ANDREWS LITIGATION REPORTER

THOMSON WEST

Government Contract

COMMENTARY

REPRINTED FROM VOLUME 22, ISSUE 5 / JULY 14, 2008

The Government Contractor Defense: A Potential Shield Against Tort Liability For Service Contractors

By Lawrence S. Sher, Esq.

For 20 years contractors have been using the "government contractor" defense as enunciated by the U.S. Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

The defense generally shields contractors 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.

Since *Boyle*, federal trial and appellate courts have extended the defense to immunize government supply contractors against tort liability in cases involving non-military products and equipment supplied under contracts with the United States.

Contractors providing services to the government can use the defense as well. A number of courts construing *Boyle* since 1988 have held that the government contractor defense can apply equally to immunize federal service contractors under performance contracts and supply contractors under procurement contracts.

Understanding how courts have applied the government contractor defense since *Boyle* in cases involving service contracts is critical to companies defending themselves in litigation concerning tort liability arising from their performance contracts.

By focusing on the elements necessary to establish the government contractor defense, service companies can structure their contracts to increase their ability to rely upon the defense in any future litigation. Early identification and timely assertion of the defense are crucial as the defense can 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). These three topics will be addressed below.

Boyle and the Establishment of the Government Contractor Defense

Boyle involved a U.S. Marine Corps co-pilot who was killed when his helicopter crashed off the Virginia coast during a training exercise. The co-pilot's father brought a diversity action in federal court against the company that supplied the helicopter to the government.

At trial the plaintiff principally argued that the helicopter's emergency escape system was defectively designed under Virginia law, claiming that the escape hatch should have opened in instead of out and therefore was ineffective in a submerged craft because of water pressure. The jury returned a verdict for the plaintiff.

The 4th U.S. Circuit Court of Appeals reversed, holding that as a matter of federal law the government contractor defense preempted state tort law and immunized the contractor from tort liability.

The Supreme Court affirmed the 4th Circuit and applied the federal common-law government contractor defense based on the government's "uniquely federal interests" in its contracts and the "significant conflict" between federal policies and state law. *Boyle*, 487 U.S. at 504-05, 511.

The high court framed this conflict as the uniquely federal interest in immunizing contractors and protecting the

government's discretionary function in military procurement against state tort law that would hold companies liable for design defects in equipment supplied to the military. Thus, the court essentially extended the government's sovereign immunity derivatively to contractors, recognizing that they perform discretionary functions for the United States.

With the goal of protecting the government's "discretionary function" in the federal contracting process, the Supreme Court concluded that the contours and parameters of the defense were shaped by the discretionary-function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a).[1]

The discretionary-function exception itself stems from the doctrine of sovereign immunity. The exception relieves the government from liability for its employees' or agents' performance of their duties involving discretionary functions (duties that necessarily involve decisions based on judgments or considerations grounded in public policy).[2]

The government contractor defense can apply equally to immunize federal service contractors under performance contracts and supply contractors under procurement contracts.

The Supreme Court expressed concern that imposing liability on government contractors would affect the terms of federal contracts and could result in companies' declining to manufacture equipment, raising their prices or otherwise passing the costs of liability judgments rendered against them to the United States.

The Supreme Court in *Boyle* set forth a now well-known three-part test a company must pass to prevail on the government contractor defense. *Boyle*, 487 U.S. 511-512. Specifically, the defendant contractor must prove that:

- The United States approved reasonably precise specifications;
- The equipment conformed to those specifications; and
- The contractor warned the United States about any dangers in the use of the equipment that were known to the company but not to the government.

The purpose of the first two prongs is to ensure that the government exercises its discretionary function in approving the products or equipment. The third prong ensures that the contractor conveys all information necessary to allow the government to make a fully informed decision.

The Government Contractor Defense Applied To Service Contractors

Compared with product liability defective-design lawsuits in the procurement context, relatively few cases since *Boyle* have addressed the issue of whether the government contractor defense applies to immunize contractors against tort claims arising from performance of service contracts.

This is particularly curious considering *Boyle*'s direct reliance on *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), a pre-World War II decision that arguably planted the seeds of what has become the government contractor defense today.

In *Yearsley* the defendant company damaged certain real property of the plaintiff landowners during the construction of dikes along the Missouri River pursuant to a federal government contract. The construction project was statutorily authorized by Congress and supervised by federal officials. *Id.* at 19.

The Supreme Court held that the project was validly conferred by an act of Congress and that there was "no liability on the part of the contractor for executing Congress' will." *Id.* The court concluded that the contractor, as an agent of the United States, could not be held liable for damages resulting from the defective construction of a dam as long as the company followed the government's specifications for the dam's construction.

