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Be Careful What You Do Not Ask For: Contracts With The Federal Government For Which Purely Nonmonetary Relief Exists In The Event Of Breach Must Provide For Monetary Damages To Make Them Available To Non-Breaching Private Parties

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NOTES

Be Careful What You Do Not Ask For Contracts with the federal government for which purely nonmonetary relief exists in the event of breach must provide for monetary damages to make them available to non-breaching private parties

Higbie v. United States, 778 F.3d 990 (Fed. Cir. 2015).

MATTHEW W. CECIL*

I. INTRODUCTION

By further limiting access to one of the only forums in which private parties may seek monetary damages over \$10,000 from the federal government, the United States Federal Circuit Court of Appeals in *Higbie v. United States*¹ has ensured non-breaching private parties will not be wholly compensated for their injuries and has undermined the court's own interest in bolstering mediation.

Outside limited exceptions, parties may only sue the United States government for monetary damages over \$10,000 in the United States Court of Federal Claims,² and even then only for claims in which the federal government has explicitly waived its sovereign immunity. The Tucker Act, which grants Federal Court of Claims' subject matter jurisdiction, requires claims to be based on a distinct and substantive money-mandating source of law. In *Higbie v. United States*, the United States Federal Circuit Court of Appeals held that Higbie, a former federal government employee, was not entitled to monetary damages for the government's breach of a confidentiality provision in a mediation agreement signed with Higbie as the contract did not explicitly contemplate the availability of monetary damages. As a result, the federal circuit court found that the Court of Federal Claims had properly dismissed Higbie's breach of contract claim for lack of sub-

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1. *Higbie v. United States*, 778 F.3d 990, 991 (Fed. Cir. 2015), *cert. denied*, 2015 U.S. LEXIS 5579 (2015).

2. Federal district courts share concurrent jurisdiction with the United States Court of Federal Claims over claims not exceeding \$10,000. 28 U.S.C. § 1346(a) (2013).

ject matter jurisdiction. In a case of first impression, the federal circuit court guaranteed that the federal government would not be held liable for damages from breaching a mediation agreement's confidentiality provision. Contrary to the government's own interest, the ruling also undermined the effectiveness of mediation as a cost-conscious alternative to litigation.

II. FACTS AND HOLDING

Richard Higbie, a Senior Criminal Investigator in Dallas, Texas, for the Bureau of Diplomatic Security of the United States State Department, contacted the Equal Employment Opportunity Commission (EEOC) on January 15, 2009, alleging that the State Department had discriminated and retaliated against him for actions protected by the Civil Rights Act of 1964.³ The complaint was referred to mediation, and the parties signed an agreement, the "EEO/Alternative Dispute Resolution Agreement to Mediate" (Mediation Agreement),⁴ which included the following confidentiality provision: "*Mediation is a confidential process. Any documents submitted to the mediator(s) and statements made during the mediation are for settlement purposes only.*"⁵ Higbie testified at an evidentiary hearing that he purposefully negotiated for confidentiality prior to the mediation.⁶ He explained that he did not want his supervisors to use anything that occurred during the mediation against him in his employment.⁷ Mediation between Higbie and the State Department proved unsuccessful, and the EEOC resumed its investigation.⁸ Two of Higbie's supervisors, Marian Cotter and Jeffrey Thomas, provided affidavits during the EEOC investigation that described Higbie's statements during the mediation and suggested he was uncooperative.⁹

Higbie filed suit against the United States on October 5, 2011, in federal district court for the Northern District of Texas.¹⁰ His complaint sought monetary damages and alleged, among other claims, that the State Department had breached the confidentiality provision of the Mediation Agreement based on the disclosure of the information contained in Cotter and Thomas' affidavits.¹¹ Higbie ultimately brought a claim for breach of contract under Texas common law.¹² On April 17, 2013, following a transfer motion by Higbie, the breach of contract claim was moved to the United States Court of Federal Claims,¹³ where Higbie could seek

3. *Higbie v. United States*, 778 F.3d at 991; *Higbie v. United States*, 113 Fed. Cl. 358, 360 (2013).

