

IN THE UNITED STATES BANKRUPTCY COURT

See #361

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:

MURDOCK MACHINE &
ENGINEERING COMPANY OF UTAH,

:
:
:
: Bankruptcy Number B-75-484

Bankrupt.

:
:
: [Chapter X]

LOGAN A. BAGLEY, TRUSTEE FOR
MURDOCK MACHINE &
ENGINEERING OF UTAH,

:
:
: Adversary Proceeding Number
: 90PB-0601

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM DECISION and ORDER

James B. Lee, Esq., Craig B. Terry, Esq., and E. Russell Vetter, Esq., of Parsons, Behle & Latimer, Salt Lake City, Utah, and Robert H. Koehler, Esq., and Jonathan S. Baker, Esq., of Patton, Boggs & Blow, Washington, D.C., appeared representing Logan A. Bagley, Trustee of Murdock Machine & Engineering Company of Utah, Bankrupt and Plaintiff.

Stuart M. Gerson, Esq., Assistant Attorney General, Dee Benson, Esq., United States Attorney, and Margaret R. Nelson, Esq., Assistant United States Attorney, Salt Lake City, Utah, and J. Christopher Kohn, Esq., Tracy J. Whitaker, Esq., and Bernard J. McKay, Esq., Attorneys, Civil Division, U. S. Department of Justice, Washington, D. C., appeared representing the United States of America, Claimant and Defendant.

Two related matters are pending for consideration by this court in this fifteen year old Bankruptcy Act case. The first is the Trustee's Motion for Partial Summary Judgment Regarding Government Claims Nos. 764 and 764A (Summary Judgment Motion) filed as a contested matter by Logan A. Bagley (Trustee), Trustee for Murdock Machine & Engineering Company of Utah (Murdock). The court heard concurrently the Motion to Dismiss or Defer to the ASBCA or Claims Court (Motion to Dismiss or Defer) filed by the United States of America (Government), on behalf of the Department of Defense and its military components, the Departments of the Army, Navy, and Air Force. The Motion to Dismiss or Defer was filed as both a response to the Trustee's Summary Judgment Motion in the main case relating to Government claims numbered 764 and 764A, and to the Trustee's objection in the adversary proceeding to certain other claims filed by the Government.

For clarity, the court will deal with the adversary proceeding and the contested matter separately, although a common thread binds the two. This opinion deals only with the Government's Motion to Dismiss or Defer filed in the adversary proceeding.

JURISDICTION

This court has jurisdiction over the subject matter of and the parties to this matter pursuant to section 2a(2) of the Bankruptcy Act of 1898 (11 U.S.C. § 11). Section 2a(2) of the Act invests bankruptcy courts with jurisdiction to "[a]llow claims, disallow

claims, reconsider allowed or disallowed claims, and allow or disallow them against bankruptcy estates." Venue in this division is proper pursuant to Bankruptcy Rule 116.

APPLICABLE LAW

The Chapter X petition in this case was filed on May 23, 1975, thus the Bankruptcy Act of 1898, as amended, is the applicable law. Bankruptcy courts are specifically granted jurisdiction over the determination of claims allowance and disallowance. The court is charged with the duty to resolve claims disputes in summary proceedings under the Bankruptcy Act. *Katchen v. Landy*, 382 U.S. 323, 329 (1966).

The Government asserts the applicability of the Contract Disputes Act of 1978 (CDA), stating that the CDA provides the exclusive system for resolving government contract disputes. 41 U.S.C. §§ 601-613. However, as Judge Baldwin noted in his concurring opinion,

[s]ection 16 of the CDA permits a contractor to proceed under the Act "with respect to any claim pending . . . before the contracting officer or initiated" after the effective date of the statute. The contracting officer issued a final decision terminating the contract for default on May 16, 1975. Appeal No. 20409 was filed on May 22, 1975. Murdock had no claim pending before the contracting officer on the effective date of the CDA, therefore the CDA does not apply to that decision.

Murdock Mach. & Eng'g Co. v. United States, 873 F.2d 1410, 1413 (Fed. Cir. 1989) (citations omitted). The Senate report accompanying the CDA explained that as a result of the CDA, "United States district court jurisdiction [was] eliminated from government contract claims." S. Rep. No. 1118, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code

Cong. & Admin. News 5235, 5244. It follows that the federal district courts had jurisdiction over government contract claims prior to the CDA.¹ As a result, this court has summary jurisdiction to consider this matter.

