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2012

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## Recommended Citation

21 Federal Circuit Bar Journal 686 (2012)

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# Affirmatively Inefficient Jurisprudence?: Confusing Contractors' Rights to Raise Affirmative Defenses with Sovereign Immunity

Steven L. Schooner\* & Pamela J. Kovacs\*\*

*It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals.*<sup>1</sup>

*Since a party cannot know what her defense is until she hears the claim leveled against her, it seems that it would be nearly impossible for a party to submit future hypothetical defenses to the administrative claims procedure—defenses to lawsuits which may not yet have [been] brought against her or which may never be brought at all.*<sup>2</sup>

## Introduction

With its 2010 decision in *M. Maropakis Carpentry v. United States*,<sup>3</sup> the U.S. Court of Appeals for the Federal Circuit upset the commonly understood rules of practice and procedure for government contracts dispute litigation. The *Maropakis* court, in what the Supreme Court might view as a drive-by jurisdictional ruling,<sup>4</sup> held that a contractor must file its own claim for time extensions before it can defend against a government claim for liquidated damages.<sup>5</sup> Initially, many feared that the decision would create a significant,

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<sup>1</sup> Abraham Lincoln, First Annual Message (Dec. 3, 1861), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 35, 44 (Roy P. Basler ed., 1953).

<sup>2</sup> Nat'l Union Fire Ins. Co. v. City Sav., F.S.B., 28 F.3d 376, 395 (3rd Cir. 1994).

<sup>3</sup> *M. Maropakis Carpentry v. United States (Maropakis II)*, 609 F.3d 1323 (Fed. Cir. 2010).

<sup>4</sup> See *infra* text accompanying notes 176–185.

<sup>5</sup> *Maropakis II*, 609 F.3d at 1331–32.

disruptive, and—from the contractors’ perspective—disadvantageous change in procedural posture for a large number of contractors defending against government claims.<sup>6</sup> These fears rapidly evolved into reality with two U.S. Court of Federal Claims (“COFC”) cases interpreting *Maropakis*.<sup>7</sup> Accordingly, practitioners now can confirm that the change breeds inefficiency and uncertainty in the contract disputes process, thereby increasing costs for both contractors and the government (without providing any corresponding benefit).<sup>8</sup> If unchecked, *Maropakis* may reflect one of the most significant changes in government-contracts litigation posture since the flurry of jurisdictional litigation following the late-1970s enactment of the Contract Disputes Act (“CDA” or “the Act”).<sup>9</sup>

This is particularly frustrating to the extent that *Maropakis* does not appear well-grounded in relevant precedent and seems to ignore the realities of the congressionally mandated contract disputes process.<sup>10</sup> The Federal Circuit—as it too often does—appears to have relied on a rigid, formalistic interpretation of the CDA.<sup>11</sup> The resulting rule creates expensive inefficiencies in the contract disputes context,<sup>12</sup> which, unavoidably, result in costly, unproductive litigation.<sup>13</sup> Moreover, the scope of the rule’s application remains unclear.<sup>14</sup> To avoid wasteful litigation, remedy the court’s departure from precedent, and restore

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<sup>6</sup> See, e.g., Ralph C. Nash, *Defense to a Government Claim Is a Contractor Claim: A Weird Thought*, 24 NASH & CIBINIC REP. ¶ 42 (Sept. 2010) [hereinafter Nash, *A Weird Thought*]; Raymond S.E. Pushkar & Justin M. Ganderson, *Federal Circuit Contravenes Purposes of CDA in Holding on Government Liquidated Damages Assessments*, BNA FED. CONT. REP., July 20, 2010, at 6; Steven L. Schooner, *A Random Walk: The Federal Circuit’s 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067, 1097–99 (2011) [hereinafter Schooner, *A Random Walk*].

<sup>7</sup> See *Structural, Inc. v. United States*, 103 Fed. Cl. 84 (2012); *Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38 (2011).

<sup>8</sup> See, e.g., Pushkar & Ganderson, *supra* note 6, at 6–8.

<sup>9</sup> Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (Supp. V 2011); see also W. Stanfield Johnson, *A Retrospective on the Contract Disputes Act*, 28 PUB. CONT. L.J. 567, 569–70 (1999) [hereinafter Johnson, *A Retrospective on the CDA*].

<sup>10</sup> See Schooner, *A Random Walk*, *supra* note 6, at 1098; see also Nash, *A Weird Thought*, *supra* note 6, at 135.

<sup>11</sup> See Schooner, *A Random Walk*, *supra* note 6, at 1095.

<sup>12</sup> Steven L. Schooner, *Postscript: Defense to a Government Claim Is a Contractor Claim*, 26 NASH & CIBINIC REP. ¶ 6 (Feb. 2012) [hereinafter Schooner, *Postscript*].

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* at 19.

contractors' rights to an equal playing field in litigating with their government customer, a statutory solution appears to be required.<sup>15</sup>

Part I of this Article will discuss *Maropakis*, prior case law on the issue, and the relevant waiver of sovereign immunity, the CDA. Part II will describe, and, in so doing, applaud, Judge Newman's dissent in *Maropakis*, which respected the status quo in CDA litigation utilizing a fair and reasonable analysis. Part II also explains how the majority's formalistic decision contradicts general principles of civil procedure. Part III proposes a simple statutory amendment to the CDA.

This Article does not suggest that any theory proffered within it is particularly unique, innovative, or even profound, but that does not diminish the importance of its message. Courts make mistakes, but, fortunately, the nature of our common-law regime is such that errors need not become permanent or indefinitely lead to inefficient, ineffective, or unfair results. Accordingly, the Federal Circuit should revisit the substance of *Maropakis*, en banc, at the first opportunity. Until then, contractor (plaintiff's) counsel should seek en banc review in any related cases or, where appropriate, consider amicus briefing.<sup>16</sup> The Justice Department's attorneys should exercise their discretion and refrain from exploiting *Maropakis* (remaining mindful that, ultimately, their responsibility must be to "do Justice"). Contractor (plaintiff's) counsel should craft arguments that persuade individual COFC judges to avoid the harsh and inefficient application of *Maropakis*. The administrative judges on the agency boards of contract appeals should stay the course and, if necessary,

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<sup>15</sup> As discussed below, the decision arises in the context of the CDA, over which the Federal Circuit exercises exclusive appellate jurisdiction. Accordingly, there is no potential demonstration of a split amongst the circuit, nor does there appear another convenient route to achieve certiorari review in the Supreme Court.

<sup>16</sup> See generally Robert K. Huffman, *Federal Circuit Decisions on Government Contracts: Insights from the Roundtable*, 24 NASH & CIBINIC REP. ¶ 7, at 27–28 (Feb. 2010):

Judge Michel said that the Federal Circuit would welcome briefs from amici curiae in considering such requests for en banc resolution. Amici participation would help the Federal Circuit understand the "downstream," or real-world, effects of its prior and/or potential decisions in the Government contracts arena.

... Judge Michel stated his belief that the Federal Circuit could be persuaded to grant en banc review in the appropriate case. He stated that dissents [such as Judge Newman's in *Maropakis*] were important in persuading the Court to grant en banc review, and he reiterated that amicus briefs were very important in helping the Court to determine whether to take a particular case en banc. Judge Michel also stated that *it was perfectly appropriate for an appellant or amici to argue that en banc initial consideration of a second appeal is appropriate years after a prior precedent relevant to the appeal on the basis that the prior precedent was wrongly decided and had adverse practical consequences.*

*Id.* (emphasis added) (italics omitted).

distinguish *Maropakis*.<sup>17</sup> And, of course, if the Federal Circuit fails to remedy the situation, Congress should craft and enact a legislative solution.

### ***I. M. Maropakis Carpentry v. United States: Depriving Contractors of Their Right to Defend***

In *M. Maropakis Carpentry v. United States*, the Federal Circuit deprived a contractor of its right to defend itself in litigation against a government claim for money, specifically, liquidated damages.<sup>18</sup> The court's rigid, formalistic reading of precedent and the CDA<sup>19</sup> unnecessarily opens a complicated can of worms.

Granted, M. Maropakis Carpentry, Inc. ("Maropakis") is not the most sympathetic character. The company spent more than two years completing a construction and repair work contract for the U.S. Navy that was originally scheduled to take only nine months.<sup>20</sup> Still, the contractor faced many obstacles.<sup>21</sup> It took months for the contractor to locate a manufacturer to custom-make the windows to meet the Navy's admittedly overly strict specifications.<sup>22</sup> The government suspended all work on the contract for three-and-a-half months after the contractor located lead-based paint in the building.<sup>23</sup> Throughout, the Navy refused to allow the contractor to mitigate the lost time by altering the sequential order of the project's phases.<sup>24</sup> In total, contract completion was delayed by 467 days.<sup>25</sup> As a result, the contracting officer ("CO") assessed \$303,550 in liquidated damages pursuant to the contract's liquidated damages clause,<sup>26</sup> which stipulated that Maropakis was liable to the government for

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<sup>17</sup> See, e.g., *Nat'l Fruit Prod. Co. v Dep't of Agric.*, CBCA No. 2445, 2012 WL 1059477 (March 26, 2012).

<sup>18</sup> *Maropakis II*, 609 F.3d 1323, 1334–35 (Newman, J., dissenting).

<sup>19</sup> *Schooner, A Random Walk*, *supra* note 6, at 1095, 1098.

<sup>20</sup> See *M. Maropakis Carpentry, Inc. v. United States (Maropakis I)*, 84 Fed. Cl. 182, 191 (2008).

<sup>21</sup> See *id.*

<sup>22</sup> *Id.* at 188, 191 (stating that the Navy had admitted that the specification's unusually high standard for the windows was an error, but refused to lower the standard because it would be unfair to the other bidders on the contract).

<sup>23</sup> See *id.* at 189–90.

<sup>24</sup> *Id.* at 187.

<sup>25</sup> *Id.* at 191.

<sup>26</sup> See generally 48 C.F.R. § 52.211–12(a) (2000) (stating that "[i]f the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of \_\_\_\_ [*Contracting Officer insert amount*] for each calendar day of delay until the work is completed or accepted" (alteration in original)).

\$650 per day for each day the contract was delayed beyond the contract completion date (or any extensions).<sup>27</sup>

Throughout the contract's duration, Maropakis requested time extensions, arguing that the government caused the delays.<sup>28</sup> Maropakis, however, never (properly) submitted a formal "claim" to the CO for a time extension.<sup>29</sup> Maropakis ultimately filed suit in the COFC,<sup>30</sup> seeking time extensions and remission of the government's assessment of liquidated damages.<sup>31</sup> The government in turn filed a counterclaim for the payment of the \$59,514 balance for liquidated damages.<sup>32</sup>

The COFC concluded that, because Maropakis had never submitted a formal "claim" to the CO for time extensions, the court lacked jurisdiction to hear the contractor's claim.<sup>33</sup> The court also held, however, that, while it had jurisdiction over the government's claim for liquidated damages, the contractor could not defend against the government's claim because the court lacked subject matter jurisdiction over the contractor's defense that the government had caused the delays.<sup>34</sup> The Federal Circuit (in a two-to-one decision) in *Maropakis*,<sup>35</sup> upheld the lower court's ruling, finding that, pursuant to the CDA, the contractor must have filed its own claim with the CO in order to challenge the government's claim for liquidated damages before the COFC.<sup>36</sup>

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<sup>27</sup> *Maropakis II*, 609 F.3d at 1325–26 (noting that the Navy withheld a final payment otherwise due to Maropakis under the contract, in the amount of \$244,036, thus resulting in a total amount due from Maropakis of \$59,514).

<sup>28</sup> The court related that the contractor requested an extension of 447 calendar days: based on five alleged delays: (1) 187 days due to the inability to locate a window manufacturer; (2) 32 days in time lost from the start date of fabrication of windows due to the need to re-submit plans; (3) 107 days due to the discovery of lead-based paint; (4) 20 days due to the Navy's prohibition of the use of asphalt as a roofing adhesive; and (5) 101 days for time lost while searching for a metal fabricator.

*Id.*

<sup>29</sup> *Id.* at 1326. In retrospect, Maropakis's counsel had numerous opportunities to avoid much of the jurisdictional chicanery that would follow.

<sup>30</sup> This Article also references decisions from the Claims Court (trial court) and the Court of Claims, which were predecessors to the COFC. All three courts will be referenced for precedential value. General references to decisions from the COFC include decisions from the Claims Court and the Court of Claims.

<sup>31</sup> *Maropakis I*, 84 Fed. Cl. 182, 193–94 (2008).

<sup>32</sup> *Id.* at 194.

<sup>33</sup> *Id.* at 205, 208.

<sup>34</sup> *Id.* at 208; Schooner, *A Random Walk*, *supra* note 6, at 1097.

<sup>35</sup> *Maropakis II*, 609 F.3d 1323, 1331–32 (Fed. Cir. 2010). As discussed below, Judge Newman filed a vigorous dissent. *See infra* Part II.A.

<sup>36</sup> *Maropakis II*, 609 F.3d at 1331–32.

