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Federal Forecaster

The Government Contractor Defense: A Potential Shield Against Tort Liability

The government contractor defense, as clarified in the U.S. Supreme Court's decision in *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988), can immunize a government contractor from tort liability in state or federal actions alleging that plaintiffs sustained injuries as a result of exposure to defective products or equipment manufactured or supplied under a government contract. If properly established, the defense can shield a company from tremendous potential tort liability exposure.

Understanding what the defense is, how it can be proved, and how it has been applied (and limited) by the courts since *Boyle*, is critical to companies defending themselves in litigation concerning products or equipment that originally may have been manufactured or supplied pursuant to government specifications or requirements. Early identification and timely assertion of the government contractor defense can also serve as a basis for removal of an entire action from an undesirable state court to a more predictable federal forum under the federal officer provision of 28 U.S.C. § 1442(a). Finally, there are several practices contractors should employ if possible to maximize their ability to rely on the government contractor defense in the future.

Boyle's Three-Prong Test

To prevail on this defense, the government contractor must prove each of the following three prongs: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the contractor warned the United States about any dangers in the use of the equipment that were known to the supplier, but not to the United States. *Boyle*, 487 U.S. 511-512. The purpose of the first two prongs is to ensure that the government exercised its discretionary decision in approving the equipment. The third prong ensures that the contractor conveyed all information necessary to allow the government to make a fully informed decision. It is an affirmative defense that must be asserted by the defendant and proved by a preponderance of the evidence (at least 51 percent).

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Actions Taken by Congress in Response to Safety Concerns with Imported Food, Toys and Other Consumer Products

Members of the House of Representatives and the Senate have held hearings, introduced more than 30 individual pieces of legislation, and appropriated additional funds to the key government agencies responsible for product and food safety.

Summary

In recent months, there have been a number of high profile recalls of imported consumer products, especially children's toys. There have also been a number of accounts of imported human and pet food being pulled from store shelves because of contamination. In response to these reports, members of the House of Representatives and the Senate have held hearings, introduced more than 30 individual pieces of legislation, and appropriated additional funds to the key government agencies responsible for product and food safety. This update serves to advise Reed Smith clients about these developments; identify key Members of Congress and congressional committees; and discuss legislative actions that have either been enacted into law or stand the greatest chance of being enacted into law before the end of the 110th Congress.

Product Safety

The key federal agency regulating the safety of consumer products, including those imported from overseas, is the Consumer Product Safety Commission ("CPSC"). Members of Congress have cited reduced testing and inspection staff at the CPSC, along with static overall funding levels, as key reasons for the increase in safety issues with imported products. Also of major concern to many in Congress is the amount of imported children's products found to contain lead. In response, a number of bills have been introduced in the House and Senate to reform the CPSC; increase its funding levels; and ban the use of lead in children's products. There have also been a number of hearings in the key congressional

committees with jurisdiction over the activities of the CPSC and its funding levels. Those committees are (1) the House Energy and Commerce Committee; (2) the Senate Commerce, Science and Transportation; (3) the Appropriations Committees in both houses of Congress.

Reforming the CPSC: Like other governmental agencies, the CPSC must have its operations periodically re-authorized by Congress. The last multi-year re-authorization was in 1990, with temporary extensions since. We expect CPSC reauthorization to be the legislative vehicle through which Congress addresses hazardous product imports in the 110th Congress. Currently, two versions of CPSC re-authorization legislation have the greatest likelihood of becoming law. Senate Bill 2045, the "CPSC Reform Act of 2007," is sponsored by Sen. Pryor (D-Ark.) and Sen. Inouye (D-Hawaii). Sen. Pryor chairs the Senate Commerce Subcommittee that directly oversees the CPSC, while Senator Inouye chairs the full Commerce Committee. House of Representatives Bill 4040, the "Consumer Product Safety Modernization Act" is sponsored by Congressman Rush (D-Ill.), who chairs the House Energy and Commerce Subcommittee that directly oversees the CPSC, and Congressman Dingell (D-Mich.), who chairs the full Energy and Commerce Committee.

Key elements of both bills include:

- **Increased funding and staffing levels.** Both bills increase the CPSC's funding level to \$80 million for the 2008 Fiscal Year, with 10 percent increases thereafter for the life of the bill. The \$80 million amount is \$17 mil-

lion more than what was appropriated in FY 2007, and represents the CPSC's largest increase in funding in more than 30 years. An additional \$20 million would go to upgrading research laboratories. In addition, S. 2045 orders the CPSC to increase full-time staffing levels from the current 420 to 500 by 2013, including more agents at the ports of entry into the United States.

