive of a case or cite for contempt.[99] The commissioners are not appointed for life but serve at the will of the court.[100]

3. Functions of the Judges and Commissioners

Although the court speaks only through decisions and orders issued by the judges, this should not obscure the important roles of the court's commissioners. As an important example, a commissioner will normally first hear a contract case whether brought to the court for trial or on appeal from an administrative decision. The judges' role in contract cases is primarily appellate, reviewing the commissioners' decisions.

a. Commissioners: Breach cases *"will* be referred to commissioners for the conduct of proceedings. . . ."[101] When so referred, and in several other stated instances, the term "commissioners" as used in the rules is specifically included within the rules' use of the term "court."[102] This is sometimes confusing. In their capacity as trial judges, commissioners are given wide authority—"the power to do and perform any acts which may be necessary or proper . . . for the efficient performance of their duties and the regulation of proceedings before them."[103] The commissioners are also given specific authority to exercise discretion on all matters not covered by the rules or the order referring the case to the commissioner. This exercise of discretion is *not* reviewable as a matter of right; it is only "subject to review by the court in its discretion."[104] The delegation to the commissioner is broad in scope and permits him to perform all acts necessary to bring a case from its initial filing through trial. Commissioners are specifically responsible for: joinder of issues; disposition of procedural motions; pretrial proceedings, including discovery and depositions; the trial itself; making and reporting findings of fact; submitting an opinion; and recommendation for the conclusion of law.[105]

The *facts* found by the commissioner "shall be presumed to be correct,"[106] but no such presumption attaches to his conclusions of law. In practice, how-

rules made hereafter in due course shall reflect such change in title.

The substitution of the term "trial judge" is a deserved one and reflects more accurately the role performed than does "commissioner." However, until specific statutes and rules are changed, the only generally available references (*i.e.*, the UNITED STATES CODE, including the RULES OF THE COURT OF CLAIMS as published as an Appendix to Title 28 [1970] and the RULES as presently published) refer to "judges" as the court's chief judge and six associate judges. Solely in the interest of harmony with statutes and rules as now printed, the "judge"/"commissioner" distinction is retained in this article. It is, of course, now proper and appropriate to refer to a commissioner as "trial judge" in writing and address him otherwise as "judge."

97 *See* 28 U.S.C. 792(a) (1970).
98 RULE 12(a).
99 *See* RULE 13; *see generally* Evans, *Current Procedures in the Court of Claims*, 55 GEO. L. J. 422 (1966).
100 28 U.S.C. § 792(a) (1970).
101 RULE 12(b) (emphasis added).
102 RULE 12(c).
103 RULE 13(a).
104 RULE 13(c) (emphasis added).
105 RULE 13(b).
106 *See* RULE 147(b).

ever, commissioners' opinions frequently are affirmed in *per curiam* opinions in which the court makes no changes or very minor ones to the commissioner's opinion. Therefore, counsel should try a case fully, not just prove facts, when trying cases before the commissioner.

Commissioners also apply Wunderlich Act review standards to Boards of Contract Appeals decisions.[107] As in breach cases, the commissioner prepares an opinion. It differs from the opinion in a breach case in that the commissioner does not find facts but determines whether Wunderlich Act standards have been met by the BCA in its factual findings. Similar to a breach case, the opinion includes a recommended conclusion of law. However, in those cases where the only issue on review is a legal one, the commissioner so informs the court by nonreviewable order and the case is heard by the court, not the commissioner.[108]

b. *Judges:* The role of the judges is appellate, reviewing the opinions and rulings of the commissioners when they are challenged by one of the parties. This is discussed in more detail below.

4. Rules

The Court of Claims has broad authority in formulating "rules for the conduct of . . . [its] business."[109] The rules are to "promote the just, speedy, and inexpensive determination of every action."[110]

Generally patterned after the FRCP, Court of Claims rules are specifically fashioned to deal with the peculiarities of practice before it,[111] *i.e.*, cases in which the Government is always the defendant in a nonjury trial. If no Court of Claims precedent is available, a party may profitably refer to decisions interpreting counterpart FRCP rules.[112] The court's broad statutory authority to promulgate rules has enabled it to change and improve its rules to accommodate its particular practice problems. The current rules, September 1, 1969 revision, are thorough (over 200 pages, including indices) and reflect the court's expectation that the rules will continue to evolve. Skip-numbering and a loose-leaf system are used to accommodate revision. Two substantial amendments have been added since 1969 demonstrating the usefulness of this system.[113] A contractor must ensure that his rules contain the most recent amendments.

107 41 U.S.C. §§ 321, 322 (1970).
108 RULE 166(b); *see* RULE 14(b)(2).
109 28 U.S.C. § 2071 (1970).
110 RULE 1(a).
111 *See* RULES at xxi-xxv, cross-referencing rules to the FEDERAL RULES OF CIVIL PROCEDURE; *see also* Evans, *supra* note 99, at 424 *et seq.*
112 *See* RULES at xxi-xxv; *see also Rulings on Procedural Motions by Commissioners* (three volumes of unpublished orders in the Library of the Court of Claims). The *Rulings* are supplied to the Library at the discretion of the Commissioner making the order and, other than published cases, are the only publicly available noncase procedural reference works in the Court of Claims.
113 Changes are made first by order, then in the formal amendments containing loose-leaf pages replacing those presently in the volume. RULES 26 and 148 and APPENDIX E have been added since 1969.

