Oklahoma Law Review

Volume 42 | Number 2

1-1-1989

Torts: Boyle v. United Technologies Corp.: The United States Supreme Court Accepts the Government Contractor Defense

Brian Shipp

Torts: *Boyle v. United Technologies Corp.*: The United States Supreme Court Accepts the Government Contractor Defense

The government contractor defense is an affirmative defense that a maufacturer may assert in actions for injuries caused by its product. When established, the defense provides a contractor complete immunity against claims founded upon negligence, strict products liability or breach of warranty.[1] The elements of the government contractor defense remain the same no matter what theory the plaintiff asserts. As with any affirmative defense, the party asserting the defense has the burden of proving each element of the defense.[2]

The government contractor defense has played a role in some of the 1980's most highly publicized cases, including the Agent Orange[3] and asbestos litigation.[4] The defense shields a product manufacturer from liability if the manfacturer complies with design specifications set forth in a government procurement contract. The effect of the defense is to allow a manufacturer to share the government's sovereign immunity for damage resulting from carrying out the contract according to its terms. Recently, the United States Supreme Court re-affirmed the government contractor defense in *Boyle v. United Technologies Corp.* The purpose of this note is to examine the basis and effect of the Supreme Court's decision in *Boyle.*

To aid in this endeavor, the underlying bases of the government contractor defense must be explored. Furthermore, each major formulation of the defense will be presented and analyzed. The policy considerations favoring the existence of the defense will also be examined. This note will also set forth the defense's unresolved issues. Finally, this note will present a discussion of the *Boyle* opinion itself. This will include an analysis of the present state of the defense after *Boyle.*

Sovereign Immunity

The concept of sovereign immunity prohibits a citizen from suing the government without its consent.[5] The government's immunity originated with the idea that "the king can do no wrong."[6] In 1946, Congress waived the United

1. Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986) (negligence and strict products liability); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980) (warranty).

2. *In re* Agent Orange Prod. Liability Litigation, 534 F. Supp. 1046, 1055 (E.D. N.Y. 1982).

3. *Id.*

4. Hanson v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *In re* Related Asbestos Cases, 543 F. Supp. 1142 (N.D. Cal. 1982).

5. As early as 1821, the United States Supreme Court applied the doctrine of sovereign immunity to bar a claim brought against the federal government by a private citizen. Cohens v. Virginia, 19 U.S. 264, 411-12 (6 Wheat. 1821).

6. Elgin v. District of Columbia, 337 F.2d 152, 154 (D.C. Cir. 1964).

States government's sovereign immunity for some tort claims by enacting the Federal Tort Claims Act (FTCA). The FTCA granted jurisdiction to the federal district courts over suits for damages "caused by the negligent or wrongful act or omission of any employee of the Government."[7] This provision has been interpreted as precluding government liability based on strict liability in tort.[8]

There are a number of exceptions to the government's waiver of sovereign immunity under the FTCA. The *Feres-Stencel* doctrine represents such an exception. In addition, the discretionary function exception is another important limitation on the FTCA's waiver of immunity. These two exceptions are particularly applicable to the government contractor defense.

The Feres-Stencel Exception

The *Feres-Stencel* doctrine is based on two Supreme Court decisions. The first decision, *Feres v. United States*,[9] involved appeals of three cases with common issues under the FTCA. Each suit was brought by a serviceman against the United States for injuries received in noncombatant activities.[10] In *Feres*, the Court determined the scope of the FTCA language that does not permit claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[11] Although the plaintiff's injuries in *Feres* were not received in combat, the Court extended the FTCA's application to include noncombatant activities. It held that the government cannot be sued under the FTCA by a member of the Armed Forces for injuries arising out of or "in the course of activity incident to [military] service."[12]

Twenty-seven years later, the Supreme Court again broadened the scope of the government's immunity under *Feres*. In *Stencel Aerospace Engineering Corp. v. United States*,[13] a serviceman was injured while trying to eject from an aircraft during an emergency. He brought a products liability action against the United States and Stencel, the manufacturer of the aircraft. Stencel cross-claimed against the United States for indemnity. However, the Court held

7. 28 U.S.C. § 1346(b) (1976).

8. Daelhite v. United States, 346 U.S. 15, 45 (1953).

9. 340 U.S. 135 (1950).

10. In Feres v. United States, 177 F.2d 535 (2d Cir. 1949), a serviceman was killed in a barracks fire. In Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), and United States v. Griggs, 178 F.2d 1 (10th Cir. 1949), negligence on the part of army surgeons were the alleged causes of the soldiers' injuries.

11. 26 U.S.C. § 2680(j) (1976).

12. 340 U.S. at 146. The Court rested its decision on three principles that are still persuasive. First, the "distinctively federal" nature of the relationship between soldiers and the government requires that federal law rather than the variations in state law determine servicemen's substantive rights. *Id.* at 143. Furthermore, a system for compensating members of the Armed Forces for injuries or death already exists under the Veterans' Benefits Act, 38 U.S.C. § 355 (1976). *Id.* at 145. Finally, claims against the government would impair military discipline because it would entail a soldier questioning the legitimacy of a superior's order. *Id.* at 112.

13. 431 U.S. 666 (1977).

that a manufacturer under contract with the United States is prohibited from bringing an indemnity action against the government.[14]

In summary, the *Feres-Stencel* doctrine provides that an accident causing injury or death to military personnel cannot be the basis of an FTCA claim against the United States, either by the victim or by private defendants seeking indemnity. Thus, the United States is not liable either directly or indirectly for injuries to servicemen during military service.

The Discretionary Function Exception

Another important exception to the government's waiver of sovereign immunity involves the government's exercise of a discretionary function.[15] Section 2680(a) of the FTCA provides that the United States' waiver of sovereign immunity does not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused."[16] The discretionary function exception protects the executive branch of the government against unjustified judicial interference.[17] The government contractor defense also protects the same interest.[18]

In *Daelhite v. United States*,[19] the Supreme Court defined a government discretionary function as an action requiring a "policy judgment and decision."[20] *Daelhite* arose out of an explosion in the port area of Texas City. A cargo vessel, loaded with fertilizer manufactured from explosive compounds, exploded while in port, causing deaths and property damage. A number of suits were brought against the government, alleging negligence in the production and bagging of the fertilizer. However, the Court held that § 2680(a) of the FTCA barred claims arising from the explosion because the production and bagging were mandated by decisions made at the *planning* rather than the *operational* level.[21] This planning-operational distinction remains the most widely used formula for determining when a suit is barred by the discretionary function rule.[22]

14. 431 U.S. at 669. The Court explained: "To permit [Stencel] to proceed . . . would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." *Id.* at 673 (quoting Laird v. Nelms, 406 U.S. 797 (1972)).

