

conduct by JOHN and the USA, were paid by the USA in a timely fashion by means of a wire transfer by the USA from Washington, D.C. to JOHN's bank account in Miami.

Upon receipt of the transfer, John Doe allegedly made timely insurance premium payments to Beneficios Medicos Internacionales (BMI), an insurance broker located in Miami, Florida, that was to provide insurance through an insurer selected by BMI. Plaintiffs John and Jane Doe further allege that on or about November 1, 1993, a duly authorized representative of the United States (Agent #2) in Latin America informed Mr. Doe that the United States had paid the premium directly to BMI for the period of December 1, 1993 to November 30, 1994. Again, for the purposes of the motion to dismiss, the United States concedes that it breached the oral agreement by failing to pay the health insurance premium due for that policy period. According to the Amended Complaint, BMI terminated insurance effective November 30, 1993, for non-payment of the premium.

The defendant agrees with plaintiffs that on December 26, 1993, while jogging in Latin America, Mr. Doe injured his right lower leg and ankle. As a result of the accident, Mr. Doe broke several bones. Plaintiffs allege that on or about December 28, 1993, after John Doe discovered that he was no longer insured, another duly authorized representative of the United States (Agent #3) assured him that all medical and rehabilitative expenses associated with his injuries would be paid or reimbursed by the United States, because of the lapse of the insurance coverage. According to the plaintiffs, although the United States paid to reinstate the policy effective April 1, 1994, Mr. Doe received no coverage for his injury because it was considered a preexisting condition.

According to the plaintiffs, because John Doe had no insurance coverage in force at the time of his accident, he was unable to afford medical treatment in the United States, but that it was the custom and practice of the prior insurer to authorize treatment of similar injuries in the United States. Moreover, according to plaintiffs, as a result of receiving allegedly inept and inferior medical treatment in Latin America, Mr. Doe's fracture collapsed, his leg developed an abscess, and doctors had to remove part of the bone in his right lower leg. Fearing leg amputation, around October 13, 1994, Mr. Doe began treatment in the United States, where he accumulated approximately \$50,000 in medical expenses, and is expected to incur an additional \$15,000 in medical and rehabilitation expenses. Mr. Doe alleges that if treatment had been obtained originally in the United States, he would have recovered by approximately June 1994. Since June 1994, however, he has undergone four (4) additional surgeries and has been required to continue use of the Ilizarov Frame, an allegedly painful device to facilitate the growing of bones. Mr. Doe alleges that he has suffered physical pain and psychological and emotional stress from the inferior and lengthy treatment he received, from being bedridden for sixteen (16) months, and from being unable to walk without crutches or engage in normal physical activity.

Under a breach of contract claim, Mr. Doe seeks damages in excess of \$500,000 for medical and rehabilitative expenses, lost wages, inability to perform the jobs for which he was trained, pain and suffering, and for his inability to file an insurance claim, since he had no coverage at the time of accident.⁽¹⁾ Mr. Doe seeks lost wages because he alleges that he was unemployed longer than he would have been if he had received the level of treatment that would have been available with insurance coverage. Furthermore, according to plaintiff, because Mr. Doe's background, training, and experience allegedly restrict him to jobs which entail rigorous physical activity, he cannot resume employment until his rehabilitation has been completed. Mr. Doe also claims pain and suffering for the additional medical procedures he has had to endure as a result of not receiving medical care in the United States initially, such as wearing the Ilizarov Frame.

Under a claim for "outrageous conduct causing severe emotional distress," Mr. Doe seeks damages for the serious injuries he received as a result of suffering severe emotional distress due to the alleged

breach of contract and the government's having informed him that the premium had been paid when, in fact, it had not been paid. Mr. Doe also seeks damages under a negligence claim, alleging that the United States breached a duty to notify Mr. Doe in a timely manner of its failure to pay the health insurance premium before a lapse occurred, when the government incorrectly informed Mr. Doe that the United States had paid the premium. According to the plaintiffs, such a breach prevented Mr. Doe from paying the premium himself, directly and proximately causing further damage.

Mr. Doe's wife, Jane Doe, alleges that because of the breach of contract, she sustained and will continue to sustain damages from the loss of consortium in that Mr. Doe's injuries force the Does to lead their lives subject to the limitations imposed by Mr. Doe's physical problems.

DISCUSSION

When considering a motion to dismiss, the court may consider all relevant evidence in order to resolve any disputes as to the truth of the jurisdictional facts alleged in the complaint. Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988). The court is required to decide any disputed facts which are relevant to the issue of jurisdiction. Id. at 747.

