

9-1-1985

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Recommended Citation

Paul L. Caron, *Confronting Unforeseen Problems Under 28 U.S.C. § 1631: The Tenth Circuit Struggles to Properly Dispose of Tucker Act Claims Within the Exclusive Jurisdiction of the Claims Court*, 1985 BYU L. Rev. 505 (1984).

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Confronting Unforeseen Problems Under 28 U.S.C. § 1631: The Tenth Circuit Struggles to Properly Dispose of Tucker Act Claims Within the Exclusive Jurisdiction of the Claims Court

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I. INTRODUCTION

The Claims Court¹ has exclusive jurisdiction of certain actions against the United States for damages in excess of \$10,000. On appeal of an action within the exclusive jurisdiction of the Claims Court that was improperly filed in the district court, the court of appeals must make an appropriate disposition. Section 1631 of title 28 of the United States Code empowers courts that lack jurisdiction over an action to transfer the case to any other court in which the action could have been brought.²

The Tenth Circuit has used three approaches to dispose of cases within the exclusive jurisdiction of the Claims Court. The court has dismissed the case, directly transferred the case to the Claims Court, and remanded to the district court with directions to transfer the case to the Claims Court. The third approach best effectuates the purposes of section 1631.

II. SECTION 1406(c): THE PREDECESSOR STATUTE

The Tucker Act grants exclusive jurisdiction to the Claims Court of any claims against the United States for over \$10,000 "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liqui-

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1. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 25, 39-41 (codified at 28 U.S.C. § 1491 (1982)), transferred jurisdiction previously granted to the former Court of Claims to the newly created Claims Court and abolished the Court of Claims. This article will refer to both the former Court of Claims and the current Claims Court as the Claims Court.

2. 28 U.S.C. § 1631 (1982).

dated or unliquidated damages in cases not sounding in tort."³ When such claims reach the appellate level after being improperly filed in the district court, the court of appeals, after recognizing the jurisdictional defect, must appropriately dispose of the action.

Section 1406(c) of title 28 was enacted in 1960 and provided that "[i]f a case within the exclusive jurisdiction of the [Claims Court] is filed in the district court, the district court shall, if it be in the interest of justice, transfer such case to the [Claims Court], where the case shall proceed as if it had been filed in the [Claims Court] on the date it was filed in the district court."⁴ According to its legislative history, section 1406(c) was enacted to prevent an action within the exclusive jurisdiction of the Claims Court from being barred by the statute of limitations if it were timely but mistakenly brought in the district court.⁵

Courts of appeals used three different methods to dispose of numerous appeals from district courts in cases in which exclusive jurisdiction rested in the Claims Court. The courts of appeals either (1) dismissed the case,⁶ (2) directly transferred the case to the Claims Court,⁷ or (3) remanded to the district court with directions to transfer the case to the Claims Court under section 1406(c).⁸ Although section 1406(c) did not explicitly au-

3. 28 U.S.C. § 1491(a)(1) (1982); *see also id.* § 1346(a)(2).

4. Act of Sept. 13, 1960, Pub. L. No. 86-770, § 1, 74 Stat. 912, *repealed by* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 132, 96 Stat. 25, 39.

5. S. REP. No. 1894, 86th Cong., 2d Sess. 4 (1960), *reprinted in* 1960 U.S. CODE CONG. & AD. NEWS 3583, 3585:

In order to prevent dismissal of suits which would become time-barred when the appropriate forum had finally been determined, this bill would permit the transfer of cases to the appropriate court. Since under transfer procedure the statute of limitations is tolled with the filing of the original suit, an action would not be dismissed because a subsequent decision that the plaintiff had chosen the wrong forum came at a time when the statute of limitations precluded filing a new action in the appropriate court.

6. *See, e.g.,* *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 824 (10th Cir. 1981); *Alamo Navajo School Bd., Inc. v. Andrus*, 664 F.2d 229, 233 (10th Cir. 1981), *cert. denied*, 456 U.S. 963 (1982).

7. *See, e.g.,* *Cox Enter. v. Holt*, 691 F.2d 989, 990 (11th Cir. 1982); *Keller v. Merit Sys. Protection Bd.*, 679 F.2d 220, 223 (11th Cir. 1982); *Graham v. Henegar*, 640 F.2d 732, 736 (5th Cir. 1981); *Russell v. Law Enforcement Assistance Admin.*, 637 F.2d 354, 357 (5th Cir. 1981); *A.L. Rowan & Son v. Department of Hous. and Urban Dev.*, 611 F.2d 997, 1001 (5th Cir. 1980); *Dr. John T. MacDonald Found., Inc. v. Califano*, 571 F.2d 328, 332 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978).