FACTS

The ASROC Contract

On June 25, 1971, the Government awarded Murdock a fixed price contract for the construction of anti-submarine rocket launchers (ASROC). Soon after the award, Murdock experienced production delays allegedly resulting in part from defective specifications and from defective tooling and other components received from the Navy, and was financially unable to perform on the contract. The Navy procuring command was concerned with timely receipt of the ASROC launchers, and therefore provided Murdock with a \$2,500,000 government-guaranteed loan and encouraged Murdock to apply for relief pursuant to Public Law 85-804 (P.L. 85-804). On April 7, 1975, the Navy Contract Adjustment Board (NCAB) approved Murdock's P.L. 85-804 request and converted the ASROC contract to a cost-reimbursement/no-fee contract with a ceiling of approximately \$22,000,000, as set forth in the NCAB's April 7, 1975, draft Memorandum of Decision.

¹ In *United States v. American Pouch Foods, Inc. (In re American Pouch Foods, Inc.)*, 30 B.R. 1015, 1024 (N.D. Ill. 1983), *aff'd*, 769 F.2d 1190 (7th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986), the district court noted that the CDA did not become effective until March 1, 1979, and that since the contract in that case was entered into before the CDA's effective date, the CDA was determined inapplicable. The district court abstained from reaching the merits of the government contract dispute counterclaims.

In the meantime, the Navy located a new manufacturer for the ASROC contract and withdrew its support of Murdock's P.L. 85-804 request. Nine days later, the Government informed Murdock that the ASROC contract would not be converted to a cost-reimbursement/no-fee contract, that the P.L. 85-804 request was being withdrawn from the NCAB, and that Murdock had ten days to cure its delinquent ASROC delivery schedule or face default termination. Murdock was allegedly unable to cure within the given time without the additional funding from the Government.

The Navy ASROC contracting officer subsequently issued a final decision on May 16, 1975, terminating for default the ASROC contract. Murdock appealed the decision and on the following day, May 23, 1975, filed a petition under Chapter X of the Bankruptcy Act. Judge Monroe E. Freeman, Jr. of the Armed Services Board of Contract Appeals (ASBCA) presided over Murdock's ASROC appeal (Appeal No. 20409) of the contracting officer's decision and ruled in favor of the Government, finding, among other things, no nexus between the Government's actions and Murdock's inability to perform on the ASROC contract.

The Federal Circuit Court of Appeals Decision and Subsequent Events

The ASBCA decisions in Appeals No. 27860 and 28031 were reversed on April 26, 1989, by the Federal Circuit Court of Appeals finding that the NCAB's April 7, 1975, decision was final and converted the fixed-price contract to a cost-reimbursement/no-fee contract that obligated the Government to pay Murdock its costs incurred in performing the ASROC contract. The Federal Circuit dismissed Appeal No. 20409 after

determining that the jurisdictional issue raised therein need not be reached because of the reversal in Appeals No. 27860 and 28031. The Federal Court subsequently found that the Government materially breached the contract by failing to reimburse Murdock for those costs and that the breach relieved Murdock of the default termination and its consequences. Murdock's default termination was thus automatically converted into a termination for the convenience of the Government. The Federal Circuit remanded the ASROC case to the ASBCA for a determination of quantum under the contract's termination for convenience clause. *See Murdock*, 873 F.2d at 1413.

Several matters have transpired since the ASBCA submitted the case to the contracting officer for quantification. On January 5, 1990, the ASBCA denied the Government's motion to dismiss the ASROC claim for lack of jurisdiction. The ASBCA indicated that the *Murdock* decision set forth the Federal Circuit's implicit judgment and mandate resolving against the Government all jurisdictional objections to the relief granted. According to the ASBCA, "[i]f the [Federal Circuit] Court committed error, jurisdictional or otherwise in granting this relief, correction should have been sought by writ of certiorari, or by motion to the Court for rehearing. But such correction is not available from this Board within the limited scope of the remand." *Murdock Mach. & Eng'g Co.*, 90-1 BCA ¶ 22,604, at 113,430 (1990).

The ASBCA also indicated Murdock was required to submit a termination settlement proposal to the contracting officer "consistent with the terms of the ASROC contract as modified by the 7 April 1975 decision of the Navy Contract Adjustment

Board." *Murdock*, 90-1 BCA ¶ 22,604, at 113,430. The ASBCA submitted the matter to Steven J. Caracciolo, the Navy ASROC contracting officer, for quantification. On September 12, 1990, the Trustee submitted a proposal to the contracting officer in the amount of \$10,875,272. Subsequently, the Trustee and the contracting officer discussed a time frame within which to attempt to arrive at a settlement. The contracting officer testified at the January 14, 1991, hearing that he would be in a position to negotiate with the Trustee sometime in February of 1991. At a settlement meeting between the Trustee and the Navy on March 4, 1991, a dispute arose regarding a communication from the Department of Justice to the Department of the Navy that requested the Navy not to conduct settlement negotiations with the Trustee until the issues pending before this court were resolved. Thus, settlement discussions between the parties ceased. The Trustee then formally requested that the settlement proposal be considered a claim and demanded a final decision from the contracting officer.