- **A ban on the use of lead in children's products.** Currently, the only restriction on the use of lead in the paint coatings applied to children's products is 600 parts per million (16 C.F.R. § 1303.1). Both S. 2045 and H.R. 4040 would end that. Under the bills, any children's product having more than a trace amount of lead from either paint or any other source would now be considered a banned hazardous substance under the Federal Hazardous Substances Act (15 U.S.C. § 1261). The definition of what constitutes a trace amount differs in each bill. S. 2045 defines it as 200 parts per million for any part of the product. H.R. 4040 starts off with a 600 parts per million standard but then requires that amount to be reduced to 100 parts per million within four years of enactment. Both bills would also restrict the existing standard for the paint coating on children's products from the current 600 parts per million under the regulations to 90 parts per million.
- **A third-party safety certification for imported children's products.** Both bills put the onus on manufacturers of children's products to have their imported products tested by an

independent third party certifying to the safety of the product as a precondition to entry.

- **A requirement that manufacturers must label children's products with tracking information.** Both bills require tracking labels to identify the location and date of production in order to facilitate a recall.
- **The creation of whistleblower protections for employees.** Senate Bill 2045 provides protection for manufacturer and importers' employees to shed light on any problems along the supply chain. House of Representatives Bill 4040 has no similar provision.
- **Increased civil and criminal penalties for those who knowingly and willingly violate product safety law.** Under S. 2045, the maximum civil penalty under the Consumer Product Safety Act increases to \$250,000 per violation (up from the current \$5,000 cap per violation) with a cap at \$100 million (up from the current inflation-adjusted \$1.25 million cap) (15 U.S.C. § 2069(a)(1)). H.R. 4040 increases the initial penalty per violation to \$5 million on a temporary basis, and requires the CPSC to re-consider this under new regulations. H.R. 4040 caps the maximum penalty at \$10 million. H.R. 4040 also includes asset forfeiture as a possible criminal penalty. S. 2045 has no similar provision.

On Dec. 5, 2007, S. 2045 passed the Senate Commerce Committee and was sent to the full Senate for its consideration. On Dec. 19, 2007, H.R. 4040 passed the House of Representatives on a voice vote and was

sent to the Senate. With the House and Senate Commerce Committee in agreement on similar pieces of legislation, it is highly likely that differences between the two will be resolved so that the bill can be sent to the President for signature.

- **Increase appropriations funding for the CPSC.** While Congress deliberates reforming the CPSC, it has already enacted an interim increase in funding for the 2008 fiscal year. Congress funds the CPSC at \$80 million in FY 08 in the Omnibus Appropriations Bill signed into law by the President on Dec. 26, 2007 (P.L. 110-161). This is the same amount provided for FY 08 in the multi-year reauthorization bills noted above.

Food Safety

Of the 12 different federal agencies responsible for food safety, two play the biggest role overseeing the importation of food into the United States: the Food and Drug Administration ("FDA"), under the Department of Health and Human Services, and the Food Safety and Inspection Service ("FSIS"), under the Department of Agriculture. Both agencies have been criticized for their recent performance in the area of food safety. But of the two agencies, FDA has faced far greater challenges in adapting to the increasingly global nature of the food industry, in large measure because of the fact that FDA exercises jurisdiction over 80 percent of the food supply. FDA has repeatedly been criticized by members of Congress for not allocating sufficient resources to deal with the increase in the volume of food being imported into the United States. Further,

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“Actions Taken by Congress Re: Safety Concerns” – *cont’d from page 3*

A number of measures have been introduced in Congress to increase the budgets of the FDA and FSIS; provide the FDA with recall authority; and institute an early warning system to make consumers aware of recalls.

Congress has noted that both agencies lack the authority to issue a mandatory recall of contaminated food. As a result, a number of measures have been introduced in Congress to increase the budgets of the FDA and FSIS; provide the FDA with recall authority; and institute an early warning system to make consumers aware of recalls. Those measures that have either been enacted into law or stand the greatest chance of this are described below.

Signed into law: Legislation has already been enacted into law that establishes an early warning and notification system regarding contaminated human and pet food, including both imported and domestically produced food. On May 2, 2007, Senator Durbin (D-Ill.), who is the Assistant Majority Leader of the Senate, successfully included this language into broader legislation reauthorizing the FDA and its operations. The amendment establishes an early warning and notification system during pet food recalls; creates an adulterated food registry for imported and domestically produced food; and imposes a duty on any manufacturer, processor, or importer of food to notify within five days other parties directly linked in the food supply chain, if food is determined to be adulterated. On Sept. 27, 2007, this legislation was signed into law by the President (P.L. 110-85).

Increased funding for Fiscal Year 2008: In the Omnibus FY 08 spending bill signed into law by the President, the FDA received \$1.7 billion, which is about \$143 million higher than FY 07 (P.L. 110-161). The Omnibus also allocates \$930 million to the Food Safety and Inspection Service, an increase

of \$38 million over FY 07. Congress did not follow through with a threat from House Agriculture Appropriations Subcommittee Chairwoman, Congresswoman Rosa DeLauro (D-Conn.), to cut off the salaries of top FDA officials until they develop a plan to tackle food safety. But Congress did include language directing the FDA to “develop a plan that establishes measurable benchmarks for concrete improvements in the performance of its food safety mission,” and provided \$28 million for this.