The standard for weighing the evidence presented by the parties when evaluating a motion to dismiss for lack of jurisdiction, pursuant to RCFC 12(b)(1), and/or a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to RCFC 12(b)(4), has been articulated by the United States Supreme Court and the United States Court of Appeals for the Federal Circuit, as follows: "in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); accord Hamlet v. United States, 873 F.2d 1414, 1416 (Fed. Cir. 1989); see also Alaska v. United States, 32 Fed. Cl. 689, 695 (1995), appeal dismissed, 86 F.3d 1178 (Fed. Cir. 1996). In rendering a decision, the court must presume that the undisputed factual allegations included in the complaint by plaintiff are true. Reynolds v. Army & Air Force Exch. Serv., 846 F.2d at 746; Miree v. DeKalb County, 433 U.S. 25, 27 n.2 (1977); Alaska v. United States, 32 Fed. Cl. at 695.

The burden of establishing jurisdiction is on the plaintiff. McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178, 189 (1936); Alaska v. United States, 32 Fed. Cl. at 695; Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399, 404 (1994). The court should not grant a motion to dismiss, however, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Nonetheless, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983).

In order for this court to have jurisdiction over plaintiff's complaint, the Tucker Act, 28 U.S.C. § 1491 (1994), requires that a substantive right, which is enforceable against the United States for money damages, must exist independent of 28 U.S.C. § 1491. The Tucker Act provides:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States 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 liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). The Tucker Act, however, merely confers jurisdiction on the United States Court of Federal Claims; it does not create a substantive right enforceable against the United States for

money damages. United States v. Mitchell, 445 U.S. 535, 538, reh'g denied, 446 U.S. 992 (1980) (Mitchell I); United States v. Testan, 424 U.S. 392, 398-99 (1976); United States v. Connolly, 716 F.2d 882, 885 (Fed. Cir. 1983) (en banc), cert. denied, 465 U.S. 1065 (1984).

Moreover, a waiver of the traditional sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969). The individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity. United States v. Testan, 424 U.S. at 398. Stated otherwise, "in order for a claim against the United States founded on statute or regulation to be successful, the provisions relied upon must contain language which could fairly be interpreted as mandating recovery of compensation from the government." Cummings v. United States, 17 Cl. Ct. 475, 479 (1989), aff'd, 904 F.2d 45 (Fed. Cir. 1990); see also United States v. Mitchell, 463 U.S. 206, 216-17 (1983) (Mitchell II) (citing United States v. Testan, 424 U.S. at 400 (quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967))); Duncan v. United States, 229 Ct. Cl. 120, 138, 667 F.2d 36, 47 (1981), cert. denied, 463 U.S. 1228 (1983).

This court's predecessor, the United States Court of Claims, articulated the jurisdiction of this court, pursuant to 28 U.S.C. § 1491, in Eastport Steamship Corp. v. United States, 178 Ct. Cl. 599 (1967), as follows:

Section 1491 of Title 28 of the United States Code allows the Court of Claims to entertain claims against the United States '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 liquidated or unliquidated damages in cases not sounding in tort'. But it is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money.

Id. at 605 (citations omitted).

Although the plaintiffs offer only verbal allegations to constitute proof that the United States breached a verbal contract with Mr. Doe to pay Mr. Doe's health insurance premium, the defendant has accepted certain allegations as true "solely for purpose of this motion to dismiss." The defendant admits that "Mr. Doe was an independent contractor or employee of the United States in Latin America between 1980 and June 30, 1994," that "the United States entered into a verbal contract . . . to pay Mr. Doe's health insurance premium in return for Mr. Doe's services," and that "the United States breached that oral agreement by failing to pay the premium due for the policy period of December 1, 1993, to November 30, 1994." Therefore, at least for the purposes of this motion to dismiss, defendant, by acknowledging a breach, has acknowledged that a valid contract was entered into by the United States, for which reason the details of any employment contract, secret or otherwise, between the United States and plaintiff John Doe need not be revealed or proven at this time.

