The Government Contractor Defense: Is It a Weapon Only for the Military?

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NOTES

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INTRODUCTION

In certain circumstances, when a contractor manufactures a product pursuant to a government contract, that contractor is granted immunity for liability arising out of the use of the product.1 In Boyle v. United Technologies Corp.,2 the United States Supreme Court issued an opinion which, in many respects, clarified the government contractor defense. However, the opinion left some issues unresolved. One of the most important questions remaining unanswered after Boyle is whether the government contractor defense applies to nonmilitary, as well as military, contractors.3 Although the government contractor defense has its roots in

* Courts have given this defense several different names, including “the government specifications defense,” Dorse v. Armstrong World Industries, Inc., 798 F.2d 1372, 1374 (11th Cir. 1986); “the government contractor defense,” Bynum v. FMC Corp., 770 F.2d 556, 560 (5th Cir. 1985); “the government contractor’s defense,” McGonigal v. Gearhart Industries, 851 F.2d 774, 777 (5th Cir. 1988); and “the military contractor defense,” Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 738-39 (11th Cir. 1985), cert. denied, 487 U.S. 1233 (1988). This Note refers to the defense as “the government contractor defense.”


3 Other issues left open are whether the government contractor defense provides immunity for manufacturing defects as well as design defects and whether the defense provides immunity for failure-to-warn claims. As for the first issue, Boyle has been interpreted as applying only to design defects and thus not to manufacturing defects. Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1317 (11th Cir. 1989) (“Plaintiff correctly points out that Boyle, by its terms, applies only to defects in design.”), cert. denied, 494 U.S. 1030 (1990); Nicholson v. United Technologies Corp., 697 F. Supp. 598, 603 (D. Conn. 1988) (“The government contractor defense does not shield government
public works projects, in recent years attempts have been made to extend the doctrine to provide immunity for nonmilitary contractors.

This Note examines the government contractor defense and its proposed application to nonmilitary contractors. The first part of the Note discusses the basic concept of the government contractor defense. The second part discusses the Supreme Court's decision in Boyle. The third part of the Note then analyzes the nonmilitary application of the government contractor defense. Finally, the Note concludes that the government contractor defense, as formulated in Boyle, should not apply to nonmilitary contractors.

I. THE GOVERNMENT CONTRACTOR DEFENSE

A. The Discretionary Function Exception

The government contractor defense has its roots in the doctrine of sovereign immunity. However, the Federal Tort Claims Act ("FTCA") limits the doctrine of sovereign immunity and allows the government to be sued for injuries caused by the negligence of government employees in certain situations. Although the FTCA generally suspends the doctrine of sovereign immunity as it applies to the federal government, certain exceptions to the FTCA provide situations in which the federal contractors from liability for manufacturing defects, i.e., the manufacturer did not comply with the government's design specifications.

See infra note 95.

See infra notes 10-49 and accompanying text.

See infra notes 50-93 and accompanying text.

See infra notes 94-171 and accompanying text.

See infra notes 172-76 and accompanying text.


5 See infra note 95.

6 See infra notes 10-49 and accompanying text.

7 See infra notes 50-93 and accompanying text.

8 See infra notes 94-171 and accompanying text.

9 See infra notes 172-76 and accompanying text.


government cannot be sued. Specifically, the discretionary function exception provides immunity for "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."¹⁴

_Dalehite v. United States_ is the seminal decision dealing with discretionary acts. In _Dalehite_, the plaintiffs sought recovery for personal and property damage resulting from an explosion of fertilizer with an ammonium nitrate base. After World War II, the government entered into contracts with private contractors and provided those contractors with detailed specifications for the manufacture, packaging, labeling, and shipping of fertilizer to Europe and Asia. The plaintiffs, claiming that the government and its contractors were negligent in bagging the fertilizer, coating the bags, and labeling the bags, sued the United States. The Supreme Court held that the government was immune under the discretionary function exception to the FTCA because the decisions were "made at [a] planning rather than [an] operational level."¹⁹

The Court further stated that a discretionary function "includes more than the initiation of programs and activities."²⁰ Therefore, "[w]here there is room for policy judgment and decision there is discretion."²¹ Decisions that relate to "the economic, political, or social effects of a policy or plan are discretionary, while decisions relating to daily operations that do not involve policy considerations are operational, and thus nondiscretionary."²² The justification underlying the discretionary function exception is that the executive branch must be allowed to implement its policy without fear of interference from the judiciary.²³

