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The FTCA v. The Tucker Act: When is a Tort Claim in Substance a Breach of Contract Claim for Jurisdictional Purposes?

GREGORY BOULOS*

I. INTRODUCTION: WHERE TORT LAW AND CONTRACT LAW INTERSECT	1159
A. <i>Background</i>	1159
B. <i>Format of this article</i>	1162
II. <i>WOODBURY V. UNITED STATES</i> : WHEN IS A TORT CLAIM BROUGHT AGAINST THE UNITED STATES IN SUBSTANCE A BREACH OF CONTRACT CLAIM FOR JURISDICTIONAL PURPOSES?	1163
III. <i>MARTIN V. UNITED STATES</i> : THE NINTH CIRCUIT LIMITS <i>WOODBURY</i> TO ACTIONS IN WHICH PECUNIARY HARM IS ALLEGED	1165
IV. CRITICISM OF <i>MARTIN</i>	1167
A. <i>Martin is contrary to longstanding policy</i>	1167
B. <i>Language in Woodbury ignored by the Martin court</i>	1167
C. <i>Reliance on Aleutco is unfounded</i>	1168
D. <i>Unreasonable reasoning</i>	1168
V. THE STATE OF ELEVENTH CIRCUIT PRECEDENT	1169
A. <i>Blanchard</i>	1169
B. <i>Smith and Herder Truck</i>	1171
C. <i>The Middle District of Alabama</i>	1172
VI. APPLICATION OF <i>WOODBURY</i> TO <i>DOWNES</i>	1174
VII. WHY SHOULD THE ELEVENTH CIRCUIT REJECT THE LIMITATION ESTABLISHED IN <i>MARTIN</i> ?	1177
A. <i>The limitation established in Martin ignores longstanding policy and the underlying justifications for the rule enunciated by the Woodbury Court</i>	1178
B. <i>The Eleventh Circuit should be bound by the precedent established in Blanchard, Smith, and Herder Truck</i>	1179
VIII. CONCLUSION	1179

I. INTRODUCTION: WHERE TORT LAW AND CONTRACT LAW INTERSECT

A. *Background*

The Federal Tort Claims Act (“FTCA”) was enacted in 1948 and partially waives the sovereign immunity of the United States by providing United States District Courts with subject matter jurisdiction over tort claims brought against the United States.¹ The FTCA states in part, [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . .

* I thank my parents, my brother, and Alexandra, whose love and support I cannot live without. I also thank my family and friends, as well as Professor Marc Fajer for advising me. I appreciate all of you very much. Gregory Boulos, J.D. Candidate, University of Miami School of Law, Class of 2012.

1. 28 U.S.C. § 1346 (2011).

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.²

On the other hand, the Tucker Act partially waives the sovereign immunity of the United States by providing the United States Court of Federal Claims (“Court of Claims”) with subject matter jurisdiction over claims based on a contract.³ The Tucker Act states in part,

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.⁴

The District Court and the Court of Claims have concurrent jurisdiction over the claims described in (a)(2) if the amount in dispute does not exceed \$10,000.⁵ However, the Court of Claims has exclusive jurisdiction over such claims when the amount in dispute exceeds \$10,000.⁶

This article addresses tort claims in which a plaintiff alleges the United States breached a duty established in a government contract.⁷ Although such cases ostensibly should be litigated under the FTCA and in the District Court, such claims have been handled differently depending on the Circuit in which they arise.⁸ At times, such claims are treated as breach of contract claims for jurisdictional purposes.⁹ Such treatment is supported by two considerations. First, a long standing policy exists which calls for government contracts to be interpreted by federal law,

2. 28 U.S.C. § 1346(b) (2011).

3. 28 U.S.C. § 1491 (2011).

4. *Id.*

5. *Aleutco Corp. v. United States*, 244 F.2d 674 (3d Cir. 1957) (explaining that “the concurrent jurisdiction of the Court of Claims and the district courts now limited to claims not in excess of \$10,000, while the Court of Claims has exclusive jurisdiction of all claims in contract in excess of that amount.”) (emphasis added).

6. *Id.*

7. *See, e.g., Woodbury v. United States*, 313 F.2d 291 (9th Cir. 1963); *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351 (5th Cir. 1965); *Salter v. United States*, 880 F. Supp. 1524 (M.D. Ala. 1995); *Downs v. United States*, No. 06-20861-CIV, 2011 WL 2416049 (S.D. Fla. 2011); *Martin v. United States*, 649 F.2d 701 (9th Cir. 1981).

8. The District Court and the Court of Claims have concurrent jurisdiction over tort claims based on the breach of a contractual duty where the amount in dispute is \$10,000 or less. However, this point addresses those claims that exceed \$10,000.

9. *See, e.g., Woodbury*, 313 F.2d 291.

rather than state law.¹⁰ Second, cases litigated under the FTCA are subject to state law.¹¹ Thus, where a tort arises from the breach of a duty established in a government contract, some Courts will hold that the District Court lacks subject matter jurisdiction.¹² That way, state law will not be used to interpret or apply a government contract (as required by the FTCA).¹³

This article advocates the position that any tort claim brought against the United States grounded on the breach of a duty established in a government contract should be treated as a breach of contract claim for jurisdictional purposes. Thus, such claims should be litigated in the Court of Claims rather than the District Court.

In 1963, the Ninth Circuit issued an opinion in *Woodbury v. United States*.¹⁴ The Court held that tort claims brought against the United States that are based on the breach of a duty established in a government contract are in substance breach of contract claims for purposes of establishing jurisdiction.¹⁵ In other words, where a plaintiff sues the United States in tort and the alleged breached duty was established in a government contract, the claim is to be litigated in the Court of Claims rather than the District Court. The Court never indicated that the type of injury (i.e., physical or pecuniary) was relevant in determining jurisdiction.¹⁶ The *Woodbury* decision was followed by other Circuits, including the Third and former Fifth Circuit.¹⁷

Eighteen years after the *Woodbury* decision, the Ninth Circuit decided *Martin v. United States*.¹⁸ In that case, the Ninth Circuit held that the rule in *Woodbury* only applies where the harm caused by the breach of a contractual duty results in purely economic harm.¹⁹ The *Martin* Court essentially limited the application of the rule in *Woodbury*

10. *Id.* at 295. Government contracts are subject to federal contract law. Tort claims under the FTCA are subject to state law. Thus, litigating such claims under the FTCA would involve applying state law to government contracts and will result in multifarious decisions and standards of interpretation.

