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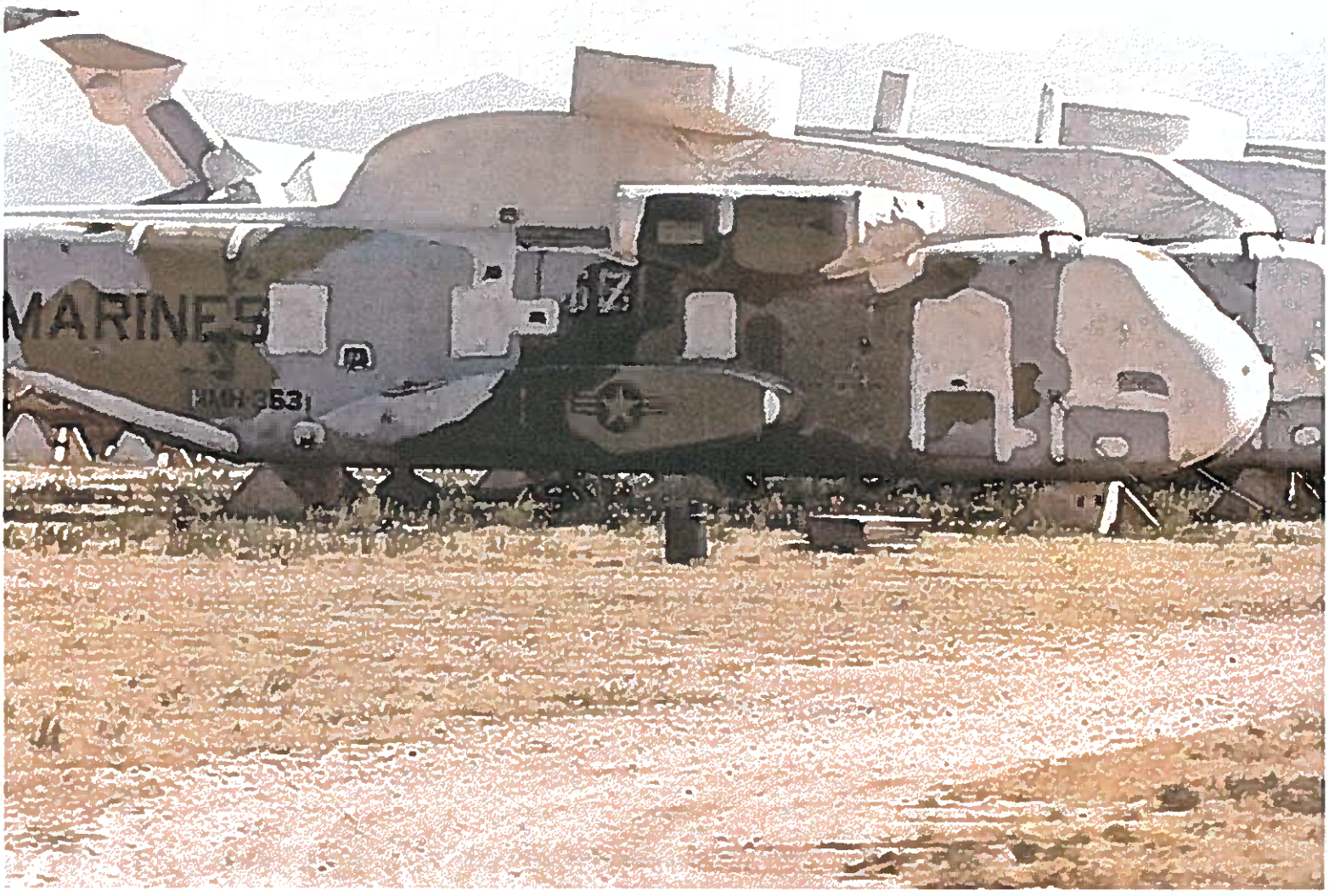
THE GOVERNMENT CONTRACTOR DEFENSE

FRAMING THE GOVERNMENT CONTRACTOR DEFENSE

Origin, Extension, and Potential



By Christopher R. Christensen and Anthony U. Battista

Two decades ago, the U.S. Supreme Court redefined the battleground on which military product liability actions are fought in its seminal decision in *Boyle v. United Technologies Corp.*[1] In *Boyle*, the Supreme Court established the "government contractor defense," a powerful weapon for military equipment manufacturers to use in the defense of product liability claims. The *Boyle* defense, which can be used in summary judgment and post-trial contexts, also has been used to immunize manufacturers of non-military products supplied to the U.S. government. In this article, we discuss the development of the government contractor defense, the *Boyle* progeny, and various efforts to expand or restrict *Boyle*'s reach.

The Basis for *Boyle*

Boyle arose out of a U.S. Marine Corps helicopter accident off the coast of Virginia on April 27, 1983. Lt. David A. Boyle was the First Officer on a Sikorsky CH-53D "Sea Stallion" helicopter engaged in a training mission while stationed aboard the USS *Nassau*. Also aboard was Capt. Bert Tussing, the pilot-in-command, and two nonflying crew members. As the Sea Stallion made its approach to land on the USS *Shreveport*, the approach was suddenly aborted, and the helicopter autorotated and settled into the ocean on its right side. Although the other three crew members evacuated the helicopter, Boyle did not and drowned.

