

Co-Op Has No Capacity to Sue for Alleged Taking

Identifying a protected property right is critical in takings litigation in the U.S. Court of Federal Claims—but it is rare for a case to turn on the identity of the plaintiff, rather than the identity of the property. In the recent case of *International Federation of Professional and Technical Engineers v. United States*, the CFC held that the plaintiffs could not identify any property that was taken, and even if they had, it seems that they were the wrong plaintiffs to sue for that taking.

Edward W. Bowe, and the union in which Bowe was a member, alleged that the Navy took the Norfolk Naval Shipyard Co-Operative Association without just compensation when it asserted control over the Co-Op in 2010. Since it was founded in 1914, the Co-Op has been run using the personal funds of the civilian employees of the shipyard, including Bowe's. But in early 2010, the Commanding Officer of the Shipyard asserted "the Navy's complete control over the Co-Op, its funds and assets." Bowe and his union sued for an uncompensated taking.

After rejecting the Government's argument that an earlier-filed suit barred the takings claim under 28 U.S.C. § 1500 (an argument the government has been making and losing repeatedly), the court turned to the question of whether the plaintiffs had the capacity to sue for the alleged taking of the Co-Op. The CFC held that, as a matter of Virginia state law, the only persons who could sue for the taking of the Co-Op (an unincorporated association) were the Co-Op's "officers . . . who have charge of its affairs or . . . members of the association who have been legally authorized to proceed with the litigation." Since the plaintiffs were neither officers, nor had they been authorized by the Co-Op to sue, they could not have capacity to sue and so could not state a claim the CFC could hear.

Interestingly enough, it seems that the plaintiffs had repeatedly sought either just that authorization, or some corrective action (perhaps a takings suit) by the Co-Op itself. But of course, "the Co-Op is under the overall direction of the Shipyard Commander," and as Bowe put it, "the Co-Op will not institute an action against itself . . ."

Finally, the Court also dispensed with the plaintiffs' argument that Bowe's financial contributions to the Co-Op allowed him to state a Fifth Amendment Takings Claim, because despite his contributions, Bowe lacked any of the "crucial indicia of a property right, such as the ability to . . . sell, assign, transfer, or . . . exclude others from the Co-Op."

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