

STUDENT COMMENT

ADMINISTRATIVE REVIEW OF GOVERNMENT CONTRACTS: THE STATUTE OF LIMITATIONS PROBLEM

I. INTRODUCTION

When the United States Government is a party to a commercial contract, the traditional remedies for breach of contract lose their applicability, for the common law is insistent that specific legislative consent precede suit against the sovereign.¹ Recognizing the Government's broad commercial involvement with private parties and the inherent injustice of sovereign immunity in many situations, Congress has stipulated conditions upon which the federal government may be sued in the federal courts. The Tucker Act,² for instance, provides, *inter alia*, that "the district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . . (2) Any . . . claim against the United States, not exceeding \$10,000 in amount, founded . . . upon any express or implied contract with the United States"³ The Suits in Admiralty Act,⁴ another statutory waiver, provides that a libel in personam may be brought against the United States in a federal district court in any case involving a vessel which is owned or operated by the United States, or cargo owned or possessed by the United States, "where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained"⁵

As might be expected, each of these jurisdictional grants is qualified by a statute of limitations. An action under the Tucker Act must be "commenced against the United States . . . within six years after the right of action first accrues," or it shall otherwise be barred.⁶ Section 745 of the Suits in Admiralty Act states that "suits . . . may be brought only within two years after the cause of action arises"⁷ Because both acts temporarily suspend sovereign immunity, their statutes of limitations have been held to be absolute time bars; the running of the statute does not simply provide an affirmative defense to a cause of action, but extinguishes the cause of action itself.⁸

It must be noted, however, that although these acts contemplate federal court actions and base their statutes of limitations on federal court jurisdic-

¹ See, e.g., *Arizona v. California*, 298 U.S. 558, 568 (1936); *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193, 216 (1828).

² Ch. 359, 24 Stat. 505 (1887) (codified in scattered sections of 28 U.S.C.).

³ 28 U.S.C. § 1346(a)(2) (1964).

⁴ 41 Stat. 525 (1920), as amended, 46 U.S.C. §§ 741-52 (1964).

⁵ 41 Stat. 526 (1920), as amended, 46 U.S.C. § 742 (1964).

⁶ 28 U.S.C. § 2401(a) (1964).

⁷ 41 Stat. 525 (1920), as amended, 46 U.S.C. § 745 (1964).

⁸ See, e.g., *United States v. Greathouse*, 166 U.S. 601, 602 (1897), construing *Finn v. United States*, 123 U.S. 227, 232-33 (1887).

tion, the fact is that the initial resolution of a government-contract dispute is rarely made in that forum. Instead, most government contracts provide for administrative review of fact disputes by incorporating a standard disputes clause similar to the following:

Any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer [whose] . . . decision . . . shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary . . . shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.⁹

Statutory law and case law have firmly established the rule that the inclusion of such a disputes clause in a government contract is tantamount to a mutual agreement to exhaust administrative remedies before invoking federal court jurisdiction.¹⁰ The purpose of this comment is to examine the effect which this administrative review has on the statutes of limitations under the Tucker Act and the Suits in Admiralty Act. Three recent decisions will highlight the nature of the problem.

II. THE CASES

*Northern Metal Co. v. United States*¹¹ involved an action under the Suits in Admiralty Act. By the terms of a contract entered into on April 30, 1957, Northern Metal Company agreed to perform terminal stevedoring and processing operations for the United States Army. The contract was duly performed and payment was made. Subsequently, the Army claimed that it had overpaid Northern in the amount of \$530.96, and deducted that sum from the November 24, 1961 invoice of a similar contract before making payment to Northern on November 30, 1961. After nearly two years of administrative proceedings pursuant to the contract disputes clause, the contracting officer and the Army Board of Contract Appeals found for the Army and disallowed Northern Metal's claim that the \$530.96 had been improperly deducted. On November 27, 1963, two years and three days after the deduction, but only three months after administrative disallowance, Northern brought an action in the federal district court under the Suits in

⁹ 32 C.F.R. § 7.103-12(a) (1966). The particular clause quoted is that used by the Department of Defense.

¹⁰ Wunderlich Act, 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1964); *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 240 (1946).

¹¹ 350 F.2d 833 (3d Cir. 1965).