15. The discretionary function exception was used by Dolphin Gardens, Inc. v. United States to support the government contractor defense in a public works case. See *infra* notes 23-24 and accompanying text.

16. 28 U.S.C. § 2680(a) (1976).

17. Rogers, *A Fresh Look at Agency "Discretion,"* 57 TUL. L. REV. 776, 807 (1983).

18. *See* Brown v. Caterpillar Tractor Co., 696 F.2d 246, 250 (3d Cir. 1982); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43, 47 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977).

19. 346 U.S. 15 (1953).

20. *Id.* at 36.

21. *Id.* at 42.

22. *See* Note, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 U. CHI. L. REV. 1030, 1034 (1981).

A dozen years after *Daelhite* established the planning-operational distinction, in *Dolphin Gardens, Inc. v. United States*,[23] the government's immunity was applied to a government contractor who was merely carrying out the will of the sovereign. In *Dolphin Gardens*, the court held that a contractor who acts pursuant to the government's discretionary authority is immune from liability if the plaintiff's injury is "the result of an affirmative decision by the government to act or not to act."[24]

The concerns of the discretionary function exception and the *Feres-Stencel* doctrine include: controlling the cost of government procurement contracts; maintaining military autonomy and discipline; and protecting the integrity of government decision-making.[25] These concerns are similar to those of the government contractor defense.[26] Therefore, the prior discussion of these doctrines, together with a historical look at the government contractor defense, should provide insight into the underlying rationale for the defense.

History of the Government Contractor Defense

The origin of the government contractor defense is found in the principles first articulated by the United States Supreme Court in *Yearsley v. W.A. Ross Construction Co.*[27] There, immunity was extended to a company acting on behalf of the government. Ross Construction, pursuant to a government contract, built dikes on the Missouri River to divert its flow. Yearsley brought an inverse condemnation action against Ross, alleging that the diversion had caused the loss of ninety-five acres of his land.

The Court found Ross not liable, analogizing Ross' position to that of an "agent or officer" of the government.[28] The Court stated that as long as the "authority to carry out the project was validly conferred, that is, if what was done was done within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."[29] Although the *Yearsley* decision was a forerunner of the government contractor defense, it failed to provide any guidelines for determining when a contractor is entitled to share the government's immunity. Thus, in the early existence of the defense, a contractor merely had to show that the work it performed complied with the terms of the government contract to receive immunity from suit.[30]

23. 243 F. Supp. 824 (D. Conn. 1965). In *Dolphin Gardens*, a government contractor dredged a river channel and deposited the dredged material onto a vacant lot near the plaintiff's land. After fumes from this material caused damage to the plaintiff's buildings, a suit was brought against the government and the contractor. The district court granted both defendants' motions to dismiss, stating that the government's decisions regarding the dredging and dumping were "within the scope of 'discretionary functions.' " *Id.* at 826.

24. *Id.* at 827.

25. *See* Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 47 OHIO ST. L.J. 985, 986 (1986).

26. See *infra* notes 69-87 and accompanying text.

27. 309 U.S. 18 (1940).

28. *Id.* at 20-21.

29. *Id.* at 21.

30. *See* Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963) (roads); Green v. ICI America, Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973) (explosives); Dolphin Gardens, Inc. v. United

After *Yearsley*, the existence of the government contractor defense was recognized in a series of cases arising from public works projects. Most of these cases involved claims for damage to land and other property.[31] Recently, the defense has been invoked to avoid liability to third parties injured by defectively designed products supplied to the government.[32] A few courts have flatly rejected the defense in product liability cases.[33]

The first case suggesting an application of the defense to military contractors being sued for design defects was *Littlehale v. E.I. du Pont de Nemours & Co.*[34] Although the case was decided on other grounds, the court stated in a footnote that a government contractor defense had merit.[35]

Although many early cases accepted the government contractor defense, their impact was lessened due to the courts' failure to set out the necessary elements of the defense. Few courts adopted the defense in the area of products liability until specific elements were enunciated.[36]

States, 243 F. Supp. 824, 827 (D. Conn. 1965) (river dredging). In one early case, however, a court refused to apply the defense because the government contracted only for an outcome and gave the contractor the discretion to determine how to achieve that outcome. Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14 (9th Cir. 1961).

31. See *supra* note 30.

32. In 1976, a New Jersey state court became the first to recognize the government contractor defense in a products liability case. In Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), a serviceman who was injured after being thrown from an Army jeep brought suit against Ford, the manufacturer. Sanner alleged that the jeep was defectively designed because it lacked seat belts and a roll-bar.

In 1980, a New York court recognized the defense in Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981). In *Casabianca*, a boy was hurt when he caught his hand in the blades of a dough mixer in his father's pizza shop. The mixer had been manufactured pursuant to government specifications for use in Army field kitchens during World War II.

An explanation for this expansion is that strict liability and breach of implied warranty joined negligence as theories of liability for providers of goods. On the other hand, those providing services could only be held liable under traditional negligence concepts. Because of the expanding liability for producers of goods, more cases began to involve the sales of goods to the government rather than the providing of services to the government. *See* Zollers, *Rethinking the Government Contract Defense*, 24 AM. BUS. L.J. 405, 408-09 (1986).

33. Challoner v. Day & Zimmerman, Inc., 512 F.2d 77 (5th Cir. 1975), *vacated on other grounds*, 423 U.S. 3 (1975); Johnston v. United States, 568 F. Supp. 351 (D. Kan. 1983).

34. 268 F. Supp. 791 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1976) (products liability action arising from the premature explosion of a blasting cap).

35. Specifically, the court stated:

> [W]here a party contracts with the Government and the Government specifies the means by which the product is to be manufactured and other details incident to the production, the manufacturer's acts in accordance with the plans are at the very least not measurable by the same tests applicable to a manufacturer having sole discretion over the method of manufacture, and at the most are insulated from any liability.

Id. at 803 n.17.