B. *How to Commence Suit*

Commencement of the suit begins with the filing of the petition and paying the required $10.00 fee to the clerk of the court.[114] All pleadings are to be "simple, concise, and direct,"[115] and will be "so construed as to do substantial justice."[116] Consistency, simplicity, and directness requirements do not, however, eliminate pleading flexibility—the pleadings still may include "as many separate claims or defenses as [the party] has, regardless of consistency and whether based on legal or on equitable grounds or on both."[117]

Fraud; mistake; action alleged "to be arbitrary, capricious, or so grossly erroneous as to imply bad faith";[118] "denial of performance or occurrence";[119] and issues raised as to a party's legal existence, capacity to sue or be sued (including in a representative capacity)[120] must all be pleaded with particularity. Positive averments of capacity and/or authority to sue or be sued,[121] mental conditions (including malice, intent, and knowledge),[122] and performance or occurrence of conditions precedent[123] may all be pleaded generally.

A petition's format requirements are not onerous but should be checked to ensure compliance.[124] Content requirements mirror common sense: the petition must set forth "[a] clear and concise statement of the facts on which each claim is based,"[125] a statement of any action taken by Congress or any Governmental agency or court,[126] citation to the statutes, regulations, orders,[127] contracts or treaties[128] on which the claim is founded, a demand for judgment,[129] and certain other information where applicable.[130] The practitioner should be aware that there are special requirements for a number of situations: for petitions pending discovery,[131] third-party petitions,[132] and petitions in Wunderlich Act review cases.[133]

The petition is filed with the clerk of the court. It may be filed by mail but the date of filing is the *date of receipt by the clerk*—there is no "mailbox rule" in the Court of Claims.[134] The clerk serves all other parties and no party is required to serve any other party with a pleading[135] except in third-party prac-

114 RULE 21(a); *see* RULE 221 (*Fees for Filing Petitions*).
115 RULE 32(a)(1).
116 RULE 32(b).
117 RULE 32(a)(2) (emphasis added).
118 RULE 33(b).
119 RULE 33(c).
120 RULE 33(a).
121 *Id.*
122 RULE 33(b).
123 RULE 33(c).
124 *See* RULE 34, RULE 213 (*Form and Size*), and RULE 214 (*Specific Papers; Duplication; Number of Copies*); *see also* RULES at 171 (*Required Number of Copies and Methods of Duplication*).
125 RULE 35(a).
126 RULE 35(b).
127 RULE 35(c).
128 RULE 35 (d).
129 RULE 35(g).
130 RULE 35(e), (f), and (h).
131 RULE 36.
132 RULE 41(g).
133 RULE 162(a).
134 RULE 21(a).
135 RULE 23.

tice.[136] If parties are served by mail outside the District of Columbia an additional five days is added to the prescribed period of time.[137]

C. *Breach of Contract Suits*

1. Rules

For breach of contract suits the Court of Claims is the first tribunal to which a contractor's case is brought for resolution of both factual and legal issues. The first, and perhaps overriding concern of the breach of contract plaintiff is establishing the facts at trial before the commissioner. Trial practice in the court is different from that of the BCAs and is analogous generally to trial before a federal district court judge sitting without a jury. The court's rules provide a detailed description of the procedures to be followed to bring a case to trial. Particular care should be given to those rules which describe areas of procedures unique to Court of Claims practice.[138]

2. Pleadings

Two basic pleadings are allowed—the petition and the answer. In addition, there "*shall* be a reply thereto" if the answer contains a counterclaim, offset or plea of fraud.[139] A reply must be made because counterclaims or "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, *shall be deemed admitted* when not denied in the responsive pleading."[140] Affirmative defenses must also be pleaded affirmatively.[141] The court or the commissioner also "*may* order a reply to an answer, or a responsive pleading to a third-party petition or answer."[142] No other pleading is permitted.[143]

3. Motions

Motions may be dispositive or[144] procedural,[145] or for rehearing, amendment of judgment, or new trial,[146] and for relief from a judgment or order.[147] Those of immediate concern relating to breach of contract cases are procedural and dispositive motions. All motions are procedural except those listed in Rules

136 RULE 41(c)(2).
137 RULE 25(c).
138 *See, e.g.*, CHAPTERS VI (*Discovery*), VII (*Depositions*), and IX (*Pretrial Procedures*).
139 RULE 31(a) (emphasis added).
140 RULE 37(c) (emphasis added); *see* Lydon, *The 1969 Rules Revision for the United States Court of Claims*, 58 GEO. L.J. 317, 326 & n.47 (1969) and cases cited therein.
141 RULE 37(b).
142 RULE 31(a) (emphasis added).
143 RULE 31(a).
144 RULE 52(a).
145 RULE 52(c).
146 RULE 151. As amended by GENERAL ORDER No. 1 of 1973, time for filing and pagination limits have been made more restrictive. The amended rule inferentially makes clear the limited nature of the motion and, as is borne out by experience, the limited likelihood of the motion's success.
147 RULE 152.

