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The Government Contractor Defense

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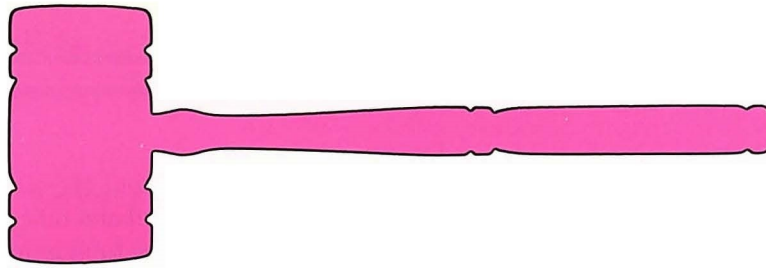
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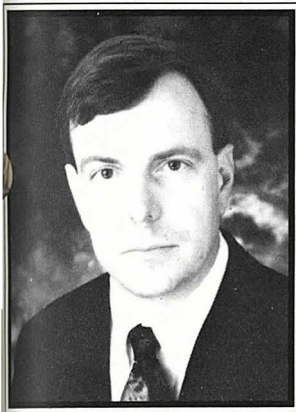
The Government Contractor Defense

David J. Stout, J.D.

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Introduction

Litigation involving defective products has increasingly become a pre-trial battle to overcome a series of technical defenses that have become a stock part of the manufacturer's



David J. Stout

defense. Defendants invariably raise the government contractor defense where the defective product resulted from some governmental involvement in the manufacturing process, no matter how peripheral or superfluous was the government's involvement in that process.¹ The defense appears in a wide variety of contexts including a forklift manufactured for use in a Air Force commissary, the restraint systems of a city bus and in the design of a postal dis-

patcher.² It is almost a certainty that plaintiffs will confront this defense in products liability litigation generally on a motion for summary judgment but often on a motion to dismiss as well.

The government contractor defense is extremely fact sensitive and should never be subject to a 12(b)6 dismissal.³ It is important, however, that where you anticipate the defense in your case, you immediately propound discovery to identify the documents and witnesses that can provide the information which will allow you to defeat the defense on summary judg-

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A Simple Rear-End Auto Accident with No Apparent Injuries Developed into a Case of Mild Head Injury Damages

James K. Gilman, J.D.,¹ Ronald Yeo, Ph.D., L.F. Wilson, Ph.D., Dan Gaither, M.Ed., and Dawn Bradley Berry, J.D.

INTRODUCTION

Litigating mild closed head-injury cases requires the plaintiff's attorney to present the unseen and to advocate from intangible evidence. No two cases are alike, and research and preparation for each case is unique.

This paper is an outline of the concept, preparation and presentation of a successful case from the plaintiff's perspective. The steps discussed show an approach which can be repeated to build the foundation for research, preparation and presentation of mild head injury cases.

Research and preparation assistance was provided by Advanced Research Information Services, Inc., Lawrence F. Wilson, Ph.D., Information Research Consultant, including: review of case materials, issues of causation and liability; development of underlying themes for the jury selection and case presentation; selection of "anchors" to explain "intan-

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ment. It is also imperative that you thoroughly understand the basis of the defense and how it operates as a practical matter. This article is an attempt to provide that understanding.

The key to understanding the government contractor defense is to recognize its limited theoretical basis. Where that theoretical basis is absent the defense should not apply. The government contractor defense derives ultimately from the government's sovereign immunity and the belief that its discretionary decisions should not be subject to second-guessing by courts or juries. Thus, the socio-political basis of the defense is to protect government policy decisions from judicial review. Where some identifiable government policy is not in direct conflict with the asserted cause of action, then the government contractor defense should have no application.⁴ The defense by its nature, therefore, only applies to design defect cases. A defect in the manufacturing process is not protected by the defense. In addition, the defense should almost never be available in failure to warn claims because, as discussed *infra*, there is virtually no conceivable federal policy which would conflict with providing adequate warnings.

The Defense

The government contract defense arises from federal common law.⁵ **Koutsoubos v. Boeing Vertol**, 755 F.2d 352, 354 (3rd Cir. 1985) (“[F]ederal common law provides a defense to liabilities incurred in the performance of government contracts.”); **Bynum v. FMC Corp.**, 770 F.2d 556, 564 (5th Cir. 1985).⁶ It has developed primarily in the area of military contracts and therefore is largely, though not exclusively, addressed to concerns unique to military specification contracts, i.e., military discretionary design decisions based upon tactical considerations. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 2517 (1988) (design of military equipment is a discretionary function involving a “trade-off between greater safety and greater combat effectiveness”); **Sanner v. Ford Motor Co.**, 364 A.2d 43 (N.J. Super. Law Div. 1976).⁷

Where the defense has been recognized outside the context of military equipment, it has involved contracts which implicate *unique* federal interests. *See, e.g., Burgess v. Colorado Serum Co. Inc.*, 772 F.2d 844, 845 (11th Cir. 1985) (serum manufactured under federal contract for use in the National Brucellosis Eradication Program); **Yearsley v. W.A. Ross Construction Co.**, 309 U.S. 18 (1940) (contract with Army Corps of Engineers for construction of dikes along Missouri River); *see also Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1455 (9th Cir. 1990) (refusing to recognize federal government contractor defense for civilian employee of Army Corps of Engineers injured by toxic paint fumes).

The controlling formulation of the government contractor defense⁸ has been set out by the United States Supreme Court:

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 use of the equipment that were known to the supplier but not to the United States.