The court thus based the sovereign-immunity defense in *Yearsley* on traditional common-law agency principles where the contractor-agent had no discretion in the design process and completely followed the government's specifications. *Id.* at 20-22.[3] The *Boyle* government contractor defense thus has its very roots in a service contract scenario.

Since *Yearsley* and *Boyle* were decided several courts have held that the defense applies equally to shield both supply and service contractors. The courts generally construed the Supreme Court's reasoning in *Boyle* (the "federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts") as dispositive of this threshold issue. *Boyle*, 487 U.S. at 506-07.

These courts also emphasized *Boyle*'s reliance on *Yearsley*, as explained above. Some other courts have pointed out that since *Boyle* the Supreme Court itself has recognized the extension of the government contractor

defense beyond the context of military procurement. *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) (citing *Boyle* and noting that "[w]here the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert a defense").

At least two federal appellate courts have recognized that the government contractor defense should be extended to immunize service contractors.

First, in *Carley v. Wheeled Coach*, 991 F.2d 1117, 1128 (3d Cir. 1993), the 3rd Circuit recognized that the defense should apply to military and non-military contractors alike in both the supply and service contract contexts.[4]

Although *Carley* itself involved the purchase of non-military equipment (ambulances) under a government procurement contract, the court, citing *Boyle* and *Yearsley*, observed that "[a] private contractor who is compelled by a contract to perform an obligation for the United States should, in some circumstances, share the sovereign immunity of the United States." *Id.* at 1120.

The Supreme Court itself has recognized the extension of the government contractor defense beyond the context of military procurement.

By way of example, the court recognized that this exception had been extended in previous cases to government contractors that performed the discretionary functions of designing roadways and bridges. *Id.* at 1122.

Later, in *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1344 (11th Cir. 2003), the 11th Circuit applied the government contractor defense to bar state tort claims against a service contractor.

"Although *Boyle* referred specifically to procurement contracts, the analysis it requires is not designed to promote all-or-nothing rules regarding different classes of contract," the court said. "Rather, the question is whether subjecting a contractor to liability would create a significant conflict with a unique federal interest." *Id.* at 1334.[5]

Since *Boyle* several federal district courts have recognized that the government contractor defense, if properly established, applies to immunize federal service contractors from state law tort liability.[6]

In some of these cases the courts said the service contractors were entitled to summary judgment based on the government contractor defense; in others, the defendants were unable to establish each element of the defense, and summary judgment was denied.

Establishing the Government Contractor Defense

- The United States approved reasonably precise specifications.
- The equipment conformed to those specifications.
- The contractor warned the United States about any dangers in the use of the equipment that were known to the company but not to the United States.

The majority of the courts analyzed the availability of the defense by first determining if the service contractor defendant could satisfy the discretionary-function exception to the FTCA and then by applying the three-part test set forth in *Boyle* but modifying it slightly to apply to service contractors. *See O'Connor v. Boeing N. Am.*, 2005 WL 6035255, at *19 (C.D. Cal. Aug. 18, 2005) (noting that the discretionary-function exception to the FTCA applies to service contractors based on *Boyle* and observing that "[f]ailure to protect contractors from tort liability arising from their performance of a government contract weakens the effect of the discretionary-function exception"); *Askir v. Brown & Root Servs. Corp.*, 1997 WL 598587 (S.D.N.Y. Sept. 22, 1997) (granting service contractor summary judgment based on the government contractor defense); *Richland-Lexington Airport Dist. v. Atlas Props.*, 854 F. Supp. 400 (D.S.C. 1994) (granting service contractor summary judgment based on the government contractor defense); *Lamb v. Martin Marietta Energy Sys.*, 835 F. Supp. 959 (W.D. Ky. 1993) (finding that the government contractor defense may be applied to immunize non-military service contractors under performance contracts but declining to grant summary judgment based on the evidence in record); *Crawford v. Nat'l Lead Co.*, 784 F. Supp. 439, 445 n.7 (S.D. Ohio 1989) (recognizing that "[a]lthough the *Boyle* court discussed the government contractor defense within the context of a procurement contract, the defense is viable with regard to performance contracts," but finding against the defendant on other grounds); *see also Arnhold v. McDonnell Douglas Corp.*, 992 S.W.2d 346, 347-48 (Mo. Ct. App. 1999) (affirming dismissal on summary judgment in favor of a service contractor based on the government contractor defense).[7]

Elements Required to Establish the Government Contractor Defense

The courts applying *Boyle* to federal service contracts, as opposed to supply contracts, illustrate that it is generally more difficult for such contractors to establish the government contractor defense. For supply contracts the courts essentially have presumed the existence of unique federal interests in the contracts' subject matter.