36. This occurred in *Agent Orange*. See *infra* notes 37-68 and accompanying text.

Elements of the Government Contractor Defense

The first major formulation of the government contractor defense was given in 1982 by a New York District Court. *In re Agent Orange Product Liability Litigation*[37] was a class action products liability case brought on behalf of Vietnam War veterans and their families. The plaintiffs alleged injury from exposure to the chemical defoliant Agent Orange. The district court originally set forth three elements for the defense:

(1) the government must have established the specifications for the product;

(2) the product must have met the government's specifications in all material respects; and

(3) the government must have known as much or more about the hazards to people that accompanied the use of the product than the manufacturer.[38]

The district court later modified the third element of the test due to the unique facts of the *Agent Orange* case.[39] The third element now provides that upon a plaintiff's proof that the contractor knew or reasonably should have known of the product's hazards; the contractor must then demonstrate either that the government knew about the dangers, or would have ordered production of the product despite the hazards.[40]

Another variation of the government contractor defense was given in *McKay v. Rockwell International Corp.*[41] *McKay* involved consolidated wrongful death actions arising out of the deaths of two naval pilots who ejected from burning aircrafts. The Ninth Circuit characterized the elements of the defense as follows:

(1) the government must be immune from liability under the *Feres-Stencel* doctrine;

(2) the government must have established or approved reasonably precise specifications for the product;

(3) the product must have conformed to those specifications; and

37. 534 F. Supp. 1046 (E.D. N.Y. 1982). Although the parties to *Agent Orange* eventually settled the case for $180,000,000, the test laid down in that case became one of the major judicial formulations of the government contractor defense.

38. *Id.* at 1055. The court believed it was unfair to hold contractors liable for the government's defective design, particularly when the military contractors were compelled to produce the equipment. *Agent Orange*, 506 F. Supp. at 793. However, later courts refused to accept the idea of compulsion as an element of the defense. *See, e.g., Bynum*, 770 F.2d 556, 574-75 (5th Cir. 1985); Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14 (9th Cir. 1961); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 40 (Sup. Ct. 1980); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 304 A.2d 43 (1977), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805.

39. The components of Agent Orange had long been used as herbicides in the civilian market. *Agent Orange*, 597 F. Supp. at 849.

40. *Agent Orange*, 597 F. Supp. 740, 849 (E.D. N.Y. 1984).

41. 704 F.2d 444 (9th Cir. 1983).

(4) the contractor must have warned the government about patent errors in its specifications or about dangers involved in the use of the product that were known to the contractor but not to the government.[42]

In 1985, the Eleventh Circuit established yet another formula for the government contractor defense, in *Shaw v. Grumman Aerospace Corp.*[43] Instead of following either the *McKay* or the *Agent Orange* formulation of the defense, the court provided a new test, resting it on separation of powers concerns.[44] This test was more restrictive than the *McKay* formulation.[45] The *Shaw* court provided that:

> 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.[46]

Government Immunity

The *McKay* formulation of the government contractor defense provides that a contractor would be immune only if the United States would also be immune from liability under the *Feres-Stencel* doctrine. In order for the government to be immune from liability under *Feres-Stencel*, the plaintiff must be a member of the armed forces, injured in the course of activity incident to military service. Thus, those courts utilizing the *McKay* formulation restrict the application of the defense to contracts involving the military.

The Design Specifications

The *Agent Orange* formulation includes the requirement that a government contractor prove that the government established the specifications for the

42. *Id.* at 451.

43. 778 F.2d 736 (11th Cir. 1985). *Shaw* was a wrongful death action arising out of a fatal crash of a Navy airplane. Grumman, the manufacturer of a defective flight control system in the airplane, asserted the government contractor defense.

44. *Id.* at 741-44. The court never referred to the defense as the government contractor defense, instead preferring "military contractor defense" as a more descriptive and precise term. *Id.* at 739 n.3.

45. The *Shaw* test does not allow as great a level of contractor participation as does *McKay*. Under *Shaw*, a contractor who establishes the specifications for the product fails to meet the test because its participation is more than "minimal." Under *McKay*, however, a contractor who established the specifications may invoke the defense as long as the government approved those specifications.

46. *Shaw*, 778 F.2d at 746. More recently, in an opinion handed down the same day as *Boyle*, the Fourth Circuit rejected the *Shaw* court's more restricted version of the defense. In Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), a wrongful death action brought by the family of a Navy pilot killed in a plane crash, the court adopted the *McKay* standard.

product. However, the court drew a broad distinction between performance and design specifications. It stated that "[i]f . . . the contract set[s] forth merely a 'performance specification,'[47] as opposed to a specific product, then the government contractor defense will be far more restricted . . . ."[48] Thus, the court was willing to allow the defense when the contractor had some involvement in the product's design. By restricting the defense, rather than denying it, when a contractor has some input into the design of the product, the court recognized that a government contractor frequently creates the actual design specifications, subject to approval by the government.

The *McKay* test expands the specification requirement by allowing the defense to apply if the government either establishes *or* approves reasonably precise specifications. This element allows the application of the defense even if the contractor exercises some influence over the product's design. Under this element, the defense will apply if the government reviews and approves a detailed set of specifications developed by the contractor.[49]

The critical difference between the *McKay* and *Agent Orange* tests is that *McKay* allows mere government approval of a contractor's design to shield the contractor from liability. Thus, under *McKay*, contractors may invoke the government contractor defense even when the contract specifications did not originate with the government. *Agent Orange* does not make such an allowance. *Agent Orange* does, however, allow a "restricted" defense where a contractor supplied specifications that the government subsequently approved.[50]

Sometimes, the government officials and contractors engage in a "back and forth" process of negotiation over the specifications. In such a situation, it may be difficult to ascertain where the specifications originated. Nevertheless, some courts have allowed the contractor to invoke the defense in these circumstances.[51] Those courts allowing contractor discretion in producing design

47. Performance specifications give the desired performance characteristics for the product to be manufactured. The contractor is given discretion as to the manner in which those characteristics are to be accomplished. *See* Aerodex, Inc. v. United States, 1962 BCA (CCH) ¶ 3492 at 17,822, *rev'd on other grounds*, 417 F.2d 1361 (Ct. Cl. 1969).

48. *In re* Agent Orange Prod. Liability Litigation, 534 F. Supp. at 1056. Unfortunately, the court did not provide exactly how "restricted" the defense becomes if a specification is deemed to be a "performance specification" rather than a "specified product."

49. *McKay*, 704 F.2d at 464. ("When only minimal or very general requirements are set for the contractor by the United States the rule is inapplicable.").