Boyle v. United Technologies Corp., 487 U.S. at ___, 108 S. Ct. at 2518. The test is based upon the central purpose of the defense which is to protect the discretionary decisions of the sovereign. Thus, the first two prongs of the test are intended to “assure that the *design feature in question was considered by a Government officer*, and not merely by the contractor itself.” **Boyle v. United Technologies Corp.**, 487 U.S. at ___, 108 S. Ct. at 2518.⁹

Where some identifiable government policy is not in direct conflict with the asserted cause of action, then the government contractor defense should have no application.

Boyle presented the military contract characteristic of the most common circumstances in which courts have applied the defense.¹⁰ In **Boyle**, the plaintiff's decedent was a Marine pilot killed when his helicopter crashed in the Atlantic Ocean. Although he survived the crash, he was unable to escape from the helicopter because the escape hatch was designed to open outward rather than inward making it impossible for him to open the hatch against the forces of the ocean waters. The plaintiff sued the manufacturer alleging the design was defective. The court of appeals held that extensive discussions between the United States and the manufacturer, together with the government's substantive review of the design feature established the government contractor defense. **Boyle v. United Technologies Corp.**, 792 F.2d 413 (4th Cir. 1986). The Supreme Court reversed and remanded for a redetermination of the issue in light of its opinion. The Fourth Circuit then remanded to the district court. 857 F.2d 1468 (4th Cir. 1988).

In **Boyle**, the Supreme Court not only sets forth the test for this common law defense but, as importantly, grounds the analytic justification for the defense in the law of federal preemption.¹¹ Claims against government contractors will be preempted and state law displaced only where a significant conflict exists between an identifiable federal policy or interest and the operation of state law. **Boyle**, 108 S. Ct. at 2515. If the contractor could comply with both its federal contractual obligations and the state prescribed duty of care, then no federal interest is implicated and the government contractor defense does not apply. It is this particular discussion in **Boyle** which leads me to the belief that there is a fourth “element” to the test which requires that there be a significant conflict between the federal interest served by the defense and allowing a state common law product liability claim to proceed.¹²

The Policy Conflict Threshold

The starting point for any analysis of the defense after **Boyle** must be to determine whether there is a significant

conflict between an identifiable federal policy and the application of state tort law to the design defect.¹³ See **Boyle**, 108 S.Ct. at 2515; **Nielsen v. George Diamond Vogel Paint Co.**, 892 F.2d 1450, 1454 (9th Cir. 1990); **Garner v. Santoro**, 865 F.2d 629, 634 (5th Cir. 1989). Where no federal policy is implicated, there is no conflict between state tort law and the federal policy, and *a fortiori* no preemption of state common law. **Nielsen v. George Diamond Vogel Paint Co.**, 892 F.2d at 1454-55.

The Ninth Circuit's analysis in **Nielsen** makes this point. In **Nielsen**, a painter for the Army Corps of Engineers was seriously injured by exposure to fumes from paint manufactured by the defendant. The Ninth Circuit refused to apply the government contractor defense even though the record apparently established that the government had specified the requirements for the paint. The reason for the court's rejection of the defense was simply that there was no discernible federal policy, such as greater combat efficiency, underlying the design decision.¹⁴ The court held:

In this case, we deal with a civilian worker injured in the course of a civilian job involving a product designed to further civilian, rather than military objectives. Under **Boyle**, we can find no reason to hold that application of state law would create a "significant conflict" with federal policy requiring a displacement of state law.

Nielsen, 892 F.2d at 1455. Where the contractor could have complied with its duties under state law without conflicting with some significant federal policy as manifested in its contractual obligations, see **Dorse v. Armstrong World Industries, Inc.**, 716 F. Supp. 589, 592 (S.D. Fla. 1989) *aff'd* 898 F.2d 1487 (11th Cir. 1990), the government contractor defense simply does not preempt state law.

The Three Other Prongs of the "Boyle" Test

The first prong of the **Boyle** test requires 1) the government to have exercised its discretion in fact by approving reasonably precise design specifications. See **Boyle**, 108 S.Ct. at 2518; See also **In Re Joint Eastern and Southern District New York Asbestos Litigation**, 897 F.2d at 629 ("The first element ensures that the design specification *at issue* actually was considered by a government official — or, in other words, that a government official had made the type of policy decision considered a discretionary function under the FTCA." (emphasis added)).

Government discretion over design specification is the central and controlling tenet of the first prong of the Boyle defense.¹⁵ See **Mitchell v. Lone Star Ammunition, Inc.**, 913 F.2d 242, 247 (5th Cir. 1990) ("for purposes of the defense the 'proper focus is the protection of the discretionary government functions for which the defense is intended.'"); **Trevino v. General Dynamics Corp.**, 865 F.2d 1474, 1479 (5th Cir. 1989) (the elements in **Boyle** represent "deference to the discretionary functions of government."). In order to find that the government exercised the kind of specific design discretion sufficient for the defense, the "Government must ultimately be respon-

sible for the defect." **Mitchell v. Lone Star Ammunition Inc.**, 913 F.2d at 248 n. 11. The Second Circuit has succinctly stated the rule after **Boyle**:

Boyle displaces state law only when the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion.

In Re Joint Eastern and Southern District New York Asbestos Litigation, 897 F.2d 626, 630 (2d Cir. 1990).

