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Supreme Court

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BNA INSIGHTS: Boyle — Justice Scalia's Gift to Government Contractors Confronted With Potential Tort Liability



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Nearly 30 years ago, on June 27, 1988, the Supreme Court issued its decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). *Boyle*'s majority opinion, authored by Justice Antonin Scalia, established what is commonly known as the ''government contractor defense'' — federal government contractors' most enduring defense in product liability and other types of state law tort litigation. As *Boyle*'s robust progeny has demonstrated, the government contractor defense is Justice Scalia's greatest jurisprudential legacy for contractors facing potential tort liability.

In *Boyle*, the family of a Marine who drowned following an accidental military helicopter crash sued the manufacturer, alleging negligent design of the helicopter's escape hatch. A Virginia jury returned a verdict for the plaintiffs.

The U.S. Court of Appeals for the Fourth Circuit reversed, holding that the plaintiffs' state tort claims were federally preempted. In his 5-4 majority opinion, Justice Scalia affirmed, articulating a three-pronged, federal common law government contractor defense based on the significant conflict between state tort law and the uniquely federal interests underlying federal procurement of military equipment. *See Boyle*, 487 U.S. at 504-05, 511.

The *Boyle* government contractor defense is predicated on a broad federal preemption principle. Justice Scalia explained in *Boyle* that ''a few areas, involving 'uniquely federal interests' . . . are so committed by the Constitution and laws of the United States to federal control that state [tort] law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts — so called 'federal common law.' '' 487 U.S. at 504 (citations omitted). One of those areas of ''uniquely federal'' inter-

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ests is ''getting the Government's work done.'' *Id.* at 505-06.

For this reason, ''the liability of independent contractors performing work for the Federal Government, is an area of uniquely federal interest.'' *Id.* at 505 n.1. Justice Scalia indicated, however, that ''[d]isplacement will occur only where . . . a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law.' '' *Id.* at 507 (citation omitted) (second alteration in original). ''[T]he fact that the area in question *is* one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can.'' *Id.* at 507-08 (emphasis in original).

Justice Scalia then discussed a ''limiting principle to identify those situations in which a significant conflict with federal policy or interests does arise.'' *Id.* at 509 (internal quotation marks omitted). That ''limiting principle'' is the uniquely federal interests underlying the statutory exceptions to the Federal Tort Claims Act (FTCA) (i.e., the exceptions to the FTCA's general waiver of sovereign immunity). *See* 28 U.S.C. § 2680.

Since *Boyle* involved the government's selection of a design for a component of a military aircraft, Justice Scalia pointed to the FTCA's ''discretionary function exception,'' *id.* § 2680(a), as ''a statutory provision that demonstrates the potential for, and suggests the outlines of, a 'significant conflict' between federal interests and state law in the context of Government procurement.'' *Boyle*, 487 U.S. at 511 (citation omitted).

Although the Supreme Court has repeatedly declined to revisit *Boyle*, numerous lower court decisions during the past three decades have refined and applied the government contractor defense, including in nonmilitary and services contractor contexts (as discussed in more detail below). This substantial and still-growing body of post-*Boyle* case law has helped inform courts and litigants as to the contours of the government contractor defense.

In this article, we highlight some of that case law. We also offer several practical tips on how contractors can position themselves, including during contract negotiations, to successfully assert the government contractor defense in the event that they are sued by private parties for alleged tortious conduct arising out of contractual performance.

Proving the Three Prongs

Boyle holds that a contractor that manufactures products for the federal government is not liable in tort to third parties if —

(1) the United States approved reasonably precise specifications;

(2) the equipment conformed to those specifications; and

(3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.* at 512.

As discussed above, Justice Scalia recognized that the area of federal procurement implicates ''uniquely federal'' interests in ''getting the Government's work done.'' *Id.* at 505. For this reason, when a government contractor tort defendant establishes the three foregoing elements of the government contractor defense — typically by means of a well-supported motion for summary judgment — state tort law significantly conflicts with federal interests and, therefore, is impliedly preempted. *Id.* at 504-06, 512 (finding that ''[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production'').

The 'Approval' Prong: The key to the government contractor defense is the first prong — the meaningful involvement, review and approval by the government of the detailed design and safety features. Some courts require not only that a contractor show meaningful government review and approval of the overall product design, but also specifically of the allegedly defective component. *See, e.g.*, *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794 (5th Cir. 1993) (contractor must prove that the government reviewed the particular design feature at issue to succeed on the first element). Rubberstamping is not approval by the government.

Long-term use by the government constitutes approval in some circuits. *See, e.g., Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 950-51 (4th Cir. 1989) (government's continued use of equipment after learning of potential design problem constitutes approval).