Admiralty Act. The district court held that the two-year statute of limitations had begun to run when the second invoice was submitted (November 24, 1961), and had fully run before suit was instituted in the federal courts.¹² Accordingly, the claim was time-barred. The Court of Appeals for the Third Circuit agreed with the district court that the statute had begun to run on November 24, but ruled that it was suspended during the pendency of administrative review; therefore the action by Northern Metal was timely, since it was brought within the two-year statutory period.¹³

In *Crown Coat Front Co. v. United States*,¹⁴ decided ten months after *Northern*, the plaintiff-manufacturer had contracted with the Government to manufacture and deliver mildew-resistant felt canteen covers. Required samples were submitted to the Government for approval but were rejected as nonconforming after tests were conducted in October and November of 1956. The parties agreed to a price modification, however, and the "defective" covers were accepted on December 14, 1956. Crown Coat claimed that it did not learn until nearly five years later that the Government had administered an improper test to determine the conforming quality of the samples. Accordingly, on October 4, 1961 (within the six-year statute of limitations), the company demanded a refund of the price adjustment and an equitable settlement under the "changes" clause of the contract for allegedly increased costs. Acting pursuant to the contract-disputes clause, the contracting officer ruled that the tests conducted by the Government were proper. His denial of relief was affirmed on February 28, 1963 by the Armed Services Board of Contract Appeals. Having exhausted all required administrative remedies, Crown Coat brought a breach-of-contract action against the Government in the federal district court on July 31, 1963 under the Tucker Act. The district court dismissed the complaint as time-barred by the statute of limitations.¹⁵ Affirming, the Court of Appeals for the Second Circuit held that the cause of action accrued on December 14, 1956, the date of final delivery of the canteen covers to the Government, and that the complaint had not been filed in the district court until more than six years thereafter.¹⁶ The statute of limitations, in its view, was not suspended during the pendency of administrative proceedings.¹⁷

The third case, *Nager Elec. Co. v. United States*,¹⁸ followed an approach different in part from *Northern* and *Crown Coat*. In *Nager* the plaintiffs had contracted with the Atomic Energy Commission to construct a facility in New York State. After preliminary warnings, a representative of the AEC, acting under the termination-for-default clause of the contract,

¹² 230 F. Supp. 38 (E.D. Pa. 1964).

¹³ 350 F.2d at 839.

¹⁴ 363 F.2d 407 (2d Cir. 1966).

¹⁵ Civil No. 63-2281, S.D.N.Y., Jan. 29, 1965.

¹⁶ 363 F.2d at 410.

¹⁷ *Id.* at 413. The court of appeals relied heavily for its decision on an earlier Second-Circuit case brought under the Suits in Admiralty Act. *States Marine Corp. v. United States*, 283 F.2d 776 (2d Cir. 1960). There, the court held that the two-year statute of limitations began to run prior to administrative disallowance and was not suspended during the pendency of administrative review.

¹⁸ 368 F.2d 847 (Ct. Cl. 1966).

terminated twenty-six items of work in July and August of 1958. The plaintiff appealed these terminations along with other controversies under the disputes clause. In September of 1963, the AEC Hearing Examiner ruled on all questions except the termination claims, holding the latter to constitute a claim for breach of contract and thus beyond the agency's jurisdiction. The plaintiff appealed from the adverse rulings respecting the other issues in dispute, but did not appeal from the Hearing Examiner's refusal to decide the termination claims. On April 23, 1964, the AEC Advisory Board of Contract Appeals upheld the Examiner's position, and on October 16, 1964, more than six years after the original terminations, Nager Electric brought suit under the Tucker Act in the Court of Claims, alleging, *inter alia*, that the default terminations were improper. The government moved for summary judgment, arguing that the action was barred by the six-year statute of limitations. The Court of Claims, however, held that the cause of action did not accrue until April 23, 1964, the date of final administrative disallowance, so that the statute of limitations did not commence to run until that time. Since the federal court suit was instituted within six months after disallowance, the government's motion for summary judgment was dismissed.

Two major issues emerge from these cases: first, when do the statutes of limitations under the Tucker Act and the Suits in Admiralty Act begin to run, *i.e.*, upon accrual of the underlying cause of action, or upon administrative disallowance; and second, should the statutes be suspended during the pendency of administrative review?