The Federal Circuit appears to have agreed that the assessment of liquidated damages constituted a government claim under the CDA.<sup>37</sup> Nonetheless, the court found that the only defense raised by Maropakis was that it was entitled to a time extension, reasoning that any time extension would necessarily modify the contract terms.<sup>38</sup> The court reasoned that, to obtain a modification to the contract terms, the contractor must follow the requirements of the CDA and submit its own claim to the CO.<sup>39</sup> The court thus affirmed the finding of the COFC, which dismissed the contractor's claims for lack of jurisdiction, and granted the government's motion for summary judgment as to the counterclaim for liquidated damages.<sup>40</sup>

Precedent and conventional wisdom prior to *Maropakis* was that the CDA's jurisdictional predicates did not apply to affirmative defenses.<sup>41</sup> Granted, the Federal Circuit had stopped short of directly addressing the issue,<sup>42</sup> and the COFC and the BCAs had inconsistently addressed the *extent* to which a contractor could assert a factual defense to a government claim without meeting the jurisdictional requirements associated with filing an affirmative CDA claim.<sup>43</sup> Still, the Federal Circuit had not previously held that a contractor could not challenge a CO's adverse government claim without submitting a separate affirmative claim.<sup>44</sup>

For example, in *Placeway Construction Corp. v. United States*, the court held that the government's refusal to disburse the remaining amount under a contract constituted a *government claim*.<sup>45</sup> Because the CO's decision to

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* "Thus, we hold that a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action." *Id.* at 1331.

<sup>40</sup> *Id.* at 1332.

<sup>41</sup> *See id.* at 1329–30; *see also* Schooner, *Postscript*, *supra* note 12, at 18.

<sup>42</sup> *Maropakis II*, 609 F.3d at 1330 n.1.

<sup>43</sup> *Compare* Kemron Envtl. Servs. Corp., ASBCA No. 51536, 00-1 BCA ¶ 30,664 (1999) (allowing a contractor to defend against the government's liquidated damages claim by proving that the government had contributed to the delay), *with* Elgin Builders, Inc. v. United States, 10 Cl. Ct. 40, 44 (1986) (stating that without submitting a claim of its own, the only defense a contractor could assert to the government's liquidated damages claim was that there was no delay in contract completion).

<sup>44</sup> *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

<sup>45</sup> *Id.* at 906 (stating that a government claim does not require certification under the CDA). The Court defined a government claim as "a claim seeking incidental and consequential damages for Placeway's alleged breach of the contract, in particular, failure to complete performance on the date set in the contract." *Id.* at 906 n.1.

withhold payment was adverse to the contractor, the court found that the contractor could properly appeal to the (then) Claims Court, despite the fact that the contractor had failed to certify its claim for the remaining amount.<sup>46</sup> Notably, the contractor in *Placeway* was initiating suit in court to recover the amount the government owed under the contract; even still, the court found that the contractor did not have to file its own claim in order to attempt to defeat the government's claim *withholding* the amount.<sup>47</sup> Similarly, in *Garrett v. General Electric Co.*,<sup>48</sup> the court held that, under the CDA, a contractor may appeal a CO's decision on a government claim without submitting a claim of its own to the CO.<sup>49</sup> Because the court found that the government's directive to perform remedial work constituted a government claim, the court held that the Armed Services Board of Contract Appeals had jurisdiction over the contractor's appeal despite the fact that the contractor had submitted no claims to the CO.<sup>50</sup> Most significantly, the court held that the board's jurisdiction rested solely on the Navy's claims under the contract.<sup>51</sup> Therefore, Federal Circuit precedent prior to *Maropakis* established that (1) a contractor can appeal a CO's decision on a government claim without submitting a claim of its own and (2) the court's or board's jurisdiction in such cases is based solely on the government claim.<sup>52</sup>

While COFC and Boards of Contract Appeals ("BCA" or "board") judges had differed—in degree—on this question directly before *Maropakis*, little suggested the path the Federal Circuit would take.<sup>53</sup> Some cases had allowed contractors to present factual defenses to government claims without requiring the contractor to bring its own claim,<sup>54</sup> while others allowed the contractor to bring only limited defenses without submission of an affirmative claim.<sup>55</sup>

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<sup>46</sup> *Id.* at 907.

<sup>47</sup> *Id.* at 906–07.

<sup>48</sup> *Garrett v. Gen. Elec. Co.*, 987 F.2d 747 (Fed. Cir. 1993).

<sup>49</sup> *Id.* at 749, 752; *see also Maropakis II*, 609 F.3d 1323, 1333 (Fed. Cir. 2010) (Newman, J., dissenting) (citing *Garrett*, 987 F.2d at 749).

<sup>50</sup> *Garrett*, 987 F.2d at 749.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; *see also Maropakis II*, 609 F.3d at 1333 (Newman, J., dissenting) (citing *Garrett*, 987 F.2d at 749).

<sup>53</sup> *See supra* note 34.

<sup>54</sup> *See, e.g.*, *Kemron Envtl. Servs. Corp.*, ASBCA No. 51536, 00-1 BCA ¶ 30,664 (1999) (not only exercising jurisdiction over a contractor's appeal from a liquidated damages assessment, but also ruling in the contractor's favor on the issue, despite the fact that the contractor had not submitted a claim to the CO).

<sup>55</sup> *See, e.g.*, *Elgin Builders, Inc. v. United States*, 10 Cl. Ct. 40, 44 (1986) (holding that a contractor could contest the government's claim to liquidated damages by challenging the actual assessment, that is, by claiming that there was no delay or less delay in completion

In *Sun Eagle Corp. v. United States*,<sup>56</sup> the Claims Court undertook a thorough examination of the difference between a contractor's claim and defense.<sup>57</sup> The Army assessed liquidated damages against Sun Eagle and withheld that amount from the remaining balance on the contract.<sup>58</sup> Sun Eagle, in turn, submitted a claim letter, challenging the assessment of liquidated damages and asserting that the government caused the delays.<sup>59</sup> The government moved to dismiss the contractor's claim because it was not properly certified under the CDA.<sup>60</sup>

The court held that the plain meaning of the CDA requires a contractor to certify its own claim where it (1) submits its own claim letter to the CO and, of course, (2) seeks interest on the sum.<sup>61</sup> Relying on *Placeway*, the court stated that, if a contractor did not submit its own claim letter to the CO, "it still could sue for that amount in the Claims Court by contesting the government claim, but would not receive a decision by the contracting officer on its own claim, nor would it be awarded interest if successful."<sup>62</sup> In *Sun Eagle*, certification was required to the extent that the contractor had filed its own claim with the CO seeking the amount withheld for liquidated damages—an amount in excess of the CDA threshold—*with interest*.<sup>63</sup>

In the end, the court did not directly address whether the court would in fact retain jurisdiction over the contractor's defense of the government claim, because, between its first opinion and reconsideration, the parties engaged in settlement negotiations.<sup>64</sup> The court stated, however, that if the contractor had not properly certified the claim, "the result would call for the dismissal

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without submitting its own claim, but that where a contractor's defense actually claimed some type of relief, such as entitlement to time extensions, such a defense constituted a contractor claim, which must first be submitted to a CO for consideration before the court could exercise jurisdiction over the defense).

<sup>56</sup> 23 Cl. Ct. 465 (1991).

<sup>57</sup> *Id.* at 476–82.

<sup>58</sup> *Id.* at 474.

<sup>59</sup> *Id.* at 476, 480.

<sup>60</sup> *Id.* at 474 (citing the CDA).

<sup>61</sup> *Id.* at 482. *See generally* 41 U.S.C. § 7109(a)(1) (Supp. V 2011) ("Interest . . . found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor's claim . . . until the date of the payment of the claim.")

<sup>62</sup> *Sun Eagle*, 23 Cl. Ct. at 482 (citation omitted).

<sup>63</sup> *Id.* (stating that "[t]he contractor made the claim in its claim letter and, if it recovers, the CDA would award the contractor interest on its claim").

<sup>64</sup> *Id.*

of all of its contractor claims, and the court would retain jurisdiction only over the government claim.”<sup>65</sup>

*Sun Eagle* differentiated between a claim and a defense.<sup>66</sup> In the first, the contractor submits a claim to the CO for recovery of funds withheld for liquidated damages and seeks interest on the sum.<sup>67</sup> Conversely, in a defense to a government claim of liquidated damages, the contractor neither submits a claim to the CO nor seeks interest on it.<sup>68</sup> The court held that a contractor must meet the jurisdictional prerequisites of the CDA for a claim but not with regard to a defense.<sup>69</sup>

The *Maropakis* majority reconciled *Placeway* and *Garrett* with its decision, agreeing that a court or board would have jurisdiction over a contractor's appeal of an adverse ruling on a government claim.<sup>70</sup> The court reasoned, however, that neither case addressed whether the lower court or the boards would have jurisdiction over a contractor's defense where the contractor did not bring its own claim.<sup>71</sup> The majority also found support for its decision in *Sun Eagle*, quoting the Claims Court's language that, if a contractor did not meet the CDA's jurisdictional prerequisites, the contractor's claims would be dismissed, and the court would retain jurisdiction only over the government claim.<sup>72</sup> We find this reading artificial and unduly restrictive.

Judge Newman read the precedent differently, finding that *Sun Eagle* specifically held that a contractor's defense to a government claim did not need to satisfy the CDA's jurisdictional prerequisites.<sup>73</sup> Judge Newman also opined that *Placeway* and *Garrett* only addressed the court's jurisdiction over the government claims and not the contractor's defenses, because a defense does not have a jurisdictional dimension.<sup>74</sup> Further, a more reasonable reading of *Placeway* and *Garrett* leads to the conclusion that the court would not explicitly rule that: (1) a contractor can appeal an adverse ruling on a government claim; and (2) the court's jurisdiction in such cases is based on

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<sup>65</sup> *Id.*; see also *Roxco, Ltd. v. United States*, 77 Fed. Cl. 138, 147–48, 151 (2007) (holding that where the contractor had not submitted claims to the CO, the court would retain jurisdiction over the portion of the contractor's claim that disputed the government's liquidated damages claim).

<sup>66</sup> *Sun Eagle*, 23 Cl. Ct. at 482.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Maropakis II*, 609 F.3d 1323, 1330 n.1 (Fed. Cir. 2010).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1331 n.2 (citing *Sun Eagle*, 23 Cl. Ct. at 482).

<sup>73</sup> *Id.* at 1334 (citing *Sun Eagle*, 23 Cl. Ct. at 480).

<sup>74</sup> *Id.* at 1333 (citing *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 906 (Fed. Cir. 1990), and *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993)).

the government claim, if the court did not intend for the contractor to be able to make a defense once its appeal was heard.

## II. Inconsistency, Injustice, and Uncertainty

The Federal Circuit erred in changing well-established law and practice. No statute, regulation, or policy appears to support its decision. Moreover, the impact—specifically, the inefficiency and expense associated with filing unnecessary claims and litigating unproductive jurisdictional issues—imposed upon the contractor community serves no productive end.<sup>75</sup> While the Justice Department may enjoy wielding a new and potent wedge that interferes with contractors' abilities to defend themselves in litigation, the public is ill served by this decision.<sup>76</sup>

It is tempting to conclude that the public is served, in the long run by court decisions that, on the one hand, limit contractor rights or remedies and, on the other hand, facilitate aggressive litigation postures advanced by the Department of Justice.<sup>77</sup> Arguably, such precedent protects the government's sovereign immunity and the public fisc.<sup>78</sup> Yet, the government's adoption of a scorched-earth litigation strategy may not make good economic sense. Each of these individual litigation victories may ultimately increase the prices that the government pays for the goods, services, and construction it procures. Limiting contractors' rights to pursue valid claims or protect their interests through litigation "slowly and subtly, but inexorably changes the fundamental bargain between purchasing agencies and [contractors], which eventually leads to the government paying more for what it buys."<sup>79</sup>

One of us previously described government efforts to constrain contractor-disputes litigation as a "breach of the contingency promise."<sup>80</sup> Consider that the fundamental premise upon which most government contracts depend is that, in exchange for the contractor not inflating its price (at the time of contract award) as insurance against unanticipated problems that *may* arise during performance, the government promises to make the contractor whole—through a number of standard remedy-granting clauses—if any number of problems

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<sup>75</sup> See *Schooner, Postscript*, *supra* note 12, at 18; see also Pushkar & Ganderson, *supra* note 6, at 7–8.

<sup>76</sup> See *Schooner, Postscript*, *supra* note 12 at 18; see also Pushkar & Ganderson, *supra* note 6, at 7–8; see also Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Business-like Government*, 50 AM. U. L. REV. 627, 695 (2001).

<sup>77</sup> See *Schooner, Fear of Oversight*, *supra* note 76, at 695.

<sup>78</sup> See *id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 695–98.

or contingencies do arise.<sup>81</sup> This bargain makes particularly good business sense if (as experience suggests) problems are the exception, rather than the rule.<sup>82</sup> If, however, the government signals to the contractor community that it does not intend to deal with its contractors on a level playing field and that it is willing to protect the public fisc without regard for the reasonable expectations of its business partners, contractors will increase their prices to protect themselves.<sup>83</sup>

Below, we accumulate a number of perspectives that reveal the error and injustice in the majority's holding in *Maropakis*. We begin with Judge Newman's dissent, which vehemently chronicles the flaws in the majority's reasoning.<sup>84</sup> We then highlight the Federal Circuit's increasing tilt to a formalism that too often produces injustice, particularly in the government contracts context.<sup>85</sup> We briefly review the purpose behind the CDA and find that *Maropakis* contravenes congressional intent. We examine some basic principles of civil procedure and find the majority opinion in *Maropakis* squarely at odds with these fundamental concepts. We offer an analysis of cases applying a similar statutory scheme—the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”)—which reveals how the general jurisdiction circuit courts reached the opposite conclusion from the Federal Circuit in a strikingly similar context. Finally, we note that the recent COFC cases applying *Maropakis* starkly display the resulting inefficiency and uncertainty.