The Claims

On November 7, 1975, the Government filed a First Amended Contingent Proof of Claim numbered 559A, for \$3,865,673.65 for unliquidated progress payments and excess procurement costs relating to Department of the Army contracts associated with production of Rocket Fin and Nozzle Assemblies² and Delay Plungers.³ On

² The Government sought \$2,024,615.27 for progress payments and \$1,288,139.78 for procurement costs on contract number DAAA-09-74-C-0060.

³ The Government sought \$552,918.60 for unliquidated progress payments on contract number DAAA09-74-C-0114.

November 28, 1975, the Government filed a First Amended Contingent Proof of Claim numbered 764A, for \$11,728,841.98. The claim was for a Government-guaranteed "V-loan" relating to the Navy ASROC contract, for unliquidated progress payments associated with an Air Force contract for the production of practice bombs, and for unliquidated progress payments for three Navy contracts including the ASROC contract, the A/B Dispensers contract and the Zuni Launchers contract.⁴

The Objection to Claims

On July 26, 1990, the Trustee filed an objection as a contested matter to a portion of the claim numbered 764A filed by the Government for unliquidated progress payments resulting from the ASROC contract. On September 18, 1990, the Trustee filed the Summary Judgment Motion seeking to have the court disallow the portion of the claim numbered 764A relating to the unliquidated progress payments from the ASROC contract based upon res judicata stemming from the Federal Circuit's *Murdock* decision.

On July 26, 1990, the Trustee also filed an adversary proceeding objecting to the Government's claims relating to five non-ASROC contracts and also seeking money damages. The Trustee's request for money damages was in the nature of a counterclaim.

⁴ Proof of Claim 764A

AF	F42600-74-C-2534	—	\$ 1,309,598.00	unliquidated progress payments
Navy	N00017-71-C-1430	—	7,933,291.71	unliquidated progress payments
Navy	N00104-74-C-B431	—	547,611.91	unliquidated progress payments
Navy	N00104-75-C-B004	—	10,582.36	unliquidated progress payments
Navy	NOFI 5-VL-393	—	<u>1,927,758.00</u>	"V-loan" from Navy
	Total		\$11,728,841.98	

The Trustee voluntarily dismissed the counterclaim on October 22, 1990, and no further relief is sought by the Trustee on the five non-ASROC claims except for their disallowance.

The issues in the adversary proceeding filed by the Trustee objecting to the claims filed by the Government on the five non-ASROC contracts arise as follows. Murdock had ceased performance on all of the contracts involved herein in May of 1975. Within the next two months, the Government terminated for default five non-ASROC contracts previously awarded to Murdock and demanded repayment of the unliquidated progress payments. The Trustee contends that the five non-ASROC terminations resulted from the domino effect of the Government's improper refusal to provide contract funds under the ASROC contract. The Trustee asserts the results of the Government's improper action were that (1) the bank called the V-Loan and declined further extensions of credit, (2) Murdock was forced to initiate massive employee layoffs, (3) the Army rejected Murdock's P.L. 85-804 request, (4) the Army and the other contracting activities withheld all contract progress payments, (5) Murdock was forced to declare bankruptcy, and (6) the Navy, Army, and Air Force contracting activities immediately terminated Murdock's contracts for Murdock's failure to perform. The Trustee alleges that, as a result of the Government's actions in the ASROC contract, all claims asserted by the Government arising from the default of the five non-ASROC contracts should be disallowed.

On November 15, 1990, the Government filed its Motion to Dismiss or Defer in the adversary proceeding and as a response to the Trustee's Summary Judgment Motion filed in the main case. Both motions were the subject of a hearing held on January 14, 1991. The court subsequently heard both the Government's motion to supplement the record and additional argument telephonically on March 21, 1991, whereupon the matters were taken under advisement.

DISCUSSION

Primary Jurisdiction and Discretionary Deferral

The issues raised by the Government's Motion to Dismiss or Defer involve the proper interplay between the bankruptcy court and other specialized dispute resolution entities, i.e., the doctrine of primary jurisdiction.

That doctrine provides that a court with jurisdiction may defer resolution of a technical factual issue to an administrative agency having expertise beyond the normal competence of judges in order to preserve consistency and uniformity in regulation of the business entrusted to that agency.

In re McLean Indus., Inc., 76 B.R. 328, 331 (Bankr. S.D.N.Y. 1987).⁵ "In the absence of precedent, whether to defer liquidation of a claim to an agency is an issue in the court's 'sound discretion.'" *McLean*, 76 B.R. at 331, citing *Nathanson v. NLRB*, 344 U.S. 25, 30 (1952).