The “Food and Drug Import Safety Act of 2007,” introduced by the Chairman of the House Energy and Commerce Committee: While many other bills addressing the safety of imported food have been introduced during the 110th Congress, only one has seen any other legislative activity beyond its introduction. House of Representatives Bill 3610, the “Food and Drug Import Safety Act of 2007,” introduced by the Chairman of the House Energy and Commerce Committee, Congressman Dingell (D-Mich.), has received one hearing since being introduced on Sept. 20, 2007 and referred to his committee. Energy and Commerce is a powerful committee in the House of Representatives, with jurisdiction and oversight over the FDA. Chairman Dingell’s sponsorship of legislation that strengthens food inspections increases the likelihood of that bill being signed into law.

Key elements include:

- **Imposition of User Fees:** H.R. 3610 imposes a user fee on imported food, with fees used for greater import inspection and research.

- **Restrictions of food importation to specific ports of entry:** H.R. 3610 restricts the importation of food to ports of entry located in a metropolitan area with a Food and Drug Administration food testing laboratory.
- **Creation of Orders to cease distribution and recall:** H.R. 3610 amends the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 351) to give the FDA the right to issue mandatory recalls of food. The FDA would first issue an order to cease distribution for food it determines to “cause serious, adverse health consequences or death.” The FDA would then be required to hold an informal hearing where manufacturers, importers, distributors and retailers subject to the order would have the opportunity to be heard. Afterwards, the FDA would be allowed to amend the order to include a recall of the food, if necessary.
- **Imposition of Country of Origin Labeling:** The USDA must label domestic and imported meat with its country of origin.
- **Creation of a Safe and Secure Food Importation Program:** The FDA must create a voluntary program that expedites imports for companies that abide by specific food safety and security guidelines. To take part in this program, each foreign facility that imports food into the United States must obtain a certification that it uses reliable methods to ensure compliance with U.S. standards.
- **Increase in civil penalties for manufacturers and importers:** H.R. 3610

increases the civil penalties for manufacturers and importers who willingly and knowingly violate the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 333). Under the Act, all who knowingly and willingly introduce adulterated food into interstate commerce face penalties of \$50,000 for the first offense, with a cap of \$500,000 for all violations adjudicated in a single proceeding. H.R. 3610 doubles those penalties for manufacturers and importers to twice those amounts: \$100,000 for the first offense, with a cap of \$1 million.

Conclusion

With the number of press reports of contaminated food and hazardous product imports in the marketplace continuing, we expect that Congress will continue to feel pressure to respond before it adjourns at the end of

2008. Congress has already appropriated additional funds to increase the level of food and product inspections at our nation’s ports, and we also expect a major reauthorization of the Consumer Product Safety Commission, including restrictions on the amount of lead in children’s products to be signed into law. We will continue to monitor actions taken within the 110th Congress on food and product safety, and update Reed Smith clients regularly.

**– Robert Helland, Ricardo Carvajal,
and Stephen P. Murphy**

Bob, Ricardo and Steve are all members of Reed Smith’s Import Safety Team. If you have questions about the services that our Team provides, please contact Tony Klapper at 202 414 9302.

New Government Contractor Code of Ethics and Conduct: Prudent Corporate Governance

This Final Rule was drafted to ensure mandatory minimum ethical standards for government contractors.

While most people were focusing on Thanksgiving turkey and upcoming holiday events, the *Federal Register* published the long awaited revision to the Federal Acquisition Regulations (“FAR”). On Nov. 23, 2007, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council published a rule requiring a contractor code of business and ethics. (72 F.R. 65873, Nov. 23, 2007) (“Final Rule”). This Final Rule amended FAR parts 2, 3 and 52, and addressed the requirement for: (1) a written Contractor Code of Ethics and Business Conduct and (2) the display of Federal Agency Office of the Inspector General (“OIG”) Fraud Hotline Poster. Although many companies have adopted business ethics plans, this Final Rule was drafted to ensure mandatory minimum ethical standards for government contractors. However, there are a few noted exceptions to this Final Rule, including:

- Commercial item contracts under FAR part 12
- Contracts not expected to exceed \$5 million with a performance period of more than 120 days
- Contracts to be performed entirely outside of the United States

The policy behind this Final Rule is for government contractors to create a program that: (1) is suitable to the size of the company and extent of its involvement in government contracting; (2) facilitates timely discovery and disclosure of improper conduct in connection with government contracts; and (3) ensures corrective measures are promptly instituted and carried out.

Code of Business Ethics and Conduct

Because of the modification of mandatory solicitation and contract clauses,

government contractors must have a code of business ethics and conduct, and must provide a copy to those employees working on the contract within 30 days of the contract award (unless the contracting officer establishes a longer period for compliance).

However, the standards of the contractor code of business ethics and conduct of the required rule are minimal and include:

- Having a written code of business ethics and conduct;
- Providing a copy of the code to each employee engaged in performance of the contract; and
- Promoting compliance with the code.