Many times a contractor will argue that if the government simply approves the *contractor's design plans*, then the government has actually approved "reasonably precise specifications". The law is clear, however, that merely approving a final design without "any substantive review or evaluation of the *relevant design features*" or a government review simply to determine that "the design complies with general requirements initially established by the government" does not establish the defense. **Trevino v. General Dynamics Corp.**, 865 F.2d at 1480. Similarly, a government review for compliance with general performance criteria does not establish that the government required reasonably precise specifications. *Id.* at 1487 n. 14. As noted by the Supreme Court in **Boyle**, where the government specifies general requirements such as cooling capacity for an air conditioner, but not the "precise manner of construction", then "[n]one suggests that state law would be generally pre-empted in this context." **Boyle**, 108 S. Ct. at 2516. The discretionary exercise of design control requires at a minimum the type of give and take between the government and the manufacturer on the specific design element at issue such as was found by the court in **Harduvel v. General Dynamics Corp.**, 878 F.2d 1311 (11th Cir. 1989) (F-16 electrical panel which involved extensive discussions between manufacturer and government).

Where the contractor could have complied with its duties under state law without conflicting with some significant federal policy as manifested in its contractual obligations, the government contractor defense simply does not preempt state law.

The second prong of the **Boyle** test requires that the equipment simply conform to the government approved design specifications. This, like the third prong, is a fact sensitive inquiry. Whether the product actually conformed to the contract specifications or whether the contractor knew about some risk and warned or failed to warn the United States are questions requiring extensive factual development. Ordinarily there is a detailed series of testing and approval requirements for products manufactured pursuant to government contracts. The so-called "first article" testing is an important part of the process and extensively documented. Close attention should be given to the paperwork surrounding the first article testing, because it may well shed light on the government's design interests.¹⁶

The third prong of the **Boyle** test requires that the manufacturer either warn the government about the specific dangers inhering in the design unless those dangers were known to the government already. The function of this portion of the test is to provide some assurance that the government has made an informed design decision, that it has balanced design considerations with whatever other non-safety related policies might take precedence.

The availability of the government contractor defense as to the product design does not relieve the contractor from providing adequate warnings.

Failure to Warn Remains a Viable Theory

The availability of the government contractor defense as to the product design does not relieve the contractor from providing adequate warnings. Under the **Boyle** test, courts have uniformly rejected the defense where the contract is silent as to what warnings are to be provided. See **In Re Hawaii Federal Asbestos Cases**, 715 F. Supp. at 300 *aff'd* 960 F.2d 806 (9th Cir. 1992) ("Plaintiffs rely on a failure to warn theory of liability. The government specifications at issue in this case did not require nor did they forbid warnings of any kind. Clearly, the defendants could have complied with their state law-imposed duty to provide adequate warnings without breaching their government contract."); **Dorse v. Armstrong World Industries, Inc.**, 513 So. 2d at 1268. In other words, a contractor can satisfy its duty to warn under state law and fulfill its obligations under the contract.

In order to establish the government contractor defense on a warning theory, the contractor must show that the "applicable federal contract includes warning requirements that significantly conflict with those that might be imposed by state law" and that "whatever warnings accompanied a product resulted from a determination of a government official." **In Re Eastern and Southern District of New York Asbestos Litigation**, 897 F.2d at 630.¹⁷ It is hard to conceive of any federal policy which would conflict with a manufacturer's providing users of its products with adequate safety information. See **Garner v. Santoro**, 865 F.2d at 635.

Post-Boyle Developments

The opinions continue to interpret **Boyle** in two ways. *First*, the courts have reaffirmed that **Boyle** grounded the government contractor defense in the doctrine of preemption, **Senior Unsecured Creditor's Committee v. FDIC**, 749 F. Supp. 758, 769 (N.D. Tex. 1990). The defense is operative only where there is a distinct conflict between state law and some overriding federal interest. *Second*, the courts look for a manifestation of that overriding federal interest through the exercise of governmental discretion as defined through the discretionary function exception developed in the context of the Federal Tort Claims Act. See **Industria Panificadora, SA v. United States**,

763 F. Supp. 1154, 1157 (D.D.C. 1991); **Hobdy v. United States**, 762 F. Supp. 1459, 1461 (D. Kan. 1991).

A good summary of the manner in which **Boyle** has been read in the context of the government contractor defense appears in **In Re Aircraft Crash Litigation, Frederick Maryland**, 752 F. Supp. 1326, 1335 (S.D. Ohio 1990). This case affirms the theory that **Boyle** requires a significant conflict between the military or governmental procurement contract (the uniquely federal interest) and state law. This conflict is established where the contract itself specifies the particular design specification. "Where, however, the government merely orders a particular piece of equipment from stock, the requisite conflict does not exist, the Supreme Court reasoned, because it cannot be said that the federal government has a significant or unique interest in the design features of that piece of equipment. Similarly, state tort law requiring a particular safety feature is not preempted where a government contract specifies a particular *operational* characteristic but does not mandate 'the precise manner of construction' and therefore does not preclude the inclusion of that safety feature." 752 F. Supp. at 1335.

In **In Re Chateaugay Corp.**, 132 B.R. 818 (Bankr. S.D.N.Y. 1991) the postal service was significantly involved in the development of the very specifications that went into the request for proposal. *Id.* at 823-24. Indeed, it appears that postal services engineers developed the initial specifications. *Id.* at 823. In addition, the government engaged in further discussions on the specifications with the manufacturer to refine the final details. *Id.* The government also "inspected, tested, and approved" the pilot model. *Id.* The Bankruptcy court found that the defense was applicable and a bar to plaintiff's claims, but the district court reversed holding that the defense is limited to the specific context of military hardware. See 146 B.R. 339 (S.D.N.Y. 1992).