⁵ "The doctrine of exhaustion of administrative remedies recognizes the valuable role that expertized agencies play by providing that, 'where a claim is cognizable in the first instance by an administrative agency alone,' judicial interference is to be 'withheld until the administrative process has run its course.'" *Prudential Lines, Inc. v. United States Maritime Admin. (In re Prudential Lines, Inc.)*, 79 B.R. 167, 176 (Bankr S.D.N.Y. 1987) citing *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956).

Various courts have dealt with the issues raised in the doctrine of primary jurisdiction, achieving divergent results for a variety of reasons.⁶ Arguably, the leading case dealing with deferral of a government contract claims dispute is *Gary Aircraft Corp. v. United States (In re Gary Aircraft Corp.)*, 698 F.2d 775 (5th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983).⁷ In *Gary Aircraft*, the Fifth Circuit found that a bankruptcy court has exclusive jurisdiction to determine the allowance or disallowance of claims.

Gary Aircraft is not the only court to determine that the bankruptcy court has discretion in the matter. In *Zimmerman v. Continental Airlines, Inc.*, 712 F.2d 55, 56 (3d Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984), the Third Circuit compared the policy consideration of the Bankruptcy Reform Act of 1978 and the United States Arbitration Act. The court investigated the expansion of bankruptcy court jurisdiction from the prior bankruptcy law to the Bankruptcy Reform Act, and found as a major impetus

the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction . . . While the reduction of unnecessary delays, expenses, and duplications of effort are important in all judicial proceedings, they are especially important in bankruptcy cases. The economic fragility of the bankrupt's estate, the excess

⁶ See, e.g., *United States v. American Pouch Foods, Inc. (In re American Pouch Foods, Inc.)*, 30 B.R. 1015 (N.D. Ill. 1983) (the court abstained from hearing a government contract dispute); *In re McLean Indus., Inc.*, 76 B.R. 328 (Bankr. S.D.N.Y. 1987) (the court retained a maritime lien dispute); *In re Continental Airlines Corp.*, 60 B.R. 898 (Bankr. S.D. Tex. 1986) (the court did not defer to arbitration); *Misener Indus., Inc. v. United States (In re Misener Indus., Inc.)*, 54 B.R. 89 (Bankr. M.D. Fla. 1985) (the court deferred a government contract dispute).

⁷ The Tenth Circuit has not reached the issues present here nor adopted the rationale in *Gary Aircraft*, therefore this court is not bound by the opinion. However, this court considers *Gary Aircraft* instructive because it is a case decided under the Act and addresses many of the issues raised here.

of creditors' demands over debtor's assets, and the goal of rehabilitating the debtor all argue for expeditious resolution of the bankruptcy proceeding.

Zimmerman, 712 F.2d at 58 (citations omitted). The court weighed the competing policy concerns between arbitration and bankruptcy court resolution and found that "while a bankruptcy court would have the power to stay proceedings pending arbitration, the use of this power is left to the sound discretion of the bankruptcy court." *Zimmerman*, 712 F.2d at 59-60.⁸

The disputes clause in a government contract that requires resolution of disputes through the various Boards of Contract Appeals, however, requires that the bankruptcy court exercise discretion regarding whether it should yield to the expertise of an administrative tribunal. The Trustee asks this court to exercise that discretion and deny the Government's Motion to Dismiss or Defer. The court finds assistance in determining whether to exercise its discretion by application of the five criteria used by the Fifth Circuit in *Gary Aircraft* in reaching its conclusion that the lower court should have deferred to the Board of Contract Appeals and Court of Claims. The Fifth Circuit's five criteria are as follows:

- 1) Resolution of the claims by a specialized tribunal would not impair the requirement that satisfaction of all claims against the bankrupt's estate should proceed in a central forum,
- 2) Technical and esoteric issues relating to government contracting law are present,

⁸ "Bankruptcy courts also have discretion to resolve claims even if there exists another tribunal for such resolution." *In re Continental Airlines Corp.*, 60 B.R. 898, 901 (Bankr. S.D. Tex. 1986), citing *Zimmerman*. The court in *Continental* distinguished *Gary Aircraft* because, as in the case at bar, it did not have related claims before it that might require relitigation of the same issues in another forum.

3) The specialized forum designed specifically to resolve government contract disputes may fulfill the needs for expertise, speed, and uniformity in resolving government contract disputes,

4) The bankruptcy court may not have authority to grant affirmative relief in excess of the amounts of the claim filed by the Government, and the contract dispute might have to be tried twice,

5) Congress has endorsed the transfer of particular disputes to specialized tribunals.

Gary Aircraft, 698 F.2d at 783-84.

