

No. _____

**In The
Supreme Court of the United States**

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HIGH PLAINS CATTLE COMPANY, LLC,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

—◆—

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

—◆—

PETITION FOR A WRIT OF CERTIORARI

—◆—

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QUESTION PRESENTED

This Court has characterized 28 U.S.C. § 2680(h) as the “intentional tort exception” to the waiver of sovereign immunity in the Federal Tort Claims Act (“FTCA”). *E.g.*, *Levin v. United States*, 133 S. Ct. 1224, 1228 (2013); *Millbrook v. United States*, 133 S. Ct. 1441, 1443 (2013). However, the court below applied the “interference with contract” exception in § 2680(h) to bar Petitioner High Plains Cattle Company, LLC’s (“High Plains”) negligence and conversion claims, not because the United States intentionally induced a breach of contract, but simply because High Plains’ property interest arose from contract.

The Tenth Circuit’s decision deepens the split among the circuits over the proper interpretation and application of the FTCA’s “interference with contract” exception. Although this Court has resolved circuit splits with respect to other § 2680(h) exceptions, it has not yet issued an opinion on the scope of the “interference with contract” exception.

The question presented is:

Whether the “interference with contract” exception to the waiver of sovereign immunity in the Federal Tort Claims Act, 28 U.S.C. § 2680(h), bars claims against the United States in the absence of intentionally tortious conduct by the Government and solely because petitioner’s property interest derives from contract.

PARTIES TO THE PROCEEDINGS

Petitioner High Plains Cattle Company, LLC was a Plaintiff-Appellant below. Other Plaintiff-Appellants – ECCO Plains, LLC and Ken Ulrich – are not parties to this Petition.

The United States of America was Defendant-Appellee below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in High Plains Cattle Company, LLC.

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PETITION FOR A WRIT OF CERTIORARI

High Plains Cattle Company, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.



OPINIONS BELOW

The decision of the court of appeals, reported at 728 F.3d 1190, is reprinted in the Appendix (“App.”) at 1-25. The decision of the district court is reprinted at App. 26-27.



JURISDICTION

The court of appeals entered its judgment on September 4, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS

Title 28, United States Code, Sections 1346(b)(1) and 2680(h) are reproduced in the Appendix at App. 28-29.



STATEMENT OF THE CASE

High Plains and an individual named Doug English formed ECCO Plains, LLC. (App. 3). ECCO Plains raised and sold cattle. (*Id.*). When forming ECCO Plains, High Plains and English agreed that High Plains would receive a return of its capital contribution before English received any of his capital contribution. (App. 4).

“ECCO Plains sold approximately \$5,500,000 worth of cattle to a packing house in Northern Colorado. FDIC caused the packing house to make the sale proceeds payable to both ECCO Plains and FDIC.” (*Id.*).

The FDIC had become the Receiver of New Frontier Bank. (App. 3-4). ECCO Plains had no business relationship with New Frontier Bank. (App. 3). English, however, owed considerable debt to the bank. (*Id.*). The FDIC applied the \$5.5 million cattle payment to English’s loan and then sold the loan to a third party. (App. 4-5).

High Plains sued the United States, asserting claims for negligence and conversion. (App. 5). The United States moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), contending that the district court lacked subject matter jurisdiction to hear the suit. (*Id.*). The district court granted the Government’s motion. (App. 26-27).

Exercising jurisdiction under 28 U.S.C. § 1291, the Tenth Circuit affirmed the dismissal for lack of

subject matter jurisdiction. The court of appeals held that “the only ‘right’ [High Plains] had to the proceeds arose from the contract between High Plains and English. . . . Thus, the ‘intentional interference with contract’ exception applies.” (App. 12).

The court rejected High Plains’ argument that the “interference with contract” exception in 28 U.S.C. § 2680(h) “requires the defendant (in this case FDIC) to intend to induce a breach of contract and to in fact cause a breach.” (App. 13-14). Central to its holding was the court’s determination that High Plains’ interest in the proceeds derives from its agreement to form ECCO Plains, and therefore any complaint about the misappropriation of those proceeds implicates the “interference with contract” exception. (App. 19-20).



REASONS FOR GRANTING THE PETITION

The Tenth Circuit has circumscribed federal jurisdiction and extended federal sovereign immunity in ways unintended by Congress, condemned by this Court, and in conflict with the majority of its sister circuits. This Court disfavors interpretations of the FTCA that expand federal sovereign immunity beyond the narrow exceptions contained in the statute. Consistent with that approach, the majority of lower courts interpret “interference with contract” in § 2680(h) to refer to the tort of that name, *viz.*, conduct intended

to cause one party to breach its contractual obligations.

Moving well beyond the standard followed in the majority of circuits, and aligning itself instead with the minority, the Tenth Circuit held that federal courts lack subject matter jurisdiction to hear High Plains' tort claims because its interest in the property that the Government converted arises from contract. High Plains did not allege that the Government induced a third party to breach its contractual commitments. (App. 15). However, according to the court below, § 2680(h) "does not require the [Government] to have intended to induce a breach or to have caused an actual breach[.]" (*Id.*) (applying Restatement (Second) of Torts § 766(1979)). The United States is immune from suit, the Tenth Circuit reasoned, because High Plains failed to allege "any injury they suffered independent of FDIC's interfering with their right to receive the proceeds under that contract." (App. 19-20).

Thus, according to the minority formulation, the United States did not only preserve sovereign immunity against claims amounting to the tort of interference with contract. Rather, the Government may pilfer property with impunity, so long as the injured party's property rights derive from contract. Under this reading, the tortious nature of the Government's conduct is not the basis for immunity. Rather, it is the provenance of the plaintiff's property interest that determines federal jurisdiction.

The exceptions to the general waiver of sovereign immunity enumerated in § 2680(h) were intended to shield the Government from liability for certain conduct, not to render the violation of certain property rights unredressable. This Court should grant the petition and reverse the court below.

I. The Tenth Circuit’s Decision Contravenes This Court’s Admonition to Apply the 28 U.S.C. § 2680(h) Exceptions Strictly According to Their Terms

A. The Congressional Record Provides No Support for the Tenth Circuit’s Expansive Reading of § 2680(h)

For nearly a century after the nation’s founding, “no general statute gave the consent of the United States to suit on claims for money damages; the only recourse available to private claimants was to petition Congress for relief.” *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Burdened by the volume of requests for private bills to remediate losses at the hands of the government, Congress resolved to delegate to federal courts the responsibility for adjudicating claims against the United States. The FTCA, 28 U.S.C. §§ 1346, 2671, *et seq.*, is one of several legislative schemes that both waives sovereign immunity for a class of claims and delegates to federal courts the jurisdiction to resolve disputes between citizens and the Government.

Through the FTCA, the United States authorized district courts to exercise

exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

“The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.” *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). It “was designed primarily to remove the sovereign immunity of the United States from suits in tort.” *Richards v. United States*, 369 U.S. 1, 6 (1962).

