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United States Contracts with Informants: An Illusory Promise?

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COMMENT

UNITED STATES CONTRACTS WITH INFORMANTS: AN ILLUSORY PROMISE?

I.	Introduction	251
II.	Contracting with the United States Government	252
III.	Compensating Cooperating Informants of the DEA ..	254
	A. General Appropriations Fund	254
	B. Asset Forfeiture Fund	255
	C. Cooperation Agreement	256
	D. Claims under Section 524	257
IV.	The <i>No Authority Runaround</i> and Recent Commonality in Claims	259
	A. The No Authority Runaround	260
	B. New United States Policy on Informant Contracts?	266
V.	The DEA and International Reach?	267
VI.	Do Recent Changes Offer a Viable Solution?	269
VII.	Conclusion	271

I. INTRODUCTION

The seizure of assets from illegal drug organizations is big business for the Drug Enforcement Agency ("DEA"). In fact, there have been years that total DEA seizures from drug trafficking activities have amounted to larger quantities than the amount allocated for its annual budget.¹ Many of these seizures were made possible with the help of "cooperating informants," who are private individuals, used by United States government agencies, to supply information or provide assistance in ongoing investigations.² In 1993, approximately \$97,000,000 was paid to informants by various agencies of the United States.³ This paper explores the process of contracting between the United States and

1. Mary Thornton, *DEA Seizures Surpass Its Budget*, WASH. POST, Oct. 5, 1986 at A5 (in 1986 alone, the DEA was seizing so many assets from drug trafficking organizations that it was taking in more cash and property than the amount spent on its annual budget which was \$363,000,000).

2. See generally Mark Curriden, *Secret Threat to Justice*, NAT'L. L.J., Feb. 20, 1995 at A1.

3. *Id.* at A28.

its informants, by summarizing a recent pattern of cases alleging dishonored contract terms and the effect of such dishonor upon the integrity of the United States as promisor in future international transactions.

Part II of this case note examines the legal elements necessary to bind the United States government in contract. Part III illustrates how the DEA compensates its informants by analyzing the statutory basis and procedure for authorizing payments to an informant. Part IV details a case study addressing the commonality in claims against the United States as a promisor in contracts with informants and theorizes as to the new policy of the United States. Part V explores the international reach of the DEA and some of the pitfalls associated therewith. Part VI concludes with some recent solutions evidenced in case law as well as suggestions for more practical solutions.

II. CONTRACTING WITH THE UNITED STATES GOVERNMENT

The United States Supreme Court has stated the risks associated with entering into contracts with the United States:

Anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through rule making power. And this is so even though . . . the agent himself may have been unaware of the limitations upon his authority.⁴

Entering into government contracts is a risky endeavor for even the most cautious of parties. In cases where an approving official exceeds his authority, the government can disavow the official's words and will not be bound by an implied contract.⁵ Furthermore, the burden of proof with respect to contracting authority of a government agent to bind the United States will always fall upon the plaintiff.⁶

4. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *See also Humlen v. United States*, 49 Fed. Cl. 497, 503 (2001); *Toranzo-Claure v. United States*, 48 Fed. Cl. 581, 583 (2001); *Doe v. United States*, 48 Fed. Cl. 495, 501 (2000); *Khairallah v. United States*, 43 Fed. Cl. 57, 63 (1999); *Cruz-Pagan v. United States*, 35 Fed. Cl. 59, 60 (1996); *Roy v. United States*, 38 Fed. Cl. 184, 187 (1997).

5. *Empresas Electronicas Walser, Inc. v. United States*, 223 Ct. Cl. 686, 688 (1980) (cited in *New America Shipbuilders, Inc., v. United States*, 871 F.2d 1077, 1080 (1989)); *Cruz-Pagan*, 35 Fed. Cl. 59, 63 (1996).

6. *City of El Centro v. United States*, 922 F.2d 816, 821 (2d Cir. 1990); *Kania v.*

Mutuality of intent, consideration, and lack of ambiguity in offer and acceptance are the elements required to form an express or implied-in-fact contract.⁷ A fourth requirement is added when the United States is a party: the government representative "whose conduct is relied upon must have actual authority to bind the government in contract."⁸

Unlike contracts between private parties, apparent authority will not be sufficient to hold the government bound by the acts of its agents.⁹ Implied actual authority, however, like expressed actual authority, will bind the Government.¹⁰ Authority to bind the government will generally be implied when such authority is considered to be an integral part of the duties assigned to a government employee.¹¹

In the case of DEA field agents, the DEA has repeatedly taken the position that its agents lack authority to bind the government in contract.¹² Even though agents are often expected to negotiate agreements with informants, this function has not been interpreted as an "integral part" of a field agent's duties. The courts have likewise held that it is not necessary, nor essential, for the DEA to grant contracting authority to its field agents in order to enable the agents to carry out their assigned duties of maintaining contact and exercising control over informants.¹³ Therefore, a contract claim based solely on implied actual authority not involving a high-level DEA official will normally be subject to summary judgment on the grounds that the agent lacked the requisite authority to bind the United States.¹⁴

Ratification is another way of binding the United States in

United States, 227 Ct. Cl. 458 (1981); *Howard v. United States*, 31 Fed. Cl. 297, 312 (1994).

7. *City of El Centro*, 922 F.2d at 820; *Fincke v. United States*, 675 F.2d 289 (1982); *Russell Corp. v. United States*, 537 F. 2d 474 (1976). See also *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592 (1923).

8. *Toranzo-Claure*, 48 Fed. Cl. at 583; *Juda v. United States*, 6 Cl. Ct. 441, 452 (1984) (citing *Federal Crop Ins. Corp.*, 332 U.S. 380); *H. Landau & Company v. United States*, 886 F.2d 322, 324 (1989); *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984).

9. *Federal Crop Ins. Corp.*, 332 U.S. at 384; *H. Landau & Company*, 886 F.2d at 324.

10. *H. Landau & Company*, 886 F.2d at 324.

11. *Id.*

12. *Henke v. United States*, 60 F. 3d 795 (Fed. Cir. 1995); *Toranzo-Claure*, 48 Fed. Cl. at 583 (2001).