The first and fifth criteria have been met in the *Murdock* case and would argue for deferral to the Claims Court. The first criterion, that resolution of claims by the Board of Contract Appeals would not impair the requirement that satisfaction of all claims against the bankrupt's estate proceed in a central forum, is met because ultimate satisfaction of all claims would be controlled in this forum regardless of this court's determination regarding deferral. The fifth criterion, the endorsement by Congress of the transfer of claims to a specialized tribunal, has been met by the statutory enactment of the CDA.

The remaining criteria set forth in *Gary Aircraft* require closer scrutiny. The second criterion surmises that government contracting law tends to be technical and esoteric, therefore, contract issues should be deferred to the government tribunal.⁹ This

⁹ The Government also cites *Misener Indus., Inc. v. United States (In re Misener Indus., Inc.)*, 54 B.R. 89 (Bankr. M.D. Fla. 1985) and *United States v. American Pouch Foods, Inc. (In re American Pouch Foods, Inc.)*, 30 B.R. 1015 (N.D. Ill. 1983). In *Misener*, the court held that bankruptcy courts should defer in the field of government contract disputes because the field is "highly esoteric and technical . . . The interests of efficiency and accuracy . . . outweigh the Debtor's need to litigate its dispute in th[e] Bankruptcy Court." *Misener*, 54 B.R. at 91. The court in *American Pouch Foods* stated that because government contract disputes "involve a very specialized area of the law, institutions such as the Armed Services Board of Contract Appeals and the Court of Claims have been created and specifically designed to resolve them." *American Pouch Foods*, 30 B.R. at 1024.

court has no doubt that this broad judicial observation is correct in a general sense. However, this court must exercise its independent analysis of whether the Trustee's specific objections to the Government's claims are technical and esoteric, thus requiring dismissal or deferral. It would be incorrect for this court to apply this judicial gloss in a *per se* manner to sanction deferral of the resolution of every issue related to a government contract claim. Instead, this court should view the dispute on a case-by-case basis.

In *Prudential Lines, Inc. v. United States Maritime Admin. (In re Prudential Lines, Inc.)*, 79 B.R. 167 (Bankr. S.D.N.Y. 1987), a complaint filed by the debtor against the United States Maritime Administration (MarAd) and the United States Department of Transportation sought affirmative relief for compensatory damages, proximately caused by MarAd's breach of contract. The defendants sought to have the dispute removed to the Court of Claims or Maritime Subsidy Board (MSB). The court held that the issues presented were not so unique as to require deferral.

To the extent that calculation of [operating differential subsidy] amounts is necessary, we agree that such falls within the expertise of the MSB. However, to the extent that Defendants urge us that the other facts in this dispute relevant to, *inter alia*, breach of contract, lender liability, turnover, and equitable subordination causes of action are technical, esoteric and beyond our expertise, we cannot agree. Such issues are clearly within the general competence of bankruptcy judges and controversies relating to the facts underlying such causes of action are resolved frequently by evidentiary hearings held by bankruptcy courts. The fact that the United States is a party to the contract brings into play various statutes that may vary application of the common law of contracts. This alone, however, does not make deferral appropriate. Analyzing legislative history and interpreting statutes are precisely the legal tasks which fall within the general competence of judges.

Prudential Lines, 79 B.R. at 178.

The Trustee seeks a determination by this court that the Government's material breach under the ASROC contract was the proximate cause that prevented Murdock from performing on the Rocket Fin and Nozzle Assemblies, Delay Plungers, Practice Bombs, A/B Dispensers, and Zuni Launchers contracts. This court already has the instruction from the Federal Circuit relating to the termination of the ASROC contract for the convenience of the Government, so such a determination is unnecessary. This court must resolve whether the termination of the ASROC contract was or was not the proximate cause of Murdock's failure to perform the five non-ASROC contracts, or whether other factors were paramount. Those issues may be economic in nature and are general concepts with which this court is familiar.¹⁰ This court concludes that the issues arising from the non-ASROC contract defaults and the effect of the ASROC termination for convenience are matters within the scope of this court's expertise. The Government has failed to show that the issues are of a highly technical or esoteric nature. Therefore, the second factor in *Gary Aircraft* requires retention of this dispute.

