

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781.

Wills and Professional Responsibility Notes

New Jersey Law Firm Can Reveal Client Information to Wife

A common occurrence in legal assistance offices is preparing wills for both the husband and wife. It is important for legal assistance attorneys to recognize the potential for conflicts of interest that arises in this situation. Clients do not think anything about it; indeed, most go to considerable lengths to arrange an appointment that both spouses can attend. How can there be a conflict, it is just a will and we agree on how to distribute our estate? The lawyer must take a very different view. It is not "our" estate. Each party to the marriage has a separate estate even when the assets are owned jointly. It is not unusual for their interests to differ. A recent case from New Jersey illustrates the Pandora's box that can be opened when estate planning, family law, and professional responsibility collide.

An attorney in the estate-planning department of the law firm Hill Wallack prepared wills in October 1997 for a husband and wife.¹ The firm's policy required that the clients read and sign a dual representation agreement. The distribution of the interests supported Hill Wallack's desire to inform her. The

estate was typical for a married couple—all to the spouse and then to issue.²

In January 1998, before the husband and wife executed the wills, a woman coincidentally retained Hill Wallack's family law department in a paternity action against the husband.³ The husband's surname was inadvertently misspelled when entered in the firm's client database; therefore, a conflict check did not identify the conflict.⁴ The husband retained different counsel for the paternity action.⁵ The conflict finally came to light when the family law attorney for Hill Wallack requested financial information from the husband for purposes of determining child support.⁶ The husband's paternity case attorney responded that Hill Wallack already had all that information. Hill Wallack immediately withdrew from the paternity action once they discovered the conflict.⁷

The real issue began, however, when Hill Wallack sent a letter to the husband notifying him that the lawfirm had a professional obligation to inform his wife of the existence of his illegitimate child.⁸ The husband joined Hill Wallack as a third party to the paternity action and obtained a restraining order preventing the disclosure to his wife.⁹ Hill Wallack faced the classic tension between the obligation of confidentiality and the conflict of interest. The New Jersey Supreme Court, after a lengthy analysis, concluded that Hill Wallack could inform the wife of the existence of the illegitimate child.¹⁰

The Supreme Court of New Jersey agreed with Hill Wallack that the information about the existence of an illegitimate child could affect the distribution of the wife's estate, if she predeceased her husband. Additionally, the husband's obligation to pay support to the child could deplete that part of his estate that otherwise would pass to his wife, if he predeceased her. Therefore, the wife's interests and the lawyer's duty to protect those court had to consider the issue of confidentiality.

1. A. v. B. v. Hill Wallack, Attorneys at Law, 726 A.2d 924 (N.J. 1999).

2. *Id.* at 925.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 926.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

New Jersey's exceptions to the confidentiality rule are broader than the ABA Model rule.¹¹ The New Jersey rule mandates disclosure of confidential information if such disclosure is necessary to prevent the client from "committing a criminal, illegal, or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another . . ."¹² The court refused to mandate disclosure under this rule.¹³ The New Jersey rule, however, also permits the disclosure of a confidential communication to the extent the lawyer reasonably believes necessary to "rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used."¹⁴ The husband's deliberate omission of the existence of his illegitimate child was enough to constitute a fraud on his wife.¹⁵

In addition to the analysis on the New Jersey confidentiality rule, the court also considered that the couple signed a dual representation agreement. The dual representation agreement signed by the husband and wife did not include an express waiver of confidentiality; however, it indicated that information provided by one client could become available to the other.¹⁶ While an explicit waiver would have made disclosure easier, the court found that the spirit of the agreement supported Hill Wallack's decision to inform the wife.¹⁷ The court also pointed out that the information was not really a confidence obtained from the husband. In fact, the husband concealed the existence of the illegitimate child from the estate planning attorney as well as the wife.¹⁸

This case illustrates the potential for a seemingly simple will interview to explode into a significant professional responsibility and legal assistance problem. Legal assistance attorneys should recognize the potential for conflict in preparing wills for both the husband and wife. They should counsel those clients and have the clients read and sign a dual representation agreement. In addition, that dual representation agreement should be explicit about waiving confidentiality between spouses. Major Fenton.

