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**TAKINGS—THE FEDERAL CIRCUIT DENIES
COMPENSATION FOR PASSENGER SCREENING
COMPANIES PUSHED OUT OF THE AIRPORT BY THE
AVIATION AND TRANSPORTATION SECURITY ACT:
*HUNTLEIGH USA CORP. V. UNITED STATES***

PAUL McBRIDE*

FOLLOWING THE terrorist attacks of September 11, 2001, Congress concluded that “fundamental change[s]” were necessary to rectify the ineffectiveness of existing airport security procedures.¹ These fundamental changes, enacted less than three months after the attacks, came in the form of the Aviation and Transportation Security Act (ATSA).² Nestled among ATSA’s numerous requirements was a provision that commanded the federalization of passenger and baggage screening responsibilities at the nation’s airports.³ By refusing to acknowledge that federalizing screening responsibilities obligated the federal government to pay just compensation to Huntleigh USA Corporation (Huntleigh), a private screening company, the Federal Circuit endorsed a taking of private property that violated Huntleigh’s right to just compensation under the Fifth Amendment’s Takings Clause.⁴

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¹ H.R. REP. NO. 107-296, at 53 (2001) (Conf. Rep.), *reprinted in* 2002 U.S.C.C.A.N. 589, 590.

² *See generally* Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C. (Supp. 2001)).

³ *Id.* § 101(g)(1), 115 Stat. at 603 (codified as amended at 49 U.S.C. § 44901 (Supp. 2001)).

⁴ *Huntleigh USA Corp. v. United States (Huntleigh IV)*, 525 F.3d 1370, 1373–74 (Fed. Cir. 2008).

In 1974, Congress enacted legislation that required airlines to begin screening passengers and baggage in the civil aviation system.⁵ To meet their obligations, many airlines contracted with private security companies that, for a fee, performed the required screening.⁶ In November 2001, Huntleigh, who began screening operations in 1989, had passenger and baggage screening contracts with approximately seventy-five airlines at thirty-five domestic airports.⁷ While some of Huntleigh's contracts were for fixed periods and others continued indefinitely, all were terminable upon notice by either party.⁸ In the decade prior to ATSA, however, no major airline terminated a contract with Huntleigh.⁹

Under ATSA, Congress directed a new federal agency, the Transportation Security Administration (TSA), to assume responsibility for airport security by February 19, 2002, and complete the federalization of passenger and baggage screening by November 19, 2002.¹⁰ To provide security during the interim period, rather than assuming the existing contracts or accepting assignments of the contracts as required by ATSA,¹¹ the TSA entered into new short-term contracts with screening companies, including Huntleigh.¹² Although only one airline actually acknowledged the termination of its contracts with Huntleigh, in view of ATSA's requirements, the airlines and Huntleigh allowed the contracts to expire according to their terms.¹³ As the federalization deadline approached, the TSA substituted federal screeners in place of the contracted screeners.¹⁴ As a result, within one year after the enactment of ATSA the new government monopoly completely replaced the market for private screening.¹⁵

⁵ Air Transportation Security Act of 1974, Pub. L. No. 93-366, § 315(a), 88 Stat. 409, 415 (repealed 1994).

⁶ *Huntleigh IV*, 525 F.3d at 1374.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See Aviation and Transportation Security Act, Pub. L. No. 107-71, §§ 101(g)(1), 110(c)(1), 115 Stat. 597, 603, 616 (2001).

¹¹ *Id.* §§ 101(g)(1)-(2), 115 Stat. at 603-04.

¹² *Huntleigh USA Corp. v. United States (Huntleigh III)*, 75 Fed. Cl. 642, 644 (Fed. Cl. 2007).

¹³ *Huntleigh IV*, 525 F.3d at 1376.

¹⁴ Brief for Plaintiff-Appellant at 20, *Huntleigh IV*, 525 F.3d 1370 (No. 2007-5118).

¹⁵ *Id.*

In November 2003, Huntleigh brought suit against the United States in the Court of Federal Claims asserting that as a result of ATSA, the government effected a taking of Huntleigh's contracts, going concern value, and goodwill without providing just compensation.¹⁶ Additionally, Huntleigh asserted that the government violated the provisions of ATSA by not providing adequate compensation when the TSA assumed the rights and responsibilities of Huntleigh's contracts.¹⁷ At three points prior to trial, the government attempted to secure the dismissal of Huntleigh's claims.¹⁸ In January 2005, the Court of Federal Claims denied the government's motion to dismiss for failure to state a claim and lack of jurisdiction.¹⁹ In its opinion, the court found that Huntleigh's contracts, goodwill, and going concern value were compensable property under the Fifth Amendment and that Huntleigh was entitled to present evidence to show that the property was taken.²⁰ In April 2005, the court rejected the government's motion for reconsideration finding that the government presented no new facts or arguments that would alter its opinion.²¹ Finally, at the close of fact and expert discovery, the court, ruling from the bench, relied on the findings contained in its previous orders and denied the government's motion for summary judgment.²²