151 and 152 and specifically enumerated dispositive motions.[148] The rules reference each of the dispositive motions and define when each may be made.[149]

Procedural motions will be referred to the commissioner "as a matter of course" for cases, including breach of contract suits, under reference to a commissioner.[150] In practice, dispositive motions are also referred to a commissioner although such referral is a matter of discretion with the court.[151] It should be noted that certain of the motions require leave of court (or the commissioner) to be filed. Leave is required to file motions for summary judgment after the case has been set for trial, after a stipulation or pretrial order has established all material facts, or after a party has filed his response to an adverse party's dispositive motion.[152] All supporting briefs, memoranda or affidavits "shall be included in or attached to each copy of such motion. . . ."[153] While all motions must "state with particularity the grounds therefor,"[154] only dispositive motions are required to be accompanied by a brief.[155] A "brief" is a specific type of document, defined in the rules with formal requirements—including, for example, a table of contents and a table of constitutional provisions, treaties, and statutes[156] and which is subject to length limitations.[157]

4. Discovery

Court of Claims discovery procedures resemble those of the federal district courts with certain notable exceptions. First, the contract jurisdiction of the Court of Claims and its attendant subpoena power are nationwide. As one result, discovery—compelling the production of documents and/or response to interrogatories—is conducted with unusual effectiveness. Also, the FRCP makes no provision for "calls"—requests for information or documentation.[158] The Court of Claims, by *statute,* not its general rule-making authority, is authorized on its own motion to "call upon any department or agency of the United States or upon any party for any information or papers, not privileged, for purposes of discovery or for use as evidence."[159] Computations also may be requested.[160]

Five methods of discovery other than calls are available: (1) depositions (upon oral examination or by written questions); (2) subpoenas *duces tecum* used in conjunction with notice to take depositions; (3) admissions; (4) interrogatories to parties; and (5) the production of documents or things or permission to enter upon land or other property for inspection or other purposes.[161]

148 *See* RULE 52(c), (a).
149 *See* RULE 52(a).
150 RULE 53 (a).
151 RULE 54(a).
152 RULE 101(c).
153 RULE 51(c).
154 RULE 51(a).
155 RULE 51(c).
156 RULE 144(a).
157 RULE 144(e).
158 *See* Evans, *supra* note 99, at 428 & n.43.
159 28 U.S.C. § 2507(a) (1970) (emphasis added); *see* RULE 75(a).
160 RULE 75(a)(2).
161 RULE 71(a).

While these methods of discovery are the same as those available in other federal courts, the method by which they are initiated—by leave of court—is *not* the same. Since 1969, the rules have urged use of voluntary discovery,[162] but this rules change has had no appreciable effect on the usual practice of initiating discovery by leave of court.[163]

Discovery begins after the filing of the answer or other pleading responsive to the petition. There is no defined order of precedence for the parties. Discovery may be conducted by both parties simultaneously, and the different discovery procedures may be used successively.[164] The court exercises control over the discovery process in several ways. After a trial date has been set, "good cause" must be shown for discovery to be permitted.[165] The court may issue protective orders to "protect *a party or person* from annoyance, embarrassment, oppression, or undue burden or expense. . . ."[166] At any time the court also may make "any order which justice requires,"[167] and concurrent with the denial of a protective order, the court may "order that any party or person provide or permit discovery."[168]

5. Pretrial

Pretrial procedures are used extensively in the Court of Claims because of the complex nature of its suits. Acting as trial judge, the commissioner is delegated wide discretion in pretrial matters—he may direct "such action in preparation for a pretrial conference or for trial as may aid in the disposition of the cause. . . ."[169] Two types of action are most often directed by the commissioners—requiring the parties to seek or supply certain information, and/or requiring them to confer. Examples of information which a party may be directed to seek or supply include: service on any other party of a request for admissions;[170] direction to supply an accounting where a claim or counterclaim is based on books of account or other records,[171] including allowing examination of the books and records by other parties;[172] other schedules to explain figures, computations, etc.;[173] and wide-ranging "submissions" from any party stating issues, facts in dispute, statement of the facts, lists of witnesses, and the like.[174] The procedures for requiring the Government to audit a contractor's claim and to file a report as to the result thereof with the court are far superior to the procedures (or lack of them) of the BCAs and the federal district courts. Moreover, the procedure requiring the Government to take a clear position on the

162 *See* RULE 71(e).
163 *See* RULE 81(a) (*Depositions*); RULE 82(b) (*Subpoenas Duces Tecum*); RULE 72(a) (*Admissions*); RULE 73(a) (*Interrogatories*); RULE 74(a) (*Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes*); RULE 75(a) (*Calls*).
164 RULE 71(c).
165 *Id.*
166 RULE 71(f)(1) (emphasis added).
167 *Id.*
168 RULE 71(f)(2).
169 RULE 111(a).
170 RULE 111(c).
171 RULE 11(d)(1).
172 *Id.*
173 RULE 111(e).
174 RULE 111(g)(1).

plaintiff's claimed costs simplifies the issues, reduces trial time, and enables the commissioner to arrive at a more correct decision. Most important, this procedure greatly enhances settlement possibilities for meritorious claims by forcing each party to examine realistically the claim far in advance of trial. The Justice Department will not settle a case before such an audit.