4. *Higbie*, 113 Fed. Cl. at 361.

5. *Higbie*, 778 F.3d at 992 (emphasis in original).

6. *Id.* at 991-92.

7. *Id.*

8. *Id.* at 992.

9. *Id.* at 992, 998 (Taranto, J., dissenting) (indicating that the affidavits alleged Higbie stonewalled mediation).

10. *Higbie v. United States*, 113 Fed. Cl. 358, 361 (2013).

11. *Higbie v. United States*, 778 F.3d at 992. Higbie alleged that the affidavits "demonstrated a willful attempt by [Cotter and Thomas] to further discriminate and retaliate against the Plaintiff for engaging in related protected activity." *Higbie*, 113 Fed. Cl. at 361.

12. *Higbie*, 113 Fed. Cl. at 361.

13. Congress created the United States Court of Federal Claims in 1855, which was then labeled the Court of Claims. *The People's Court*, UNITED STATES COURT OF FEDERAL CLAIMS http://www.usfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited Aug. 25, 2015). Among other duties, the Article I court provides a venue for citizens seeking mone-

monetary damages.¹⁴ On September 13, 2013, the court dismissed Higbie's claim for lack of subject matter jurisdiction, on the basis that the Mediation Agreement could not "fairly be interpreted as contemplating money damages in the event of breach."¹⁵ The court explained that Higbie had failed to respond to the government's argument that the Mediation Agreement did not contemplate the award of money damages in the case of breach.¹⁶ Higbie subsequently appealed the dismissal of his complaint to the United States Federal Circuit Court of Appeals.¹⁷

The Federal Circuit Court affirmed the Court of Federal Claims' dismissal for lack of subject matter jurisdiction.¹⁸ The appellate court wrote that where a purely non-monetary form of relief exists for breach of contract, a plaintiff must show that the agreement in question could be fairly interpreted to contemplate monetary damages for the Court of Federal Claims to have jurisdiction under the Tucker Act.¹⁹

III. LEGAL BACKGROUND

Traditionally, monetary damages are implied for breach of contract absent contrary language.²⁰ However, in breach of contract claims before the Court of Federal Claims, plaintiffs may be required to show that the agreement in question contemplated monetary damages when a purely non-monetary form of relief exists.²¹

A. Federal Jurisdiction over Breach of Contract Claims against the United States Government

The Court of Federal Claims' jurisdictional authority is limited to claims against the United States government.²² The federal government has sovereign immunity and therefore cannot be sued unless it has waived immunity or explicitly consented to suit.²³ The Tucker Act encapsulates such an area where the federal government has waived sovereign immunity and conferred jurisdiction on the Court of Federal Claims for "any claim against the United States founded . . .

tary damages against the United States government. *Id.* The court's general jurisdiction is set out in 28 U.S.C. § 1491. *Id.*

14. *Higbie*, 113 Fed. Cl. at 361.

15. *Id.* at 365.

16. *Id.* In support of his argument, Higbie cited to a Florida statute that provided a cause of action for breach of mediation confidentiality and contemplated monetary relief. *Id.* Higbie also cited to two trade secret cases as well as to a California Supreme Court case addressing the availability of monetary relief for violation of court-ordered mediation. *Id.* The Court of Federal Claims found none of these sources persuasive. *Id.*

17. *Id.*; *Higbie v. United States*, 778 F.3d 990, 993 (Fed. Cir. 2015).

18. *Higbie*, 778 F.3d at 991.

19. *Id.* at 992-93. The Tucker Act is a jurisdictional provision that carves out exceptions to the United States' sovereign immunity based on other sources of law. *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009). The Act requires plaintiffs to base their claims on a separate source of substantive law, which must "fairly be interpreted as mandating compensation by the Federal Government." *Id.* (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)).

20. RESTATEMENT (SECOND) OF CONTRACTS § 346, cmt. a (AM. LAW INST. 1981) ("Every breach of contract gives the injured party a right to damages against the party in breach").