Following a four-day bench trial, however, the court ruled in favor of the United States and ordered the dismissal of Huntleigh's claims.²³ This decision was a significant departure from the reasoning and conclusions contained in the court's previous orders.²⁴ In its opinion, the court attributed the differences to "the benefit of a complete record and a review of the applicable law."²⁵ Appealing the trial court's decision to the Federal Circuit, Huntleigh asserted that the trial court erred in finding that (1) the enactment of ATSA did not result in a taking of Huntleigh's property; and (2) that under the provisions of the Act,

¹⁶ *Huntleigh III*, 75 Fed. Cl. at 643.

¹⁷ *Id.*

¹⁸ Brief for Plaintiff-Appellant, *supra* note 14, at 4–9.

¹⁹ *Huntleigh USA Corp. v. United States (Huntleigh I)*, 63 Fed. Cl. 440, 442 (Fed. Cl. 2005).

²⁰ *Id.* at 444–50.

²¹ *Huntleigh USA Corp. v. United States (Huntleigh II)*, 65 Fed. Cl. 178, 178–79 (Fed. Cl. 2005).

²² Brief for Plaintiff-Appellant, *supra* note 14, at 9–10.

²³ *Huntleigh IV*, 525 F.3d 1370, 1373 (Fed. Cir. 2008).

²⁴ See *Huntleigh III*, 75 Fed. Cl. 642, 644 (Fed. Cl. 2007).

²⁵ *Id.*

Huntleigh was not entitled to adequate compensation for the assumption of its contracts.²⁶ Although its analysis of Huntleigh's takings claim differed from that of the trial court,²⁷ the Federal Circuit affirmed the trial court's decision.²⁸

In addressing Huntleigh's Takings Clause claim, the Federal Circuit began by recognizing that the property interests asserted by Huntleigh were cognizable under the Fifth Amendment.²⁹ The court then explained that because the government did not actually assume Huntleigh's contracts, any taking must be because "ATSA rendered the contracts and the going concern value and goodwill associated with Huntleigh's security screening business worthless."³⁰ Relying on its interpretation of established precedent, the Federal Circuit concluded that because ATSA was directed at the airlines and not at the screening companies, Huntleigh's losses were indirect, stemming only from a frustration of Huntleigh's business expectations, and therefore not a taking.³¹

In reaching its holding, the Federal Circuit focused primarily on two cases: *Omnia Commercial Co. v. United States*³² and *Air Pegasus of D.C. v. United States*.³³ In *Omnia*, the Supreme Court considered whether the government's conduct of requisitioning the steel plate produced by Allegheny Steel Company was a taking of *Omnia's* executory contract to purchase the steel at below market price.³⁴ The Supreme Court acknowledged that if the government took the contract, there would be an obligation to provide compensation; however, it cautioned against confusing the subject matter of the contract with the contract itself.³⁵ The

²⁶ *Huntleigh IV*, 525 F.3d at 1377.

²⁷ Compare *id.* at 1378–79 (finding that Huntleigh did possess a cognizable property interest but that the interest was not taken) with *Huntleigh III*, 75 Fed. Cl. at 646–47 (finding that Huntleigh did not have a cognizable property interest).

²⁸ *Huntleigh IV*, 525 F.3d at 1373–74. On August 13, 2008, Huntleigh filed a petition for a writ of certiorari with the Supreme Court seeking review only of the Federal Circuit's decision dismissing the takings claim. Petition for a Writ of Certiorari at 13, *Huntleigh USA Corp. v. United States*, No. 08-198 (S. Ct. Aug. 13, 2008). On December 1, 2008, the Supreme Court denied certiorari. *Huntleigh USA Corp. v. United States*, 129 S. Ct. 626 (2008).

²⁹ *Huntleigh IV*, 525 F.3d at 1378.

³⁰ *Id.* at 1379.

³¹ *Id.* at 1380.

³² *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923).

³³ *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1216 (Fed. Cir. 2005).

³⁴ *Omnia*, 261 U.S. at 507–08.

³⁵ *Id.* at 510–11.