Stout v. Borg-Warner Corp., 933 F.2d 331 (5th Cir. 1991) also affirmed the essential teachings of **Boyle**. The air conditioner in **Stout** was a 38,000 BTU unit used by the Army to cool its Hawk Missile System Mobile Repair Unit. Believe it or not I had a defendant cite this case to the court as an example of how the defense was applied to a "stock" product, an air conditioner! The Army Corps of Engineers was the original developer of the VEA4-3 air conditioner. The government wrote the initial specifications including the engineering drawings and the required shop drawings and pre-production models. *Id.* at 333. None of these specifications either required or prohibited the installation of a safety device such as a wire screen to cover the condenser fan. *Id.* at 334.

The manufacturer, Fairchild Industries, Inc., obtained the contract to redesign the air conditioner. Fairchild developed a complete preliminary design layout, submitted it to the Army engineers who reviewed it, critiqued it and made changes. The Army then approved the preliminary design. *Id.* After the Army approved the final detailed drawings no change could be made by the manufacturer without the units being automatically rejected. The Army and Fairchild engaged in extensive testing of the prototypes. The Army spent a month reviewing the results

of the tests. The plaintiff in the case raised most of the same arguments that we did about the government's approval (rubber stamping mere acceptance of manufacturer's design choice), but these were rejected by the court which determined that under the facts set forth above, the government did approve reasonably precise specifications. The court distinguished the **Boyle** air conditioner example by characterizing it as a case where "the government was indifferent to the challenged design" *Id.* at 336 n.1, that is, the government was only interested in a stock off-the-shelf air conditioning unit.

Conclusion

A large body of law has grown up around the government contractor defense.¹⁸ The **Boyle** case has delineated the contours of the defense and established that it requires a conflict between an identifiable federal policy and the operation of state tort law and the ultimate exercise of the government's design discretion. Absent these two critical elements the defense should not apply.

ENDNOTES

1. The government contractor defense is most often encountered in products cases involving military equipment, but creative defense counsel can raise it in virtually any circumstance where a government contract is involved. This defense has actually been raised as a defense to insurance bad faith where the insurer had a reinsurance agreement with a government agency.

2. See **In Re Chateaugay Corp.**, 132 B.R. 818 (Bankr. S.D.N.Y. 1991) *rev'd* 146 B.R. 339 (S.D.N.Y. 1992).

3. Plaintiff's counsel should never allow the manufacturer to proceed on a straight motion to dismiss. Counsel should immediately file a motion to permit discovery on the underlying factual basis for the defense. Obviously if you have identified the defense as a potential issue then you must plead around its strictures. It is frequently a manufacturer's tactic to file an early motion for summary judgment, even before filing an answer, attaching for example the affidavit of its design engineer and a 100 pages of government contract. In such a situation, counsel for plaintiff should immediately seek relief through either Fed. R. Civ. P. 56(f) or SCRA 1-056(F) which allow discovery prior to having to respond to the motion. Counsel may then proceed with discovery on the government contract defense issues. Keep in mind that because this defense is tied into the particular design elements at issue, discovery on the defense will often also provide discovery on the merits.

4. This is why the defense is most commonly applied to the manufacture of military hardware where the purpose of the government contractor defense is to prevent judicial review of strategic, tactical design decisions which consciously sacrificed safety on the altar of combat efficiency.

5. The history and contours of the defense are well explicated in **Tillett v. J.I. Case Co.**, 756 F.2d 591, 596-97 (7th Cir. 1985); see also **Shaw v. Grumman Aerospace Corp.**, 778 F.2d 736, 739-741 (11th Cir. 1985); **Bynum v. FMC Corp.**, 770 F.2d 556, 561-62 (5th Cir. 1985). In essence, the defense descended from three lines of federal cases. *First*, the defense was based upon the **Feres-Stencil** doctrine which makes the government immune for injuries arising out of or incident to military service. See *infra* n. 9. *Second*, the defense was rounded upon the "uniquely federal" interest in protecting government officials in the exercise of discretionary duties as related to civil liabilities arising out of the performance of federal procurement contracts. **Boyle v. United Technologies Corp.**, 487 U.S. 500, 2510, 108 S. Ct. 2514 (1988). *Third*, the contractor has been found to be acting as the agent of or surrogate for the federal government and therefore partakes of the sovereign's immunity. See **Yearsley v. W.A. Ross Construction Co.**, 309 U.S. 18 (1940).

6. Although the government contractor defense arises under federal law, some states have adopted the defense as part of that state's common law. See **In Re Joint Eastern and Southern District New York Asbestos Litigation**, 897 F.2d 626, 635 (2nd Cir. 1990); **Brown v. Caterpillar Tractor Co.**, 696 F.2d 246, 249 (3rd Cir. 1982). New Mexico has not yet adopted this defense. The Tenth Circuit has not offered its own comprehensive

analysis of the defense. The Tenth Circuit made a passing reference to the **Boyle** decision, but offered no analysis. See **Ellis v. Consolidated Diesel Electric Corp.**, 894 F.2d 371, 372 n.2 (10th Cir. 1990).

New Mexico has, however, adopted contract defenses as to independent contractors that present certain similarities to the government contractor defense. New Mexico recognizes what might be described as a species of the "contract specifications defense." New Mexico has recognized a limitation on the liability of independent contractors to injured third-parties. New Mexico courts have applied this limitation to a narrow range of cases and counsel should not permit a manufacturer to mislead the court into thinking that these cases represent New Mexico's adoption of a government contractor defense. The general rule for an independent contractor's liability is that it "may be liable to third parties who may have been foreseeably endangered by the contractor's negligence, even after the owner has accepted the work." **Terry v. New Mexico State Highway Commission**, 98 N.M. 119, 645 P.2d 1375, 1376 (1982). The limitation on that liability is described as follows:

A. The independent contractor should not be liable if he merely carefully carried out the plans, specifications or directions given him, at least where the plans are not so obviously dangerous that no reasonable man would follow them.