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<sup>81</sup> *Id.* at 695–96.

<sup>82</sup> To the extent that relatively few contract disputes arise given the number of contracts the government enters into (and, of course, the hundreds of billions of dollars in purchasing the government engages in each year), the bargain proves quite efficient for the government and the taxpayer. More specifically, for example, fewer than 1,000 contract disputes reached the agency boards of contract appeals in Fiscal Year 2011 (432 at the ASBCA, Memorandum from Paul Williams, Chairman, ASBCA, to Sec'y of Def., the Army, the Navy, the Air Force, Gen. of Dep't of Def., and Dir. of the Def. Logistics Agency (Oct. 21, 2011), *available at* [http://www.asbca.mil/Reports/FY2011%20Reports/FY2011\\_annual.pdf](http://www.asbca.mil/Reports/FY2011%20Reports/FY2011_annual.pdf); 421 at the CBCA, Donald G. Featherstun & Kevin P. Connelly, *Disputes*, in WEST GOVERNMENT CONTRACTS YEAR IN REVIEW CONFERENCE: COVERING 2011 CONFERENCE BRIEFS 8-1 (2012); and 117 at the COFC, U.S. Court of Federal Claims—Cases Filed, Terminated, and Pending for the 12-Month Period Ending September 30, 2011, *available at* [http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/US\\_Court\\_of\\_Federal\\_Claims\\_all.pdf](http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/US_Court_of_Federal_Claims_all.pdf)), despite the fact that the federal government entered into millions of contracts worth more than \$500 billion for services, goods, and construction in each of the last four fiscal years.

<sup>83</sup> Schooner, *Fear of Oversight*, *supra* note 76, at 696.

<sup>84</sup> *Maropakis II*, 609 F.3d 1323, 1332–35 (Fed. Cir. 2010) (Newman, J., dissenting).

<sup>85</sup> Schooner, *A Random Walk*, *supra* note 6, at 1069.

### **A. The Newman Dissent: Fairness and Common Sense (or, Well, Justice)**

Judge Newman filed a vigorous dissent in *Maropakis*, arguing that the majority failed to recognize the well-established distinction between an affirmative claim and a factual defense.<sup>86</sup> “When a claim is within a tribunal’s jurisdiction, like the government’s claim for delay damages, the tribunal routinely has jurisdiction to consider defenses to the claim. This rule is not negated by any provision of the Contract Disputes Act.”<sup>87</sup> Judge Newman reasoned that—by the time the case was before the Federal Circuit—Maropakis sought neither a modification of the contract nor damages nor additional compensation.<sup>88</sup> Instead, Maropakis merely sought to defend against the government’s claim, and “[n]o rule or precedent holds that a contractor forfeits its right of defense if it does not file its own claim.”<sup>89</sup> Judge Newman explained:

The right to defend against an adverse claim is not a matter of “jurisdiction,” nor of grace; it is a matter of right. The denial of that right, argued by the government on a theory of “jurisdiction” that was supported by the Court of Federal Claims and is now supported by this court, is contrary to the purposes of the CDA, contrary to precedent, and an affront to the principles upon which these courts were founded.<sup>90</sup>

Judge Newman’s articulate prose demonstrates that she found the distinction between a claim and a defense rather obvious and that simple logic supports the distinction.<sup>91</sup> Focusing upon the demand and the relief available simplifies the analysis. A contractor’s claim for time extensions (based upon Government delay or interference with the contractor’s progress)—submitted to the CO<sup>92</sup>—both quantifies and demands additional payment for the extra time spent and additional work that the contractor completed on the contract, in addition to seeking interest on both the extra payment sought and any remaining balance on the contract withheld by the government.<sup>93</sup> By contrast, a defense to a government claim for liquidated damages was not previously

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<sup>86</sup> *Maropakis II*, 609 F.3d at 1334 (Newman, J., dissenting).

<sup>87</sup> *Id.* at 1333.

<sup>88</sup> *Id.* at 1332.

<sup>89</sup> *Id.* at 1334.

<sup>90</sup> *Id.* at 1334–35. See also *infra* Part II.C. (discussing the finding of a jurisdictional rule).

<sup>91</sup> *Maropakis II*, 609 F.3d at 1334–35 (Newman, J., dissenting).

<sup>92</sup> A decision by the CO is required for both contractor claims and government demands. A contractor claim demands a CO decision under the CDA. See CDA, 41 U.S.C. § 7103(f) (5) (Supp. V 2011). A government claim is generally a demand for payment. Neither type of claim is a defense, but instead they are both a demand for a “sum certain.” See 48 C.F.R. § 2.101 (2010) (defining the term “claim”).

<sup>93</sup> See *Maropakis II*, 609 F.3d at 1334–35 (Newman, J., dissenting); *Sun Eagle Corp. v. United States*, 23 Cl. Ct. 465, 482 (1991); Pushkar & Ganderson, *supra* note 6, at 3–4.

required to be submitted to the CO and, similarly, does not accrue interest.<sup>94</sup> As the moniker suggests, a defense serves only to deter the government from withholding payment due the contractor under the contract and from collecting any further damages that the government seeks.<sup>95</sup> The purported distinction has a checkered history,<sup>96</sup> but the basic parameters did not appear to be in question.

Prior decisions of both the [BCAs] and the COFC's predecessor courts have discussed the differences between a contractor's *affirmative CDA claims* . . . to combat a liquidated damages assessment *versus* a contractor's *defenses* against an assessment through an attack of its factual underpinnings. *The key to understanding this distinction is in the form of relief requested.* An affirmative CDA claim is an attempt to modify or adjust the contract to counter the liquidated damages assessment (*e.g.*, compensable time extensions as a result of government delays). A factual defense to a liquidated damages assessment merely serves to attack the assessment itself (*e.g.*, the government's assessment was incorrect because the delay was excused as a result of government delays). Plainly stated, *a CDA claim seeks affirmative relief under the contract through a contract adjustment; a factual defense only attempts to reduce or eliminate the liquidated damages assessment.*<sup>97</sup>

Professor Ralph Nash also agreed with Judge Newman and made no effort to hide his exasperation with the majority in *Maropakis*:

It is difficult to conceive of a more bizarre holding than this rule that if a defense looks like an affirmative claim, it can only be asserted if it meets the standard of being a proper CDA claim. . . . [N]othing in the CDA . . . would lead to this conclusion and it surely flies in the face of the congressional purpose of providing contractors a fair procedure for resolving disputes. We never had any problem with the holding in *Ruhnau-Evans-Ruhnau Associates v. U.S.*, 3 Cl. Ct. 217 (1983), that precludes interest on a Government claim unless it is converted into a contractor claim. However, it is [a] far stretch to hold that a contractor cannot even assert a defense to a Government claim unless it is converted into a contractor claim.<sup>98</sup>

Similarly, Stanfield Johnson explained: "The CDA had plainly given the sovereign's consent to *Maropakis*' appeal from the final decision asserting the government claim, a right that should not have been emasculated by attributing an abnormal meaning to 'defense.' Even a strict construction requires a reasonable basis, consistent with the purpose of the waiver."<sup>99</sup> Yet

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<sup>94</sup> See *Sun Eagle*, 23 Cl. Ct. at 482.

<sup>95</sup> See *Maropakis II*, 609 F.3d at 1334–35 (Newman, J., dissenting); *Sun Eagle*, 23 Cl. Ct. at 482; *Ruhnau-Evans-Ruhnau Assocs. v. United States*, 3 Cl. Ct. 217, 218–19 (1983) (holding that though contractor successfully defended against the government's claim for damages, the contractor was not entitled to interest because it never submitted a claim of its own); see also Pushkar & Ganderson, *supra* note 6, at 3–4.

<sup>96</sup> See Pushkar & Ganderson, *supra* note 6, at 2–4.

<sup>97</sup> *Id.* at 2–3 (underscore added).

<sup>98</sup> Nash, *A Weird Thought*, *supra* note 6, at 135.

<sup>99</sup> W. Stanfield Johnson, *The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors"*, 40 PUB. CONT. L.J. 275, 342 (2011) [hereinafter Johnson, *The*

despite what appears patently obvious to the government contracts bar, the distinction between a contractor's affirmative claim and a factual defense was lost on the majority, resulting in "one of the court's most formalistic decisions."<sup>100</sup> Judge Newman also found the decision unjust and unfair.<sup>101</sup>

Judge Newman found it wholly unnecessary for a contractor to submit a claim in order to defend against the government claim.<sup>102</sup> First, she reasoned that the court's jurisdiction solely depended on the government's claim.<sup>103</sup> She noted that the court in *Placeway* "based jurisdiction on the government's claim; a defense does not have a jurisdictional dimension."<sup>104</sup> Second, she rejected the majority's finding that the contractor's defense amounted to a claim for contract modification.<sup>105</sup> "The routine defense that the government contributed to delay is a defense, not a contract modification. Failure to meet the CDA requirements for certification, naming a sum certain, requesting a final decision, or modifying the contract, does not preclude defending against the government's claim."<sup>106</sup> Accordingly, Judge Newman saw neither a statutory nor a policy rationale for requiring the contractor to file a separate claim.<sup>107</sup> Her pleas for fairness to government contractors seem to have fallen on deaf

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*Federal Circuit's Great Dissenter*]. Judge Newman's dissent is just the latest example of her "unique judicial approach to government contracts cases." Schooner, *A Random Walk*, *supra* note 6, at 1077. Labeling Judge Newman "The Federal Circuit's Great Dissenter," Stanfield Johnson recently explained how her general viewpoint in government contract cases differs from that of her colleagues:

At the core of Judge Newman's dissenting jurisprudence is the premise that the sovereign as a contracting party should be accountable for its actions, subject only to limited exceptions not to be presumed, unnecessarily expanded, or imposed in a formalistic, doctrinaire way that ignores or masks the facts of government conduct. Where the facts justify it, contractors should be entitled to a "fair and just" remedy, and the Federal Circuit is there to make sure this happens.

Johnson, *The Federal Circuit's Great Dissenter*, *supra* note 99, at 333. Johnson finds "[h]er jurisprudence . . . so consistent with the authorized history of the jurisdiction inherited from the Court of Claims, declaring the court as a nation's 'conscience,' that one wonders why she appears a maverick among the judges of the Federal Circuit." *Id.*; see also Schooner, *A Random Walk*, *supra* note 6, at 1079 ("Judge Newman proved true to form . . . dissenting in [*Maropakis*], expressing disapproval, if not exasperation, with the majority's unwillingness to protect the interest of a government contractor.").

<sup>100</sup> Schooner, *A Random Walk*, *supra* note 6, at 1095, 1098.

<sup>101</sup> *Maropakis II*, 609 F.3d 1323, 1334–35 (Fed. Cir. 2010) (Newman, J., dissenting).

<sup>102</sup> *Id.* at 1332.

<sup>103</sup> *Id.* at 1333.

<sup>104</sup> *Id.* at 1333 n.2.

<sup>105</sup> *Id.* at 1332.

<sup>106</sup> *Id.* at 1334.

<sup>107</sup> *Id.*

ears as the Federal Circuit continues to depart from its intended role as the nation's conscience in government contracts jurisprudence.<sup>108</sup>

## B. The Formalist Trend Continues

Viewing *Maropakis* in the context of the Federal Circuit's recent jurisprudence reflects the court's ongoing shift toward formalism,<sup>109</sup> which stands in stark contrast to the approach of its predecessor, the Court of Claims.<sup>110</sup> Congress established the U.S. Court of Appeals for the Federal Circuit in 1982, replacing the appellate level of the Court of Claims and (somewhat as an afterthought) enshrining the court as the primary appellate court for government contract cases.<sup>111</sup> Since then, the Federal Circuit has appeared intent on distinguishing itself from the Court of Claims, not just in name, but also in its view of its role.<sup>112</sup>

One potential cause of this changed perspective is that the Federal Circuit—unlike its predecessor—does not exclusively hear claims against the government.<sup>113</sup> Therefore, the Federal Courts Improvement Act enabled a shift from a well-established specialty court to a far more generalized institution<sup>114</sup>:

In terms of Federal Circuit caseload, while the formal jurisdiction of the court is defined by subject matter (which itself is substantially varied), the kinds of issues dealt with by any particular judge of the court is a function of the luck of the draw in cases and, over time, will run a wide gamut of legal issues.<sup>115</sup>

Not only do Federal Circuit judges hear relatively few government contract cases each year, but they—as a group and individually—lack any pre-appointment

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<sup>108</sup> Schooner, *A Random Walk*, *supra* note 6, at 1078–79.

<sup>109</sup> *Id.* at 1069.

<sup>110</sup> *Id.* at 1078–79. Prior to the creation of the Federal Circuit, the Court of Claims exercised jurisdiction over government contract cases (with divided jurisdiction between trial and appellate levels). Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 544 (2003).

<sup>111</sup> Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164, sec. 127, § 1295, 96 Stat. 25, 37–38 (codified in scattered sections of 28 U.S.C.). The same statute created the U.S. Claims Court—now the COFC—to replace the trial level of the Court of Claims. *Id.* sec. 133, § 1491, 96 Stat. at 39–41. The court hears appeals of both protests (or disappointed offeror suits) and contract disputes.

<sup>112</sup> Ralph C. Nash, *The Government Contract Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586, 587–88 (2010) [hereinafter Nash, *Government Contract Decisions*].

