Military Contractors Claim Mantle of Government to Defend Tort Suits

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Since 2001, the use of private contractors to actively support U.S. military operations has risen to "unprecedented levels."[1] Numerous injury and death cases have been brought against those contractors. These include cases against private airlines chartered by the government to carry passengers and cargo and companies hired to maintain military aircraft. Under the Feres doctrine, the government has sovereign immunity from liability for injuries to military personnel that arise out of their service.[2] Furthermore, the statutory immunities established by the exceptions to the Federal Tort Claims Act (FTCA) for discretionary acts and combatant activities apply only to the government and not to contractors.[3] Congress has never enacted legislation to shield private contractors from tort liability.[4]

Nevertheless, contractors have, often successfully, advanced defenses to bar tort liability based on the political question doctrine and federal preemption. This article will present an overview of developing law addressing those two defenses.

Preemption Defense

The seminal 1988 Supreme Court decision in *Boyle v. United Technologies Corp*.[5] held that a government aircraft contractor could assert a preemption defense to a product design defect lawsuit involving a military aircraft. The plaintiff in *Boyle* sought damages for the death of her husband, a Marine pilot killed when he was trapped under water and drowned because of the allegedly negligent design of his helicopter's escape hatch.

The court found that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced."[6] The Court devised a new preemption rule, patterned on the FTCA's discretionary function exception, to effectively bar suits against contractors in cases where the government approved reasonably precise specifications for a product; the product conformed to those specifications; and the contractor warned the government about dangers known to the contractor but not to the government.[7]

Boyle's preemption doctrine was carefully tailored to apply only to those tort lawsuits that raised a "significant conflict" with a product design specification approved by the government. The court observed that its rule did not apply to products purchased from stock or standard "off the shelf" equipment. The court rejected granting the contractor complete immunity akin to the Feres doctrine that bars military personnel from suing the government.[8]

In a 2009 decision, *Saleh v. Titan Corp.*,[9] the U.S. Court of Appeals for the D.C. Circuit expanded Boyle preemption to dismiss injury suits against private contractors who allegedly participated along with military personnel in the unauthorized torture of prisoners at the Abu Ghraib prison in Iraq. *Saleh* created a rule of "battle-field preemption" based on the FTCA's combatant activities exception. The D.C. Circuit ruled that "where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Saleh* rationalized its rule by observing that "these cases are really indirect challenges to the actions of the U.S. military (direct challenges obviously are precluded by sovereign immunity)." The dissent in *Saleh* argued that the alleged acts of torture were illegal and that the tort suit did not raise a "significant conflict" with a government interest as required under *Boyle* to the contrary, the government's clear policy banned the use of torture.

Subsequently, in *Harris v. Kellogg Brown & Root Services*, the U.S. Court of Appeals for the Third Circuit considered *Saleh's* battle-field preemption defense in a wrongful death claim for an Army sergeant electrocuted while taking a shower at a military base in Iraq.[10] The plaintiff alleged that the death was caused by the defendant contractor's negligent installation and maintenance of a water pump (which was not properly grounded). *Harris* adopted the Saleh preemption test, and determined that the contractor's maintenance of a base in a war zone could constitute a "combatant activity," but concluded that the case was not preempted because "[t]he military did not retain command authority over [the contractor's] installation and maintenance of the pump" and the contractor had "considerable discretion" in deciding how to perform its work.[11]

In contrast to *Harris*, a New York federal court applied preemption to dismiss a case involving the maintenance of a military toilet at another Iraq base by the same contractor.[12] The plaintiff (an employee of a different contractor) alleged personal injuries when he fell on bathroom tiles that were loose, wet and slippery. The court concluded that the uncontradicted evidence

showed that the contractor's maintenance work was integrated into combatant activities over which the military retained command authority.[13]

Two months ago, a Chicago federal court judge rejected the application of Saleh preemption to the deaths of crew members killed in the crash of a Boeing 747 jet operated by National Airlines, a private airline carrying military cargo pursuant to a government contract.[14] The crash allegedly occurred because that cargo had not been properly secured by the airline prior to takeoff and broke loose during flight, causing the plane to crash. The district court found that even if the Saleh rule were correct (which the court sharply questioned), there was no basis to hold that the mere transport of military equipment in a war zone constituted a combatant activity.