B. If the owner discovers the danger, or it is obvious to him, his responsibility may supersede that of the contractor.

Terry v. New Mexico State Highway Commission, 645 P.2d at 1376. The New Mexico cases apply the test in a limited context of independent contractors performing construction work. See **Tipton v. Clower**, 67 N.M. 388, 356 P.2d 46 (1960) (cementing process for drilling operation); **Baker v. Fryar**, 77 N.M. 257, 259-60, 421 P.2d 784 (1966) (installation of sprinkler system); **Terry v. New Mexico State Highway Commission**, 98 N.M. 119, 645 P.2d 1375, 1376 (1982) (construction of roadway). No New Mexico case has extended this limitation on an independent contractor's liability to manufacturers or suppliers of defective products. These cases should not be extended to create a new defense which really has no direct theoretical basis for a state sovereign.

7. **Sanner** provides an excellent example of the safety/combat efficiency trade-off which characterizes the defense. In **Sanner**, the military made a specific design decision that its jeeps would not have seatbelts because troops needed to be able to get in and out of the jeep quickly and without encumbrance. The court held the manufacturer was protected from suit because the government had made this specific design decision.

8. Many of the pre-**Boyle** cases utilized a similar test articulated in **In Re Agent Orange Product Liability Litigation**, 534 F. Supp. 1046 (E.D.N.Y. 1982) which provided that the defense was available where the contractor established that: (1) the government provided the specifications for the product; (2) the product manufactured by the contractor met the

government's specifications in all respects; (3) the government knew as much or more than the contractor about the hazards to people which accompanied the use of the product. *Id.* at 1055.

Another formulation of the defense which pre-dated **Boyle** was found in **Shaw v. Grumman Corp.**, 778 F.2d 736 (11th Cir. 1985). In **Shaw**, the Eleventh Circuit grounded the defense in a separation of powers analysis which "compel[ed] the judiciary to defer to a military decision to use a weapon or weapons system (or a part thereof) designed by an independent contractor, despite its risks to servicemen." *Id.* at 743. The **Shaw** court's formulation of a test that would advance the governmental interest was: "A contractor may escape liability only if it affirmatively proves: (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design." *Id.* at 746. The Supreme Court in **Boyle** expressly rejected this formulation of the test concluding that it did not adequately protect the federal interest "embodied in the discretionary function exception." **Boyle**, 108 S.Ct. at 2518.

9. The court in **Boyle** was presented with the opportunity to adopt the **Feres/Stencil** doctrine as the theoretical underpinning of the defense. **Feres v. United States**, 340 U.S. 135 (1950) and **Stencel Aero Engineering Corp. v. United States**, 431 U.S. 666 (1977) collectively bar personal injury claims against the United States incident to military service. The majority rejected the **Feres** doctrine and focused instead upon the discretionary function exception to the Federal Tort Claims Act as a means to limit the defense. *See Boyle*, 108 S.Ct. at 2517; **Mitchell v. Lone Star Ammunition, Inc.**, 913 F.2d 242, 245 (5th Cir. 1990); **Trevino v. General Dynamics Corp.**, 865 F.2d 1474, 1479 (5th Cir. 1989). **Boyle** rejected the **Feres** doctrine because it would permit the manufacturer of a standard commercial or stock product to escape liability through the simple fortuity of a military rather than civilian contract. The application of the government contractor defense, the Supreme Court held, would be wholly inappropriate to a standard commercial product whether the procurement contract was for the military or a civilian branch of government. **Boyle**, 108 S. Ct. at 2517.

10. It is in this context of military procurement for combat products that a unique federal interest is most visibly in conflict with state tort law because the government often exercises its discretionary judgment by specifically balancing the "trade-off between greater safety and greater combat effectiveness." **Boyle**, 108 S. Ct. at 2517. Where, however, no federal interest in the particular design specifications can be shown, the contractor cannot claim the benefits of the defense, since the federal government has obtained no corresponding benefit from the defective design.

11. Federal preemption is entirely a matter of congressional intent. *See, e.g., Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890, 1899 (1986); **Florida Lime & Avocado Growers, Inc. v. Paul**, 373 U.S. 132, 141 (1963). Preemption may occur where (1) Congress expresses a "clear intent to preempt state law," **Louisiana Public Service Commission v. FCC**, 106 S. Ct. at 1898 ("express preemption"); or where a congressional intent to preempt may be inferred because the state law operates as an insurmountable barrier to accomplishing the objective of the federal law or where Congress through its legislation has "occupied the field." *Id.* ("implied preemption").

There is a heavy burden to establish a preemption claim because time and again the Supreme Court has stated that "courts should not lightly infer preemption," **International Paper Co. v. Ouellette**, 107 S.Ct. 805, 811 (1987), and there is a heavy presumption against finding preemption where the claim of preemption addresses the historic police powers of the state, such as common law tort liability. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 144; **Ferebee v. Chevron Chemical Company**, 736 F.2d 1529, 1542 (D.C. Cir. 1984). "[W]e start with the proposition that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." **Rice v. Santa Fe Elevator Corp.**, 331 U.S. 218, 230 (1947). This presumption

against preemption was recently reaffirmed by the United States Supreme Court in **Cipollone v. Liggett Group, Inc.**, ___U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

The key to federal preemption is the determination whether congress intended to preempt the particular state common law claims at issue. The analysis begins by looking to the plain language of the statute. "Absent explicit preemptive language", there is no express preemption and the analysis must be one of implied preemption. **Gade v. National Solid Wastes**, 120 L.Ed.2d 73, 84 (1992).