11. *See Id.* (explaining that “[t]he [FTCA] expressly provides for liability of the United States for torts ‘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.’”) (citation omitted). Under this Act, therefore, state law, not federal law, controls.)

12. *Id.* at 295.

13. *Id.*

14. *Id.*

15. *Id.* at 296.

16. *See generally Woodbury*, 313 F.2d 291.

17. *See Petersburg Borough v. United States*, 839 F.2d 161 (3d Cir. 1988); *see also United States v. Smith*, 324 F.2d 622 (5th Cir. 1963).

18. 649 F.2d 701 (9th Cir. 1981).

19. *Id.* at 706.

to cases where purely economic harm results.²⁰ As the dissent aptly points out, the decision was inconsistent and not in line with *Woodbury*.²¹

The former Fifth Circuit followed the *Woodbury* decision in *Blanchard*.²² However, the Eleventh Circuit has not yet expressly decided whether to adopt the limitation contained in the *Martin* decision. This article advocates a rejection of *Martin* by the Eleventh Circuit because it is not in line with the purpose behind the rule in *Woodbury* and because *Martin* is an inconsistent opinion.²³ The dissent in *Martin* is particularly persuasive.²⁴ The Eleventh Circuit may soon have an opportunity to explicitly reject the reasoning in *Martin* and apply *Woodbury* even where physical injury results from the United States breaching a duty established in a government contract.

Recently, *Downs v. United States* was remanded by the Eleventh Circuit and has been litigated in the United States District Court for the Southern District of Florida.²⁵ This case, if appealed, will present an opportunity for the Eleventh Circuit to clarify its position regarding tort claims brought against the United States that are grounded on the breach of a duty established in a government contract.²⁶ *Downs* will be discussed in greater detail in section VI of this article.

B. *Format of this article*

The first section of this article will analyze the decision in *Woodbury*. The opinion succinctly discussed the underlying reasons why tort claims based on the breach of a government contract should be treated differently, jurisdictionally, from other tort claims. Specifically, such claims should fall under the Tucker Act's jurisdiction and should be litigated in the Court of Claims.²⁷ This would ensure the uniform inter-

20. *Id.*

21. *Id.* (Ferguson, J., dissenting) (stating, "First, [the majority] distinguishes *Woodbury* by pointing out that the plaintiff there suffered only economic harm, while in the instant case, the plaintiff has suffered a physical injury. Nothing in *Woodbury* suggests such a distinction.")

22. *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351 (5th Cir. 1965). Although the former Fifth Circuit addressed *Woodbury* in two other cases prior to deciding *Blanchard*, *Blanchard* is the first former Fifth Circuit case to address the *Woodbury* opinion in great detail. See *Smith*, 324 F.2d 622; see also *Herder Truck Lines v. United States*, 335 F.2d 261 (5th Cir. 1964).

23. *Martin*, 649 F.2d at 726.

24. *Id.* (Ferguson, J., dissenting).

25. No. 06-20861-CIV, 2011 WL 2416049 (S.D. Fla. 2011).

26. It is important to note that this article does not assert that the Federal Government can never be sued under the FTCA for personal injuries. It is only when the breached duty is established in a government contract. If the breached duty is established by statute or the circumstances surrounding the injury, the District Court has jurisdiction.

27. *Woodbury v. United States*, 313 F.2d 291, 296 (9th Cir. 1963).

pretation of government contracts.²⁸ Furthermore, an understanding of these underlying justifications evinces the reasons why the subsequent *Martin* decision was inconsistent with *Woodbury*.

After discussing the nuances of the *Woodbury* decision, this article will discuss the majority opinion in *Martin*. This decision essentially limited the holding in *Woodbury*. It held that the FTCA applies to tort claims based on the breach of a duty established in a government contract where the breach results in personal injury, as opposed to pecuniary harm.²⁹ The Court also asserted that District Courts have subject matter jurisdiction over any “classic tort” under the FTCA.³⁰ This article will also discuss criticisms of the *Martin* decision.

This article will then focus on the Eleventh Circuit’s position on this issue. The longest standing precedent on the issue can be found in the former Fifth Circuit’s opinion in *Blanchard*.³¹ In that case, the former Fifth Circuit adopted the rule in *Woodbury* and held that tort claims based on the breach of a contractual duty fall under the Tucker Act’s jurisdiction.³² Thus, such cases are to be litigated in the Court of Claims.³³ A discussion of why the Eleventh Circuit should not adopt the reasoning and holding of *Martin* will follow.

Lastly, this article will discuss an opportunity for the Eleventh Circuit to reject *Martin* by applying the reasoning of *Woodbury* and *Blanchard* to a case that has been decided by the United States District Court for the Southern District of Florida. That case is *Downs v. United States*.³⁴

II. *WOODBURY V. UNITED STATES*: WHEN IS A TORT CLAIM BROUGHT AGAINST THE UNITED STATES IN SUBSTANCE A BREACH OF CONTRACT CLAIM FOR JURISDICTIONAL PURPOSES?

Several Courts have addressed facts in which the United States allegedly breached a duty that was embodied in a government contract, resulting in harm to a plaintiff.³⁵ Courts finding that such tort claims are

28. *Id.* at 296–97.

29. *Martin*, 649 F.2d 701.

30. *Id.*

31. It is important to note that two other former Fifth Circuit opinions favorably quoted *Woodbury*. Those cases will be discussed in this article. *United States v. Smith*, 324 F.2d 622 (5th Cir. 1963); *Herder Truck Lines v. United States*, 335 F.2d 261 (5th Cir. 1964). However, *Blanchard* was the first former Fifth Circuit opinion to analyze *Woodbury* in great detail.

32. *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351 (5th Cir. 1965).

33. *Id.*

34. *Downs v. United States*, No. 06-20861-CIV, 2011 WL 2416049 (S.D. Fla. 2011).

35. *See, e.g.*, *Woodbury v. United States*, 313 F.2d 291 (9th Cir. 1963); *Blanchard*, 341 F.2d at 351; *Salter v. United States*, 880 F. Supp. 1524 (M.D. Ala. 1995); *Downs*, 2011 WL 2416049, at *1; *Martin*, 649 F.2d 701.

in substance breach of contract claims for jurisdictional purposes typically cite to *Woodbury v. United States* in support of that finding.³⁶ *Woodbury* was decided by the Ninth Circuit in 1963.

