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FEATURE COMMENT: The Government Contractor Defense—A Call For Clarity After The Supreme Court's *Campbell-Ewald* Decision

Introduction—On January 20, the U.S. Supreme Court in its decision in *Campbell-Ewald Co. v. Gomez*, __ U.S. __, 136 S. Ct. 663 (2016), revised (Feb. 9, 2016); 58 GC ¶ 41, clarified the scope of "*Yearsley* immunity"—a form of derivative sovereign immunity available to qualifying Government contractors when they are sued for injury or damages resulting from their work under a Government contract. The Supreme Court noted that, up until now, many courts misconstrued the scope of its 1940 decision in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), interpreting its immunity to protect only those Government contractors sued in connection with their work on public works projects. The Supreme Court confirmed in *Campbell-Ewald*, however, that the *Yearsley* immunity defense applies outside of the public works context so long as the contractor can demonstrate that it complied with the Government's specifications regardless of the subject matter of the contract:

> We disagree with the Court of Appeals to the extent that it described *Yearsley* as "establish[ing] a narrow rule regarding claims arising out of property damage caused by public works projects." Critical in *Yearsley* was not the involvement of public works, but the contractor's performance in compliance with all federal directions.

Campbell-Ewald, 136 S. Ct. at 673 n.7. Thus, the key point Government contractors must establish when relying on the *Yearsley* defense is the contractor's compliance with all federal specifications and directions, not whether the project involved public works. This is significant because it broadens the scope of the Government contractor defense under *Yearsley*, expanding its potential applicability to virtually all service contracts regardless of subject matter.

Since 1988, contractors have been chiefly relying upon the "Government contractor defense" enunciated by the Supreme Court in *Boyle v. United Techs. Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988); 30 GC ¶ 248. This federal common law defense can immunize a Government contractor from tort liability in state or federal actions alleging that plaintiffs sustained injuries stemming from defective products or equipment manufactured or supplied under a Government contract. In *Boyle,* the Supreme Court expanded *Yearsley* to specifically cover military procurement contractors. But, at that time, the prevailing view of *Yearsley* was that its immunity shielded only those Government contractors engaged on public works projects.

Campbell-Ewald has reinvigorated *Yearsley* by clarifying that its critical factor is not whether the contractor was engaged in a public works project, but rather, whether it was following Government instructions and directions under its contract. After *Campbell-Ewald*, there is no reason that the *Yearsley* derivative sovereign immunity defense should not be asserted by *all* Government service contractors, not just those working on public works projects, effectively making the three-prong *Boyle* analysis largely irrelevant, at least with respect to Government service contracts.

***Yearsley*, *Boyle* and Their Progenies**—*Yearsley*: In *Yearsley*, a Government contractor building dikes along the Missouri River used paddleboat wheels to accelerate the erosion of a riverbank in order to keep a navigable channel open. However, this resulted in 95 acres of two landowners' property being washed downstream. The landowners brought suit against the Government contractor for damages resulting from the erosion.

In *Yearsley,* the Supreme Court analyzed whether a federal contractor could be held liable for

damage caused during performance of a Government contract authorized by Congress and directed by the Federal Government. The court reasoned that when the "authority to carry out the project was validly conferred … there is no liability on the part of the contractor for executing [Congress'] will." *Yearsley*, 309 U.S. at 20–21. Additionally, this Government contractor immunity was premised on a determination that the contractor did not exceed its authority under that contract. Id. at 21. Notably, in *Yearsley*, the work was performed under the direction of the secretary of war and under the supervision of the chief of engineers of the U.S. Id. at 19.

Most federal courts have since interpreted *Yearsley* as creating a form of derivative sovereign immunity. See, e.g., *McMahon v. Presidential Airways, Inc*., 502 F.3d 1331, 1343 (11th Cir. 2007); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (private contractors following directions of foreign sovereigns enjoy derivative sovereign immunity); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009) (referring to "shared immunity"); 52 GC ¶ 56; *In re World Trade Ctr. Disaster Site Litig*., 521 F.3d 169, 196 (2d Cir. 2008) (discussing "derivative immunity"); *Myers v. U.S.*, 323 F.2d 580, 583 (9th Cir. 1963).