21. *Holmes v. United States*, 657 F.3d 1303, 1315 (Fed. Cir. 2011).

22. *Simmons v. New York*, 50 Fed. App'x. 988, 989 (Fed. Cir. 2002).

23. *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009).

upon any express or implied contract with the United States.”²⁴ Before the Court of Federal Claims can exercise jurisdiction under the Tucker Act, “a plaintiff must identify a separate source of substantive law that creates the right to money damages.”²⁵ The claims court cannot grant equitable relief unrelated to a claim for monetary damages.²⁶

The Federal Circuit Court of Appeals observed in *Holmes v. United States* that previous courts, including the United States Supreme Court,²⁷ have not required the monetary relief inquiry in granting Tucker Act jurisdiction for contract-based claims.²⁸ Typically, federal courts have treated contract-based claims differently in assessing Tucker Act jurisdiction, skirting the question of whether the agreement contemplated monetary relief.²⁹ Nevertheless, the Federal Circuit Court in *Holmes* held that the monetary relief inquiry could be required in breach of contract claims where the agreement provided for purely nonmonetary relief.³⁰ The monetary relief inquiry has also been required for contracts entirely concerned with the conduct of parties in a criminal case,³¹ or where the agreement expressly disavowed monetary damages.³²

The Federal Circuit Court has stressed that not all contracts with the United States government grant Tucker Act jurisdiction.³³ In *Rick’s Mushroom Service, Inc. v. United States*, the circuit court held that the Court of Federal Claims had properly found that it lacked subject matter jurisdiction over the lawsuit, which sought indemnification from the government in connection with a cost-share agreement the parties had entered.³⁴

According to the circuit court, the claims court lacked jurisdiction because Rick’s Mushroom Service’s breach of contract claim was not based on a money-mandating source of law.³⁵ Unlike Higbie’s Texas-contract-law-based claim, Rick’s Mushroom Service’s breach of contract claim was not brought under state contract law, but the Contract Disputes Act of 1978, a federal law.³⁶ Rick’s Mushroom Service’s claim failed because the Contract Disputes Act only applies to express or implied government contracts for procurement of goods or services.³⁷ The cost-share agreement between Rick’s Mushroom Service’s and the federal government was not such a contract.³⁸

Still, Tucker Act breach of contract claims based on state law must be judged by federal law: “It is well settled that contracts to which the government is a party . . . are normally governed by federal law, not by the law of the state where they are made or performed.”³⁹

24. 28 U.S.C. § 1491(a)(1) (2011).

25. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005).

26. *Nat’l Air Traffic Controllers Ass’n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998).

27. *United States v. Testan*, 424 U.S. 392, 400 (1976).

28. *Holmes v. United States*, 657 F.3d 1303, 1314 (Fed. Cir. 2011).

29. *Id.*

30. *Id.* at 1314-15.

31. *Sanders v. United States*, 252 F.3d 1329, 1336 (Fed. Cir. 2001).

32. *Holmes*, 657 F.3d at 1314.

33. *Id.*

34. *Rick’s Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1340 (Fed. Cir. 2008).

35. *Id.* at 1343-44.

36. *Id.* at 1342.

37. *Id.* at 1343-44; 41 U.S.C. § 602(a).

38. *Rick’s Mushroom Service*, 521 F.3d at 1344.

39. *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1298 (Fed. Cir. 1986).

B. Contemplating Monetary Damages in Mediation Agreements

Federal courts have rarely addressed the breach of confidentiality provisions in mediation agreements. However, in applying state contract law, federal courts have awarded monetary damages for breach of such confidentiality clauses. In *Bethlehem Area School District v. Zhou*, the United States District Court for the Eastern District of Pennsylvania held that a school district had breached the confidentiality provision of a mediation agreement with Diana Zhou, a mother of two students in the school district.⁴⁰ The school district entered into the agreement to mediate with Zhou to address allegations that she had taken advantage of a right to certain due process procedures provided under the Individuals with Disabilities Act.⁴¹ After mediation proved ineffective, the school district filed suit against Zhou and wrote in its complaint that Zhou had told the mediator she was using the due process procedures to drive up legal costs for the school district in hopes that it would pay for her children to attend private school.⁴² Zhou counterclaimed for breach of contract based on the comments provided in the school district's complaint and requested monetary relief.⁴³ The district court held that Zhou was entitled to damages as in any other breach of contract claim and awarded her nominal damages of \$1, adding that Zhou could introduce evidence of actual damages at trial.⁴⁴ The court also enjoined the school district from calling the mediator to testify at trial and found that evidence of statements made during mediation could not be admitted at trial.⁴⁵