50. See *supra* note 48 and accompanying text.

51. *See, e.g.*, Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 355 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1985). *Accord* Boyle v. United Technologies Corp., 792 F.2d 413, 414-15 (4th Cir. 1986), *vacated on other grounds*, 56 U.S.L.W. 4792 (U.S. June 27, 1988); Price v. Tempo., Inc., 603 F. Supp. 1359, 1363 (E.D. Pa. 1985). In *Koutsoubos*, Boeing proposed changes of detailed specifications for a helicopter formulated by the Navy. This "initiated a 'back-and-forth' discussion [between the two], with the Navy undertaking all final decisions as to the helicopter's specifications." *Koutsoubos*, 533 F. Supp. at 343-44.

specifications have justified the rule on the basis that contractor participation in the design process is an important goal.[52]

Even the courts that have accepted the *McKay* "approval" standard require more than a cursory review by the government of the contractor's specifications. Rather, the government must have played a significant role in developing the specifications. Thus, the government cannot merely "rubber stamp" the contractor's design specifications.[53] Instead, the government must evaluate the specifications closely enough to equate the level of expertise necessary to prepare them.[54]

Conformance with the Specifications

In order to successfully assert the government contractor defense, a contractor must prove that the product it manufactured met the government specifications in all material respects.[55] Thus, the defense does not apply in cases of manufacturing defects.[56] Rather, it applies only in cases of design defects. The conformance element is relatively straightforward, and not many cases have discussed it.

However, it has been determined that conformance is a question of fact that requires "a comparison of the government's specifications for the [product] with the characteristics and quality of the product supplied."[57] Evidence that the product that caused the injury was accepted by the government after a thorough inspection has been held to satisfy this element of the defense.[58] A contractor's performance is nonconforming "if the discrepancy between specifications and product [is] a material one."[59] To be "material," a variation must be causally related to the accident giving rise to the lawsuit.[60]

Knowledge of Product's Dangers

The final element of the government contractor defense involves the parties' relative knowledge of the hazards associated with the product. This element, as originally devised by the *Agent Orange* court, was satisfied only if the

52. One court acknowledged the importance of contractor participation in the design of sophisticated military weapons:

> We recognize this back-and-forth as a reality of the procurement process, as well as a valuable part of that process; indeed if the military technology is to continue to incorporate the advances of science, it needs the uninhibited assistance of private contractors.

Tozer v. LTV, Inc., 792 F.2d 403, 407 (4th Cir. 1986).

53. *See Shaw*, 778 F.2d 736 (11th Cir. 1985). See also *supra* notes 43-68 and accompanying text.

54. Trevino v. General Dynamics Corp., 626 F. Supp. 1330, 1337 (E.D. Tex. 1986).

55. See *infra* notes 38, 42 and accompanying text.

56. *See, e.g.*, Foster v. Day & Zimmerman, Inc., 502 F.2d 867 (8th Cir. 1974).

57. *Agent Orange*, 534 F. Supp. at 1057.

58. Black v. Fairchild Indus., Prod. Liab. Rep. (CCH) ¶ 11022 (E.D. N.Y. 1986).

59. *Agent Orange*, 534 F. Supp. at 1057.

60. Mackey v. Maremont Corp., 350 Pa. Super. 415, 504 A.2d 908 (1986).

government knew as much or more than the contractor about the potential hazards of the product.[61]

The *Agent Orange* court extended this element of the defense to require the contractor to prove that the government knew as much about the dangers of the product as the contractor knew or should have known.[62] After the government has been fully informed about the risks of a design, it may decide to accept these risks after balancing them with the benefit of the product. After the contractor proves this element, the burden shifts to the defendant to disprove the element or to prove that even if the government had as much knowledge as the defendant should have had, it would have ordered production anyway and would not have taken steps to reduce or eliminate the hazard.[63] "Reasonable knowledge" does not mean "infinite knowledge." Rather, a design risk would be considered to be reasonably known according to industry standards and the level of the contractor's expertise.[64]

Under the *Shaw* test, a contractor may escape liability by proving that it warned the government of the reasonably known risks of the design and of the existence of alternative designs. Furthermore, the contractor must show that the government clearly authorized the contractor to go ahead with the more dangerous design.[65] However, the authorization must be "knowing," and a mere "rubber stamp" approval will not suffice.[66]

Both *Agent Orange* and *Shaw* adopted the "should have known" test for knowledge of a product's risks. However, many courts have adopted the ac-

61. The *Agent Orange* court justified this element by stating:

> A supplier should not be insulated from liability for damages that would never have occurred if the military had been apprised of hazards known to the supplier. A supplier, therefore, has a duty to inform the military of known risks attendant to a particular weapon that it supplies, so as to provide the military with at least an opportunity fairly to balance the weapon's risks and benefits.
>
> The principle would not impose upon a supplier any duty of testing that was not included in the specifications. It merely would require the supplier to share with the military the extent of a supplier's knowledge about the hazards of the product being purchased.

Agent Orange, 534 F. Supp. at 1055.

62. This additional duty to warn was meant to discourage contractors from deliberately remaining ignorant about the dangers of a product. *Agent Orange*, 597 F. Supp. at 849.

63. *Id.* at 847-49. However, the difficulty of discovering information as to what the government "knew" was recognized in Mackey v. Maremont, 504 A.2d 908, 914 n.1 (Pa. Super. 1986): "In our view, a comparison of relative degrees of knowledgeability of the government and the contractor is both abstract and difficult of proof. As such, we reject it as an unmanageable requirement."

64. *Shaw*, 778 F.2d at 746. *See also* Note, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?*, 36 U. MIAMI L. REV. 489, 501-02 (1984).

65. *Shaw*, 778 F.2d at 746.

66. *Id.* In *Shaw*, the trial court had determined that the Navy did not make a detailed check of Grumman's design data to determine whether it was safe. *Shaw*, 593 F. Supp. 1066, 1077 (S.D. Fla. 1984).

tual knowledge standard of *McKay*.[67] One court stated that the "should have known" test would require a contractor to evaluate the government's design specifications and engage in design testing not required under the procurement contract. That court reasoned that testing decisions should be left to the military.[68]

Policy Considerations Or "Why the Government Walks Free From Liability"

Virtually every government contractor case contains a discussion of the purposes served by the existence of the defense. Collectively, the courts have identified four groups of policy justifications for the defense. Because judicial doctrines are based upon their underlying policies, an examination of these policies is warranted.