The third factor in *Gary Aircraft* indicated that the specialized boards of contract appeals were created precisely because of the needs for expertise, speed, and uniformity, and that the bankruptcy courts should exploit those traits. This court does not

¹⁰ This is not the only court to find that a dispute ordinarily committed to a specific tribunal may not be technical or esoteric. In *McLean*, the bankruptcy court held that although a dispute regarding asserted liens on vessels could have been brought before the United States Maritime Administration, the dispute was not complex and fell within the general competency of judges. *McLean*, 76 B.R. at 333.

question that those boards and the ASBCA have expertise and that their determination of these issues may result in increased uniformity. The remaining trait of speed that is credited to these boards, however, gives pause. This court has no information regarding the cause of the unconscionable delay previously experienced in resolving the ASROC claim and will not attribute it to the courts involved but, rather, to the parties. However, this court has no evidence to support a finding and is therefore unwilling to assume that the five non-ASROC contracts can be resolved expeditiously if this court defers.¹¹ Counsel for the Government discussed the possibility of having the five non-ASROC claims case assigned to Judge Freeman, but the Trustee indicated opposition to such an assignment. The Trustee anticipates a three to five day trial on the non-ASROC claims. The Government, not having its evidentiary base assembled, is less sure of the anticipated length of trial.

The Government disclosed that the ASBCA's fiscal year 1990 annual report shows that the average length of a trial was 3.2 days and that the median time to

¹¹ In *In re Vogue Instrument Corp.*, 31 B.R. 87 (Bankr. E.D.N.Y. 1983), the court had before it a factually similar case in which the bankrupt filed in 1978 under Chapter XI of the Bankruptcy Act while there were pending before the ASBCA appeals dealing with the alleged improper termination by the contracting officer for default on three military contracts. The Government then filed claims in the bankruptcy case, but later asserted the bankruptcy court lacked jurisdiction to hear the claims and should defer to the ASBCA.

The court noted the conflict between *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234, 239-40 (1946) and *Pepper v. Litton*, 308 U.S. 295 (1930), and elected to follow *Gary Aircraft*. One important factor was the lack of any prior resolution of the alleged improper termination, a circumstance dissimilar to the one presented here. It is also interesting to note that the claims pending in *Vogue* had only been in existence from 1978 to 1983. In this case they have been in existence from 1975 to 1991. That delay brings into question the propriety of deferral to the ASBCA or Claims Court. In *Prudential Lines*, the court indicated that "an administrative remedy may be deemed inadequate and unavailable if an agency refuses to act or takes an inordinate period of time to act." 79 B.R. at 177 n.4 (citations omitted).

complete a case from docketing to decision was 258 days. The annual report information, however, is not particularly helpful in ascertaining when these claims could be scheduled for trial, and the Government has not ventured a guess. This court does have a five-day, first-place setting available from September 9, 1991, through September 13, 1991, to hear these claims disputes. That trial date should give the parties sufficient time to discover the evidence required for trial, as well as provide the necessary time estimated by the Trustee to hear the objections.

No substantial activity regarding these claims has yet taken place on the administrative level, thus no special benefit would be derived by deferring to the ASBCA. The Government has not amended the proofs of claim at issue, although it has a duty to update its claims. If the Government's Motion to Dismiss or Defer is denied, at least this court will have the advantage of overseeing the progress of the case and exercising some control over its administration, a factor that would be unavailable if the Government's motion were granted.

This case is also unusual because of the mandate issued in section 311, Title III of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. Pub. L. No. 99-554 (1986). Pursuant to such direction, the reference was withdrawn in this case and a hearing held in November 22, 1988, before the Honorable Bruce S. Jenkins, Chief Judge. At that time, Murdock anticipated that a final report could be filed sixty days after the Federal Circuit ruled. The ruling was handed down on April 26, 1989. Clearly, it was not anticipated by the Chief Judge in returning the case for final

disposition, that the claims litigation herein would be transferred from this court to the ASBCA for more years of litigation. This court concludes, under the circumstances of this case, that deferral would unduly delay administration of the estate. See, e.g., *Schaefer v. Smith*, 469 F.2d 1256, 1258 (10th Cir. 1972); *In re Invader Corp.*, 71 B.R. 564, 567 (Bankr. W.D. Tex. 1987).

The fourth criterion considered by *Gary Aircraft* is not supportive of the Government's position as a factor in favor of deferral. *Gary Aircraft* attributes the existence of claims running against the Government as a factor in favor of deferral because this court may not have authority to grant affirmative relief against the Government. The Trustee has withdrawn counterclaims asserted against the Government in the adversary proceeding. Therefore, no issue remains regarding the authority of this court to grant affirmative relief against the Government.

In *Prudential Lines*, the court deferred because it could not grant affirmative relief in light of 11 U.S.C. § 106 and the Tucker Act. The court held that if the debtor "decides to limit its demands for affirmative relief to that which can be fully entertained here, the damage claims, as limited, and the equitable subordination claim can be tried together." *Prudential Lines*, 79 B.R. at 183. In the case at bar, because the Trustee has modified its claims for affirmative relief, the counterclaims are no longer a factor in a determination of the Government's motion. Therefore, the fourth criterion recited in *Gary Aircraft* favors retention of the matters in this forum.