Although fashioned as a broad waiver of sovereign immunity, the FTCA contains certain exceptions, including those set forth in 28 U.S.C. § 2680(h), for “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse

of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”

Resort to legislative history to reveal the intended extent or application of these exceptions reflects that Congress was concerned, primarily, with governmental liability arising from intentional torts. Similar exclusions to those contained within § 2680(h) first appeared in S. 211, 72d Cong., 1st Sess. § 206 (1931). Since then, nearly identical exclusions were included in most subsequent tort claims bills. The first explanation – and not a particularly illuminating one – came in 1940, when Alexander Holtzoff, representing the Department of Justice, testified that the exclusions are intended “to exclude from the cognizance of the law claims arising out of assault, battery, false imprisonment, false arrest, and so forth, a type of tort which would be difficult to make a defense against, and which are easily exaggerated.” Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 76th Cong., 3d Sess., on S. 2690, p. 9 (March 6 and 11, 1940). Subsequently, a DOJ official testified that § 2680(h) would apply “where some agent of the Government gets in a fight with some fellow . . . [and] socks him.” Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 33 (1942). The exceptions shield “the Federal Government from liability when its agents [commit] intentional torts such as assault and battery.” S. Rep. No. 93-588, p. 3 (1973).

B. This Court Has Insisted that Lower Courts Refrain from Expanding the § 2680(h) Exceptions

This Court has supplied ample guidance for how to apply the § 2680(h) exceptions. “In interpreting the exceptions to the generality of the grant, courts include only those circumstances which are within the words and reason of the exception.” *Dalehite v. United States*, 346 U.S. 15, 31 (1953).

Where the facts of a case do not fit within the precise contours of the excepted tort, the district court retains subject matter jurisdiction. Thus, § 2680(h) enumerates particular torts and it is only if a plaintiff’s claim in fact constitutes one of those torts that the exception applies. “Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending some twenty-eight years of congressional drafting and re-drafting, amendment and counter-amendment.” *Molzof v. United States*, 502 U.S. 301, 307-08 (1992) (quoting *United States v. Spelar*, 338 U.S. 217, 219-20 (1949)).

Such narrow application of the exceptions is necessary to preserve the general waiver of sovereign immunity. *See, e.g., Kosak v. United States*, 465 U.S. 848, 854 n.9 (1984) (“unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute”). Therefore, this Court has explained that a district court should not “as a self-constituted guardian of the Treasury import immunity

back into a statute designed to limit it.” *Indian Towing*, 350 U.S. at 69. “The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.” *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949), quoting *Anderson v. Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.).

Whenever this Court has addressed § 2680(h) exceptions, it has focused on the Government’s conduct, not on the source of the plaintiff’s property rights. *See, e.g., Millbrook v. United States*, 133 S. Ct. 1441, 1446 (2013) (“Congress has spoken directly to the circumstances in which a law enforcement officer’s conduct may expose the United States to tort liability”); *United States v. Shearer*, 473 U.S. 52, 55 (1985) (“Congress believed that § 2680(h) would bar claims arising out of a certain type of factual situation – deliberate attacks by Government employees”); *Sheridan v. United States*, 487 U.S. 392, 398 (1988) (“in at least some situations the fact that an injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur”).

For example, in *Block v. Neal*, 460 U.S. 289 (1983), this Court determined the proper application of the “misrepresentation” exception in § 2680(h). The case arose from Neal’s complaint that employees of the Farmers Home Administration failed to properly inspect and supervise the construction of her home.

The Government argued that Neal's claims arose out of alleged misrepresentations, and were therefore barred. This Court began with the premise that "the Tort Claims Act, 28 U. S. C. § 2674, authorizes suit against the Government for the negligence of a federal agency in performing a voluntary undertaking." *Id.* at 293. Thus, if an exception did not apply, Neal's negligence claim would be justiciable.

Turning to § 2680(h), this Court observed that "the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies." *Id.* at 296. Therefore, the exception "does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty." *Id.* at 297. This Court concluded that the "misrepresentation" exception did not adhere because "under the Good Samaritan doctrine, Neal must show that FmHA officials voluntarily undertook to supervise construction of her house; that the officials failed to use due care in carrying out their supervisory activity; and that she suffered some pecuniary injury proximately caused by FmHA's failure to use due care," all of which is "distinct from any duty to use due care in communicating information to respondent." *Id.*

Whether a given exception applies turns on "the essence of **an action for**" that tort. *Id.* at 296 (emphasis added). In other words, § 2680(h) bars certain tort actions. A claim, however denominated, will

be barred if it in fact constitutes “an action for” the excepted tort. *See, e.g., Jimenez-Nieves v. United States*, 682 F.2d 1, 4-5 (1st Cir. 1982) (Breyer, J.) (analyzing elements of “misrepresentation” to determine whether FTCA forecloses action); *Sheehan v. United States*, 896 F.2d 1168, 1171 (9th Cir. 1990) (“the issue in this case is whether the conduct upon which plaintiff rests her claim for intentional infliction of emotional distress constitutes an assault as that tort is traditionally defined”). Determining whether a claim is in fact a Trojan Horse ferrying an excepted tort into federal court requires courts to ascertain whether the Government’s conduct constituted “breach of a different duty” than that covered by an excepted tort. *Block*, 460 U.S. at 297.

The Government’s conduct in this case does not give rise to a claim for interference with contract, as that tort has been traditionally understood. The Government did not purposely cause a third party to breach its contract with High Plains. *See* Restatement (First) of Torts § 766 (1939) (“one, who without a privilege to do so, induces or otherwise purposely causes a third person not to . . . perform a contract with another”); (App. 18 n.12 (“[High Plains claims] FDIC did not induce English to breach the agreement. But a breach is not necessary; mere interference with performance is enough”). Such inducement or intentional interference is “the essence of an action for” interference with contract. *Block*, 460 U.S. at 296.

The complaint in this case “focus[es] . . . on the Government’s breach of a different duty.” *Id.* at 297.

As in *Block*, the Government “voluntarily undertook” a responsibility, namely to take possession of and properly disburse \$5.5 million of proceeds. *Id.* “[T]he officials failed to use due care in” maintaining and disbursing those funds. *Id.* High Plains “suffered some pecuniary injury proximately caused by [FDIC’s] failure to use due care.” *Id.*

Applying the elements of “interference with contract” extant in 1946 when the FTCA was enacted, High Plains’ claims survive § 2680(h). It is only by expanding “interference with contract” beyond its intended meaning that High Plains’ suit is barred.

C. The Tenth Circuit Has Adopted an Unduly Expansive View of the “Interference with Contract” Exception

The Tenth Circuit held: “[D]espite the labels placed on the claims (i.e., conversion and negligence), High Plains and Ulrich’s complaint is that FDIC interfered with their contractual right to the sale proceeds as outlined by High Plains’ operating agreement with English.” (App. 8). Rather than focus on the Government’s tortious conduct, the Tenth Circuit instead looked to the source of High Plains’ property right – “High Plains’ operating agreement with English” – and held that because High Plains’ property interest arose from contract, the Government was immune from suit under the “interference with contract” exception in § 2680(h).

The court's holding is based on the following determination:

[T]he only 'right' they had to the proceeds arose from the contract between High Plains and English. Therefore, the essence of their claim is that FDIC interfered with this contract. Thus, the 'intentional interference with contract' exception applies.