13. *Cruz-Pagan*, 35 Fed. Cl. at 61; *Khairallah v. United States*, 43 Fed. Cl. 57, 63-4 (1999); *Doe*, 48 Fed. Cl. at 502.

14. *Toranzo-Claure*, 48 Fed. Cl. at 581; *Cruz-Pagan*, 35 Fed. Cl. at 60; *Nagy Khairallah*, 43 Fed. Cl. at 64.

contract. The ratification of an unauthorized agreement by an agent with actual authority will have the same effect as an initial authorization.¹⁵ Proving ratification, however, can be very difficult. "Ratification requires that a superior official have authority to ratify, knowledge of a subordinate's unauthorized act, and then must confirm, adopt, or acquiesce to the unauthorized action of his subordinate."¹⁶ Thus, a plaintiff would need to produce evidence that a superior, having actual authority, acted with full knowledge, in such a manner as to manifest a "knowing acquiescence" to the details of the agreement in question.¹⁷

III. COMPENSATING COOPERATING INFORMANTS OF THE DEA

The cooperating agreements of the DEA and FBI illustrate the government's policy with regard to promises of payment to informants.¹⁸ The DEA's policies, in particular, deserve a closer look, due to the numerous cases recently filed in Federal Claims Court regarding alleged false oral promises made by DEA agents to informants.

According to *Doe v. United States*, confidential informants can receive monetary compensation under two different schemes.¹⁹ Payments can be made from the general appropriations fund or the Attorney General may grant an award from the Asset Forfeiture Fund.²⁰

A. General Appropriations Fund

With respect to payments from the general appropriations fund, the court in *Doe v. United States* explains the operation of authorizing payments according to Section 6612.61(D) of the cur-

15. See RESTATEMENT (SECOND) OF AGENCY § 100 & cmt. a (1958); *IRS v. Gaster*, 42 F.3d 787, 793 (1994); *BE&K Constr. Co. v. Nat'l Labor Relations Bd.*, 23 F.3d 1459, 1466 (1994).

16. *Doe*, 48 Fed. Cl. at 504; *California Sand & Gravel, Inc. v. United States*, 22 Cl. Ct. 19, 27-28 (1990), *aff'd*, 937 F.2d 624 (Fed. Cir. 1991); *United States v. Beebe*, 180 U.S. 343, 354 (1901).

17. *Humlen*, 49 Fed. Cl. at 504; *Khairallah*, 43 Fed. Cl. 64; *Doe*, 48 Fed. Cl. at 504; *Henke*, 43 Fed. Cl. 37.

18. Other agencies of the United States government known to have policies and procedures with regard to payment include the Federal Bureau of Investigations, United States Customs Service, Bureau of Alcohol, Tobacco & Firearms, and the Internal Revenue Service.

19. *Doe*, 48 Fed. Cl. at 497.

20. *Id.*

rent DEA Agent's Manual.²¹

Payments less than [text redacted] may be approved by the immediate supervisor of a field agent; payments between [text redacted] and [text redacted] may only be approved by an authorized senior field manager, GS-1811-15, or higher; and a single payment in excess of [text redacted] requires the additional approval of the Special Agent in Charge or Country Attache, and the Chief of Domestic Operations or the Chief of International Operations as appropriate.²²

The older version of the DEA Agent's Manual in effect from February 1988 until September 10, 1998 contained fewer levels of authorization.²³ The present version of the DEA Agent's Manual, in comparison, has added an additional monetary range to the older structure and has expanded the number of DEA Agents that have explicit authority to approve payments from the general appropriations fund.²⁴ Thus, to be an agent with explicit authority to approve payments, such a person must be one of the following: (1) an immediate supervisor of a field agent, (2) an authorized senior field manager, GS-1811-15 or higher, or (3) a Special Agent in Charge or Country Attache, and the Chief of Domestic Operations or the Chief of International Operations as appropriate.²⁵

B. Asset Forfeiture Fund

With respect to payments from the Asset Forfeiture Fund, the court in *Doe v. United States* also explains the operation of authorizing payments according to Section 6612.67(1) of the current DEA Manual:²⁶

Confidential sources have no inherent "entitlement" to receive payment from the Asset Forfeiture Fund, regardless of the extent of, or fruits of their cooperation. The final decision as to whether and how much to pay a confidential source from the Asset Forfeiture Fund rests with Headquarters, and will depend on the availability of funds at the

21. *Id.*

22. *Doe*, 48 Fed. Cl. at 498; *See also* DRUG ENFORCEMENT AGENCY, DEA AGENT'S MANUAL Chapter 66, Subchapter 6612.61(D) (2001).

23. According to Section 6612.43(B) (1998) of the DEA Agent's Manual, the Special Agent in Charge or Country Attache is authorized to approve payments up to [text redacted]. Payments beyond [text redacted] must be approved by the Deputy Assistant Administrator for Operations. *Id.*

24. *Doe*, 48 Fed. Cl. at 498. *See also* DRUG ENFORCEMENT AGENCY, *supra* note 22.

25. *Doe*, 48 Fed. Cl. at 498. *See also* DRUG ENFORCEMENT AGENCY, *supra* note 22.

26. *Doe*, 48 Fed. Cl. at 497.

time the application is processed, as well as other factors.²⁷

Thus, DEA agents can only recommend that an award, in an unknown amount, be made to a confidential informant.