Boyle's father commenced an action against the Sikorsky division of United Technologies Corporation, the manufacturer of the Sea Stallion. One of the plaintiff's theories of liability, which became the primary issue on appeal, was the plaintiff's design defect allegation directed to the emergency window exit in the cockpit. The cockpit emergency exit for this helicopter is an escape hatch comprised of the window and its frame, which falls outward, away from the helicopter, when activated by a crew member. It was undisputed at trial that Boyle had survived the impact with the water but drowned before he could exit the helicopter. His body was found in the cargo area, unbuckled from his seat. The plaintiff theorized that Boyle had been unable to open his emergency window exit and was attempting to escape from the helicopter through the rear cargo area. The plaintiff's theory was that Sikorsky had defectively designed the emergency window exit because it opened outward instead of inward and therefore had prevented Boyle's egress from the helicopter because of the water pressure exerted on the window.[2]

The jury rendered a verdict for the plaintiff of $725,000. Although the trial court denied Sikorsky's motion for a judgment notwithstanding the verdict, the Fourth Circuit ruled that Sikorsky had satisfied the elements of the "military contractor defense," previously enunciated in *Tozer v. LTV Corp.*[3] The government contractor defense, also known as the military contractor defense, was recognized in several jurisdictions but had been applied inconsistently.[4] The Supreme Court granted Boyle's petition for writ of certiorari to resolve this dispute.[5]

The *Boyle* decision. By a 5–4 margin, the Supreme Court affirmed the Fourth Circuit's decision, holding that the government contractor defense existed under federal common law and barred the plaintiff's state law design defect claim as a matter of law.[6] Writing for the majority, Justice Antonin Scalia recognized that the police powers of the state should not be superseded absent "the clear and manifest purpose of Congress." The federal preemption of these powers is thus limited to issues involving "uniquely federal interests," in which the courts may establish federal common law, or where federal preemption is based on constitutional or statutory grounds. Scalia concluded that the U.S. government's procurement of equipment involves a uniquely federal interest and that the imposition of tort liability on military contractors that provide such equipment would have a direct effect on the terms of such government contracts or result in the contractors' refusal to manufacture these products for the government.[7] Scalia reasoned that if contractors can be held liable for design defects, they would pass on to the government the expense of this liability and impose a substantial cost on the government.[8] Further, "second guessing" the military's equipment decisions "through state tort suits against contractors would produce the same effect sought to be avoided by the [Federal Tort Claims Act] exemption."[9] The discretionary function exception of the Federal Tort Claims Act immunizes the United States from liability for its agents' performance of duties involving discretionary decisions.[10]

Scalia also noted that state law should not be preempted in this manner unless there is a "significant conflict" between the duty imposed by the federal contract at issue and the duty imposed by state law.[11] This significant conflict requirement is met when the three *Boyle* elements, described below, have been satisfied.[12]

The *Boyle* test. Scalia adopted the three elements of the government contractor defense used by the Fourth and Ninth Circuits:[13]

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of

the equipment that were known to the supplier but not the United States.[14]

Scalia described the rationale for adopting the three elements as follows:

> The first [two elements] assure that the suit is within the area—where the policy of the "discretionary function" would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state court law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt[ed] this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.[15]

Based on the rationale for creating the *Boyle* defense, the government contractor defense should theoretically be applied when the discretionary function exception to the Federal Tort Claims Act would prevent governmental liability. Thus, in a case applying *Boyle*, the overriding inquiry is whether the government has exercised discretion with respect to the design of the product at issue. If the contractor convinces the court that government discretion was exercised—by satisfying the three elements of Scalia's *Boyle* test—the contractor is vested with immunity from state tort law causes of action.

The Supreme Court vacated and remanded *Boyle* back to the Fourth Circuit to allow the court to clarify its findings in light of the *Boyle* decision. On remand, the Fourth Circuit held that Sikorsky had established the government contractor defense as a matter of law and was immune from liability.[16]

Applying the *Boyle* Test

The first element. Of the three *Boyle* elements, the one on which many cases turn is the first, which requires proof that the government approved "reasonably precise specifications" for the product at issue. Post-*Boyle* case law has established that government approval requires proof of "continuous back and forth" collaboration between the contractor and the government with respect to the design of the product supplied to the government.[17] In contrast, the first element has not been satisfied if the factual record reveals that the government merely "rubber stamped" the contractor's design, without a meaningful evaluation of the design by the government.[18] It is not necessary that government officials actually design the product or product feature at issue, although the contractor must show that the government evaluated the design of the product and held the ultimate approval authority, such that the requisite government discretion is established.

Satisfying the first element of *Boyle* is a fact-specific inquiry into the nature of the product's original design and development phase, with a focus on the nature and extent of the interplay between the contractor and responsible government officials.[19] For sophisticated aircraft and weapons systems, the entire product development process—from the original contract award, through the design and testing, up to the delivery of the first production equipment—typically takes five years or more. The mere fact that the development process is lengthy and detailed will not satisfy the first element of the government contractor defense. Rather, the extent to which the contractor can establish hands-on involvement by government officials during the design and testing phase will usually determine whether the defense will be successful. Where the government's participation in the overall design process is deliberate, continuous, and meaningful, courts usually conclude that the contractor has demonstrated an adequate exercise of government discretion. Several post-*Boyle* decisions illustrate how courts evaluate the level of collaboration between the government and the military contractor.

In *Kerstetter v. Pacific Scientific Co.*,[20] a naval pilot died after being inadvertently ejected from a T-34C aircraft because the pilot restraint system released without command. The Fifth Circuit agreed with the district court's findings that the

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government approved reasonably precise specifications for the design of the subject system. The government continuously interacted with the contractor over eight years, and the government addressed the design issues specific to this case during the design process. The Fifth Circuit found that the Navy approved reasonably precise specifications and affirmed the district court's grant of summary judgment.[21]

In *Kleeman v. McDonnell Douglas Corp.*,[22] the key issue was the degree of the Navy's involvement in the development and approval of the landing gear design for the F-18 fighter aircraft.[23] According to the court, the significant factors relating to the collaboration between the contractor and the Navy were (1) regular discussions between Navy officials and the contractor's employees as to the design, testing, and production of the aircraft; (2) the Navy's large staff presence at the contractor's facility; (3) the Navy's retention and exercise of the power to approve and reject design modifications; (4) the contractor's use of the Navy specifications for the landing gear design; and (5) the Navy's testing of the prototype. The court concluded that the contractor's detailed evidence of government participation throughout the design of the aircraft provided compelling proof to satisfy the first element of *Boyle*.[24]

In the Fourth Circuit's initial *Boyle* opinion, the court held that Sikorsky had established government approval of reasonably precise specifications for the Sea Stallion by providing detailed evidence about the back-and-forth collaboration between Sikorsky and Navy officials responsible for the helicopter project. This included the Navy's interaction with Sikorsky engineers to prepare detailed specifications for the helicopter, the Navy's review of extensive and substantive technical data about the helicopter, and the Navy's review and approval of a full mock-up of the helicopter.[25]

In *Stout v. Borg-Warner Corp.*,[26] the Fifth Circuit held that the government contractor defense is available where "review [of the project] involved, *inter alia*, [the contractor's] submission of detailed drawings at various progressive stages of the design, critical design reviews where [government] engineers critiqued [the contractor's] work, and, finally, the production of prototype models tested and evaluated for months by the [government] for its actual performance."[27]

If the contractor convinces the court that government discretion was exercised by satisfying the three elements of Scalia's *Boyle* test, it is immune from state tort law causes of action.