12. Whether it is in fact a fourth element or simply the context in which to analyze the three elements of **Boyle** is fairly debatable. The point is that the preemption analysis adopted by the court appears to require that there be a clear and identifiable conflict between the application of state common law and some federal policy. In many cases the federal interest in its procurement contracts may suffice, *see Boyle*, 487 U.S. at 505-506, but counsel should always look behind that general interest and attempt to determine what specific and articulated federal policy would suffer if a common law claim were permitted to go forward.

13. The last term of the Supreme Court decided a major federal preemption case that may bear directly on the type of "conflicts" analysis suggested by the Court in **Boyle**. The United States Supreme Court conducted a major analysis of federal preemption in **Cipollone v. Liggett Group Inc.**, ___U.S. ___, 112 S.Ct. 2608, 120 L.Ed. 2d 407 (1992). The **Cipollone** case involved the preemptive effect of the Federal Cigarette Labelling and Advertising Act of 1965 and its successor the Public Health Cigarette Smoking Act of 1969. The issue was the extent to which the warning requirements of the Acts preempted state common law claims for failure to warn, breach of warranty, fraudulent misrepresentation and conspiracy. The decision has a relatively complex series of rulings and the Justices on the Court were somewhat fragmented in their analysis. The major points of the majority opinion are as follows:

A. There is a presumption against preemption and the central analysis is whether the federal statute contains an express preemption provision. If so, then the analysis begins and ends with the scope of the preemptive provision and you do not need to examine any form of implied preemption. Only where there is no express preemptive provision in the federal law is it necessary to proceed to examine whether there is an implied preemption. In the words of the Court, "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' ... 'there is not need to infer congressional intent to preempt state laws from the substantive provisions' of the legislation." **Cipollone**, 120 L. Ed. 2d at 423 citations omitted.

B. State common law claims are a form of regulation, as opposed to a state statute or rule, which can be preempted by a federal regulatory scheme.

The Tenth Circuit Court of Appeals in a recent case has applied the **Cipollone** analysis to the Federal Aviation Act in arriving at a conclusion that the Act did not impliedly preempt state law tort actions by occupying the field of airplane safety. **Cleveland v. Piper Aircraft Corporation**, slip op. No. 91-2065 (10th Cir. February 16, 1993). The Tenth Circuit used **Cipollone** to support its conclusion that a savings clause in the Act, together with the absence of an express preemption provision, demonstrated that Congress did not intend to preempt state common law. **Cleveland**, slip op. at 10 (construing **Cipollone** to conclude that the "doctrine of implied preemption is general inapplicable to a federal statute that contains an express preemption provision" and that " 'enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.' " *Id.* quoting **Cipollone**.

How does **Cipollone** speak to the government contractor defense? If the touchstone of the defense has become whether there is a conflict between an

identifiable federal policy and the application of state tort law, then **Cipollone** suggests that, because of the deference afforded the historic police powers of the states, **Cipollone**, 120 L. Ed. 2d at ___, the defense should not apply absent a clearly expressed federal intent to limit state tort actions. Such an intent may be found in the traditional deference given to military command decisions, but would be difficult to find in other contexts.

14. The **Boyle** court's emphasis on a conflicting federal policy has led some courts to question whether the defense even applies outside the context of special military requirements. See **In Re Hawaii Federal Asbestos Cases**, 715 F. Supp. 298, 300 (D. Haw. 1988) *aff'd* 960 F.2d 806 (9th Cir.1992); **Garner v. Santoro**, 865 F.2d at 637-38. Indeed, those cases reported after **Boyle** which have recognized the defense have arisen overwhelmingly in the specific context of military equipment with special combat considerations. See, e.g., **Smith v. Xerox Corp.**, 866 F.2d 135 (5th Cir. 1989) (VIPER missile); **Zinck v. ITT Corp.**, 690 F. Supp. 1331 (S.D.N.Y. 1988) (night vision goggles); **Harduvel v. General Dynamics Corp.**, 878 F.2d 1311 (11th Cir. 1989) (F-16 fighter instrument panel); **Maguire v. Hughes Aircraft Corp.**, 912 F.2d 67 (3rd Cir. 1990) (T63 helicopter engine bearing); **Kleeman v. McDonnell Douglas Corp.**, 890 F.2d 698 (4th Cir. 1989) (F/A-18 carrier support aircraft landing gear). The concentration on military combat products and the almost complete absence of non-military items is not surprising because the combat efficiency/safety balancing question presents the paradigm for the government's exercise of discretion. See, e.g., **Harduvel v. General Dynamics Corp.**, 878 F.2d at 1322; **Kleeman v. McDonnell Douglas Corp.**, 890 F.2d at 701.

15. As one astute judicial wag from the Second Circuit has pithily noted "[s]tripped to its essentials, the military contractor's defense under **Boyle** is to claim 'The Government made me do it.'" **In Re Joint Eastern and Southern District New York Asbestos Litigation**, 897 F.2d at 632. (1990).

16. Counsel should seek out any requests for exceptions to the contract which may reveal that a particular design decision was actually proposed by the contractor.