8. *See, e.g.,* *Portsmouth Redevelopment and Hous. Auth. v. Pierce*, 706 F.2d 471, 475 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983); *Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971, 974 (5th Cir. 1981); *Drennan v. Harris*, 606 F.2d 846, 850 (9th Cir. 1979);

thorize direct transfer by the courts of appeals, courts applying the second approach reasoned that "Congress did not intend to prevent transfer directly from the appellate court. Direct transfer not only furthers the policies behind section 1406, but also comports with the precepts of judicial economy."⁹

These three approaches created uncertainty under section 1406(c) because the courts of appeals did not expressly recognize the existence of alternative approaches and thus did not attempt to determine which provided the preferable disposition. Unfortunately, this uncertainty continued even after Congress repealed section 1406(c) in the Federal Courts Improvement Act of 1982¹⁰ and enacted section 1631.¹¹

III. SECTION 1631

Section 1631 provides that whenever a civil action or appeal is filed in or noticed for a court that lacks jurisdiction, "the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed."¹² Section 1631 also states that after such a transfer, "the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred."¹³ Unlike its predecessor, section 1631 by its terms permits a court of appeals to directly transfer a case to the Claims Court.

Denton v. Schlesinger, 605 F.2d 484, 488 (9th Cir. 1979); Clark v. United States, 596 F.2d 252, 254 (7th Cir. 1979); Sierra-Vista Hosp., Inc. v. Califano, 597 F.2d 200, 200 (9th Cir. 1979) (per curiam); Cook v. Arentzen, 582 F.2d 870, 878 (4th Cir. 1978); American Science & Eng'g, Inc. v. Califano, 571 F.2d 58, 64 (1st Cir. 1978); Sherar v. Harless, 561 F.2d 791, 794-95 (9th Cir. 1977); Polos v. United States, 556 F.2d 903, 906 (8th Cir. 1977).

Courts of appeals in other cases remanded to the district court to decide whether to dismiss or to transfer the case pursuant to § 1406(c). See, e.g., Rowe v. United States, 633 F.2d 799, 802 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981); DSI Corp. v. Secretary of Hous. and Urban Dev., 594 F.2d 177, 180 (9th Cir. 1979); Lee v. Blumenthal, 588 F.2d 1281, 1283 (9th Cir. 1979).

9. Dr. John T. MacDonald Found., Inc. v. Califano, 571 F.2d 328, 332 (5th Cir.), cert. denied, 439 U.S. 893 (1978); see also Cox Enter. v. Holt, 691 F.2d 989, 990 (11th Cir. 1982) ("[A] direct transfer here promotes the policies underlying § 1406 and judicial economy.").

10. Pub. L. No. 97-164, § 132, 96 Stat. 25, 39-41.

11. *Id.* at § 301(a), 96 Stat. at 55 (codified at 28 U.S.C. § 1631 (1982)).

12. 28 U.S.C. § 1631 (1982).

13. *Id.*

The legislative history indicates that section 1631 was "broadly drafted to allow transfer between any two Federal courts."¹⁴ The purpose of such a broad transfer rule was to prevent expiration of a statute of limitations or filing period and to save the additional expense of refileing the case in the proper court.¹⁵ However, the Tenth Circuit in recent cases has made the same three dispositions as courts of appeals made under section 1406(c) when faced with an appeal of an action within the Claims Court's exclusive jurisdiction that was improperly brought in a district court.

First, in *United States v. City of Kansas City*,¹⁶ the court simply vacated the case without mentioning section 1631. Second, in *Tafoya v. Department of Justice*¹⁷ and *New Mexico v. Regan*,¹⁸ the court directly transferred the actions to the Claims Court under section 1631. Third, in *Rogers v. Ink*,¹⁹ the court remanded the case to the district court with directions to transfer the action to the Claims Court under section 1631. The Tenth Circuit has generated the same confusion that existed under section 1406(c) by not discussing the alternative approaches in these cases. The Tenth Circuit should clarify this area of the law by considering the three methods of disposition under section 1631 and following the method that best effectuates the policies of that section.

IV. THE PREFERRED DISPOSITION

The broad transfer provisions of section 1631 were enacted to save the expense of refileing actions in the proper court and to prevent expiration of a statute of limitations or filing period.²⁰

14. S. REP. NO. 275, 97th Cong., 2d Sess. 30 (1981), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 11, 40.

15. *Id.*

16. 761 F.2d 605, 609 (10th Cir. 1985).

17. 748 F.2d 1389, 1393 (10th Cir. 1984).

18. 745 F.2d 1318, 1323 (10th Cir. 1984), cert. denied, 105 S. Ct. 2138 (1985).

19. 766 F.2d 430, 436 (10th Cir. 1985); see also *Burgos v. Milton*, 709 F.2d 1, 3 (1st Cir. 1983); *Schulthess v. United States*, 694 F.2d 175, 179 (9th Cir. 1982); cf. *Hahn v. United States*, 757 F.2d 581, 590 (3d Cir. 1985) (vacating portion of district court's order awarding monetary relief and remanding with directions to either permit plaintiffs to amend their complaint to waive damages in excess of \$10,000 or to transfer those claims to the Claims Court under § 1631); *Delta Data Sys. Corp. v. Webster*, 755 F.2d 938, 940 (D.C. Cir. 1985) (per curiam) (remanding to district court with instructions to entertain a claim for bid preparation costs under the Tucker Act and ordering district court to transfer the case to the Claims Court under § 1631 if the claim exceeds \$10,000).

