

Government Contractor Defense

The government contractor defense provides private contractors with protection from certain product liability claims when they do business with the U.S. government. There are two basic forms of the defense, a common-law defense, which is discussed in the U.S. Supreme Court decision of *Boyle v. United Technologies*, and a statutory defense defined in the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, also known as the SAFETY Act.

The U.S. government, particularly the military, is a large purchaser of products. For fiscal year 2002, the government spent approximately \$85 billion on supplies and equipment. These products ranged from hand tools, fabrics, toiletries, and construction materials to aircraft, ships, and weapons systems. In addition, the government entered into an additional \$160 billion in service contracts.

As a general rule, the United States and its various agencies are immune from product liability actions under the principle of sovereign immunity. This immunity has been recognized and enforced by both federal and State courts throughout the United States. The government has consented to partially waive its immunity to tort liability under specific circumstances, which are defined in the Federal Tort Claims Act (FTCA).

Private contractors doing business with the U.S. government may be protected from State product liability claims by a common law defense called the "government contractor defense (GCD)." In essence, this defense as described allows private contractors to share the government's immunity from tort liability on public policy grounds. The modern requirements for

the defense were set forth by the U.S. Supreme Court in the case of *Boyle v. United Technologies Corp.* In 2002, Congress codified this defense for manufacturers and sellers of anti-terrorism technologies (ATT) in the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, also known as the SAFETY Act.

This report provides an overview of the government contractor defense as defined in *Boyle* and the SAFETY Act. Because the scope of the defense varies significantly by jurisdiction, it is important that knowledgeable counsel be consulted for specific legal advice.

The Common Law Defense

Courts have recognized several formulations of "government contractor defense" or "military contractor defense" since the early 1900's. These formulations varied from court to court. In 1988, the U.S. Supreme Court decided the case of *Boyle v. United Technologies, Inc.* 487 U.S. 500 (1988). In this decision, the court defined the modern requirements for the common law government contractor defense.

The Boyle Case

The Boyle case involved a product liability action brought against a military contractor by the estate of a helicopter co-pilot who died in a crash. Although he survived the crash impact, the co-pilot drowned when he could not escape from the helicopter before it sank in the ocean.

The co-pilot's estate brought a wrongful death action against the Sikorsky Division of United Technologies Corp., the manufacturer of the helicopter. The suit alleged that the manufacturer defectively designed the co-pilot's emergency escape system and that this led to his death. A jury returned a large verdict for the co-pilot's estate that was overturned by the U.S. Court of Appeals for the Fourth Circuit based upon a "military contractor defense" recognized by the court. The estate appealed the decision to the U.S. Supreme Court, arguing that there was no justification in federal law for shielding contractors from liability for design defects in military equipment; and that even if such defense exists, that the Court of Appeal's formulation of the conditions for its application were wrong.

The Supreme Court affirmed the Fourth Circuit's decision; however, it did not adopt the appellate court's justification or method. Instead, the Supreme Court found that in some circumstances, State liability laws may present a significant conflict with federal policy. In such circumstances, the conflicting law should be displaced by a federal common law. For the instant case, the federal interest identified was the government's ability to procure military equipment at the lowest reasonable price, since the imposition of liability would either affect the ability of the government to find a manufacturer to produce the equipment to government

specifications or would increase the price of the equipment.

The court then defined a three-part test for determining when a State product liability claim, which was based on defective design, significantly conflicted with federal interests. Under this test, a contractor would not be found liable for design defects in military equipment if:

- The United States approved of reasonably precise specifications
- The equipment conformed to these specifications
- The supplier warned the United States about dangers in the use of the equipment that were known to the supplier, but not the United States.

This three-part test is often referred to as the Boyle test. The first two of these conditions are necessary to assure that there was a strong federal interest in the features of the equipment and that the product met the terms of the contract. The court, however, made it clear that the simple selection of a commercially produced product by stock number would not show a strong enough federal interest or conflict to justify displacing State law. The third condition was necessary to prevent contractors from withholding knowledge of risks that might disrupt the contract.

Court Decisions following Boyle

The Boyle case involved design defects in military equipment. Although the test is easily applicable in this context, the decision left several important questions unanswered that the lower courts have had to resolve. These include whether the defense may be extended to product defects other than design defects; whether the defense applies to non-military equipment provided to the

military; and whether the defense applies to non-military contractors. The following sections briefly summarize how lower courts have addressed these issues. References 1 and 3 provide more detailed analysis of these issues.