The prior DEA Agent's Manual in effect from February 1988 until September 10, 1998 still listed the positions delegated with authority to approve awards.²⁸ Under Section 6612.44(C)(2) of the DEA Agent's Manual:

Offices must not promise awards in any amount to an individual. The statutory authority²⁹ provides that the payment of such awards is purely discretionary. Moreover the authority to grant an award of less than [text redacted] from the Asset Forfeiture Fund was delegated to and was within the discretion of the Deputy Assistant Director for Operations of the DEA. Pursuant to 28 U.S.C. § 524(c)(2), the authority to approve an Asset Forfeiture Fund award of \$250,000 or more was delegated by the Attorney General only to the DEA Administrator, and could not be re-delegated.³⁰

The more recent version of the DEA Agent's Manual departs from a clear structure and adopts a newer version that is subject to varying interpretations. Under Section 6612.67(1), an informant will have no entitlement to receive payment. If, however, payment is promised, the decision to honor such a promise will be dependent upon approval by so-called Headquarters,³¹ which can only disburse funds subject to availability and can depend on a mysterious third prong: "other factors."³²

C. Cooperation Agreement

A cooperating informant is usually asked to sign a coopera-

27. *Id.*; See also DRUG ENFORCEMENT AGENCY, *supra* note 22, at Subchapter 6612.67 (1) (2001).

28. *Doe*, 48 Fed. Cl. at 497. See also DRUG ENFORCEMENT AGENCY, *supra* note 22, at Subchapter 6612.44(C)(2) (1998).

29. 28 U.S.C. § 524(c) (2001).

30. DRUG ENFORCEMENT AGENCY, *supra* note 22, at Subchapter 6612.44(C)(2) (1998).

31. The term "Headquarters" is not currently listed on the DEA organizational chart as a division, section or office. See <http://www.usdoj.gov/dea/briefingbook/page5.htm>.

32. DRUG ENFORCEMENT AGENCY, *supra* note 22, at Subchapter 6612. "Other factors" remains undefined and is subject only to the limitations and discretion of the participating agent's principles.

tion agreement.³³ Cooperation agreements are forms that outline the conditions that confidential informants agree to follow when furnishing information and assistance to the DEA.³⁴ A cooperation agreement will usually state clauses stipulating that the informant must not violate any laws in furtherance of his assignment, that the informant has no official status with the DEA, that confidentiality cannot be guaranteed, and that the informant may be called to testify.³⁵ The cases, however, indicate that the form is often silent with respect to compensation of cooperating informants and that actual written agreements addressing compensation are not usually completed.³⁶ The most common claim regarding cooperation agreements is that particular DEA agents made oral promises of compensation during the signing of their respective cooperating agreements.³⁷

*D. Claims under Section 524*³⁸

The majority of breach of contract claims against the DEA stem from misinterpretations of 28 U.S.C. § 524(c). Section 524 establishes the Department of Justice Asset Forfeiture Fund discussed above. This United States Treasury special fund is available to the Attorney General without fiscal year limitation for certain enumerated purposes.³⁹ One such purpose is "the payment of awards for information or assistance directly relating to violations of the criminal drug laws of the United States".⁴⁰ Another such purpose is for "the payment of awards for information or assistance leading to a civil or criminal forfeiture involving any federal agency participating in the Fund".⁴¹

The Court of Federal Claims, however, has repeatedly held that section 524 is not a money mandating statute and therefore

33. See DEA Form 473 (on file with the University of Miami Inter-American Law Review).

34. *Doe*, 48 Fed. Cl. at 498.

35. See *Khairallah*, 43 Fed. Cl. at 59.

36. There are no cases involving informants whereby an informant or the DEA has produced written agreements outlining compensation. Oral promises are usually utilized until a request form outlining compensation is completed after a seizure or upon the need of an informant's testimony or further assistance.

37. *Cruz-Pagan*, 35 Fed. Cl. at 59; *Salles v. United States*, 156 F.3d 1383 (1998); *Khairallah*, 43 Fed. Cl. at 57; *Doe*, 48 Fed. Cl. at 495; *Toranzo-Claure*, 48 Fed. Cl. at 581.

38. 28 U.S.C. § 524 (2001).

39. 28 U.S.C. § 524(c)(1).

40. 28 U.S.C. § 524(c)(1)(B).

41. 28 U.S.C. § 524(c)(1)(C).

cannot form the basis of a claim of breach.⁴² The reward for information and assistance that is offered by section 524 is totally discretionary and cannot take place before the fact of seizure.⁴³ "Forfeiture for the purpose of determining whether to make an award cannot take place until after the forfeiture is complete."⁴⁴ Therefore, allegations of any agreements made regarding awards prior to seizure or forfeiture will not entitle any informant to a claim.

In *Khairallah v. United States*, Harold D. Wankel, the Deputy Assistant Administrator of the DEA, describes the procedure as being initiated by the submission of a "memorandum recommending an amount of award no greater than one fourth of the net amount realized by the United States from the drug-related forfeitures, or a dollar amount up to \$250,000."⁴⁵ Recent cases, however, allege that DEA Agents have been making offers of twenty-five percent without placing any limitation on the computation of forfeitures made in relation to an informant's information.⁴⁶

This inconsistency may be the result of DEA Agents promising an award of twenty-five percent when they should really be saying that they promise to *recommend* an award of twenty-five percent. The agent may also be making promises of an *up to* twenty-five percent award when the informant is mistakenly hearing and agreeing to a *full* twenty-five percent figure. Any confusion on the informant's part is, however, irrelevant. We now know that agreeing in advance to particular awards is impermissible under Section 524 and regardless of permissibility, the DEA Agent's Manual⁴⁷ makes clear that there is no inherent entitlement to payment from the Asset Forfeiture Fund.

Therefore, the only reasonable expectation for an informant to recover an award or payment will rely heavily upon a memorandum recommending the award prepared by the supervising agent.⁴⁸ This memorandum will be subject to the approval of a

42. *Khairallah*, 43 Fed. Cl. at 61; *See also* Hoch v. United States, 33 Fed. Cl. 39, 44 (1995) (Section 524 not money mandating).

43. 28 U.S.C. § 524 (c)(1)(A) & (C) (payments from the Asset Forfeiture Fund for expenses or awards are made at the discretion of the Attorney General).

44. *Khairallah*, 43 Fed. Cl. at 62.

45. *Id.*

46. *Cruz-Pagan*, 35 Fed. Cl. at 59; *Salles*, 156 F.3d at 1383; *Khairallah*, 43 Fed. Cl. at 57; *Doe*, 48 Fed. Cl. at 495.