Depending on the amount of discretion given to the contractor, performance specifications may be ''reasonably precise.'' *See Carley v. Wheeled Coach*, 991 F.2d 1117, 1125 (3rd Cir. 1991). Reasonably precise specifications exist as long as there is evidence of some degree of precision regarding the design feature at issue, e.g., designated minimum or maximum figures or tolerances.

The 'Conformance' Prong: The main dispute regarding conformance has been whether proof of conformance to government specifications precludes any allegations of manufacturing defect. The government contractor defense does not apply to ''manufacturing'' (as opposed to ''design'') defects. A manufacturing defect is one where the particular product at issue was not produced in conformance with the military's approved specifications.

As such, the contractor would not be able to succeed on the second element of the government contractor defense. *See McGonigal v. Gearhart Indus.*, 851 F.2d 774 (5th Cir. 1988). But if the evidence is that the particular feature at issue in the suit is a ''common feature'' present throughout the design of the entire fleet of such products, then the courts will convert the ''manufacturing'' defect allegations into ''design defects'' and apply the government contractor defense. *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989).

The 'Comparative Knowledge' Prong: Under the third prong of the government contractor defense, a contractor has the responsibility to warn the government of those hazards or risks of which the contractor has actual knowledge and the government lacks such knowledge.

The contractor is not held to a ''should have known'' standard but to an ''actual knowledge'' standard. If there is evidence that the government had knowledge equal to or greater than the contractor of the risks/hazards at issue, the contractor can satisfy this element. This knowledge can be acquired by the government through its own operational experience and independent of information provided to it by the contractor.

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Some courts have found that a failure-to-warn claim against a government contractor is not barred by the government contractor defense unless the contractor can show that the government specifically prohibited the contractor from placing or modifying a warning on a product or explicitly ''prescribed'' such warning. *See, e.g.*, *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 630-32 (2d Cir. 1990).

Other federal courts have adopted a lesser standard by which the government contractor defense can defeat a failure to warn claim, i.e., the contractor need only show that the government was aware of and considered the alleged hazard or deficiency. *See Tate v. Boeing Helicopters*, 55 F.3d 1150, 1153-54 (6th Cir. 1995); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 998 (7th Cir. 1996).

Recently, the Ninth Circuit in *Getz v. Boeing Co.*, 654 F.3d 852 (9th Cir. 2011) modified its long-standing ''prescribe'' rule and held that plaintiffs' state law claims, including its claim for failure to warn, were barred by the government contractor defense where the Army ''considered, reviewed, and determined which warnings to provide.'' *Id.* at 867.

Boyle 's Reach Beyond Military Equipment Product Liability Suits

Courts around the nation have grappled with how to apply the government contractor defense to sets of facts different from those presented to the court in *Boyle*. As a result, the defense has been expanded beyond military product manufacturers defending against state law claims for product defects, thereby making the government contractor defense available to a broader array of government contractors.

- *Non-military contractors:* The majority of circuits have held that the government contractor defense applies not just to military contractors but also to contractors working for civilian agencies, such as the General Services Administration (GSA), the U.S. Postal Service (USPS), the Environmental Protection Agency and the Department of Energy. For example, in *Carley*, the Third Circuit held that the government contractor defense, if satisfied, could preclude state law claims brought against the manufacturer of an ambulance that had conformed with specifications contained in a GSA contract. Another example is *Wisner v. Unisys Corp.*, 917 F. Supp. 1501 (D. Kan. 1996), where a federal district court applied the government contractor defense to claims against a contractor that had manufactured letter-sorting machines for the USPS. The Ninth Circuit, however, has held that the defense applies only to military contractors. *See In re Haw. Fed. Asbestos Cases*, 960 F.2d 806, 810-12 (9th Cir. 1992).

- *Services contractors:* While *Boyle* involved the sale of military equipment, courts subsequently have held that *Boyle*'s government contractor defense applies to cases involving the provision of services. Such services include, for example, security services (*see Griffin v. JTSI, Inc.*, Civ. No. 08-00242 ACK-LEK, 2009 WL 8761211 (D. Haw. July 28, 2009)); maintenance and repair services (*see Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003)); and environmental remediation services (*see Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400 (D.S.C. 1994)).

- *Subcontractors:* Some courts have extended the government contractor defense to protect subcontractors, as well as prime contractors, from state tort claims. In *Griffin*, 2009 WL 8761211, for example, the court applied the government contractor defense to a whistle-blower claim against a government subcontractor providing security personnel. Likewise, in *LaForge v. ECC Operating Services*, Civ. A. No. 07-523, 2010 WL 497657 (E.D. La. Feb. 5, 2010), the court found that a defendant's status as a government subcontractor, as opposed to a prime contractor, did not preclude it from asserting the government contractor defense at trial.