Boyle: In *Boyle*, a U.S. Marine Corps co-pilot was killed when his helicopter crashed 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 escape system was defectively designed under Virginia state law. The jury returned a verdict for the plaintiff, but the Fourth Circuit reversed, holding, as a matter of federal law, that the Government contractor defense immunized the contractor from tort liability.

The primary rationale behind the Supreme Court's *Boyle* defense was based on *Yearsley*'s holding that a contractor's immunity should be derivative of the Government's. Although the *Boyle* case involved the manufacture of military equipment, the Court did not limit application of the Government contractor defense in *Boyle* only to military procurement contracts. Instead, it expressly extended the defense to include performance of service contracts: "The federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction." *Boyle*, 487 U.S. at 506.

With the goal of protecting the Government's "discretionary function" in the federal contracting process, the Supreme Court in *Boyle* concluded that the contours and parameters of the defense were shaped by the discretionary function exception to the Federal Tort Claims Act, 28 USCA § 2680(a). The discretionary-function exception itself stems from the doctrine of sovereign immunity and relieves the Government from liability for its employees' or agents' performance involving discretionary functions (duties that necessarily involve decisions based on judgments or considerations grounded in public policy). The exception 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 USCA § 2680(a).

The Court held that to successfully assert the Government contractor defense under *Boyle*, a contractor must prove each of the following three prongs: (1) the U.S. approved reasonably precise specifications; (2) the equipment produced conformed to those specifications; and (3) the contractor warned the U.S. about any dangers in the use of the equipment that were known to the supplier, but not to the U.S. *Boyle*, 487 U.S. 511–12. The purpose of the first two prongs is to ensure that the Government exercised its discretion 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. This 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 (9th Cir. 1983).

The Intersection and Overlap of *Yearsley* and *Boyle*—Some courts have construed the *Yearsley* sovereign-immunity defense as a defense separate and distinct from the Government contractor defense under *Boyle*. See, e.g., *In re KBR, Inc.*, 736 F. Supp. 2d 954, 965 (D. Md. 2010) ("Clearly, the Supreme Court viewed the concept of derivative sovereign immunity, at least as it derives from the immunity of federal officials, as separate and distinct from the preemption-based Government contractor defense recognized in

Boyle."); *Amtreco Inc. v. O.H. Materials*, 802 F. Supp. 443, 445 (M.D. Ga. 1992); 34 GC ¶ 749. Other courts have disagreed. See, e.g., *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224, 1240 (D. Or. 2010) ("Under the so-called 'government contractor defense,' where certain conditions are met[,] a government contractor enjoys derivative sovereign immunity against tort actions arising out of the contractor's provision of services to the government."); *Hilbert v. McDonnell Douglas Corp.*, 529 F. Supp. 2d 187, 197 n.8 (D. Mass. 2008) ("*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) ("The purpose and scope of the [*Yearsley*] government contractor defense was clarified and expanded in *Boyle*").

More recently, in *Cabalce v. VSE Corp*., 922 F. Supp. 2d 1113, 1123 (D. Haw. 2013), aff'd sub nom., *Cabalce v. Thomas E. Blanchard & Assocs., Inc*., 797 F.3d 720 (9th Cir. 2015), the defendant contractor asserted both the Government contractor defense derived from *Boyle* and *Yearsley*'s derivative sovereign immunity. The Ninth Circuit observed, "[t]his has become a complex area of law," and acknowledged defendant's potential source of confusion: the lack of any concrete distinction between *Yearsley* and *Boyle*. The Ninth Circuit noted, "specifically, it is unclear whether a 'derivative sovereign immunity defense' (or a 'shared immunity defense') derived from *Yearsley* is truly distinct from a 'government contractor defense' derived from *Boyle*." Id. at 1123. For the purposes of determining the defendant's right to remove the action filed in state court to federal court based on the Government contractor defense under federal officer removal, 28 USCA § 1442(a), the court analyzed *both* asserted defenses. See id. at 1123–29.