Recently, in *Agent Orange Products Liability Litigation*,[28] the Second Circuit addressed the issue of adequate governmental discretion.[29] This case is a continuum of the numerous cases brought by Vietnam War veterans alleging that their exposure to the chemical defoliant Agent Orange caused a myriad of diseases. The Second Circuit found that the government exercises adequate discretion over contract specifications when it remains the "agent of the decision." The government remains the agent of the decision through "independent and meaningful" review of the specifications. The court stated that the government only needs to approve the specifications, not create them, and that it may rely on the manufacturer's expertise to make a fully informed decision when approving the specifications. After reviewing the evidence, the court decided the government had approved the specifications and was "plainly the 'agent of the decision' with respect to Agent Orange's contractually specified composition."[30] The key evidence contained instructions from government officials to the chemical manufacturers insisting on high purity levels that the Army toxicology labs had examined and approved.[31]

In contrast to the above cases is the Fifth Circuit's decision in *Trevino v. General Dynamics*.[32] *Trevino* arose out of the accidental deaths of five U.S. Navy scuba divers in a submarine diving chamber manufactured by the defendant contractor. After examining the design process for the diving hanger, the court concluded that the evidence did not establish that the government did anything other than passively accept the contractor's independently developed design choices and, accordingly, had not exercised sufficient discretion over the design features in question.[33] In an often-cited passage, the court held that approval under the *Boyle* defense requires more than a mere "rubber stamp" by government officials. A "rubber stamp [by the government] is not a discretionary function [and] therefore, a rubber stamp is not 'approval' under *Boyle*."[34] Whether or not the government's approval of a product design was sufficiently meaningful is one of the fundamental government contractor defense issues.

Another approach that plaintiffs have taken to restrict the

application of the government contractor defense is to argue that proof of the overall back-and-forth between the contractor and the government cannot establish the first element of *Boyle*. Rather, they argue that *Boyle* requires the contractor to establish explicit government approval of the specific design feature in question. This approach has met with some success.[35]

In *Snell v. Bell Helicopter Textron, Inc.*,[36] the Ninth Circuit reversed the district court's ruling that the contractor had established the government contractor defense with respect to the design of the Army UH-1N "Huey" helicopter.[37] The plaintiff alleged that two components of the helicopter's transmission were defectively designed and had caused the accident. The court found that where the Army's detailed specifications for the helicopter left the placement of these components up to the contractor, the government contractor defense did not apply.[38] The court in *Snell* held that the contractor must show that the government had affirmatively exercised discretion with respect to the specific components at issue in order to satisfy *Boyle*.

The Eleventh Circuit reached a similar conclusion in *Gray v. Lockheed Aeronautical Systems Co.*[39] In *Gray*, which arose out of an accident involving a Navy S-3 Viking antisubmarine aircraft, the plaintiffs alleged that a defectively designed aileron servo caused the accident in which the plaintiffs' decedents were killed. Lockheed contended that the government contractor defense applied because the Navy had promulgated the specifications pertaining to the servo design. The Eleventh Circuit agreed with the district court that Lockheed had not established government approval of reasonably precise specifications because the specifications governing the servo design consisted only of a general narrative description. "We conclude that although the narrative may embody some aspects of the servo's specifications, it does not comprise the precise design specifications that the *Boyle* test requires."[40] The so-called specificity argument made successfully by the plaintiffs in *Snell* and *Gray* is most likely to prevail where the specifications are ambiguous or silent as to the particular characteristics of a component alleged to be defective.[41]

The majority of courts faced with the issue have held that if the contractor establishes the three elements of *Boyle*, the defense applies equally to nonmilitary products.

The second element. The second *Boyle* element is satisfied when the contractor establishes that the product conforms to the government's specifications. Courts usually evaluate the nature of the collaboration between the contractor and the government during the product development phase to determine whether the product conformed to the government's specifications. If the court is satisfied by the proof offered by the contractor with respect to the first element of *Boyle*, it typically concludes that the product conformed to the government's specifications.

Courts generally have been hesitant to second-guess the government's acceptance of a product as conforming to the contractual specifications and design requirements where the contractor presents evidence of continuous back-and-forth involvement in the product development and design approval process.[42] In *Ramey v. Martin-Baker Aircraft Co.*,[43] the court held that "[n]othing in the record suggests to us that the Navy found the [product] not to conform to specifications. It is not our province, of course, to make such a finding on the Navy's behalf. We, accordingly, conclude that no issue exists as to the product's conformity to Navy specifications."[44] In *Kleeman*, the Fourth Circuit stated that "[w]here the military procurement process involves this kind of continuous exchange between the contractor and the government, the process itself becomes persuasive evidence of product conformity to precise specifications."[45] According to Eastern District of New York Judge Jack B. Weinstein, "[i]f the government is aware that the product being procured has inherent dangers, the manufacturer is not liable if it follows specifications."[46] As the court in *Trevino* noted, evidence of a continuous exchange of information between the contractor and the government tends to show that the government retained discretion and the contractor had little freedom to deviate from specifications.[47] As a practical matter, if the court concludes that the contractor has satisfied the first element, the government's original acceptance and continued use of the product is usually sufficient to establish the second element of *Boyle*.