- *Certain commercially available items:* Courts even have extended the government contractor defense to cover items sold commercially where the items were once sold to the government. In *Glassco v. Miller Equipment Co.*, 966 F.2d 641 (11th Cir. 1992), the Eleventh Circuit applied the government contractor defense to claims by a civilian tree trimmer relating to a safety belt purchased at a civilian store where the belt initially was made under contract with the U.S. Army. Similarly, in *Skyline Air Service, Inc. v. G.L. Capps Co.*, 916 F.2d 977 (5th Cir. 1990), the Fifth Circuit applied the government contractor defense to a suit arising out of a helicopter crash during commercial logging operations where the helicopter was initially manufactured for the military.

Combatant Activities Preemption Based on *Boyle*

Along with the government contractor defense, the ''combatant activities preemption'' defense spawned by *Boyle*'s overarching preemption framework is an additional jurisprudential gift that Justice Scalia gave to government contractors facing potential tort liability.

As discussed above, ''[t]he crucial point [in *Boyle*] is that [Justice Scalia] looked to the FTCA exceptions to the waiver of sovereign immunity to determine that the conflict was significant and to measure the boundaries of the conflict.'' *Saleh v. Titan Corp.*, 580 F.3d 1, 6 (D.C. Cir. 2009). *Saleh* was a ''battlefield contractor'' tort suit brought on behalf of Iraqi nationals who alleged that they were tortured or abused by U.S. military contractors that provided interrogation and translation services at Abu Ghraib prison during Operation Iraqi Freedom.

In his frequently cited majority opinion, Senior Circuit Judge Laurence Silberman, joined by Circuit Judge Brett Kavanaugh — over Circuit Judge Merrick Garland's dissent — held that ''the plaintiffs' common law tort claims are controlled by *Boyle*.'' *Id.* at 5. More specifically, Judge Silberman indicated in *Saleh* that ''the relevant exception to the FTCA's waiver of sovereign immunity is the provision excepting 'any claim arising out of the combatant activities of the military or armed forces, or the Coast Guard, during time of war.' '' *Id.* at 6 (quoting 28 U.S.C. § 2680(j)).

He explained that ''the policy embodied by the combatant activities exception is simply the elimination of

tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit.'' *Id.* at 7. Further, ''the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control.'' *Ibid.*

Building on *Boyle*'s preemption principles and the foregoing policies underlying the FTCA combatant activities exception, *Saleh* articulated a combatant activities preemption test: ''During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted.'' *Id.* at 9. At least two other circuits have adopted *Saleh*'s combatant activities preemption test. *See In re KBR, Inc.*, *Burn Pit Litig.*, 744 F.3d 326, 351 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1153 (2015); *Harris v. Kellogg, Brown & Root Servs., Inc.* 724 F.3d 458, 480 (3d Cir. 2013), *cert. denied*, 135 S. Ct. 1152 (2015).

In certiorari-stage *amicus curiae* briefs filed in the Supreme Court, the United States has advocated a broader combatant activities test than the *Saleh* test, and in so doing, has endorsed a combatant activities preemption principle based on the ''general preemption framework set forth in *Boyle.*'' Br. for the United States as Amicus Curiae, *Kellogg, Brown & Root Servs., Inc. v. Harris*, No. 13-817 (U.S. Dec. 16, 2014), at 13.

Practice Tips for Government Contractors

Government contractors should consider the following practice tips to place themselves in the best position to assert *Boyle*'s government contractor defense when and if necessary.

Negotiation of contract terms and conditions: In negotiating special clauses, government contractors should:

1. Ensure certain safety-related activities are scheduled for government review.
2. Recommend qualifications needed by the government reviewers.
3. Include conformance (e.g., verification) events.
4. Ensure hazard and safety issues are in writing.

Marshaling the evidence: As a threshold matter, government contractors should remove these state law product liability and/or services-related tort suits to federal court whenever possible. Grounds such as federal officer removal are particularly appropriate in these cases, and the government contractor defense serves as a colorable federal defense. Following removal, government contractors should ensure that summary judgment motions based on the government contractor defense are supported by the following types of documents:

1. Relevant to the ''approval'' prong — the requests for proposals (RFP) or solicitation, including any specifications provided therein, and the contractor's response to such RFP; all contracts for the product or service at issue; all technical manuals; and all documents related to the ''review and approval'' events.
2. Relevant to the ''conformance'' prong — any DD250 or acceptance report for the product or service at issue; and inspection report documents, including in-process and final inspection reports.
3. Relevant to the ''comparative knowledge'' prong — all safety assessment reports, hazard analyses and incident reports relevant to the product or service at issue; and for products, all documents reflecting an effort to track the product's performance following delivery.

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