Similarly, the United States District Court of Kansas held in *Bashaw v. Johnson* that defendant Jeremiah Johnson, an attorney, would be entitled to damages for breach of contract if he proved that plaintiffs had violated the confidentiality agreement the parties signed before mediation.⁴⁶ Plaintiffs, who were former employees of Johnson's, agreed to participate in a confidential mediation session with Johnson in connection with their allegations that Johnson had used an application on his smartphone and personal tablet to film under the employees' clothing.⁴⁷ After mediation failed, Johnson claimed that the employees brought information obtained during mediation to the county prosecutor who had been considering whether to file criminal charges against Johnson for the conduct outlined in plaintiffs' lawsuit.⁴⁸ The court cast doubt on Johnson's assertion that the breach increased his risk for criminal prosecution but indicated that Johnson was nevertheless entitled to damages if he could prove actual harm.⁴⁹

Additionally, in *Sarsfield v. County of San Benito*, the United States District Court for the Northern District of California declined to award relief for alleged breach of a mediation agreement's confidentiality clause but considered monetary

40. *Bethlehem Area Sch. Dist. v. Zhou*, No. 09-03493, 2012 WL 930998, at *1 (E.D. Pa. March 20, 2012).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at *4-5.

45. *Id.*

46. *Bashaw v. Johnson*, No. 11-2693-JWL, 2012 WL 1623483, at *3-4 (D. Kan. May 9, 2012).

47. *Id.* at *1, *3.

48. *Id.* at *3.

49. *Id.* at *4-5.

damages to be the proper potential remedy.⁵⁰ Plaintiff Sarsfield had entered into a confidential mediation contract to discuss potential settlement agreements arising out of sexual harassment claims against him.⁵¹ The district court found that plaintiff's claim that the prosecutor's office where he used to work breached the confidentiality clause of the mediation agreement was unsubstantiated and that plaintiff had failed to prove legally cognizable damages entitling him to monetary relief.⁵² Other federal courts have found monetary relief proper for the breach of contractual confidentiality provisions in a variety of other contexts as well.⁵³

C. Presumption of Monetary Relief for Breach of Contract

Monetary damages are the presumptive relief for breach of contract. The Restatement (Second) of Contracts generally provides that any party injured by breach of contract is entitled to monetary damages.⁵⁴ Contracts also normally "do not contain provisions specifying the basis for the award of damages in case of breach."⁵⁵ Texas contract law, the substantive law on which Higbie based his complaint in the Court of Federal Claims, provides that monetary damages are the preferred remedy for breach of contract.⁵⁶ Monetary damages are also the default remedy for breach of a contract with the United States government.⁵⁷ In addition, courts usually refrain from awarding equitable relief where monetary damages suffice to compensate the injured party.⁵⁸

The United States Supreme Court has held that in interpreting contracts, courts should look to background legal rules, or default rules, absent contrary language in the agreement.⁵⁹ Judge Posner, too, has written that contracts "are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' intent that they not govern."⁶⁰

As previously discussed, the Federal Circuit Court of Appeals has held that presumption of monetary damages for a breach of contract generally satisfies the

50. Sarsfield v. City of San Benito, No. 07-cv-02528 JF, 2010 WL 1929619, at *9 (N.D. Cal. May 12, 2010).

51. *Id.* at *1.

52. *Id.* at *10.