Supreme Court stated that “[i]n exercising the power to requisition, the government dealt only with the steel company. . . . As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated, but ended.”³⁶ *Omnia* therefore stands for the proposition that a company’s consequential loss resulting from legislation that only indirectly impacts its contract rights is not compensable as a taking.³⁷ Consistent with *Omnia*, in *Air Pegasus* the Federal Circuit concluded that any frustration of Air Pegasus’s business expectations was indirect and not compensable.³⁸ It explained that because Air Pegasus neither operated nor owned any helicopters, restricting the airspace above Air Pegasus’s heliport leasehold was a regulation of third parties that only indirectly affected Air Pegasus.³⁹

Relying on *Omni* and *Air Pegasus*, the Federal Circuit determined that because ATSA was directed at the airline companies, any impact on Huntleigh was only incidental.⁴⁰ Stating that Huntleigh’s claim was indistinguishable from the facts of *Air Pegasus*, the Federal Circuit concluded that Huntleigh’s losses were “indirect, arising only as a consequence of ATSA’s elimination of the airlines’ security screening obligations” and therefore not compensable as a taking.⁴¹ The court expressly rejected Huntleigh’s contention that, unlike in *Omnia* and *Air Pegasus*, Congress specifically directed ATSA at airport security screening companies and that its damages were direct, rather than the product of the regulation of third parties.⁴²

While the court asserted that *Omnia* and *Air Pegasus* supported its holding, a closer examination of Huntleigh’s situation yields an opposite conclusion. The holdings of both *Omnia* and *Air Pegasus* were grounded in the fact that the regulation at issue was directed at a party other than the claimant, and therefore, the claimant’s loss was only consequential.⁴³ In *Omnia*, the government was concerned with obtaining steel plate necessary to support the ongoing war effort—it was only incidental that the

³⁶ *Id.* at 511.

³⁷ *Cienega Gardens v. United States*, 331 F.3d 1319, 1335 (Fed. Cir. 2003).

³⁸ *Air Pegasus*, 424 F.3d at 1216.

³⁹ *Id.* at 1215.

⁴⁰ *Huntleigh IV*, 525 F.3d 1370, 1380 (Fed. Cir. 2008).

⁴¹ *Id.* at 1380.

⁴² *Id.* at 1380–81.

⁴³ *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510–11 (1923) (directed at Allegheny Steel); *Air Pegasus*, 424 F.3d at 1215 (directed at aviators).

requisition required the termination of Omnia's executory contract.⁴⁴ Likewise, in *Air Pegasus*, the government regulation addressed the terrorist threat associated with the operation of aircraft over Washington D.C.—it was only incidental that this regulation affected Air Pegasus's ability to operate a heliport.⁴⁵

The Federal Circuit's assertion that ATSA was directed at the airlines, and that Huntleigh was only impacted indirectly as a third party, was the fundamental flaw in its analysis of Huntleigh's claim. By describing Congress's action as merely an "elimination of the airlines' security screening obligations[,]"⁴⁶ the court vastly oversimplified the purpose of ATSA. "Elimination" implies only that the obligation previously imposed by the government no longer exists. If this were the situation, a stronger argument could be made that Huntleigh's losses were incidental and its takings claim was unsupported.

In actuality though, ATSA did not simply eliminate the obligation; rather, it transferred responsibility for the obligation to the federal government.⁴⁷ The express purpose of the transfer, as reflected in Congress's findings, was to bring airport security functions under the federal government's control in order to correct the failings it attributed to the private security firms.⁴⁸ To that end, it is undeniable that Congress intended for ATSA to directly impact the private screening firms, like Huntleigh, by eliminating their role in passenger and baggage screening. In fact, significant portions of the floor debate on the Act were directed at removing contracted security firms from the nation's airports. As one Representative stated, "[t]he bill we passed in the House last week does not call for Federal law enforcement personnel to be entrusted with aviation security. Only the Senate version does. The House bill simply calls for the oversight of private firms that have already proven themselves incapable of doing the job."⁴⁹

⁴⁴ See *Omnia*, 261 U.S. at 510–511.

⁴⁵ See *Air Pegasus*, 424 F.3d at 1209–10.

⁴⁶ *Huntleigh IV*, 525 F.3d at 1380.

⁴⁷ Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(g)(1), 115 Stat. 597, 616 (2001).

⁴⁸ H.R. REP. NO. 107-296, at 53 (2001) (Conf. Rep.), reprinted in 2002 U.S.C.C.A.N. 589, 590.

⁴⁹ 147 CONG. REC. H7754 (daily ed. Nov. 6, 2001) (statement of Rep. Crowley); see also *id.* (statement of Rep. Moran) (stating that the House of Representative's refusal to eliminate private screening firms was a victory for the private screening industry and that federal screeners are necessary to restore the public confidence).

