

PRODUCTS LIABILITY LITIGATION



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Government Contractor Defense: Military and Non-Military Applications

Bryan A. Coleman and Jennifer M. Moore – September 12, 2016

The government contractor defense may offer protection from state law product liability actions arising out of a contractor's compliance with a federal government contract. The Supreme Court of the United States articulated this defense in *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988). *Boyle* involved a wrongful death claim brought against a contractor that supplied a military helicopter to the United States government. The plaintiff alleged, in part, that a defective design of the aircraft's emergency escape system caused the death of one of the pilots. The jury returned a verdict for the plaintiff, and the United States Court of Appeals for the Fourth Circuit reversed.

The Supreme Court granted cert and considered whether a contractor providing military equipment to the federal government can be liable under state tort law for injury caused by a design defect. The Court noted that the procurement of military equipment by the United States is an area of uniquely federal interest. The Court determined that state law tort claims for design defects in military equipment are displaced when there is a significant conflict between the federal interest and the application of state law. Specifically, state law is displaced when (1) the United States approved reasonably precise specifications for the equipment; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States.

Courts are split as to whether the government contractor defense applies in a non-military application. As recently as 2015, the United States Court of Appeals for the Ninth Circuit confirmed that the defense only applied in the military context. *Cabalce v. Blanchard & Assoc.*, 797 F.3d 720, 731 (9th Cir. 2015) (noting that

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the government contractor defense “is only available to contractors who design and manufacture military equipment.”) However, other courts have applied the defense in a non-military setting. In *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993), the plaintiff brought a personal injury/product liability claim against the manufacturer of a government ambulance. The United States Court of Appeals for the Third Circuit recognized the Ninth Circuit’s limitation of the government contractor defense to military equipment, but determined that certain significant federal interests are implicated in both military and nonmilitary procurements. These interests included, among other things, preventing judicial second-guessing of the government’s public policy decisions and limiting the government’s financial burdens. The court held that the defense was therefore available to manufacturers of nonmilitary products.

Nevertheless, with respect to product liability claims, the government contractor defense will likely be asserted primarily in the military context. Currently, the government is attempting to decrease the size of the active duty military forces while at the same time maintain combat readiness. This requires the procurement of technology and equipment that will enable the military to do more with less manpower. Contracts that effectuate this procurement will center on products that are increasingly complex. Contractors that manufacture these products should pay special attention to how the product specifications are drafted, as those terms are critical in determining the applicability of the defense to product liability claims.

Practice Points:

- To the extent possible, the language in the government contract should be designed to assist the contractor in satisfying *Boyle’s* three-part test. Ensure that the contract expressly states the government’s product specifications and requirements.
- Government contracts should include language stating that the contractor is operating under the federal government’s direction and oversight.
- For a contractor that is forming a business entity to obtain government procurement contracts, consider corporate formation in a jurisdiction that applies the defense in both the military and non-military context.

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