Similarly, a 2015 Sixth Circuit decision observed the federal courts' confusion regarding *Yearsley*'s scope by pointing to the then-Ninth Circuit discussion of *Gomez v. Campbell-Ewald*:

> One circuit that previously endorsed the doctrine now questions whether it sweeps as far as its language purports to reach. See *Gomez v. Campbell-Ewald Co*., 768 F.3d 871, 879-80 (9th Cir. 2014) (commenting in dicta that *Yearsley* is limited to "claims arising out of property damage caused by public works projects").

Adkisson v. Jacobs Eng'g Grp., Inc., 790 F.3d 641, 646 (6th Cir. 2015), cert. denied, 136 S. Ct. 980 (2016). The *Adkisson* court noted that "[if] *Yearsley* really does stretch as broadly as its language suggests, the Supreme Court in *Boyle* would presumably not have invented a new test to govern the liability of military procurement contractors; it could have simply cited *Yearsley* and called it a day." Id.

Boyle*'s Application to Service Contracts*: Since *Yearsley* and *Boyle* were decided, several courts have held that the Government contractor defense applies equally to shield both contractors that supply products and those that provide services to the Federal Government. See, e.g., *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) (same); *Lamb v. Martin Marietta Energy Sys.*, 835 F. Supp. 959 (W.D. Ky. 1993) (same); *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). The courts generally have 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. Most courts following *Boyle* have extended the defense to shield Government contractors from liability in cases beyond military equipment design defects, while others (mostly within the Ninth Circuit) have limited its application to products or equipment designed for a military purpose. See, e.g., *Cabalce*, 797 F.3d at 731; *Atiqi v. Acclaim Tech. Servs., Inc.*, 2016 WL 2621946, at *10 (C.D. Cal. Feb. 11, 2016).

For example, in *Carley v. Wheeled Coach*, the Third Circuit recognized that the Government contractor defense should apply to military and non-military contractors alike in both the supply and service contract contexts. 991 F.2d 1117, 1128 (3d Cir. 1993); 35 GC ¶ 324. Later, in *Hudgens v. Bell Helicopters/Textron*, the Eleventh Circuit applied the Government contractor defense to bar state tort claims against a service contractor. 328 F.3d 1329, 1344 (11th Cir. 2003); 45 GC ¶ 211. "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 concluded. Id. at 1334. "Rather, the question is whether subjecting a contractor to liability would create a significant conflict with a unique federal interest." Id. In a more recent case, workers who performed restoration and debris removal work brought suit against Government contractor employers for injuries sustained from inhaling toxic fumes. See *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169 (2d Cir. 2008). The Second Circuit not only contemplated *Boyle*'s application to non-military service contracts, but also extended its defense to the context of disaster relief efforts having a uniquely federal interest. See id. at 196–98. For additional examples, see *Kadan v. Am. Contractors Ins. Co.*, No. CIV. A. 08-695, 2008 WL 5137259 (E.D. La. Dec. 5, 2008) (recognizing that courts have applied *Boyle* to service contracts, but declining to extend the protection to defendants under circumstances where the requisite federal interest was not implicated); *Campbell v. Brook Trout Coal, LLC*, No. CIV. A. 2:07-0651, 2008 WL 4415078 (S.D. W. Va. Sept. 25, 2008) (recognizing and applying the *Boyle* defense to failure to warn claims arising out of a service contract to dispose of munitions, but declining to extend its protection to defendants for various reasons).

Synthesizing *Boyle*, *Yearsley* and *Campbell-Ewald* Today—*Effects on Federal Officer Removal*: The Supreme Court's *Campbell-Ewald* decision affects the landscape of federal removal procedure as well. The specific basis for removal is the federal officer provision of 28 USCA § 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. Cal.*, 489 U.S. 121, 128 (1989).