Summary Jurisdiction and Consent

The Government has raised two additional issues regarding this court's jurisdictional ability to hear these disputes. First, the Government contends that sovereign immunity prevents this court from adjudicating any claims against it. Second, the Government asserts that the Trustee is time barred from objecting to its claims.

As stated above, this court has summary jurisdiction to adjudicate claims filed against Murdock's estate. Section 2a(2) of the Bankruptcy Act; 11 U.S.C. § 11. A claim filed submits the claimant to the jurisdiction of the court for the purpose of adjudicating the claim against the estate. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989); *Inter-State Nat'l Bank v. Luther*, 221 F.2d 382 (10th Cir. 1955), *cert. granted*, 350 U.S. 810 (1955), *cert. dismissed*, 350 U.S. 944 (1956). The filing of a claim under the Act may also subject the claimant to the jurisdiction of the court for the purpose of adjudicating any counterclaims held by the estate against the claimant. Counterclaims are not good against the United States except defensively. *United States v. Kennedy (In re Greenstreet, Inc.)*, 209 F.2d 660, 663 (7th Cir. 1954).¹² In this instance, Murdock has dismissed its counterclaims in the adversary proceeding. The Government argues that in

¹² In *Greenstreet*, the trustee, in a counterclaim, sought to set off \$150,000 against a claim filed by the government in the amount of \$370,000. The government objected to the court's jurisdiction of the counterclaims upon the premise that it was immune from suit. The Seventh Circuit held that the district court properly permitted the trustee to set off against the government's general claim in order to defeat or reduce it for breach of contract by the government, but found that no affirmative judgment above the amount of its claim could be rendered against the United States. *Greenstreet*, 209 F.2d at 667.

actuality the Trustee's objections to the claims¹³ are based only on assertions of entitlement to convenience termination in the non-ASROC contracts, and that such assertions constitute counterclaims for money damages against the United States. Even if the Government's theory is correct, the Trustee's position is the type of defensive counterclaim allowed prosecution in this court because it does not exceed the amount of the claim, and indeed seeks no affirmative amount from the Government.

The Government further argues that the waiver of sovereign immunity granted by 11 U.S.C. § 106 is inapplicable in this Bankruptcy Act case, and that the general language of the Act cannot be construed as a waiver of governmental immunity. Although the Government cites *United States v. Mel's Lockers, Inc.*, 346 F.2d 168, 170 (10th Cir. 1965) and *United States v. Krakover*, 377 F.2d 104 (10th Cir. 1967), *cert. denied*, 398 U.S. 845 (1967), neither case is on point on the facts or on the issue of sovereign immunity vis-a-vis a filed proof of claim.¹⁴ The last word on the subject, however, appears to be the Supreme Court's holding in *Granfinanciera*, and by implication, its effect on sovereign immunity. The petitioners in *Granfinanciera* had not filed claims against the

¹³ A creditor, including the Government, has the burden of establishing its claim. *In re Ward*, 131 F. Supp. 387 (D. Colo. 1955). The Government must establish its claim in the bankruptcy court and not elsewhere. *United States v. Wood*, 290 F. 109 (2d Cir. 1923), *aff'd*, 263 U.S. 680 (1923).

¹⁴ *Mel's Lockers* involved the bankruptcy court's power to enjoin and restrain the Small Business Administration from executing upon a judgment. The Tenth Circuit held that nothing in the Small Business Act nor the Bankruptcy Act constitutes a waiver of immunity from injunction. *Mel's Lockers*, 346 F.2d at 169. In *Krakover*, the issue was whether the United States can be ordered to pay to the chapter 13 trustee part of the wages of one of its employees. The Tenth Circuit held that sovereign immunity prevented the bankruptcy court from issuing a wage deduction order. *Krakover*, 377 F.2d at 106. Nothing in the opinion indicates that the government had filed a claim or was a creditor in the case.

estate, and consequently, the trustee's fraudulent conveyance action did not arise as part of the bankruptcy claims allowance process. Had the petitioners filed claims, the bankruptcy court would have acquired jurisdiction over the petitioners because of the court's actual or constructive possession of the estate and the court's "power and obligation to consider objections by the trustee in deciding whether to allow claims against the estate." *Granfinanciera*, 109 S. Ct. at 2798, citing *Katchen v. Landy*, 382 U.S. 323, 327 (1966). "By submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims." *Granfinanciera*, 109 S. Ct. at 2799 n.14, construing *Katchen*. Therefore, the principle of sovereign immunity is rendered inapplicable in this case.

