

---

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

HAROLD WEISBERG,

Appellant/Cross-Appellee,

v.

U.S. DEPARTMENT OF JUSTICE

Appellee/Cross-Appellant.

---

AND CONSOLIDATED Nos. 82-1274  
83-1722 and 83-1764

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

SUPPLEMENTAL BRIEF FOR THE APPELLEE/CROSS-APPELLANT

---

RICHARD K. WILLARD  
Acting Assistant Attorney General

STANLEY S. HARRIS  
United States Attorney

LEONARD SCHAITMAN  
JOHN S. KOPPEL  
Attorneys, Appellate Staff  
Civil Division, Room 3617  
Department of Justice  
Washington, D.C. 20530  
Telephone: (202) 633-5459

---

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 82-1229

---

HAROLD WEISBERG,

Appellant/Cross-Appellee,

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant.

---

AND CONSOLIDATED Nos. 82-1274,  
83-1722 and 83-1764

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

SUPPLEMENTAL BRIEF FOR THE APPELLEE/CROSS-APPELLANT

---

Pursuant to the Court's order of February 4, 1985, defendant-appellee/cross-appellant Department of Justice hereby files the instant brief to address the following two questions:

1. Whether the Court has jurisdiction over the FOIA claims decided in Part II A in the panel opinion.

2. Assuming arguendo that the answer to question 1 is in the affirmative, whether the Court has jurisdiction over the contract and promissory estoppel claims decided in Part II B of

the panel opinion, based upon pendent jurisdiction or any other branch of jurisdiction.

As we explain below, we believe that both questions should be answered in the affirmative.

THIS COURT HAS JURISDICTION TO  
DECIDE NOT ONLY THE FOIA CLAIMS,  
BUT THE ENTIRE "CASE."

28 U.S.C. 1295(a)(2) provides that the Court of Appeals for the Federal Circuit shall have exclusive jurisdiction over "an appeal from a final decision of a district court of the United States, \* \* \* , if the jurisdiction of that court was based, in whole or in part," on 28 U.S.C. 1346. This provision became effective on October 1, 1982, but does not apply to "any case in which a notice of appeal has been filed in a district court of the United States prior to the effective date of th[e] Act." Pub. L. 97-164, §403(e), 96 Stat. 58.

Section 1295(a)(2) is potentially implicated here by virtue of plaintiff's consultancy agreement claim. However, regardless of whether this Court would otherwise have had jurisdiction over this case, the case is properly on appeal to this Court because of the clear applicability of the transition provision.<sup>1</sup>

---

<sup>1</sup> It is far from certain that the district court actually had jurisdiction under 28 U.S.C. 1346(a)(2) in this case. Although the district court purported to base its jurisdiction over plaintiffs' consultancy fee claim upon 28 U.S.C. 1346(a)(2), we believe that plaintiff's contract claim was so deficient on its face that the court lacked subject matter jurisdiction. See, e.g., McNutt v. General Motors Corporation, 298 U.S. 178, 189

(CONTINUED)

The transition provision of the Federal Courts Improvement Act preserves the jurisdiction of this Court over this entire case, since it covers "any case in which a notice of appeal has been filed in a district court \* \* \* prior to the effective date of th[e] Act." Ibid. In the case at bar, two notices of appeal had been filed early in 1982 and remained pending, having been stayed by this Court pending disposition of all motions remaining in the district court.<sup>2</sup> See Order of April 8, 1982.

---

<sup>1</sup> (FOOTNOTE CONTINUED)

(1935) (plaintiff must establish relevant facts supporting court's jurisdiction); Kania v. United States, 650 F. 2d 264, 267-69 (Ct. Cls. 1981); Consortium Ventures v. United States, 5 Cls. Ct. 801, 802-803 (Cls. Ct. 1984), appeal pending. In particular, here, as in Kania and Consortium Ventures, plaintiff's failure to establish the authority of the persons with whom he allegedly contracted is a fatal jurisdictional flaw. Since the district court therefore lacked jurisdiction over plaintiff's consultancy claim, its jurisdiction did not rest "in whole or in part" on 28 U.S.C. 1346, and the case is not within the jurisdiction of the Federal Circuit. Cf. Doe v. Department of Justice, No. 84-5006, slip op. at 14-16 (D.C. Cir. Feb. 1, 1985); Maier v. Orr, No. 84-985, slip op. at 17-18 (Fed. Cir. Feb. 4, 1985) (attached, Addendum); In Re Snap-On Tools Corporation, 720 F. 2d 654, 655 (Fed. Cir. 1983).

Although we briefed the authority issue at some length in our opening brief (at 38-39 n. 14), the Court did not need to reach it in its opinion. Since this question may now be important for jurisdictional purposes, however, we reiterate our argument on this point. However, since the transition provision gives this Court jurisdiction over the entire case, the Court need not reach the separate question of whether, absent the transition provision, it would have possessed jurisdiction over the case in any event.