Innovation and Cooperation

A major policy behind the government contractor defense is that it encourages a close working relationship between contractors and the government in developing and producing military equipment.[69] In the absence of the defense, contractor participation in design and in research and development would decrease. Arguably if military technology is to continue to incorporate advances of science, it needs the assistance of private contractors.[70]

Another justification for the government contractor defense is that in developing military products, the government is required to push technology towards its limits, thus incurring risks considered unacceptable for ordinary consumer goods.[71] Often the government simply chooses to accept the risks associated with the production of technologically advanced military equipment.[72] Without the government contractor defense, contractors might be discouraged from manufacturing dangerous equipment for the government because they would be unwilling to accept the increased chance of liability.[73]

67. Bynum v. FMC Corp., 770 F.2d 556, 575-76 (5th Cir. 1985). *Accord* Tillett v. J.I. Case Co., 756 F.2d 591, 599 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1986).

68. *Bynum*, 770 F.2d at 576. (court reasoning that such testing would result in delays and increased costs not contemplated by the parties to the procurement contract).

69. *McKay*, 704 F.2d at 449-50; *Koutsoubos*, 755 F.2d at 354-55.

70. *Tozer*, 792 F.2d at 407.

71. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354-55 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1986).

72. Courts have allowed the government the liberty to decide whether a particular risk is acceptable. *See, e.g.*, Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 742 (11th Cir. 1985); Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986).

73. However, many technologically advanced consumer products are developed despite the fact that product liability law does not protect the non-government product developer. Thus, it may be argued that this lack of immunity for non-government producers does not discourage manufacturers from developing products on the cutting edge of technology.

This unwillingness would arguably impair the government's ability to provide for the national defense.[74]

Protection of Sovereign Immunity

The oldest reason for the government contractor defense is that it is necessary to preserve sovereign immunity.[75] Courts have long recognized that in the absence of the government contractor defense, contractors would pass the costs of their liability on to the government in the form of cost overrun provisions or through higher prices in later equipment sales to the government.[76] The government contractor defense protects the policy of sovereign immunity by preventing the government from absorbing the costs of damages from design defects.[77] Without the defense, the *Feres-Stencel* doctrine would be subverted because the government would, in effect, pay for injuries caused by products procured through government contracts.[78]

Separation of Powers

To hold military suppliers liable for defective designs where the government set or approved the design specifications, would thrust the judiciary into the making of military decisions.[79] Such an intrusion into the legislative and executive branches of government has been held to violate the separation of powers doctrine as an imposition upon military autonomy.[80] Furthermore,

74. *Shaw*, 778 F.2d at 742. However, it has been argued that manufacturers would not be discouraged from selling military equipment to the government if they obtain liability insurance and could raise their contract prices to cover the insurance premiums. *See* Comment, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 47 Ohio St. L.J. 985, 1011 (1986).

75. This concern was first voiced by a Connecticut district court in *Dolphin Gardens, Inc.*, see *infra* notes 23-24 and accompanying text.

76. *See, e.g., McKay*, 704 F.2d at 449. On the other hand, contractors with good safety records could obtain liability insurance for lower rates than could their competitors. Thus, the safer contractors could make lower bids and pass the benefits of safety, rather than the cost of liability, to the government. *See id.* at 457 (Alarcon, J., dissenting). Furthermore, the government would also benefit from lower accident costs because only safe contractors would be manufacturing products for the government. *See* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741-42 (11th Cir. 1985).

77. However, it has been argued that because the defense does not shield contractors from liability for manufacturing defects, the defense does not prevent the government from suffering increased costs. The logic is that contractors will raise their prices to account for the chance of liability for the defective manufacture of the government's product. *See* Johnston v. United States, 568 F. Supp. 351 (D. Kan. 1983).

78. This argument was criticized in Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985). There, the court stated that the cost pass-through rationale is based on an outdated interpretation of *Feros-Stencel* and a strained reading of *Stencel*. The court relied on United States v. Shearer, 105 S. Ct. 3039, 3043 n.4 (1985), which stated that the original reasons for the *Feres-Stencel* limitation of government liability (other than the preservation of military discipline) are "no longer controlling."

79. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

80. *See* Tozer v. LTV Corp., 792 F.2d 403, 406-08 (4th Cir. 1986); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741-42 (11th Cir. 1985).

trials involving such issues would involve the second-guessing of military judgments concerning the equipping of the armed services.[81] This could impair military discipline because the suit might involve a soldier testifying against a superior.[82] Finally, civilian courts are not considered competent to make decisions concerning military equipment.[83] Therefore, deference has generally been given to military decisions regarding military procurements.

Fairness

Finally, simple fairness dictates that liability should not be imposed on an otherwise innocent contractor, whose only role in causing an injury to a third party was the production of a design supplied by the government.[84] Put another way, a government contractor neither creates nor controls the product supplied to the government.[85] Tort law places liability on the wrongdoer in order to deter persons from engaging in potentially injurious practices.[86] However, a contractor is not able to prevent injury to users of the product because it must follow government specifications.

Because the responsibility for the dangerous design lies elsewhere, the imposition of products liability would have little deterrent value. Therefore, liability on the part of a contractor is considered inappropriate.[87] This reasoning is strengthened by the fact that injured military personnel are at least partially

81. *See, e.g., Agent Orange*, 534 F. Supp. at 1054 n.1, where the court stated, "Considerations of cost, time of production, risk to participants, risks to third parties, and any other factor that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and should be exempt from review by civilian courts."

82. *See* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

83. *See id. See also* Tozer v. LTV, Corp., 792 F.2d 403, 406 (4th Cir. 1986), where the court vividly stated this proposition: "While jurors may possess familiarity and experience with consumer products, it would be the rare juror or judge who has been in the cockpit of a Navy RF-8G off the deck of a carrier on a low level, high speed fly-by maneuver." *But see In re* Air Crash Disaster at Mannheim Germany, 586 F. Supp. 711 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115, *cert. denied sub nom.*, Eschler v. Boeing Co., 106 S. Ct. 851 (1986) (court stating that not all decisions regarding the design of military equipment involve military judgments and "[m]any military products such as aircraft, vehicles, firearms, and explosives have civilian counterparts"). Zollers, *Rethinking the Government Contract Defense*, 24 AMER. BUS. L.J. 405, 418-19 (1986).

84. *Agent Orange*, 506 F. Supp. at 793. *But see* Johnston v. United States, 568 F. Supp. 351, 358 (D. Kan. 1983) (court stating "[t]he manufacturer will not always be 'innocent,' particularly when he has had substantial input into the product's design: indeed, where the manufacturer is the 'de facto' designer or has substantially greater sophistication than the government purchaser, the manufacturer may be more culpable than the ostensible designer.").

85. On the other hand, testimony in recent cases indicates that contractors often have as active a role in setting the design specifications as does the government. *See* Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 355 (3d Cir. 1985) (continuous back-and-forth between contractor and government); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 256 (3d Cir. 1982) (ongoing dealings between contractor and government).