The Government also asserts that any action of the Trustee in objecting to its claims is untimely. The Bankruptcy Act does not set forth a deadline or bar date after which claims objections become untimely. Section 57f of the Act provides that "[o]bjections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit." Additionally, "the court retains jurisdiction to re-examine and disallow or modify claims at any time during the administration when the question is duly brought to its attention." J. MacLachlan, *Handbook of the Law of Bankruptcy* 83 (1956) (citing sections 2a(2) and 57k of the Act). There is no specific time limit within which the Trustee is required to intervene in pending litigation. Bankruptcy Rule 306. "In some cases it may be advantageous for him to hold back and take over the bankrupt's litigation only if and

when developments indicate that such a course would, on a balance of probability, be beneficial to the estate." J. MacLachlan, *supra*, at 244. Section 11a of the Act provides for an automatic stay of a suit founded upon a claim from which a discharge would be a release until adjudication or dismissal of the bankruptcy petition. The court has the express power to reconsider claims according to the equities of the case up to the time of closing the estate as provided in sections 57k and 2a(15).

The Trustee asserts that even under the *Fulford*¹⁵ doctrine, if the Government asserts a claim to recover procurement costs, then the Government opens the door to the Trustee to contest the underlying default terminations. However, because the Government filed proofs of claim, it subjected itself to the jurisdiction of the bankruptcy court. Therefore, bankruptcy law, and not the *Fulford* doctrine or the contract's disputes clause, applies to the determination of timeliness of the Trustee's objections. Bankruptcy Rule 306(a) permits the Trustee to "object to the allowance of improper claims, unless no purpose would be served thereby." Nowhere in Rule 306 is a limitation placed on the time within which to object to claims. Furthermore, the Trustee cites section 11f of the Bankruptcy Act as support for his contention that any limitation period is "suspended during the period from the date of the filing of the petition in bankruptcy . . . until thirty days after the dismissal of the bankruptcy proceedings." The arguments set forth by

¹⁵ *Fulford Mfg. Co.*, 6 Cont. Cas. Fed. (CCH) ¶ 61,815, ASBCA No. 2143, 2144 (1955) (a contractor who did not file a timely appeal to a contract default termination is allowed a second chance to challenge the propriety of the Government's default determination by appealing the contracting officer's assessment of excess procurement costs).

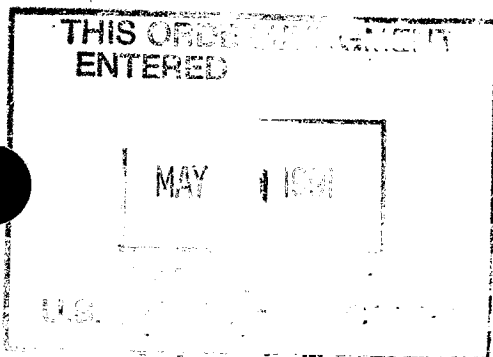
this court has jurisdiction over the Government by its mere filing of claims against the Murdock estate, which has not been closed. The court concludes that it has jurisdiction to resolve these claims issues and that the Trustee's action is timely. The Government's motion to dismiss is, accordingly, denied.

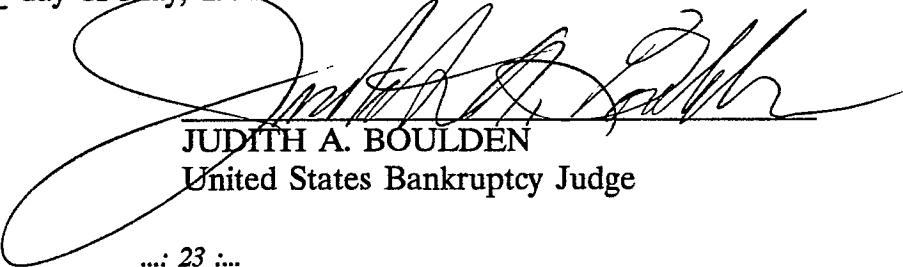
CONCLUSION

The court has carefully considered the evidence, case law, and competing policy considerations inherent in a resolution of the Government's Motion to Dismiss or Defer. This court has no wish to intrude into the province of other courts, nor to challenge their expertise in a complex area. This court does, however, desire to fulfill its statutory duty to resolve the claims of this estate and to administer the estate in a timely manner. The Government, throughout all of its argument, has failed to provide convincing argument that this court lacks jurisdiction over these matters or that the most expeditious manner of resolving these disputes lies in deferral. Application of the five elements set forth in *Gary Aircraft* leads to the conclusion that, in the exercise of the discretion vested in this court, denial of the Government's Motion to Dismiss or Defer is appropriate. Therefore, it is hereby

ORDERED, that the Government's Motion to Dismiss or Defer is denied.

DATED this 1st day of May, 1991.




JUDITH A. BOULDEN
United States Bankruptcy Judge