<sup>113</sup> *Id.* at 588; *see also* Schooner, *A Random Walk*, *supra* note 6, at 1081.

<sup>114</sup> *See* S. Jay Plager, *The United States Court of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 860 (1990).

<sup>115</sup> *Id.* (footnote omitted).

experience in the field.<sup>116</sup> Prior to retiring, Chief Judge Michel acknowledged the court's expertise vacuum in government contract law<sup>117</sup>:

Judge Michel urged the members of the Government contracts bar to consider seeking the nomination of persons with Government contracts expertise and experience as replacements for the Federal Circuit judges who would be retiring or taking senior status . . . Judge Michel stated that the appointment of one or more individuals with such experience could go a long way towards raising the court's understanding of the real-world effects of its decisions in the Government contracts area.<sup>118</sup>

As a result, the court is “not a specialized court in any meaningful sense of the word.”<sup>119</sup> Like the COFC, the Federal Circuit is neither a specialty court nor a general court, but somewhere in the middle.<sup>120</sup> By contrast, “the Court of Claims was marked by a jurisdiction dependent upon the provision of the particular remedy (monetary awards) for a particular harm (breach of contract) and upon the presence of a particular defendant (the United States).<sup>121</sup> These differences in makeup and jurisdiction appear to have caused the Federal Circuit to distinguish itself from the Court of Claims.<sup>122</sup>

The trend has been difficult to watch. “The Court of Claims perceived itself as the conscience of the nation. That is to say, it believed that one of its major tasks, as the court where citizens could obtain redress for actions of the government, was to show those citizens that the government treated them fairly.”<sup>123</sup> As the Federal Circuit has slowly drifted away from that view,<sup>124</sup> it seems that, rather than elevating fairness to the citizen as its foremost priority, the court has adopted a strong deference toward the government, regardless of whether in the role of plaintiff or defendant.<sup>125</sup> This shift was most explicitly confirmed by the congressionally established Acquisition Advisory Panel.<sup>126</sup> The

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<sup>116</sup> Schooner, *A Random Walk*, *supra* note 6, at 1070–71.

<sup>117</sup> *See id.* at 1069.

<sup>118</sup> Huffman, *supra* note 16; *see also* Schooner, *A Random Walk*, *supra* note 6, at 1069.

<sup>119</sup> Plager, *supra* note 114, at 864 (citing Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 612 (1989)).

<sup>120</sup> Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 719–20 (2003).

<sup>121</sup> Judith Resnick, *Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One's Anomalous Character*, 71 GEO. WASH. L. REV. 798, 801 (2003).

<sup>122</sup> Nash, *Government Contract Decisions*, *supra* note 112, at 588.

<sup>123</sup> *Id.* at 587.

<sup>124</sup> *Id.* at 588; *see also* Schooner, *A Random Walk*, *supra* note 6, at 1081.

<sup>125</sup> Schooner, *A Random Walk*, *supra* note 6, at 1079.

<sup>126</sup> ACQUISITION ADVISORY PANEL, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 84 (Jan. 2007), *available at* <https://www.acquisition.gov/comp/aap/finalaapreport.html>.

panel's 2007 report articulated the premise that the "fundamental difference between government and commercial contracting is unequal treatment of the parties in the contracting process. The government enjoys certain contractual 'advantages' by virtue of its status as the 'sovereign' resulting in benefits from the centuries-old, judicially created doctrine of sovereign or governmental immunity."<sup>127</sup> By contrast, "[t]he United States Supreme Court . . . has held for some 130 years that the same rules of contract interpretation and performance apply to both the government and contractors."<sup>128</sup> Unfortunately government contractors sustain harm from this ever-increasing deference to the government.<sup>129</sup>

The Federal Circuit also appears to have adopted a preference for rigid rules in the area of government procurement.<sup>130</sup> "There seems to be a belief that there are no shades of gray in contracting—that the issues are either black or white. The problem is that the contracting process—in both commercial and government contracts—is not that way."<sup>131</sup> The Federal Circuit seems to have abandoned the Court of Claims's method of considering all relevant evidence in the case in favor of this formalistic approach.<sup>132</sup>

Where the Federal Circuit once resolved issues based upon "all the facts and circumstances," it now more often applies a discrete list of factors. Where the court once employed standards, it now employs rules. Where the court once had dense rules, they have become leaner. In short, the Federal Circuit has embraced an increasingly formal jurisprudence.<sup>133</sup>

Instead of looking to the parties' intent in drafting the contract, the court rigidly adheres to the language of the contract without reference to context.<sup>134</sup> This proves surprisingly problematic. "Armed with dictionaries and thesauruses, a clever attorney can propound interpretations that never occurred to the parties at the time they entered into the contract."<sup>135</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 85.

<sup>129</sup> Schooner, *Postscript*, *supra* note 12, at 18.

<sup>130</sup> Nash, *Government Contract Decisions*, *supra* note 112, at 612; Schooner, *A Random Walk*, *supra* note 6, at 1081; John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 773–75 (2003) (discussing "formalism" of the Federal Circuit in the context of patents).

<sup>131</sup> Nash, *Government Contract Decisions*, *supra* note 112, at 612.

<sup>132</sup> *Id.* at 592.

<sup>133</sup> Thomas, *supra* note 130, at 773–74 (footnotes omitted).

<sup>134</sup> Nash, *Government Contract Decisions*, *supra* note 112, at 592–93.

<sup>135</sup> *Id.* at 593. Ironically, even the dictionaries contradict the court's finding in *Maropakis*.

*Webster's Dictionary* defines "defense" as "a denial, answer, or plea" or "the collected facts and method adopted by a defendant to protect and defend against a plaintiff's action"—with no mention of "claim." *Black's Law Dictionary* defines "defense" as a

The preference for such strict construction takes “discretion away from the judges on the Court of Federal Claims and the boards of contract appeals to assess the facts fully and seek a fair outcome.”<sup>136</sup> In the *Maropakis* decision, both the court’s strict adherence to rigid rules and its deference to the sovereign make a meaningful appearance.<sup>137</sup>

### C. The Contract Disputes Act: No Drive-By Jurisdictional Rulings

*Maropakis* also appears sharply at odds with both the statutory language and purpose of the CDA.<sup>138</sup> Congress designed the CDA to streamline the dispute resolution process for government contracts, intending to create an efficient process through which contractor and government claims could be resolved.<sup>139</sup> Congress aspired to reduce litigation by encouraging dispute resolution through negotiation prior to litigation; provide different forums suitable for different types of disputes; and create a fair and equitable system of dispute resolution for both government contractors and government agencies.<sup>140</sup> In short, Congress trumpeted that the CDA was enacted “to ‘streamline contract disputes’ and ‘clarify what [were then] confusing procedures.’”<sup>141</sup> Congress perceived the statutory scheme as a way to “release[] contractors from the limited confines of administrative law by providing direct access to a judicial forum,” which in turn “eliminated procedural delays and returned the focus of the disputes process to the merits of claims.”<sup>142</sup>

To encourage resolution prior to litigation, the CDA imposes specific jurisdictional prerequisites before the government or a contractor may initiate

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“defendant’s stated reason why the plaintiff . . . has no valid case—also with no mention of “claim” (in more than two pages of additional definitions). The CDA had plainly given the sovereign’s consent to *Maropakis*’ appeal from the final decision asserting the government claim, a right that should not have been emasculated by attributing an abnormal meaning to “defense.” Even a strict construction requires a reasonable basis, consistent with the purpose of the waiver.

Johnson, *The Federal Circuit’s Great Dissenter*, *supra* note 102, at 342 (alteration in original) (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 326 (11th ed. 2003), and BLACK’S LAW DICTIONARY 482–85 (9th ed. 2009)).

<sup>136</sup> Nash, *Government Contract Decisions*, *supra* note 112, at 613.

<sup>137</sup> See *supra* Part I.

<sup>138</sup> See CDA, 41 U.S.C. §§ 7101–7109 (Supp. V 2011); S. REP. NO. 95-1118, pt. 1, at 1 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5235.

<sup>139</sup> Johnson, *A Retrospective on the CDA*, *supra* note 9, at 570.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (quoting 124 CONG. REC. 36,264 (1978) (statement of Sen. Metzenbaum)).

<sup>142</sup> Clarence Kipps et al., *The Contract Disputes Act: Solid Foundation, Magnificent System*, 28 PUB. CONT. L.J. 585, 591 (1999).

a suit in the COFC or the BCAs.<sup>143</sup> First, the Act requires that a contractor submit all claims against the government to the CO.<sup>144</sup> Second, all claims must be in writing.<sup>145</sup> Third, if their claims (currently) exceed \$100,000, the contractor must certify that, among other things, the claims are made in good faith and are accurate to the best of the contractor's knowledge.<sup>146</sup> Fourth, the contractor must receive a final decision from the CO on the claim.<sup>147</sup> Only after fulfilling these requirements may the contractor initiate litigation with regard to its claim before either an agency board<sup>148</sup> or the COFC.<sup>149</sup> If a contractor fails to fulfill these jurisdictional mandates, the court and the boards lack subject matter jurisdiction over the claim.<sup>150</sup>

Although the CDA regime essentially “revolves around the ‘claim,’”<sup>151</sup> the CDA does not define “claim,”<sup>152</sup> and the meaning of the term remains rather

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<sup>143</sup> CDA, 41 U.S.C. § 7104(a), (b)(1). One of the goals of the CDA was to provide an election of forum or concurrent alternative forums to which a contractor could appeal an adverse decision by a CO. S. REP. NO. 95-1118, pt. 1, at 1. *See generally* Michael J. Schaengold & Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 FED. CIR. B.J. 279 (2008) [hereinafter Schaengold, *Choice of Forum 2008*]; Thomas C. Wheeler, *Let's Make the Choice of Forum Meaningful*, 28 PUB. CONT. L.J. 655 (1999); Michael J. Schaengold, Robert S. Brams & Christopher Lerner, *Choice of Forum for Contract Claims: Court vs. Board*, 3 FED. CIR. B.J. 35 (1993).

<sup>144</sup> CDA, 41 U.S.C. § 7103(a)(1); *see also* 48 C.F.R. § 2.101 (2010). The CO oversees the contract and generally has authority to bind the government in contract, make changes to the contract, and rule on contract claims. John S. Pachter, *The Incredible Shrinking Contracting Officer*, 39 PUB. CONT. L.J. 705, 709–10 (2010).

<sup>145</sup> CDA, 41 U.S.C. § 7103(a)(2).

<sup>146</sup> *Id.* § 7103(b).

<sup>147</sup> *Id.* § 7104. In the alternative, failure by the CO to issue a decision within a prescribed period may be deemed to be a final decision, and the contractor may then file an appeal. *Id.* § 7103(f)(5).

<sup>148</sup> Examples of agency boards include the Armed Services Board of Contract Appeals and the Civilian Board of Contract Appeals. *Id.* § 7105.

<sup>149</sup> *Id.* § 7104(a), (b)(1).

<sup>150</sup> *England v. Swanson Grp., Inc.*, 353 F.3d 1375, 1379–80 (Fed. Cir. 2004); *see also* *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541–42 (Fed. Cir. 1996) (stating that a contractor must properly submit a claim and receive a decision from the CO before a reviewing court will have jurisdiction over a claim).

<sup>151</sup> Johnson, *A Retrospective on the CDA*, *supra* note 9, at 569.

<sup>152</sup> CDA, 41 U.S.C. §§ 7101–7103. The CDA does define other terms such as “executive agency,” “contractor,” and “misrepresentation of fact.” *Id.* § 7101.

unclear.<sup>153</sup> The Federal Circuit has looked to the Federal Acquisition Regulation (“FAR”) for guidance.<sup>154</sup> The FAR defines a claim as:

a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract . . . . A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim.<sup>155</sup>

While the CDA does not require a contractor to submit a claim in a certain form or use particular language, the claim must contain “a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.”<sup>156</sup> Therefore, a contractor must be sure that its “claim” meets the above definition and that the CO issues a final decision on that claim before filing an appeal to the BCAs or the COFC.<sup>157</sup>

In contrast to a contractor claim, when the government asserts a claim (or, in effect, makes a formal demand for payment), a contractor may properly appeal a final decision on the government’s claim to the BCAs or the COFC without submitting a claim of any type to the CO.<sup>158</sup> Not surprisingly, neither the CDA nor the FAR require a contractor to submit a claim outlining its affirmative defenses to a government claim.<sup>159</sup> While the language of the Act seems clear, courts and boards nonetheless disagree on the proper application of these procedures in the case of a contractor’s defense to a government claim.<sup>160</sup>

Regrettably, the majority opinion in *Maropakis* contravenes the legislative intent of the CDA to insure fair and equitable treatment of both contractors and the government.<sup>161</sup> Whereas Congress enacted the CDA “to ‘streamline

<sup>153</sup> Johnson, *A Retrospective on the CDA*, *supra* note 9, at 569 (stating that “[t]wo decades later, after repeatedly revisiting the subject in litigation, regulation, and statutory amendment, we are still not completely certain what ‘claim’ means”).

<sup>154</sup> *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc).

<sup>155</sup> 48 C.F.R. § 2.101 (2000).

<sup>156</sup> *Maropakis II*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (quoting *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1997) (internal quotation marks omitted)).

<sup>157</sup> *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1543–44 (Fed. Cir. 1996).