The third element. The third *Boyle* element requires proof that the contractor warned the government about possible dangers in the use of the product known to the contractor but not to the government.[48] The contractor satisfies this element by proving (1) that it lacks knowledge of any alleged danger relating to the product,[49] or (2) that the government already

knew of the alleged danger or hazard.[50] Courts have rejected the argument that the contractor has an obligation to warn the government about hazards of which it "should have been" aware.[51]

The court in *Kleeman* noted that "[g]overnment involvement in the [procurement and development] process also makes it more likely, [but] not certain, that a sharing of information will occur with respect to potential dangers in the use of the equipment."[52] In a typical military procurement, the contractor is contractually bound to report accidents, incidents and potentially unsafe conditions involving the product, making it likely that the government will be aware of potential dangers and hazards in the use of the product by the government. As noted by the Ninth Circuit, "the Navy . . . was aware of . . . injuries incurred while using the system."[53] Yet, "[i]t 'realized the danger[.]' . . . Thus, there was no reason for [the contractor] to believe that the Navy was unaware of problems . . . and [the contractor] had no duty to warn the Navy . . . ."[54]

The contractor also may satisfy this element by showing that it proposed remedies to perceived defects that the government rejected.[55] As a general matter, contractors have not had a difficult time in design defect cases establishing that they met the requirements of the third element of *Boyle* because the substantial quantity of information typically provided by the contractor to the government puts the government on equal footing with the contractor.

Extending the *Boyle* Parameters

Application to nonmilitary products. The *Boyle* decision did not explicitly address the question of whether the government contractor defense applied outside the context of military equipment. As a result, this issue has been vigorously contested. The majority of courts faced with this issue have held that if the contractor can establish the three elements of *Boyle*, the defense applies equally to nonmilitary products. In *Carley v. Wheeled Coach*,[56] the Third Circuit held that the government contractor defense applied to nonmilitary products such as an ambulance produced in accordance with government specifications.[57] The court in *Carley* supplied the following reasons:

1. *Boyle* recognized the unique federal interest in all government contracts, not merely military contracts;
2. The underlying rationale of *Boyle*, to prevent contractors from passing on their costs to the government, applies equally in the nonmilitary context; and
3. *Boyle* rejected the *Feres-Stencel* military doctrine (in favor of the broader "discretionary exception" to the Federal Tort Claims Act) as the foundation of the defense.[58]

The majority of circuits have followed this trend to apply the defense to nonmilitary products.[59]

The Ninth Circuit holds a strongly different view of the government contractor defense and has limited the application of *Boyle* to military products. In *In re Hawaii Federal Asbestos Cases*,[60] the court held that the defense was not available to the manufacturer of asbestos insulation that was sold to the Navy and commercial buyers.[61] The court did not consider the insulation to be "military equipment" because it was "not manufactured with the special needs of the military in mind[,]" and the Navy was "a relatively insignificant purchaser of products that were primarily designed for applications by private industry."[62] The court's definition of military equipment has been rejected by other courts in the asbestos context.[63] However, the Ninth Circuit has continued to follow its narrow application of the military contractor defense.[64]

The government contractor defense also has been held to apply to products originally manufactured in accordance with government specifications for military use but that were later sold to the private sector.[65] In *Glassco v. Miller Equipment Co.*,[66] a tree trimmer sustained injuries from a fall after the leather safety belt that he was wearing broke. The belt had been originally manufactured for the U.S. Army during the Korean War and was later sold to the private sector. The plaintiff asserted a design defect theory against the belt manufacturer, claiming that the belt was too thin and should not have been made of leather. The Eleventh Circuit applied *Boyle* and concluded that the government contractor defense precluded the design defect claim because the original manufacture of the belt for the Army involved a uniquely federal interest.[67] Similarly, *Skyline Air Service v. G.L. Capps Co.*[68] arose out of an accident involving a surplus military helicopter that was originally designed in accordance with government specifications and delivered to the government in 1963.[69] The helicopter was later sold to the plaintiff and used in commercial logging operations. The Fifth Circuit concluded that the government contractor defense applied to surplus military equipment and concluded that the contractor had established the three elements of *Boyle*.[70]

Application to failure-to-warn claims. An area of considerable controversy is the application of the government contractor defense to failure-to-warn allegations. Although *Boyle* did not involve an alleged failure to warn, the courts have

held that the government contractor defense applies to these causes of action. Initially, some courts questioned whether *Boyle* applied to failure-to-warn claims.[71] Subsequent decisions have reversed this trend, and the government contractor defense is now uniformly applied to failure-to-warn claims,[72] although divergent tests have evolved.

One line of cases that has developed simply requires the contractor to establish the three elements of *Boyle* with respect to the failure-to-warn claim. In *Tate v. Boeing Helicopters*,[73] the Sixth Circuit stated that the contractor must show that

1. the United States exercised discretion and approved the warnings, if any;
2. the contractor provided warnings that conformed to the approved warnings; and
3. the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.[74]

Tate is consistent with other government contractor defense decisions in which the courts have relied on Scalia's "government's discretion" rationale as a basis to apply the three *Boyle* elements to failure-to-warn allegations.[75]

The Seventh Circuit in *Oliver v. Oshkosh Trucking Corp.*[76] rejected the test adopted in the Second and Ninth Circuits and approved the standard articulated by the Sixth Circuit in *Tate*:

> In *Boyle*, the Supreme Court established the requirement that the "government approve reasonably precise specifications" as the test of whether a particular case implicates a discretionary function of the government. We believe that the same touchstone ought to govern in the context of failure-to-warn claims. As the Sixth Circuit [in *Tate*] put it, "[w]hen the government exercises its discretion and approves designs prepared by private contractors, it has an interest in insulating its contractors from liability for such design defects. Similarly, when the government approves warnings intended for users, it has an interest in insulating its contractors from state failure to warn tort liability."[77]

Along similar lines, the Fifth Circuit in *Bailey v. McDonnell Douglas Corp.*[78] held that the label attached to the plaintiffs' claims is immaterial for government contractor defense purposes:

> [W]hether the defense will apply cannot be determined by the label attached to the claim. Strict adherence to the three *Boyle* conditions specifically tailored for the purpose will ensure the defense is limited to appropriate claims. In evaluating an assertion of the defense, therefore, the state law label on the claim(s) sought to be dismissed is irrelevant.[79]