47. DRUG ENFORCEMENT AGENCY, *supra* note 22, at Subchapter 6612.67(1).

48. *Khairallah*, 43 Fed. Cl. at 62 ("The procedure is initiated by the submission of a memorandum, or appropriate DEA form, from the Special Agent in charge of the requesting field office of the DEA. This memorandum sets forth relevant information

higher-ranking officer that may or may not be familiar with the case.⁴⁹ Lastly, if the memorandum proves unconvincing or there are insufficient funds available, then the informant is left with no payment unless he can prove that he was authorized for payment from a different fund, such as the general appropriations fund.

IV. THE *NO AUTHORITY RUNAROUND* AND RECENT COMMONALITY IN CLAIMS

In the period between 1996 and 2001, there have been at least seven⁵⁰ similar breaches of contract actions brought against the United States Government in the Court of Federal Claims.⁵¹ In each case, the defendant claimed that several United States officials offered compensation of up to twenty-five percent of the total seizures made from that informant's information.⁵² These alleged oral promises were usually made in the presence of several other agents, during the signing of cooperation agreements.⁵³ The cooperation agreements were usually witnessed and also signed by such agents.⁵⁴ In all of the cases where the government eventually offered compensation, there was either no payment or an amount significantly lower than the orally agreed amount.⁵⁵ These breaches in the alleged agreements were upheld due to a lack of actual or implied-actual contracting authority on the part of the government agents.⁵⁶ Detailed chronologies of the seven cases

pertaining to the award request, including the extent and significance of the cooperation.").

49. *Id.* (The memorandum is submitted by the Special Agent in charge of the requesting field office of the DEA. Then, "the request is reviewed within my office [Deputy Assistant Administrator] for approval, denial, or modification.").

50. *Cruz-Pagan*, 35 Fed. Cl. at 59; *Roy*, 38 Fed. Cl. at 184; *Salles*, 156 F.3d at 1383; *Khairallah*, 43 Fed. Cl. at 57; *Doe*, 48 Fed. Cl. at 495; *Toranzo-Claure*, 48 Fed. Cl. at 581; *Humlen*, 49 Fed. Cl. at 497.

51. The Court of Federal Claims has exclusive jurisdiction over cases sounding in contract against the United States where the damages sought exceed \$10,000.00.

52. *Cruz-Pagan*, 35 Fed. Cl. at 60; *Roy*, 38 Fed. Cl. at 186; *Salles*, 156 F.3d at 1383; *Khairallah*, 43 Fed. Cl. at 58; *Doe*, 48 Fed. Cl. at 498; *Toranzo-Claure*, 48 Fed. Cl. at 582; *Humlen*, 49 Fed. Cl. at 500.

53. *Salles*, 156 F.3d at 1384; *Khairallah*, 43 Fed. Cl. at 60; *Doe*, 48 Fed. Cl. at 498; *Humlen*, 49 Fed. Cl. at 500.

54. *Khairallah*, 43 Fed. Cl. at 60; *Doe*, 48 Fed. Cl. at 498; *Humlen*, 49 Fed. Cl. at 500.

55. *Cruz-Pagan*, 35 Fed. Cl. at 60; *Roy*, 38 Fed. Cl. at 191; *Salles*, 156 F.3d at 1384; *Khairallah*, 43 Fed. Cl. at 59; *Doe*, 48 Fed. Cl. at 499; *Toranzo-Claure*, 48 Fed. Cl. at 583; *Humlen*, 49 Fed. Cl. at 501.

56. *Cruz-Pagan*, 35 Fed. Cl. at 63; *Roy*, 38 Fed. Cl. at 191; *Salles*, 156 F.3d at 1384; *Khairallah*, 43 Fed. Cl. at 63; *Doe*, 48 Fed. Cl. at 503; *Toranzo-Claure*, 48 Fed. Cl. at 583; *Humlen*, 49 Fed. Cl. at 504.

brought against the United States are discussed below.

A. *The No Authority Runaround*

In *Cruz-Pagan v. United States*, an informant sought to recover \$225,250 from the United States Department of Justice⁵⁷ for assistance and information leading to the forfeiture of \$901,000 in cashier's checks.⁵⁸ The informant claimed that he entered an enforceable contract with the DEA, agreeing that he would receive twenty-five percent of the value of any property seized and forfeited as a result of his assistance.⁵⁹ The DEA, however, recommended that the plaintiff receive a \$100,000 award for his assistance, but later withdrew its recommendation when the plaintiff was indicted for other crimes.⁶⁰

The plaintiff argued that contracting authority was an "integral part of the duties assigned" to DEA agents because contracting authority was necessary and essential to the performance of their assigned duties of maintaining contact and exercising control over informants.⁶¹ The United States Court of Federal Claims, however, ruled that "because reasonably efficient alternatives appear to exist to create the desired expectation of compensation, it would not be necessary for [the] DEA to grant contracting authority to its agents" and, thus, the prerequisites for implied-actual authority did not exist.⁶² An alternative ground for denying implied actual authority was also offered. "The doctrine of implied actual authority cannot be used to create an agent's actual authority to bind the government in contract when the agency's internal procedures specifically preclude that agent from exercising such authority."⁶³

In *Roy v. United States*, the plaintiff alleged that FBI agents promised him up to twenty-five percent of any related forfeitures, or \$250,000, whichever amount was less.⁶⁴ For the next four years, the informant ran a sting operation and helped accumulate

57. *Cruz-Pagan*, 35 Fed. Cl. at 59 (the claim is made against the DEA, which is a subdivision of the United States Department of Justice).

58. *Cruz-Pagan*, 35 Fed. Cl. at 60.

59. *Id.*

60. *Id.* A \$100,000 award would yield an approximate nine percent of the seizure of the cashier's checks.

61. *Id.* at 61.

62. *Id.* at 61-62.

63. *Id.* at 61-62.