Help With Preparing Wills for Louisiana Domiciliaries

Have you ever conducted an interview with a soldier or family member whose home of record was Louisiana? You do the interview and try to prepare the will using the LAAWS or Patriot Wills Program. Then you find out that Louisiana wills *are not* available on either. In the past the only options were to try to create a document using the All States Wills Guide, coordinate with the Legal Assistance Office at Fort Polk, or tell the client you could not assist him.

Now you can pull the Louisiana will questionnaire off of legal assistance database on JAGCNet, have your client complete the document, e-mail the questionnaire to Fort Polk at <shermanl@polk-emh2.army.mil>, <lenzp@polk-emh2.army.mil>, or <AFZX-JA@polk.emh2.army.mil>. The legal assistance staff will prepare the will in accordance with Louisiana law and *Army Regulation 27-3*¹⁹ and e-mail you a document ready for execution.

This initiative has been in place since late February 1999 after coordination with the Legal Assistance Policy Division, OTJAG. Fort Polk reports that the initial requests have been coming in worldwide and the turnaround time has been less than three workdays on average. Do not let those Louisiana concepts of usufruct or forced heirship scare you away from providing clients Louisiana wills. Take Fort Polk up on its offer to provide will services for all Louisiana soldiers and their family members regardless of where they are stationed. Major Fenton.

Consumer Law Note

The Internet: A New Medium for Scam Artists

The Internet has been a boon to many people. Information on news, travel, health, and myriad other topics is available at any time of the day or night in the privacy of your own home. This twenty-four-hour per day convenience has also attracted a booming Internet business community. The United States Department of Commerce estimates that by 2001, businesses

11. *Id.* at 927.

12. *Id.* (citing RPC 1.6(b)(1)).

13. *Id.*

14. *Id.* (citing RPC 1.6(c)).

15. *Id.*

16. *Id.* at 928.

17. *Id.*

18. *Id.* at 932.

19. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (10 Sept. 1995).

will conduct \$300 billion dollars in commerce via the Internet.²⁰ It should come as no surprise, then, that those seeking to take advantage of consumers would use this tool as well. The Federal Trade Commission (FTC) recently dealt with the perpetrators of two typical scams—credit repair and e-mail fraud.

The first group of actions reflects a joint effort between the FTC and state and local law enforcement. The focus of these forty actions was file segregation credit repair scams.²¹ According to the FTC, the schemes work like this: fraudulent actors place ads in newspapers, magazines or, increasingly, on the Internet, selling a service they say can help consumers create a new credit identity. Using claims like,

“Anyone can have a New Credit File virtually overnight . . .”;

“WIPE OUT ALL OF THE OLD BAD CREDIT ON YOUR OLD FILE. . . .”; and

“Credit Start Over. There’s a way to obtain a new Social Security N[umber] . . .”

[T]hey offer to sell a “kit” or “package” for prices ranging from \$21.95 to \$129.95. The “kit” advises consumers to apply for a new identification number from the I.R.S., Social Security Administration or credit reporting agencies and to use that number in place of their Social Security number when applying for credit. Consumers are frequently given advice about how to develop whole new credit profiles by doing such things as getting new driver’s licenses using the new I.D. number and advised about places that will give consumers “starter credit” using the new number.²²

Of course, the problem is that consumers violate federal law when they attempt to use any of these identification numbers as their social security number.²³ The message, according to FTC’s Bureau of Consumer Protection Director Jodie Bernstein, is that

[t]hese credit repair con games are spreading like wildfire on the Internet and in unsolicited junk e-mail, . . . They target credit-impaired consumers,

anxious to repair their credit profiles. But we want consumers to get the message that using a false Social Security number—such as a taxpayer I.D. number—to apply for credit violates federal law and will only compound their problems.²⁴

Like other consumers, soldiers want credit, and the things that credit enables them to purchase. As young people with moderate incomes, however, these soldiers often have credit problems that they want or need to fix. Legal assistance attorneys must be vigilant in their preventive law programs to educate young soldiers about scams like the credit repair scam detailed above. Soldiers do not need to exacerbate their credit problems with violations of federal law.