III. INITIATION OF THE STATUTE OF LIMITATIONS

It is generally held that statutes of limitations commence to run upon the accrual of an underlying cause of action.¹⁹ Antecedent, then, to a resolution of the limitations question is the inquiry as to when the cause of action itself "accrues." Courts differ on the issue of accrual both as a general concept and in cases brought under the Tucker Act and the Suits in Admiralty Act where administrative review is made a condition precedent to federal court jurisdiction.²⁰ The Court of Claims, which hears large numbers of contract-disputes claims, has for some years held that the accrual of a claim against the Government first occurs at that point in time

¹⁹ See, e.g., *In re William Duncan & Son*, 165 F. Supp. 159, 161 (N.D. Cal. 1958). Note that the Tucker Act specifically incorporates the term "accrues" into its statute of limitations, while the Suits in Admiralty Act uses the synonym "arises." See p. 644 and notes 6 & 7 *supra*.

²⁰ As to "accrual" generally, compare *Terteling v. United States*, 167 Ct. Cl. 331, 338 (1964) (on claim for reimbursement for litigation expenses, held: accrual occurs when damages sustained), with *Lucom v. Atlantic Nat'l Bank*, 354 F.2d 51, 54 (5th Cir. 1965) (in action alleging taking of property without due process, held: accrual occurs upon invasion of a right even though damages do not materialize until later). As to "accrual" in the context of the Tucker Act, compare *Cosmopolitan Mfg. Co. v. United States*, 156 Ct. Cl. 142, 144, 297 F.2d 546, 547 (1962), cert. denied sub nom. *Arlene Coats v. United States*, 371 U.S. 818 (1963) (when appeals board acted), with *Crown Coat Front Co. v. United States*, *supra* note 14, at 410 (prior to appeals board action); and, in the context of the Suits in Admiralty Act, compare *Thurston v. United States*, 179 F.2d 514, 516 (9th Cir. 1950) (upon agency disallowance), with *McMahon v. United States*, 342 U.S. 25 (1951) (upon date of injury).

"when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action."²¹ Applying this notion in *Nager* (a Tucker Act case), the court stated that the statute of limitations begins to run when the work contracted for is completed, or goods are delivered, unless the contract includes a disputes clause or otherwise provides for mandatory administrative review. In that event, accrual does not occur until the plaintiff's claim has been administratively disallowed.²²

The Supreme Court has also spoken on this issue in a case which arguably covers *Northern Metal*, *Crown Coat*, and *Nager*. *McMahon v. United States*²³ involved a seaman's action under the Suits in Admiralty Act. An administrative review of the claim preceded suit in the district court. The Supreme Court, addressing itself specifically to the issue of whether the statute of limitations runs from the date of injury or the date of administrative disallowance of the claim, concluded that the statute begins to run upon the occurrence of the former; the cause of action accrued at the moment the tort was committed.²⁴ This was the rule later applied in *Crown Coat* and *Northern Metal* under fact situations strikingly similar to *Nager*. Therefore, unless *Nager* can effectively be distinguished from *McMahon* as to accrual, it appears that the result reached by the Court of Claims on this issue is erroneous, while that of the circuits is correct.

One possible basis of differentiation is to distinguish between mandatory and nonmandatory administrative proceedings as they relate to accrual. The Court of Claims and the Supreme Court have, in the past, agreed that where administrative review of a claim against the Government is *permissive* rather than *mandatory*, accrual for limitations purposes occurs at the time of injury and not administrative disallowance.²⁵ The inquiry remains whether the rule stated in *McMahon* as to time of accrual is to be applied only in instances of permissive administrative review or whether it includes mandatory administrative review cases as well. The Court of Claims in *Nager* clearly felt that accrual should be delayed in the latter circumstances.²⁶ A contrary result, however, is apparent from an examination of

²¹ *Oceanic S.S. Co. v. United States*, 165 Ct. Cl. 217, 225 (1964).

²² *Nager Elec. Co. v. United States*, supra note 18, at 853-54.

²³ 342 U.S. 25 (1951).

²⁴ *Id.* at 27.

²⁵ *Soriano v. United States*, 352 U.S. 270, 275 (1957); *Steel Improvement & Forge Co. v. United States*, 174 Ct. Cl. —, 355 F.2d 627 (1966).

²⁶ *Nager Elec. Co. v. United States*, supra note 18, at 853-54. *Northern Metal*, which reached a different conclusion on the same issue, was distinguished by the Court of Claims as a breach-of-contract action. Breach-of-contract claims are among those held to be outside the disputes procedure and not subject to administrative determination. See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966). Neither the district court nor the circuit court of appeals, however, spoke of breach of contract in *Northern Metal*. In fact, the original libel emphasized the commitment of the parties to an exhaustive administrative review under the disputes article. The appellant's brief similarly framed the issues in terms of a claim arising under the contract. In *Crown Coat*, by contrast, the petitioner argued breach of contract before both the district court and the circuit court, although the original claim, pursued administratively under the "Changes" clause, was one for an equitable adjustment of the contract price. A dictum in the *Utah* case stated that "when the contract makes provision for equitable adjustment

the statute which provided the basis of jurisdiction in *McMahon*: seamen's injury claims "shall, if *administratively disallowed* in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act."²⁷ (Emphasis added.) Thus, by statute, administrative review was made a condition precedent to suit, with the result that the Supreme Court's holding in *McMahon* necessarily established the rule that accrual occurs prior to administrative disallowance even where such administrative review is mandatory.