(App. 12).

The court below characterized High Plains' argument as follows:

[T]he interference with contract exception does not apply because their complaint alleges FDIC breached several duties separate and distinct from its duty not to interfere with a third-party's contractual relationships. Namely, they allege FDIC breached its duties (1) not to exercise dominion and control over property to which it had no interest, (2) to turn over property it wrongfully held to the proper owners, (3) to exercise reasonable care in the custody and preservation of the property, (4) to avoid foreseeable damage to High Plains and Ulrich, and (5) to apply the funds equally. Thus, under *Block*, they say their complaint is not barred by the interference with contract exception because their injuries are not 'wholly attributable' to the exempted tort and any allegations of interference with contract are 'not essential' to their claims. *Block*, 460 U.S. at 297.

(App. 19).

The Tenth Circuit rejected this argument, concluding that all these enumerated duties “arise out of High Plains’ contract with English. Thus, they are not independent of the contract[.]” (*Id.*). The court further ruled that High Plains had not “alleged any injury they suffered independent of FDIC’s interfering with their right to receive the proceeds under that contract. Therefore, their injuries are wholly attributable to FDIC’s interference with the contract.” (App. 19-20).

The Tenth Circuit held that the Government is immune from suit by plaintiffs whose property rights “arise out of” or “under” a particular contract, regardless of whether the Government induced the contracting counter-party to breach its contractual obligations. This holding contravenes both congressional intent and this Court’s § 2680(h) jurisprudence and should be reversed.

II. The Circuits are Split Five-to-Three Over the Proper Application of the “Interference with Contract” Exception

When sued by a plaintiff whose property rights derive from contract, the Government seeks cover under the § 2680(h) “interference with contract” exception. The majority of circuits have rejected the Government’s unsound approach by holding that even where a plaintiff’s property interest arises from contract, the Government may nevertheless be liable for breach of a duty separate and distinct from the duty not to interfere with the underlying contract.

In such cases, although a contract may establish the measure of damages, it does not limit the duties owed by the Government. A minority of circuits disagree, concluding that where a plaintiff's injury stems from his inability to benefit from a contract, the Government's action amounts to "interference with contract" within the meaning of § 2680(h).

In *Sowell v. United States*, 835 F.2d 1133 (5th Cir. 1988), the United States Army undertook the responsibility to deduct a soldier's life insurance premium from his paycheck and to send the funds to the insurance company. The Army failed to fulfill this responsibility. After the soldier died, the insurance company denied the claim and his widow sued the United States for negligence. The government moved to dismiss the case for lack of subject matter jurisdiction, "arguing that the claim against the United States was barred by the 'interference with contract rights' exception to the Federal Tort Claims Act[.]" *Id.* at 1134.

Relying on *Block*, the **Fifth Circuit** held:

[T]he duty the Army owed to use due care in processing [plaintiff's insurance forms] is distinct from any duty the Army may have had not to interfere with existing or potential contractual relationships between [plaintiff and the insurer]. The fact that the measure of damages – loss of the value of insurance coverage – from the Army's failure to fulfill its duty to process the forms correctly is the same as it would have been for interfering

with contract rights does not merge the duties.

Id. at 1135. Therefore, the court concluded that the plaintiff's claim "is not barred by the interference with contract rights exception in 28 U.S.C. § 2680(h)." *Id.*

It was immaterial that the plaintiff had not "alleged any injury [she] suffered independent of [the Government's] interfering with [her] right to receive the proceeds under that [insurance] contract." (App. 19-20). The "interference with contract" exception did not bar her claims because the Government's duty to exercise due care "is distinct from any duty the [Government] may have had not to interfere with existing or potential contractual relationships between" plaintiff and the insurer. *Sowell*, 835 F.2d at 1135.

The Tenth Circuit distinguished *Sowell* on the basis that "the Army agreed with Sowell to pay the premium out of his paycheck" but in this case "there is no allegation FDIC agreed with High Plains and Ulrich to perform any service on their behalf[.]" (App. 20). However, there is no indication in *Sowell* that "the Army agreed with Sowell" to do anything. Rather, deducting an insurance premium from a soldier's paycheck is done "[p]ursuant to normal procedures[.]" *Sowell*, 835 F.2d at 1134. Moreover, the Fifth Circuit did not base its decision on any agreement between the Government and Sowell, but rather on the duty assumed by "a person who undertakes to voluntarily perform a service they would otherwise not be

obligated to perform[.]” *Id.* Nothing distinguishes the facts in *Sowell* from the present case. In both instances the Government voluntarily undertook to perform a service and, having done so, “must perform that undertaking with due care.” *Id.* That duty is distinct from the duty to not interfere with third-party contracts.

The **Second Circuit** adopted the *Sowell* analysis in *Devlin v. United States*, 352 F.3d 525 (2d Cir. 2003). There, a federal employee submitted the proper form to his personnel office to change the beneficiary on his life insurance policy. The personnel assistants allegedly filed the form incorrectly, preventing the change in beneficiary status. Upon the employee’s death, the insurance company denied benefits to the intended beneficiary, who then sued the Government for negligence. The Government defended under § 2680(h), seeking shelter under both the “misrepresentation” and “interference with contract” exception. Reversing the grant of summary judgment, the court of appeals instructed the district court to apply *Sowell* on remand. *Id.* at 529 n.2; *accord Kramer v. Sec’y, United States Dep’t of Army*, 653 F.2d 726, 728-29 (2d Cir. 1980).

Similarly, in *Coastwise Packet Co. v. United States*, 398 F.2d 77 (1st Cir. 1968), the **First Circuit** denied the Government refuge under the “interference with contract” exception. Plaintiff ship owner sued the Government for the Coast Guard’s negligent delay in certifying the ship to carry passengers for hire. The Government argued that the complaint was,

in fact, for interference with contract, because plaintiff's injury arose from its inability to fulfill its contracts with paying passengers. The court held: "The only relevance of the fact that plaintiff anticipated profits from already executed passenger contracts is as evidence of the value of that use." *Id.* at 79.

In *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249 (D.C. Cir. 2005), the **D.C. Circuit** considered allegations that the FDA "posted on its website trade secrets and confidential information contained in a New Drug Application ('NDA') filed by Jerome Stevens Pharmaceuticals, Inc.," resulting in claims for misappropriation of trade secrets and breach of a confidential relationship. *Id.* at 1250. The Government contended that the claims were barred by the "interference with contract" exception in § 2680(h). The district court granted the Government's motion to dismiss, treating the "claims of misappropriation of trade secrets and breach of a confidential relationship as a claim of interference with contract rights[.]" *Id.* at 1255. The D.C. Circuit reversed, holding that "[t]he duty underlying the first set of claims is the duty not to disclose trade secrets and confidential information contained in JSP's NDA, whereas the duty underlying the second claim is the duty not to interfere with JSP's economic relationship with a third party, namely its business partner Watson Laboratories. Thus, the district court erred in treating Counts I and II of JSP's complaint as claims of interference with contract rights and dismissing them as barred by the intentional tort exception." *Id.* at 1255-56.