86. *Agent Orange*, 506 F. Supp. at 793.

87. Bynum v. General Motors Corp., 599 F. Supp. 155, 157 (N.D. Miss. 1984), *aff'd*, 770 F.2d 556 (5th Cir. 1985).

compensated through veterans benefits. Thus, the government contractor defense does not protect the contractor completely at the expense of the injured party.

Questions Left Unanswered

Nonmilitary Products

Disagreement exists concerning whether the government contractor defense is limited to military equipment or whether manufacturers of nonmilitary equipment may invoke the defense. Some courts have made specific reference to "military equipment"[88] or "military contractors."[89] Thus, one argument is that such language implicitly limits the application of the defense to military equipment.[90] Indeed, the *McKay* court expressly held that the defense is not warranted in cases involving nonmilitary products.[91] However, two decisions subsequent to *McKay* failed to reach a similar conclusion.[92]

Limiting the defense's application to cases involving military equipment raises the problem of defining that term. For example, in *McKay*, the Ninth Circuit was unable to precisely state what distinguishes military and nonmilitary products: "The line . . . lies somewhere between an ordinary consumer product purchased by the armed forces—a can of beans, for example—and the escape system of a Navy RA-5C reconnaissance aircraft."[93] In addition to the difficulty in defining the term "military equipment," categorizing products that are used by both the military and by consumers is a problem. The cases to date suggest that courts are willing to accept as "military products," many civilian products that were modified to meet government needs.[94]

88. *See, e.g.*, *In re* Air Crash Disaster at Mannheim Germany, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied sub nom.*, Eschler v. Boeing Co., 106 S. Ct. 851 (1984); Tillett v. J.I. Case Co., 756 F.2d 591, 598 (7th Cir. 1985); *In re* Agent Orange Prod. Liability Litigation, 506 F. Supp. 762, 794 (E.D. N.Y. 1980).

89. *See, e.g.*, Bynum v. FMC Corp., 770 F.2d 556, 565-66 (5th Cir. 1985).

90. Some courts expressly reserve judgment as to whether the defense applies to manufacturers of non-military products. *See, e.g.*, Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 355 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1986); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400, 402 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981).

91. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). *Accord* Johnston v. United States, 568 F. Supp. 351, 357 (D. Kan. 1983) (refusing to apply the defense to radium dials designed for aircraft); Jenkins v. Whittaker Corp., 551 F. Supp. 110, 114 (D. Haw. 1982) (refusing to apply the defense to an atomic simulator that was "not a device used as a weapon").

92. Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985) (court allowing the manufacturer of a calf serum to assert the government contractor defense and stating: "[I]t would be illogical to limit the availability of the defense solely to 'military' contractors."); Price v. Tempo, Inc., 603 F. Supp. 1359, 1365 (E.D. Pa. 1985) (*McKay* limitation rejected in allowing defense by manufacturer of firefighters' coats and gloves).

93. 704 F.2d at 451.

94. The term "military products" has been recognized as including pizza dough mixers (Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981)), jeeps (Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976),

An objection to limiting the government contractor defense to military products is that such a restriction is inconsistent with the discretionary function exception.[95] That is, the procurement of nonmilitary products is as much a discretionary function as is the procurement of military equipment. Thus, the defense "should not be limited to military equipment but should include any design choice that involves an exercise of government discretion."[96]

Civilian Plaintiffs

Another unresolved issue is whether the government contractor defense may be invoked in cases brought by civilian plaintiffs. The *McKay* court answered no to this question by making government immunity under *Feres-Stencel* an element of the defense. Because *Feres-Stencel* applies only to injured servicemen, it does not bar claims by civilians. Thus, courts, such as *McKay*, that ground the defense on the *Feres-Stencel* doctrine limit application of the defense to cases brought by military plaintiffs. However, neither the *Agent Orange* nor the *Shaw* formulation of the defense has the requirement that the government be immune from suit under *Feres-Stencel*.[97] Moreover, some courts have allowed a contractor to invoke the defense against civilian plaintiffs.[98]

Boyle v. United Technologies Corp.

Boyle v. United Technologies Corp.[99] arose out of the crash of a Marine helicopter in the ocean near Virginia Beach. Boyle, the copilot of the helicopter, drowned when he was unable to get out of the aircraft through emergency exits.[100] Boyle's family brought suit against Sikorsky, the manufacturer of the helicopter,[101] alleging that the copilot's escape hatch was defec-

aff'd, 154 N.J. Super 407, 381 A.2d 805 (App. Div. 1977)), bulldozers (Brown v. Caterpillar Tractor Co., 692 F.2d 246 (3d Cir. 1982)), chemical herbicides (*In re* Agent Orange Products Liability Litigation, 534 F. Supp. 1046 (E.D.N.Y. 1982)), and front-end loaders (Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985)).

95. *See* Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 47 OHIO ST. L.J. 985, 1016 (1986).

96. *Id.* This would allow the defense to apply to products such as Post Office trucks, Coast Guard helicopters, and National Park Service off-road vehicles. *Id.* at 1016 n.249.

97. It has been suggested, however, that although these versions of the defense "do not list the government's immunity under the *Feres-Stencel* doctrine as a prerequisite to the government contractor defense, the immunity appears to be assumed." Turner & Sutin, *The Government Contractor Defense: Liability for Design Defects?*, 52 J. AIR L. & COMM. 397, 422 (1986). "Whether or not courts specifically list *Feres-Stencel* immunity as a separate and distinct element, it seems clear that such immunity must exist before the defense will apply in a military products liability case." *Id.* at 422 n.156.

98. *See, e.g.*, Burgess v. Colorado Serum Co., 772 F.2d 844 (11th Cir. 1985) (veterinarian plaintiff); Price v. Tempo, Inc., 603 F. Supp. 1359 (E.D. Pa. 1985) (fireman plaintiff); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 40 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981) (plaintiff was young boy).

99. 56 U.S.L.W. 4792 (U.S. June 27, 1988).

100. *Id.* at 4793.