A different standard for applying the government contractor defense in the failure-to-warn context has developed in the Second, Ninth, and Eleventh Circuits, primarily in the context of suits against contractors that supplied asbestos to the government.[80] The standard developed in these cases is considerably more stringent than in the *Tate/Oliver* line of cases. These decisions require the contractor to prove that the government either "dictated" the content of the warnings or expressly restricted the contractor's ability to comply with its state law duty to warn. In *In re Joint Eastern & Southern District of New York Asbestos Litigation (Grispo)*,[81] a case frequently cited for this approach, the Second Circuit stated:

> [The contractor] must show that the applicable federal contract includes warning requirements that significantly conflict with those that might be imposed by state law. Moreover, it seems clear to us that *Boyle*'s requirement of government approval of "reasonably precise specifications" mandates that the federal duties be imposed upon the contractor. The contractor must show that whatever warnings [a company places upon] a product resulted from a determination of a government official . . . and thus, that the government itself "dictated" the content of the warnings meant to accompany the product. Put differently, under *Boyle*, for the military contractor defense to apply, the government officials ultimately must remain the agents of decision.[82]

The Second Circuit further refined the test requirements in *Densberger v. United Technologies Corp.*[83] The court in *Densberger* held that the displacement of state law must be preceded by a showing that the contents of the warnings—or absence of warnings—were dictated by the government. The test set out in *Densberger* requires

1. government control over the nature of [the] product warnings;
2. compliance with the [g]overnment's directions; and
3. communication to the [g]overnment of all product dangers known to [the contractor] but not to the [g]overnment.[84]

A majority of the circuits appear to follow the *Tate* line of cases, although the split in the circuits on this issue ultimately

may have to be resolved by the Supreme Court.[85]

Effect of government's continued use on application of *Boyle*. Another interesting *Boyle* issue is the effect of the government's continued use of the product after it is made aware of an alleged hazard or defect in the product. This issue is particularly important with respect to government contractor defense cases relating to military aircraft, given that the government typically uses the aircraft for decades. A decision that squarely addressed this subject is *Lewis v. Babcock Indus., Inc.*[86] *Lewis* arose out of an F-111 hard landing incident, allegedly caused by a malfunction of a repositioning cable that connected the pilot's command module to the parachute. The contractor provided evidence that the military became aware of the potential cable hazard after the original delivery of F-111 aircraft but prior to the reordering of additional aircraft (and prior to the accident).

The plaintiff commenced an action against the aircraft manufacturer, alleging a design defect based on the selection of the material used for the repositioning cable. Despite the fact that the precise composition of the cable was not specified by the government because the government reordered the aircraft with full knowledge of the alleged cable defect, the government's reordering enabled the contractor to use the government contractor defense. *Lewis* relied heavily on Scalia's discussion about the need for the government's exercise of discretion. The government's decision to continue to use and reorder the product after it had become aware of the precise hazard alleged by the plaintiff is exactly the type of government discretion at which *Boyle* was aimed:

> [S]ince the government specifically requested the cable that failed despite awareness of its alleged design defect, thus precluding characterization of the cable as a stock item that happens to have a design defect, we also cannot second-guess the contractor's decision regarding the materials to be used for the cable. Based on the reorder, the contractor can claim: "The government made me do it." The imposition of liability under state law would constitute a

significant conflict with the government's decision to order replacement cables.[87]

Lewis is consistent with two earlier government contractor defense cases, *Dowd v. Textron, Inc.* and *Ramey v. Martin-Baker Aircraft Co.*, which held that the government's continued use of a product establishes government approval when that continued use occurs after the government is aware of an alleged defect in the product.[88]

Recent cases attempt to expand the defense to preclude liability resulting from disaster response, nuclear substance exposure, and services provided to the military.

The Future of *Boyle*

The future of *Boyle* will likely involve attempts to expand the applicability of the defense outside the realm of products liability. Recent cases attempt to expand the defense to preclude liability resulting from disaster response, from nuclear substance exposure, and from services provided to the military.

For example, the Second Circuit recently extended *Boyle* to disaster response in *In re World Trade Center Disaster Site Litigation*.[89] Although the court ultimately concluded that the defendants had not satisfied all of the *Boyle* elements, the case provided the groundwork for private contractors to apply *Boyle* in a context outside of the typical products liability application. After the September 11, 2001, terrorist attacks, many of the police, firefighters, and construction workers who participated in the cleanup efforts of the collapsed World Trade Center buildings alleged that they suffered respiratory illnesses as a result of exposure to toxic fumes, gases, and hazardous debris at the disaster site. Claims were filed against the City of New York and against the private companies that the city hired to assist with the cleanup. The plaintiffs alleged that the city "took control of the site, engaged contractors, and supervised the clean-up operations, but failed to provide adequately for the safety of workers engaged in the clean-up operations."[90] The defendants sought derivative immunity under the Stafford Act.[91] Applying *Boyle*, the Second Circuit found that the government contractor defense could "extend to the disaster relief context due to the unique federal interest in coordinating federal disaster assistance and streamlining the management of large-scale disaster recovery projects."[92] The court suggested that the three *Boyle* elements could be applied in the disaster relief context under the Stafford Act where

1. the agency, in its discretion, approved reasonably precise specifications regarding the management of a recovery site;
2. the agency supervised and controlled an entity charged with implementing those specifications; and
3. the entity warned the agency about any dangers known to it but not to the agency.[93]

However, the Second Circuit agreed with the district court's findings that the lead federal agencies' relationship with the city and the private contractors was one of "cooperation and collaboration" rather than one of supervision and control, and affirmed the denial of the defendants' motion for summary judgment.[94] It is worth noting that although the defense was unsuccessful based on these specific facts, the Second Circuit's holding provides a framework for government contractors to apply *Boyle* in future disaster response cases.