Supporting the Tenth Circuit's holding are decisions by the **Third Circuit** and the **Eighth Circuit**. In *Dupree v. United States*, 264 F.2d 140 (3d Cir.), *cert. denied*, 361 U.S. 823, 4 L. Ed. 2d 67, 80 S. Ct. 69 (1959), a member of the Coast Guard alleged that the Coast Guard negligently delayed approval of his security clearance, causing him to lose income. In a split with the First Circuit in *Coastwise Packet Co.*, 398 F.2d at 79, on a case with similar facts, the Third Circuit concluded that the coast guardsman's claims were barred by the "interference with contract" exception. The Eighth Circuit followed the Third Circuit's *Dupree* decision in *Moessmer v. United States*, 760 F.2d 236, 237 (8th Cir. 1985) (former CIA employee accused his former employer of providing false information about him to a prospective employer). Thus, where the First Circuit viewed the plaintiff's contractual relationships as merely setting the measure of damages, the Third and Eighth Circuits determined that the claim arose from the plaintiff's contractual rights and was therefore barred by the "interference with contract" exception.

Both the D.C. Circuit in *Black v. Sheraton Corp. of America*, 564 F.2d 531 (D.C. Cir. 1977) and the **Ninth Circuit** in *Mundy v. United States*, 983 F.2d 950 (9th Cir. 1993), expressly declined to follow the Third Circuit. These courts distinguished "between the tortious wrong alleged in plaintiff's complaint and the items of damage flowing therefrom." *Black*, 564 F.2d at 541; *accord Mundy*, 983 F.2d at 953 ("[e]ven though the damages sought by Mundy are similar to

those obtainable on an interference claim, the tortious wrong alleged in his complaint is the failure to process a security clearance with due care, not an interference with contract”).

The circuits are deeply divided on the proper application of the “interference with contract” exception in cases where the Government’s conduct prevented a plaintiff from obtaining a contractual benefit. The majority of circuits (1st, 2nd, 5th, 9th, and D.C.) hold that the contractual interest merely establishes the measure of damages and that the Government’s duties are separate and distinct from the duty to not interfere with contract. The minority (3rd, 8th, and now 10th) holds that if a plaintiff’s injury stems, even in part, from his inability to realize on a contractual interest, then his claims are barred.

This issue has percolated long enough in the circuits and the split continues to deepen. A decision by this Court on this important issue of federal statutory interpretation and federal jurisdiction is essential.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISH

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

ECCO PLAINS, LLC.; KEN
ULRICH; HIGH PLAINS
CATTLE COMPANY, LLC.,

Plaintiffs-Appellants,

v.

UNITED STATES
OF AMERICA,

Defendant-Appellee.

No. 11-1559

**Appeal from the United States District
Court for the District of Colorado
(D.C. No. 1:10-CV-02961-RPM)**

(Filed Sep. 4, 2013)

Jordan D. Factor (Matthew M. Wolf with him on the brief) of Allen & Vellone, P.C., Denver, Colorado, for Plaintiffs-Appellants.

Michael Conrad Johnson, Assistant United States Attorney, Denver, Colorado (John F. Walsh, United States Attorney, Denver, Colorado, and Dina L. Biblin, Senior Litigation Counsel, FDIC Legal Division, Arlington, Virginia, with him on the brief) for Defendant-Appellee.

Before, **TYMKOVICH, McKAY, and O'BRIEN**, Circuit Judges.

O'BRIEN, Circuit Judge.

The Federal Depository Insurance Corporation (FDIC), while acting as receiver¹ of the New Frontier Bank (the Bank), used proceeds from the sale of cattle belonging to a limited liability company (LLC) to pay down a loan of one of the two LLC members. According to the complaint, the FDIC had no authority to do so because the payment was contrary to the members' agreement. Ignoring the separate entity status of an LLC, the other LLC member brought suit in its own name against the United States under the Federal Tort Claims Act (FTCA) for what it claimed to be the FDIC's wrongful disbursement of the proceeds. The LLC itself sued the government under the Fifth Amendment Takings Clause. The district judge dismissed the suit for failure to state a claim. While we

¹ FDIC often operates in the dual capacities of corporation and receiver. As a corporation it insures bank deposits and pays depositors when an insured bank fails. *Bullion Servs., Inc. v. Valley State Bank*, 50 F.3d 705, 708 (9th Cir. 1995). As receiver, it steps into the shoes of the failed bank and either (1) liquidates the assets and pays off the bank's creditors and shareholders or (2) engages in a purchase and assumption transaction in which it sells the assets of the failed institution to another solvent bank. *FDIC v. Jenkins*, 888 F.2d 1537, 1540-41 (11th Cir. 1989); see also *Golden Pacific Bancorp. v. FDIC*, 375 F.3d 196, 201 (2d Cir. 2004).

agree dismissal was appropriate, it should have been for lack of jurisdiction as to the member's claims (the FTCA's "interference with contract" jurisdictional exception, *see* 28 U.S.C. § 2680(h)) and as to the LLC's claim because jurisdiction lies exclusively with the United States Court of Federal Claims.

I. FACTUAL BACKGROUND

We draw the facts from the amended complaint. Ken Ulrich is the majority owner of High Plains Cattle Company, LLC. High Plains and Doug English formed ECCO Plains, LLC, to raise cattle for sale. Each made a \$7,000,000 capital contribution to ECCO Plains. High Plains financed its capital contribution with a loan from the New Frontier Bank; Ulrich personally guaranteed the debt.² English also financed his capital contribution from the Bank.³ No ECCO Plains assets were pledged as security for either loan. Indeed, it appears ECCO Plains had no business relationship with the Bank.

² Apart from the High Plains loan, Ulrich obtained other loans from the Bank for entities separate and distinct from ECCO Plains. Ulrich was not the borrower on these loans but he personally guaranteed them. As of April 10, 2009, the balances on all of these loans, including the High Plains loan, exceeded \$30,000,000.

³ The borrower on his loan, however, was English Cattle Company. Like many other aspects of this case, it is unclear why the Bank loaned money to English Cattle Company rather than English, who actually utilized the loan proceeds.

Prior to forming ECCO Plains, High Plains and English entered into an agreement regarding its operation. Relevant here, the parties agreed that High Plains would, upon request, receive a return of its capital contribution before English received any of his capital contribution. The Bank, as well as FDIC, had a copy of the agreement.

The Bank subsequently became insolvent and FDIC was appointed receiver. Thereafter, ECCO Plains sold approximately \$5,500,000 worth of cattle to a packing house in Northern Colorado. FDIC caused the packing house to make the sale proceeds payable to both ECCO Plains and FDIC.⁴

High Plains made a written demand to FDIC to apply 100% of the sale proceeds to High Plains' loan. The demand was based on its 50 percent membership interest in ECCO Plains and the terms of the ECCO Plains/English operating agreement. English, on the other hand, instructed FDIC to apply 50% of the proceeds to the High Plains loan and the other 50% to the English Cattle Company loan. FDIC, however, did neither. Instead, it applied all of the proceeds to the

⁴ In the district court, the government represented that the Bank's records showed the owner of the cattle was English Cattle Company, not ECCO Plains, and the sale proceeds were made payable to English Cattle Company and FDIC. If true, that probably explains why FDIC acted as it did. But the complaint alleges the cattle belonged to ECCO Plains and the proceeds were made payable to ECCO Plains and FDIC.