<sup>158</sup> CDA, 41 U.S.C. §§ 7103(a), (e) (contents of decision), 7104(a), (b)(1) (Supp. V 2011); *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993).

<sup>159</sup> *See* CDA, §§ 7103(a), 7104(a), 7104(b)(1); 48 C.F.R. § 52.211-11 (2000) (stating that if the contract makes a successful defense it will not be charged with liquidated damages).

<sup>160</sup> *See, e.g.*, *Kemron Envtl. Servs. Corp., ASBCA No. 51536, 00-1 BCA ¶ 30,664* (1999); *Sun Eagle Corp. v. United States*, 23 Cl. Ct. 465, 479–82 (1991); *Elgin Builders, Inc. v. United States*, 10 Cl. Ct. 40, 44 (1986).

<sup>161</sup> S. REP. NO. 95-1118, pt. 1, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5235; *see Nash, A Weird Thought, supra* note 6.

contract disputes' and 'clarify . . . confusing procedures,'"<sup>162</sup> *Maropakis* complicates and confuses the disputes process. *Maropakis* cautions contractors to anticipate claims by the government and expend resources to resolve previously non-existent jurisdictional issues or be left helpless to defend against sizable liquidated damages claims brought by the government.<sup>163</sup> Thus, instead of eliminating procedural delays and returning the focus to the merits of a case,<sup>164</sup> *Maropakis* creates additional procedural delays and forces contractors to meticulously focus on counter-intuitive procedural requirements now complicating their disputes.<sup>165</sup>

The opinion also seems contrary to the role of the agency boards and the COFC to equitably and efficiently resolve disputes between contractors and the government.<sup>166</sup> Instead of facilitating fair and efficient outcomes, the *Maropakis* majority enables and even encourages the government to drag out expensive litigation and block recovery and resolution on jurisdictional grounds.<sup>167</sup> The decision has and will likely continue to result in contractors bringing more claims simply to preserve their right to defend against government claims—even where it is unnecessary to do so under *Maropakis* or would have been unnecessary but for *Maropakis*.<sup>168</sup> *Maropakis* is not the first instance of unnecessarily rigid interpretation of the CDA.<sup>169</sup> Just as in prior decisions that have further complicated the CDA process, here "[t]he plans of its framers, if well laid, have plainly gone awry because of regulations and decisions focusing on 'definitional structures' at odds with the CDA's basic purposes."<sup>170</sup>

Furthermore, the Federal Circuit in *Maropakis* seemingly disregarded the Supreme Court's recent decisions warning lower courts against imposing

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<sup>162</sup> Johnson, *A Retrospective on the CDA*, *supra* note 9, at 569–70 (quoting 124 CONG. REC. 36,264 (1978) (statement of Sen. Metzenbaum)).

<sup>163</sup> See *Maropakis II*, 609 F.3d 1323, 1334–35 (Fed. Cir. 2010) (Newman, J., dissenting); *Sun Eagle*, 23 Cl. Ct. at 476.

<sup>164</sup> Kipps et al., *supra* note 142, at 591.

<sup>165</sup> Schooner, *Postscript*, *supra* note 12, at 21; see *Maropakis II*, 609 F.3d at 1334–35 (Newman, J., dissenting).

<sup>166</sup> See S. REP. NO. 95-1118, pt. 1, at 1; Wheeler, *supra* note 143, at 656 (describing how procedures in the BCAs have become complicated in contravention of the purpose and mandate of the CDA).

<sup>167</sup> See *Sun Eagle*, 23 Cl. Ct. at 476 ("The amount of litigation engendered by the terms or requirements of the CDA relating to jurisdiction is staggering, and the results have not been satisfactory at both the trial and appellate levels; hence, litigation continues."); see also *Maropakis II*, 609 F.3d at 1334–35 (Newman, J., dissenting).

<sup>168</sup> See Pushkar & Ganderson, *supra* note 6, at 6.

<sup>169</sup> See Johnson, *A Retrospective on the CDA*, *supra* note 9, at 574–77 (reviewing cases analyzing the meaning of "claim").

<sup>170</sup> *Id.* at 584.

jurisdictional bars based on claim-processing rules in the absence of a clear congressional mandate.<sup>171</sup> “Our recent cases evince a marked desire to curtail . . . ‘drive-by jurisdictional rulings,’ which too easily can miss the ‘critical differences’ between true jurisdictional conditions and nonjurisdictional limitations on causes of action.”<sup>172</sup> The Court specifically stated that, in the case of claim-processing rules, courts should refrain from labeling a rule as jurisdictional absent a clear congressional mandate to do so.<sup>173</sup> “Among the types of rules that should not be described as jurisdictional are what we have called ‘claim-processing rules.’ These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”<sup>174</sup>

If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, court should treat the restriction as nonjurisdictional in character.<sup>175</sup>

The Court explained that because a jurisdictional rule has drastic consequences, harm results if a court erroneously labels a rule as jurisdictional.<sup>176</sup> “Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants.”<sup>177</sup>

In *Maropakis*, the Federal Circuit created a jurisdictional bar that lacks an obvious basis in the CDA, much less a clear congressional label.<sup>178</sup> The CDA does not contain statutory language addressing civil procedure, nor does the statute suggest that a court is without jurisdiction to hear affirmative defenses that have not first been filed as claims before the CO.<sup>179</sup> As the Supreme Court

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<sup>171</sup> *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (unanimous decision (with Justice Kagan not participating)) (reversing an en banc decision of the Federal Circuit); *Reed Elsevier v. Muchnick*, 130 S. Ct. 1237, 1244 (2010); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514–16 (2006); see also *Gonzalez v. Thaler*, 132 S. Ct. 641, 648–49 (2012); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 317–318 (2012).

<sup>172</sup> *Reed Elsevier*, 130 S. Ct. at 1244 (citations and brackets omitted); *Arbaugh*, 546 U.S. at 511.

<sup>173</sup> See *Henderson*, 131 S.Ct. at 1203.

<sup>174</sup> *Id.*

<sup>175</sup> *Arbaugh*, 546 U.S. at 515–16 (citation omitted).

<sup>176</sup> *Henderson*, 131 S. Ct. at 1202 (giving examples such as a litigant’s ability to raise the issue of subject matter jurisdiction after losing a trial and being able to get the case dismissed on the jurisdictional ground after the trial is over).

<sup>177</sup> *Id.* at 1202.

<sup>178</sup> See *Maropakis II*, 609 F.3d 1323, 1331–32 (Fed. Cir. 2010).

<sup>179</sup> See *supra* Part II. A.

observed, the result of creating such a jurisdictional hurdle wastes judicial resources and unfairly prejudices litigants.<sup>180</sup>

#### **D. *Maropakis* Contradicts Fundamental Practices and Rules of Civil Procedure**

The majority's decision in *Maropakis* also contradicts commonly understood and generally accepted principles of civil procedure, which distinguish affirmative defenses from claims.<sup>181</sup> "Affirmative defenses are the way defendant sets forth defenses that cannot be conveyed by simply admitting or denying the factual allegations of the complaint. An affirmative defense generally involves the assertion of matter extraneous to plaintiff's claims that would bar or limit recovery . . . ."<sup>182</sup> An affirmative defense must be pled in the opposing party's answer.<sup>183</sup> More specifically, defenses to liquidated damages are typically pled as affirmative defenses under state common law.<sup>184</sup>

Additionally, affirmative defenses are distinct from counterclaims.<sup>185</sup> "Unlike a defense, which simply denies plaintiff's right to recover under the theories alleged, a counterclaim is an affirmative demand for something from plaintiff."<sup>186</sup> "Since [a counterclaim and cross-claim] are not portions of an answer but constitute a new complaint against the parties to whom they are directed, counterclaims and cross-claims are treated quite differently than are affirmative defenses."<sup>187</sup>

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<sup>180</sup> *Henderson*, 131 S. Ct. at 1202.

<sup>181</sup> JACK H. FRIEDENTHAL, ET AL., *CIVIL PROCEDURE* 293 (2d ed. 1993) (stating that "the distinction between counterclaims and cross-claims and affirmative defenses is an important one").

<sup>182</sup> 1 *BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS* 679 (Robert L. Haig, ed., 3d ed. 2011).

<sup>183</sup> FRIEDENTHAL, *supra* note 185, at 290.

<sup>184</sup> *See, e.g.*, *J.M. Beeson Co. v. Sartori*, 553 So.2d 180, 181 (Fla. Dist. Ct. App. 1989) (stating that "where liquidated damages are attacked, it is the burden of the defendant to raise the excessiveness of the damages as an affirmative defense" (citing C.T. McCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 622–23 (1977)); *Tex. All Risk Gen. Agency, Inc. v. Apex Lloyds Ins. Co.*, No. 10-10-00017, 2010 WL 4572738, at \*5 (Tex. App. Nov. 10, 2010) (stating that "an assertion that a liquidated damages provision is a penalty is an affirmative defense that a defendant has the burden of pleading and proving").

<sup>185</sup> FRIEDENTHAL, *supra* note 185, at 292–93.

<sup>186</sup> Haig, *supra* note 186, at 697.

<sup>187</sup> FRIEDENTHAL, *supra* note 185, at 292–93 (stating that, as an example, counterclaims and cross-claims must be answered by reply pleading, but usually affirmative defenses will be taken as denied without further pleading by the plaintiff).

From a simplistic perspective, jurisdiction generally is not based on defenses, but is rather based on the original claim.<sup>188</sup> That is why “[a] defense that raises a federal question is inadequate to confer federal jurisdiction.”<sup>189</sup> Likewise, where a court has jurisdiction to hear a claim, it also enjoys jurisdiction over the factual defenses to the claim.<sup>190</sup>

The majority’s reasoning in *Maropakis* clearly deviates from these basic principles of civil procedure. The court took an affirmative defense that intended to present facts to bar or limit the government’s recovery and asserted that it was a “claim” for a sum certain.<sup>191</sup> Furthermore, it erroneously held that the affirmative defense needed its own jurisdictional grounds, despite the court’s admission that it had jurisdiction over the government’s claim.<sup>192</sup> Such a peculiar departure from civil procedure norms might be understandable if the statutory scheme required such an approach. As discussed above, however, no such mandate derives from the CDA’s language or Congress’s intent in enacting the CDA.<sup>193</sup>

### E. A Useful Analogy

*Maropakis*’s flawed reasoning and contradiction of general principles of civil procedure is illustrated through analogy to a similar statutory scheme—one with which the Federal Circuit has more than a passing familiarity.<sup>194</sup> Congress enacted FIRREA to address the savings and loan crisis of the 1980s.<sup>195</sup> FIRREA

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<sup>188</sup> See, e.g., *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

<sup>189</sup> *Id.* (citing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908)).

<sup>190</sup> See *Maropakis II*, 609 F.3d 1323, 1334–35 (Fed. Cir. 2010) (Newman, J., dissenting). See generally FED. R. CIV. P. 8(c), 8(c)(1) (“Affirmative Defenses”) (discussed in the context of “responding to a pleading”). Note that Rule 8(c)(2) provides that “[i]f a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated.” Rule 13, on the other hand, deals with “counterclaims” and “crossclaims.” FED. R. CIV. P. 13(a)–(e) (counterclaims), (g) (crossclaims).

<sup>191</sup> *Maropakis II*, 609 F.3d at 1327.

<sup>192</sup> See *id.* at 1330–32.

<sup>193</sup> See *id.* at 1334–35 (Newman, J., dissenting).

<sup>194</sup> Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 and 15 U.S.C.). Granted, it appears that neither the contractor nor the government’s counsel referenced any of these cases in their appellate briefs.

<sup>195</sup> The Federal Circuit and the government contracts bar, of course, are both familiar with FIRREA and its after-effects. Alan R. Burch, *Purchasing the Right to Govern: WINSTAR and the Need to Reconceptualize the Law of Regulatory Agreements*, 88 KY. L.J. 245 (2000); John Cibinic, Jr., *Retroactive Legislation and Regulations and Federal Government Contracts*, 51 ALA. L. REV. 963 (2000); Rodger D. Citron, *Lessons Learned From the Damages Decisions*

created the Resolution Trust Corporation (“RTC”) under the exclusive management of the Federal Deposit Insurance Corporation (“FDIC”).<sup>196</sup> Under FIRREA, the (then RTC or, now) FDIC can be appointed as receiver of a failed depository institution and assume responsibility for managing its assets and liabilities in an efficient manner.<sup>197</sup> Under 12 U.S.C. § 1821(d)(3), the receiver can decide claims against the failed institution subject to de novo review in the district courts.<sup>198</sup> FIRREA contains a jurisdictional bar similar to that of the CDA, Section 1821(d)(13)(D):

Except as otherwise provided in this subsection, no court shall have jurisdiction over –

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation<sup>199</sup> has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.<sup>200</sup>

The exception refers to § 1821(d), which provides for de novo review by the district courts of the receiver’s decisions concerning claims against the

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*Following United States v. WINSTAR Corp.*, 32 PUB. CONT. L.J. 1 (2002); David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473 (1999); Stanley I. Langbein, *The Thrift Crisis and the Constitution*, 53 WASH. & LEE L. REV. 159 (1996); Michael P. Malloy, *When You Wish Upon WINSTAR: Contract Analysis and the Future of Regulatory Action*, 42 ST. LOUIS U. L.J. 409 (1998); Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of WINSTAR: An Interim Report*, 51 ALA. L. REV. 1177 (2000); Richard E. Speidel, *Contract Excuse Doctrine and Retrospective Legislation: The WINSTAR Case*, 2001 WIS. L. REV. 795 (2001); Jerry Stouck & David R. Lipson, *United States v. WINSTAR Corp.: Affirming the Application of Private Contract Law Principles to the Federal Government*, 6 FED. CIR. B.J. 315 (1996); Gerard Wimberly & Kristin Amerling, *The Sovereign Acts Doctrine After WINSTAR*, 6 FED. CIR. B.J. 127 (1996).