In *Woodbury*, the plaintiff brought an action against the United States asserting that the Housing and Home Finance Agency ("HHFA") committed a breach of fiduciary duty while he was in the process of constructing prefabricated housing for naval and civilian personnel stationed in the Kodiak Naval Base in Alaska.³⁷ The plaintiff brought his action under the FTCA, alleged over \$800,000 in damages, and the case was litigated in the United States District Court.³⁸

The case was eventually appealed to the Ninth Circuit. In its opinion, the Ninth Circuit held that tort claims that are based entirely upon the breach of duty established in a government contract are in substance breach of contract claims for jurisdictional purposes.³⁹ In other words, the Court held that the District Court lacked subject matter jurisdiction under the FTCA. The case was subject to Tucker Act jurisdiction and should have been brought in the Court of Claims.⁴⁰

Had this claim been brought against an individual, the question of jurisdiction would not be an issue. Generally, a plaintiff may base a negligence claim on the breach of a contractual duty in the District Court.⁴¹ However, where the defendant is the United States, jurisdiction becomes an issue due to the unique nature of government contracts. Specifically, the Court in *Woodbury* explained that a "long established policy" existed by which "government contracts are to be given a uniform interpretation and application *under federal law*, rather than being given different interpretations and applications depending upon the vagaries of the laws of fifty different states."⁴² This presents a problem because the law applied under the FTCA and the law applied under the Tucker Act differs.⁴³ The Court noted that actions brought under the FTCA are governed by state law.

The Federal Tort Claims Act expressly provides for liability of the United States for torts "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with

36. See, e.g., *Woodbury v. United States*, 313 F.2d 291 (9th Cir. 1963); *Blanchard*, 341 F.2d 351; *Salter v. United States*, 880 F. Supp. 1524 (M.D. Ala. 1995); *Downs*, 2011 WL 2416049, at *1; *Martin*, 649 F.2d at 701.

37. *Woodbury*, 313 F.2d at 291-92.

38. *Id.*

39. *Id.* at 295-96.

40. See *id.* at 296 (stating that where the cause of action is essentially for breach of contract, the Tucker Act does apply, even though the breach could also be said to be tortious).

41. See, e.g., *Gallicho v. Corporate Grp. Servs., Inc.*, 227 So. 2d 519 (Fla. 3d DCA 1969).

42. *Woodbury*, 313 F.2d at 295 (emphasis added).

43. *Id.* at 295.

the law of the place where the act or omission occurred.” (28 U.S.C. § 1346(b)). Under this Act, therefore, state law, not federal law, controls. Thus to permit the result here sought would give to the plaintiff not only a choice of forum (district court rather than Court of Claims where over \$10,000 is sought), but also a choice of law.⁴⁴

From these statements, it is clear that the underlying purpose of finding some tort claims in substance breach of contract claims for jurisdictional purposes was to ensure that federal law is utilized in the interpretation of government contracts.⁴⁵ Nowhere in the opinion does the Court point to the nature of plaintiff’s injury (physical or pecuniary) as a basis for its decision.⁴⁶ Nonetheless, the Court in *Martin v. United States* determined that jurisdiction turns on the nature of the plaintiff’s injury.⁴⁷

III. *MARTIN V. UNITED STATES*: THE NINTH CIRCUIT LIMITS WOODBURY TO ACTIONS IN WHICH PECUNIARY HARM IS ALLEGED.

In *Martin*, the plaintiff, Mildred Martin, brought a personal injury claim against the United States.⁴⁸ The plaintiff purchased a home that had been repossessed by the Veteran’s Administration (“VA”).⁴⁹ Prior to the sale, an inspector recommended that certain repairs be made.⁵⁰ The VA agreed to the repairs but required that the plaintiff move into the home prior to the repairs being complete.⁵¹ While occupying the home, the plaintiff fell in the bathtub and injured her hand.⁵² The plaintiff brought a claim for tortious breach of a contractual duty, alleging that the VA had a contractual obligation to repair the premises and make them habitable.⁵³ The plaintiff sought damages in excess of \$10,000.⁵⁴ The District Court entered judgment for the plaintiff.⁵⁵

The case was appealed to the Ninth Circuit. The key issue was whether the District Court erred in finding that it had jurisdiction under the FTCA over a case grounded on the tortious breach of a contractual duty.⁵⁶ The government, relying on *Woodbury*, argued that the District

44. *Id.*

45. *Id.*

46. *See generally id.* at 291.

47. 649 F.2d 701 (9th Cir. 1981).

48. *Id.* at 702.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 702–03.

Court lacked subject matter jurisdiction because the breached duty was established in a government contract.⁵⁷ Thus, the government argued that the Court of Claims had jurisdiction over the claim rather than the District Court.⁵⁸

The Court made two assertions while holding that the District Court properly exercised jurisdiction under the FTCA. First, the Court asserted that the rule in *Woodbury* did not apply to the *Martin* facts because the plaintiff here is complaining of personal injuries as opposed to the purely pecuniary harm that was complained of in *Woodbury*.⁵⁹ Second, the Court asserted that every "classic tort" is within the jurisdiction of the District Court.⁶⁰

While discussing *Woodbury*, the Court explained that the plaintiff in that case complained of severe economic harm.⁶¹ It further pointed out that every other case that the government cited was contractual in nature.⁶² The Court found that the *Martin* facts were more analogous to *Aleutco Corp. v. United States*.⁶³ Relying on *Aleutco*, the Court explained, "[M]erely because one element of the case is based on a contractual relationship would not further the statutory distinction made between those cases to be brought in the Court of Claims and those to be brought in the District Court."⁶⁴

Furthermore, the Court pointed to *Aleutco* as an example of a "classic tort" that was within the jurisdiction of the District Court despite involving a government contract.⁶⁵ The plaintiff in *Aleutco* brought an action for conversion against the United States.⁶⁶ Essentially, the plaintiff had entered into a contract to purchase surplus war property located in Alaska from the United States.⁶⁷ After paying for those goods, the United States sold those goods to another buyer.⁶⁸ As a result, the plaintiff brought an action for conversion.⁶⁹ The Court found that the action was subject to the District Court's jurisdiction under the FTCA. As will be discussed later in this article, the *Martin* Court's reliance on *Aleutco* was unfounded.⁷⁰

57. *Id.* at 704-05.

58. *Id.*

59. *Id.* at 704.

60. *Id.* at 705.

61. *Id.* at 704.

62. *Id.*

63. *Id.*

64. *Id.* at 705.

65. *Id.* at 704-05.

66. *Id.* at 704.

67. *Aleutco Corp. v. United States*, 244 F.2d 674, 675 (3d Cir. 1957).

68. *Id.*

69. *Id.* at 675-76.

70. *See Martin v. United States*, 649 F.2d 701 (9th Cir. 1981).