17. Indeed, there is authority that the government's failure to warn is not a discretionary function within the meaning of that exception to the Federal Tort Claims Act. See **Smith v. United States**, 546 F.2d 872, 877 (10th Cir. 1976) (holding that government's decision "to omit warnings of dangerous or hazardous conditions ... [does] not come within the exception for discretionary functions."); **Dube v. Pittsburgh Corning**, 870 F.2d 790, 800 (1st Cir. 1989); **In Re New York City Asbestos Litigation**, 542 N.Y.S. 2d 118, 121 (Sup. Ct. 1989). If the government itself is not immune for failure to warn, then *a fortiori* a contractor with derivative immunity cannot partake of the defense.

18. What follows is a list of representative cases involving the government contractor or related contractor defenses with a brief description of the salient characteristic of the case.

1. **In Re Agent Orange**, 818 F.2d 187 (2nd Cir. 1987) Government contractor traditionally shielded construction projects, but logically extends to military contractors.
2. **In Re Air Crash Disaster of Manneheim Germany**, 769 F.2d 115 (3rd Cir. 1985) Gov't contractor defense, place of manufacturer applies despite accident occurred elsewhere, contractor entitled to gov't contractor defense where military had knowledge of defect and approved same. Pennsylvania law.
3. **Boyle, Personal Representative of the Heirs and Estate of David A. Boyle, Deceased v. United Technologies Corporation**, 487 U.S. 500, 108 S. Ct. 2510 (1988) Major U.S. Supreme Court case defining contours of the government contractor defense.
4. **Brown v. Caterpillar Tractor Company**, 696 F.2d 246 (3rd Cir. 1982) Government contractor defense to a military contract involving non-combat equipment.
5. **Burgess v. Colorado Serum Company, Inc.**, 772 F.2d 844 (11th Cir. 1985) Defense applies generally to government contractors not just military contracts.

6. **Bynum v. FMC Corporation**, 770 F.2d 556 (5th Cir. 1985) Good summary of government contractor defense and other related contractor defenses such as that available under the Restatement (Second) of Torts § 404. Government contractor defense grounded in federal common law.

7. **Casabianca v. Casabianca**, 428 N.Y.S.2d 400 (NY 1980) Government contractor defense - compliance of supplier to military specifications in time of war complete defense.

8. **Cumming v. Nielson's, Inc. and Warren Louis Snyder**, 108 N.M.198,769 P.2d 732 (Ct. App. 1988) Industry standard - not conclusive on breach of duty.

9. **Dorse v. Armstrong World Industries**, 716 F.Supp. 589 (S.D. Fla. 1989) No government specification preventing additional warnings, could have complied with state law duty to warn, affirmed 898 F.2d 1487 (11th Cir. 1990)

10. **Dorse v. Armstrong World Industries**, 513 So.2d 1265 (Fla. 1987), Military contract - asbestos, No defense when contract silent on safety or warnings. No defense when product standard commercial item.

11. **Dube v. Pittsburgh Corning**, 870 F.2d 790 (1st Cir. 1989), Military contract - asbestos, no defense to failure to warn; not within discretionary function exception.

12. **Garner v. Santoro**, 865 F.2d 629 (5th Cir. 1989), Military contract - paint, good case on warnings, discussion of significant conflict in policy, necessity for fully developed factual record.

13. **Harduvel et al., v. General Dynamics Corporation**, 878 F.2d 1311 (11th Cir. 1989) Military contract F-16, Boyle test intended to insure discretionary decisions.

14. **Hunt v. Robert Blasius, et al.**, 384 N.E.2d 368 (Ill. 1978) Contract design defense, follows Restatement (Second) of Torts § 404 NOTE: different analysis for strict liability and negligence.

15. **In Re Hawaii Federal Asbestos Cases**, 715 F.Supp. 298 (D. Hawaii 1988) *aff'd* 960 F.2d 806 (9th Cir. 1992). Asbestos — failure to warn proceeds where government did not require or forbid warnings.

16. **Jackson v. Deft, Inc.**, 273 Cal.Rptr. 214 (Cal. App. 1 Dist. 1990) Government contractor defense can apply to a standard commercial product.

17. **Johnston et al. v. United States of America, et al.**, 568 F. Supp. 351 (D. Kansas 1983) Contract specification defense pursuant to Restatement (Second) of Torts § 404.

18. **In Re Joint Eastern and Southern District New York Asbestos Litigation** 897 F.2d 626 (2nd Cir. 1990) Government contract defense highlighting that it is federal government which must be in *significant conflict* with state law. Stock commercial products are not displaced by the defense. Discretion requires government official to make decision.

19. **Kleemann v. McDonnell Douglas Corporation**, 890 F.2d 698 (4th Cir. 1989) Military contract, landing gear F/A 18, good case to show kind of detailed government involvement in complete combat item.

20. **Koutsoubos v. Boeing Vertol Division of the Boeing Co.**, 755 F.2d 352 (3rd Cir. 1985) Government contractor defense affirmed.

21. **Mackey v. Maremont Corporation**, 504 A.2d 908 (Pa. Super. Ct. 1986) Government contract defense, military - recognized by Pennsylvania.

22. **Maguire v. Hughes Aircraft**, 912 F.2d 67 (3rd Cir. 1990), Post Boyle, federal defense, emphasis on discretionary function.

23. **Maguire v. Hughes Aircraft**, 725 F.Supp. 821 (D.N.J. 1989) District court opinion affirmed by the Third Circuit as noted above.