Ongoing Business Ethics and Business Conduct Awareness Program

Such contractors, unless they represent themselves as a small business concern, must also establish an ongoing business ethics and business conduct awareness program and internal control system within 90 days of a contract award. An internal control system must (1) facilitate timely discovery of improper conduct in connection with government contracts, and (2) ensure corrective measures are promptly instituted and carried out. The following are examples of what the Final Rule states such an internal control system should provide:

- Periodic review of company practices, procedures, policies, and internal controls for compliance with the contractor’s code of business ethics and conduct and the special requirements of government contracting;
- An internal reporting mechanism, such as a hotline, by which employ-

ees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports;

- Internal and/or external audits, as appropriate; and
- Disciplinary action for improper conduct.

Fraud Hotline Posters

The Final Rule also requires such contractors or subcontractors funded with disaster assistance funds to display the agency OIG fraud hotline poster, unless the agency does not have such a poster. The contractor may also have to display the Department of Homeland Security disaster assistance poster. Displaying the fraud hotline poster is defined in the Final Rule as “[d]uring contract performance in the United States, the Contractor shall prominently display in common work areas within business segments performing work under this contract and at contract work sites.” Furthermore, if the contractor maintains a website as a method of providing information to its employees, the Contractor can display an electronic version of the poster on the website.

Next Steps to Establish Compliance

This rule requires government contractors to exercise prudent corporate governance. As a first step, government contractors should determine whether this Final Rule applies to their organization and, if so, whether the existing code of business ethics is adequate. However, even if this Final Rule does not apply to your organization, the minimal nature of these requirements, and the knowledge that business practices often change quicker than policies and procedures, has led many

government contractors to embrace this ethics requirements, even though not required.

If not already implemented, government contractors should consider developing a government contractor compliance plan. As part of that plan, government contractors should consider:

- Conducting an inventory of the current policies and reviewing the policies to determine if they are still adequate.
- Reassessing current government contract ethics and training programs and ensuring the right em-

ployees and new employees receive training.

- Establishing Compliance or Ethics Officer.
- Instituting a hotline or whistleblower program for internal reporting by employees.
- Committing to revisit the government contractor compliance plan on an annual basis to determine if it is still adequate, and whether employees are consistently made aware of the importance of business ethics and conduct.

– Lorraine M. Campos and James P. Gallatin Jr.

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GAO Report Shows Increase in Protest Filings in Fiscal Year 2007

Background on Protests

A protest is an objection, submitted in writing by an interested party that opposes an agency solicitation for offers, the cancellation of a solicitation, or the award or proposed award of a contract. *See* FAR 33.101. Currently, there are three forums where a protest action may be heard and resolved. Specifically, a protest may be heard by: (1) General Accountability Office (“GAO”); (2) the procuring agency; or (3) Court of Federal Claims (“COFC”). However, the GAO is the most popular forum used to resolve government contract protest actions.

According to law, a GAO protest must be filed by an “interested party.” *See* 31 U.S.C. § 3553(a). Per law and implementing regulations, an “interested party” is an actual or prospective bidder or offeror with a direct economic interest in the procurement. *See* 31 U.S.C. § 3551(2); *see also* 4 C.F.R. § 21.0(a). The key phrases in the above definition are “actual or prospective bidder or offeror” and “direct economic interest.” These phrases are considered key because the protester must meet both tests. Generally, these key phrases mean that the protester must be an offeror that would potentially be in line for contract award if the protest is sustained.

In addition, protest actions must be timely filed and the GAO timeliness rules are strictly enforced. The timeliness requirements for filing protests at GAO are set forth in regulation. *See* 4 C.F.R. § 21.2. According to this regulation, a protest alleging improprieties in a solicitation must be filed before bid opening, or the time set for receipt of initial proposals, if the improprieties

were apparent prior to that time. *See* 4 C.F.R. § 21.2(a)(1). A solicitation defect that was not apparent before that time must be protested not later than ten (10) days after the defect becomes apparent. *See* 4 C.F.R. § 21.2(a)(1). In a negotiated procurement, if an alleged impropriety did not exist in the initial solicitation but was later incorporated into the solicitation by an amendment, a protest based on that impropriety must be filed before the next closing time established for submitting proposals. *See* 4 C.F.R. § 21.2(a)(1). In all other cases, protests must be filed not later than ten (10) days after the protester knew or should have known the basis of protest, whichever is earlier. *See* 4 C.F.R. § 21.2(a)(2).

Basis for Reporting GAO Protest Data

The Competition in Contracting Act of 1984 requires that the Comptroller General report to the Congress each instance in which a federal agency does not fully implement a recommendation made by GAO in connection with a bid protest decision. Accordingly, GAO submitted its annual report to Congress on Dec. 10, 2007. As a preliminary matter, the GAO Report indicated that there were no instances in which an agency did not fully implement a GAO recommendation during fiscal year 2007. In addition, the annual report contains statistical information that provides insight regarding protest actions at GAO for the most recent fiscal year.