Even though the Supreme Court addressed the discretionary function exception in _Dalehite_ and other cases,²⁴ it is still extremely difficult to draw

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¹² Id. § 2680.
¹³ Id. § 2680(a).
¹⁴ Id.
¹⁶ Id. at 17.
¹⁷ Id. at 20.
¹⁸ Id. at 39-42.
¹⁹ Id. at 42.
²⁰ Id. at 35.
²¹ Id. at 36.
²² _Stewart_, _supra_ note 1, at 983.
²³ _Ausness_, _supra_ note 4, at 987 ("This article takes the position that the real objective of the government contract defense is to protect governmental decisionmaking against collateral attacks in the courts.").
²⁴ _See_, _e.g._, United States v. Varig Airlines, 467 U.S. 797 (1984) (holding that policy
the line between discretionary and nondiscretionary acts. It does seem clear that high-level policy judgments about "how to implement a regulatory program are within the discretionary function exception." However, the distinction is less clear when actions are performed in carrying out regulatory programs. In such a case, the key issue is whether the action involves a policy judgment. If, for example, a relevant statutory or regulatory provision prohibits an action, then refraining from performing that action involves no discretion.

B. The Feres-Stencel Doctrine

Prior to Boyle v. United Technology Corp., the Feres-Stencel doctrine established the basis for the government contractor defense. In Feres v. United States, the Supreme Court held that the government is immune from claims by military personnel for injuries related to their service in the military. In Stencel Aero Engineering Corp. v. United States, the Supreme Court extended the scope of immunity to include third-party actions against the United States. The Court held that when an injured member of the military sues a government contractor, the government contractor cannot join the United States as a third-party defendant.

Therefore, the Feres-Stencel doctrine grants immunity to the government from suits by members of the military directly against the government for service-related injuries, as well as from third-party actions against the government for service-related injuries. Before the Boyle decision, many courts relied on this doctrine to extend immunity to private government contractors from suits by members of the military.

judgments concerning a regulatory program and its implementation fall within the discretionary function exception).

26 Id.
27 Id.
28 Id. (citing Berkovitz v. United States, 486 U.S. 531, 539 (1988)).
29 Id.
30 Although some courts refer to this as the Feres doctrine, this Note refers to it as the Feres-Stencel doctrine.
34 Id.
who were injured by defectively designed products. Nonetheless, it is important to keep in mind that the *Feres-Stencel* doctrine originally offered a shield of immunity to the government for service-related injuries; only later was this doctrine extended to shield *private government contractors* from liability for service-related injuries.

C. Circuit Court Approaches

Prior to the Supreme Court’s decision in *Boyle*, the circuit courts of appeals followed two different formulations of the government contractor defense. These formulations arose principally from decisions by the Ninth and the Eleventh Circuits. The Ninth Circuit Court of Appeals, in *McKay v. Rockwell International Corp.*, held that a contractor could successfully invoke the government contractor defense when

1. the United States is immune from liability under *Feres* and *Stencel*,
2. the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment,
3. the equipment conformed to those specifications, and
4. the supplier warned the United States about patent errors in the government’s specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

In *McKay*, the widows of two Navy pilots sought damages from Rockwell International Corporation for the defective design of an airplane ejection system. The *McKay* court held that Rockwell would be immune from liability under the government contractor defense if, on remand, it could prove that “the United States set or approved reasonably detailed specifications for the . . . ejection system.”

The *McKay* court relied on the *Feres-Stencel* doctrine as the basis for its decision. The court stated that the underlying reasons for the government’s liability shield under the doctrine apply equally to situations in which service personnel sue military contractors.

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35 Ausness, *supra* note 4, at 992.
36 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). In the original version, the court did not break the elements down into paragraphs; the text was continuous.
37 *Id.* at 446.
38 *Id.* at 453.
39 *Id.* at 451.
40 *Id.* at 449.
To justify this determination, the court stated that risks unacceptable under tort law may be acceptable for the military and its members. Additionally, the court feared that imposition of liability on government contractors would cause the contractors to pass the additional incurred costs to the government through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales. The McKay court also based its decision on the danger of having a judiciary second-guess important military decisions. Finally, the court opined that giving immunity to government contractors provides an added incentive for the contractors to work more intimately with the government in the design, development, and testing of new products. The Ninth Circuit's formulation of the defense generated a substantial following.