Pretrial conferences are held for: issue simplification, pleading amendment discussion, avoidance of unnecessary proof, limits on the number of expert witnesses, beginning the establishment of a record with the documentation already received, and "such other matters as may aid in the disposition of the action."[175] These submissions and conferences do not "try the case before trial." The purpose of the procedure is to "expedite the trial of cases without depriving any party of any just claim, defense, or objection."[176] In this light *"for good cause shown,"* a party may alter its position as to the facts or the law or call witnesses other than those listed "to meet the exigencies of the case as it develops."[177]

Nevertheless, particular care should be taken to establish one's position with as much accuracy as possible for at least two reasons. First, settlement possibilities are considerably enhanced with thorough pretrial preparation, particularly of accounting statements and schedules. Secondly, upon receipt of the required submissions and after holding a pretrial conference, the "commissioner shall make a memorandum or order reciting agreements reached, orders made, and actions taken at any pretrial conference . . ." or pursuant to information-gathering procedures.[178] The memorandum may be modified within ten days by motion, but subject to such modification, the "memorandum or order shall become part of the record and shall govern future proceedings in the action."[179] The seriousness with which the pretrial order must be taken is illustrated further by the severe restrictions which may be imposed by the commissioner for disobeying it. They range from taking facts as established to "the rendition of judgment by default against the disobedient party."[180]

6. Trial before the Commissioner

Trial before a commissioner is most closely analogous to a nonjury trial in a federal district court.[181] Court rules recognize the commissioner's participation in the trial process stating that he "may call and examine witnesses, including the parties to the action; and he may require the production before him of evidence upon all pertinent matters. . . ."[182] He may exclude proposed witnesses on his own or on a party's motion.[183] As to the admissibility of evidence, "the rule which favors the reception of the evidence governs. . . . [And] [t]he com-

175 RULE 112(a).
176 RULE 114(a).
177 RULE 111(g)(2) (emphasis added).
178 RULE 113.
179 *Id.*
180 RULE 114(b).
181 *See* RULES 133(a) and 13(a); *see, e.g.,* RULES 121, 131(a), (b), 132, and 133, describing the commissioner's trial functions.
182 *See* RULE 121(a).
183 RULE 133(b).

petency of a witness to testify shall be determined in like manner."[184] Specific rules describe the taking[185] and reception[186] of evidence and should be examined separately prior to trial. Transcript arrangements are made by the court and not by the parties; copies of the transcript may be obtained at prices fixed in the reporting contract.[187]

If the parties desire, as they often do in contract cases, and the commissioner agrees, the trial can be limited to liability—the right to recover.[188] And, whether or not the parties agree, the court can reserve the amount of recovery for further proceedings after entering judgement on the right to recover.[189] The parties will usually be allowed "a reasonable time within which to stipulate or otherwise agree upon a computation."[190]

When satisfied that the presentation of the evidence is complete, the commissioner files an order closing the proof.[191] Then follows an extremely important procedure which is used more widely by the Court of Claims than by other federal courts: unless otherwise ordered by the commissioner, the plaintiff and the defendant file requested findings of fact as well as a brief on the law.[192] The normal order of filing is plaintiff, then defendant, then plaintiff replying;[193] but concurrent filing may be ordered by the commissioner.[194] The rules prescribe the contents of the proposed findings[195] but do not give the real flavor of that which is requested. To draft the findings adequately the first time, practitioners would do well to examine a commissioner's findings of fact found in any recent volume of the Court of Claims Reports in a case tried before the court. With his order closing proof the commissioner will often include a standard set of guidelines for the preparation of findings of fact. If not provided, the guidelines should be requested and closely followed. The importance of filing well-prepared requested findings of fact is that the court's knowledge of the case will consist solely of those findings contained in the commissioner's report. If the contractor fails to request a finding relating to an essential element of his case, such a finding will not be included in a commissioner's report and will be fatal to recovery. If a party has not requested a certain finding, the court may not consider an exception to the commissioner's report based on his failure to make such a finding.[196]

7. Report by the Commissioner

After closing the record or receiving stipulations as to all facts,[197] the commissioner decides the case by means of a "Report" to the court which will include

184 RULE 133(a).
185 RULE 132.
186 RULE 133.
187 RULE 122(e) (Copies of Transcript); *see* RULE 122(a)-(d).
188 RULE 131(c)(1).
189 RULE 131(c)(2).
190 RULE 131(c)(2).
191 RULE 134(a).
192 RULE 134.
193 RULE 134(c)(1)-(3).
194 RULE 134(c)(4).
195 RULE 134(d).
196 RULE 134(g)(2).
197 RULE 134(b).

a conclusion of law and detailed findings of fact.[198] The legal portion of the report begins with the reasoning leading to the commissioner's recommended conclusion of law. A large number of the commissioners' decisions are adopted *per curiam* by the court so that counsel would be unwise in the extreme to underestimate their importance or to save an argument for the court anticipating appeal from the commissioner's report.