GAO Statistics

According to the GAO Report, in fiscal year 2007, GAO received 1,318 bid protests that sought to challenge federal

In fiscal year 2007, the number of sustained decisions in favor of contractors was the most in the past five fiscal years.

agency procurement actions, and 93 requests for reconsideration, for a total of 1,411 cases. The 1,411 cases filed with GAO represent a 6 percent increase in filings when compared with the 1,327 total cases filed in fiscal year 2006. This is the first increase in case filings at GAO since fiscal year 2004 when a total of 1,485 cases were filed.

The below table summarizes the data contained in the GAO Report, as provided to Congress on Dec. 10, 2007. Moreover, the table presents GAO protest data as provided to Congress for fiscal years 2004 through 2007. With respect to each fiscal year, the below table shows: (1) total cases filed with GAO; (2) number of cases where alternative dispute resolution (“ADR”) was used; (3) number of sustains; and (4) sustain rate.

Trend Analysis of the GAO Statistics

As noted above, the number of total cases filed at GAO in fiscal year 2007 increased by 6 percent when compared with fiscal year 2006. Moreover, this is the first increase in filings since fiscal year 2004. The increase in total cases filed in fiscal year 2007 is the second most in five years. In fiscal year 2004, the 1,485 total case filings at GAO represented a 10 percent increase from fiscal year 2003. However, following fiscal year 2004, GAO experienced a downward trend in total cases filed. Specifically, the total number of cases

filed decreased 9 percent in fiscal year 2005 and then by another 2 percent in fiscal year 2006.

The upward trend in case filings may continue into fiscal year 2008. Such may be the case in part because of the sharp decline in the number of cases where ADR is being used. According to the GAO Report, ADR was used in only 62 cases in fiscal year 2007 when compared with 91 cases in fiscal year 2006. This is a decline of 47 percent. The below table shows that the number of ADR cases has steadily decreased since fiscal year 2004. Although not shown in the table, the ADR success rate (which indicates the percentage of cases resolved without a formal GAO decision) also decreased to 85 percent in fiscal year 2007, which was down from 96 percent in fiscal year 2006. These numbers indicate that in fiscal year 2007, more contractors elected to move forward with the protest action in order to receive a decision rather than use ADR. Likewise, the table shows a downward trend in recent years in the use of ADR, which ultimately translates into increased litigation.

An increase in the number of GAO protest decisions is not necessarily bad news for contractors. In fiscal year 2007, the number of sustained decisions in favor of contractors was the most in the past five fiscal years. Specifically, there were 91 favorable protest decisions for contractors in fiscal year

2007 compared with 72 sustained decisions in 2006. This is an overall increase of 21 percent. As shown above, the 91 sustained decisions are the most since fiscal year 2004 when GAO sustained 75 protest actions.

While the total number of sustained decisions increased in fiscal year 2007, the sustain rate declined slightly from fiscal year 2006. In fiscal year 2007, the sustain rate dropped slightly to 27 percent from 29 percent in fiscal year 2006. Generally, the sustain rate is usually in the 20 percent range, giving protesters a 1-in-5 chance in obtaining a favorable decision. That said, the fiscal year 2007 sustain rate is somewhat encouraging. Although the rate is a 2 percent decrease from fiscal year 2006, the fiscal year 2007 sustain rate is the second highest in the five-year period for which GAO reported its statistics to Congress.

Conclusion

The most recent GAO Report shows that protest filings are up and that the use of ADR is going down. Moreover, the report reveals that although the sustain rate remains in the 20 percent range, the 2007 sustain rate is the second highest in recent history.

– Keith D. Coleman

	FY2007	FY2006	FY2005	FY2004	FY2003
Total Cases Filed	1,411	1,327	1,356	1,485	1,385
ADR	62	91	103	123	120
Number of Sustains	91	72	71	75	50
Sustain Rate	27%	29%	23%	21%	17%

“The Government Contractor Defense...” – *continued from page 1*

The Boyle Case

Boyle involved a United States Marine Corps helicopter co-pilot who was killed when his helicopter crashed off of the Virginia coast during a training exercise. The co-pilot’s father brought a diversity action in federal district court against the company that built the helicopter for the U.S. government. At trial, the plaintiff principally argued that the helicopter’s emergency escape system was defectively designed under Virginia state law, claiming that the escape hatch should have opened in, instead of out, and was therefore ineffective in a submerged craft because of water pressure. The jury returned a verdict for the plaintiff, but the U.S. Court of Appeals for the Fourth Circuit reversed, holding, as a matter of federal law, that the government contractor defense immunized the contractor from tort liability.

The Supreme Court’s rationale in *Boyle* was based on several components, but the fundamental premise of the defense is that a contractor’s immunity from suit is and should be derivative of the government’s. The defense is designed to protect the government’s “discretionary function” in the federal procurement and approval process. The Supreme Court was concerned that imposing liability on government contractors would directly affect the terms of government contracts, and could result in contractors declining to manufacture equipment as designed by the government, or raise their prices. This is important because generally, contractors have no right of indemnification against the government absent some specific explicit statutory authorization.