A second possible basis of differentiation between the positions taken by the Supreme Court and the Court of Claims was asserted in the latter's argument that the Suits in Admiralty Act and the Tucker Act are historically distinct from one another.²⁸ However, nowhere in the *Nager* opinion is the substantive nature of the supposed distinction explicitly delineated. All the court does is extract a portion of the *McMahon* rationale, restate the Supreme Court's rule as to time of accrual in cases under the Suits in Admiralty Act, and then note that not until *Crown Coat* has any decision similarly construed the Tucker Act.²⁹ Without a clear articulation of its position, the only inference to be drawn from the court's argument stands as a non sequitur: that the absence of case law applying the rule of *McMahon* to Tucker Act claims necessarily implies an incompatible historical development between the two acts. The fact is that no court, aside from the Court of Claims and the Third Circuit, has ever had occasion to consider the accrual question under the Tucker Act in the context of mandatory administrative review.³⁰

In short, it appears that no viable distinction exists which might take *Nager* outside the rule of *McMahon*. Each case involved a mandatory administrative review, and jurisdiction was invoked under two acts whose relevant historical differences are dubious. The apparent impossibility of distinction, however, is not necessarily unfortunate. If the statute of limita-

of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract." *Id.* at 404 n.6. Since the changes article under which *Crown Coat Front Company's* claim was first pursued does provide for the equitable adjustment of claims presented under it, it seems that the company was required to pursue its administrative remedies before invoking federal court jurisdiction. Both circuit cases, then, properly followed the contract-disputes procedures and cannot effectively be distinguished from *Nager* on that basis.

²⁷ Clarification Act, 57 Stat. 45 (1943), 50 U.S.C. § 1291(a) (App. 1964). Although *McMahon* is a Suits in Admiralty Act case, the federal court noted jurisdiction of the personal-injury claim under the Clarification Act. The latter expands the coverage of the Suits in Admiralty Act to include seamen's claims for injuries, maintenance, and cure. Once the claim is properly alleged, the substantive provisions of the Suits in Admiralty Act control.

²⁸ *Nager Elec. Co. v. United States*, *supra* note 18, at 863-65.

²⁹ *Id.* at 863-64.

³⁰ One reason for the court's apparent difficulty in proving an historical distinction might well rest on the fact that the more likely argument points to an historical affinity between the two acts on the accrual issue. Neither contains language specifically applicable to disallowed claims. Both, however, were enacted subsequent to *Kihlberg v. United States*, 97 U.S. 398 (1878), in which the Supreme Court first established the principle of mandatory administrative review of claims arising under government contracts.

tions did not commence to run until administrative disallowance of a claim, the purposes of the statute itself could be substantially frustrated. Since no statutory requirement exists as to when a petitioner must begin to pursue his administrative rights, a moving party could indefinitely postpone the running of the statute by delay in instituting administrative review.³¹ The court in *Nager* attempts to counter this argument by suggesting that the danger is nonexistent in view of the stipulation in most disputes clauses that administrative review be commenced within thirty days.³² To leave so important a consideration to the bargaining prowess of the parties, however, is to neutralize the whole concept of limitations.

IV. THE EFFECT OF MANDATORY ADMINISTRATIVE REVIEW

A contracting party who has committed himself to exhaust administrative remedies before invoking federal court jurisdiction on a contract-disputes claim may be precluded from relief if the applicable statute of limitations has run before administrative disallowance of his claim. The Third Circuit's solution, as expressed in *Northern Metal*, is to suspend the running of the statute during the administrative review.³³ There is, however, a general reluctance on the part of the courts to permit suspension,³⁴ and the Second Circuit illustrated this reluctance in *Crown Coat* when it refused to suspend the statute of limitations while the plaintiff's claim was before the administrative agency.³⁵ The court suggested that this holding need not work a hardship upon a claimant, since he may institute a protective suit in the federal courts during the pendency of administrative review, thus preserving the cause of action in the event that his claim is administratively disallowed.³⁶