Courts around the country have accepted the Government contractor defense in *Boyle* as a colorable defense for service contractors seeking to remove claims filed in state court to the corresponding federal venue. See, e.g., *Jacks v. Meridian Res. Co.*, 701 F.3d 1224 (8th Cir. 2012) (recognizing colorable *Boyle* defense asserted by healthcare subrogation and reimbursement services contractor); *Bennett v. MIS Corp.*, 607 F.3d 1076 (6th Cir. 2010) (recognizing colorable *Boyle* defense asserted by mold removal contractor); *Smith v. Collection Techs., Inc.*, No. 2:15-CV-06816, 2016 WL 1169529 (S.D. W.Va. Mar. 22, 2016) (recognizing colorable *Boyle* defense asserted by debt collection agency contracted by the Department of Education, but noting that the Fourth Circuit has yet to address the issue of *Boyle*'s availability to non-military service contractors); *Anchorage v. Integrated Concepts & Research Corp.*, No. 3:13-CV-00063-SLG, 2013 WL 6118485 (D. Alaska Nov. 21, 2013) (recognizing colorable *Boyle* defense asserted by construction contractor); *Badilla v. Nat'l Air Cargo, Inc.*, No. 12-CV-1066A, 2013 WL 5723324 (W.D.N.Y. Oct. 21, 2013) (recognizing colorable *Boyle* defense asserted by both service contractors and subcontractors providing air transportation in support of NATO operations in Afghanistan); *Williams v. Aetna Life Ins. Co.*, No. CIV.A. 2:12-0258-KD, 2013 WL 593505 (S.D. Ala. Jan. 30, 2013), report and recommendation adopted, No. CIV.A. 2:12-0258-KD, 2013 WL 593501 (S.D. Ala. Feb. 15, 2013) (recognizing colorable *Boyle* defense asserted by life insurance provider for the Army and Air Force Exchange Service).

Campbell-Ewald now presents defendants with a broader application of *Yearsley*: Government contractors should no longer need to satisfy all of the factors and tests specified in *Boyle*. Now, *any* Government contractor who can assert that plaintiff's injuries arose from its duties performed within the scope of a validly conferred Government contract should satisfy the "colorable defense" standard for federal officer removal under 28 USCA § 1442(a). But, because 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, early identification and development of the *Yearsley* defense is crucial. See, e.g., *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247 (9th Cir. 2006).

Campbell-Ewald*'s Effect on* Boyle: Although the Government contractor defense in *Boyle* is rooted in the Court's earlier derivative sovereign immunity defense in *Yearsley*, the *Boyle* Court went farther by requiring a defendant to prove elements not expressly discussed in *Yearsley*. The *Boyle* Court added the third prong, requiring that contractors establish that they warned the Government of any known defects in the equipment or products at issue.

In light of the Supreme Court's decision in *Campbell-Ewald* and the fact that the very purpose of requiring contractors to prove the first two

prongs of the *Boyle* test is to ensure the Government exercised its discretion—which are consistent with the proof required to establish the defense under *Yearsley*—going forward, defendants relying on the Government contractor defense applying *Yearsley* and *Campbell-Ewald* in the service contract context should no longer be required to prove *Boyle*'s third-prong—that the contractor was not aware of any dangers with respect to its performance of the contract of which the Government was unaware.

