

A Contractor's Derivative Immunity from Liability: The Government Contractor Defense

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During the course of a construction or other government contract, it is not unusual for a third party to claim injury and damages resulting from some action taken in performance of the contract. The injured party's ability to sue the government for damages is restricted by the scope of the Federal Tort Claims Act ("FTCA"), which protects the federal government from suit in certain situations, so plaintiffs typically focus their efforts on the contractor. However, the contractor may be protected from liability to the same extent as the government if the contractor was acting under the authority and at the direction of the government. The so-called "government contractor defense" turns on the theory that if the government cannot be sued for third-party injury claims arising from the contract, then the government contractor who is doing the government's bidding should be protected from suit as well. When faced with a third-party claim, a contractor should consider whether it might qualify for derivative immunity under the government contractor defense.

I. The Government Contractor Defense

The Supreme Court first recognized the government contractor defense for private contractors in 1940, holding that the interests of justice required that federal immunity be extended to private contractors where (1) the contractor was working pursuant to authorization and direction of the federal government, and (2) the acts complained of fell within the scope of such government directives. Nearly 50 years later, the Supreme Court elaborated on the basis and standard of the government contractor defense. In *Boyle v. United Technologies Corp.*,



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487 U.S. 500 (1988), the Court found additional authority for the defense in the discretionary function provision of the FTCA, which precludes the imposition of liability on the government for "the exercise or performance or failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The Boyle Court believed that if it permitted second-guessing of the government's judgments through state tort suits against contractors, the financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, as contractors "predictably" would raise prices to account for the possibility of liability resulting from adherence to government directives. The Court reasoned that it made little sense to protect the Government against financial liability when

the Government produces equipment itself, but not when it contracts for the production of such equipment.

In the context of a procurement contract, the Boyle court announced a three-part test for application of the government contractor defense: (1) the government must have approved "reasonably precise specifications" for the manufacture of the equipment that is the subject of the contract; (2) the equipment must conform to those specifications; and (3) the supplier must have warned the government of any dangers associated with the equipment known to the supplier but not to the government.

Subsequent courts in states such as Mississippi, Kentucky, Ohio, and South Carolina have adapted the three-part Boyle test to service contracts. For example, the South Carolina federal district court applied the Boyle test to a government contract for the provision of

environmental clean-up services. First, the court determined that the EPA had discretionary authority under the FTCA to determine how to best execute the clean-up. Having determined that the discretionary function provision applied to the government, the court then found that the contractor was derivatively immune under Boyle because, (a) EPA made the decisions regarding how the clean-up was to be performed; (b) the contractor performed the clean-up activities according to the specifications issued by the EPA; and (c) the contractor was not aware of any dangers with respect to the clean-up activities of which EPA was not also aware. *Richland Lexington Airport District v. Atlas Properties*, 854 F. Supp. 400 (D.S.C. 1994).

Recently, the U.S. District Court for the Southern District of Mississippi granted a service contractor's motion to dismiss a lawsuit brought against it for property damage relating to debris removal in Mississippi following Hurricane Katrina. The plaintiff sought damages from the prime debris removal contractor for the United States Army Corps of Engineers (the "Corps") for allegedly demolishing his home, which had moved off its foundation during the storm and came to rest, at least in part, in a public right of way, without his permission. The contractor argued it was immune from suit because it had been expressly directed by the Corps to remove debris from "all" public rights of way, its contract contained precise specifications mandating how the work was to be performed, and the Corps' personnel in the field directly oversaw all debris removal work. See *Weggeman v. AshBritt, Inc.*, No. 106CV1256, 2007 WL 2026820 (S.D. Miss. July 6, 2007).

The court agreed that the contractor was immune from this suit based on the government contractor's defense, but, interestingly, the court did not center its analysis on the Boyle factors; rather, it focused primarily on the requirements of the discretionary function exception to the FTCA. In doing so, the court found

that the post-Katrina debris removal at issue was within the discretionary authority of the Corps, and that the government's decisions regarding when, where, and how to remove debris were the sort of public policy decisions assigned by Congress to the agency with the intent that they not be second-guessed by a state tort suit. The court then determined that since the plaintiff could not have sued the Corps itself, and since the contractor was following the Corps' directives, it could not sue the contractor.

Thus, in order to establish entitlement to derivative immunity under the government contractor defense, a contractor should be prepared to demonstrate:

- That had the plaintiff sued the government, the government would have been entitled to immunity under the discretionary function provision of the FTCA, because (i) the nature of the challenged governmental conduct involves an element of judgment or choice, and (2) the judgment or choice was grounded in social, economic, and political policy of the sort that Congress sought to shield or protect from second-guessing; and
- That under the Boyle test (as adapted to service contracts, if applicable), the contractor should share in that immunity because (i) it was operating pursuant to reasonably precise specifications by the government, (ii) it complied with such specifications, and (3) it was not aware of any dangers or risks of which the government was unaware.

II. Procedural Benefits of the Government Contractor Defense

In addition to being a powerful tool for fending off third-party liability claims arising out of contract performance, the government contractor defense also gives rise to significant benefits associated with lawsuit procedure that make the defense particularly

valuable. For example, by claiming immunity from suit, the contractor in effect is asserting that the court is without jurisdiction to hear the case. Accordingly, as with any immunity defense, the court is compelled to consider the merits of the defense at the outset of the case, before the contractor has been required to answer the plaintiff's complaint or respond to discovery. Some jurisdictions provide by rule that an immunity motion effectively stays the case until it has been decided (except for any discovery needed to decide the immunity question). If successful, the contractor will be able to avoid most of the costs and burdens of litigation and halt an action before it has begun – indeed, one of the purposes of immunity generally is to shield against the burdens of suit as well as against ultimate liability. The procedural benefits of raising the government contractor defense should not be overlooked.

In sum, a contractor facing a third-party tort suit for injuries allegedly arising out of its contract performance is well advised to consider whether it might be entitled to share derivatively in the government's immunity from suit. Courts increasingly recognize the validity of the government contractor defense where a third party seeks to hold a contractor liable for actions taken in carrying out the government's mandate.



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