Education is the best way to combat this problem since the solicitation for these types of services comes over e-mail and the internet—a medium that people normally view privately in their own home. Legal assistance attorneys will often be unaware of the problem until it is too late. The bottom line—without active preventive education in the Internet/e-mail arena, we will not be able to help soldiers avoid problems. Instead, we will only be able to help them pick up the pieces after they have already felt the problem’s bite.

A second type of problem that comes over e-mail is simply fraud. It is an Internet/e-mail twist on the telephone billing scams that have become popular over the last several years.²⁵ In this technological twist on the scam, however,

[c]onsumers receive an e-mail informing them that their order has been received and processed and their credit card will be billed for charges ranging from \$250 to \$899. In fact, the consumers hadn’t ordered anything. The e-mail advises consumers that if they have questions about their “order” or want to speak to a “representative” they should call a telephone number in area code 767. Most consumers don’t know the area code is in a foreign country, Dominica, West Indies, because no country code is required to make the calls. Consumers who call expecting to speak to a “representative” about the errone-

20. The Better Business Bureau, *Online Shoppers Do Have Recourse*, (visited 1 June 1999) <<http://www.bbb.org/alerts/19990201.html>>. The Better Business Bureau (BBB) also highlights their online complaint system in this article. More than 20,000 consumers per month access this system. *Id.* The BBB also certifies member businesses. Consumers can look for the “BBBOnLine” seal on businesses that are members of the BBB and agree to conduct their business in accord with its standards. *Id.*

21. Federal Trade Commission, *Law Enforcement Crackdown Targets Credit Repair Con Artists* (visited June 1, 1999) <<http://www.ftc.gov/opa/1999/9905/id21a4.htm>>.

22. *Id.*

23. *Id.*

24. *Id.*

25. See Federal Trade Commission, *Cramming: Mystery Phone Charges* (visited 1 June 1999) <<http://www.ftc.gov/bcp/online/pubs/services/cramming.htm>>.

ous “order” are connected to an adult entertainment audiotext service with sexual content. Later, consumers receive telephone charges for the international, long-distance call to Roseau, Dominica.²⁶

The company conducting the scam makes money because “under international agreements, U.S. telephone carriers would ordinarily bill consumers for their pay-per-call charges and forward the funds to the Dominica telephone company which in turn distributes portions of the revenue to the providers of the audiotext service.”²⁷ Fortunately, the FTC has obtained injunctions against the individuals conducting this particular scam and is working to get consumers their money back.²⁸

The message from this scam is clear—consumers must be cautious about *any* message they get via e-mail. Consumers understandably worry when someone indicates that a business is about to place a significant charge on the consumer’s credit card. There is enormous temptation to call immediately. But, as with other e-mail/Internet scams,²⁹ the time necessary to verify the company and the problem is time well-spent.

Again education is the key. Legal assistance attorneys cannot monitor soldiers’ e-mail to protect them from unscrupulous people. They can, however, use all means at their disposal to get soldiers the word on these types of problems. Some innovative ideas that judge advocates have used include posting information pages linked to the installation web site;³⁰ periodic e-mail information papers or e-mail alerts to commanders; and use of television or radio public access to provide classes and information. While informed consumers are not always going to make the best choices, they are bound to make better choices than if they had no information. As electronic commerce becomes increasingly popular, the value of preventive law will only increase. It is the best way that we can help consumers avoid people who use “low-down tactics and high-tech tools to rob consumers in their own homes.”³¹ Major Lescault.