<sup>196</sup> Anthony C. Providenti, Jr., *Playing with FIRREA, Not Getting Burned: Statutory Overview of the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 59 FORDHAM L. REV. S323, S337 (1991).

<sup>197</sup> See *id.*; see also *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 710 (8th Cir. 1996); *Nat’l Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 376 (3d Cir. 1994) (RTC as receiver). The RTC no longer exists, and the FDIC now wields this power. See, e.g., Lee Davison, *The Resolution Trust Corporation and Congress, 1989-1993, PART II: 1991-1993*, FDIC BANKING REV. (Apr. 27, 2007), available at <http://www.fdic.gov/bank/analytical/banking/2007apr/article1/> (“[C]ongressional oversight of the RTC continued until the agency closed in 1995, but the legislative story ends with the passage of the 1993 Completion Act—the last significant legislative activity involving the RTC.”).

<sup>198</sup> 12 U.S.C. § 1821(d)(3)–(6) (2006).

<sup>199</sup> “Corporation” refers to the RTC.

<sup>200</sup> 12 U.S.C. § 1821(d)(13)(D).

failed institution.<sup>201</sup> The courts have thus “characterized the jurisdictional restriction . . . as a statutory exhaustion requirement: in order to obtain jurisdiction to bring a claim in federal court, one must exhaust administrative remedies by submitting the claim to the receiver in accordance with the administrative scheme for adjudicating claims detailed in [the statute].”<sup>202</sup>

FIRREA’s jurisdictional bar blocks any type of claim, including a determination of rights,<sup>203</sup> and it extends to all claimants, whether creditors, debtors or others.<sup>204</sup> In addition to paying creditors, the receiver of the failed institution may also seek monetary recovery from the institution’s debtors.<sup>205</sup> Under this regime, a number of circuit courts confronted an issue that mirrored *Maropakis*: whether the jurisdictional bar applied to the debtors’ affirmative defenses to claims brought against them by the receivers.<sup>206</sup> These circuits, unlike the Federal Circuit in *Maropakis*, accurately distinguished a claim from an affirmative defense and allowed the debtors to defend themselves against monetary claims.<sup>207</sup>

### ***1. Similarities Between the FIRREA Cases and Maropakis***

The similarities between the FIRREA scenario and the situation in *Maropakis* are striking. First, the receiver in these cases has presented a claim for monetary relief against a debtor based on a contract under which the debtor agreed to pay a certain amount of money.<sup>208</sup> Similarly, in *Maropakis*, the government claimed monetary relief from the contractor based on a contract under which the contractor agreed to pay a certain amount in liquidated damages for each day of delay.<sup>209</sup> Second, under the exhaustion requirement in FIRREA, claims had to be submitted to the receiver—the party against whom the claims were asserted.<sup>210</sup> Likewise, under the CDA, claims are submitted to the CO—a representative of the government against whom the claims are asserted.<sup>211</sup>

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<sup>201</sup> *Nat’l Union*, 28 F.3d at 383.

<sup>202</sup> *Id.* at 383 (citations omitted); see also *Tri-State*, 79 F.3d at 715 n.12 (stating in dicta that the administrative claims procedure and the jurisdictional bar have concurrent scope).

<sup>203</sup> *Nat’l Union*, 28 F.3d at 393.

<sup>204</sup> *Tri-State*, 79 F.3d at 714 (holding that the jurisdictional bar applies to debtors as well as creditors).

<sup>205</sup> *Id.*

<sup>206</sup> See, e.g., *Nat’l Union*, 28 F.3d at 383.

<sup>207</sup> See, e.g., *id.* at 394; see also *infra* note 221 (collecting circuit court cases).

<sup>208</sup> See, e.g., *Nat’l Union*, 28 F.3d at 380.

<sup>209</sup> *Maropakis II*, 609 F.3d 1323, 1325 (Fed. Cir. 2010).

<sup>210</sup> FIRREA, 12 U.S.C. § 1821(d) (2006).

<sup>211</sup> CDA, 41 U.S.C. § 7103 (Supp. V 2011).

Third, the jurisdictional bar is just as broad—if not broader—under FIRREA as under the CDA.<sup>212</sup>

[Section 1821(d)(13)(D) of FIRREA] bars jurisdiction over four categories of actions: (1) claims for payment from assets of any depository institution for which the RTC has been appointed receiver; (2) actions for payment from assets of such depository institution; (3) actions seeking a determination of rights with respect to assets of such depository institution; and (4) a claim relating to any act or omission of such institution or the RTC as receiver.<sup>213</sup>

As noted above, the CDA requires that any claim against the government relating to a government contract be submitted to the CO before it is adjudicated in the COFC or the BCAs.<sup>214</sup> Therefore, the courts addressing affirmative defenses under FIRREA faced a strikingly similar issue to that presented to the Federal Circuit in *Maropakis*.<sup>215</sup>

## ***2. Circuit Courts Distinguish a Claim and Affirmative Defense under FIRREA***

When the district courts first addressed the issue of affirmative defenses, there was some disagreement as to whether these defenses were subject to FIRREA's jurisdictional bar.<sup>216</sup> Once the issue reached the federal appellate courts, however, the courts distinguished between a claim and an affirmative defense and held that the latter were not barred by § 1821(d).<sup>217</sup> The Third Circuit stated that “it is plain enough that a defense or an affirmative defense is neither an ‘action’ nor a ‘claim,’ but rather is a *response* to an action or a claim,

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<sup>212</sup> Compare *Nat'l Union*, 28 F.3d at 393 (describing the jurisdictional bars of FIRREA) with *England v. Swanson Grp., Inc.*, 353 F.3d 1375, 1379 (describing the jurisdictional bar of the CDA).

<sup>213</sup> *Nat'l Union*, 28 F.3d at 393.

<sup>214</sup> CDA, 41 U.S.C. §§ 7103, 7104; see also *supra* Part II.C.

<sup>215</sup> See *Maropakis II*, 609 F.3d 1323, 1331–32 (Fed. Cir. 2010).

<sup>216</sup> See *Resolution Trust Corp. v. Midwest Fed. Sav. Bank*, 36 F.3d 785, 792 (9th Cir. 1993) (discussing the disagreement among the district courts).

<sup>217</sup> See, e.g., *Am. First Fed., Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259, 1264 (11th Cir. 1999) (following all three circuit courts that had addressed the issue and holding that affirmative defenses are not barred under § 1821(d)); *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 715 n.13 (8th Cir. 1996); *Nat'l Union*, 28 F.3d at 394; *Resolution Trust Corp. v. Love*, 36 F.3d 972, 978 (10th Cir. 1994); cf. *Midwest Fed. Sav. Bank*, 36 F.3d at 792–93 (allowing affirmative defense of mutual mistake where the issue could not have been asserted in an affirmative claim through the administrative process); see also *Jacobs v. PT Holdings, Inc.*, No. 8:11-CV-106, 2012 WL 458418, at \*8 n.7 (D. Neb. Feb. 13, 2012) (collecting circuit court cases that distinguish between a claim and a defense in connection with FIRREA's jurisdictional bar). The circuit courts clarified that only true affirmative defenses—opposed to counterclaims—could proceed without meeting the exhaustion requirement. *Nat'l Union*, 28 F.3d at 394.

and that therefore defenses and affirmative defenses do not fall under any of the . . . four categories of actions” placed beyond the courts’ jurisdiction.<sup>218</sup>

The circuit courts also reasoned that barring affirmative defenses would not serve the purpose behind FIRREA<sup>219</sup>:

In barring declaratory judgment actions, “Congress apparently . . . determined that the societal benefits resulting from the right to bring . . . declaratory judgment actions, are outweighed by the societal benefits resulting from the RTC being able to avoid costly and perhaps unnecessary litigation.” However, when the FDIC has completed its administrative review, and has chosen a judicial forum in which to prosecute its rights, the policy of avoiding unnecessary litigation is no longer applicable, *and the party’s Due Process rights to defend the claims in the FDIC’s lawsuit become paramount.*<sup>220</sup>

Expanding on the due process concerns, the Third Circuit stated that if FIRREA’s jurisdictional bar were read to prohibit a party from presenting affirmative defenses, it would violate the Due Process Clause<sup>221</sup>:

If parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but they would invariably lose on the merits of the claims brought against them. Such a serious deprivation of property without due process of law cannot be countenanced in our constitutional system.<sup>222</sup>

Again pointing to the statute, the Tenth Circuit concluded that if Congress had wanted to bar affirmative defenses, it would have done so explicitly<sup>223</sup>:

Significantly, the statute never uses the term “defense”, “affirmative defense” or “potential affirmative defense” . . . . [I]f Congress had intended “to remove from the jurisdiction of the courts any and all actions, claims or defenses which might diminish the assets of any depository institution . . . or [which might] diminish or defeat any claims of the Corporation in any capacity, it would [have] been simple to so provide.” But Congress did not so provide.<sup>224</sup>

From a practical standpoint, the courts found that “such a literal application of the statute . . . would lead to the patently absurd consequence of requiring presentment and proof to the RTC of all potential affirmative defenses that might be asserted in response to unknown and unasserted claims or actions

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<sup>218</sup> *Nat’l Union*, 28 F.3d at 393; *see also* 12 U.S.C. § 1821(d)(13)(D); *Tri-State*, 79 F.3d at 715.

<sup>219</sup> *See Nat’l Union*, 28 F.3d at 395; *see also Tri-State*, 79 F.3d at 715 n.13.

<sup>220</sup> *Tri-State*, 79 F.3d at 715 n.13 (alterations in original) (emphasis added) (citation omitted) (citing *Nat’l Union*, F.3d at 388, 394 ).

<sup>221</sup> *Nat’l Union*, 28 F.3d at 394.

<sup>222</sup> *Id.*

<sup>223</sup> *See* Resolution Trust Corp. v. Love, 36 F.3d 972, 977–78 (10th Cir. 1994).

<sup>224</sup> *Id.* (third, fourth, and fifth alterations in original) (citation omitted) (quoting RTC v. Conner, 817 F. Supp. 98, 100 (W.D. Okla. 1993)).

by the RTC.<sup>225</sup> *Maropakis* demonstrates the wisdom of the Tenth Circuit's analysis: to the extent that Congress did not explicitly mandate contractor claims submission as a jurisdictional predicate to raising an affirmative defense to a government claim, *Maropakis* leads to a "patently absurd consequence."<sup>226</sup>

The Third Circuit's *National Union* decision was one of the first circuit court cases to address this issue and squarely presented the court with the task of distinguishing a claim from an affirmative defense.<sup>227</sup> The failed institution had policies with two insurance companies prior to its failure.<sup>228</sup> The insurance companies filed a declaratory judgment action in the district court, asserting the right to rescind the insurance policies issued to the failed institution.<sup>229</sup> In response, the receiver filed a counterclaim to collect under the insurance policies on behalf of the failed institution and filed a motion to dismiss the insurance companies' claims for failure to exhaust their administrative remedies.<sup>230</sup> The district court granted the motion to dismiss and also held that the insurance companies were likewise barred from raising the argument of rescission as an affirmative defense to the receiver's counterclaim.<sup>231</sup> The Third Circuit affirmed in part and reversed in part.<sup>232</sup> The court held that the insurance companies' declaratory judgment claim was barred for failure to exhaust its administrative remedies;<sup>233</sup> but the Third Circuit concluded that the companies could raise the same argument related to the right to rescind in an affirmative defense to the receiver's counterclaim.<sup>234</sup>

### 3. Analogizing the FIRREA Cases

The Federal Circuit, in *Maropakis*, should have followed the circuit courts' reasoning in the FIRREA cases. First, the Federal Circuit should have distinguished between a claim and an affirmative defense. Second, the court should have considered the due process concerns implicated when it stripped *Maropakis* of its ability to defend itself. Third, the court should have recognized that once the government had "completed its administrative review, and ha[d identified] a judicial forum in which to prosecute its rights, the policy of avoiding unnecessary litigation is no longer applicable, and the

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<sup>225</sup> *Nat'l Union*, 28 F.3d at 395 (quoting *Conner*, 817 F. Supp. at 102) (internal quotation marks omitted).

<sup>226</sup> See *Maropakis II*, 609 F.3d 1323 (Fed. Cir. 2010).

<sup>227</sup> *Nat'l Union*, 28 F.3d at 380.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 381.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 395.

<sup>233</sup> *Id.* at 392.

<sup>234</sup> *Id.*

party's Due Process rights to defend the claims in the . . . lawsuit become paramount."<sup>235</sup> Fourth, the Federal Circuit should recognize that its decision produces the "patently absurd consequence of requiring presentment and proof to the [government] of all potential affirmative defenses that might be asserted in response to unknown and unasserted claims or actions by the [government]."<sup>236</sup> Fifth, the court should have recognized that the CDA "never uses the term 'defense', 'affirmative defense' or 'potential affirmative defense' . . . [;] if Congress had intended 'to remove from the jurisdiction of the courts any and all actions, claims or defenses . . . it would [have] been simple to so provide.' But Congress did not so provide."<sup>237</sup> Finally, *even if* the Federal Circuit prefers to eschew commonly accepted practices and procedures in government contract disputes in favor of a more formalistic (or generalist) approach, the most compelling precedent in an analogous setting (outside of government contracts, and outside of the Federal Circuit) also favored the status quo (that there are no jurisdictional prerequisites to raising affirmative defenses).