53. See, e.g., Youtie v. Macy's Retail Holding, Inc., 626 F.Supp.2d 511 (E.D. Pa. 2009) (employment contract); Davidson v. Cao, 211 F.Supp. 2d 264 (D. Mass. 2002) (confidential disclosure agreement concerning drug research).

54. RESTATEMENT (SECOND) OF CONTRACTS § 346, cmt. a (AM. LAW INST. 1981) ("Every breach of contract gives the injured party a right to damages against the party in breach").

55. San Juan City College v. United States, 391 F.3d 1357, 1361 (Fed. Cir. 2004).

56. Zachary Const. Corp. v. Port of Houston Authority of Harris County, 449 S.W.3d 98, 112 n. 66 (Tex. 2014) ("[P]arties entering into a contract presumably contemplate that contract damages will be available if that contract is breached.>").

57. Sanders v. United States, 252 F.3d 1329, 1334 (Fed. Cir. 2001); United States v. Winstar Corp., 518 U.S. 839, 885 (1996).

58. RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (AM. LAW INST. 1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.>").

59. US Airways, Inc. v. McCutchen, 133 S. Ct. 1537, 1549 (2013) ("Indeed, ignoring those rules is likely to frustrate the parties' intent and produce perverse consequences.>").

60. Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Wells, 213 F.3d 398, 402 (7th Cir. 2000).

Tucker Act's monetary relief requirement.⁶¹ Such an inquiry is only required when the agreement is entirely concerned with the conduct of parties in a criminal case,⁶² expressly disavows monetary damages,⁶³ or provides for purely nonmonetary relief.⁶⁴

IV. INSTANT DECISION

The United States Federal Circuit Court of Appeals in *Higbie* agreed by a 2-1 majority that the availability of purely nonmonetary relief obviated the monetary relief inquiry.⁶⁵ On appeal, the Federal Circuit reviewed the lower court's dismissal de novo.⁶⁶ In affirming the Court of Federal Claims' dismissal for lack of subject matter jurisdiction, a divided Federal Circuit Court of Appeals substantially mirrored the lower court's reasoning.⁶⁷

A. Majority Opinion

The Federal Circuit acknowledged that while the presumption that monetary damages are available for a breach of contract usually obviated the Tucker Act's monetary relief requirement, certain exceptions existed.⁶⁸ In particular, the court pointed to instances in which the contract's terms expressly waived monetary damages or in which the relief for breach could be entirely nonmonetary.⁶⁹ Where a purely nonmonetary form of relief exists, the court may require complainant to show the agreement in question contemplated monetary damages for the Court of Federal Claims to exercise jurisdiction under the Tucker Act.⁷⁰

As an initial matter, the court held that because the Mediation Agreement provided for a purely nonmonetary remedy — the exclusion of statements made during mediation for any purposes other than settlement — it was proper for the Court of Federal Claims to require the monetary relief inquiry.⁷¹ The majority added that this interpretation followed the logic of Rule 408 of the Federal Rules of Evidence,⁷² which provides that “a statement made during compromise negotiations about the claim . . . to prove or disprove the validity or amount of a disputed claim” is inadmissible.⁷³

Higbie contended that the Mediation Agreement could be fairly read as contemplating monetary damages and, in fact, that all such agreements contemplate monetary damages for breach of confidentiality agreements.⁷⁴ In support, *Higbie*

61. *Holmes v. United States*, 657 F.3d 1303, 1314 (Fed. Cir. 2011) (“[W]hen a breach of contract claim is brought in the Court of Federal Claims under the Tucker Act, the plaintiff comes armed with the presumption that money damages are available, so that normally no further inquiry is required.”).

62. *Sanders*, 252 F.3d at 1336.

63. *Holmes*, 657 F.3d at 1314.

64. *Id.* at 1314-15.

65. *Higbie v. United States*, 778 F.3d 990, 991-93 (Fed. Cir. 2015).

66. *Id.* at 993.

67. *Id.* at 993-95.

68. *Id.* at 993.

69. *Id.*

70. *Id.*

71. *Higbie*, 778 F.3d at 994.