English Cattle Company loan. It then sold that loan, along with the High Plains loan, to third parties.

ECCO Plains, High Plains and Ulrich filed suit against the United States. All three alleged conversion and negligence under the FTCA. ECCO Plains also alleged a Fifth Amendment Takings Claim. The government moved to dismiss based on lack of subject matter jurisdiction or, in the alternative, for failure to state a claim. The district judge granted the motion without much of an explanation. He concluded ECCO Plains' FTCA claims should be dismissed for lack of subject matter jurisdiction because it failed to file a notice of claim. The remaining claims were dismissed for failure to state a claim.

II. DISCUSSION

Before turning to the issues, we pause to address what is *not* at issue in this case. The cattle were owned by ECCO Plains. The proceeds from the sale of the cattle also belonged to ECCO Plains. It is unclear how FDIC came to be a co-payee of those proceeds or why ECCO Plains endorsed the check, especially since it had no relationship with the Bank and consequently no relationship with FDIC as receiver. English was the managing member of ECCO Plains and endorsed the check in that capacity but, for some reason, was not sued.⁵ But whatever claim for conversion

⁵ The district judge noted the anomaly:

THE COURT: Well, did ECCO Plains get the money?

(Continued on following page)

or negligence ECCO Plains may have had against the government based on FDIC's actions is not before us. The judge concluded ECCO Plains had not filed a notice of claim prior to bringing suit, leaving the district court without jurisdiction over its tort claims.⁶ *See Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 852 (10th Cir. 2005) (stating a notice of claim is a jurisdictional prerequisite for bringing suit under the FTCA). ECCO Plains has not appealed from this decision. ECCO Plains' only remaining claim is its Fifth Amendment Takings

[COUNSEL]: No. ECCO Plains did not get the money.

THE COURT: Well, what happened to it?

[COUNSEL]: What happened to the money is . . . the check was endorsed by Doug English –

THE COURT: Yeah.

[COUNSEL]: – as a managing member of ECCO Plains –

. . . .

THE COURT: [W]hy didn't you sue English?

. . . .

[COUNSEL]: For a number of reasons. First and foremost, it's not obvious that Mr. English did anything inherently wrong.

THE COURT: Well, he violated the agreement that you've alleged.

[COUNSEL]: Well, that's true, the underlying agreement, but –

(Appellants' App'x at 139-41.)

⁶ While the judge's dismissal order only mentioned ECCO Plains' conversion claim, it is clear his ruling would also apply to the negligence claim.

Claim.⁷ Before turning to that claim, however, we first address High Plains and Ulrich's conversion and negligence claims under the FTCA.⁸

A. High Plains and Ulrich's Conversion and Negligence Claims

"The Federal Tort Claims Act [FTCA] . . . provides generally that the United States shall be liable, to the same extent as a private party, 'for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.'" *Kosak v. United States*, 465 U.S. 848, 851-52 (1984) (quoting 28 U.S.C. § 1346(b)); *see also* 28 U.S.C. § 2674. But there are exceptions to this waiver of immunity. *See* 28 U.S.C. § 2680. Relevant here, the FTCA excludes from its coverage "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or *interference with contract rights*." *Id.*

⁷ ECCO Plains' Fifth Amendment Takings Claim is not cognizable under the FTCA; thus, no notice of claim was necessary to preserve it. *See FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994).

⁸ Unlike ECCO Plains, High Plains and Ulrich filed the requisite notice of claim. According to the complaint, Ulrich's interest in the sale proceeds arises from his membership interest in High Plains which, at best, is twice removed. There is no mention of any claimed right to the proceeds based on his status as guarantor of High Plains' loan.

§ 2680(h) (emphasis added). If a claim falls within an exception, it must be dismissed for lack of jurisdiction. *Estate of Trentadue*, 397 F.3d at 853.

The government relies on the “interference with contract” exception, arguing that despite the labels placed on the claims (i.e., conversion and negligence), High Plains and Ulrich’s complaint is that FDIC interfered with their contractual right to the sale proceeds as outlined by High Plains’ operating agreement with English. We agree.⁹

To determine whether a claim falls within an FTCA exception, we identify “those circumstances which are within the words and reason of the exception – no less and no more.” *Kosak*, 465 U.S. at 853 n.9 (quotations omitted). In doing so, “[w]e must . . . look beyond the literal meaning of the language to ascertain the real cause of complaint.” *Hall v. United States*, 274 F.2d 69, 71 (10th Cir. 1959).

⁹ Both parties say the district judge dismissed the negligence and conversation [sic] claims for lack of subject matter jurisdiction apparently based on the interference with contract exception. They are mistaken; he dismissed them for failure to state a claim. While the judge did not provide much explanation, he apparently disagreed with the government that the “interference with contracts” exception applied.

A dismissal based on the interference with contract exception deprives a court of subject matter jurisdiction – an issue we must ordinarily address before turning to the merits. See *Estate of Trentadue*, 397 F.3d at 853; see also *Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1259-60 (10th Cir. 2009). We review a dismissal for lack of jurisdiction de novo. See *Harms v. IRS*, 321 F.3d 1001, 1007 (10th Cir. 2003).

In *Hall*, the government tested Hall's cattle for brucellosis and determined some had the disease. As a result, Hall sold the cattle for less than fair market value. In fact, the cattle did not have the disease. Hall sued the government for negligently performing the tests. But we concluded Hall had not alleged damages based on the negligent testing, i.e., that the cattle suffered physical damage due to the testing. *Id.* at 71. Rather, his "real claim" was that as a result of the negligent manner in which the tests were made, Hall received inaccurate information and sold his cattle for a loss. *Id.* Thus, his damages arose from the government's misrepresentation of the cattle's condition. *Id.* Because misrepresentation was an exempted tort under the FTCA, dismissal was proper. *Id.*

The Supreme Court adopted *Hall's* reasoning in *United States v. Neustadt*, 366 U.S. 696, 703-04 (1961). There, the Neustadts purchased a home which had been inspected by an appraiser with the Federal Housing Administration (FHA). Relying on the appraisal, the Neustadts paid more for the home than its fair market value. After purchasing the home and finding numerous defects, the Neustadts sued the government under the FTCA. They alleged FHA acted negligently in performing the inspection and appraisal. The Supreme Court held the case was barred under 28 U.S.C. § 2860(h) [sic] which exempts from FTCA coverage "any claim arising out of . . . misrepresentation." *Id.* at 701 (quotations omitted). It held the Neustadts' claim that the government had breached its "duty to use due care in obtaining and

communicating information upon which [they were] reasonably . . . expected to rely in the conduct of [their] economic affairs,” merely restated the traditional legal definition of “negligent misrepresentation” as would have been understood by Congress when the FTCA was enacted. *Id.* at 706-07. Therefore, despite the Neustadts labeling their claim as one for negligence, the Court determined the claim was really one for misrepresentation. *Id.* at 700-01, 711.