Defendant, nonetheless, argues that the court should dismiss the plaintiffs' complaint based on a doctrine expounded many years ago by the United States Supreme Court in Totten v. United States, 92 U.S. 105 (1875). The Totten case holds that a secret contract with the United States for covert services is not judicially enforceable because (1) parties to the secret agreement implicitly agree to keep the contract confidential; and (2) litigation of secret agreements would jeopardize national security and covert information gathering. Id. at 106-07. In Totten, the court wrote:

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this

principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Id. at 107. As also stated by the United States Supreme Court: "The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." Id. In Totten, the services to be provided were for a secret purpose, and the fact of employment and the nature of the services were both intended to be concealed, unlike the openly acknowledged contractual agreement at issue before this court, to purchase insurance coverage for plaintiff John Doe.⁽²⁾

At least at this juncture, for the purpose of the motion to dismiss, having conceded a breach of contract by the defendant regarding purchase of insurance, the parties avoid having to explore any underlying employment contract which may have existed between the parties. Moreover, regarding the contract to provide insurance coverage, the risk of exposing an alleged underlying secret employment contract is limited and any threat to the national security or inter-government operations is slight at this time. Furthermore, in the papers currently on file with the court, no allegations have been made that any confidences have been breached to date. As discussed above, even if the underlying employment contract between the United States and John Doe was one for covert services, the government's stipulation of contractual liability forecloses defendant's attempt to rely on the Totten doctrine. Defendant's motion to dismiss based on the Totten doctrine, therefore, must be denied at this time.

As is discussed below, although certain portions of plaintiffs' claims are beyond the jurisdiction of the court and must be dismissed, the court will schedule further proceedings regarding the breach of contract portion of plaintiffs' claims. Certainly, the court and the parties must continue to apply proper safeguards during any future proceedings in order to avoid any unwarranted disclosures regarding national security matters that might arise, in which case it might be appropriate for the government to properly invoke the state secrets privilege.⁽³⁾ See also United States v. Reynolds, 345 U.S. 1 (1952); In re United States, 872 F.2d 472, 474-79 (D.C. Cir. 1989) (urging disentangling sensitive information from non-sensitive information, and that the use of a bench trial would reduce the threat of unauthorized disclosure of sensitive material). See also Monarch Assurance P.L.C. v. United States, 36 Fed. Cl. 324, 326 (1996) (discussing a court's decision not to immediately and automatically apply the Totten doctrine), and United States v. Ehrlichman, 376 F. Supp. 29, 32 n.1 (D.D.C. 1974) (rejecting use of Totten because of its inapplicability in criminal actions and because the Totten doctrine "has been modified by a century of legal experience, which teaches that the courts have broad authority to inquire into national security matters so long as proper safeguards are applied to avoid unwarranted disclosures").

Plaintiffs John and Jane Doe's claims alleging negligence by government officials, outrageous conduct causing extreme emotional distress, and loss of consortium are claims primarily sounding in tort, however, and as such are not within the jurisdictional purview of this court. 28 U.S.C. § 1491(a)(1) (1994). The jurisdictional statute of this court, the Tucker Act, 28 U.S.C. § 1491(a)(1), specifically states that this court does not have jurisdiction over claims "sound[ing] in tort." See Brown v. United States, 105 F.3d 621, 623, reh'g denied, April 17, 1997 (Fed. Cir. 1997); Shearin v. United States, 992 F.2d 1195, 1197 (Fed. Cir. 1993). In reviewing the jurisdiction of this court, the United States Court of Appeals for the Federal Circuit has stated the following:

It is well settled that the United States Court of Federal Claims lacks --and its predecessor the United States Claims Court lacked -- jurisdiction to entertain tort claims. The Tucker Act expressly provides

that the 'United States Court of Federal Claims shall have jurisdiction . . . in cases not sounding in tort.' 28 U.S.C. § 1491(a)(1) (1988) (emphasis added), as amended by Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506; see Aetna Casualty and Surety Co. v. United States, 655 F.2d 1047, 1059, 228 Ct. Cl. 146 (1981).

Shearin v. United States, 992 F.2d at 1197. Jurisdiction to hear tort claims is exclusively granted to the United States District Courts under the Federal Tort Claims Act. 28 U.S.C. 1346(b) (1994); see also Wood v. United States, 961 F.2d 195, 197 (Fed. Cir. 1992); Martinez v. United States, 26 Ct. Cl. 1471, 1476 (1992), aff'd, 11 F.3d 1069 (Fed. Cir. 1993). Plaintiff John Doe's claims for monetary damages, which arise out of alleged negligent and wrongful conduct of the defendant in the course of discharging official duties, are claims sounding in tort. See, e.g., Smithson v. United States, 847 F.2d 791, 794 (Fed. Cir. 1988), cert. denied, 488 U.S. 1004 (1989) (allegations of malfeasance by government officials); Berdick v. United States, 222 Ct. Cl. 94, 99, 612 F.2d 533, 536 (1979) (allegations of intentional infliction of emotional distress and interference with business relationships); Curry v. United States, 221 Ct. Cl. 741, 746, 609 F.2d 980, 982-83 (1979) (allegations of alleged emotional distress, anguish and humiliation); Blazavich v. United States, 29 Fed. Cl. 371, 374 (1993) (allegations of loss of a box by the postal service). Therefore, this court has no jurisdiction over those of plaintiffs' allegations which may be characterized as actions sounding in tort.