72. *Id.*

73. FED. R. EVID. 408.

74. *Higbie*, 778 F.3d at 993-95.

pointed to sources stressing the importance of confidentiality in mediation and the benefits of Alternative Dispute Resolution (ADR).⁷⁵ Specifically, Higbie referenced Congressional findings describing the benefits of ADR and portions of the EEOC's website discussing the importance of confidentiality in mediation.⁷⁶ He also alleged that monetary relief was implied from the terms of the contract and discussions between the parties.⁷⁷ However, he did not identify any contractual provisions or statements supporting that contention.⁷⁸

The court largely avoided discussing the merits of Higbie's other offers of legal authority beyond decrying them as non-controlling state law.⁷⁹

B. Dissenting Opinion

Writing separately in dissent, Judge Taranto argued that the Federal Circuit Court of Appeals should honor the strong general rule that monetary damages are implied for breaches of contract and that the Court of Federal Claims accordingly had jurisdiction over Higbie's complaint.⁸⁰ Judge Taranto cited as authority a number of cases discussed earlier in this Note that provided for monetary damages as a remedy for breach of confidentiality provisions in mediation agreements.⁸¹ The judge disagreed with the majority that the text of the Mediation Agreement implied that monetary damages were not contemplated in the event of breach.⁸² He suggested that the kind of equitable remedy present in this case, exclusion of evidence, supplemented rather than replaced monetary relief.⁸³

In conclusion, Judge Taranto stressed that the matter before the court was only a threshold jurisdictional issue.⁸⁴ Regardless of any perceived lack of merit in Higbie's claim, the judge wrote that he believed the complainant's pleading had cleared the Court of Federal Claims' jurisdictional hurdle.⁸⁵

V. COMMENT

The Federal Circuit Court of Appeals has stressed that the government has not consented to suit for every contract into which it enters.⁸⁶ Among other instances, the court has said that where a purely non-monetary form of relief exists, a court may require the complainant to show that the parties contemplated monetary relief when entering the agreement at issue.⁸⁷ The Federal Circuit has main-

75. *Id.* at 993-94.

76. *Id.*

77. *Id.* at 993-95.

78. *Id.* at 995.

79. *Id.*

80. *Higbie*, 778 F.3d at 995 (Taranto, J., dissenting).

81. *Id.* at 996.

82. *Id.* at 997 ("[T]here is no such express disavowal in the agreement at issue here. Nor is there a sound basis for finding an implicit disavowal.").

83. *Id.* at 996-97.

84. *Id.* at 1000.

85. *Id.*

86. *Holmes v. United States*, 657 F.3d 1303, 1314 (Fed. Cir. 2011).

87. *Id.* at 1314-15.

tained this position while acknowledging the longstanding presumption of monetary relief for breach of contract.⁸⁸

The appellate court's ruling in *Higbie* guaranteed that where the United States government breaches a confidentiality provision in a mediation agreement, some victims will not be fully compensated or even compensated at all for their injuries. Furthermore, the court's decision ran contrary to its own interests in undermining the effectiveness of mediation as a cost-conscious alternative to litigation.

A. The Higbie Ruling Sets a Precedent of Inadequate Compensation for the Federal Government's Breach of Confidentiality Provisions in Mediation Agreements

The availability of monetary relief for breach of contract ensures that non-breaching parties are being placed in as good a position as they would have been had the breaching party fully performed.⁸⁹ With the breach of confidentiality clauses, evidentiary exclusion alone often fails to fully compensate the non-breaching party for its injuries.⁹⁰ In his dissent, Judge Taranto pointed to potential reputational or job-related harms resulting from breach of confidentiality.⁹¹ The non-breaching party would likely face increased legal costs to resolve the dispute as well.⁹²

The evidentiary remedy in cases like *Higbie*'s remains vital to curing harm done by breach of confidentiality. Yet the inclusion of language in a mediation agreement providing for such an equitable remedy by no means indicates an intention to preclude the availability of monetary damages.⁹³ Equitable relief is generally unavailable where monetary damages adequately compensate a victim of contractual breach.⁹⁴ Accordingly, Judge Taranto stressed that it made "perfect sense for a contract to provide expressly for a non-monetary remedy to ensure its availability," and that such a provision did not imply that the non-monetary remedy would be exclusive.⁹⁵

Furthermore, it is illogical to presume *Higbie* would have expected his only remedy to be the exclusion of statements made during mediation from future legal proceedings. As the court and federal government identify,⁹⁶ Federal Rules of Evidence 408 already secures that right.⁹⁷ *Higbie* may have wanted to be redun-

88. *Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir. 2001).