However, merely because a complaint contains allegations supporting an exempted tort does not mean it cannot also contain other allegations supporting a non-exempted tort. In *Block v. Neal*, Neal obtained a loan from the Farmers Home Administration (FmHA) to build a house. 460 U.S. 289 (1983). FmHA agreed to supervise the construction. FmHA inspected the house after it was built and found no defects. Neal moved in and discovered numerous defects. She sued FmHA under the FTCA. Relying on *Neustadt*, the government argued the misrepresentation exception applied. *Id.* at 294, 296. The Supreme Court disagreed and distinguished *Neustadt*. *Id.* at 296. It said the gravamen of the complaint in *Neustadt* was that plaintiffs were misled by the appraisal; they had not alleged any injury they suffered independent of their reliance on the erroneous appraisal. *Id.* In contrast, FmHA’s misstatements were not essential to Neal’s negligence claim – the defective house did not arise from the erroneous inspection reports but rather from the negligent construction. *Id.* at 297-98. The Court concluded the government owed a duty to Neal separate and apart

from any duty to exercise due care in communicating information, namely, to exercise due care in supervising the construction of the house (the Good Samaritan doctrine). *Id.* at 297. The fact Neal could have also brought a misrepresentation claim based on her reliance on any inspection reports (absent the misrepresentation exception to the FTCA) was of no moment:

[T]he partial overlap between [a misrepresentation claim and the Good Samaritan doctrine] does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well. Neither the language nor history of the Act suggest that when one aspect of the Government's conduct is not actionable under the "misrepresentation" exception, a claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct. The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced. Any other interpretation would encourage the Government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits.

Id. at 298 (citations and quotations omitted).

Determining whether a complaint falls within an exception under § 2680(h) is no easy task. This is especially true in this case where High Plains and

Ulrich strain to convince us their claims are what they say they are – conversion and negligence. But looking beyond their labels to the gravamen of the complaint reveals their true claim is that FDIC negligently paid out proceeds belonging to ECCO Plains which they had a “right” to. But the only “right” they had to the proceeds arose from the contract between High Plains and English. Therefore, the essence of their claim is that FDIC interfered with this contract. Thus, the “intentional interference with contract” exception applies.¹⁰

High Plains and English nevertheless insist this is not an interference with contract case (or not solely one under the reasoning of *Block*) for two reasons. First, their complaint does not state an interference with contract claim because their allegations do not

¹⁰ High Plains and Ulrich also claim they had a right to the proceeds based on High Plains’ 50 percent ownership interest in ECCO Plains. They are incorrect. See *Meyer v. Haskett*, 251 P.3d 1287, 1292 (Colo. App. 2010) (“[LLCs] generally operate under an entity theory of property rights. Under this theory, a member has no interest in the property owned by the LLC.”) (citation omitted). Moreover, while Colorado law gives members a right to receive distributions from the LLC (unless its liabilities exceed its assets), that right is limited “to the extent and at the times or upon the happening of the events stated in the operating agreement or as otherwise agreed by all of the members.” See Colo. Rev. Stat. Ann. §§ 7-80-601, 7-80-606(1). Here, the members agreed High Plains could request a return of its capital contribution prior to English. But it had not yet done so. The complaint only alleges High Plains and Ulrich “intended to exercise their right to [a] return of [High Plains’] capital contribution.” (Appellants’ App’x at 11 (emphasis added).)

satisfy all the elements of an interference claim under Colorado law.¹¹ Second, they adequately alleged a breach of a duty separate and distinct from the duty not to interfere with contractual relationships.

1. Elements of Interference Claim

High Plains and English claim the interference with contract exception does not apply because under Colorado law, an interference with contract claim requires the defendant (in this case FDIC) to intend to induce a breach of contract and to in fact cause a

¹¹ The government contends High Plains and Ulrich waived this argument by not raising it below. High Plains and Ulrich say they did raise it. Looking to the record, the government has the better argument. We will nevertheless consider the argument because we can easily dispose of it.

High Plains and Ulrich also complain it is unclear what contract the government is relying on in making the interference with contract argument. They say the government refers to ECCO Plains' operating agreement but the complaint contains no allegations concerning an operating agreement and in fact there is no operating agreement. We disagree. The complaint alleges: "Prior to the formation of ECCO Plains, English and High Plains entered into a *binding agreement regarding the operation of ECCO Plains*, the parties' capital contributions and the parties' exposures on their . . . loans [with the Bank]. The parties agreed that High Plains would receive a return of its capital contribution upon request, and before English received any of his capital contribution." (Appellants' App'x at 9 (emphasis added).) In any event, whether or not it is technically an operating agreement, it is clear the government is relying on the agreement between High Plains and English in which High Plains would receive a return of its capital contribution upon request before English received any of his contribution.

breach. They say their complaint contains no allegations supporting such intent or breach. To the extent our analysis requires us to determine whether High Plains and Ulrich's complaint contains the essential elements of an interference with contract claim, we conclude it does. *See Estate of Trentadue*, 397 F.3d at 854-55 (stating other courts have held a claim must contain the essential elements of excepted tort and finding misrepresentation exception did not apply because two elements of misrepresentation claim were not present).

Under the FTCA, the United States is liable to the same extent a private person would be liable "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). High Plains and Ulrich rely on this provision to apply Colorado law in determining whether their complaint states an interference claim. However, in *Neustadt*, the Supreme Court did not rely on the elements of misrepresentation as defined by state law but rather on "the traditional and commonly understood legal definition" of misrepresentation as defined by the Restatement of Torts and other relevant treatises which it believed "Congress had in mind" when it enacted the FTCA in 1946. *Neustadt*, 366 U.S. at 706 & n.16. We need not resolve the issue as the result is the same regardless of the source of the tort's elements.

Turning first to Colorado law, High Plains and Ulrich correctly quote the Colorado Supreme Court:

To be liable for intentional interference with contract, a defendant must 1) be aware of a contract between two parties, 2) *intend that one of the parties breach the contract*, 3) and *induce the party to breach* or make it impossible for the party to perform the contract. In addition, the defendant must have acted improperly in causing the result.

Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859, 871 (Colo. 2004) (emphasis added) (citations and quotations omitted). Thus, they say Colorado interference law requires both an intent to induce a breach and a breach; their complaint does not allege either.

However, prior to *Krystkowiak*, the Colorado Supreme Court relied on the definition provided by the Restatement (Second) of Torts § 766 (1979), which does not require the defendant to have intended to induce a breach or to have caused an actual breach:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing *or otherwise causing the third person not to perform the contract*, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

See *Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc.*, 690 P.2d 207, 210 (Colo. 1984)

(quoting Restatement (Second) of Torts § 776) (emphasis omitted, new emphasis added); *see also Colo. Nat'l Bank v. Friedman*, 846 P.2d 159, 170 (Colo. 1993). Comments to § 766 clarify that inducement of a breach is not a necessary showing but rather merely one way in which the tort can be established. *See* Restatement (Second) of Torts § 766, cmt. k. The focus is not on whether the third party breached the contract but rather on the defendant's conduct. *Id.*, cmts. c & j.