64. *Roy*, 38 Fed. Cl. at 186.

substantial audio and video evidence for the FBI.⁶⁵ This evidence enabled the FBI to identify, infiltrate, and destroy some of the largest drug rings in Philadelphia.⁶⁶ In exchange for his informant tasks, the plaintiff's mandatory five-year jail term was reduced to five years of probation.⁶⁷ He also received \$84,428 for expenses incurred during informant activities and a lump sum of \$100,000 for his informant services.⁶⁸ Although the parties disagree over the value of the forfeited assets⁶⁹, the Court of Federal Claims still held that because the agreement was for an amount "up to twenty-five percent of plaintiff's claim", then the total amount seized was not in issue as long as the FBI gave the plaintiff some money.⁷⁰ In other words, the \$100,000 figure was sufficient because it could fall within the range that encompassed an amount "up to twenty-five percent." Applying this reasoning, *a fortiori*, the FBI could have also paid the informant a one-dollar figure and have still remained true to the contract's terms.

Similarly in *Humlen v. United States*, the informant alleged he was promised twenty-five percent of any money recovered from property or money forfeiture, \$500 per kilogram of cocaine seized, and a lump-sum award of up to \$250,000 at the conclusion of the investigation.⁷¹ The cooperation agreement signed by the informant in this case, however, contained a clause that had not been mentioned in any of the prior cases dealing with such agreements.⁷² This cooperation agreement contained an integration clause stating that any "modifications to this agreement will have no force and effect unless and until such modifications are reduced to writing and signed by all parties thereto."⁷³ Upon reading the agreement, the plaintiff asked why the written contract terms differed from those of the oral promises.⁷⁴ The response and explanation of the agents was that the agreement had to be "couched" in

65. *Id.* at 185.

66. *Id.*

67. *Id.* at 185-186.

68. *Id.* at 186.

69. The values submitted for the total forfeited assets that the plaintiff's assistance helped obtain were a sum of \$1,820,000 for the FBI and \$5,000,000 for the plaintiff. A lump sum of \$100,000 award, compared to an asset seizure of \$1,820,000 and \$5,000,000, amounts to 5.5% and 0.02% of the amount seized, respectively. *Id.* at 186.

70. *Id.* at 191.

71. *Humlen*, 49 Fed. Cl. at 500.

72. *Id.* at 501.

73. *Id.*

74. *Id.*

that way because it was a discoverable document.⁷⁵

Although the total amount seized⁷⁶ as a result of the information from the informant was in dispute, the plaintiff eventually received a \$5000 disbursement, a monthly compensation of \$2000 for expenses, and a \$50,000 lump sum for informant services.⁷⁷ On the issue of breach of contract, the Court held that the promises were unenforceable as a matter of law because none of the agents listed in the complaint had the requisite actual authority to bind the government in contract.⁷⁸ Additionally, the court noted that "even if the Special Agents did have the requisite authority to contractually bind the government, [the] plaintiffs' claims are barred by the agreement's integration clause."⁷⁹

In *Salles v. United States*, the plaintiff contends that she was orally promised a twenty-five percent commission on the value of all the money and property seized as a result of her assistance and information.⁸⁰ On appeal from summary judgment for the government, the United States Court of Appeals affirmed, ruling that none of the employees had implied actual authority to bind the United States.⁸¹ One dissenting judge, however, found this case "troubling" and maintained that when parties have mutually assented to be bound, the written document itself need not be a fully integrated contract in order to memorialize that some kind of agreement was made.⁸²

The complete disclaimer by the United States of any understanding or obligation whatsoever is what troubles me most about this case. The position of the Department of Justice that there was no agreement, and that in all events an agreement on percentage terms is not enforceable because the informant's work turned out to produce very large monetary returns to the United States, does scant credit to the nation. The integrity of the United States as a promisor is

75. *Id.*

76. Plaintiff claims his information led to the seizure of 428 kilograms of cocaine and the eventual forfeiture of \$754,000, a residence, and four vehicles. The government maintains that the information led to the seizure of over 230 kilograms of cocaine and approximately \$50,000. If the contract terms were enforced, a seizure of 230 kilograms of cocaine *alone*, at a reward of \$500 per kilogram would yield \$115,000 irrespective of the other assets seized. *Id.* at 501.

77. *Id.* at 501-02.

78. *Id.* at 504.

79. *Id.* at 506.

80. *Salles*, 156 F. 3d at 1383.

81. *Id.*

82. *Id.* at 1384.

not less stringent when dealing with informants.⁸³

Although the case neglected to mention the amount of the forfeiture, it is apparent from the above-quoted dissent that large monetary figures were at stake and played at least some role in the court's decision.

During oral argument, counsel for the government conceded that some persons in the DEA have authority to promise compensation in percentage terms, but countered by conditioning that such arrangements were extraordinary and available only at the highest level of the Department of Justice.⁸⁴ The dissent, however, found such a contention to be uneasily reconciled with the document evidence of apparently routine DEA forms that contained a line item for "recommended percentage."⁸⁵ Judge Newman clarified, "I doubt that the federal agents who deal with confidential informants are required to personally have monetary authority as contracting officers, in order to have authority to promise a percentage of the illegal proceeds recovered due to the informant's services."⁸⁶

In *Khairallah v. United States*, the plaintiff was offered as payment for his expenses, \$5000 per kilogram of heroin, \$100 a day, and a reward of twenty-five percent of the value of assets recovered.⁸⁷ The distinguishing factor in this case was that the informant had grown accustomed to being consistently paid in accordance with the above payment scheme.⁸⁸ The DEA never disputed that the plaintiff worked on numerous cases and that with the exception of the three cases that formed the basis of this action, it "always paid plaintiff the way he asserts."⁸⁹ Upon transfer, however, from the Detroit office to the New York Field Division office, the agreement began to deteriorate. The New York agents again promised him a salary of \$3100 per month, \$1000 a week for expenses, \$5000 per kilogram of heroin, \$1000 per kilogram of cocaine, and twenty-five percent of all cash seized.⁹⁰

The informant claimed non-payment on two investigations

83. *Id.*

84. *Id.*

85. *Id.* at 1385 n.2 ("This is illustrated by a document in the record, showing a monetary award to this appellant, on a form which contains the following line: C. Recommended Percentage: N/A").

86. *Id.* at 1385.

87. *Khairallah*, 43 Fed. Cl. at 58.