Boyle held that the federal law government contractor defense can preempt state tort law where a “significant conflict” arises between state law (that would hold government contractors liable for design defects in equipment) and the uniquely federal interests in immunizing government contractors and protecting the government’s discretionary function. The Court acknowledged that making military equipment at times requires the balancing of many technical, military, and even social considerations, including the tradeoff between greater safety and greater combat effectiveness.

Boyle Has Been Applied with Mixed Results

Since *Boyle*, federal appellate and trial courts across the country have struggled to determine the scope of the government contractor defense and have applied the defense with varied results. Although the *Boyle* case involved a design defect in military equipment, courts following *Boyle* have extended the defense to shield government contractors from liability in cases beyond military equipment design defects. Some courts have extended the defense to non-military products and equipment. Other courts have construed *Boyle* more narrowly, limiting the government contractor defense exclusively to products or equipment designed for a military purpose. While most courts have applied *Boyle* to include immunity against state law failure-to-warn claims, the results have been varied depending upon the jurisdiction. Some courts have also extended *Boyle* beyond design defects to protect against manufacturing defects under certain circumstanc-

es. The government contractor defense has been extended to protect subcontractors as well if all of the *Boyle* prongs are satisfied.

Satisfying Boyle’s First Prong: The Government Approved Reasonably Precise Specifications

Courts have held this prong can be satisfied by demonstrating the government was intimately involved in a “continuous exchange” or “dialogue” at various stages of the design and development process. Contractors should demonstrate that the government was both “knowledgeable and concerned” about the contents and warnings. Contractors must show that the government exercised its discretionary function by creating, approving or participating in the design of the product or equipment, or by showing that the government played a significant role in evaluating, reviewing, modifying or testing the equipment to ensure compliance with government specifications. Imprecise or general design guidelines that leave discretion with the contractor will not satisfy the first prong of the government contractor defense.

Courts have consistently held the contractor must show government approval by more than a “mere rubber stamp” of the contractor’s work. Thus, the defense has been rejected as a matter of law in cases where the government merely approved the product design without much oversight or involvement, or left too much discretion regarding the design to the contractor.

The following is a list of military products or equipment that courts have held satisfied *Boyle*’s first prong:

- aircraft pilot restraint system
- Naval vessel accommodation ladder
- fuel tank and exhaust system of military trucks for Marines
- tandem hooks for Army helicopter
- protective cables for military aircraft
- lineman’s belt
- ball bearings used in Army helicopter engine
- wiring system for Air Force aircraft
- Navy aircraft ejection seat
- Army weapon simulator used in military training
- fighter jet aircraft fuel pump
- Air Force aircraft seat data recorder
- Navy aircraft landing gear
- military night-vision goggles
- missile-launcher simulator radiator system

Courts have held that if the products or equipment at issue were designed under government specifications and otherwise meet the *Boyle* test, the defense applies to design defect claims even if the products were military surplus products and used only by civilians for non-military purposes. Thus, products made under specifications to the military that are incidentally sold commercially, such as a military surplus lineman’s belt, a military surplus helicopter, or welding rods, have each been held to come within the ambit of the government contractor defense.

Military vs. Non-military Contractors

Several courts have extended the government contractor defense to protect manufacturers of *non-military* products:

- ambulance manufactured to government specifications
- flu vaccine manufacturer
- condenser fan in an air conditioner
- U.S. Postal Service mail-sorting machine keyboard and console
- cattle vaccine
- U.S. Postal Service Vehicles
- firefighter coat and gloves

Some other courts have held that the government contractor defense is available *only* to manufacturers of military products. These courts have required that the product or equipment must have been designed for military purpose in order for the defense to apply in the first place. *E.g.*, *Allison v. Merck & Co.*, 878 P.2d 948 (Nev. 1994) (held defense did not apply to vaccine, but only to military equipment). Some courts have also rejected the defense where the products at issue were sold or readily available commercially, outside of the military context. *E.g.*, *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 812 (9th Cir. 1992) (government contractor defense did not apply to immunize defendant contractors that supplied commercial insulation containing asbestos on board Navy vessels against failure-to-warn claims).

Boyle Prong 2: Conformance to Governmental Specifications

To satisfy the second prong of the *Boyle* test, contractors are required to establish that their product or equipment conformed to the government’s specifications. Courts have consistently held that this prong is met, as a matter of law, if the product or equipment was accepted and used by the govern-

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A defendant contractor must show that it warned the United States about dangers in the use of the equipment which were known to the contractor, but not to the United States.

ment over a period of time and/or where there is no substantial evidence to support a finding of a manufacturing defect in the product at issue. *E.g.*, *Perez v. Lockheed Corp.*, 81 F.3d 570 (5th Cir. 1996) (Air Force accepted a C-5A aircraft and used it for more than 20 years without any significant problems). The military procurement process itself is often seen as persuasive evidence of product conformity to precise specifications where it can be shown the process involved a continuous exchange between the contractor and the government. The contractor generally only need demonstrate that the product or equipment at issue conformed with all *material* specifications or requirements. *E.g.*, *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989) (conformity met unless product deviates from the design to a material degree).