The Eleventh Circuit, in Shaw v. Grumman Aerospace Corp., utilized a more limited approach in defining a government contractor's immunity. Under the Shaw test, a government contractor could avoid liability only by proving (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.

41 Id. at 453.
42 Id. at 449.
43 Id. Although the McKay court did not adopt the discretionary function exception as the rationale behind the government contractor defense, this particular justification for the defense mirrors that of the discretionary function exception. Thus, the fact that McKay did recognize this justification is further support for the proposition that the Ninth Circuit, in general, and McKay, in particular, should be afforded a great deal of deference in this area of the law.

45 The Fourth, Fifth, and Seventh Circuits all followed the exact standard announced by the Ninth Circuit. See Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986), cert. denied, 487 U.S. 1233 (1988); Bynum v. FMC Corp., 770 F.2d 556, 567 (5th Cir. 1985); Tillet v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985). Additionally, the Third Circuit set forth a standard very similar to that of the Ninth Circuit. In Koutsoubos v. Boeing Vertol, 755 F.2d 352, 354 (3d Cir. 1985), cert. denied, 474 U.S. 821 (1985), the court stated that for the government contractor defense to apply, the defendant must establish the following elements: "(1) that the government established the specifications for the [equipment]; (2) that the [equipment] met the government specifications in all material respects; and (3) that the government knew as much as or more than [the contractor] about the hazards of the product."

In Shaw, the personal representative of a deceased Navy pilot claimed that the defendant, Grumman Aerospace Corporation, defectively designed an aircraft because it did not include "any warning or back-up systems [to protect the pilot] in the foreseeable event of a stabilizer control failure."\(^{47}\) The court stated that the government contractor defense should be narrow\(^{48}\) and that Grumman had not satisfied the narrow formulation of the test.\(^{49}\)

II. THE SUPREME COURT'S DECISION IN BOYLE V. UNITED TECHNOLOGIES

In Boyle v. United Technologies Corp., the United States Supreme Court addressed the government contractor defense and attempted to clarify the elements that must be shown in order to invoke the defense.\(^{50}\) Although the Supreme Court resolved a split in the circuits regarding the proper formulation of the defense, it also left a number of issues unsettled.\(^{51}\)

In Boyle, a co-pilot in the United States Marines, David Boyle, drowned as a result of a helicopter crash off the Virginia coast.\(^{52}\) Although Boyle survived the impact of the crash, he could not escape from the helicopter and drowned.\(^{53}\) Boyle's father claimed that his son was unable to escape from the helicopter because of a defectively designed emergency escape system which opened outward rather than inward.\(^{54}\) The design was alleged to be defective because when the helicopter was submerged in water, the resulting water pressure would not allow the door to be opened outward.\(^{55}\) Had the door opened inward, the water pressure resistance would have been avoided.\(^{56}\)

Writing for a majority of the Supreme Court, Justice Scalia first dealt with the argument that no immunity for government contractors can exist absent specific legislation granting that immunity.\(^{57}\) Although the majority

\(^{47}\) Id. at 738. The stabilizer actuation system "hydraulically operates part of the aircraft's tail, allowing the pilot to steer the plane up or down." Id. at 738 n.1.

\(^{48}\) Id. at 741.

\(^{49}\) Id. at 747.

\(^{50}\) 487 U.S. 500 (1988).

\(^{51}\) See supra note 3 for a discussion of issues left unresolved by the Boyle Court.

\(^{52}\) Boyle, 487 U.S. at 502.

\(^{53}\) Id.

\(^{54}\) Id. at 503.

\(^{55}\) Id.

\(^{56}\) Id.