8. Review by the Judges

Any party may take exception to any or all parts of the commissioner's report—the findings of fact, opinion, or recommended conclusion of law.[199] To initiate appeal, a notice of intention to except must be filed within 30 days after service of the report.[200] If none of the parties intends to take exception, the court will entertain a motion from either or both parties that all or part of the commissioner's report be accepted as the judgment of the court.[201]

If the commissioner's report contains no legal opinion, but only findings of fact, or if the facts have been stipulated, notice of intention to except is not required;[202] and any exceptions by the contractor must be filed within 45 days from the date of the report.[203] Defendant is then permitted to respond, and plaintiff to reply;[204] or the plaintiff may file a statement that he elects to submit the case on the report of the commissioner.[205]

9. Briefs

As noted above, a party who takes exception to the commissioner's findings of fact and/or conclusions of law is required to file his exceptions and a brief delineating his objections to the report and the basis for them.[206] As a general rule, briefs "must be compact, concise, logically arranged, and free from burdensome, irrelevant, immaterial, and scandalous matter."[207] Briefs of more than ten pages also must conform to specific format requirements.[208] In addition, the rules limit brief page length.[209]

10. Oral Argument

Oral argument to the court is not a litigant's right.[210] It is considered as time provided for the court to explore the case with counsel. In practice, however, oral argument is calendared as a matter of course. The clerk of the court notifies the parties of such calendaring and of their place on the calendar about

198 RULE 134(h).
199 RULE 143(a).
200 RULE 141(a).
201 RULE 141(b).
202 RULE 141(c).
203 RULE 143(b).
204 RULE 142(c), (d).
205 RULE 142(b).
206 *See* RULE 143(a), (d).
207 RULE 144(d).
208 RULE 144 as amended by GENERAL ORDER NUMBER ONE of 1973, dated May 15, 1973.
209 RULE 144(e).
210 *See* RULE 146(a).

a month in advance.[211] Under the court's recent docket load, oral arguments are usually calendared within sixty days of completion of briefing. Normally thirty minutes is allowed each party, although additional time may be requested in advance of the argument. Unexcused failure of a party to appear when the case is called may result in consideration of the case as if it is submitted to the court without argument.[212]

11. Decision by the Court

After oral argument on exceptions to the commissioner's report, the court renders its decision and enters judgment finding the facts and separately stating its conclusion of law.[213] The court may adopt the commissioner's report or "may modify it, or reject it in whole or in part, or direct the commissioner to receive further evidence, or refer the case back to him with instructions."[214] The court is not limited to granting the relief demanded by the successful party in its pleadings. Rather, "every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."[215] Decisions are issued monthly by the court during its October through June term. A party may expect a decision to be forthcoming within sixty days of oral argument. Sometimes opinions are issued one month and seldom more than three months after oral argument.

E. *Wunderlich Act Review*

1. Rules

Chapter XIV of the Rules is devoted to the procedures for Court of Claims review of BCA decisions under the Wunderlich Act (the Act). The Wunderlich Rules are meant to supplement, not supplant, other rules.[216] It may be assumed, however, that in cases of possible conflict within the rules, the more specific Wunderlich Act Rules govern over other, more general rules.[217] They prescribe an entire set of procedures from pleadings[218] through remand to the BCA.[219] The special rules are not lengthy and a thorough knowledge of them is an *absolute prerequisite* for obtaining successful review under the Act's standards. Reviewed here are those features which are characteristic of, and generally peculiar to, Wunderlich Act review suits.

211 *See* RULE 146(d).
212 RULE 146(f).
213 RULE 147(a).
214 RULE 147(b).
215 RULE 147(a).
216 *See* RULE 161.
217 *Compare* RULE 163(a) *with* RULE 37(b); *see* Lydon, *supra* note 140, at 538 and n.133.
218 RULE 162.
219 GENERAL ORDER No. 3 of 1972. For older cases already returned to the appropriate BCAs, the RULES provisions (RULES 167 and 168) relating to "stay" of proceedings still apply. For suits not already so stayed, RULES 167 and 168 are suspended, the GENERAL ORDER No. 3 of 1972 applying instead.

2. Pleadings

The petition must make clear the exact relationship of the relief sought to the Act[220] by specifically stating whether the suit is brought totally or partially under the Act, and whether the petition is based on the Act's first[221] (review of factual findings) and/or second[222] (review of legal conclusions) sections.[223] If these petition requirements are not observed, the defendant may move to dismiss the petition.[224] The commissioner's action dismissing the petition is reviewable by the court,[225] but his orders requiring a more definite statement or amendment to the petition are not reviewable.[226] The administrative decision must be included as an appendix to the petition.[227]

The answer also is required to be specific in describing its relationship to the Act.[228] The defendant must assert with particularity or deny the finality of the administrative decision or assert failure of the plaintiff to exhaust his administrative remedies.[229] If the answer alleges the finality of an administrative decision other than the one referenced in the petition, a copy of that decision must be attached as an appendix to the answer.[230]

The Government is required to file the administrative record no later than sixty days after the petition is filed.[231] This record should be checked for completeness and accuracy as it will be the sole basis for reviewing factual issues.