Criminal Law Note

Changes to Federal Rules Become Effective in the Military

Pursuant to Military Rule of Evidence (MRE) 1102,³² MRE 407, 801, 803, 804, and 807 are amended to reflect corresponding changes in the federal rules. The changes to the federal rules became effective on 1 December 1997. The changes to the military rules became effective 1 June 1999. The changes are set forth below with the new language underlined. Major Hansen.

MRE 407. Subsequent remedial measures

When, after an injury or harm allegedly caused by an event, measures are taken ~~which that~~; if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Note: There is a typo in the last sentence of MRE 407 of the MCM 98 Edition (“or feasibility or precautionary measures” should be “or feasibility of precautionary measures”).

MRE 801(d)(2) now reads as follows:

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party’s own statement in either the party’s individual or representative capacity, or (B) a statement of which the party has manifested the party’s adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment of the agency or

26. Federal Trade Commission, *E-mail Duped Consumers into Making Costly International Calls* (visited 1 June 1999) <<http://www.ftc.gov/opa/1999/9905/audiot10.htm>>.

27. *Id.*

28. *Id.*

29. See Federal Trade Commission, *FTC Consumer Alert! FTC Names Its Dirty Dozen: 12 Scams Most Likely to Arrive Via Bulk E-mail* (visited June 1, 1999) <<http://www.ftc.org/bcp/online/pubs/alerts/doznalrt.htm>>.

30. See, e.g., Fort Benning Legal Assistance Office Web Page (visited June 1, 1999) <<http://www.jag.benning.army.mil/la/>> (containing an excellent collection of information linked to the post home page).

31. Federal Trade Commission, *E-mail Duped Consumers into Making Costly International Calls* (visited 1 June 1999) <<http://www.ftc.gov/opa/1999/9905/audiot10.htm>> (quoting Jodie Bernstein, Director of the FTC’s Bureau of Consumer Protection).

32. Military Rule of Evidence 1102 states: “Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is take by the President.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102 (1998).

employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Note. This change responds to three issues raised in *Bourjaily v. United States*, 483 U.S. 171 (1987). First, the amendment codifies the Court's holding by expressly allowing the trial court to consider the contents of the co-conspirator's statement to determine if a conspiracy existed and the nature of the declarant's involvement. Second, it resolves the issue left unresolved in *Bourjaily* by stating that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the accused participated. Third, the amendment extends the rationale of *Bourjaily* to statements made under 801(d)(2)(C) and (D).

MRE 803(24) now reads as follows:

(24) *[Transferred to Rule 807]*

Note. The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

MRE 804(b)(5) and (6) now read as follows:

(5) *[Transferred to Rule 807]*

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Note. 804(b)(6) states that a party forfeits the right to object to hearsay when that party's wrongdoing caused the declarant to be unavailable.

MRE 807 is new and reads as follows:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Contract and Fiscal Law Note

Constructive Termination for Convenience Cannot be Invoked Retroactively in Requirements Contracts

Introduction

In *Carroll Automotive*,³³ the Armed Services Board of Contract Appeals (ASBCA) denied the Air Force's motion to dismiss the contractor's appeal based on the doctrine of constructive termination for convenience.³⁴ Instead, the board concluded that the Air Force breached its requirements contract³⁵ by failing to order all of its requirements from the same contractor. The board ruled that Carroll Automotive (Carroll), the requirements contractor, was entitled to lost profits. The ASBCA ruled that the Air Force may not retroactively argue that its actions (that is, purchasing the automotive parts accessories from another contractor) constituted partial constructive terminations for convenience.