IV. CRITICISM OF *MARTIN*

There are several reasons why the *Martin* decision should not be followed by other Circuits. First, the Court's opinion is contrary to the underlying justifications for treating tort claims as in substance breach of contract claims for jurisdictional purposes. Second, the *Martin* Court ignored language in the *Woodbury* opinion that called for a contrary holding in *Martin*. Third, the *Martin* Court's reliance on *Aleutco* is unfounded because the contract was not the essential basis of the plaintiff's claim in that case. Lastly, the majority opinion in *Martin* is, in part, inconsistent.

A. *Martin is contrary to longstanding policy*

It seems that the majority drew its conclusions from the fact that the plaintiff in *Woodbury* brought an action for breach of fiduciary duty, which is a tort that only results in pecuniary harm.⁷¹ However, the majority failed to realize that this fact had no effect on the *Woodbury* Court's opinion. Rather, the underlying policy upon which the *Woodbury* Court formed its holding was that government contracts should be governed by federal law, not state law.⁷² As previously mentioned, the law that is applied under the FTCA is state law.⁷³ Thus, no tort claim based on the breach of a duty established in a government contract, regardless of the nature of the resulting harm, should be litigated under the FTCA.

B. *Language in Woodbury ignored by the Martin Court*

To further illustrate the *Martin* Court's misunderstanding of *Woodbury*, it should be noted that *Woodbury* explicitly recognized the Court of Claims's jurisdiction over a case in which a plaintiff complained of physical harm resulting from the breach of a government contract.

Somewhat analogous is the holding in *Feres v. United States* that military personnel sustaining injuries while on active duty, injuries resulting from the negligence of other members of the Armed Forces, cannot recover under the Federal Tort Claims Act. There is no express exception for such cases in that Act, but the Court denied recovery because the relationship of military personnel to the Government has been governed exclusively by federal law.⁷⁴

Through this example, the *Woodbury* Court expressly articulates that a personal injury case may not be subject to FTCA jurisdiction if the

71. *Woodbury v. United States*, 313 F.2d 291, 294 (9th Cir. 1963).

72. *Id.* at 295-96.

73. *Id.*

74. *Id.*

relationship between the plaintiff and defendant is governed exclusively by federal law.⁷⁵ Because government contracts are governed by federal law, it follows that any tort claim based on the breach of a government contract must not be litigated under the FTCA. Considering the example of *Feres*, it is hard to see why the *Martin* Court attempted to analogize the facts to *Aleutco*. *Feres* provides a much more analogous fact pattern. Both *Feres* and *Martin* involved a personal injury and the duty that was breached was embodied in a government contract. It seems that the *Martin* Court was reaching when it decided to analogize a personal injury claim to the conversion claim in *Aleutco*.

C. *Reliance on Aleutco is unfounded*

As stated above, the *Martin* Court relied on *Aleutco* in asserting that “merely because one element of the case is based on a contractual relationship would not further the statutory distinction made between those cases to be brought in the Court of Claims and those to be brought in the District Court.”⁷⁶

However, the *Martin* Court ignored the language in *Woodbury* that explicitly discussed *Aleutco*. The *Woodbury* Court stated,

[T]he contract [in *Aleutco*] was not the essential basis of the claim rather, it came into the case as a claimed defense on behalf of the government, which asserted that plaintiff, by breach of contractual arrangements with the government, had forfeited its right to the property.⁷⁷

Thus, it could be argued, and was asserted by the *Woodbury* Court, that *Aleutco* was properly under the District Court’s jurisdiction because the basis of the claim was *not* the breach of a duty established in a government contract. The *Martin* Court ignored this detail in relying on *Aleutco*.

D. *Unreasonable reasoning*

The *Martin* Court advanced the position that plaintiffs bringing an action sounding in tort, in which a breach of contract was merely a background to the tort, should bring their claims to the District Court.⁷⁸ This seems to draw a distinction between tort claims involving contracts where the contract is merely a background to the tort, and other tort actions where the contract is something more than just background. This distinction does not seem to make much sense. Any time a negligence

75. *Id.*

76. *Martin v. United States*, 649 F.2d 701 (9th Cir. 1981).

77. *Id.* at 706.

78. *Id.* at 705.

claim involves the breach of a contractual duty, the contract will likely merely be a background for the tort.⁷⁹ There are four elements to be satisfied in a negligence claim.⁸⁰ Those elements are (1) an existing duty, (2) a breach of that duty, and (3) a causal relationship between the duty and (4) harm suffered by the plaintiff.⁸¹ When the duty is established in a contract, the contract only involves one element of the negligence claim. It appears that, in such cases, the contract will be merely a background for the tort.

Furthermore, although the Court in *Martin* seemed to believe that it applied *Woodbury* accurately, it essentially limited *Woodbury*. The underlying basis for the Court's decision includes two theories. First, it appears that the Court recognized that tort claims based on a duty established by a government contract resulting in economic harm should be litigated in the Court of Claims.⁸² However, the Court also seems to hold that a "classic tort" should be subject to FTCA jurisdiction.⁸³ These two statements can be inconsistent under certain circumstances. What about those classic torts that result in pecuniary harm? Are there no negligence actions that involve pecuniary, rather than physical, harm to the plaintiff?

V. THE STATE OF ELEVENTH CIRCUIT PRECEDENT

The Eleventh Circuit has consistently recognized the rule expressed in *Woodbury*. First, this section will discuss *Blanchard v. St. Paul Fire & Marine Insurance Company*. Second, this section will discuss two former Fifth Circuit cases that favorably quote *Woodbury*. Lastly, this section will discuss a Middle District of Alabama opinion that adopted the limitation in *Martin*.

A. *Blanchard*

The first Eleventh Circuit case in which a tort claim brought under the FTCA was found to be in substance a breach of contract claim for jurisdictional purposes was decided by the former Fifth Circuit.⁸⁴ In *Blanchard v. St. Paul Fire & Marine Insurance Company*, the former Fifth Circuit relied on *Woodbury* in holding that the District Court lacks subject matter jurisdiction over torts grounded on the breach of a duty

79. See, e.g., *Galichio v. Corporate Grp. Servs.*, 227 So.2d 591 (3d DCA Fla. 1969).

80. See, e.g., *Mintz v. Blue Cross of Cal.*, 172 Cal. App. 4th 1594 (Cal. Ct. App. 2009).

81. *Id.* at 1609.

82. See generally, *Martin*, 649 F.2d 701.

83. *Id.* at 705.