88. *Id.*

89. *Id.* at 59.

90. *Id.* at 58-59.

and a remaining fifteen percent on a third investigation where only a ten percent reward was granted.⁹¹ Twelve DEA Agents were identified by the plaintiff as having entered into an express agreement that was allegedly ratified by an additional two high-ranking agents.⁹² All in all, there were fourteen agents, one of whom was a Special Agent in Charge and another who was an Assistant Administrator for Operations.⁹³ In response, the DEA asserted that none of the fourteen agents with whom the plaintiff had any direct contact had authority to enter into the type of contract plaintiff alleges; or, in the alternative, that no one with sufficient contracting authority ever ratified the necessary contract terms.⁹⁴

The question left unanswered, then, was how Khairallah had been paid consistently in the past, before and after these investigations, if there was no authorization made for the payments? The affidavit of James M. Whetstone, Deputy Assistant Administrator for the Office of Acquisition Management, was used to describe the process for obtaining payments.⁹⁵ In fact, it was his affidavit that was used by the court to find an absence of genuine issue of material fact regarding the contracting authority of the fourteen agents.⁹⁶

Whetstone states that a delegation of procurement authority from either Whetstone or his predecessors is required for a DEA employee to enter into a contract with any non-government contractor, vendor, or other individual. None of these agents with whom plaintiff alleged he negotiated had ever been delegated procurement authority.⁹⁷

Whetstone's affidavit still leaves one glaring inconsistency. Under what procedure did Khairallah get paid for all of the other contracts that are not currently in dispute?⁹⁸ How and why are

91. *Id.* at 59 ("In 1987, the plaintiff worked on an investigation . . . [that] resulted in the seizure of five pounds of cocaine and \$53,000. Plaintiff did not receive a reward from this investigation. Also in 1987, plaintiff worked on an investigation . . . [that] resulted in the seizure of one pound of cocaine and \$73,000. Again, plaintiff did not receive a reward from this seizure. In 1988, plaintiff worked on an investigation . . . [that] resulted in the seizure of 113 pounds of cocaine and \$480,000. Plaintiff received ten percent reward from this seizure.").

92. *Id.* at 60.

93. *Id.*

94. *Id.*

95. *Id.* at 62.

96. *Id.* at 61.

97. *Id.* at 60.

98. *Id.* at 59. (The record indicates that the informant was paid consistently in the

they subject to different treatment than the litigated matter? If the requisite authority approved the prior paid contracts, then why was there no analysis distinguishing one contract from the others at issue? This discrepancy begs the question of whether contract authorization is only a technicality asserted for litigation purposes and not an actual DEA customary practice.⁹⁹

In *Doe v. United States*, the plaintiff claims he was offered between ten to twenty-five percent of the value of any seizures resulting from his cooperation.¹⁰⁰ He claimed to be owed in excess of \$600,000 for his participation in three investigations.¹⁰¹ In one of the three investigations, a DEA Agent did actually recommend an award of 12.5% of the value of any property seized.¹⁰² That recommendation, however, was withdrawn upon the informant's failure to submit to a polygraph examination.¹⁰³

In court, upon a showing that the contracting agents lacked the requisite contracting authority, the plaintiff argued that "the government 'had a custom of allowing its agents to enter [into] contracts' shown by the past dealings of the DEA with the plaintiff, his father, and other confidential informants."¹⁰⁴ The United States Court of Federal Claims, in response, held that the plaintiff's prior experience with the DEA was not sufficient as proof with respect to the contract at issue, and that the plaintiff did not meet his burden of proving that any of the agents had the requisite contracting authority.¹⁰⁵

In *Toranzo-Claure v. United States*, the plaintiff sought \$75,000 for his informant services and expenses incurred.¹⁰⁶ The United States Court of Federal Claims noted that the monetary amount claimed by the plaintiff was improbable in light of the short nine-month period of service, as well as the apparent lack of

manner that he asserts. There is no indication, however, that the other contracts that were honored were subject to similar legal scrutiny).

99. See *Salles*, 156 F.3d at 1385 (wherein Judge Newman states in his dissenting opinion) ("I doubt that federal agents who deal with confidential informants are required to personally have monetary authority as contracting officers, in order to have authority to promise a percentage of the illegal proceeds recovered due to the informant's services.").

100. *Doe*, 48 Fed. Cl. at 498.

101. *Id.* at 497.

102. *Id.* at 499.

103. *Id.* (Informant was asked to submit to a polygraph examination with regard to allegations of "unsatisfactory/unlawful conduct.").

104. *Id.* at 504.

105. *Id.*

106. *Toranzo-Claure*, 48 Fed.Cl. at 581.

any specificity in describing the purported contracts.¹⁰⁷ The case was ultimately decided on the grounds that the written agreements did not require any such payments and that the defendant's agents lacked the required contracting authority.¹⁰⁸

B. New United States Policy on Informant Contracts?

The occurrence of seven cases within the last six years involving government agents following almost exact protocol demonstrates a disturbing trend.¹⁰⁹ Perhaps more shocking is the fact that the cases do not indicate any signs of a forthcoming cure. Rather, an increase in the frequency of these cases indicates that the repercussions for making unauthorized promises to informants must not be severe enough to deter further violations. It seems the United States agencies are simply not taking any active steps towards preventing future violations. More troubling still are the many opinions from the Federal Claims Court that evidence the lack of disdain for this pattern of troubling behavior.

The agencies of the United States government that deal with informants often correlate the success of their agents, to a great extent, upon the number of cases and the amount of property seizures made.¹¹⁰ The faster an agent can establish his reputation as an effective agent, the faster a promotion will be in line.¹¹¹ The use of informants will often times offer the quickest and most effective track for infiltrating and closing-in on illegal operations and organizations.¹¹²

These agencies are also aware that agents will need to promise their informants either reduced prison sentences or substantial monetary compensation to get them to risk their lives. Therefore, it is clear that these agents will be entering into some form of an agreement that deals with a method of compensation. This authority to negotiate payment terms creates an incentive for agents to exaggerate these awards and payments. The obvious

107. *Id.* at 583.

