Stephanie Tatham

Subject: Section 1500 comments

From: Dan Syrdal
Sent: Tuesday, October 16, 2012 12:58 PM
To: Comments
Cc: 'Dave Keenan'; Parris, Mark; Stephanie Tatham
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To Whom It May Concern:

On further review of the most recent draft from ACUS, it has come to my attention that its proposed amendatory language may not cover many plaintiffs who have already finally disposed of their actions in other courts and are only left with those pending in the Federal Court of Claims. This could have the unintended and unfair effect of the proposed changes not applying retroactively to those plaintiffs.

Though the Conference is clear in its Preamble that it seeks to ameliorate the harms imposed upon litigants as a result of the current operation of 28 U.S.C. § 1500 in light of the Supreme Court's decision in Tohono, the Conference's proposed language regarding the presumption of a stay would only serve as a case management tool for cases that are pending before the Court of Federal Claims and "any other court." As helpful as this language is to some litigants, it does not appear to address the more difficult situation faced by the many litigants who long ago disposed of their claims in "any other court," but who are now facing jurisdictional bars in the Court of Federal Claims by virtue of the decision in Tohono, which effectively operates to deprive the Court of Federal Claims of jurisdiction retroactively. For example, my client, Resource Investments, Inc., resolved its claims in United States District Court and the Court of Appeals many years ago, but as a result of the Tohono decision, is now facing the potential that the Court of Federal Claims will be deprived of jurisdiction. Many other parties are similarly situated, and the Conference's proposed language concerning the presumption of a stay will be of no aid to those parties because they no longer have a claim pending in "any other court."

If Congress merely repeals the current enactment of 28 U.S.C. § 1500 and replaces it with the Conference's proposed language regarding the presumption of a stay, it is possible that the jurisdictional bar that operated under the repealed statute would continue to apply to pending cases that do not fit within the Conference's current proposal, i.e., cases which are no longer pending before "any other court." See 1 U.S.C. § 109 (specifying in relevant part that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.").

To address the injustice that would otherwise be visited upon parties such as my client, the Conference should consider proposing that, in repealing the prior enactment of 28 U.S.C. § 1500, Congress clearly express that any jurisdictional bar that operated upon cases pending at the time of repeal is no longer valid and that any court that was deprived of jurisdiction as a result of the interpretation and application of Tohono shall have its jurisdiction restored in order to serve the ends of justice. The express retroactivity language is important, because if Congress is express on this point, courts will not inquire further on the question of whether the statute applies retroactively. See Gay v. Sullivan, 966 F.2d 1124, 1127 (7th Cir. 1992) ("The court should have first decided whether Congress had a more specific intention regarding whether the law should apply retroactively. Only if congressional intent on that point is unclear does the remedial/substantive distinction come into play."). Moreover, the remedial nature of the new statute should be manifest to avoid any confusion. See Harrison v. Otis Elevator Co., 935 F.2d 714, 719 (5th Cir. 1991) ("It is well settled that legislation that is interpretive, procedural, or remedial must be applied retroactively, while substantive amendments are given only prospective application.").

Thus, in addition to the Conference's proposed language concerning the presumption of a stay, the Conference should consider a separate proposed provision regarding pending cases that would otherwise fall outside of the new statute:

Section 1500(a). Presumption of Stay. Whenever a civil action is pending in the United States Court of Federal Claims, or on appeal from the Court of Federal Claims, and the plaintiff or his assignee also has pending in any other court (as defined in section 610 of this title) any claim against the United States or an agency or officer thereof involving substantially the same operative facts, the court presiding over the later filed action shall stay the action, in whole or in part. If such actions or appeals were filed on the same day, regardless of the time of day, the United States Court of Federal Claims action shall be deemed to have been filed first. This provision shall not apply if the parties otherwise agree, when the second filed action is an appeal pending in an appellate court, or if the stay is not in the interest of justice. The presumption of a stay shall apply to all cases pending at the time this provision is adopted.
Section 1500(b). Other Pending Cases. As to cases pending at the time of the repeal of the prior enactment of 28 U.S.C. § 1500, it is the intent of Congress that any jurisdictional bar that existed by prior operation and judicial interpretation of the previous statute shall be inapplicable to said pending cases, and that any court that was previously deprived of jurisdiction by virtue of the operation and interpretation of the previous statute shall have its jurisdiction restored as to such pending cases.

Sincerely,
Dan Syrdal