Background

On 19 September 1990, the Air Force awarded a requirements contract to Carroll. The contract required Carroll to provide automotive parts and accessories for various vehicles and miscellaneous equipment at Luke Air Force Base, Arizona. The contract specified a base year plus four option years, effective on 1 November 1990.³⁶

33. ASBCA No. 50993, 98-2 BCA ¶ 29,864.

34. The constructive termination for convenience is a judge-made doctrine based on the concept that a contracting party who is sued for breach of contract may ordinarily defend on the ground that there existed at the time of the breach a legal excuse for non performance, although that party was then ignorant of the fact. *See* College Point Boat Corp. v. United States, 267 U.S. 12 (1925); Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).

35. A requirements contract is generally used for purchasing supplies or services when the government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated (in the contract) government agencies will need during the contract performance period. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 16.503(b) (June 1997) [hereinafter FAR].

In December 1995, Carroll learned that the Air Force had purchased vehicle parts and supplies from other contractors, contrary to the terms of its requirements contract, thus breaching the “requirements” clause³⁷ incorporated in the contract. When Carroll requested the Air Force’s complete purchase records for the total contract period, the Air Force only supplied records for 1995.³⁸ From the 1995 purchase records, Carroll estimated that it lost \$46,013.00 in profits for that year.

In June 1996, Carroll submitted a claim for lost profits totaling \$184,052.00. This amount covered four of the five years of the total contract period based on the 1995 purchase records provided by the Air Force. In June 1997, the contracting officer granted partial relief on the claim and paid Carroll \$15,318.94 in “lost anticipatory profits” for calendar year 1995. The contracting officer denied the remainder of Carroll’s claim because the contractor failed to substantiate its monetary entitlement for the prior four years.³⁹ On 4 September 1997, Carroll appealed the contracting officer’s final decision to the ASBCA.

The ASBCA Decision

On appeal, the Air Force moved for dismissal alleging that Carroll failed to state a claim upon which relief could be

granted. The Air Force argued that its actions of purchasing the required parts and accessories from other contractors constituted partial constructive terminations for convenience.⁴⁰ Based solely on this legal theory, the Air Force argued that the contract’s termination clause⁴¹ precluded Carroll from recovering profit on the terminated work.⁴² Furthermore, the Air Force asserted that Carroll did not allege bad faith, abuse of discretion, or arbitrary or capricious conduct by the agency.⁴³

The board disagreed. First, the board ruled⁴⁴ that “[p]roof of a constructive convenience termination is not an element of [Carroll’s] claim.”⁴⁵ Therefore, Carroll had no duty to allege bad faith, abuse of discretion, or arbitrary or capricious conduct by the Air Force. Furthermore, the board implied that even if Carroll had argued wrongful termination alleging bad faith, the Air Force could still assert the defense of constructive termination for convenience.⁴⁶

Second, the board concluded that the Air Force could not rely upon the constructive termination for convenience theory to retroactively breach a requirements contract and thus change its obligations under a completed contract.⁴⁷ In arriving at this conclusion, the board relied heavily on *Maxima Corp. v. United States*.⁴⁸ The *Maxima* court held that the government cannot use the constructive termination for convenience doctrine to

36. *Carroll*, 98-2 BCA ¶ at 147,779.

37. See FAR, *supra* note 35, 52.216-21(c) (Requirements). The Requirements Clause states, in part: “Except as this contract otherwise provides, the [g]overnment shall order from the [c]ontractor all the supplies or services specified in the [s]chedule that are required to be purchased by the [g]overnment activity or activities specified in the [s]chedule.” *Id.*

38. The contracting officer did not provide purchase records for the previous four years because the agency did not breach the requirements contracts for those years. Telephone Interview with Major David Frishberg, United States Air Force, Trial Attorney (Apr. 8, 1999) [hereinafter Frishberg Interview].

39. *Carroll*, 98-2 BCA ¶ 29,864 at 147,779. Ironically, the contracting officer denied the monetary claim for the previous four years when it was the Air Force that failed to provide Carroll with the purchasing records for those years.

40. *Id.* It is interesting to note that the contracting officer’s final decision failed to categorize the Air Force’s actions as partial terminations. This retroactive partial termination for convenience did not surface until the Air Force moved for dismissal of the appeal.