The Ninth Circuit in *Hanford Nuclear Reservation Litigation*[95] acknowledged that the government contractor defense applies not only to the design of products by private entities for the federal government but also to the processes that produce the products.[96] In *Hanford*, the plaintiffs alleged that radioactive emissions from the Hanford Nuclear Weapons Reservation in Washington state caused their life-threatening diseases. The U.S. government had solicited several private corporations to operate the reservation to build atomic bombs for use in World War II. The defendant corporations asserted the government contractor defense. The Ninth Circuit recognized that the defense could apply to private entities that operate production facilities; however, they rejected the defense on the ground that a federal statute, the Price-Anderson Act,[97] which provides compensation to victims of nuclear accidents, predated the common-law *Boyle* defense.[98] The court also found the Price-Anderson Act and the government contractor defense incompatible because the statute provided indemnity to contractors, whereas the government contractor defense provided a defense to liability.[99] Based on *Hanford*, government contractors could potentially apply the government contractor defense to cases involving liability arising from the operation of a production facility, assuming the absence of conflicting federal statutes.

Recently, government contractors have attempted to apply the government contractor defense

to liability arising from services provided to the U.S. military. Two district courts addressing the issue have held that the government contractor defense should not protect contractors from liability for services provided for the federal government in combat zones.[100] These courts also found that the government contractor defense should not be extended outside product manufacturing.[101]

However, previously in *Hudgens v. Bell Helicopters/Textron*[102] in 2003, the Eleventh Circuit applied the defense to a private company that provided maintenance services to military helicopters at a U.S. military base.[103] The court acknowledged that the facts in *Boyle* involved a procurement contract, not a services contract. However, the court found that the rationale in *Boyle* did not turn on classes of contract but on "whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest."[104] According to the court, "[h]olding a contractor liable under state law for conscientiously maintaining military aircraft according to specified procedures would threaten government officials' discretion in precisely the same manner as holding contractors liable for departing from design specifications."[105] The Eleventh Circuit cited no cases that had previously applied *Boyle* to service contracts. This issue is likely to continue to be tested in district courts in light of the U.S. military's increased use of private contractors to perform services in the current wars in Iraq and Afghanistan.

Predictably, since the Supreme Court's *Boyle* decision we have seen an increasing number of government contractor defense decisions, which have both expanded and contracted the scope of the defense. As discussed above, the case law has resulted in conflicting standards on certain issues, which have affected the outcome in several cases. Within the next several years, it is conceivable that the Supreme Court may accept another government contractor defense case to further define the boundaries of the defense—or, in the hopes of some, to eliminate it. If the Supreme Court reviews a case involving the government contractor defense, it will likely resolve the conflict in the circuits as to the appropriate standard in a failure-to-warn case or define the appropriate limits of the defense outside the products liability context. In both instances, the next Supreme Court decision will almost certainly involve a reexamination of the defense itself. ■

Notes

1. 487 U.S. 500 (1988).

2. The jury apparently disregarded the finding of Navy safety investigators that the safety wire on Boyle's emergency release handle was intact, indicating that he had not attempted to open his emergency exit. *See* Colin P. Cahoon, *Boyle under Siege*, 59 J. Air L. & Com. 815, 827–28 (May/June 1994).

3. 792 F.2d 403, 408–09 (4th Cir. 1986); Boyle v. United Techs. Corp., 792 F.2d 413, 414–16 (4th Cir. 1986). The Fourth Circuit also held that Boyle had failed to meet his burden of proof against Sikorsky to prove fault for the original accident. *Boyle*, 792 F.2d at 414–16.

4. *See, e.g.*, Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985); Portney v. Cessna Aircraft Co., 612 F. Supp. 1147, 1152 (S.D. Miss. 1985).

5. *See* Boyle v. United Techs. Corp., 479 U.S. 1029 (1987) (granting certiorari).

6. *Boyle*, 487 U.S. at 512–14.

7. *Id.* at 507.

8. *Id.* at 511–12.

9. *Id.* The Federal Tort Claims Act precludes recovery from the United States on "[a]ny claim . . . 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) (2006).

10. *See also* Kerstetter v. Pac. Scientific Co., 210 F.3d 431, 435 (5th Cir. 2000) ("Government contractor immunity is derived on the government's immunity from suit where the performance of a discretionary function is at issue.").

11. "That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law. Displacement will occur only where . . . a 'significant conflict' exists between an identifiable 'federal policy or interest and [operation] of state law,' or the application of state law would 'frustrate specific objections' of federal legislation." *Boyle*, 487 U.S. at 507 (citation omitted).

12. *See* Lewis v. Babcock Indus., Inc., 985 F.2d 83, 86–87 (2d Cir. 1993) ("[A]nswering the question whether the Government approved reasonably precise specifications for the design feature in question necessarily answers the question whether the federal contract conflicts with state law."); *In re* Aircraft Crash Litig., Frederick, Md., 752 F. Supp. 1326, 1365 (S.D. Ohio 1990), *aff'd sub nom.* Darling v. Boeing Co., 935 F.2d 269 (6th Cir. 1991).

13. Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983).

14. *Boyle*, 487 U.S. at 512.

15. *Id.* at 512–13.

16. 857 F.2d 1468 (4th Cir. 1988).

17. *See, e.g.*, Kerstetter v. Pac. Scientific Co., 210 F.3d 431, 435 (5th Cir. 2000) (government was extensively involved in approval process); Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 998 (7th Cir. 1996); *In re* "Agent Orange" Prod. Liab. Litig., 304 F. Supp. 2d 404, 433 (E.D.N.Y. 2004), *aff'd*, 517 F.3d 76 (2d Cir. 2008).

18. *See In re* World Trade Ctr. Disaster Site Litig., 521 F.3d 169, 198 (2d

Cir. 2008); Gray v. Lockheed Aeronautical Sys. Co., 125 F.3d 1371, 1377 (11th Cir. 1997), *aff'd on reh'g*, 155 F.3d 1343 (5th Cir. 1998); Trevino v. Gen. Dynamics Corp., 865 F.2d 1474, 1479 (5th Cir. 1989).

19. In *Boyle*, Scalia relied on the trial record for the facts related to the application of the government contractor defense. The *Boyle* defense typically is asserted in a defendant contractor's motion for summary judgment.