The Second Circuit's position is unsound both in its refusal to suspend the running of the statute of limitations during mandatory review, and in its suggestion that initiation of a protective suit preserves the plaintiff's claim. Admittedly, statutes granting jurisdiction to sue the Government are to be strictly construed, but not so strictly as to lose sight of the grant itself. It makes little sense to interpret a statute with such rigidity as to effectively prevent, in a large number of cases, the substantial recourse prescribed by it.³⁷ Statutes of limitations accomplish two things: they close the ledger on potential litigation after a certain period of time, and they

³¹ See *McMahon v. United States*, supra note 23, at 27.

³² *Nager Elec. Co. v. United States*, supra note 18, at 864.

³³ *Northern Metal Co. v. United States*, supra note 11, at 839.

³⁴ See, e.g., *Williams v. United States*, 228 F.2d 129, 132 (4th Cir. 1955), cert. denied, 351 U.S. 986 (1956); *Atlantic Carriers, Inc. v. United States*, 131 F. Supp. 1, 4 (S.D.N.Y. 1955).

³⁵ *Crown Coat Front Co. v. United States*, supra note 14, at 413.

³⁶ *Ibid.*

³⁷ The Supreme Court apparently recognized the dilemma in a Federal Employers' Liability Act case where it upheld the suspension of a statute which qualified by limitation a statutory grant to sue the United States. In *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1964), a timely suit was brought in a state court having proper jurisdiction. Because of improper venue, however, the state court dismissed the action. The Supreme Court held that the FELA statute of limitations was suspended during

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prevent surprise and hardship to a defendant who, after a period of years, may be unable to collect evidence and witnesses to support his defense.³⁸ Suspending the statute of limitations interferes with neither of these objectives. The statute is suspended only during administrative review. Accordingly, a petitioner *must* pursue his administrative remedies within the statutory period or lose his claim. Further, the administrative record serves to preserve the evidence and thus virtually eliminates the possibility of surprise or hardship.³⁹

Nor may it be said that the moving party can adequately protect himself by instituting a protective suit during the pendency of administrative review of his claim, for courts which allow such suits do so at their discretion, and not as a matter of right.⁴⁰ Further, a policy requiring protective suits would threaten docket congestion,⁴¹ and might well defeat legitimate claims in instances where claimants are unaware of the availability of such suits.⁴²

V. CONCLUSION

The suspension issue will be resolved by the Supreme Court this term by virtue of its grant of certiorari to review that question as presented in *Crown Coat*.⁴³ Hopefully, in cases involving mandatory administrative review, the Court will order suspension of the statute of limitations during the pendency of administrative proceedings. A statute of limitations should run only during those periods of time when the petitioner has control of his cause of action. That he has such control from the date of injury to the date of commencement of administrative review, and from the date of administrative disallowance to the date of his invocation of federal court jurisdiction, is clear. It is equally clear that he has no such control during the time that the matter is before an administrative agency for review.

Although the Supreme Court has not been asked to consider the issue of when the statute of limitations begins to run relative to contract-disputes claims brought under the Tucker Act, perhaps its forthcoming decision will answer that question as well. Should the Court find that its decision in *McMahon* does not control, it is submitted that the rule of that case ought to be extended to claims under the Tucker Act. To do otherwise would seriously qualify the purpose of limitations statutes.

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the pendency of the state suit, thus allowing the petitioner to institute an action in the federal district court although the statute had otherwise run.

³⁸ *Id.* at 428.

³⁹ Recent Supreme Court decisions have made clear that in cases involving mandatory disputes procedures all facts relating to the claims are to be found administratively and not in the federal courts. *United States v. Anthony Grace & Sons*, 384 U.S. 424 (1966); *United States v. Utah Constr. & Mining Co.*, *supra* note 26. See generally Hiestand & Parler, *The Disputes Procedure Under Government Contracts: The Role of the Appeals Boards and the Courts*, 8 B.C. Ind. & Com. L. Rev. 1 (1966).

⁴⁰ See, e.g., *United States v. Winegar*, 254 F.2d 693, 696 (10th Cir. 1958).

⁴¹ See *Northern Metal Co. v. United States*, *supra* note 11, at 839.

⁴² See *Crown Coat Front Co. v. United States*, *supra* note 14, at 416 (Anderson, J., dissenting).

⁴³ *Crown Coat Front Co. v. United States*, 385 U.S. 811 (1966).