Defenses which assert or deny the finality of an administrative decision must be pleaded in conformance with the same rules as apply to the pleading of defenses in breach of contract suits, including specificity of denials and positive allegation of affirmative defenses.[232]

3. Dispositive Motions

In contrast to suits for breach of contract, in suits for review under the Wunderlich Act the facts have already been tried before an administrative board. The challenge in the court is to the correctness of the board's findings of fact and conclusions of law. Since such cases cannot be tried *de novo* by the court, review is achieved through dispositive motions filed by the contractor and the Government. Such motions may be filed at any time,[233] but if neither party has filed within thirty days after the filing of the answer, the commissioner may order a plaintiff by nonreviewable order to file such a motion.[234] Two types of dispositive

220 RULE 162(a).
221 41 U.S.C. § 321 (1970).
222 41 U.S.C. § 322 (1970).
223 RULE 162(a).
224 RULE 162(b).
225 *Id.*; RULE 53(b)(1), (3).
226 RULE 162(b)(2).
227 RULE 162(a).
228 RULE 162(c).
229 *Id.*
230 *Id.*
231 RULE 164(a).
232 *See* RULE 161; *see also* RULE 37.
233 RULE 165(a).
234 RULE 165(b)(1).

motions are available: assertion of defenses by motion[235] and motions for summary judgment in support of or in opposition to the administrative decision.[236]

In addition to pleading requirements for defenses (which are similar to those applicable to breach of contract cases), Wunderlich Act review procedures enumerate certain defenses which may be asserted by dispositive motions for summary judgment, judgment on the pleading, or motions to dismiss.[237] Assertion of these defenses removes the reference to the commissioner—the case is then before the court for decision.[238]

Wunderlich review cases are most often disposed of by a unique procedure misnamed a motion for "summary judgment." Usually the contractor files such a motion attacking the finality of the board decision and the Government cross-moves asserting as its defense the finality of the board's decision. Rule 163 must be read carefully and understood—its requirements and "summary judgment" concept are unique to the Court of Claims. When motions for summary judgment in support of or in opposition to an administrative decision are filed, the commissioner retains the case[239]—unless, in his judgment, the issues are limited to questions of law.[240] In such event, he so informs the court by nonreviewable order, and the reference to him is suspended.[241] Motions for summary judgment in support of the administrative decision are not subject to special rules detailing content[242] and therefore are controlled by the general rule that the "motion shall set forth the relief or order sought and shall state with particularity the grounds therefor."[243] In the usual case, this will be a motion filed by the Government, because only contractors have the right of appeal from a BCA decision.[244] There is, however, one probable exception: those instances in which liability is found by the BCA in the contractor's favor, but he nevertheless challenges the BCA's finding as to the amount owed him. In such instances the Government apparently can reopen the entire issue of the proper amount of equitable adjustment.

The beginning of the normal review sequence, then, is the contractor's filing a motion for summary judgment in opposition to the administrative decision.[245] Such motions have specific content requirements. They must indicate which section, or whether both sections of the Wunderlich Act form the basis for opposition to the administrative decision,[246] including a listing of each finding of fact or conclusion of law with which the moving party disagrees.[247]

For each alleged error of law, full authorities must be cited and the conclusion of law requested must be stated.[248] For review of factual findings the

235 RULE 163(a).
236 RULE 163(b).
237 RULE 163(a); *cf.* RULE 37(b).
238 RULE 166(a).
239 RULE 166(b).
240 *Id.*
241 *Id.*
242 RULE 163(b)(1).
243 RULE 51(a).
244 S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972).
245 RULE 163(b)(2).
246 RULE 163(b)(2)(i)-(iii).
247 RULE 163(b)(3)(i).
248 RULE 163(b)(3)(ii).

brief must cite transcript pages, exhibits, and all other evidence in the record relied on or refuting the BCA decision.[249] These requirements must be observed. Failure to follow them may mean that the court will refuse to consider any record citations not made to the commissioner.[250] The importance of a careful motion for summary judgment is heightened by the fact that it establishes the format of the Government's response to it. Responses and objections to the contractor's motion for summary judgment "shall include refutations of each challenge of a conclusion of law or finding of fact."[251]

The Government next objects to the contractors' motion for summary judgment and responds[252] refuting each of the contractor's challenges to the administrative findings of fact or conclusions of law.[253] Then should follow the plaintiff's reply to the Government's objections,[254] and this should end the briefing. However, when the Government's objection and response to the contractor's motion for summary judgment takes the form of a cross-motion for summary judgment, as it almost invariably does, the cycle begins again. The plaintiff then "responds and objects" to the Government's motion in the same pleading in which it "replies" to the Government's objections. Then the Government files a reply to plaintiff's "objections or response"—the final brief. This permits the Government the opportunity to file one more brief than it is normally entitled to file. This procedure depends upon acceptance of the Government's first pleading as both a statement of objections to plaintiff's summary judgment motion and a proper motion for summary judgment. In Wunderlich Act cases, however, where only the contractor can appeal, a cross-motion which does no more than "move" that the administrative decision be upheld really is only placing another title on the Government's opposition to plaintiff's motion for summary judgment. Accordingly, the contractor should challenge the propriety of such a so-called cross-motion when in reality it is nothing more than an opposition to the contractor's motion. If one of the parties so requests or the commissioner so desires, an informal oral argument may be held.[255]

4. Commissioner's Opinion; Appeal; Oral Argument; Court Decision

After final briefs have been submitted, the commissioner drafts his opinion "on the issues"—both fact and law—and files it with the clerk.[256] If either party disagrees with the commissioner's opinion, appeal may be taken to the court. Appeal procedures, content of briefs, oral argument, and the like are generally the same as for breach of contract cases.[257] In Wunderlich Act review cases, both in oral argument and in briefs on appeal from the commissioner's opinion, the "court may [and often will] decline to consider any citations to the