89. *N. Star Alaska Hous. Corp. v. United States*, 76 Fed. Cl. 158, 212 (Fed. Cir. 2007).

90. *Higbie*, 778 F.3d at 997-98 (Taranto, J., dissenting).

91. *Id.*

92. *Id.* at 998 ("[F]or example, Mr. Higbie might incur delay and expense from additional proceedings in the resolution of his discrimination claim because the EEO investigator, at an early stage, might have been influenced by knowledge of Mr. Higbie's alleged stonewalling in the mediation.").

93. *Id.* at 997 ("The natural inference is that this kind of specified remedy supplements but does not supplant the default damages remedy.").

94. RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (AM. LAW INST. 1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.").

95. *Higbie*, 778 F.3d at 997 (Taranto, J., dissenting).

96. *Id.* at 994.

97. FED. R. EVID. 408 ("Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: ... conduct or a statement made during compromise negotiations about the claim.").

dant in ensuring that statements made during mediation were not later used against him. However, Higbie also wanted protections beyond those encapsulated in the Federal Rules of Evidence. He wanted to ensure not only that the statements made during mediation were kept out of other legal proceedings, but that those confidential statements were not disclosed in any manner or at any time as well.⁹⁸

For this reason, the Federal Circuit Court of Appeals' monetary relief requirement fails on policy grounds. It presupposes individuals entering into contracts with the federal government have any awareness of sovereign immunity or the difference between equitable and monetary relief. In reality, these private parties likely expect greater protection than the specter of equitable remedies afford. Higbie and others may not have considered the possibility of monetary damages until breach. However, that does not indicate that they did not expect to be fully compensated — regardless of the means of relief — for whatever injury they did incur as a result of breach. Furthermore, Higbie would naturally assume that the agreement did not need to explicitly contemplate monetary relief if he was familiar with contract law, as monetary damages are the presumptive remedy for breach of contract. Ignorance of the law is no excuse,⁹⁹ but the law should also not rely on illogical presumptions and contradictions.

The unavailability of monetary damages where an agreement provides for purely nonmonetary relief makes sense when the nonmonetary remedy fully compensates the injured party. However, for claims where the government has waived sovereign immunity, where nonmonetary relief does not suffice, and where monetary relief is presumed in nearly all other contexts, a monetary remedy should be available. In *Higbie*, the United States Circuit Court of Appeals ensured that some private parties will not be fully compensated should the federal government breach confidentiality provisions in mediation agreements between the two. The Federal Circuit Court's ruling also undermines the federal government's own interests in promoting mediation as a cost-effective alternative to litigation.

*B. Allowing Monetary Damages for Breach of Confidentiality Provisions
in Mediation Agreements with the United States Government Benefits the
Federal Court System*

Sovereign immunity, and otherwise limiting subject matter jurisdiction, provides the Court of Federal Claims, and federal courts in general, with some relief from docket congestion. Mediation and other forms of ADR further alleviate caseloads.¹⁰⁰ However, the effectiveness of mediation stems in large part from the reliability of confidentiality guarantees as legal mechanisms to discourage unauthorized disclosure.¹⁰¹ In precluding monetary relief when not explicitly contemplated by the parties for breach of confidentiality provisions in mediation agreements with the federal government, the Federal Circuit Court of Appeals in *Higbie* undermined that which makes mediation so effective.

98. *Higbie*, 778 F.3d at 991-92.

99. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 574 (2010).