24. **Mitchell v. Lone Star Ammunition, Inc.**, 913 F.2d 242 (5th Cir. 1990) Military contract, defective mortar shell, defense applies only to design defect.

25. **McCabe Powers Body Company v. Paul Sharp and Wanda Sharp**, 594 S.W.2d 592 (Ky. 1980) Contractor specification defense, defect must be open and obvious.
26. **In Re New York City Asbestos Litigation**, 542 N.Y.S.2d 118 (Sup. 1989) Failure to warn is not a discretionary function.
27. **Nicholson v. United Technologies**, 697 F.Supp. 598 (D. Conn 1988) Military contract, landing gear.
28. **Nielson v. George Diamond Vogel Paint Company**, 892 F.2d 1450 (9th Cir. 1990) Gov't. contractor defense, post Boyle — civilian employee injured by standard paint fumes; no significant conflict, no defense.
29. **Niemann v. McDonnell Douglas Corporation, et al.**, 721 F.Supp 1019 (S.D. Ill. 1989) Stock product exception not applicable to component parts. Poor analysis, asbestos exposure, government made decision re: use of asbestos tape.
30. **Price v. Tempo, Inc. and Alb. Inc.**, 603 F. Supp. 1359 (1985) Government contractor defense, non-military applies to city, contractor's duty to disclose defects, Pennsylvania law.
31. **Ramey v. Martin-Baker Aircraft Co., Ltd.**, 874 F.2d 946 (4th Cir. 1989) Military contract defense insulates supervisor from liability under provisions of Maryland Workers' Compensation Act.
32. **Ryan v. Feeny & Sheehan Bldg. Co.**, 145 N.E. 321 (N.Y. 1924) Contractor specification defense.

33. **Sanner et al. v. Ford Motor Company et al.**, 364 A.2d 43 (Super. Ct. N.J. 1976) Government contractor defense, military, government rejected proposal for seatbelts, specific exercise of discretion to exclude seatbelts from military jeeps.
34. **Shaw v. Grumman Aerospace Corporation**, 778 F.2d 736 (11th Cir. 1985) Government contractor defense.
35. **Smith v. Xerox**, 866 F.2d 135 (5th Cir. 1989) Government contractor defense, soldier could not recover under doctrine of *res ipsa loquitur*.
36. **Terry v. New Mexico State Highway Commission**, 98 N.M. 119, 645 P.2d 1375 (1982) Contractor design specification defense.
37. **Tillett v. J. I. Case Company**, 756 F.2d 591 (7th Cir. 1985) Government contractor defense, U.S. military.
38. **Trevino v. General Dynamics Corp.**, 865 F.2d 1474 (5th Cir. 1989) Military contract, submarine diving valve, good explanation of exercise of discretion.
39. **Zinck v. ITT Corporation**, 690 F.Supp. 1331 (S.D.N.Y. 1988) Military equipment, very special item, government changed specifications, independent testing.



A Simple Rear-End Auto Accident - Cont. from Front Page

gibles" to the jury; preview of experts' testimony and countering the opposing expert; post trial review and evaluation.

THE PLAINTIFF

In August 1988, the plaintiff slowed/stopped his car suddenly to avoid striking a dog in the street. While doing so, he was struck in the rear by the following vehicle.

At the time of the accident, Terry, the plaintiff, was a 36-year-old male born in the Midwest. He was attractive, 190 pounds and over 6 feet. He had earned an Associate of Science Degree in management; a Bachelor of Science in Real Estate; and a General Contractor's GB 98 Certificate. He constructed homes.

Prior to the accident, the plaintiff participated in a demanding and highly competitive career as a real estate sales broker and also owned his own corporation which built homes. He worked in excess of 50 hours per week; was athletic; had his FAA private pilot license; and had achieved \$1.4 million in residential listings in a 14-week period with RECA, Inc. He had an active personal life, numerous hobbies and had relocated from San Diego to Albuquerque a year or so before this accident.

He had two motor vehicle accidents before the accident of record: one in 1982, the other in 1986. The 1982 accident resulted in cervical strain, low back strain, compression fracture at T7, and myofascial headaches for which he was treated by an orthopedic physician, and neurologist, Dr. John Kitchen. The 1986 accident resulted in sprain/strain syndromes to the cervical and thoracic spine, for which he was treated by a chiropractic physician.

The 1988 accident resulted in immediate head pain, blood on the tongue which was observed by the scene witness, who

was a nurse, and brief loss of consciousness. Terry was taken to an emergency room and evaluated. X-rays revealed wedging of the T8 vertebral body. He was treated with an injection in his lower back, given a prescription for medication and discharged. He immediately returned to his job as a broker at RECA Real Estate.

Because of increasing thoracic pain, he went to several physicians, including an anesthesiologist, orthopedist and neurologist.

MRI of the head revealed unremarkable brain scan with the exception of some increased intensity in the maxillary and ethmoid sinuses. Mild bulging was found at cervical levels, and a compression fracture was found at T7.

Terry's sales performance at RECA deteriorated. He quit and obtained a salaried job as a right-of-way agent for the New Mexico State Highway Department. After several months he was terminated from that job for insubordination and refusing to follow instructions.

His primary problems were decreased memory, personality changes, head and orthopedic pain. His medical diagnoses included the following:

1. post-concussive syndrome
2. post-traumatic headaches
3. cervical sprain
4. thoracic sprain with compression fracture at T7 and HNP at T7-T8.
5. lumbosacral sprain
6. post-traumatic maxillary and ethmoid hemorrhage
7. neuropsychological deficits in cognitive functioning
8. psychological condition associated with chronic