\(^{57}\) Id. at 504.
recognized that, in most instances, state law will not be preempted in the absence of a clear statutory provision or direct conflict between state and federal law, there are circumstances beyond these which may result in preemption of state law.\(^{55}\)

The Court formulated a two-part test to determine when federal law will preempt state law in the context of the government contractor defense. The first prong of the test requires that the area be one involving "uniquely federal interests.\(^{59}\) The second prong requires that "a 'significant conflict' exist[ ] between an identifiable 'federal policy or interest and the [operation] of state law,' or [that] the application of state law would 'frustrate specific objectives' of federal legislation."\(^{60}\)

As for the first prong, the Boyle Court found that the case of a military contractor is analogous to two areas which have previously been found to constitute uniquely federal interests. In the first area, obligations and rights arising out of contracts with the United States are usually governed exclusively by federal law.\(^{61}\) The second area that is of a uniquely federal concern is the civil liability of United States officials for actions taken within the scope of their employment.\(^{62}\) Refusing to rest solely on those two analogies, the Court went on to further explain how situations with military contractors involve an area of uniquely federal interest.\(^{63}\) The majority expressed concern regarding the effect that the allowance of liability would have on the actual terms of government contracts.\(^{64}\) In other words, the Court feared that government contractors would either cease to enter into contracts with the government or would raise their prices as a result of liability, thereby affecting the ability of the government to procure items through contracts.\(^{65}\)

Therefore, the Court found that military contractors engage in activities that involve "uniquely federal interests."\(^{66}\)

\(^{55}\) Id.

\(^{59}\) Id. (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)). Such interests are those that are "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts -- so-called 'federal common law.'" Id.

\(^{60}\) Id. at 507 (second alteration in original) (citations omitted) (relying on and quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) and United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)).

\(^{61}\) Id. at 504.

\(^{62}\) Id. at 505.

\(^{63}\) Id. at 506-07.

\(^{64}\) Id. at 507.

\(^{65}\) Id.

\(^{66}\) Id. at 506.
However, the first prong "merely establishes a necessary, not a sufficient, condition for the displacement of state tort law." A "significant conflict" between state and federal law must also exist. The Court stated that the conflict need not be as great as in ordinary preemption cases. The fact that the analysis involved an area of uniquely federal interest could turn what would otherwise not be a "significant conflict" into a conflict that would give rise to preemption. Notwithstanding the above, the Court noted that a significant conflict would not exist where the contractor could comply with both its obligations under the contract and its obligations under state law. Thus, for a significant conflict to exist, the state law duty must be precisely contrary to the duty imposed by the government contract.

Additionally, the Court noted that for a significant conflict to exist, the government must have a significant interest in the particular feature which is defective. For example, where the government orders a piece of equipment by stock number and that piece of equipment has a defective component, if the government does not have a significant interest in the particular feature that is defective, no conflict will arise and thus no preemption will occur.

The majority then recognized that courts have grappled with finding a limiting principle in order to identify cases in which a significant conflict with federal policy exists. The Court rejected the Feres-Stencel doctrine as such a limiting principle because it was both over- and under-inclusive. In the eyes of the Court, the Feres-Stencel doctrine was

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67 Id. at 507.
68 See supra note 60 and accompanying text.
69 Boyle, 487 U.S. at 507. Such an ordinary case would be "when Congress legislates in a field which the States have traditionally occupied." Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
70 Id. at 508.
71 Id. at 509.
72 See id.
73 Id.
74 Id. As an illustration, the Court gave the following example: If . . . a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered.
75 Id.
76 Id. at 510.
over-inclusive in that it allowed a government contractor to escape liability even when its defective product was purchased from stock or was otherwise standard equipment, as long as the plaintiff happened to be a member of the military. However, the doctrine was also underinclusive in that it covered only service-related injuries. Consequently, the Court held that the government contractor defense would apply to bar suits by civilians as well as military personnel.

The Supreme Court then adopted as its limiting principle the discretionary function exception of the FTCA. Scalia, speaking for the majority, stated that “selection of the appropriate design for military equipment” is a discretionary function within the meaning of the FTCA. It is very important to note the specific wording employed by Scalia in announcing the Court’s holding. By its own terms, the holding is limited to military equipment. The majority then continued by explaining why the procurement of military equipment should be included in the discretionary function exception.

The Court first expressed concern over second-guessing of military decisions. Such decisions are not solely those involving engineering, but also include considerations of society at large and involve judgments which balance those social considerations against technical and military considerations. These military considerations might even include a decision to forego optimum safety for better performance in combat.

Additionally, the Court expressed concern that the financial costs of imposing liability on government contractors would be passed through to the United States itself. The majority feared that “defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs.” Again, it is key to note the language employed by Scalia. His use of the term “defense” indicates a desire to limit the Court’s holding to military contractors as opposed to extending the holding to encompass nonmilitary contractors.