While helpful, resort to the legislative history is not necessary to reach the conclusion that *Omnia* is not applicable to Huntleigh's takings claim. This fact is apparent from the text of ATSA itself. In *Cienega Gardens v. United States*, the Federal Circuit considered legislation that effectively prevented owners of housing projects operated under Department of Housing and Urban Development programs from exercising their contract right to prepay their private mortgages after twenty years.⁵⁰ Finding that the legislation effected a taking, the court stated that, "[t]he proposition in *Omnia* about consequential loss or injury refers to legislation targeted at some public benefit, which incidentally affects contract rights, not, as in this case, legislation aimed at the contract rights themselves in order to nullify them."⁵¹ Immediately following ATSA's mandate that the government assume the responsibility for aviation security, Congress included two separate provisions that specified how the government was to address contracts between the private screening companies and the airlines.⁵² Congress's inclusion of these provisions evidenced its intent either to nullify the contract rights of the private screening companies or to perpetuate the contracts with the government in place of the airlines until the completion of federalization. Therefore, under *Cienega Gardens*, because ATSA was aimed directly at Huntleigh's contract rights, *Omnia* does not apply.⁵³

Furthermore, the court's argument that Huntleigh's claim was indistinguishable from the facts of *Air Pegasus* is incorrect. Drawing an analogy to *Omnia*, the court in *Air Pegasus* stated that the claimant did have a property interest in its leasehold, but that it did not allege that the restrictions regulated its operations under the lease.⁵⁴ The court's decision in *Air Pegasus* therefore was not that the company's property was not taken; rather, the court found the property interest asserted by Air Pegasus, the right to operate a heliport which "assumed the ability for the helicopters to use [the] airspace[.]" was not cognizable for purposes of the Fifth Amendment.⁵⁵ Considering that Air

⁵⁰ *Cienega Gardens v. United States*, 331 F.3d 1319, 1325–27 (Fed. Cir. 2003).

⁵¹ *Id.* at 1335.

⁵² Aviation and Transportation Security Act §§ 101(g)(1), 110(c)(1), 115 Stat. at 603, 616.

⁵³ See *Cienega Gardens*, 331 F.3d at 1335.

⁵⁴ *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1216 (Fed. Cir. 2005).

⁵⁵ *Id.* at 1214.

Pegasus neither owned nor operated any helicopters, the court noted that the “economic injury is not the result of the government taking Air Pegasus’s property, but is the more attenuated result of the government’s purported taking of other people’s property.”⁵⁶ In fact, counsel for Air Pegasus admitted at oral argument that its takings claim was really for a “derivative injury.”⁵⁷ Unlike in *Air Pegasus*, however, the Federal Circuit readily acknowledged that Huntleigh asserted a cognizable property interest and that it claimed that ATSA directly affected the property interest.⁵⁸ The court therefore devoted the majority of its opinion only to determining whether that property interest was taken. Because the court never reached this second stage of the inquiry in *Air Pegasus*, any analogy between the two cases used to support the holding is misplaced.⁵⁹

In 1922, Justice Holmes stated that “[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁶⁰ Only one year later, however, the Supreme Court in *Omnia* contributed to this danger by drawing an artificial distinction between the contract and the subject matter of the contract.⁶¹ Eighty years after the Supreme Court created the distinction, the Federal Circuit’s holding in *Cienega Gardens* clarified *Omnia* by acknowledging that compensation is due when “legislation is aimed at the contract rights themselves.”⁶²

The Federal Circuit’s holding in *Huntleigh IV*, however, created two significant and coordinated threats to the protection of private contract rights from government taking. First, by refusing to acknowledge that ATSA was “aimed at” and directly affected Huntleigh’s contract rights, the Federal Circuit undermined the limitation on *Omni* expressed in *Cienega Gardens*.⁶³ Second, by misstating the essential facts of *Cienega Gar-*

⁵⁶ *Id.* at 1215.

⁵⁷ *Id.*

⁵⁸ *Huntleigh IV*, 525 F.3d 1370, 1378 (Fed. Cir. 2008).

⁵⁹ See Petition for a Writ of Certiorari, *supra* note 28, at 19 n.1.

⁶⁰ *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

⁶¹ RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 91–92 (1985) (“The government takes private property when it compels an assignment of a contract right from the buyer for less than its fair market value. Surely, then, it ‘takes’ the contract when it chooses not to compel that assignment but to appropriate the contract’s subject matter.”).

⁶² *Cienega Gardens v. United States*, 331 F.3d 1319, 1335 (Fed. Cir. 2003).

⁶³ See *id.*

dens, the court drew an erroneous distinction between conceptually identical cases and thereby created an internal split in authority within the Federal Circuit.⁶⁴ The Supreme Court's failure to reverse the court's holding will inevitably result in uncertainty and unsatisfactory outcomes for future claimants as courts now have the option of following either *Cienega Gardens* or *Huntleigh IV*. While *Cienega Gardens* demands just compensation, a court choosing to follow *Huntleigh IV* will interpret nearly any legislation passed by Congress, despite its obvious intent to directly nullify contract rights and thereby effect a taking under *Cienega Gardens*, as merely an incidental frustration of business expectations.

⁶⁴ See Petition for a Writ of Certiorari, *supra* note 28, at 22–25.