The third prong of *Boyle*'s analysis is satisfied by "[a] showing that the government 'knew as much as or more than the defendant about the hazards.'" *Gates v. A.O. Smith Water Prods. Co.*, No. 3:13-CV-1435, 2014 WL 104965, at *5 (N.D.N.Y. Jan. 9, 2014) (quoting *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982)). The third prong is often the most difficult for defendant contractors to establish, especially at the summary judgment stage, because it is based on an intensely factual showing of whether the contractor or the Government had superior knowledge of a dangerous or harmful aspect of the product or equipment alleged to have caused the plaintiff's injury. See, e.g., *Pavlick v. Advance Stores Co.*, No. 10-00174, 2013 WL 1114646, at *1 (E.D. Pa. Feb. 20, 2013) (denying summary judgment because defendant failed to provide any evidence that the Army knew of the hazards of asbestos contained in brakes); *Caldwell v. Morpho Detection, Inc.*, No. 4:10-CV-1537, 2013 WL 500867, at *7 (E.D. Mo. Feb. 11, 2013) (denying summary judgment because defendant failed to show any evidence that the Government had greater knowledge of an inclined entrance conveyor); *Ammend v. BioPort, Inc.*, 322 F. Supp. 2d 848, 879 (W.D. Mich. 2004) (denying summary judgment, in part, because questions of fact remained as to whether defendants warned the Government or whether the Government knew of the dangers associated with a vaccine).

The third prong also is inconsistent with the Supreme Court's decision in *Yearsley* and its recent reinvigoration through *Campbell-Ewald.* The third-prong factor has never been required to establish the defense following the *Yearsley* line of cases. See *Adkisson*, 790 F.3d at 646 (6th Cir. 2015), cert. denied, 136 S. Ct. 980 (2016).

In addition, as a result of *Boyle*'s discussion of the discretionary function inherent in the federal procurement and approval process, many federal courts applying *Boyle* have further required that defendants establish—as a threshold issue—that the challenged decision or act by the contractor was discretionary under the discretionary function test. See, e.g., *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*). The defendant's particular act must "involve an element of judgment or choice," and should not be "mandatory." *Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988).

To satisfy the discretionary function test, a service contractor must establish that 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. 28 USCA § 2680(a). Courts tend 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.

After *Campbell-Ewald*, service contractor defendants also no longer should be required to shoulder the additional burden of separately proving that their challenged decision or conduct was a discretionary function under the FTCA, if they can demonstrate that their performance under the contract complied with the Government's specifications and directions.

Using *Campbell-Ewald* itself as an example, the defendant service contractor (a global advertising agency that contracted with the Navy to support its recruiting efforts), relied only on the *Yearsley* immunity defense at the district level and made no mention of *Boyle*. In fact, the plaintiff's argument that defendant had to satisfy the *Boyle* analysis was expressly rejected by the court on summary judgment. See *Gomez v. Campbell-Ewald Co.*, No. CV 10-02007, 2013 WL 655237, at *5 (C.D. Cal. Feb. 22, 2013), vacated, 768 F.3d 871 (9th Cir. 2014), aff'd, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), as revised (Feb. 9, 2016). The defendant prevailed on *Yearsley* grounds because the Navy contracted with the defendant to obtain advertising-related services, and pursuant to those contracts, the defendant acted at the Navy's direction. See id. The court further found that the Navy worked closely with defendant on the text message recruiting campaign, providing oversight and approval, and reviewed, revised, and approved the text message itself.

Id. at *6. The Supreme Court's decision to affirm and remand to the district court effectively validates the logic of *Adkisson*, at least in the service contract context. To establish the Government contractor defense in the service contract context, the defendant should only need to rely on *Yearsley*.

Conclusion—The Supreme Court in *Campbell-Ewald* has clarified that the *Yearsley* derivative immunity doctrine is alive and applies to immunize Government contractors from tort liability outside of the context of public works projects. Accordingly, the additional elements courts have required defendant contractors to prove after *Boyle* to establish the Government contractor defense in the service contract context are unwarranted and unnecessary. A successful Government contractor defense should only require proof that the service contractor was acting under Government authority and followed the Government's instructions and directions in the performance of its contract. Until further clarification from the courts confirms this analysis and conclusion, however, to be prudent, Government contractor defendants should continue to assert both defenses under the *Yearsley* and *Boyle* doctrines, even while arguing that doing so should not be necessary.

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