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77 Id.
78 Id.
79 Id. at 510-11.
80 Id. at 511. For a description of the discretionary function exception, see supra notes 10-29 and accompanying text.
81 Boyle, 487 U.S. at 511 (emphasis added).
82 Id. at 511-12.
83 Id. at 511.
84 Id.
85 Id.
86 Id. at 511-12.
87 Id. (emphasis added).
The Court went on to state that it would not make sense to provide the government with immunity when the government itself produced a piece of defective military equipment, yet make the government suffer the financial consequences of a defective piece of military equipment which the government obtained from a private contractor. Scalia then stated the precise holding of the Court: "[S]tate law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." Once again, note the language chosen by the Court. The holding expressly covers only military equipment, reflecting a conscious decision by the Court to so limit the government contractor defense.

The next step for the Court was to formulate an exact wording of the government contractor defense. The Court adopted the approach taken by the Ninth Circuit in McKay v. Rockwell International Corp. In formulating its rule, the Court stated:

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

Again, note that the language employed by Scalia in formulating the wording of the government contractor defense includes the term "military equipment." Thus, the holding of the Court should be understood as applying only to military equipment. In adopting the approach of the Ninth Circuit, the Supreme Court rejected the Eleventh Circuit's approach in Shaw, stating that it did not protect the federal interest embodied in the discretionary function exception.

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88 Id. at 512. This line of reasoning assumes that if military contractors were not subject to immunity they would pass the costs of liability to the government. Thus the government would indirectly suffer the financial consequences of defective designs.
89 Id. (emphasis added). The "in some circumstances" language employed by Scalia further limits the defense in that it will not always apply in the military context. These limitations, such as the "ordering from stock" exception, were discussed previously. See supra notes 73-74 and accompanying text.
90 Boyle, 487 U.S. at 512 (citing with approval McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984)).
91 Id. at 512 (emphasis added).
92 See supra notes 46-49 and accompanying text.
93 Boyle, 487 U.S. at 513. The Court based this rejection on the fact that the design
III. APPLICATION OF THE GOVERNMENT CONTRACTOR
DEFENSE TO NONMILITARY CONTRACTORS

As it now stands, a key issue left unresolved by Boyle is whether the government contractor defense applies to nonmilitary as well as military contractors. Although the overwhelming majority of cases decided after Boyle involve products either procured or used for military purposes, several opinions have dealt with nonmilitary products. While some of these opinions have held that the government contractor defense is available to all manufacturers, regardless of whether the defendant is a military or nonmilitary manufacturer, many have held that the government contractor defense is available only to manufacturers of military products.

for a particular military product may be reflective of a policy decision by military officials regardless of whether the contractor or the officials actually developed the design. Additionally, the Court did not want to penalize and deter contractor input in the design process. Id.

See In re Chateaugay Corp., 146 B.R. 339, 348 (S.D.N.Y. 1992). This proposition is supported by the following cites:


In re Chateaugay Corp., 146 B.R. at 348.


See, e.g., In re Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810-12 (9th Cir. 1992);
The dissenting opinion of Justice Brennan in *Boyle* addressed the issue of nonmilitary applications of the government contractor defense. Brennan stated that the majority's formulation of the government contractor defense was far too sweeping and that injustice would likely result. In fact, Brennan feared that the defense, as worded by the majority, would "appl[y] 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."

However, Brennan's fears seem to have been misplaced. In fact, in 1992, a federal district court in New York decided that the government contractor defense did not apply to nonmilitary equipment; it specifically held that the government contractor defense did not apply to suits against the manufacturer of postal vehicles, an area of particular concern for Brennan. Commentators agree that Brennan's assessment of the scope of the defense was mistaken:

The precise wording of the majority's opinion suggests that Justice Brennan's assessment of the "breathtakingly sweeping" scope of the defense is an exaggeration. Justice Scalia tailored the scope of the majority opinion to the circumstances of the case, stating at the outset, "This case requires us to decide when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect."

A recent article proposing that the government contractor defense be extended to asbestos manufacturers recognized that in order for such an extension to be successful, "[t]he relevant inquiry [will be] whether the

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*Boyle*, 487 U.S. at 516 (Brennan, J., dissenting).

Id.

Id.