Plaintiffs, nonetheless, contend that this court may hear the claims for negligence, outrageous conduct causing extreme emotional disturbance, and loss of consortium because they were foreseeable from the breach of contract. This court, however, has no jurisdiction over such claims which primarily sound in tort. Although there are instances in which this court, or its predecessor court, have found jurisdiction to adjudicate tortious breaches of contract, they were not torts of such a nature as to be independent of the underlying contract so as to preclude jurisdiction under the Tucker Act, Chain Belt Co. v. United States, 127 Ct. Cl. 38, 54, 115 F. Supp. 701, 711-12 (1953), and the litigation proceeded as an action for breach of contract. The test was articulated as "whether there has been in effect a 'tortious' breach of contract, rather than a tort independent of the contract." H.H.O., Inc. v. United States, 7 Ct. Cl. 703, 706 (1985). In the above-captioned case, due to defendant's admission that a breach of contract occurred, whether tortious or otherwise, plaintiffs' claim for breach of contract may proceed as of this time.

The general rule in common law breach of contract cases is to award damages which will place the injured party in as good a position as a plaintiff would have been had the breaching party fully performed. See Estate of Berg v. United States, 687 F.2d 377, 379 (Ct. Cl. 1982); Northern Helix Co. v. United States, 207 Ct. Cl. 862, 875, 524 F.2d 707, 713 (1975), cert. denied, 429 U.S. 866 (1976) (citing Restatement of Contracts § 329, Comment a at 504 (1932)); J. D. Hedin Constr. Co. v. United States, 197 Ct. Cl. 782, 803, 456 F.2d 1315, 1327-28 (1972); G. L. Christian & Assocs. v. United States, 160 Ct. Cl. 1, 312 F.2d 418, cert. denied, 375 U.S. 954 (1963). With respect to breach of contract actions, a plaintiff can only recover damages which are foreseeable at the time of the making of the contract, not at the time of the breach. Globe Ref. Co. v. Lanada Cotton Oil Co., 190 U.S. 540, 544 (1903); Prudential Ins. Co. of America v. United States, 801 F.2d 1295, 1300 (Fed. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) (citing United States v. Allegheny County, 322 U.S. 174, 183 (1944)) (holding that in order for damages to be recoverable as consequential or special under a government contract for property lease, they must have been foreseeable by the tenant at the time the lease agreement was executed). The damages must have been caused by the breach, and expenses which would properly have been incurred regardless of breach are not recoverable on a breach of contract action. Boyajian v. United States, 423 F.2d 1231, 1235-42 (Ct. Cl. 1970) (rejecting the "total cost" method of computing damages). "[D]amages are ordinarily limited to the natural and probable consequences of the breach complained of, and the damages remotely or consequently resulting from the breach are not allowed." William C. Ramsey v. United States, 121 Ct. Cl. 426, 433 (1951), cert. denied, 343 U.S. 977 (1952). In order for a damage to qualify as direct, "there must appear no intervening incident * * * the cause must produce the effect

inevitably and naturally, not possibly nor even probably." Id. (quoting Myerle v. United States, 33 Ct. Cl. 1, 27 (1897)). The court does not award damages based on unearned gain or anticipatory profits. See General Builders Supply Co. v. United States, 409 F.2d 246, 251 (Ct. Cl. 1969).

Lost wages are not a proper element of damages for breach of the contract to pay plaintiff John Doe's health insurance premium because the loss of such wages is not a reasonable and natural consequence of the failure to pay the health insurance premium. That the nonpayment of the health insurance premium would cause plaintiff to forego similar employment for an indefinite period of time could not have been reasonably foreseen by the government, nor is there any indication in the record that plaintiff would have secured or continued in similar employment, but for his injuries. Similarly, plaintiffs' claims for damages due to pain and suffering, both physical and emotional, were not foreseeable from the contract to pay insurance premiums and were not necessarily in the contemplation of the parties when the agreement was made. See William C. Ramsey v. United States, 121 Ct. Cl. at 434-35 (holding that anticipated profits of the entire business are not a proper element of damages, because the capital shortage allegedly caused by the government's failure to pay contract amounts when due was too remote to be identified as a natural consequence of the failure to pay).