249 RULE 163(b)(3)(iii).
250 RULE 166(e).
251 RULE 163(c).
252 RULE 52(b)(1).
253 RULE 163(c).
254 RULE 52(b)(2).
255 *See* RULE 55.
256 RULE 166(c).
257 RULE 166(e).

administrative record which were not cited for the consideration of the commissioner."[258]

5. Remand

Only since August 29, 1972, has the Court of Claims had remand power.[259] As of that date, "[i]n any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."[260] Prior to that date, the court had no remand power[261] and relied upon a complex set of procedures whereby a case was "stayed."[262] The court suspended action on a case returning it to the BCA for further factual determinations without specific direction to the BCA other than as could be inferred from the court's decision. If the contractor disagreed with the BCA determination, then it was back to the Court of Claims for another determination—this back-and-forth procedure properly being characterized as similar to a legal ping-pong match!

Regardless of the remand statute, these problems remain partially with us even though the statutory amendment is "applicable to all judicial proceedings pending on or instituted after the date of its enactment,"[263] and that the court by General Order No. 3 (dated December 12, 1972) amended its rules to deal with its new remand authority. The old system is left in effect for cases now under stay of proceedings.[264] For all other cases, remand procedures may be used. The procedures are initiated by the parties' request for specific direction to the BCA by the court, or the court may issue remand directives on its own.[265]

In addition to remand, by the same statute, the court has been given additional powers in order "[t]o provide an entire remedy and to complete the relief afforded by the [money] judgment" and power to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records. . . ."[266] In addition, these "orders may be issued to any appropriate official of the United States."[267] The effect of this statute upon the court's contract jurisdiction will not be known until its language is judicially interpreted.

E. *Declaratory Judgments*

The court's "jurisdiction to render judgment upon any claim against the United States"[268] is the power to render money *judgments* against the United

258 *Id.*
259 28 U.S.C. § 1491 (1970), *as amended,* Pub. L. No. 92-415 (August 29, 1972).
260 *Id.*
261 Anthony Grace & Sons, Inc. v. United States, 170 Ct. Cl. 688, 695, 345 F.2d 808, 812 (1965), *rev'd on other grounds,* 384 U.S. 394 (1966); *see generally* Jaffe, *Remand Powers of the Court of Claims,* 55 GEO. L.J. 444 (1966).
262 *See* RULES 167, 168.
263 Pub. L. No. 92-415 (August 29, 1972) § 2 (emphasis added).
264 Court of Claims General Order No. 3 of 1972, *supra* note 219.
265 *Id.*
266 Pub. L. No. 920415 (August 29, 1972).
267 *Id.*
268 28 U.S.C. § 1491 (1970).

States.[269] The Supreme Court, in the landmark case of *United States v. King,* has specifically held that the court's money judgment powers do not authorize the making of declaratory judgments.[270] The absence of declaratory judgment jurisdiction is unfortunate and requires resort to the District Courts for this form of relief.

F. *Costs*

In cases before the Court of Claims few costs, other than filing fees, are charged against the parties. The costs for service of notice of publication or for issuing subpoenas are borne by the party at whose instance the notice is made[271] or subpoena issued;[272] and costs resulting from the deferred completion of examination of a witness may be charged to the party requesting the delay.[273]

By statute the Court of Claims has authority to award costs, excluding attorneys' fees, in any suit brought against the United States.[274] However, no provision is made in the Court of Claims' rules for judgments to include the award of such costs. The decision not to include cost provisions was made during the drafting of the 1969 rules revision and represents a rejection of the imposition of costs as a sanction.[275] There is no discernible movement in the bar or the court to change the *status quo.*

G. *Payment of Judgments*

If the contractor is successful and obtains a money judgment, additional steps must be taken to obtain the money. These procedures are partly defined by statute.[276] If the judgment is for $100,000 or less, the payment is made from a permanent indefinite appropriation created for this purpose.[277] The successful plaintiff must obtain a certified copy of the transcript of judgment (available from the clerk of the court) and forward it to the Claims Section of the General Accounting Office together with a letter or statement naming the payee, stating his authority to receive payment, and the address to which the check is to be sent. Normally, the plaintiff's attorney forwards the transcript of judgment and the plaintiff himself sends the required letter. After receiving confirmation from the Department of Justice that review of the judgment will not be sought and after a search of its records to determine whether the plaintiff is indebted to the United States in which case the indebtedness will be set off against the judgment, the GAO issues a certificate of settlement to the Treasury which makes payment to the plaintiff.