20. See *supra* note 15 and accompanying text.

Therefore, the preferable method of disposition is the one that best effectuates these purposes.

Under the first approach of simply dismissing the case, the party seeking relief will incur the additional expense of refileing the action in the Claims Court. More importantly, the relevant statute of limitations or filing period may have expired, thereby precluding the party from initiating the action in the proper court. Because this approach does not further either purpose of section 1631, a court of appeals should not dismiss a Tucker Act claim within the exclusive jurisdiction of the Claims Court.

The second approach of directly transferring the case to the Claims Court avoids refileing expenses. Nevertheless, this approach may result in unintended limitations or filing period problems. Section 1631 provides that when an action is transferred, it "shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred."²¹ In these circumstances, the court of appeals is the transferor court and the Claims Court is the transferee court. Treating the action after it has been transferred as if it were commenced when the notice of appeal was filed in the court of appeals will not necessarily avoid all limitations and filing period problems. These problems can be prevented if the district court, rather than the court of appeals, is treated as the transferor court. However, the literal language of section 1631 does not permit such an interpretation when the court of appeals directly transfers the case to the Claims Court.²² Thus, to avoid unanticipated limitations and filing period problems, a court of appeals should not directly transfer a case to the Claims Court.

Instead, the third approach of remanding to the district court with directions to transfer the case to the Claims Court should be employed because it best serves the purposes of section 1631. This method of disposition avoids the additional expense of refileing the action and prevents potential limitations and filing period problems. In contrast to the direct transfer approach, the district court is the transferor court under the lan-

21. 28 U.S.C. § 1631 (1982).

22. This difficulty with § 1631 suggests that Congress anticipated that § 1631 would be used to transfer cases from one appellate court to another appellate court, or from one trial court to another trial court, but did not envision the need for an appellate court to transfer a case to a trial court.

guage of section 1631. The action is treated as if it commenced in the Claims Court on the date it was improperly filed in the district court. Although the Tenth Circuit in *Rogers v. Ink*²³ did not discuss the policies of section 1631 in making such a disposition, that case highlights the desirability of this approach over dismissal or direct transfer to the Claims Court.

In *Rogers*, plaintiffs sought to compel a federal agency to fully fund a state antipoverty organization.²⁴ The action was commenced on September 30, 1981, the last day of the 1981 federal fiscal year.²⁵ Congress had eliminated the direct federal funding program for state antipoverty organizations effective October 1, 1981, the beginning of the 1982 federal fiscal year.²⁶ The commencement date of the action was critical to the merits of the lawsuit because a suit must be filed before the lapse of a congressional appropriation to enable a court to issue orders with respect to the appropriated funds.²⁷ Due to the importance of the commencement date, the plaintiffs in *Rogers* would have been prevented from bringing their action in the Claims Court if the Tenth Circuit had not followed the third approach.

The Tenth Circuit could have followed the first approach and dismissed the case on June 28, 1985, the date of its decision. However, the plaintiffs would have been forced to refile their action in the Claims Court well after the appropriation lapsed on October 1, 1981, thus precluding any court order with respect to the funds.

Similarly, the Tenth Circuit could have employed the second approach and directly transferred the case to the Claims Court. Under this method of disposition the action would have been treated as if it commenced in the Claims Court on October 5, 1982, the date the notice of appeal was filed in the Tenth Circuit (the transferor court). Accordingly, the Claims Court would have been unable to issue orders with respect to the funds because the appropriation had lapsed over one year earlier.

The Tenth Circuit properly followed the third approach and remanded to the district court with directions to transfer the

23. 766 F.2d 430, 436 (10th Cir. 1985).

24. *Id.* at 431-33.

25. *Id.* at 432.

26. *Id.* at 431.

27. See, e.g., *Connecticut v. Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983); *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 55-56 (D.C. Cir. 1977).

case to the Claims Court.²⁸ Under this method, the action was treated as if it commenced in the Claims Court on September 30, 1981, the date the action was filed in the district court (the transferor court), one day before the appropriation lapsed. Therefore, this approach was the only one that could preserve plaintiffs' claim on the merits in the Claims Court.

V. CONCLUSION

When an action within the exclusive jurisdiction of the Claims Court is appealed after being improperly brought in district court, the court of appeals should neither dismiss the claim nor directly transfer the case to the Claims Court under section 1631. Instead, the court of appeals should give effect to the purposes of section 1631, rather than its literal language, and remand to the district court with directions to transfer the case to the Claims Court. This approach eliminates unnecessary refiling fees and prevents expiration of relevant statutes of limitations and filing periods.

28. *Rogers*, 766 F.2d at 436.