*Chateaugay*, 146 B.R. at 351.

asbestos insulation . . . rises to the status of military equipment." This article noted that in rejecting the *Feres-Stencel* doctrine, the *Boyle* Court clearly did not intend to immunize the government from liability with respect to standard commercial items. Moreover, another observer noted that "the Supreme Court's requirement for an active, direct conflict" between state and federal law should guarantee that the government contractor defense "will be narrowly applied."

In the military context of *Boyle*, the Court was concerned with the effect contractors' liability would have on the prices the government pays for its products. However, in the standard consumer context, or the nonmilitary context, "products do not require any unique or special design that has not already been completed." In this situation, the products have been priced based on a wide market (the consumer market) in which liability for design defect is already imposed. Thus, granting immunity for such products will not affect their price. Only in the military area, where products require a unique or special design not already attempted, will the possibility of liability for design defects have a measurable impact on the price of the product.

Since *Boyle* adopted a new justification (the discretionary function exception) for the government contractor defense and resolved a split in the circuits as to the exact elements of the defense, this Note chiefly analyzes cases decided since *Boyle*. In re Hawaii Federal

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103 Id. The *Boyle* Court rejected the *Feres-Stencel* doctrine as too broad, in that it might be applied to bar a suit against a contractor for injuries caused by standard equipment or by equipment purchased from stock. Id.; see supra notes 75-79 and accompanying text.
105 *Boyle*, 487 U.S. at 511-12 ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs.").
106 Scadron, supra note 102, at 392.
107 See supra notes 75-82 and accompanying text.
108 See supra notes 90-93 and accompanying text.
109 Before embarking on an analysis of the case law, it is important to note that many post-*Boyle* decisions refer to the defense as the "military contractor defense." The use of such restrictive terminology provides further evidence that the defense applies only to the military. According to In re Joint Eastern and Southern District New York Asbestos
Asbestos Cases\textsuperscript{110} and In re Chateaugay Corp.\textsuperscript{111} provide the most extensive analysis of why the government contractor defense should only apply to military contractors.

A. Cases Which Have Refused to Apply the Government Contractor Defense to Nonmilitary Contractors

\textit{Hawaii Federal Asbestos Cases} was a consolidated appeal involving hundreds of asbestos products liability actions on behalf of plaintiffs who were exposed to asbestos dust while serving in the United States Navy.\textsuperscript{112} The defendants were manufacturers that supplied the Navy with asbestos.\textsuperscript{113} In holding that the government contractor defense only applies to military contractors, the court noted that \textit{Boyle} “repeatedly described the military contractor defense in terms limiting it to those who supply military equipment to the Government."\textsuperscript{114} The court emphasized that \textit{Boyle} rejected the \textit{Feres-Stencel} doctrine as the rationale for the defense because the broad nature of the doctrine would prevent military personnel from ever holding defense contractors accountable.\textsuperscript{115} The \textit{Hawaii Federal Asbestos Cases} court then stated that limiting the defense to the military context “is consistent with the purposes the [\textit{Boyle}] Court ascribes to the defense.”\textsuperscript{116}

The \textit{Hawaii Federal Asbestos Cases} court noted that part of \textit{Boyle}’s rationale was that the military makes “highly complex and sensitive

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\textsuperscript{110} 960 F.2d 806 (9th Cir. 1992).
\textsuperscript{112} \textit{Hawaii Fed. Asbestos Cases}, 960 F.2d at 808-09.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at 810. Along these lines, the \textit{Hawaii Federal Asbestos Cases} court noted that \textit{Boyle} stated, "We are of the view that state law which holds Government contractors liable for design defects in \textit{military equipment} does in some circumstances present a "significant conflict" with federal policy and must be displaced. Liability for design defects in \textit{military equipment} cannot be imposed [ ] pursuant to state law," when the elements of the defense are satisfied.” \textit{Id.} at 810-11 (emphasis added) (citations omitted) (quoting \textit{Boyle}, 487 U.S. at 512).
\textsuperscript{115} \textit{Id.} at 811.
\textsuperscript{116} \textit{Id.}
decisions” concerning state-of-the-art military equipment and that allowing suits against the producers of such equipment would negatively impact the military’s decision-making process in that the contractors would either inflate their prices or refuse to manufacture products for the government. However, these concerns, according to the court, do not exist in products that are readily available on the commercial market.