Where the fact of damage has been established, as in plaintiffs' case, utter certainty or precise mathematical accuracy as to the amount of damages is not necessary. See Dale Constr. Co. v. United States, 168 Ct. Cl. 692, 729 (1965). The claimant, however, bears the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation. Willems Indus., Inc. v. United States, 155 Ct. Cl. 360, 376 (1961) (citing Winn-Senter Constr. Co. v. United States, 110 Ct. Cl. 34, 63 (1948)). In the instant case, the record is incomplete. Even with defendant's concession that a breach of contract occurred, in order to recover, plaintiff John Doe will still have to present documentation of his damages to the court.

CONCLUSION

Based on the filings presented to this court, defendant's motion to dismiss, pursuant to RCFC 12(b)(1) for lack of jurisdiction over the subject matter, is **GRANTED** for those of plaintiffs' claims which sound in tort, including those for outrageous conduct causing emotional distress, negligence, and loss of consortium. Based on defendant's admission that it breached a contract with plaintiff John Doe to purchase insurance for him, defendant's motion to dismiss plaintiffs' claim for breach of contract is **DENIED** at this time. Plaintiffs' claim for breach of contract may proceed in this court, with damages limited to the costs and expenses described above.

IT IS SO ORDERED.

MARIAN BLANK HORN

Judge

1. The plaintiffs submitted copies of insurance policies as exhibits to their amended complaint. The copies of the insurance policies included in the record, however, pertain to the coverage period beginning April 1994, rather than December 1, 1993 to November 30, 1994, the period of time for which Mr. Doe would have been covered had the United States paid the premium at issue and during which time the plaintiff John Doe's injury occurred. These insurance policies issued by European Specialty Assurance Co., Ltd. provided for disability coverage of \$150,000.00 and \$25,000.00, respectively. Additionally, the insurance policies in the record only concern "Permanent Total Disability

Coverage," and do not expressly permit coverage for medical care obtained in the United States. In fact, one of the exhibits specifically states that the insured can only collect the Permanent Total Disability benefit if he is medically certified to be disabled after a period of continuous disability of not less than one year and such condition will be permanent. Although the Amended Complaint indicates that the recovery time will be lengthy, it is unclear from the record, or the allegations, however, whether Mr. Doe's injuries are permanent.

2. Defendant also cites De Arnaud v. United States, 151 U.S. 483 (1894); Vu Duc Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988), cert. denied, 490 U.S. 1023 (1989); and Mackowski v. United States, 228 Ct. Cl. 717 (1981) as supporting the proposition that plaintiff's claim should be dismissed based on the Totten doctrine. However, the instant case is distinguishable from each of the cases cited. Nowhere in any of the cases cited by the defendant did the United States concede a breach of contract. Also, in the other cases cited by the defendant, specific protected information was implicated requiring identification of particular employers and job activities, while in the instant case, only the broad categories of the "United States" and "employee or contractor" are identified. In De Arnaud, although the United States Court of Claims dismissed the plaintiff's petition on the basis of the Totten doctrine, the United States Supreme Court did not pass on the Totten issue, instead choosing to dispose of the case by allowing other defenses. De Arnaud v. United States, 151 U.S. at 492-93. In Vu Duc Guong, the court wrote "[i]n effect, plaintiff concedes that he cannot prevail without revealing or compromising government secrets," and suggests stipulating that the plaintiff was employed in a covert CIA sabotage group. Vu Duc Guong v. United States, 860 F.2d at 1066. In Mackowski, the government did not admit the breach, or even existence, of a contract, and plaintiff, herself, alleged that she was an employee of the CIA. The court concluded that: "[I]t is obvious the claim could not be prosecuted or defended without revealing secret matters which should not be disclosed." Mackowski v. United States, 228 Ct. Cl. at 720. Plaintiff John Doe does not allege that he worked for the CIA or other government organization involved in covert activities, instead plaintiffs merely allege that John Doe was an independent contractor or employee of the United States. Thus, in the above-captioned case, the court need not explore any secret employment relationships, if they existed, because the government has conceded that it breached its contractual obligation to provide plaintiff John Doe with insurance coverage.

3. The court also notes that the state secrets privilege must be formally and properly invoked by the head of the agency which has control over the matter after personal consideration by that officer. See United States v. Reynolds, 345 U.S. at 7-8. In the above-captioned case, no such determination by the head of the agency has been offered to the court, and the only claim of the privilege by the defendant is included in briefs filed with the court by defendant's counsel in support of defendant's motion to dismiss.