Courts also tend more easily to accept that the government exercises its discretionary function when procuring supplies for military or other specific governmental purposes rather than when it contracts for a range of services, many of which may not involve discretionary functions.[8]

Guidance gleaned from the service contractor cases decided since *Boyle* demonstrates that government service contractors that plan to assert the government contractor defense should be prepared to establish all the following elements:[9]

- The action challenged under the contract:
  - — was an exercise of discretionary function on behalf of the government under the FTCA;
  - — involved the exercise of government judgment or choice; and
  - — involved public policy judgment;
- *Boyle*'s three-part test:
  1) The service contractor performed the contract in accordance with reasonably precise government specifications:
     - — The challenged actions were required under the contract and were not independent;[10]
     - — There was intense and direct or exclusive government supervision and oversight; and
     - — The government more than merely approved ("rubber-stamped") the contractor's actions;
  2) The service contractor's performance conformed to applicable government specifications or requirements:
     - — The actions in question were within the scope of the contract and its requirements;
     - — The contractor followed government directions; and
     - — The claim that the contractor negligently failed to follow government directions may negate defense;[11] and
  3) The service contractor was not aware of any dangers with respect to its performance of the contract of which the government was unaware:
     - — It is an "actual knowledge" test (not a "should have known" standard);
     - — Both the contractor and government had same knowledge of danger; or
     - — Neither the government nor the contractor had knowledge of danger.[12]

A 'Colorable' Government Contractor Defense Can Justify Removal to Federal Court

Because federal courts are generally considered to be a more predictable and favorable venue than most state courts, service contractors should carefully evaluate the state law claims asserted against them to determine, as early as possible, if they potentially can assert the government contractor defense.[13]

Even a colorable defense to any of the plaintiff's claims could potentially get the entire action removed to federal court, whether or not the actual merits of the defense are later proven.[14]

Service contractors should carefully evaluate the state law claims asserted against them to determine, as early as possible, if they potentially can assert the government contractor defense.

A number of federal courts have removed cases based on federal officer removal where the company asserting the defense provided services to the government and was able to establish a "colorable claim" to the defense. *See, e.g., Williams v. Todd Shipyards Corp.*, 1998 WL 526612 (5th Cir. 1998); *Bowers v. J&M Disc. Towing*, 472 F. Supp. 2d 1248 (D.N.M. 2006); *Lalonde v. Delta Field Erection*, 1998 WL 34301466 (M.D. La. 1998); *Guillory v. Ree's Contract Serv.*, 872 F. Supp. 344 (S.D. Miss. 1994).

Conclusion

Understanding what the government contractor defense is, and how and when it should be asserted by service

contractors, can prove to be a valuable and effective defense strategy. Such understanding potentially could immunize a company facing tremendous tort liability or, at the very least, result in removal of all the claims against it to federal court.

To increase their ability to assert the defense in the future, contractors should consider structuring their service contracts in anticipation of being able to establish the elements of the discretionary-function test under the FTCA as well as under *Boyle*'s three-part test.

For example, the contract and related documentation should provide that the services to be rendered are pursuant to particular government specifications, requirements or directions. The service contract should also specify that the contractor's activities are under the direct or exclusive direction of the government or require advance federal review and approval of such activities.

During performance service contractors also must ensure that their employees are acting within the scope of the contract and following the government's requirements or directions. Planning ahead and incorporating these elements into the service contract can put a contractor at a tremendous advantage should subsequent litigation arise.

Notes

[1] The discretionary-function exception in the FTCA provides, in relevant part, "The provisions of this chapter … shall not apply to any claim based upon an act or omission of an employee of the government, … based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

[2] Courts have held that the defendant's particular act must "involve an element of judgment or choice" and should not be "mandatory." *See, e.g., Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000).

[3] Although some courts have construed the sovereign-immunity defense based on *Yearsley* as a defense separate and distinct from the government contractor defense under *Boyle* (e*.g., Amtreco Inc. v. O.H. Materials*, 802 F. Supp. 443, 445 [M.D. Ga. 1992]), most courts have disagreed. *See, e.g., Hilbert v. McDonnell Douglas Corp.*, 529 F. Supp. 2d 187, 197 n.8 (D. Mass. 2008) (noting that "*Boyle* expands and elaborates *Yearsley* but does not set forth a separate doctrine. The *Boyle* court simply extended immunity from performance contracts in *Yearsley* to procurement contracts [as in *Boyle*]"); *see also In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 561 (S.D.N.Y. 2006) (noting that "[t]he purpose and scope of the [*Yearsley*] government contractor defense was clarified and expanded in *Boyle*").