### F. Inefficiencies and Uncertainty: Feared and Realized

Following the *Maropakis* decision in 2010, the contractor community was troubled by how the ruling might change and impede the contract disputes process.<sup>238</sup> At the very least, a contractor appealing a liquidated damages assessment that resulted in an offset of the contract amount must submit a claim for time extensions before raising the defense that the government caused the delays.<sup>239</sup> The majority, however, gave no clear indication of the decision's limitations.<sup>240</sup> It remains unclear whether the reasoning could or would be applied to other defenses, not only against liquidated damages, but also related to other government claims.<sup>241</sup> As a result, the only way for contractors to ensure that their affirmative defenses are preserved is to anticipate

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<sup>235</sup> *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 715 n.13 (citing *Nat'l Union*, 28 F.3d at 394).

<sup>236</sup> *Nat'l Union*, 28 F.3d at 395 (quoting *RTC v. Conner*, 817 F. Supp. 98, 102 (W.D. Okla. 1993)) (internal quotation marks omitted).

<sup>237</sup> *RTC v. Love*, 36 F.3d 972, 977–78 (10th Cir. 1994) (final alteration in original) (citation omitted) (quoting *Conner*, 817 F. Supp. at 100).

<sup>238</sup> See Pushkar & Ganderson, *supra* note 6, at 6; see also Nash, *A Weird Thought*, *supra* note 6; *Government Contractors Must Now Assert Some Defenses as Affirmative Claims Or Lose Them*, HUNTON & WILLIAMS LLP, 3 (July 2010), available at <http://www.hunton.com/> (follow "News & Events" hyperlink; then search for keyword "Government Contractors") [hereinafter "HUNTON & WILLIAMS"].

<sup>239</sup> See Pushkar & Ganderson, *supra* note 6, at 6.

<sup>240</sup> See *id.* at 8–9.

<sup>241</sup> *Id.*

*all* possible defenses and file affirmative claims with the CO setting forth such defenses. Consequently, it seemed unavoidable that *Maropakis* would generate an increase in claims, costing both the contractor and the government time and money.<sup>242</sup> It did not take long for these fears to be realized.<sup>243</sup> Although the initial cases have percolated up through the COFC, no clarity appears forthcoming.<sup>244</sup>

### **1. Sikorsky Aircraft Corp. v. United States**

In *Sikorsky Aircraft Corp. v. United States*,<sup>245</sup> a COFC judge was presented with the issue of whether the court had jurisdiction over a contractor's affirmative defenses when the contractor did, in fact, submit a separate claim for its affirmative defenses, but only *after the litigation had commenced*.<sup>246</sup> Sikorsky's Corporate Administrative Contracting Officer (CACO)<sup>247</sup> issued a final decision, claiming about \$80 million against Sikorsky as a result of its cost allocation practices on various contracts for aircraft and spare parts.<sup>248</sup> Sikorsky challenged the determination by filing a complaint in the COFC in December of 2009, alleging various defenses to the government's assessment.<sup>249</sup> After learning of the *Maropakis* decision, "out of an abundance of caution," Sikorsky submitted a second claim to its contacting officer reasserting its affirmative defenses.<sup>250</sup> The CO rejected the claim, stating that he lacked authority to render a decision because the matter was already in litigation before the COFC.<sup>251</sup> Sikorsky, taking this as a denial, filed a second complaint with the COFC asserting its affirmative defenses; the government moved to dismiss this second complaint.<sup>252</sup> The court, in addressing the government's motion, bemoaned the convoluted process in "what was already an abstruse case."<sup>253</sup>

The government asserted that *Maropakis* had no bearing on its motion.<sup>254</sup> It argued that the CO lost his authority to rule on Sikorsky's claim once the

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<sup>242</sup> *Cf. id.*; HUNTON & WILLIAMS, *supra* note 238, at 3.

<sup>243</sup> *See Sikorsky Aircraft Corp. v. United States*, 102 Fed. Cl. 38 (2011).

<sup>244</sup> *See, e.g., id.*; *see also* Structural Concepts, Inc. v. United States, 103 Fed. Cl. 84 (2012).

<sup>245</sup> 102 Fed. Cl. 38 (2011).

<sup>246</sup> *Id.* at 40–41.

<sup>247</sup> *See generally* 48 C.F.R. § 42.6 (2011).

<sup>248</sup> *Sikorsky*, 102 Fed. Cl. at 44.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 44–45.

<sup>253</sup> *Id.* at 44.

<sup>254</sup> *Id.* at 47.

matter entered litigation before the COFC.<sup>255</sup> The government asserted that 28 U.S.C. § 516, which gives the Attorney General and the DOJ sole authority to litigate on behalf of the government in the federal courts,<sup>256</sup> dispossessed the CO of any authority to “reject” Sikorsky’s claim.<sup>257</sup> As such, it contended that Sikorsky had failed to meet the jurisdictional prerequisites of the CDA, and the claim therefore needed to be dismissed for lack of jurisdiction.<sup>258</sup>

Judge Lettow rejected the government’s argument, reasoning that regardless of whether *Maropakis* applied, the court had jurisdiction to hear Sikorsky’s affirmative defenses, one way or another.<sup>259</sup> “On the assumption that *Maropakis* does not apply to Sikorsky’s affirmative defenses, the court would continue to entertain Sikorsky’s affirmative defenses as pled in Sikorsky’s first complaint. Alternatively, if *Maropakis*’s filing requirement does apply to Sikorsky’s affirmative defenses, then this court manifestly has jurisdiction over Sikorsky’s second complaint . . . .”<sup>260</sup> If *Maropakis* applied, Sikorsky’s claim for affirmative defenses submitted to the CO would be a separate claim from the litigation.<sup>261</sup> Thus, “the contracting officer’s choice to decline issuing a final decision on Sikorsky’s second set of claims would be incorrect: the claims would not have been already in litigation, so the contracting officer should have issued a final decision within 60 days or a reasonable time.”<sup>262</sup> The CO’s refusal to decide the claim would constitute a deemed denial and the second complaint would be jurisdictionally proper, though still redundant of the defenses raised in the first complaint.<sup>263</sup> Judge Lettow reasoned that “Sikorsky need not be put to the Hobson’s choice of preserving its affirmative defenses only through its original complaint or not at all.”<sup>264</sup>

The court attempted to use a footnote to differentiate *Maropakis* from the situation at hand:<sup>265</sup>

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<sup>255</sup> *Id.*

<sup>256</sup> See *Schooner, Postscript*, *supra* note 12, at 5 (citing *Sharman Co. v. United States*, 2 F.3d 1564 (Fed. Cir. 1993)); see also Ralph C. Nash, *Contracting Officer Decision During Litigation: Are They Valid?*, 22 NASH & CIBINIC REP. ¶ 13 (Feb. 2008); Ralph C. Nash & John Cibinic, *Procedural Litigation on Default Terminations: Will it Never End?*, 8 No. 7 NASH & CIBINIC REP. ¶ 42 (July 1994).

<sup>257</sup> See *Sikorsky*, 102 Fed. Cl. at 47.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 47–48.

<sup>260</sup> *Id.* at 47.

<sup>261</sup> *Id.* at 47–48.

<sup>262</sup> *Id.* at 48.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 47.

<sup>265</sup> *Id.* at 48 n.14 (citations omitted).

First, *Maropakis*' holding only extends to counterclaim defenses that seek contract modification. The *Maropakis* plaintiff sought an extension of time, which is typically considered an equitable adjustment and resolved under doctrines concerning contractual changes. By contrast, Sikorsky's affirmative defenses are traditional common law defenses that are independent of the means by which a party seeks equitable adjustment to a government contract.<sup>266</sup>

Judge Lettow further differentiated *Maropakis*, stating that Maropakis only had one affirmative defense that shared an identity with its dismissed claim for time extensions.<sup>267</sup>

Second, Maropakis' dismissed claim for a time extension "was the *only* defense asserted against the government's counterclaim for liquidated damages." The time-extension claim could not be used as a sword, so in the procedural setting of that case, neither could it be used as a shield. Sikorsky's affirmative defenses are not claims for additional relief, nor is Sikorsky in the hapless position of proffering a defense that shares an identity with a dismissed claim.<sup>268</sup>

Nonetheless, in the end, the court declined to decide whether *Maropakis* applied to the situation at hand, finding that it had jurisdiction to hear Sikorsky's affirmative defenses either way.<sup>269</sup>

The good news was that the judge sought to differentiate *Maropakis*, give it a limited reading, and constrain its application.<sup>270</sup> However, because the other COFC judges are not bound by *Sikorsky*'s holding, the contractor community holds no guarantee that *Maropakis* will be read narrowly before

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<sup>266</sup> *Id.* (citations omitted) (citing *Travelers Cas. & Sur. of Am. v. United States*, 74 Fed. Cl. 75, 97 (2006)); *see also* *Metric Constr. Co. v. United States*, 81 Fed. Cl. 804, 818 (2008); JOHN CIBINIC, JR. ET AL., *ADMINISTRATION OF GOVERNMENT CONTRACTS* 567–76 (4th ed. 2006).

<sup>267</sup> *Sikorsky*, 102 Fed. Cl. at 48 n.14.

<sup>268</sup> *Id.* (citing *Maropakis II*, 609 F.3d 1323, 1331–32 (Fed. Cir. 2010)); *Sun Eagle Corp. v. United States*, 23 Cl. Ct. 465, 474 (1991) (invoking *Elgin Builders, Inc. v. United States*, 10 Cl. Ct. 40, 44 (1986) for the proposition that, absent presentment to the CO, a contractor's defenses are "limited to the nature of, and the issues presented in, the assessment itself," rather than those that could serve as affirmative claims for contract modification). Similarly, in *Z.A.N. Co. v. United States*, 6 Cl. Ct. 298 (1984), the court observed that the finality of a CO's decision

is not [diminished] by any absence of certification by the contractor when it seeks solely to defend against the government's assertion of its claim for liquidated damages. On the other hand, if the contractor further asserts, in addition to its defense of the government's claim, its right to additional relief such as extensions of time and/or money . . . , then this portion of the dispute may be identified as a claim by the contractor . . . .

*Id.* at 304 (footnote and citation omitted).

<sup>269</sup> *Sikorsky*, 102 Fed. Cl. at 48.

<sup>270</sup> *See* *Schooner, Postscript*, *supra* note 12.

Judge Lettow's colleagues.<sup>271</sup> Consequently, contractors must continue to act with "an abundance of caution" to preserve their affirmative defenses,<sup>272</sup> with no guaranteed outcome.

## 2. Structural Concepts, Inc. v. United States

A second COFC case applying *Maropakis* gives greater cause for concern because of the government's argument before the court.<sup>273</sup> In *Structural Concepts, Inc. v. United States*,<sup>274</sup> Structural Concepts, Inc. ("SCI") contracted with the Air Force, in 1999, to alter and repair a building on a base within a year.<sup>275</sup> SCI did not complete the project until late 2003 or early 2004.<sup>276</sup> SCI filed a claim with its CO, claiming damages in the form of additional compensation due to government-caused delay and other government actions.<sup>277</sup> While the government admitted suspending work and modifying the contract to extend the completion date, it nonetheless asserted that SCI was responsible for 384 days of delay, resulting in \$776,448 in liquidated damages.<sup>278</sup> The CO denied SCI's claim and upheld the government's liquidated damages assessment.<sup>279</sup> SCI filed suit in the COFC, and the government counterclaimed for liquidated damages.<sup>280</sup> Both parties moved for summary judgment on the liquidated damages claim.<sup>281</sup>

The government asserted that, under *Maropakis*, the court lacked jurisdiction to hear SCI's affirmative defenses to the government's counterclaim, because the contractor had not presented "a *separate* claim to the CO providing adequate notice of the total number of days requested in extension as a defense to the Government's claim assessing liquidated damages."<sup>282</sup> Fortunately, Judge Bush saw this argument as an extension of *Maropakis* and refused to accept it.<sup>283</sup> The court differentiated *Maropakis*, noting "that SCI *did* present a valid CDA claim to the CO requesting damages caused by government-

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<sup>271</sup> *Id.* at ¶ 21.

<sup>272</sup> *Sikorsky*, 102 Fed. Cl. at 44.

<sup>273</sup> *Structural Concepts, Inc. v. United States*, 103 Fed. Cl. 84 (2012).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 84–85.

<sup>276</sup> *Id.* at 85.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 85.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 89.