Other Types of Defects

The Supreme Court provided for the defense in cases of design liability; however, it did not address the applicability of the defense to manufacturing defects or warning defects, and the lower courts are divided on whether the defense would apply under these circumstances.

Most cases have held that the defense may apply to warning defects. The rationales used to arrive at this result have varied. A key consideration is whether the government specified the warning to be provided or if the contract specifications were silent as to warnings.

Most cases have held that the defense does not apply to manufacturing defects. A limited number of courts have indicated that the defense may be available under some circumstances, such as the case where the product is a single-use, single-purpose combat item that may not be field tested.

Non-military Equipment Provided to the Military

In general, courts do not support the application of the defense for non-military commercial products provided to the military. There are numerous decisions concerning what is "military equipment" for the purposes of the defense. These decisions are varied; for example, government-specification paint used on military equipment was considered to be "military equipment;" however, asbestos used for

insulation of the equipment was not. This has become an area of concern for contractors with the federal government's efforts to simplify and reduce the cost of procurements under the Federal Acquisition Streamlining Act of 1994, the Federal Acquisition Reform Act of 1996, and related acts. These laws encourage government agencies to use commercially available products, particularly commercial off-the-shelf (COTS) items, rather than products designed to government specifications. These decisions lessen the likelihood that the contractor will be able to claim the defense; because the products are stock products, which are sold to others, it is difficult to demonstrate that there was a significant conflict between State law and federal policy.

Two other related concerns are the use of commercial products adapted for military use and the use of uprated commercial components in military equipment. Adapted commercial items are commercial items that have been modified to meet government specifications. Whether contractors may invoke the defense for claims involving such products likely will depend upon the extent of the modifications made. Uprating is a practice where component parts are used under conditions other than those for which they are specified. This practice is used for automobiles and avionics equipment, as manufacturers are eliminating military-specification components that have been ruggedized for harsh environments. It is unclear how courts will treat such products.

Nonmilitary Contractors

Decisions are inconsistent on whether the defense applies to nonmilitary contractors. Decisions that support the application of the defense rely on the argument

that the same, uniquely federal interests implicated in military contracts also exist in nonmilitary contracts. Decisions that disallow the defense find that the public policy considerations used to justify tort liability (i.e., that the manufacturer is in a better position to take actions to prevent injury and harm and is better able to bear the costs of the injury) are more important than the federal interest.

Suggestions for Satisfying the Boyle Test

The government contractor defense is judicially created, and whether it will apply in particular product liability litigation will depend upon the facts surrounding the litigation. At the same time, there are proactive steps that a contractor, who is doing business with the U.S. government, may take. These steps include:

- Seeking advanced government approval of any contractor-proposed or developed specifications
- Documenting any government involvement in the development, review, and approval of specifications, standards, and product design
- Ensuring that the contract accurately describes the scope of the parties' obligations with respect to design decisions
- Establishing a quality management system to ensure that products are manufactured according to specifications
- Documenting the government's acceptance of the product along with concurrence that the product conforms to contract specifications
- Documenting the effectiveness of the quality management system
- Warning the government in writing of all potential product safety hazards, even obvious hazards
- Documenting any recommendations made to the government for changes to address identified hazards
- Ensuring that all safety issues are satisfactorily closed and documented.

Safety Act

The SAFETY Act was enacted by Congress as part of the Homeland Security Act of 2002, Public Law No. 107-296. The purpose of the law as stated is to ensure that the threat of liability does not deter potential manufacturers and sellers of anti-terrorism technology from developing and commercializing technologies that could significantly reduce the risks or mitigate the effects of a large scale terrorist event. One of these incentives is to codify the availability of the government contractor defense to such entities if certain conditions are met.

Statement of the Defense

Subsection 863(d) of the law defines the requirements for the government contractor defense. Paragraph (d) (1) of Subsection 863 (d) states as follows: "(1) In General - Should a product liability or other lawsuit be filed for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies approved by the Secretary [of the Department of Homeland Security (DHS)]...have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller there is a rebuttable presumption that the government contractor defense applies in such a lawsuit. This presumption shall only be overcome by evidence showing that the Seller acted fraudulently or with willful misconduct in submitting information

to the Secretary during the course of the Secretary's consideration of such technology under this subsection. This presumption of the government contractor defense shall apply regardless of whether the claim against the seller arises from a sale of the Product to Federal Government or nonfederal Government Customers."