Boyle Prong 3: Knowledge/Warning of the Dangers in the Use of the Equipment

To satisfy this prong of the defense, a defendant contractor must show that it warned the United States about dangers in the use of the equipment that were known to the contractor, but not to the United States. Courts have held that this is an “actual knowledge” standard. *E.g.*, *Guerinot v. Rockwell Int’l Corp.*, 1991 WL 4105 (9th Cir. 1991) (applying the actual knowledge standard and finding that there was no evidence of any contractor knowledge of the risks alleged). In most jurisdictions, this prong can be satisfied where the government and the contractor *both* had knowledge of the danger, or where *neither* had knowledge of the danger. *E.g.*, *Oliver v. Oshkosh Truck Corp.*, 96

F.3d 992 (7th Cir. 1997) (third prong satisfied where neither the contractor nor the government had actual knowledge of the particular danger caused by the design); *Trevino v. General Dynamics Corp.*, 862 F.2d 1487 (5th Cir.), *cert. den.*, 493 U.S. 935 (1989) (third prong satisfied where the government and the contractor *both* had knowledge of the danger).

Contractor defendants may be able to satisfy this prong by alternatively showing that the government was in a superior position to assess the risks or warnings from use of the product or equipment in question. *E.g.*, *Ramey v. Martin-Baker Aircraft Corp.*, 874 F.2d 946 (4th Cir. 1989) (a showing that the government had knowledge of the dangers is sufficient to establish the third element of the *Boyle* test, without having to address whether the defendants knew of any risks).

Difficulty with proof issues regarding the knowledge of the dangers prong typically makes it the most difficult element of the *Boyle* test to establish as a matter of law. Accordingly, courts often send this issue to the jury rather than make a determination on summary judgment. The relevant case law reflects several “battles of the experts” during trials on this very issue. *E.g.*, *Sundstrom v. McDonnell Douglas Corp.*, 816 F. Supp. 577, 586 (N.D. Cal. 1992) (remanding to determine if Air Force had actual knowledge of danger of aircraft data recorder and if contractor provided adequate warning).

Application of the Defense Against Failure-to-Warn Claims

Courts have reached inconsistent results applying the government con-

tractor defense to strict liability failure-to-warn claims (claims that the product or equipment was defective or unreasonably dangerous for failure to include a warning). Federal courts within the Third, Fourth, Fifth, Sixth Circuits, and the District of Columbia Circuit, have held that if the defense is proved with respect to design defect claims, it should logically also bar related strict liability failure-to-warn claims. *E.g., Tate v. Boeing Helicopters*, 55 F.3d 1150, 1154 (6th Cir. 1995). These courts have recognized that requiring a contractor to produce evidence of a prohibition of warnings is inconsistent with

the exercise of governmental discretion, which is at the core of the government contractor defense.

Courts within the Seventh Circuit have applied the government contractor defense against failure-to-warn claims, but only upon the contractor's showing that the government exercised its discretion, approved the warnings, and that the warnings conformed to the government's requirements. *E.g., Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1003 (7th Cir. 1996).

Courts within the Ninth Circuit have adopted a stricter approach to applying

the government contractor defense to failure-to-warn claims than most other federal appellate courts. These courts place the burden on the contractor to establish that the government prohibited the contractor from providing its own warnings or that the government otherwise affirmatively exercised its discretion as to whether or not to place warnings. *E.g., Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d 582 (9th Cir. 1996). Although plaintiffs often argue the defense is unavailable because the contractor failed to warn the end-user

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plaintiff, the Supreme Court in *Boyle* only required that the contractor warn the government about any dangers in the use of the equipment that were known to the supplier, but not to the government. The Court never discussed warnings to end-user victims. See *Boyle*, 487 U.S. at 513; *Kerstetter v. Pacific Sci. Co.*, 210 F.3d 431, 435 (5th Cir.), *cert. denied*, 531 U.S. 919 (2000) (“Contractors need not warn the victim directly”).

The Defense Usually Does Not Apply to Manufacturing Defects

Courts in most federal jurisdictions have held that the government contractor defense is *not* available against claims that the product or equipment in question was defective because of a manufacturing defect or negligence. E.g., *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983). Some defendants have been successful in convincing courts in a few federal circuits to extend the defense in limited situations where it can be shown that the manufacturing defect arose out of the defective specifications themselves. E.g., *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1997) (nature of defect causing F-16 Fighter Jet to crash was unknown and court extended defense to include those defects inherent in the design or system that the government approved); *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794 (5th Cir. 1993) (court concluded that a manufacturing defect could be included within the *Boyle* defense if the defect arose out of the government’s specifications); *Snell v. Bell Helicopter Textron*, 107 F.3d 744 (9th Cir. 1997) (holding that government contractor defense can apply to manufacturing defects

in certain circumstances, but denying summary judgment on the defense).