84. As noted above, there are two other former Fifth Circuit opinions that favorably quote *Woodbury*. See *United States v. Smith*, 324 F.2d 622 (5th Cir. 1963); *Herder Truck Lines v. United States*, 335 F.2d 261 (5th Cir. 1964). Those cases will be discussed shortly.

established in a government contract.⁸⁵

Although *Blanchard* was decided fifteen years prior to *Martin*, an analysis of the Court's underlying reasoning in *Blanchard* reveals that the former Fifth Circuit's opinion based its decision not on the nature of the alleged harm, but on the source of the breached duty.⁸⁶ Thus, following *Blanchard* would require rejecting the reasoning and holding advanced by the *Martin* opinion.

In *Blanchard*, the Court explicitly recognized that cases litigated under the Tucker Act were governed by federal law, whereas cases litigated under the FTCA were governed by state law.⁸⁷ The Court further recognized the long standing policy that "the law to be applied in construing or applying provisions of government contracts is federal, not state law."⁸⁸ Accordingly, the reason that tort claims based on the breach of a duty established in a government contract are litigated in the Court of Claims is because of the source of the duty (i.e., the government contract); it has nothing to do with the nature of the harm suffered by the plaintiff.

In support of its conclusion that the claim in *Blanchard* fell outside of the scope of the FTCA, the Court found that (1) the sole relationship between the plaintiff and the United States was wholly contractual and (2) the plaintiff's claims related exclusively to the manner in which government officials performed their responsibilities under the contract.⁸⁹ The Court concluded that a lack of jurisdiction under the FTCA is a consequence of such findings.⁹⁰ These findings make no reference to the nature of harm suffered by a plaintiff.⁹¹

The Eleventh Circuit, through *Blanchard* and the two cases that are explained shortly, has consistently held that tort claims based on the breach of a duty established in a government contract are in substance breach of contract claims for jurisdictional purposes.⁹² However, these cases have mostly involved a plaintiff who alleges purely pecuniary harm resulted.⁹³ It is not certain how the Eleventh Circuit would resolve such a case in which physical harm results.

The two former Fifth Circuit opinions published before *Blanchard*

85. 341 F.2d 351 (5th Cir. 1965).

86. *Id.* at 358.

87. *Id.*

88. *Id.*

89. *Id.* at 359.

90. *Id.*

91. *Id.*

92. *Id.*; *United States v. Smith*, 324 F.2d 622 (5th Cir. 1963); *Herder Truck Lines v. United States*, 335 F.2d 261 (5th Cir. 1964).

93. I have not found an Eleventh Circuit case on this issue involving a plaintiff that alleges physical harm as opposed to purely pecuniary harm.

shed some, but not much, light on the Circuit's position on the issue. It should also be noted that one District Court within the Eleventh Circuit, the Middle District of Alabama, has expressly adopted the reasoning in *Martin*.

B. *Smith and Herder Truck*

As mentioned above, *Blanchard* was the first former Fifth Circuit case to address *Woodbury* in great detail. However, prior to deciding *Blanchard*, *Woodbury* was briefly mentioned in two other former Fifth Circuit cases.

The first case that mentioned *Woodbury* was *Smith*.⁹⁴ In that case, the Court delved into the minds of the legislators who drafted the FTCA and explained the legislative intent behind the act.⁹⁵ As part of that explanation, the Court stated,

The concern of Congress, as illustrated by the legislative history, was the problem of a person injured by an employee operating a Government vehicle or otherwise acting within the scope of his employment.⁹⁶

This legislative intent illustrates that the FTCA should not apply where a duty is established through a government contract. The language cited to above helps distinguish those tortious acts that come under the ambit of the FTCA and those that do not. Specifically, the language suggests that the FTCA applies where a government employee breaches a general duty of care. That is, a duty of care that arises out of the circumstances of a particular case. For example, an employee has a duty to operate a vehicle with due care. This duty will not be found in a government contract. Rather, it is a duty that arises out of the undertaking of an inherently dangerous task. Such duties are distinguishable from duties that arise solely because they are established through contract. *Smith* suggests that duties established by a contract were not contemplated by the drafters of the FTCA.

The other former Fifth Circuit case that mentioned *Woodbury* is *Herder Truck Lines v. United States*.⁹⁷ In that case, the former Fifth Circuit quoted *Woodbury* with approval.⁹⁸ The following portion of the *Woodbury* opinion that was cited with approval is significant to this discussion:

The notion of such waiver of breach and suit in tort is a product of

94. 324 F.2d 622.

95. *Id.* at 625.

96. *Id.* at 622.

97. 335 F.2d 261.

98. *Id.* at 263.

the history of English forms of action; it should not defeat the long established policy that government contracts are to be given a uniform interpretation and application under federal law, rather than being given different interpretations and applications depending upon the vagaries of the laws of the fifty different states.⁹⁹

The fact that this particular language was quoted with approval indicates that the Court was more concerned with the source of the duty rather than the nature of the alleged harm to the plaintiff. Specifically, this language shows that the Court is concerned with the interpretation of government contracts.¹⁰⁰ The nature of the harm to the plaintiff is irrelevant in interpreting a duty established in a contract.

C. *The Middle District of Alabama*

In *Salter v. United States*, the Middle District of Alabama expressly adopted the views in *Martin*.¹⁰¹ Being the only decision in the Eleventh Circuit to do so, *Salter* is an important decision that should be analyzed carefully. Overall, there is nothing in the opinion that controverts the points made in this article, nor does the opinion provide an adequate basis for adopting the *Martin* Court's limitation on *Woodbury*.

The plaintiff in *Salter* was an employee of the Southern Boil Weevil Eradication Program ("the Program").¹⁰² The Program was a cooperative effort by the federal government, several state governments, and cotton producers to eradicate the boil weevil, which is a cotton destroying pest.¹⁰³ The plaintiff, Charles G. Salter, alleged that, while working in cotton fields for the Program, he was exposed to excessive amounts of pesticides.¹⁰⁴ As a result of this over-exposure, the plaintiff alleged that he suffered numerous injuries.¹⁰⁵ Those injuries included mental, emotional, and physical injuries.¹⁰⁶ Salter brought an action for negligence against the United States under the FTCA.¹⁰⁷ The Middle District of Alabama found that it had jurisdiction over the claim.¹⁰⁸

In its reasoning, the Court accurately quoted *Woodbury* and approved of the distinction between tort and contract claims.¹⁰⁹ However, after quoting no language that would support the notion that one

99. *Id.*

100. *Id.*

101. 880 F. Supp. 1524 (M.D. Ala 1995).