The remaining paragraphs within the subsection describe the procedure that the Secretary must use for approving products. While the Act does not expressly delineate the scope of the defense, the Act and the legislative history make it clear that the scope is broad.

Qualifying for the Defense

Procedurally, as stated, in order to qualify for the defense, a manufacturer or seller must perform two acts. They must have their technology designated as a Qualified Antiterrorism Technology (QATT) by the Secretary of the DHS and then they must have the QATT approved by the Secretary specifically for the purposes of the defense. Once these two steps occur, the presumption of the defense is conferred automatically and may only be rebutted by demonstrating that the manufacturer or seller acted fraudulently or with willful misconduct in their dealings with DHS.

Qualified Anti-terrorism Technology

The SAFETY Act defines anti-terrorism technology (ATT) to be any product, equipment, service, device, or technology that is designed, developed, modified, or procured for the specific purpose of detecting, identifying, preventing, or deterring acts of terrorism, or limiting the harm that such acts might otherwise cause. This broad definition encompasses tangible

products, software, services, and various forms of intellectual property.

The manufacturer or seller of ATT must submit an application to DHS requesting that DHS designate the technology as a QATT. The application forms ask for detailed information on the technology that will be reviewed by DHS against statutory criteria defined in the SAFETY Act.

These criteria include:

- Prior U.S. government use or demonstrated substantial utility and effectiveness
- Availability of the ATT for deployment
- Existence of extraordinarily large or unquantifiable third party liability risk exposures to the Seller or provider of the technology
- Substantial likelihood that the ATT will not be deployed unless protections are provided under the Act
- Magnitude of the risk exposure to the public if the ATT is not deployed
- The capabilities of the technology
- Effectiveness of the ATT

In each case, DHS will use their discretion in interpreting and weighing these criteria. The culmination of an application will result in either approval or rejection by DHS. If approved, DHS will issue a designation to the applicant that the technology is a QATT. The designation is valid for 5-8 years, as determined by the Secretary. The designation may be renewed or transferred. It will expire automatically if the QATT is significantly changed or modified unless a supplemental application is filed and approved by DHS.

Approved by the Secretary

Designation as a QATT is not sufficient to qualify for the government contractor

defense. As stated, in order to be eligible for the government contractor defense, DHS must perform an additional level of review, called certification. If the applicant successfully passes this review, DHS will issue a certificate that the QATT is an "Approved Product for Public Defense," making it qualified for the defense should claims arise from deployment of the technology during the occurrence of a terrorist act.

To receive a certification, a QATT must be shown to perform as intended, conform to seller's specifications, and is safe for use as intended. Applicants must provide detailed safety and hazard analyses, documenting that these conditions are met. Once certification is granted, the technology will be placed on an "Approved Product List for Homeland Security" and becomes eligible for the defense.

The certification is valid for as long as the related designation is in effect and will terminate automatically when the designation ends. The certification may be renewed or transferred, along with the designation.

Application Information

DHS issued interim regulations concerning the application process on October 16, 2003. These rules, the application forms, and lists of

qualified products are available on-line from a special DHS Web site, www.safetyact.gov.

Differences with the Common Law Defense

There are three basic differences between the common law defense and the SAFETY Act defense. First, the SAFETY Act expressly provides that the government contractor defense is available not only to government contractors, but also to those who sell to State and local governments and the private sector. Second, the manufacturer or seller of QATT does not have to design their technology to federal specifications in order to obtain the defense. Third, the SAFETY Act expressly states the limited circumstances under which the applicability of the defense may be rebutted.

References

1. 63A Am. Jur. 2d Products Liability §§ 1474-1512 (2003).
2. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). October 6, 2004. <http://laws.findlaw.com/us/487/500.html>.
3. Brian Sheppard, Annotation, *The Government Contractor Defense to State Products-Liability Claims*, 53 A.L.R.5th 535 (2003).
4. Maffei, Rocco and Jason Richter. "COTS-Uprating and the Government Contractor Defense." *National Contract Management Journal*. 29.1 (1998): 1-14.
5. "Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the Safety Act)" 68 Fed. Reg. 59684 (2003) (codified at 6 CFR Part 25).
6. U.S. General Services Administration (GSA). *Federal Procurement Report - FY 2002*. Washington, DC: GSA, 2002. October 6, 2004. <https://www.fpds.gov/fpdsng/cms/index.php/reports>.

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