101. Sikorsky was a division of United Technologies Corp.

tively designed. The jury returned a verdict in favor of Boyle's family.[102] After the trial court denied Sikorsky's motion for judgment notwithstanding the verdict, Sikorsky appealed.[103]

The Fourth Circuit reversed the trial court and remanded the case with directions that judgment be entered for Sikorsky.[104] It found as a matter of law that Sirkorsky could not be held liable because it satisfied the requirements of the government contractor defense.[105] Boyle's family petitioned the United States Supreme Court for a writ of certiorari, contending that there was no justification in federal law for the defense and, alternatively, that even if the defense should exist, the Fourth Circuit's version of the defense was inappropriate.[106]

When the United States Supreme Court granted certiorari, the elements of the government contractor defense were indeed an area ripe for resolution.[107] There were three major judicial formulations of the defense. *Boyle* was the Supreme Court's first opportunity to craft its own version of the defense. But before the Court could examine the defense itself, it had to determine if there was a basis for a recognition of the defense by a federal court.

Pre-emption of State Law

Normally, in the absence of statutory prescription, state law is applied to diversity cases. This is the rule of *Erie Railroad Co. v. Tompkins.*[108] This rule prevents federal courts from making federal common law. However, in some instances, federal law will pre-empt state law.

To determine whether federal law will pre-empt state law, the Supreme Court fashioned a test in *Clearfield Trust v. United States.*[109] Under this test, federal law will prevail if uniquely federal interests are involved and a federal policy or interest and the operation of state law are in conflict.[110] This was the test employed by the *Boyle* court to determine whether the scope and nature of the government contractor defense should be governed by federal or state law.

102. *Boyle*, 56 U.S.L.W. at 4793.

103. *Id.*

104. *Id.*

105. *Id.* The circuit court followed its earlier ruling in Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), *cert. filed*, Oct. 23, 1986, which adopted the government contractor defense formulation of *McKay v. Rockwell Int'l Corp.*, discussed *infra* at notes 37-68 and accompanying text.

106. *Boyle*, 56 U.S.L.W. at 4793.

107. See *supra* notes 37-68 and accompanying text.

108. 304 U.S. 64 (1938).

109. 318 U.S. 363 (1943).

110. *Boyle*, 56 U.S.L.W. at 4793-94 (citing *Clearfield Trust*, 318 U.S. at 366-67). It should be noted that the *Clearfield Trust* test included a third element — the federal interest must outweigh the state interest involved. 318 U.S. at 366-67. The *Boyle* Court did not include this element in its analysis of the preemption issue. It is possible that implicit in the Court's reasoning was a determination that the federal interest in protecting the policy decisions of its officials outweighs the competing state interest in compensating its tort victims.

In a 5-4 decision, Justice Scalia delivered the opinion for the court.[111] He began by examining areas of "unique federal interest." Two such areas were identified. The first was "[o]bligations to and rights of the United States under its contracts."[112] Another area found to be of federal concern was "the civil liability of federal officials for actions taken in the course of their duty."[113] Both of these areas are controlled by federal law.[114] However, these interests were not present in *Boyle*.[115]

Out of the two areas found to be of federal interest, the Court derived a new area of federal interest—the interest in the liabilities arising out of the performance of federal procurement contracts.[116] The Court recognized that in *Yearsley*,[117] federal law was applied to a government performance contract. The Court reasoned that "[t]he federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts . . . ."[118]

111. He was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy. Justice Brennan dissented and was joined by Justices Marshall and Blackmun. A separate dissent was filed by Justice Stevens.

112. *Boyle*, 56 U.S.L.W. at 4793.

113. *Id.*

114. *Id.*

115. Instead, *Boyle* involved a contractor's tort liability to an injured serviceman rather than its contractual obligation to the government. Furthermore, it involved a contractor's performance of a procurement contract rather than a federal official's performance of his duties. *Id.*

116. *Id.* at 4794. This creation of a new area of unique federal interests did not escape criticism by the dissent. Justice Brennan, writing for the dissent, stated:

> [T]he Court does not pretend that its newly manufactured Government contractor defense fits within any of the handful of "narrow areas" of "uniquely federal interests" in which we have heretofore done so. Rather, the Court creates a new category of "uniquely federal interest" out of a synthesis of two whose origins pre-date *Erie* itself . . . . [T]he court's ability to list two, or three, inapplicable areas of "uniquely federal interest" does not support its conclusion that the liability of Government contractors is so "clear and substantial" an interest that this Court must step in lest state law does "major damages."

Id. at 4797 (Brennan, J., dissenting).

117. See *supra* notes 27-30 and accompanying text.

118. *Boyle* at 4794. Moreover, the federal interest in the procurement of equipment was found to be affected by suits between private parties, such as in *Boyle*. "The imposition of liability on Government contractors will directly affect the terms of Government contracts; either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.*

Brennan's dissent strongly criticized the majority for extending *Yearsley* beyond a takings context. He doubted that such a result was intended by *Yearsley*, stating:

> In a valiant attempt to bridge the analytical canyon between what *Yearsley* said and what the Court wishes it had said, the Court invokes the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The Court does not suggest that the exception has any direct bearing here, for petitioner has sued a private manufacturer (not the Federal Government) under Virginia law (not the FTCA).

Id. at 4799 (Brennan, J., dissenting).

The finding that the procurement of equipment by the United States was an area of unique federal interest only satisfied the first element of the *Clearfield* test. Thus, the Court had to determine whether a significant conflict between federal and state law existed in *Boyle*.[119] The Court examined the *Feres-Stencel* doctrine as a possible means of determining when a significant conflict exists.[120] The Court stated that the defense should not be based upon *Feres-Stencel* because it would produce results that are both too broad and too narrow.[121] The results would be too broad because liability against manufacturers would be precluded even if the serviceman was injured by standard equipment purchased by the government.[122] On the other hand, the results would be too narrow because the defense could not be invoked to prevent civilians from bringing suit against the manufacturers of military equipment.[123]

Finally, the Court held that the FTCA's discretionary function exception "demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of government procurement."[124] The discretionary function exception assures that the defense only applies when the government has exercised a discretionary function—the approval of the specifications.[125] If the defense was not recognized in such instances, the discretionary function exception would be frustrated.[126] Thus, Virginia products liability law, which imposes liability on manufacturers for design defects, was displaced in favor of the government contractor defense.[127]

The Boyle Formulation of the Defense

After determining that federal law could shield a contractor from liability under the government contractor defense, the Court set forth the elements

119. The Court noted that the conflict between federal policy and state law "need not be as sharp as that which must exist for ordinary preemption when Congress legislates in a field which the States have traditionally occupied." *Id.* at 4794.

120. This was the limiting principle identified by Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), the case which *Boyle* ultimately accepted as the proper formulation of the government contractor defense. See *supra* note 105.

121. *Boyle*, 56 U.S.L.W. at 4795.