<sup>2</sup> Indeed, we note that one of these notices of appeal was plaintiff's notice of appeal, timely filed under Rule 4(a)(3), Fed. R. App. P., from the district court's orders of December 4, 1981 and January 5, 1982, granting the Department's motion for summary judgment on the merits of plaintiff's FOIA claims and

(CONTINUED)

The view that §403(e) of the Federal Courts Improvement Act exempts from Federal Circuit jurisdiction the entire "case" in which "a" notice of appeal was filed and pending prior to October 1, 1982 is buttressed by an examination of the language and legislative history of the Federal Courts Improvement Act. 28 U.S.C. 1295(a)(2)--§127(a) of that Act--confers on the Federal Circuit exclusive jurisdiction over "an appeal from a final decision" of a district court if district court jurisdiction rested wholly or partly on 28 U.S.C. 1346(a)(2); this language plainly incorporates the finality requirements of 28 U.S.C. 1291 and Rule 54(b), Fed. R. Civ. P. In contrast, §403(e) of the Federal Courts Improvement Act preserves for the customary appellate route any "case" in which "a" notice of appeal was filed prior to October 1, 1982; thus, if this Court had jurisdiction over plaintiff's FOIA claims prior to October 1, 1982--as it plainly did, since plaintiff had taken an appeal under 28 U.S.C. 1292(a)--then the Court had jurisdiction to

---

<sup>2</sup> (FOOTNOTE CONTINUED)

dismissing this action. D.E. 238. Thus, plaintiff had filed an appeal under 28 U.S.C. 1292(a)(1) from the district court's complete resolution of his FOIA claims long before the October 1, 1982 effective date of the Federal Courts Improvement Act. See Center For National Security Studies v. Central Intelligence Agency, 711 F. 2d 409, 410-14 (D.C. Cir. 1983). The validity of plaintiff's appeal is not undermined by Rule 54(b), Fed. R. App. P., since that rule does not apply to appeals taken under 28 U.S.C. 1292(a)(1). See, e.g., Pang-Tsu Mow v. Republic of China, 201 F. 2d 195, 197 (D.C. Cir. 1952); Wright and Miller, Federal Practice and Procedure, §§2658.1, 2962- (2d ed. 1983). For the same reason, plaintiff's Rule 59(e) motion to amend the judgment (D.E. 232) does not affect the validity of his appeal of March 12, 1982.

decide the entire case under §403(e).

As this Court has recently recognized, it is a "common sense principle of statutory construction that 'clear use of different terminology within a body of legislation is evidence of an intentional differentiation.'" Wydra v. Law Enforcement Assistance Administration, 722 F. 2d 834, 839 (D.C. Cir. 1983), citing Lankford v. Law Enforcement Assistance Administration, 620 F. 2d 35, 36 (4th Cir. 1980), and Russell v. Law Enforcement Assistance Administration, 637 F. 2d 354, 356 (5th Cir. 1981). This "common sense principle of statutory construction" is particularly applicable in the instant case, since Congress itself has characterized the transition provision as a "fairly detailed" measure designed to "provide for the orderly disposition of [pending] cases" and to reduce ambiguities to a minimum. H. R. Rep. No. 97-312, 97th Cong., 1st Sess. 50 (1981). Congress plainly chose the word "case" carefully and deliberately. Cf. also §§403(a)-(d) (discussing disposition not only of pending "case[s]," but of pending "matter[s]" and "petition[s] for rehearing"). Its considered language resolves any doubts regarding the Court's jurisdiction in the instant case.

Thus, under §403(e) of the Federal Courts Improvement Act, this Court retains jurisdiction not only of plaintiff's FOIA claims, but of the rest of the "case" as well. This approach is in keeping with the Federal Courts Improvement Act's emphasis on avoidance of bifurcated appeals (see, e.g., Atari, Inc. v. JS & A Group, 747 F. 2d 1422, 1435-36 (Fed. Cir. 1984) (en

banc), as well as with the plain language of the statute.<sup>3</sup>

---

<sup>3</sup> As we have demonstrated above, §403(e) of the Federal Courts Improvement Act gives this Court jurisdiction to decide the entire case here, including plaintiff's contract and estoppel claims. Assuming arguendo, however, that this Court determines that it only had jurisdiction under the transition provision of the Federal Courts Improvement Act to decide plaintiff's FOIA claims, and that the jurisdiction of the district court rested in part on 28 U.S.C. 1346 (see n. 1, supra), we do not believe that the doctrine of pendent jurisdiction may be applied to give the Court jurisdiction over the whole case.

28 U.S.C. 1295(a)(2) gives the Federal Circuit exclusive jurisdiction over any final decision in which the jurisdiction of the district court rested in whole or in part on 28 U.S.C. 1346. Thus, application of the doctrine of pendent jurisdiction would be inconsistent with the statutory scheme. It would enable parties and courts to circumvent the clear mandate of the statute in cases where the jurisdiction of the district court rested in part on 28 U.S.C. 1346. The exercise of pendent jurisdiction in this context therefore would swallow up the very rule that 28 U.S.C. 1295(a)(2) purports to establish. Cf. Atari, supra.

In short, unless the transition provision of the Federal Courts Improvement Act gives this Court jurisdiction to decide the entire case, or the jurisdiction of the district court did not rest in part on 28 U.S.C. 1346, the Court cannot properly exercise jurisdiction over plaintiff's contract and estoppel claims. The Court need not reach this issue, however, because the transition provision does give this Court jurisdiction to decide the entire case, and alternatively because the district court's jurisdiction did not rest in part on 28 U.S.C. 1346.

CONCLUSION

For the foregoing reasons, this Court should hold that it possessed jurisdiction to decide this case in its entirety.

Respectfully submitted,

RICHARD K. WILLARD  
Acting Assistant Attorney General

STANLEY S. HARRIS  
United States Attorney

LEONARD SCHAITMAN  
JOHN S. KOPPEL  
Attorneys, Appellate Staff  
Civil Division, Room 3617  
Department of Justice  
Washington, D.C. 20530  
Telephone: (202) 633-5459

MARCH 1985



CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 1985, I served the foregoing Supplemental Brief For The Appellee/Cross-Appellant upon counsel of record by causing two copies to be mailed, postage prepaid, to:

James H. Lesar, Esquire  
1000 Wilson Blvd., Suite 900  
Arlington, VA 22209

  
JOHN S. KOPPEL (202) 633-5450  
Attorney