102. *Id.* at 1527.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.* at 1532.

must be a party to a contract for *Woodbury* to apply, the Middle District stated that “Salter is not attempting to recover in tort for the breach of a contract to which he was a party.”¹¹⁰ Similarly, without pointing to any language in *Woodbury* that the nature of the alleged harm is relevant, the Court points out that Salter suffered physical, rather than pecuniary, harm.¹¹¹ As one reads the rest of the opinion, it is clear that the Court is relying on *Martin* while explaining that the FTCA applies.¹¹² Thus, for the same reasons expressed above advocating the rejection of *Martin*, the Eleventh Circuit should not rely on *Salter* in deciding whether or not to reject the rule in *Martin*. The two cases embody the same reasoning.¹¹³

Furthermore, there is an additional reason why *Salter* does not aid in determining whether *Martin* should be adopted by the Eleventh Circuit. The duty in *Salter* was not entirely based in a government contract.¹¹⁴ Rather, the Court explained that, under Alabama law, a person must act as a reasonably prudent person when he or she voluntarily undertakes safety inspections.¹¹⁵ Accordingly, the Court found that the duty in *Salter* also arose independent of a contract because of the government’s affirmative duty to undertake an inspection in a reasonably safe manner.¹¹⁶ Thus, *Salter* is distinguishable from the kinds of cases that this article is referring to. The position in this article only applies to cases in which the alleged breached duty was established in a government contract. Duties arising out of the law or other circumstances are beyond the scope of this article.

Salter raises another important point. The Court in *Salter* implicitly criticized applying the *Woodbury* standard to cases in which physical injury resulted because, in the Court’s view, there would be no remedy for the plaintiff under the Tucker Act.¹¹⁷ If this is true, it reveals a flaw in the Tucker Act, not in the reasoning provided in this Article. The *Woodbury* Court determined that there was a longstanding policy that government contracts be interpreted using federal law, and such inter-

110. *Id.*

111. *Id.* (stating, “Unlike the plaintiffs who suffered economic injury in the cases upon which the Defendant relies, Salter suffered personal injury.”)

112. *See generally id.*

113. *Compare id. with* *Martin v. United States*, 649 F.2d 701 (9th Cir. 1981).

114. *Salter*, 880 F. Supp. at 1530.

115. *Id.*

116. *Id.* (stating that “a plaintiff may argue that another party has duties independent of any contract because that party has acted affirmatively [A defendant] can be held liable for negligence injuring third parties, whether or not the defendant has a similar duty under contract to some others.”) (citing *Berkel & Co. Contractors, Inc. v. Providence Hosp.*, 454 So. 2d 496, 502 (Ala. 1984)).

117. *Id.* at 1532.

pretation is impossible under the FTCA because state law applies.¹¹⁸ Thus, if the Tucker Act does not provide a plaintiff with remedies in such cases, the legislature ignored the longstanding policy recognized in *Woodbury* and should have accommodated plaintiffs who bring such actions. Such accommodation should have come in the form of fashioning appropriate remedies in such cases.

Nonetheless, the idea that there are no remedies for plaintiffs who bring tort actions under the Tucker Act, in which the underlying duty was established in a government contract, is difficult to accept. There are other cases over which the Court of Claims had jurisdiction where a plaintiff was complaining of a tort that was found to be essentially a breach of contract for jurisdictional purposes. Consider *Woodbury*: the action, which was a tort action, was sent to the Court of Claims for disposition.¹¹⁹ Despite the fact that the action was a tort, and was only found to be a breach of contract for jurisdictional purposes, there was no mention of a lack of remedies under the Tucker Act.¹²⁰

The Court in *Salter* did not elaborate on its statement that there are no alternative remedies under the Tucker Act.¹²¹ However, it appears from other opinions, which essentially send tort cases to the Court of Claims, that a plaintiff would have remedies available if the action were litigated in the Court of Claims.¹²²

VI. APPLICATION OF *WOODBURY* TO *DOWNNS*

As explained above, the Eleventh Circuit may soon have an opportunity to explicitly reject *Martin. Downs v. United States* is a case that has been litigated in the Southern District of Florida.¹²³ It involves a plaintiff who severely injured himself after diving into Miami Beach during the early morning of April 7, 2003.¹²⁴ The plaintiff alleged, and the District Court ultimately found, that he struck his head upon a large rock.¹²⁵ The story of how the rock arrived on the shores of Miami Beach starts in the late 1970's, when the United States Army Corps of Engineers ("the Corps"), together with Miami-Dade County, signed a Local Cooperating Agreement ("LCA") in order to renourish Miami Beach.¹²⁶

118. *Woodbury v. United States*, 313 F.2d 291, 295 (9th Cir. 1963).

119. *See generally id.*

120. *Id.*

121. *Salter*, 880 F. Supp. at 1532.

122. *See generally, Woodbury*, 313 F.2d 291.

123. *Downs v. United States*, No. 06-20861-CIV, 2011 WL 2416049 (S.D. Fla. 2011).

124. *Id.* at *3.

125. *Id.* at *2.

126. *Id.*

The entire project was divided into several phases.¹²⁷ The phase that is relevant to the *Downs* case is Phase Two, which involved renourishing the beach between 72nd and 73rd Street.¹²⁸ The project involved dredging fill material from offshore and adding it to several miles of Miami Beach that was in the process of erosion.¹²⁹ The LCA outlined the obligations of the Corps.¹³⁰ Specifically, the LCA required that the Corps only use non-rocky, sandy material similar to that of the existing beach, in the fill that would be used.¹³¹ It was expected that only five percent of the fill would consist of rocks, and that those rocks would range in size from two to ten inches in diameter.¹³² The District Court found that there were rocks the size of basketballs in the fill.¹³³ The Court further found that Downs struck his head on one of those rocks when he dove into Miami Beach, resulting in his severe injuries.¹³⁴

During the bench trial, the United States argued that the source of the duty not to include large rocks in the fill was established in the LCA, which required that the Corps use “non-rocky material.”¹³⁵ This argument was rather persuasive considering that a substantial period of time was dedicated to interpreting what the LCA required of the Corps.¹³⁶ Particularly, the case had previously been remanded by the Eleventh Circuit to determine the definition of the term “non-rocky material.”¹³⁷ It was determined that the term meant “a material consisting almost exclusively of sand, with only a small percentage of interspersed gravel no larger than one or two inches in diameter.”¹³⁸ It appears that, had it not been for the LCA, the Corps would not have been required to use the materials defined in the government contract.