If the judgment is for more than $100,000, a special appropriation must

269 *See, e.g.,* Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 372 F.2d 1002 (1967).
270 United States v. King, 395 U.S. 1 (1969).
271 RULE 41(d).
272 RULE 123(e)(2).
273 RULE 133(f).
274 28 U.S.C. § 2412 (1970).
275 Evans [Commissioner, retired], *Analysis of the New Rules: Significant Changes,* Remarks before the United States Court of Claims Judicial Conference, September 16, 1969 (unpublished).
276 *See* 28 U.S.C. §§ 2414, 2517(a) and 2518 (1970).
277 31 U.S.C. § 724a.

be obtained.[278] The procedure is the same as that for judgments of $100,000 or less except that the transcript of judgment is filed with the Department of the Treasury, rather than GAO, which includes the amount of the judgment in the next appropriation bill. The contractor still files his request for payment to the GAO naming the payee, address to which the check is to be sent, etc. After the appropriation is enacted (it always is), GAO issues a certificate of settlement to the Treasury, which makes payment.

Settlement of a pending suit with the Justice Department is converted to Court of Claims judgment by the filing of a joint stipulation of judgment for a certain amount. Although it is free to reject such stipulations, they are almost invariably accepted by the court, which renders its judgment in the amount stipulated. Payment of such judgments follows the procedures described above.

Procuring agencies sometimes desire that payment of a BCA award or a settlement with the Contracting Officer be converted to a Court of Claims judgment to save agency money. While such procedure is possible the Justice Department has refused to agree to the practice.

As a general rule, interest is not chargeable on claims against the United States unless expressly provided for by statute or in the contract.[279] For judgments, the rules are somewhat more favorable. For contract suit judgments, interest at 4% will be paid if the judgment is appealed to the Supreme Court and the Court of Claims award of judgment is affirmed.[280] The period for computation of such interest is from the day on which the transcript of judgment is filed with the GAO or Treasury until the date of the affirmance by the Supreme Court.[281] The importance of promptly filing the transcript of judgment with the GAO or Treasury, as the case may be, is obvious.

H. *Supreme Court Review*

Appeal of right from judgments to the Court of Claims to the Supreme Court is limited to a single instance—from a decision holding that a statute of the United States is unconstitutional.[282] Two other methods of obtaining review may be available but are not granted as a matter of right. First, the Court of Claims may "certify" a "question of law . . . in any case as to which instructions are desired."[283] The Supreme Court then "may give binding instructions on such question."[284] Also in its discretion the Supreme Court may grant a writ of certiorari to the claimant (contractor) or the United States.[285] In practice certiorari is the only avenue potentially available to the contractor. However, certiorari is seldom granted to a contractor (the recent *S&E Contractors* case[286] is the only grant of certiorari to a contractor in the last 20 years) making the Court of Claims effectively the final forum available to him. The court's rules

278 *See* 28 U.S.C. § 2518.
279 28 U.S.C. § 2516(a).
280 28 U.S.C. § 2516(b) (1970). *Compare* 28 U.S.C. § 2411(a), allowing interest of 6% on tax refunds.
281 28 U.S.C. § 2516(b) (1970).
282 28 U.S.C. § 1252 (1970).
283 28 U.S.C. § 1255 (1970); *see* 28 U.S.C. § 1292 (1970).
284 28 U.S.C. § 1255.
285 *Id.*
286 S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972).

describe the detailed steps to be taken to provide a transcript to accompany the petition for certiorari[287] or to provide the transcript at a later date.[288]

IV. Conclusion

It must be determined initially whether the Court of Claims is the proper forum to resolve the dispute at hand. For the court to have jurisdiction the claim must be against the Government for money damages, either for breach of contract or one which "arises under" the contract.

If the contract contains a disputes clause and another clause under which a remedy may be granted, the claim would be one "arising under the contract." As such, the case must first be tried by the Board of Contract Appeals of the agency responsible for the contract—the contractor must exhaust his administrative remedies before the claim may be reviewed by the Court of Claims on Wunderlich Act review.

If the claim is for breach of contract and is for more than $10,000, the contractor *must* bring suit in the Court of Claims. For less than $10,000, the suit *may* be brought in the Court of Claims or in the appropriate Federal District Court. Once before the court with either type of case, the court's rules requirements must be followed—some rules apply to all suits and others vary according to the type of claim being brought.

In breach of contract cases, emphasis should be placed on complete compliance with all prehearing procedures—they are normally emphasized by the commissioner. Particular attention should be paid to issue definition. Similarly, the court's nationwide jurisdiction, especially as it makes effective the court's broad discovery procedures, should be utilized. In trial before and presentation of briefs to the commissioner, all aspects of the case should be fully argued—both legal and factual. The plaintiff/contractor has the burden of proof. Particular attention should be paid to the unique Court of Claims practice which permits the drafting of proposed findings of fact.

If the contractor is certain that his administrative remedies have been exhausted it is then his choice to appeal under the Wunderlich Act. On appeal, the objections to the administrative decision must be carefully delineated, including rebuttal of factual findings by specific transcript citation. As in breach cases, a contractor's full case—legal and factual—must be presented to the commissioner, or later appeal of points not raised will probably be precluded.

The presentation of a contractor's case differs in renegotiation cases from all others in the Court of Claims. The contractor must present a prima facie case showing that he is included within the appropriate statutory factors, but the Government bears the burden of proof that the contractor has received excessive profits.

If there is objection to a commissioner's decision or to his findings of fact or legal conclusions, such objections must be detailed to the court and record citations and/or legal arguments in rebuttal must be included. The case will not be tried again, and writs of certiorari to the Supreme Court are seldom granted.

287 RULE 154(a).
288 RULE 154(b).