108. *Id.* at 583-584.

109. *Cruz-Pagan*, 35 Fed. Cl. at 59; *Roy*, 38 Fed. Cl. 184; *Salles*, 156 F.3d at 1383; *Khairallah*, 43 Fed. Cl. at 57; *Doe*, 48 Fed. Cl. at 495; *Toranzo-Claure*, 48 Fed. Cl. at 581; *Humlen*, 49 Fed. Cl. 497.

110. Curriden, *supra* note 2 at A30 (statement of E. Michael McCann) ("The more cases you make, the faster you get a promotion.").

111. *Id.*

112. *Id.* (statement of E. Michael McCann) ("Let's make no mistake; the system operates on numbers. The more cases you make, the faster you get a promotion, and informants are the fastest way for a detective to make lots of cases.").

inquiry that remains is why the agencies do not simply produce and implement procedures, whereby legitimate written contracts are always required for agreements between agents and cooperating informants.

A policy that overlooks the possibility of government agents having the ability to make oral assurances and then dishonoring them at-will is not only unethical, but also impractical. A decreased willingness to cooperate on the part of informants can have a damaging effect upon law enforcement agencies.¹¹³ In an age of increased accessibility to information and news, it is risky to assume that non-enforcement of informant contracts will remain hidden from the knowledge of the underworld.

Although large amounts of money will often be involved, the value that an informant brings to large-scale illegal investigations is often immeasurable. The effectiveness of law enforcement would certainly diminish without the aid of cooperating informants.¹¹⁴ It is, therefore, essential to maintain a healthy rapport with informants in order to continue to efficiently battle evolving forms of organized crime.

The current rules and policies simply are not encouraging agents to make truthful compensation disclosures to informants. Assuming, *arguendo*, that the policies currently encourage frank disclosure, is it practical and beneficial for these agencies to assume that their agents will make promises within their means? With no policy requiring routine forms to be completed with regard to compensation, the courts are left to rely upon the veracity of the supervising agents. Without stronger sanctions and reforms there is little preventing DEA agents from exploiting this unintentional, yet dangerous, loophole.

V. THE DEA AND INTERNATIONAL REACH?

The DEA website boasts that the DEA maintains seventy-

113. *Id.* ("The National Law Journal surveyed search warrants filed in federal courts in Atlanta, Boston, Cleveland, and San Diego in 1980, 1988, and 1993 . . . practically all warrants now rely on information from confidential informants in some manner. In 1980, forty-six percent of the warrants cited an informant's word; in 1993, ninety-two percent of them did.").

114. *See generally* Curriden, *supra* note 2 (explaining that the ability to obtain warrants would greatly diminish without the aid of informants. Lack of informant cooperation would require law enforcement to seek out other forms of requisite evidence to establish the basis for obtaining a warrant).

eight offices in fifty-six countries throughout the world.¹¹⁵ This international presence is needed to combat the constant flow of illegal drugs into the United States. Indeed, fighting the war on drugs solely at home and ignoring the foreign importation problem would be ignoring the source of the problem and would prove to be a fruitless effort.

Of the five cases¹¹⁶ discussed thus far concerning DEA Agents exceeding the scope of their authority, at least¹¹⁷ two cases have dealt with informants either contacted abroad or working abroad.¹¹⁸ In *Khairallah v. United States*, the informant made initial contact with DEA Agents in Toronto, Canada while working as an informant for the Royal Canadian Mountain Police.¹¹⁹ Similarly, in *Toranzo-Claure v. United States*, the informant worked for the DEA in Bolivia from 1983 to 1991.¹²⁰ How many other cases have gone unrecorded is unknown, but it is probably safe to assume that the average foreign informant does not have the resources needed to bring a suit against the United States. Whether the informant's reasons are financial inability, lack of "know-how," or concern for safety, the likelihood of contesting a foreign cooperation agreement will be unlikely.

The role of the DEA has, however, expanded beyond mere domestic operations into a full-scale international effort with offices in fifty-six countries throughout the world. At these offices, the DEA surely works closely with local government and law enforcement officials from many different countries. In their capacities, these agents, for all practical purposes, represent the United States of America and the policies of the United States government with regard to law enforcement. We trust that these agents are acting in a legal, good faith-based, and principled manner.

On many of these foreign assignments, the DEA uses informants to effectively infiltrate many of the local drug conspiracies that support the larger supply channels that flow to the United

115. See DEA Website, at <http://www.usdoj.gov/dea/agency/foreign.htm> (last visited May 15, 2002).

116. *Cruz-Pagan*, 35 Fed. Cl. at 59; *Salles*, 156 F.3d at 1383; *Khairallah*, 43 Fed. Cl. at 57; *Doe*, 48 Fed. Cl. at 495; *Toranzo-Claure*, 48 Fed. Cl. at 581.

117. The term "at least" is used to illustrate that the *Cruz-Pagan* and *Salles* cases failed to discuss where the informants were contacted or the location of any work performed.

118. *Khairallah*, 43 Fed. Cl. at 58; *Toranzo-Claure*, 48 Fed. Cl. at 582.

119. *Khairallah*, 43 Fed. Cl. at 58.

120. *Toranzo-Claure*, 48 Fed. Cl. at 582.

States. Cooperating informants, with the expectation of financial compensation, often work for the DEA relying on oral and written agreements reached with supervising DEA Agents. Whether these agents are actually authorized to enter into these agreements and the kinds of representations they are making are issues that should warrant concern.

The recent pattern of cases emanating from the United States Court of Federal Claims have consistently denied the right to payment for contracts made by DEA officials lacking in actual or implied authority to contract.¹²¹ Unscrupulous and overzealous agents, on foreign assignment, could easily exploit these precedents. Domestically, "persons who cooperate in criminal investigations typically deal with the investigating agents and not their superiors, and may often be unaware of what level of authority is required to commit the government to contractual undertakings."¹²² If within the domestic arena an informant is unlikely to be aware of levels of authority, then the lack of awareness in an international arena is surely greater.