<sup>283</sup> Elizabeth A. Ferrell & Justin M. Ganderson, *COFC Rejects Government's Attempt to Extend Holding in M. Maropakis Carpentry v. United States*, 97 FED. CONT. REP. 227 (Mar. 6, 2012).

caused delay, placing this plaintiff in a different position than the plaintiff in *Maropakis*. Thus, the *Maropakis* decision provides limited guidance in the case at bar.”<sup>284</sup> The court found that *Maropakis* did “not directly address the question of whether a contractor who has already filed a valid CDA claim for damages caused by government delay must necessarily then file a *separate* claim once it has learned the full extent of the government’s liquidated damages assessment.”<sup>285</sup> Judge Bush looked to other Federal Circuit precedent, stating that CDA claims before the COFC need not rigidly adhere to the original claim presented to the CO, but only must “arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery.”<sup>286</sup> The court found that much of SCI’s defense to the government’s counterclaim had, indeed, been presented to the CO.<sup>287</sup> In the end, Judge Bush denied the cross motions for summary judgment on the issue of liquidated damages, finding that SCI’s claim for damages due to government delay and the government’s claim for liquidated damages were so related that they must both be preserved for trial.<sup>288</sup>

While the issue resolved favorably for SCI, the case shows just how far *Maropakis* may be taken by another judge who is not bound by the *Structural Concepts* decision.<sup>289</sup> Under the government’s theory, a contractor would need to present a separate claim to the CO *even if it had already made a claim for time extensions under the CDA*.<sup>290</sup> In *Structural Concepts*, the government specifically contended that even if SCI’s original claim asserted that the government caused some of the delays covered by the liquidated damages assessment, the claim did not cover the entire period of delay claimed by the government.<sup>291</sup> Therefore, not only would a contractor have to make a claim for government-caused delays, but it would have to file a separate claim if the government’s liquidated damages claim covered a greater or different time period.<sup>292</sup> Perhaps most troubling is that the government did not need to read *Maropakis* all that broadly to form its theory. If a contractor’s affirmative defenses to a government claim for liquidated damages differ from its original claim for delay damages, then under *Maropakis* a judge could rule that those

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<sup>284</sup> *Structural*, 103 Fed. Cl. at 89.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* (quoting *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)).

<sup>287</sup> *Id.* (quoting *Scott Timber Co.*, 333 F.3d at 1365).

<sup>288</sup> *Id.* at 91.

<sup>289</sup> See Ferrell & Ganderson, *supra* note 283 (warning contractors that another COFC judge is not bound by *Structural* and may not rule as favorably).

<sup>290</sup> *Structural*, 103 Fed. Cl. at 89.

<sup>291</sup> See *id.* at 89.

<sup>292</sup> See *id.*

portions of the affirmative defenses not covered by the contractor's claim have not met the jurisdictional prerequisites of the CDA.<sup>293</sup>

*Sikorsky* and *Structural Concepts* demonstrate just how abundantly cautious contractors must be (in preparing and submitting unnecessary and unproductive claims that anticipate government claims for liquidated damages).<sup>294</sup> After *Sikorsky*, a contractor cannot be sure what types of defenses are covered by *Maropakis* and whether it must file a separate claim with the CO to assert such defenses.<sup>295</sup> Under the government's theory in *Structural Concepts* (which the government is in no way estopped from attempting before all other COFC judges), the contractor must submit a separate claim for its affirmative defenses even where it has presented its own claim for delay damages (or at the very least must ensure that its claim asserts enough to counter the entire amount claimed by the government in liquidated damages).<sup>296</sup>

Accordingly, *Maropakis* and these recent decisions will undoubtedly lead to contractors preparing and submitting multiple claims at multiple times to the CO "out of an abundance of caution," generating inefficiency and unnecessary consideration of claims both at the agency level and before the COFC and the BCAs.<sup>297</sup> "Although [the] requirement [to submit a valid CDA claim to preserve defenses] . . . is counterintuitive and ignores the distinction between an affirmative claim and a defense to a government claim, contractors cannot dismiss the importance of this necessary, albeit artificial, step."<sup>298</sup>

### ***3. Another COFC and BCA Split?***

The inefficiencies created by *Maropakis* might also be analogized to the process through which a contractor can defend against another type of government claim—termination for default.<sup>299</sup> Because a termination for default is a government claim, the contractor need not present its own claim to the CO in order to merely defend against the government's claim (or challenge the propriety of the default termination) before the BCAs.<sup>300</sup> The standard default clauses identify a number of defenses that a contractor can make against a

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<sup>293</sup> See *Maropakis II*, 609 F.3d 1323, 1329–32 (Fed. Cir. 2010).

<sup>294</sup> *Schooner, Postscript*, *supra* note 12, at 18–19, 21; *Structural*, 103 Fed. Cl. at 87–91.

<sup>295</sup> *Schooner, Postscript*, *supra* note 12, at 18–19, 21.

<sup>296</sup> See *Structural*, 103 F.3d at 87–91.

<sup>297</sup> However, *Sikorsky* has virtually no bearing on proceedings before the BCAs because the agencies retain authority over the matters even after the case goes before one of the boards, so a CO would not lose his or her authority as they may when a case goes to the COFC.

<sup>298</sup> Ferrell & Ganderson, *supra* note 283.

<sup>299</sup> See *Schooner, Postscript*, *supra* note 12, at 21.

<sup>300</sup> See *id.*

termination for default,<sup>301</sup> and the BCAs do not require a contractor to submit its own claim to the CO to appeal a default termination.<sup>302</sup> Before the COFC, however, the contractor must present a settlement proposal for a (hypothetical) termination for convenience as a “claim” to the CO before defending against a termination for default, even though a termination for convenience has yet to occur.<sup>303</sup> The difference in COFC and the BCA procedures reflects one of the most significant differences today in what, generally, is perceived as concurrent and parallel jurisdiction.<sup>304</sup>

In defense of the COFC, the case of defending against a termination for default is a much more compelling case for requiring a contractor to submit its own affirmative claim, because the single remedy for invalidating a termination for default is a convenience termination, which brings with it an explicitly regulated monetary recovery.<sup>305</sup> Conversely, the remedy for defeating a liquidated damages claim is simply that the contractor does not owe the government any money;<sup>306</sup> the contractor receives no affirmative monetary recovery. Therefore, there is little justification for requiring a contractor to take the inefficient extra step of filing a separate claim before asserting its defenses.

The government’s litigation strategy in *Sikorsky* eventually might lead to a split between the COFC and the BCAs similar to that present in the termination for default context. In light of *Maropakis*, any COFC judge could accept this, or a similar, argument from the government and hold that: (1) a contractor cannot raise affirmative defenses that it did not previously present to its CO; and (2) the contractor cannot achieve anything by presenting the defenses in a separate claim because the CO lost any decisional authority when the contractor initiated suit in the COFC. Conversely, because a CO retains authority while a matter is pending before the BCAs, this distinction could

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<sup>301</sup> For example:

the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions[,] (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

48 C.F.R. § 52.249-8(c) (2000).

<sup>302</sup> See Steven L. Schooner, *More Bites of Red Herring: Claims Court/BCA Differences in Handling Default Terminations*, 2 NASH & CIBINIC REP. ¶ 21, at 55 (Apr. 1988) (quoting *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987)).

<sup>303</sup> See Schooner, *Postscript*, *supra* note 12, at 21.

<sup>304</sup> See Schooner, *supra* note 302, at 55.

<sup>305</sup> 48 C.F.R. § 52.249-8(g); see also Schooner, *Postscript*, *supra* note 12, at 21.

<sup>306</sup> 48 C.F.R. § 52.211-11(c); see also Schooner, *Postscript*, *supra* note 12, at 21.

create another split between the courts and the boards. Yet little purpose—other than to artificially restrict a contractor’s pre-existing statutory right to an election of forum—would be served by such a split.

All of which points to the same conclusion—*Maropakis* was wrongly decided. If left unchanged, the decision will continue to cause costly problems, not only for contractors, but also for the government, by generating expensive and unproductive litigation. This result stands in direct opposition to the intent of the CDA—to streamline the contract disputes process and avoid costly litigation.<sup>307</sup> Therefore, in order to abide by the legislative intent of the CDA, to conform the contract disputes process to well-accepted rules of civil procedure, and to prevent further unjust results, the CDA should be amended to supersede *Maropakis*.

### III. Solution: Amending the Contract Disputes Act

*Maropakis* unfairly disadvantaged government contractors attempting to exercise their right to defend themselves in the congressionally constructed contract disputes process. Of course, an en banc Federal Circuit panel could quickly undo the damage done and restore the status quo. Until then, a legislative solution is necessary to restore a level playing field in government contracts litigation. The *Maropakis* decision nullifies the Supreme Court’s consistent admonition that “[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”<sup>308</sup> However, as the law currently stands, contractors are held to a much more rigid, inefficient, and unfair standard than the government.

When a contractor makes an affirmative claim, it must follow the requirements of the CDA, certifying (when appropriate) the amount it claims and providing full support for each assertion and the amount claimed.<sup>309</sup> Conversely, when the government makes a “claim,” it simply demands something from the contractor, giving only a short explanation in support of its assertions. As a result, the only way a contractor can dispute the government claim is by taking on the role of the plaintiff and filing suit in the COFC or appealing to the BCAs.

Now, under *Maropakis*, when the government asserts a right to contractor funds, the contractor must not only anticipate but also fully disclose its defenses to the government’s claim before it even initiates suit in the COFC or the BCAs. To be clear, before the government files its initial pleading in

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<sup>307</sup> See *supra* Part II.C.

<sup>308</sup> *Lynch v. United States*, 292 U.S. 571, 579 (1934); see also *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002).

<sup>309</sup> See CDA, 41 U.S.C. § 7103 (Supp. V 2011).

an action in which the government is claiming money, the contractor must identify and fully document its defenses by submitting a claim outlining those defenses.<sup>310</sup> Such a requirement, that a contractor must anticipate all defenses before it even knows the details of the government's litigation strategy, is as unfair as it is inefficient. And, again, the government has no corresponding burden when defending against contractor claims.

To remedy such an unfair and inefficient result, Congress should amend the CDA. The CDA should be amended to treat affirmative defenses just as they are treated under the rules of civil procedure. Further, Congress should explicitly amend the Act to state that a contractor need not submit its own claim in order to raise affirmative defenses to a government claim.

Congress should amend the CDA to simply state that affirmative defenses under the CDA are treated the same as under traditional civil procedure rules. For example, Congress could add to 41 U.S.C. § 7101<sup>311</sup> the following language:

**(10) Affirmative defense.** The term "affirmative defense" shall be interpreted consistent with the Federal Rules of Civil Procedure pursuant to title 28. A contractor need not submit a claim to raise an affirmative defense to a government claim in an appeal to an agency board of contract appeals or in litigation in a Federal court.

The proposed amendment to the CDA would allow for a more fair and equitable result for contractors. *Maropakis* left contractors who were not inclined to pursue monetary claims against the government unnecessarily defenseless when the government chooses to demand money from them.<sup>312</sup> As a result, when the COFC refused to exercise jurisdiction over Maropakis's defense, the government may have received a windfall.<sup>313</sup> Under the proposed amendments to the CDA, the outcome of *Maropakis* may have been markedly different. The COFC would have had jurisdiction over Maropakis's factual defenses, particularly its defense that the government had contributed to the

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<sup>310</sup> See *id.* Additionally, the contractor must keep in mind the different time limitations in the two fora, thereby further complicating the problem. From the date of receipt of a CO's decision, a contractor has either ninety days to file a notice of appeal to the appropriate board or twelve months to file a formal complaint in the COFC. CDA, 41 U.S.C. § 7104(a), (b) (1), (3) (Supp. V 2011). While either party may appeal the decision to the Federal Circuit, the time limitations for an appeal differ. Once a judgment or order is rendered, a party has 60 days to appeal an adverse COFC decision, Fed. R. App. P. 4(a)(1)(B)(i), but 120 days to appeal an adverse board decision, CDA, 41 U.S.C. § 7107(a)(1) (Supp. V 2011). See Schaengold, *Choice of Forum 2008*, *supra* note 143, at 311, 336.

<sup>311</sup> The authors do not suggest that this particularly placement is unique or superior to alternatives. For example, similar language might be placed at 41 U.S.C. § 7103(a)(6) or 41 U.S.C. § 7105(e)(3) (Supp. V 2011).

<sup>312</sup> See *Maropakis II*, 609 F.3d at 1334–35 (Newman, J., dissenting).

<sup>313</sup> See *id.*

delays.<sup>314</sup> Maropakakis could have defended against the liquidated damages claim and prevented the government from recovering all or part of the liquidated damages claimed.<sup>315</sup> But again, Maropakakis would have been entitled to nothing more than the right to defend itself in court.<sup>316</sup> The contractor could not have recovered added expenses due to the delay, nor could it have recovered interest on added expenses or on the portion of the contract balance that was withheld.<sup>317</sup>

## Conclusion

The Federal Circuit's drive-by jurisdictional decision in *Maropakakis* broke from precedent, contravened the purpose of the CDA, and produced inefficiency and uncertainty. Subsequent COFC cases offer compelling examples of the inefficient litigation that is sure to result from *Maropakakis*. Comparisons with basic principles of civil procedure and case law under similar statutory schemes illuminate the injustice produced by the decision. This lengthy list of problems can only be solved by: (1) a Supreme Court or Federal Circuit decision overturning *Maropakakis*, or (2) a statutory amendment to the CDA. Failure to change course may generate lucrative work for the bar, but no obvious policy is served by maintaining the status quo. If the Federal Circuit chooses not to right its error, a prompt, simple, statutory solution is appropriate.

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<sup>314</sup> See *id.* at 1326, 1329–30 (majority opinion).

<sup>315</sup> See *id.* at 1329–30.

<sup>316</sup> See *id.*

<sup>317</sup> See *Ruhnau-Evans-Ruhnau Assocs. v. United States*, 3 Cl. Ct. 217, 218–19 (1983); Nash, *A Weird Thought*, *supra* note 6.