100. 1 Alt. Disp. Resol. § 22:1, n. 1 (3d ed.) (citing various sources describing efficiency of alternative dispute resolution methods in alleviating court congestion).

101. See Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1419 n. 1 (2006).

Confidentiality provides an integral foundation for mediation¹⁰² and “promotes the free flow of information that may result in the settlement of a dispute.”¹⁰³ The success of mediation depends largely on the preservation of party confidences.¹⁰⁴ Confidentiality facilitates candor between parties and ensures attorneys do not use mediation as a discovery tool.¹⁰⁵

Private parties that know they will likely not be entitled to monetary damages in the event of the government’s breach will be less amenable to mediation. While government employees like Higbie may bargain for a clause in the mediation agreement calling for monetary damages in the case of breach, the employees’ comparatively weak bargaining position may not always allow for such a clause. Monetary damages are also often presumed, absent contrary contractual language.¹⁰⁶ Government agents, like the government employees who provided affidavits discussing Higbie’s actions during mediation, will be less deterred from breaching confidentiality agreements knowing that, in many cases, the only remedy available to the complainant will be the exclusion of confidential evidence from later legal proceedings. Where monetary damages have not been specifically contemplated, little prevents the government from causing significant reputational harm to complainants like Higbie.

The money saved in shrinking federal dockets could outweigh the added costs of paying out monetary damages. Breach of confidentiality provisions in mediation agreements mark a narrow area for liability. The cases would surely be rare where a complainant could prove that the government breached a confidentiality provision in a mediation agreement and that the breach caused injury to the complainant sufficient to warrant monetary relief. The availability of monetary damages does not necessitate entitlement.¹⁰⁷ While the exact cost savings of bolstering mediation as an alternative to litigation are unknown, it is reasonable to believe those fiscal benefits would reach farther than the government’s potential increase in exposure to monetary liability for breach of mediation agreements’ confidentiality provisions.

VI. CONCLUSION

The United States Court of Federal Claims remains one of the only forums in which parties like Higbie may seek monetary relief from the federal government. By limiting access to that court based on the parties’ explicit contemplation of monetary damages, the Federal Circuit Court of Appeals has curtailed non-breaching parties’ compensation for injury and undermined the court’s own interest in bolstering mediation.

102. *In re Teligent, Inc.*, 640 F.3d 53, 57 (2d Cir. 2011) (“Confidentiality is an important feature of the mediation and other alternative dispute resolution processes.”).

103. *In re Grand Jury Subpoena Dated Dec. 17, 1996*, 148 F.3d 487, 492 (5th Cir. 1998).

104. *See, e.g., In re Anonymous*, 283 F.3d 627, 636 (4th Cir. 2002); *In re County of Los Angeles*, 223 F.3d 990, 993 (9th Cir. 2000) (citing *Poly Software Int’l, Inc. v. Su*, 880 F. Supp. 1487, 1494 (D. Utah 1995)); *Clark v. Stapleton*, 957 F.2d 745, 746 (10th Cir. 1992).

105. *In re Anonymous*, 283 F.3d at 636.

106. *See supra* text accompanying notes 54-59.

107. *Higbie v. United States*, 778 F.3d 990, 1000 (Fed. Cir. 2015) (Taranto, J., dissenting) (citing *Sarsfield v. County of San Benito*, No. 07-cv-02528 JF, 2010 WL 1929619, at *8-9 (N.D. Cal. 2010)).

Contrary to the common law rule that monetary damages are the default remedy for breach of contract, private parties entering into a contract with the federal government must now bargain for an explicit statement of the availability of monetary damages in case of breach. Given the federal government's comparatively strong bargaining position, private parties may be less willing to seek redress for discrimination and retaliation because monetary damages may offer the only comprehensive means of compensation and because they know they will have to bargain for that monetary relief. The *Higbie* ruling has given the federal government little disincentive to breach agreements that provide for a purely nonmonetary form of relief and that do not contemplate monetary damages. The Federal Circuit Court of Appeals has curtailed non-breaching parties' access to monetary relief in one of the only courts where such relief is available.