Removal to Federal Court Based on the Government Contractor Defense

Because federal courts are generally considered to be a more predictable and favorable venue than most state courts, defendant contractors should carefully evaluate tort product liability claims asserted against them to determine, as early as possible, if they can assert the government contractor as a potential defense and remove the action to federal court. Defendants only have 30 days from the service of the complaint (or from the formal service of another pleading or other document first giving rise to the defense) to file their notice of removal, so early identification and development of the defense is crucial. The 30-day period cannot be waived or extended.

The basis for removal applying the government contractor defense is the federal officer provision of 28 U.S.C. § 1442(a). To remove under the federal officer provision, the defendant contractor must: (1) demonstrate that it acted under the direction of a federal officer; (2) raise a “colorable defense” to the plaintiff’s claims; and (3) demonstrate a causal nexus between the plaintiff’s claims and the defendant’s acts performed under color of federal office. *Mesa v. California*, 489 U.S. 121, 128 (1989). The consent of the other defendants is not required for federal officer removal. A “colorable” government contractor defense will justify removal of the entire state court action to federal court. To withstand the often-filed remand motion, however, contractors have the burden of putting forth

The Supreme Court in Boyle only required that the contractor warn the government about any dangers in the use of the equipment.... The Court never discussed warnings to end-user victims.

some evidence (by declaration or otherwise) as to each of *Boyle's* three prongs. It is well established that a defendant need not prove the merits of its government contractor defense for removal; only that the defense is "colorable" (a somewhat less showing than required to survive summary judgment).

A colorable defense resulting in removal will then allow contractors to prove the merits of the government contractor defense, which arises under federal law, in federal court. Because plaintiffs' lawyers typically favor litigating their personal injury cases in state courts, a contractor's federal officer removal in one case may help limit future state suits by plaintiffs' lawyers against the contractor based on the same product or equipment.

Maximizing Potential Future Use of the Government Contractor Defense

Government contractors can do several things to maximize their ability to avail themselves of the government contractor defense in the future:

- Whenever possible, the government contract and related documentation should provide that the product or equipment has been produced or designed pursuant to particular government specifications.
- The "Statement of Need" for commercial items may establish government approval of specific features or essential characteristics of the product or equipment.
- Concept Papers may be used to obtain government review and approval of new procedures that should be described in sufficient de-

tail to constitute "reasonably precise specifications."

- The contractor should document during the procurement process the government's involvement as much as possible in the design, evaluation, approval and testing of the product or equipment.
- Create integrated product teams to establish the "back-and-forth" exchange of design information with the government.
- Use Four Milestone Acquisition Procedures to obtain information relevant to the government contractor defense.
- *E.g.*, DoD Regulation 5000.2-R provides that for major defense acquisition programs, the four milestones consist of obtaining approval to: (a) conduct concept studies, (b) begin a new acquisition program, (c) enter engineering and manufacturing development, and (d) produce or field/deploy equipment.
- The contractor should have a comprehensive document retention policy to retain all documents evidencing government involvement, as well as actual contracts and specifications.
- Because some injuries have long latency periods (*e.g.*, asbestos or chemical exposures), FOIA requests and U.S. Archives searches can be used for older products to collect and assemble any missing documents.
- Component manufacturers or assemblers should obtain copies of documents that may be in the hands

of the actual manufacturer of the finished product or equipment that is sold to the U.S. government.

- Memorialize in writing communications to the government of any known dangers related to potential use (or misuse) of the product or equipment.
- Seek government approval in writing before providing your own warnings.
- Document if the government is providing its own warnings or instructions.
- Document if the government has prohibited the contractor from employing its own warnings or instructions.

– *Lawrence S. Sher*

The Government Contractor Defense and Related Indemnification Concerns

“The Government made me do it...or at least they should pay for it”

The government contractor defense, as established by the U.S. Supreme Court in *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988), can immunize a government contractor from tort liability in state or federal actions.

Where a contractor has been sued based on allegedly defective products or equipment that were manufactured under a government contract or pursuant to government specifications, the government contractor defense may protect your company from tort liability.

Understanding the government contractor defense and ensuring that your company has the ability to use it, if needed, is crucial to those involved in contract negotiation, administration, litigation and risk management. Reed Smith offers a CLE presentation that will enable you to:

- Learn about the government contractor defense, what it is (and what it isn't), how it works, how it has been applied by the courts, and how it can be successfully proved.
- Examine the type and nature of products to which courts have applied the government contractor defense, including both military and non-military products.
- Delve into the defense's application to strict liability design defect and failure-to-warn claims.
- Explore in detail how to remove state court tort actions to federal court based on the government contractor defense.
- Evaluate the possibility of indemnification or contribution claims against the U.S. government and/or other manufacturers that may have caused the product defect.
- Consider ways to increase the possibility of indemnification from the government.
- Gain practical insight as to steps you can take to gather and strengthen proof for the government contractor defense.

Lawrence Sher, a partner in Reed Smith's Washington, D.C. office, focuses his practice on high-stakes commercial litigation and products liability defense, and has successfully employed the government contractor defense against state court product liability claims in several cases. He also teaches Reed Smith's CLE presentation on the subject and can tailor the presentation to suit your company's needs; his contact information is listed to the right.

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