41. See FAR, *supra* note 35, 52.249-2 (Termination for Convenience of the Government). The termination clause provides, in part: “If the termination is partial, the [c]ontractor may file a proposal with the [c]ontracting [o]fficer for an equitable adjustment of the price(s) of the continued portion of the contract. The [c]ontracting [o]fficer shall make any equitable adjustment agreed upon.” *Id.*

42. The termination for convenience clause specifically limits recovery of profit to work completed by the contractor before the termination. In part, FAR 52.249-2(f) provides: “the [c]ontractor and the [c]ontracting [o]fficer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. . . .” *Id.* (emphasis add).

43. Generally, a contractor must allege and prove bad faith, abuse of discretion, or arbitrary or capricious government conduct in order to overcome the government’s convenience termination. See generally *Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 543 F.2d 1298 (1976); *A-Transport Northwest Co. v. United States*, 36 F.3d 1576 (Fed. Cir. 1994).

44. *Carroll*, 98-2 BCA ¶ 29,865 at 147,780.

45. *Id.*

46. *Id.*

47. *Id.*

48. 847 F.2d 1549 (Fed. Cir. 1988). In *Maxima*, the EPA had a contract for typing, photocopying, editing, and related services. The EPA failed to order the contract’s guaranteed minimum quantity during the contract performance period. One year later, the EPA retroactively terminated the contract for the convenience of the government. *Id.* at 1550-1551.

retroactively terminate a fully performed contract to limit its liability for failing to order the contract's minimum amount of goods or services.⁴⁹ Although *Maxima* involved a partial convenience termination on an indefinite-delivery/indefinite-quantity contract versus a requirements contract in *Carroll*, the board concluded that *Maxima* applied to the *Carroll* case because the Air Force invoked the constructive termination for convenience doctrine after completing the requirements contract.

Third, the board held that bad faith, abuse of discretion, or arbitrary or capricious action by the Air Force are not the exclusive bases for recovering lost profit.⁵⁰ The board concluded that the termination for convenience clause required an equitable adjustment in the contract price in the event of a partial termination. In reaching this conclusion, the board relied upon the contracting officer's final decision that allowed Carroll to recover an additional \$15,318.94 including interest. Based on the contracting officer's determination, the board concluded that the partial terminations for convenience under the requirements contract did not prohibit Carroll from recovering lost profit.⁵¹

The termination for convenience doctrine puts an end to the government's massive procurement efforts that accompanied major wars without paying a contractor profits on unperformed work.⁵² Two factors, however, limit the government's broad right to terminate for convenience any government contract. First, the government may not terminate a contract unless it is in the government's interest.⁵³ Second, the contracting officer cannot in bad faith, abuse of discretion, or arbitrarily or capriciously terminate a contract for convenience.⁵⁴

In *John Reiner & Co. v. United States*,⁵⁵ the court stretched the doctrine of termination of convenience by creating the doctrine of constructive termination. By retroactively allowing the government to constructively terminate a contract for convenience, the doctrine prevents a contractor from recovering anticipated profits by nullifying a government breach. Courts and boards generally applied the *Reiner* rule unless a contractor alleges and proves bad faith, abuse of discretion, or arbitrary or capricious government conduct.⁵⁶ Courts and boards have generally treated the government's failure to perform its obligations under a requirements contract as a constructive change or a breach of contract; "If the [g]overnment action is considered

49. The *Maxima* court held:

The termination for convenience clause can appropriately be invoked only in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties. . . . The termination for convenience clause will not act as a constructive shield to protect defendant from the consequences of its decision to follow an option considered but rejected before contracting. . . .

No judicial authority has condoned use of the convenience clause to create a breach retroactively, where there was none, in order to change the government's obligations under a completed contract. *Id.* at 1553-1554.

50. *Carroll*, 98-2 BCA ¶ 29,865 at 147,780.