The Colorado Court of Appeals recently addressed the apparent conflict between *Krystkowiak* (requiring impossibility of performance or breach of contract) and the prior precedent adopting the Restatement (requiring merely interference with performance). *See Slater Numismatics, LLC v. Driving Force, LLC*, ___ P.3d ___, No. 11CA0683, 2012 WL 2353847, at *4-5 (Colo. App. June 21, 2012). It concluded *Krystkowiak* did not overrule the prior precedent because it relied on it. *Id.* at *5. It interpreted *Krystkowiak's* discussion of impossibility and breach as merely expressing two ways in which interference with contract could be established. *Id.* Thus, the Court of Appeals determined Colorado courts could still rely on the Restatement definition and under that definition, a defendant may be liable for interference with contract where:

1. the defendant causes a third party to fail in some significant aspect of performance which the third party owes to the plaintiff, such as by depriving the third party in

significant part of the means of performance;
and

2. the defendant's conduct was wrongful;
and

3. the defendant acted either for the primary purpose of interfering with the performance of the plaintiff's contract, or knowing that the interference was certain or substantially certain to occur as a result of the defendant's action.

Id. at *9.

A similar result ensues when we consider pertinent treatises in effect at the time of the FTCA's enactment in 1946 (including the exceptions contained in 28 U.S.C. § 2860(h) [sic]). For example, the Restatement (First) of Torts defined interference with contract as "one, who without a privilege to do so, induces or otherwise purposely causes a third person not to . . . perform a contract with another." See Restatement (First) of Torts § 766 (1939); see also William L. Prosser, Handbook of the Law of Torts, § 104 at 987-89 (1941) (breach of contract not required for interference with contractual relations; action for interference with contract has also been allowed where the defendant has merely prevented the contract's performance or made it more difficult).

In this case, High Plains and Ulrich have alleged facts stating an interference with contract claim against the government under Colorado law and the treatises in effect in 1946: (1) FDIC induced English

to endorse the check on which both FDIC and ECCO Plains were payees, thus permitting FDIC to cash a check which allegedly belonged to High Plains under its agreement with English;¹² (2) FDIC allegedly had no privilege to induce English to endorse the check and thereby violate his agreement with High Plains; and (3) FDIC, having knowledge of the parties' agreement and their instructions as to payment of the proceeds, knew performance of the agreement would be compromised.

Thus the complaint does satisfy the elements of interference with contract.¹³

¹² High Plains and Ulrich claim FDIC did not induce English to breach the agreement. But a breach is not necessary; mere interference with performance is enough. In any event, their attorney admitted English's violation of the agreement. *See supra* n.5.

¹³ High Plains and Ulrich also argue that merely because a contract establishes ownership interests or substantiates damages does not mean the interference with contract exception applies. But the cases they cite are inapposite. *Ft. Vancouver Plywood Co. v. United States* concerned a contract [sic] between a timber company and the United States. 747 F.2d 547 (9th Cir. 1984). Thus, the question was whether the timber company's complaint sounded in tort or contract for purposes of whether the timber company alleged a claim under the FTCA. *Id.* at 549-52. The interference with contract exception was not at issue. The exception was in question in *Coastwise Packet Co. v. United States*, 398 F.2d 77 (1st Cir. 1968), and *Appleton v. United States*, 69 F. Supp.2d 83 (D.D.C. 1999). In those cases the court held the fact a contract may establish the value of the plaintiff's negligence claim does not mean the interference with contract exception applies. *Coastwise Packet Co.*, 398 F.2d at 79; *Appleton*, 69 F. Supp.2d at 88. Here, the contract between High Plains

(Continued on following page)

2. Separate and Distinct Duty

High Plains and English also claim the interference with contract exception does not apply because their complaint alleges FDIC breached several duties separate and distinct from its duty not to interfere with a third-party's contractual relationships. Namely, they allege FDIC breached its duties (1) not to exercise dominion and control over property to which it had no interest, (2) to turn over property it wrongfully held to the proper owners, (3) to exercise reasonable care in the custody and preservation of the property, (4) to avoid foreseeable damage to High Plains and Ulrich, and (5) to apply the funds equally. Thus, under *Block*, they say their complaint is not barred by the interference with contract exception because their injuries are not "wholly attributable" to the exempted tort and any allegations of interference with contract are "not essential" to their claims. *Block*, 460 U.S. at 297.

But these alleged duties, even if owed to High Plains and Ulrich, as opposed to ECCO Plains (the owner of the cattle and proceeds), all arise out of High Plains' contract with English. Thus, they are not independent of the contract and the allegations of interference are essential to their claims. Moreover, High Plains and Ulrich have not alleged any injury

and English does more than just establish value; it establishes High Plains and Ulrich's alleged right to the sale proceeds. And the complaint alleges (despite its labels) FDIC interfered with those rights.

they suffered independent of FDIC's interfering with their right to receive the proceeds under that contract. Therefore, their injuries are wholly attributable to FDIC's interference with the contract.

High Plains and Ulrich rely mainly on *Sowell v. United States*, 835 F.2d 1133 (5th Cir. 1988). Sowell, an Army private, completed a form allowing the Army to deduct a life insurance premium from his paycheck and pay it to the insurance company. No premiums were ever paid. As a result, when Sowell died, the insurance company denied coverage to the anticipated beneficiary. The beneficiary sued the United States under the FTCA alleging it negligently misplaced the form. The United States moved to dismiss based on the interference with contract exception. The court disagreed: "[T]he duty the Army owed to use due care in processing Sowell's allotment forms is distinct from any duty the Army may have had not to interfere with existing or potential contractual relationships between Sowell and [the insurance company]." *Id.* at 1135.

Sowell is inapposite. There, the Army agreed with Sowell to pay the premium out of his paycheck. Thus, the Army had a duty independent of its duty not to interfere with Sowell's contract with the insurance company. Here, there is no allegation FDIC agreed with High Plains and Ulrich to perform any service on their behalf with regard to the sale proceeds.

Because the interference with contract exception to the FTCA applies, the district court lacked jurisdiction over High Plains and Ulrich's conversion and negligence claims.¹⁴

¹⁴ Even assuming, *arguendo*, the complaint could be construed as alleging conversion and negligence claims independent of an interference with contract claim, we believe they fail for one key reason – ECCO Plains, not High Plains and Ulrich, owned the cattle and the proceeds from the sale of the cattle. High Plains and Ulrich claim FDIC owed them a duty of reasonable care because their injury was foreseeable given High Plains 50 percent ownership interest in ECCO Plains and its debt with the Bank. But under Colorado law, a member of an LLC has no interest in the property owned by the LLC. *See Meyer, supra* n.10. And they point to no Colorado cases recognizing a legal duty owed to them (as opposed to ECCO Plains) in these circumstances. Thus, they cannot establish a negligence claim. *Ryder v. Mitchell*, 54 P.3d 885, 889 (Colo. 2002) (“To establish a prima facie case for negligence, the plaintiff must show that the defendant owed a legal duty of care to the plaintiff, the defendant breached that duty, the plaintiff suffered injury, and the defendant’s breach caused the plaintiff’s injury. If a negligence action is based on facts that do not impose a duty of care upon a defendant for a plaintiff’s benefit, the claim will fail.”) (citations omitted); *see also English v. Griffith*, 99 P.3d 90, 93 (Colo. App. 2004) (“A negligence claim fails when it is based on circumstances for which the law does not impose a duty.”).

