

U.S. COURT OF FEDERAL CLAIMS

MEMORANDUM

September 22, 2015

To: Chief Judge Campbell-Smith, Chairman, U.S. Court of Federal Claims Advisory Council

Copy to: Members of Committee on Takings & Tribal Claims

From: Thomas C. Wheeler

Re: Recommendations from the Committee on Takings & Tribal Claims

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I am forwarding with this memorandum, two proposals addressing procedural issues identified by our Committee as worthy of consideration by the Court's Advisory Council.

The first addresses our Court's Rule 68, Offer of Judgment, which currently provides incentives for plaintiffs in our Court to accept offers from defendants prior to trial. Nancie Marzulla, an attorney in private practice and a member of the Committee on Takings & Tribal Claims, has provided to the Committee her extensive study of the Rule and use of similar rules in other jurisdictions. At our last meeting the Committee discussed modifying Rule 68 to make it equally applicable to both parties and thus increase settlement possibilities. Our members representing the Department of Justice had reservations about the change and about the utility of the Rule in general, but agreed that it should be referred to the Advisory Council for discussion.

The second proposal is a response to the recent U.S. Supreme Court decision in the Wong case, United States v. Kwai Fun Wong, 135 S.Ct. 1625 (2015). That decision upheld equitable tolling of the statute of limitations to sustain jurisdiction under the Federal Tort Claims Act. However, the Supreme Court did not extend the tolling concept to the statute of limitations within the Tucker Act, leaving in place John R. Sand & Gravel Company v. United States, 552 U.S. 130 (2008), which holds that the Tucker Act statute of limitations is jurisdictional and cannot be waived. Professor Greg Sisk, a law professor and member of our Committee, has drafted proposed amendments to 28 U.S.C. § 2401 and § 2501 to place our statute of limitations on equal footing with that of the Federal Tort Claims Act. You will see that the addition of one sentence in each section would accomplish this amendment.

At our next Advisory Council meeting, I can make a brief introduction of these two recommendations and then have Ms. Marzulla and Professor Sisk respectively, provide a more detailed treatment of each subject.

Attachments: (1) Marzulla, Can Rule 68 Be Made a More Effective Tool for Settlement?

(2) Sisk, Proposed Amendments to 28 U.S.C. § 2401 and § 2501, with Wong slip opinion