122. *Id.*

123. *Id.*

124. *Id.*

125. In approving the specifications, the government must make a "judgment as to the balancing of many technical, military, and even social considerations, including the trade-off between greater safety and greater combat effectiveness." *Id.* These policy judgments or decisions are discretionary functions. See discussion of *Daelhite v. United States, supra* at notes 19-22 and accompanying text.

126. "The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself . . . ." *Boyle*, 56 U.S.L.W. at 4795.

127. *Id.* Most courts which have addressed this issue agree that federal law should be controlling. *See, e.g.*, Bynum v. FMC Corp., 770 F.2d 556, 568 (5th Cir. 1985); *In re* Agent Orange Prod. Liability Litigation, 597 F. Supp. 740, 846 (E.D. N.Y. 1984); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764, 765 (1981). *Contra* Brown v. Caterpillar Tractor Co., 696 F.2d 246, 248-49 (3d Cir. 1982).

of the defense. The Court stated that the *McKay* formulation of the defense was the proper scope of displacement of state law.[128] Under the Court's new *Boyle* test, "liability for design defects in military equipment cannot be imposed" when:

(1) the government approves reasonably precise specifications;

(2) the equipment conforms to those specifications; and

(3) the contractor warns the government of any dangers in the use of the equipment known to the contractor but not to the government.[129]

The government's discretionary functions are protected by the first two elements of the *Boyle* formulation of the defense. These elements limit the defense to instances where the government approves reasonably precise specifications and where the product conforms to these specifications.[130] They are met only when the government exercises a discretionary function. The final element, the duty to warn, is necessary to create an incentive for contractors to convey knowledge of a product's risks.[131] In the absence of such an element, the contractor would be tempted to withhold such knowledge because conveyance of that knowledge would disrupt the procurement contract, while withholding it would produce no liability.[132]

The Effect of Boyle

The *Boyle* Court stated that it was adopting the *McKay* formulation of the government contractor defense.[133] However, when the specific elements of the defense were cited, the Court failed to list the *McKay* requirement that the government be immune from liability under the *Feres-Stencel* doctrine. As previously discussed, in the Court's search for a principle upon which to base the defense, *Feres-Stencel* was considered and rejected.[134] Thus, *Boyle* should preclude civilians who are injured by military equipment from bringing suit against the manufacturer of that equipment.[135] The *Feres-Stencel* doc-

128. *Boyle*, 56 U.S.L.W. at 7495. The Court considered and rejected the *Shaw* formulation of the defense, stating: "While this formulation may represent a perfectly reasonable tort rule, it is not a rule designed to protect the federal interest embodied in the 'discretionary function' exemption." *Id.* at 4796.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 4795.

134. See *supra* note 121 and accompanying text.

135. The dissent agreed with this conclusion:

> The contractor may invoke the defense in suits brought not only by military personnel like Lt. Boyle, or Government employees, but by anyone injured by a Government contractor's negligent design, including, for example, the children who might have died had respondent's helicopter crashed on the beach.

56 U.S.L.W. at 4796 (Brennan, J., dissenting).

trine's failure to produce such a result was the reason that the Court rejected the doctrine as a limiting principle of the defense.

The *Boyle* formulation of the government contractor defense also provides some insight into the issue of whether the defense will be limited to military products. In its statement of the defense, the Court specifically referred to "military equipment," thus apparently restricting the defense to such equipment. However, the Court provided no definition of military equipment.[136] And, as previously discussed, many civilian products used to meet government needs have been labelled "military products."[137] No matter how the term "military equipment" is defined by courts, persons injured by defectively designed *nonmilitary* equipment will apparently have recourse against the manufacturer of that equipment.[138] If the defense is now indeed limited to military equipment, perhaps a more appropriate name for the defense is the "military equipment defense."

The Court may not have intended to restrict the defense to military equipment. Possibly the *Boyle* test was intended to apply only to the facts of that case—facts involving an injury caused by military equipment.[139] Perhaps a different version of the defense would have been given if the case had involved nonmilitary products.

Conclusion

The government contractor defense recognizes that the government's management of the procurement process is a discretionary function that must not be hindered by judicial interference. This is accomplished by extending to government contractors immunity from products liability suits for injuries caused by their products. The rationale for this immunity is that for a decision to be truly discretionary, the government must be free to chose the course of action that it deems best. Such a choice (being made at the planning level) should not be subject to review by the courts to determine its correctness. Instead, only the execution (or operation) of the decision may be evaluated by the courts.

If a member of the armed services is injured by a military product, he is prevented from suing the government under the *Feres-Stencel* doctrine. Because the doctrine of sovereign immunity precludes government liability, the injured

136. See *supra* notes 89-96 and accompanying text for other courts' interpretations of this term.

137. See *supra* note 94 and accompanying text.

138. On the other hand, the dissent felt that:

> [T]he injustice [of the government contractor defense] will extend far beyond the facts of this case, for the Court's newly discovered government contractor defense is breathtakingly sweeping. It applies not only to military equipment . . . , but (so far as I can tell) to any made-to-order gadget that the Federal Government might purchase after previewing plans — from NASA's Challenger space shuttle to the Postal Service's old mail cars.

56 U.S.L.W. at 4796 (Brennan, J., dissenting).

139. But see *supra* note 138 for the dissent's negative interpretation of this argument.

serviceman must look to the product's producer for redress. However, under the *Boyle* formulation of the government contractor defense, a serviceman injured by a defectively designed military product will have no judicial remedy. Thus, when the government contractor defense is successfully asserted, an injured service member's only compensation will be from the government under the Veteran's Benefits Act.

The *Feres-Stencel* doctrine applies only to injured servicemen. Therefore, courts who base the defense on *Feres-Stencel* limit the application of the government contractor defense to servicemen-plaintiffs. Under *Boyle*, however, the defense does not include governmental immunity under *Feres-Stencel* as an element. Therefore, civilians who are injured by a military product are now apparently left with no remedy whatsoever.

The government contractor defense now appears to be applicable to both civilian and military plaintiffs. Thus, both civilian and military plaintiffs are now barred by *Boyle* from recovery for injuries caused by defectively designed military products. The only difference in the application of the defense rests upon the military/nonmilitary distinction. Under *Boyle*, the defense does not preclude suits brought by parties injured by nonmilitary equipment. Thus, the manufacturer of a defectively designed nonmilitary product cannot assert the defense regardless of whether the plaintiff is a civilian or a service member. However, no judicial definition of "military equipment" exists. It will be interesting to see what interpretation the *Boyle* "military equipment" language is given by courts in the future.

Brian Shipp