Nonetheless, the District Court found that the LCA was not the source of the Corps’ duty to not include rocks in the fill.¹³⁹ Specifically, it found that the Corps had an obligation to complete the project in a reasonably safe manner.¹⁴⁰ The Eleventh Circuit does not have to disa-

127. *Id.* at *1.

128. *Id.*

129. *Id.*

130. *Id.* at *2.

131. *Id.* at *1.

132. *Id.*

133. *Id.* at *2.

134. *Id.* at *5.

135. *Id.* at *1.

136. *Id.* at *2.

137. *Id.* at *2.

138. *Id.*

139. *Id.* at *11.

140. *Id.* (stating that “[t]he LCA expresses, at least in part, the Corps’ undertaking for the Project. After entering this undertaking, the Corps became obligated to complete the Project in a reasonably safe manner.”).

gree with this conclusion, and ultimately does not need to overturn the District Court's findings, in order to clarify the Circuit's position on *Martin*. It need only express that, had the LCA been the only source of the Corps duty to Downs, the District Court would lack subject matter jurisdiction under *Blanchard*¹⁴¹, *Smith*¹⁴², and *Herder Truck*¹⁴³. In doing so, the Eleventh Circuit should reiterate the underlying justifications for making the distinction between tort actions based on a duty established in a government contract and other tort actions.

However, it is still possible to accept the District Court's finding that there was both a general duty to perform the contract in a reasonably safe manner and a duty established in the LCA to not include rocks in the fill, yet still hold that the claim should be litigated in the Court of Claims. To accomplish this, language used by the Federal Circuit in *Wood v. United States* should be adopted.¹⁴⁴

"If contractual relations exist, the fact that the alleged breach is also tortious does not foreclose Tucker Act jurisdiction."¹⁴⁵ If an action arises "primarily from a contractual undertaking," jurisdiction lies in the Claims Court "regardless of the fact that the loss resulted from the negligent manner in which defendant performed its contract."¹⁴⁶ Thus, since the primary thrust of [plaintiff's] complaint is breach of contract, even if a negligence cause would lie, the Claims Court would retain jurisdiction over the suit.¹⁴⁷

This language directly applies to *Downs*, even if the source of the Corps' duty derived both from the LCA and a general duty to undertake the performance of the contract in a reasonably safe manner.¹⁴⁸ Note that the language quoted above states that in an action arising primarily from a contractual undertaking (the entire project of renourishing the beach was a contractual undertaking) the Court of Claims has jurisdiction *regardless of the fact that the loss resulted from the negligent manner in*

141. *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351 (5th Cir. 1965).

142. *United States v. Smith*, 324 F.2d 622 (5th Cir. 1963).

143. *Herder Truck Lines v. United States*, 335 F.2d 261 (5th Cir. 1964).

144. It should be noted that the opinion in its entirety did not hold that *Woodbury* applies to cases in which physical harm results. However, the quoted language captures the essence of the position taken in this article, especially considering that the *Woodbury* Court never mentioned the nature of the resulting harm as a basis for determining whether the District Court or the Court of Claims has jurisdiction over an action.

145. *Fountain v. United States*, 192 Ct. Cl. 495, 427 F.2d 759, 761 (1970).

146. *San Carlos Irrigation and Drainage Dist. v. United States*, 877 F.2d 957, 960 (Fed. Cir. 1989) (quoting *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984)).

147. *Wood v. United States*, 961 F.2d 195, 198 (Fed. Cir. 1992).

148. *Downs v. United States*, No. 06-20861-CIV, 2011 WL 2416049, at *11 (S.D. Fla. 2011) (stating that "[t]he LCA expresses, at least in part, the Corps' undertaking for the Project. After entering this undertaking, the Corps became obligated to complete the Project in a reasonably safe manner.").

which the defendant performed its contract.¹⁴⁹ In *Downs*, the District Court found that the Corps performed its contractual duty in a negligent manner.¹⁵⁰ The language of the Federal Circuit can lead to the conclusion that the claim should still be litigated in the Court of Claims because, even though the Corps performed their duties in a negligent manner, the tort arose from a contractual undertaking.¹⁵¹

Considering the underlying justifications of the *Woodbury* decision, such an approach makes good sense. Regardless of whether the duty was actually expressed in the contract, or if a duty was breached during the performance of a contract, it is likely that the contract itself will be subject to review and interpretation if litigation arises. For example, whether a worker's action is imputed to the Corps may depend on whether the worker's actions were conducted in the course of the worker's employment.¹⁵² In fact, the FTCA specifically uses such language.¹⁵³ In turn, determining what exactly was in the worker's course of employment may depend on what the Corps was obligated to do under a government contract. If the Corps was obligated to deliver fill with no rocks, then the actions of a worker who delivers fill with rocks is imputed to the Corps. However, the actions of a worker who decides to act in a manner bearing no relation to the Corps' obligation in the contract may not be imputed to the Corps. Accordingly, using the Federal Circuits' language can protect the policy advanced in *Woodbury* in a broad and effective manner.

VII. WHY SHOULD THE ELEVENTH CIRCUIT REJECT THE LIMITATION ESTABLISHED IN *MARTIN*?

There are several reasons why the Eleventh Circuit should reject the limitation established in *Martin*. First, as discussed above, an analysis of the underlying reasoning of the *Martin* decision reveals that the Court in *Martin* ignored longstanding policy. The Court essentially created an opportunity for government contracts to be subject to state law. Furthermore, the decision creates a burden on the United States Government by subjecting its contracts to the varying contract laws of the fifty states.¹⁵⁴

149. *Wood*, 961 F.2d at 198.

150. *Downs*, 2011 WL 2416049, at *9.

151. *Wood*, 961 F.2d at 198.

152. See Restatement (Second) of Agency § 228; see also Restatement (Third) of Agency § 7.707.

153. 28 U.S.C. § 1346 (stating that "the district courts . . . shall have 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.").

154. *Woodbury v. United States*, 313 F.2d 291, 295 (9th Cir. 1963).

Moreover, the Eleventh Circuit should follow the precedent established by *Blanchard*.¹⁵⁵ Specifically, the Eleventh Circuit should uphold the longstanding policy that government contracts should be subject to federal law and recognize the importance of the uniform interpretation and application of government contracts.