Similarly, High Plains and Ulrich cannot state a conversion claim. Their claim for conversion is based on two theories: (1) FDIC’s obligation to “particularly treat” the sale proceeds, namely to apply at least 50 percent to High Plains’ loans due to its 50 percent membership interest in ECCO Plains, *see Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1195 (Colo. App. 2008), and (2) High Plains and Ulrich’s immediate right to possess the sale proceeds. The former theory fails because we see no obligation owed to High Plains and Ulrich, as opposed to ECCO Plains, to “particularly treat” the sale proceeds; the latter fails

(Continued on following page)

B. ECCO Plains’ Fifth Amendment Takings Claim

In the district court, the government argued ECCO Plains’ Fifth Amendment Takings claim failed either for lack of jurisdiction or failure to state a claim. The district judge dismissed it for failure to state a claim.¹⁵ The claim should have been construed as an illegal exaction claim and dismissed for lack of jurisdiction.

An illegal exaction claim exists when “the plaintiff has paid money over to the Government, directly

because an immediate right to possess certain property is not enough – the plaintiff must also have some general or specific property interest in the converted property. *See Byron v. York Inv. Co.*, 296 P.2d 742 (Colo. 1956) (“Conversion is any distinct, unauthorized act of dominion or ownership exercised by one person over personal property *belonging to another* An action for damages for the conversion of personal property cannot be maintained *unless plaintiff had a general or special property [interest] in the personalty converted, coupled with possession or the immediate right thereto.*”) (emphasis added). Again, a member does not have any interest in property owned by the LLC. However, even assuming an immediate right to possess the property is enough, neither High Plains nor Ulrich had such right – while High Plains had the right to seek a return of its capital contribution upon request, it had not yet exercised this right. Indeed, the complaint only alleges High Plains and Ulrich “*intended to exercise their right to [a] return of [High Plains’] capital contribution.*” (Appellants’ App’x at 11 (emphasis added).)

¹⁵ The parties say the judge dismissed ECCO Plains takings claim for both lack of jurisdiction and failure to state a claim. While the judge’s oral ruling suggests this, his written order dismisses it for failure to state a claim.

or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.” *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quotations omitted); *see also Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (“An illegal exaction . . . involves money that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.”) (quotations omitted). In other words, an illegal exaction occurs “when the Government has the citizen’s money in its pocket.” *Aerolineas Argentinas*, 77 F.3d at 1573 (quotations omitted). “An illegal exaction involves a deprivation of property without due process of law” in violation of the Fifth Amendment’s Due Process Clause. *Norman*, 429 F.3d at 1095. While the United States Court of Federal Claims ordinarily lacks jurisdiction over due process claims under the Tucker Act, 28 U.S.C. § 1491, it does “have jurisdiction over illegal exaction claims ‘when the exaction is based on an asserted statutory power.’” *Id.* (quoting *Aerolineas Argentinas, Inc.*, 77 F.3d at 1573); *see also Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004) (Tucker Act’s waiver of government’s sovereign immunity includes illegal exaction claims); *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1363 (Fed. Cir. 2002) (“[T]here is no jurisdiction under the Tucker Act over a Due Process claim unless it constitutes an illegal exaction.”).

According to the complaint, the FDIC acted under its receivership powers – an “asserted statutory power” – to take control of the cattle proceeds which otherwise would have gone directly to ECCO Plains. See 12 U.S.C. § 1821(d). The FDIC thereby put ECCO Plains’ money “in its pocket” (although it later took that money out of its metaphorical pocket and applied it to English’s loans). Thus, ECCO Plains’ takings claim is best seen as an illegal exaction claim subject to Tucker Act jurisdiction.¹⁶

¹⁶ The complaint seeks both compensatory damages and a constructive trust. It is unclear which type of relief goes to which claims. Nevertheless, we will assume the relief ECCO Plains is seeking on the takings claim is limited to a constructive trust.

“A constructive trust is a legal fiction, an equitable remedy devised to prevent unjust enrichment and compel restitution of property that in equity and good conscience does not belong to the Defendant.” See *United States v. Andrews*, 530 F.3d 1232, 1237 (10th Cir. 2008) (quotations omitted). “The recipient of the property, the constructive trustee, is deemed to hold legal title to the property for the benefit of the claimant, and it is the obligation of the constructive trustee to surrender the property to the claimant.” *Id.*; see also *Lawry v. Palm*, 192 P.3d 550, 562 (Colo. App. 2008) (“A constructive trust is a flexible equitable remedy that may be imposed to prevent unjust enrichment. . . . By imposing a constructive trust, a court awards the successful plaintiff a personal order requiring the defendant to transfer specific property to the plaintiff.”) (citations omitted).

A constructive trust is generally imposed upon specific assets. *Andrews*, 530 F.3d at 1237; *Lawry*, 192 P.3d at 562. Here, the proceeds from the cattle sale were long gone before the litigation was started. Thus, regardless of their convenient pleading, High Plains and Ulrich were and are seeking money damages from the government, not a constructive trust or other form of equitable relief.

We **REVERSE** the district court's dismissal of High Plains and Ulrich's negligence and conversion claims and ECCO Plains' Fifth Amendment Takings claim for failure to state a claim and **REMAND** to the district court to dismiss these claims for lack of jurisdiction.¹⁷

¹⁷ The government relies on 12 U.S.C. § 1821(j) which prohibits a court from “restrain[ing] or affect[ing] the exercise of powers or functions of [FDIC] as a conservator or a receiver.” This statute only applies to a claim for injunctive relief against FDIC; this case seeks money from the United States. In any event, reliance on the statute is unnecessary as jurisdiction is otherwise defeated.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02961-RPM

ECCO PLAINS, LLC,
KEN ULRICH and
HIGH PLAINS CATTLE COMPANY, LLC,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendants.

ORDER OF DISMISSAL

Pursuant to the hearing held today and upon the finding and conclusion that the amended complaint is insufficient to state a claim for relief by plaintiffs Ken Ulrich and High Plains Cattle Company, LLC, for conversion of the proceeds of sale of cattle owned by ECCO Plains, LLC, as alleged in the first claim for relief in the amended complaint and for negligence in the third claim for relief and that the plaintiff ECCO Plains, LLC, failed to file an administrative claim as required by 28 U.S.C. § 2675(a), resulting in a lack of jurisdiction over its claim for conversion in the second claim for relief and plaintiff ECCO Plains has failed to allege adequately a Fifth Amendment claim in the fourth claim for relief, it is therefore

ORDERED that pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) the amended complaint and this civil action are dismissed with prejudice.

Dated: October 18, 2011

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch,
Senior Judge

Title 28 U.S.C. § 1346(b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28 U.S.C. § 2680(h) provides in pertinent part:

The provisions of this chapter and section 1346(b) of this title shall not apply to –

- (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights[.]
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