[4] Courts within the 9th Circuit and a few others continue to limit the government contractor defense to military contractors. *See, e.g., In re Haw. Fed. Asbestos Cases*, 960 F.2d 806, 810-12 (9th Cir. 1992). Interestingly, the 9th Circuit has recognized that the defense can be extended in some circumstances to government contractors that perform services for the U.S. military pursuant to military specifications. *See Phillips v. DuPont Co.* (*In re Hanford Nuclear Reservation Litig.*), 521 F.3d 1028, 1045 (9th Cir. 2008) (recognizing "that the government contractor defense applies not only to claims challenging the physical design of a military product, but also to the process by which such equipment is produced" and observing that "a contractor who agrees to operate a production facility pursuant to government specifications may qualify for the defense").

[5] The 11th Circuit in *Hudgens* rearticulated *Boyle*'s three-part test in the context of a service contract, concluding that the service contractor, Dyncorp, had to establish that "(1) the United States approved reasonably precise maintenance procedures; (2) Dyncorp's performance of maintenance conformed to those procedures; and (3) Dyncorp warned the United States about dangers in reliance on the procedures that were known to Dyncorp but not to the United States." *Hudgens v. Bell Helicopters/Textron*, 328 F.2d at 1335.

[6] Not all courts have agreed; a few have held that the government contractor defense applies only to military contracts or only to procurement (and not performance) contracts. *See Filippi v. Sullivan*, 866 A.2d 599 (Conn. 2005) (government contractor defense applies only to military procurement contracts); *Amtreco*, 802 F. Supp. at 445 (court rejected defendant's claim that *Boyle* defense could apply to anything other than a procurement supply contract but mistakenly concluded that the Supreme Court's *Yearsley* decision provided a defense distinct from *Boyle*'s government contractor defense).

[7] Recently, the court in *Ibrahim v. Titan Corp.*, 2007 WL 3274784 (D.D.C. Nov. 6, 2007) granted summary judgment in favor of a government service contractor under the "combatant activities" exception to the FTCA. The court relied on *Boyle*, and its reasoning is analogous to decisions applying the government contractor defense.

[8] A persuasive argument could be made, however, that the very purpose of requiring contractors to prove the first two prongs of the *Boyle* test is to ensure the government had exercised its discretion, and thus forcing service contractors to satisfy *Boyle*'s three prongs and the discretionary-function exemption under the FTCA is unwarranted and unnecessary. *See Boyle*, 487 U.S. at 511-512.

[9] The government contractor defense is an affirmative defense that the defendant must assert and prove by a preponderance of the evidence (at least 51 percent). *See, e.g., McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 453 (9th Cir. 1983).

[10] *See, e.g., In re World Trade Center*, 456 F. Supp. 2d at 563 (court observed that "if, however, the private actor was acting independently of precise government specifications, the defense does not apply").

[11] *See, e.g., In re Katrina Canal Breaches Consol. Litig.*, 2007 WL 4219351, at *124 (E.D. La. Nov. 27, 2007) (government contractor defense "is unavailable where there are allegations that the contractor performed any negligent act or omission or any intentional act that went beyond the scope of the task" required by the government); *Adorno v. Correctional Servs. Corp.*, 312 F. Supp. 2d. 505, 521 (S.D.N.Y. 2004) (government contractor defense did not apply to claims that defendant service contractor had been negligent in hiring, supervising and training its correctional staff because plaintiffs alleged contractor failed to follow the government's specifications). This is consistent with the courts in most federal jurisdictions that have held that the government contractor defense is not available to immunize procurement contractors who allegedly manufactured their products negligently. *See, e.g., McKay*, 704 F.2d at 451.

[12] In most jurisdictions *Boyle*'s third prong can be satisfied where both the government and the contractor 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. Gen. Dynamics Corp.*, 876 F.2d 1154 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989) (third prong satisfied where the government and the contractor both had knowledge of the danger).

[13] Early detection of the government contractor defense is crucial. Defendants only have 30 days from the service of the complaint (or from the service of another pleading or other document first giving rise to the defense) to file their notice of removal, and the 30-day period cannot be waived or extended. *See, e.g., Duham v. Lockheed Martin Corp.*, 445 F.3d 1247 (9th Cir. 2006).

[14] The specific basis for removal is the federal officer provision of 28 U.S.C. § 1442(a). To remove under this provision, the defendant contractor must demonstrate that it acted under the direction of a federal officer, raise a "colorable defense" to the plaintiff's claims, and 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. *See, e.g., Ely Valley Mines v. Hartford Accident & Indem. Co.*, 644 F.2d 1310, 1315 (9th Cir. 1981).

Lawrence S. Sher *is a partner in the Washington office of* ***Reed Smith LLP,*** *where he focuses his practice on commercial and government contract litigation. He has successfully employed the government contractor defense for his clients and is a frequent speaker on the topic at professional meetings and forums.* *© 2008.*