A. *The limitation established in Martin ignores longstanding policy and the underlying justifications for the rule enunciated by the Woodbury Court.*

Both *Martin* and *Blanchard* purport to build upon the platform created by the Ninth Circuit in *Woodbury*.¹⁵⁶ The Courts in both cases justify their opinions by citing to the decision reached in *Woodbury*.¹⁵⁷ Thus, it would make sense to analyze the underlying justifications outlined by the Court in *Woodbury* prior to extending or limiting the impact of its rule. Analysis of the opinion reveals that the two main concerns of the *Woodbury* Court were:

- (1) Upholding the longstanding policy that government contracts should be interpreted and applied in accordance with federal law, not state law.¹⁵⁸
- (2) Ensuring that government contracts are uniformly interpreted and applied.¹⁵⁹

Although the facts of *Woodbury* involved a plaintiff that suffered purely pecuniary harm, the Court did not use this fact as a basis for its decision.¹⁶⁰ As has been explained in greater detail above, *Martin* exposes government contracts to the various laws of the fifty states, which in turn subjects the contracting parties to uncertainty. Furthermore, the *Martin* decision is inconsistent because, on the one hand, it states that all classic torts are in the District Court's jurisdiction, but on the other hand, those torts resulting in pecuniary harm are under the jurisdiction of the Court of Claims.¹⁶¹ Some classic torts inevitably result in pecuniary harm. Also, the *Martin* Court ignored much of the language in *Woodbury*. Importantly, it ignored the *Woodbury* Court's analysis of *Aleutco*, a case which the *Martin* Court relied on while making its decision.¹⁶² It also overlooked *Feres*, which was a very important decision that advanced the idea that a relationship governed by federal

155. *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351 (5th Cir. 1965).

156. *Woodbury*, 313 F.2d 291; *Blanchard*, 341 F.2d 351.

157. *Woodbury*, 313 F.2d 291; *Blanchard*, 341 F.2d 351.

158. *Woodbury*, 313 F.2d at 295.

159. *Id.*

160. See generally *id.*

161. See generally *Martin v. United States*, 649 F.2d 701 (9th Cir. 1981).

162. *Woodbury*, 313 F.2d at 296.

law cannot be governed by state law under the FTCA.¹⁶³ Coupled with the long-standing policy discussed in this article, *Feres* alone would call for tort claims based on the breach of a duty established in a government contract to be litigated in the Court of Claims.

B. *The Eleventh Circuit should be bound by the precedent established in Blanchard, Smith, and Herder Truck*

It has long been established that the Eleventh Circuit is bound to follow the decisions reached by the former Fifth Circuit.¹⁶⁴ Prior decisions by other Circuits can be used to persuade the Eleventh Circuit; however, these decisions do not carry the influence that former Fifth Circuit decisions do. Accordingly, the principles and rationale enunciated in *Blanchard* should shape the Eleventh Circuit's approach to claims brought under the FTCA based on the breach of a duty established in a government contract, not *Martin*.

While recognizing that Courts often overrule prior opinions and follow the rationale of other Courts, *Blanchard* should not be overruled because it upholds the longstanding policy discussed above and ensures the uniform interpretation and application of government contracts.¹⁶⁵ If the principles and rationale of *Blanchard* conflict with the principles and rationale of *Martin*, *Blanchard* should be followed.

VIII. CONCLUSION

Some actions brought against the United States under tort law involve the interpretation of a government contract. At times, such interpretation is necessary to establish that the United States owed a particular plaintiff a duty, which it allegedly breached through the course of actions of its employees or agents. These actions present an issue that has been addressed by relatively few courts. That is, where should such actions be litigated? Should they be litigated in the District Courts under the FTCA, or should they be litigated in the Court of Claims under the Tucker Act? Ostensibly, this is a simple question. Torts should be brought under the Federal *Tort* Claims Act. However, consideration of long standing policies and governmental interests complicates the question.

As has been analyzed and discussed in this article, there exists a long standing policy that contracts entered into by the United States are

163. *Id.* at 295-96.

164. *Bonner v. City of Prichard*, 661 F.2d 1206, 1210 (11th Cir. 1981).

165. *See Woodbury*, 313 F.2d at 295; *see also Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351, 358 (5th Cir. 1965).

to be interpreted and applied using federal law.¹⁶⁶ It has also been established that actions brought in the District Courts under the FTCA are governed exclusively by state law.¹⁶⁷ Thus, there is a tension between the long standing policy and the governing law under the FTCA in cases where a government contract must be interpreted to determine whether or not the United States owed a duty to a particular plaintiff under particular circumstances.

The Ninth Circuit, through *Woodbury*, addressed this tension by holding that tort actions in which a plaintiff alleges that the United States breached a duty established in a government contract are subject to the jurisdiction of the Court of Claims under the Tucker Act.¹⁶⁸ The Court expressly noted that it was concerned with the law that is used to interpret and apply government contracts.¹⁶⁹ The underlying concern was that government contracts should be uniformly interpreted.¹⁷⁰ Nowhere in its analysis or reasoning did the Court ever mention that the type of harm resulting from the alleged breach was relevant in determining whether the action was to be litigated in the Court of Claims or the District Court.¹⁷¹ Nonetheless, eighteen years later, the Ninth Circuit determined that *Woodbury* only applied where a plaintiff complains of pecuniary harm, not physical harm.¹⁷²

The Eleventh Circuit, through *Blanchard*, has adopted the rule in *Woodbury*. However, the Eleventh Circuit has not addressed the subsequent limitation expressed in *Martin*. As mentioned above, it is unclear how the Eleventh Circuit would approach the issue. This is because those opinions that favorably quote *Woodbury* have all involved a plaintiff that complained of pecuniary harm. Thus, although the Court has not explicitly adopted the limitation in *Martin*, it has also not explicitly rejected it. Although a Middle District of Alabama opinion has expressly adopted the limitation in *Martin*, the Eleventh Circuit should not follow suit.

The limitation in *Martin* disregards the fundamental justifications for the standard articulated in *Woodbury*. As this article has explained, the opinion suffers from other shortfalls. But the most significant of those is that the opinion opens the door to government contracts being interpreted and applied using state, rather than federal law. The Eleventh Circuit should take the opportunity presented by *Downs*, in the event

166. *Woodbury*, 313 F.2d 291.

167. *Id.* at 295.

168. *Id.* at 295-96.

169. *Id.* at 295.

170. *Id.*

171. *See generally id.*

172. *See Martin v. United States*, 649 F.2d 701 (9th Cir. 1981).

that the case is appealed, to clarify its position on this issue. It should reaffirm the standards set out in *Blanchard*, adopt the language provided in *Wood*, and ultimately hold that any tort in which a duty established in a government contract is allegedly breached should be litigated in the Court of Claims under the Tucker Act.¹⁷³

173. See *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351 (5th Cir. 1965); see also *Wood v. United States*, 961 F.2d 195, 198 (Fed. Cir. 1992).