20. 210 F.3d 431 (5th Cir. 2000).

21. *Id.* at 437–39.

22. 890 F.2d 698 (4th Cir. 1989).

23. *Id.* at 703.

24. *Id.* at 700–01 ("It is this salient fact of governmental participation in the various stages of the [equipment's] development that establishes the [government] contractor defense.").

25. Boyle v. United Techs. Corp., 792 F.2d 413, 414–15 (4th Cir. 1986).

26. 933 F.2d 331 (5th Cir. 1991).

27. *Id.* at 336.

28. 517 F.3d 76 (2d Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3242 (U.S. Oct. 6, 2008) (Nos. 08-460 & 08-461).

29. *Id.* at 91.

30. *Id.* at 91–92 (citation omitted).

31. *Id.* at 91–92, 94–95.

32. 865 F.2d 1474 (5th Cir. 1989).

33. *Id.* at 1486–87.

34. *Id.* at 1480.

35. *See, e.g.*, Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744 (9th Cir. 1997); Gray v. Lockheed Aeronautical Sys. Co., 125 F.3d 1371, 1377–78 (11th Cir. 1997); Bailey v. McDonnell Douglas, 989 F.2d 794, 799 (5th Cir. 1993) ("[T]he requirements of 'reasonably precise specifications' and conformity with them refer to the particular feature of the product claimed to be defective.").

36. 107 F.3d 744 (9th Cir. 1997).

37. *Id.* at 750.

38. *Id.* at 748 (citing Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582, 584 (9th Cir. 1996)).

39. 125 F.3d 1371 (11th Cir. 1997).

40. *Id.* at 1378.

41. *See also* Trevino v. Gen. Dynamics, 865 F.2d 1474, 1486 (5th Cir. 1989) (government specifications were silent as to precise location of allegedly defective vent valve and safety devices); Shurr v. A.R. Siegler, Inc., 70 F. Supp. 2d 900, 900 (E.D. Wis. 1999) (military did not approve reasonably precise specifications for the design features in question); Strickland v. Royal Lubricant Co., 911 F. Supp. 1460, 1467–68 (M.D. Ala. 1995) (where specification for hydraulic fluid was "silent" as to toxicity, the government contractor defense has not been established).

42. *See In re* Air Disaster at Ramstein Air Base, Germany, 81 F.3d 570, 575 (5th Cir.), *amended sub nom.* Perez v. Lockheed Corp., 88 F.3d 340 (5th Cir. 1996) (a contractor may show conformity with government specifications through evidence that the government was "present and actively involved throughout the design, review, development and testing of the [product at issue]"); *In re* "Agent Orange" Prod. Liab. Litig., 304 F. Supp. 2d 404, 435 (E.D.N.Y. 2004), *aff'd*, 517 F.3d 76 (2d Cir. 2008); Quiles v. Sikorsky Aircraft, 84 F. Supp. 2d 154, 166 (D. Mass 1999).

43. 874 F.2d 946 (4th Cir. 1989).

44. *Id.* at 951 (citation omitted).

45. 890 F.2d 698, 702 (4th Cir. 1989).

46. *Agent Orange*, 304 F. Supp. 2d at 435; *see also, e.g.*, Miller v. Diamond Shamrock Co., 275 F.3d 414, 420 (5th Cir. 2001) ("Acceptance and use of an item following its production can establish that the items conformed to its specifications."); Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 992 (7th Cir. 1996) (unsafe placement of exhaust pipe and fuel tank on truck did not deviate from Marine Corps specifications).

47. Trevino v. Gen. Dynamics, 865 F.2d 1474, 1481 (5th Cir. 1989).

48. Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988).

49. *In re* Aircraft Crash Litig., Frederick, Md., 752 F. Supp. 1326, 1339 (S.D. Ohio 1990), *aff'd sub nom.* Darling v. Boeing Co., 935 F.2d 269 (6th Cir. 1991).

50. *Agent Orange*, 517 F.3d at 99, 101 (military officials were aware of the risks of Agent Orange yet continued ordering it from the manufacturers); *Oliver*, 96 F.3d at 1003–04 (government and contractor were both aware of the same dangers, therefore contractor not obligated to warn government of known danger); Ramey v. Martin-Baker Aircraft Co., 874 F.2d 946, 951 n.10 (4th Cir. 1989) (showing of government knowledge of the alleged danger or hazard is sufficient to establish third element of *Boyle*).

51. Harduvel v. Gen. Dynamics Corp., 878 F.2d 1311, 1322 (11th Cir. 1989) ("The Air Force was plainly aware of the chafing problem in the F-16 generally, and the possible serious consequences of chafing. There is no evidence that General Dynamics had knowledge it withheld. Despite its knowledge, the Air Force continued to fly the hundreds of F-16s in operations, and to purchase additional ones. . . . We think the third *Boyle* condition is satisfied here as a matter of law."); *Aircraft Litig., Frederick, Md.*, 752 F. Supp. at 1364 ("Under *Boyle*, a contractor has no need to warn the government of dangers in the use of its equipment of which it has no actual knowledge."); Kerstetter v. Pac. Scientific Co., 210 F.3d 431, at 438–39 (5th Cir. 2000) (government contractor defense applied because the Navy exercised its discretion in approving warnings in flight manual, and Navy knew about the danger ten years prior to the accident).

52. 890 F.2d 698, 701 (4th Cir. 1989).

53. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 454 (9th Cir. 1983).

54. *Id.*

55. *In re* Air Crash Disaster at Mannheim, F.R.G., 769 F.2d 115, 124–25 (3d Cir. 1985) (third element met where Army reviewed and rejected contractor's proposed improvements relating to alleged defects); *see also Kleeman*, 890

F.2d at 703 (Navy rejected contractor proposal to improve design relating to alleged defect).

56. 991 F.2d 1117 (3d Cir. 1993).

57. *Id.* at 1123.

58. *See id.* at 1120–21.