Any foreigner would expect oral agreements made and witnessed by U.S. DEA Agents to be honored. The United States Supreme Court has held, however, that "anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority."¹²³ Unfortunately, the likelihood of a foreign informant being able to accurately ascertain the authority of a supervising agent is highly doubtful. In fact, many would balk at the idea that the United States government would be willing to allow people to risk their lives over bogus awards and contracts concocted by unprincipled DEA Agents.

VI. DO RECENT CHANGES OFFER A VIABLE SOLUTION?

The drafting of new clauses into cooperating agreement forms, as evidenced by two recent cases, indicates at least *some* change, albeit minor change.¹²⁴ These clauses will protect against future lawsuits alleging breach of unauthorized promises. For example, clauses that address the scope of agent discretion and

121. *Cruz-Pagan*, 35 Fed. Cl. at 59; *Roy*, 38 Fed. Cl. 184; *Salles*, 156 F.3d at 1383; *Khairallah*, 43 Fed. Cl. at 57; *Doe*, 48 Fed. Cl. at 495; *Toranzo-Claure*, 48 Fed. Cl. at 581; *Humlen*, 49 Fed. Cl. at 497.

122. *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1380-81 (2001).

123. *Federal Crop Ins. Corp.*, 332 U.S. at 384.

124. *Doe*, 48 Fed. Cl. at 495; *Humlen*, 49 Fed. Cl. at 497.

disclaimers regarding promises of a sum-certain would certainly reduce the amount of claims filed by informants. It remains unclear, however, whether these modifications encourage change in the misconduct of agents or if they simply make the contracts more conscionable to the courts.

A clause stating that no sum-certain can be guaranteed by a government agent might clear up future misunderstandings and would be difficult to overlook. In *Doe v. United States*, upon an informant's reactivation, he was asked to sign a second cooperation agreement that stated: "[t]he amount of any payments paid to me by [the] DEA for my cooperation shall be at the discretion of [the] DEA, and no sum-certain can be guaranteed by any officer or employee thereof."¹²⁵ Certainly this clause would put a reasonable person on notice that their compensation is based solely at the discretion of the DEA, and that there is a possibility of nonpayment. This clause does not, however, clarify the nuances that a recommendation from a field agent will normally entail. A better clause might also explain that final discretion is likely to be exercised by a higher-ranking DEA official other than the agent currently being dealt with.¹²⁶ Furthermore, such higher-ranking agents have the discretion to be unfamiliar or unsympathetic to the informant's particular case on an at-will basis.

Clauses stating that payment will be discretionary and that any oral modifications to the written agreement will have no effect would be the most prudent modifications to existing cooperation agreement forms. In *Humlen v. United States*, the FBI chose to address the scope of its agreement by expressly stating, "[t]his document constitutes the full and complete agreement between Humlen and the FBI. Modifications to this agreement will have no force and effect unless and until such modifications are reduced to writing and signed by all parties thereto."¹²⁷ In response to this clause, the court held that the plaintiff's claims to enforce additional oral compensation "directly collides" with the plain language of the agreement.¹²⁸

The use of integration clauses can greatly reduce the amount of claims against the government by informants, but will not

125. *Doe*, 48 Fed. Cl. at 498.

126. See *Khairallah*, 43 Fed. Cl. at 62 (the office of the Deputy Assistant Administrator reviews memorandum requests for award payments and determines their approval, denial, or modification).

127. *Humlen*, 49 Fed. Cl. at 501.

128. *Id.* at 506.

always prove successful in preventing agent misconduct.¹²⁹ For example, the plaintiff in *Humlen v. United States*, asserts that when the agreement was presented for his signature, he asked why the written contract differed from the oral promises made.¹³⁰ "In response, the agents allegedly explained that the agreement had to be 'couched' in that way because it was a discoverable document . . . and thus could be used to discredit plaintiff's reliability and credibility."¹³¹ To no avail, the plaintiff maintained that the agents assured him that despite the wording of the contract, he would receive his promised compensation.¹³²

These recent modifications offer a solution only to the cautious and untrusting reader of these agreements. Signed cooperation agreements claiming that a supervising agent is only authorized to make recommendations, and that such recommendations are subject to the discretion of authorized agents, would certainly diminish the amount of claims alleging oral promises to informants. Perhaps an even stronger measure would be to mandate agents with contracting authority to complete a written form with the informant detailing the compensation arrangement that has been agreed upon. At a minimum, the informant should be asked to sign a disclaimer statement attesting that the informant is aware that any oral promises will be deemed irrelevant and that there is the possibility of nonpayment. Preventive drafting of this nature removes any appearance of impropriety from government agencies and should be considered in order to allow informants to make informed decisions regarding the risks associated with such endeavors.

VII. CONCLUSION

The burden of proof with regard to contracting authority will always fall upon the informant with regards to cooperation agreements.¹³³ Currently, the only way to assure that an informant contract is appropriately authorized is first to insist upon a written contract outlining compensation arrangements; second, to

129. The court made no determination regarding agent misconduct or upon the factual question of whether compensation promises were made or not. In fact, "during their respective depositions, each FBI Special Agent vehemently denied making any of the promises the plaintiff allege[d]." *Id.* at 503.

130. *Id.* at 501.

131. *Id.*

132. *Id.*

133. *Doe*, 48 Fed. Cl. at 501. See also, *City of el Centro*, 922 F. 2d at 821; *Kania*, 227 Ct. Cl. 458, 465; *Federal Crop Ins. Corp.*, 332 U.S. 380, 384 (1947).

obtain a copy of the most recent DEA Agent's Manual, and, finally, to request by name that one of the enumerated agents sign the agreement.

The decision to become an informant entails placing one's life and limb in danger for some sort of compensation. Whether that compensation is in the form of a reduced prison term or monetary reward, the end result is a future filled with fear that those prosecuted will seek vengeance. Thus, the decision to become an informant is one with dire consequences. Such consequences warrant well-informed decisions, free of deceitful puffery. Unfortunately, under current policies and regulations, informants will continue to make decisions based upon information provided by and subject to only their assigned agent's scruples.

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