51. *Id.* After the board denied the Air Force's motion for dismissal, the Air Force and Carroll settled the appeal in the fall of 1998 for under \$5000. Frishberg Interview, *supra* note 38.

52. JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 1073 (3d ed. 1995). The government termination of a contract before the implementation of the termination for convenience doctrine forced the government into a breach of contract. Under the common law breach damages, the contractor was entitled to "anticipatory profits" on unperformed work. *Id.* at 1074.

53. See FAR, *supra* note 35, 52.249-2(a) (Termination for Convenience). The termination clause states, in part: "The [g]overnment may terminate performance of work under this contract in whole or, from time to time, in part if the [c]ontracting [o]fficer determines that a termination is in the [g]overnment's interest." *Id.* Note that the termination does not require that it be in the government's "best" interest.

54. A contractor may prevail over the termination if it can prove there was a specific intent to injure the contractor. *Kelvar Corp. v. United States*, 543 F.2d 1298 at 1301-2 (1976).

55. 163 Ct. Cl. 381, 325 F.2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964).

56. Proving that the government acted in bad faith, abused its discretion, or acted arbitrarily or capriciously is extremely difficult. See *Krygoski Construction Company, Inc. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996). In *Krygoski*, the Air Force awarded the plaintiff a contract to demolish an abandoned missile site in Michigan. During a pre-demolition survey, the plaintiff identified additional areas not included in the original government estimate that required asbestos removal. Due to the substantial cost increase related to additional asbestos removal, the contracting officer decided to terminate the contract for convenience and to reprocure the requirement. The plaintiff sued in the Court of Federal Claims alleging breach of contract. Relying on *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), the trial court found the government improperly terminated *Krygoski's* contract. The court also found that the government abused its discretion in terminating the contract under the standard found in *Kalvar*. See *supra* note 55 and accompanying text. The Court of Appeals for the Federal Circuit reversed and remanded, holding that the Court of Federal Claims incorrectly relied upon *dicta* in the plurality opinion in *Torncello* (*Torncello* stands for the proposition that when the government enters into a contract knowing that it will not nor the contract, it cannot avoid a breach claim by using the termination for convenience clause.). Specifically, the court concluded that the trial court improperly found the change of circumstances insufficient to justify termination for convenience. Although arguably the government's circumstances had changed to meet even the *Torncello* plurality standard, the court declined to reach that issue, because *Torncello* only applies when the government enters a contract with no intention of fulfilling its promises.

a breach, the *Reiner* rule (constructive termination for convenience) has been applied to limit recovery on the theory that a convenience termination was possible and could have been used by the contracting officer.⁵⁷ In *Carroll*, the Air Force apparently relied on the *Reiner* rule and claimed its actions constituted constructive terminations for convenience. Therefore, the Air Force could avoid paying the contractor anticipatory profits (breach cost). Unfortunately, the board never addressed the applicability of the *Reiner* rule in its decision and instead

relied on *Maxima*, which dealt with an indefinite-delivery-indefinite-quantity contract.⁵⁸

Will this issue be raised again? Perhaps not, but it is interesting to note that the board could have at least considered the decisions involving a requirements contract that were constructively terminated for convenience.⁵⁹ Major Hong.

57. CIBINIC & NASH, *supra* note 52, at 1088.

58. An IDIQ is a variable quantity contract that is commonly used when the government has some minimum need for supplies and services, but do not know the full extent of the need or when that need may arise. Unlike a requirements contract, the government must purchase a guaranteed minimum quantity under an IDIQ contract. Under an IDIQ contract, however, there is no prohibition from purchasing the same supplies or services from a competing contractor that is found in a requirements contract. See FAR, *supra* note 35, 16.503, 16.504, 52.216-21 (Requirements), 52.216-22 (Indefinite Quantity).

59. See, e.g., S&W Tire Servs., Inc., GSBGA No. 6376, 82-2 BCA ¶ 16,048.