59. *See* Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986) (government contractor defense applies to nonmilitary contractors); Burgess v. Colo. Serum Co., 772 F.2d 844, 846 (11th Cir. 1985). *But see In re* World Trade Ctr. Disaster Site Litig., 521 F.3d 169, 196–97 (2d Cir. 2008) ("this court has yet to decide whether the [government contractor] defense extends to contractors in non-military contexts" other than the disaster relief context).

60. 960 F.2d 806 (9th Cir. 1992).

61. *Id.* at 814.

62. *Id.* at 812.

63. *See, e.g., In re* Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 839–40 (2d Cir. 1992); Niemann v. McDonnell Douglas Corp., 721 F. Supp. 1019, 1023–24 (S.D. Ill. 1989).

64. Snell v. Bell Helicopter Textron, 107 F.3d 744, 750 (9th Cir. 1997); Nielsen v. George Diamond Vogel Paint Co., 892 F.2d 1450, 1455 (9th Cir. 1990).

65. Glassco v. Miller Equip. Co., Inc., 966 F.2d 641, 643–44 (11th Cir. 1992); Skyline Air Serv., Inc. v. G.L. Capps Co., 916 F.2d 977, 980 (5th Cir. 1990).

66. Glassco v. Miller Equip. Co., Inc., 966 F.2d 641 (11th Cir. 1992).

67. *Id.* at 643–44.

68. 916 F.2d 977 (5th Cir. 1990).

69. *Id.* at 979–80.

70. *Id.*; *see also* Timberline Air Serv. v. Bell, 125 Wash. 2d 305, 323 (1994) ("The fact that the helicopter was later transferred to a private party does not preclude applicability of the [government contractor] defense. . . . The same policy considerations identified in *Boyle* apply whether the product remains in military use or ultimately ends up in civilian hands.") (citation omitted); *see generally* Gregory C. Read, "The Applicability of the Government Contractor Defense to Surplus Military Aircraft," ABA Forum on Air and Space Law (June 12–13, 1997).

71. *See* Dorse v. Eagle-Picher Indus., Inc., 898 F.2d 1487, 1489 (11th Cir. 1990) (the three-part *Boyle* test is "necessarily limited to design defect cases").

72. *See, e.g.*, Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 1003 (7th Cir. 1996); Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582, 586 (9th Cir. 1996); Tate v. Boeing Helicopters, 55 F.3d 1150, 1157 (6th Cir. 1995).

73. 55 F.3d 1150 (6th Cir. 1995).

74. *Id.* at 1157.

75. *See also* Tate v. Boeing Helicopters, 140 F.3d 654, 660 (6th Cir. 1998); Bailey v. McDonnell Douglas Corp., 989 F.2d 794, 801 (5th Cir. 1993); Smith v. Xerox Corp., 866 F.2d 135, 139 (5th Cir. 1989).

76. Oliver v. Oshkosh Truck Corp., 911 F. Supp. 1161 (E.D. Wis.), *aff'd*, 96 F.3d 992 (7th Cir. 1996).

77. 96 F.3d at 1003, 1004 n.8 (citing *Tate*, 55 F.3d at 1157) (citation omitted).

78. Bailey v. McDonnell Douglas Corp., 989 F.2d 794 (5th Cir. 1993).

79. *Id.* at 801.

80. *See* Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582, 586 (9th Cir. 1996); Dorse v. Eagle-Picher Indus. Inc., 898 F.2d 1487, 1489 (11th Cir. 1990); *In re* Joint E. & S. Dist. of N.Y. Asbestos Litig., 897 F.2d 626, 632–33 (2d Cir. 1990).

81. 897 F.2d 626 (2d Cir. 1990).

82. *Id.* at 630 (citations and emphasis omitted).

83. 297 F.3d 66 (2d Cir. 2002).

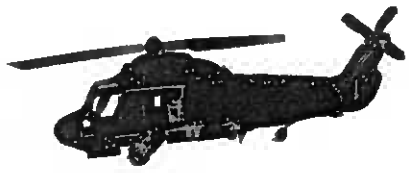
84. *Id.* at 75 n.11 (citation and quotation marks omitted).

85. *See* Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 1003–04 (7th Cir. 1996).

86. 985 F.2d 83 (2d Cir. 1993).

87. *Id.* at 89 (citation omitted).

88. Dowd v. Textron, Inc., 792 F.2d 409, 412 (4th Cir. 1986) ("The length and breadth of the Army's experience with the [product]—and its decision to continue using it—amply establish government approval of the alleged design defects."); Ramey v. Martin-Baker Aircraft Co., 874 F.2d 946, 950 (4th Cir. 1989) (long-term government experience with the product is one



of the ways to establish approval of reasonably precise specifications); *see also* Kerstetter v. Pac. Scientific Co., 210 F.3d 431, 438–39 (5th Cir. 2000) (the Navy knew about the problem ten years prior to the accident at issue).

89. 521 F.3d 169 (2d Cir. 2008).

90. *Id.* at 174 (citation omitted).

91. 42 U.S.C. § 5148 (2006). The Stafford Act provides immunity to federal agencies or employees that participate in certain federal disaster relief initiatives. *See In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 533–34, 566 (S.D.N.Y. 2006).

92. *World Trade Ctr. Disaster Site Litig.*, 521 F.3d at 197.

93. *Id.*

94. *Id.* at 198.

95. 534 F.3d 986 (9th Cir. 2008).

96. *Id.* at 1000.

97. 42 U.S.C. § 2210 (2006).

98. 534 F.3d at 1000–02.

99. *Id.* at 1001–02.

100. *See, e.g.*, McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1328–30 (the government contractor defense is available to private contractors in the "very limited context of equipment procurement" and not available to a private airline that contracted to provide air transportation to the U.S. military in Afghanistan); Fisher v. Halliburton, 390 F. Supp. 2d 610, 615–16 (S.D. Tex. 2005) (refusing to extend the government contractor defense to private companies that provide supply convoy services in combat zones).

101. *McMahon*, 460 F. Supp. 2d at 1328–30; *Fisher*, 390 F. Supp. 2d at 615–16.

102. 328 F.3d 1329 (2003).

103. *Id.* at 1345.

104. *Id.* at 1334.

105. *Id.*