Political Question Doctrine

The political question doctrine is a "narrow exception" to a federal court's "responsibility to decide cases properly before it."[15] Private contractors have argued that tort claims against them raise nonjusticiable political questions that threaten the separation of powers by questioning military judgments and decision-making in a war environment. The landmark Supreme Court case of *Baker v. Carr*[16] set forth six indicia of a political question, which the U.S. Court of Appeals for the Fourth Circuit recently distilled into two critical components in military contractor cases: first, the extent to which the government contractor was acting under the military's control; and second, whether national defense interests were closely intertwined with military decisions governing the contractor's conduct, so that a decision on the merits of the claim would require the judiciary to question actual sensitive judgments made by the military.[17]

Two Eleventh Circuit cases illustrate the parameters of the political question doctrine in military contractor cases. *McMahon v. Presidential Airways*[18] involved the death claims for three soldiers killed in the crash of a flight operated by a private carrier hired by the government. The U.S. Court of Appeals for the Eleventh Circuit rejected the carrier's claim of a political question, finding that the allegations raised an ordinary negligence claim based on pilot error (the plane was flown into a mountain) and did not require the court to examine any military decision or judgment.

By contrast, the Eleventh Circuit applied the political question doctrine to bar suit in *Carmichael v. Kellogg, Brown & Root Services*.[19]*Carmichael* was brought to recover damages for severe injuries suffered by an Army sergeant as he was guarding the defendant contractor's tanker truck, which overturned while part of a convoy navigating a dangerous route through a war zone. The court found that the truck was under the direct control of the military and that any negligence claim against the contractor implicated military judgments and decisions regarding the multiple hazards (speed, road conditions and routing) of the operation. The court observed that while *McMahon* involved "a more or less routine airplane flight" in which "the fact that the crash took place over Afghanistan during wartime was incidental ." the military mission and dangers faced by the truck convoy in *Carmichael* was "utterly central" to the case.[20]

The potential complexities involved in applying the political question doctrine are demonstrated by the Third Circuit's decision in *Harris*, addressed earlier with regard to the preemption defense. The contractor in *Harris* argued that a nonjusticiable political question was raised by its causation defense that the military's own decisions were at least in part responsible for the serviceman's electrocution. The Third Circuit determined that the application of the doctrine hinged on state choice of law. If Pennsylvania law applied, the case could proceed without impediment. That is because Pennsylvania recognizes the doctrine of joint and several liability and the contractor could be held liable for all of plaintiff's damages without making any determination regarding the government's conduct. But the outcome was different if Tennessee or Texas law applied, since those states apply proportional liability and would require the fact-finder to weigh the responsibility of the contractor and the government in setting damages.

Harris remanded the case for the district court to make a choice of law determination, noting that "[e]ven if Tennessee or Texas law applies only the fact finder's calculation of damages would be nonjusticiable. This means that we can extract the nonjusticiable issue in a manner that possibly preserves some of the plaintiffs' claims by dismissing only the damages claims that rely on proportional liability."[21]

Finally, in *Al Shimari v. CACI Premier Technology*, the Fourth Circuit will soon decide a key appeal on the political question doctrine involving a group of injury claims, like those in *Saleh*, for a group of prisoners allegedly tortured at the Abu Ghraib prison in Iraq. After nine years of litigation including a series of decisions and appeals, this past summer the district court in the case held that the political question doctrine barred the claims, determining that the military exercised control over the interrogation process and "the Court is simply unequipped to second-guess the military judgments in the application or use of extreme interrogation measures in the theatre of war."[22] Moreover, the court found that there was a "cloud of ambiguity" over the definition of torture at the time of the relevant events so that "the court lacks judicially manageable standards to adjudicate the merits "[23] The Fourth Circuit's decision on these issues may finally provide the basis for the Supreme Court to be heard on the subject.

Endnotes:

1. *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 331 (4th Cir. 2014).

2. *Feres v. United States*, 340 U.S. 135, 146 (1950).

3. 28 U.S.C. 2671 ("As used in this chapter the term "Federal agency" does not include any contractor with the United States.").

4. See *Boyle v. United Technologies Corp.*, 487 U.S. 500, 515 n.1 (1988)(Brennan, dissenting).

5. 487 U.S. 500 (1988).

6. Id. at 512.

7. Id.

8. Id. at 510.

9. 580 F.3d 1 (D.C.Cir. 2009), cert. denied, 131 S.Ct. 3055 (2011)

10. 724 F.3d 458 (3d Cir. 2013), cert. denied, 135 S.Ct. 1152 (2015).

11. Id. at 481.

12. *Aiello v. Kellogg, Brown & Root Services*, 751 F.Supp. 698 (S.D.N.Y. 2011).

13. Id. at 714-15.

14. *Brokaw v. Boeing*, 2015 WL 5915996 (N.D.Ill. 2015).

15. *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1427 (2011).

16. 369 U.S. 186, 217 (1962).

17. *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 331 (4th Cir. 2014).

18. 502 F.3d 1331 (11th Cir. 2007).

19. 572 F.3d 1271 (11th Cir. 2009).

20. Id. at 1291.

21. 724 F.3d at 474.

22. *Al Shimari v. CACI Premier Technology*, 2015 WL 4740217, *12 (E.D.Va. 2015).

23. Id. at *14.