First of all, it is unlikely that the imposition or refusal to impose liability in such over-the-counter commercial settings would affect the pricing of such products because manufacturers would still be liable when they sell the product directly to the public. In addition, no direct military input affects the design of the products available on the commercial market. These products are designed and marketed in response to commercial, not military, demand and need.

The Ninth Circuit issued the Hawaii Federal Asbestos Cases decision, which is significant because it is the same circuit that issued the McKay v. Rockwell International Corp. decision. McKay supplied the elements of the government contractor defense adopted by the Supreme Court in Boyle. It is clear that the Ninth Circuit was the circuit most in line with the thinking of the Supreme Court in Boyle. Thus, the Ninth Circuit’s position that the government contractor defense does not apply to nonmilitary defendants should be very persuasive.

In fact, in the Hawaii Federal Asbestos Cases case, the court stated that it was reaffirming the view expressed in McKay “that the military contractor defense does not apply to ‘an ordinary consumer product purchased by the armed forces.’” Thus, the argument goes as follows: Boyle relied on McKay, and McKay has been interpreted as standing for the proposition that the government contractor defense does not apply to nonmilitary contractors. So, to the extent that the

117 Id.
118 Id.
119 See id.
120 Although this premise was not expressly stated in the opinion, it is a necessary implication given the court’s reasoning.
121 Hawaii Fed. Asbestos Cases, 960 F.2d at 811. In fact, in the context of the situation before it, the Hawaii Federal Asbestos Cases court relied heavily on the fact that an executive of one of the defendants admitted that the defendant primarily sold asbestos insulation to private companies. Id. at 812.
123 See supra notes 90-91 and accompanying text.
124 Hawaii Fed. Asbestos Cases, 960 F.2d at 811-12 (quoting McKay, 704 F.2d at 451).
125 See id.
Supreme Court relied on *McKay* in *Boyle*, an interpretation of *McKay* as holding that the defense has no application to nonmilitary contractors should be afforded tremendous weight.

The second case containing an extensive analysis of why the government contractor defense should not apply to nonmilitary contractors, *In re Chateaugay Corp.*, involved a claim that the defendant government contractors had defectively designed a postal vehicle, causing it to be more likely to rollover. In this case, the contractors essentially had three claims. The first claim was that the *Boyle* Court, in relying on the discretionary function exception rather than the *Feres-Stencel* doctrine, intended the defense to apply to nonmilitary contractors. Hence, the discretionary function exception in the FTCA would apply to nonmilitary contractors. Second, the contractors argued that the *Boyle* Court constantly referred to the defense as the "government contractor defense" in its analysis and did not limit its discussion to military contractors. Finally, the contractors argued that the fact that most of the cases had involved the military could not be used to prove the defense was limited to such military contractors.

On the other hand, the plaintiffs relied on the specific language of the *Boyle* Court holding and argued that "[liability for design defects in military equipment cannot be imposed]" if the three criteria set forth in *Boyle* are met. Additionally, the plaintiffs argued that the policies underlying the government contractor defense are policies peculiar to the military and do not extend to the nonmilitary context. In this regard, the plaintiffs stated that the chief purpose behind the government contractor defense was to allow for more discussion between the contractors and the military in the development of products. Finally, the plaintiffs relied on the fact that numerous courts have previously held that the defense only applies to military contractors.

In the end, the *Chateaugay* court agreed that the government contractor defense should be limited to the military context.

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127 *Id.* at 347.
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.* at 346 (emphasis added) (quoting *Boyle*, 487 U.S. at 512).
132 *Id.* at 349.
133 *Id.* (quoting *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 704 (4th Cir. 1989), cert. denied, 495 U.S. 953 (1990)).
134 *Id.* at 348; *see also supra* note 96.
135 *Chateaugay*, 146 B.R. at 348.
coming to this conclusion, the court relied on the arguments made by the plaintiffs and also stated that the Supreme Court in Boyle, although abandoning the Feres-Stencel doctrine, relied upon the Ninth Circuit's decision in McKay. The court then stated that a review of the McKay decision indicated that the defense had its roots in "the special need for the maintenance of military discipline and the avoidance of litigation "second-guessing" sensitive military decisions." This rationale mirrors that of the discretionary function exception. Thus, to a degree, the McKay court based its holding on the same rationale as that of the Supreme Court in Boyle. This finding further supports the proposition that the Ninth Circuit, and particularly the McKay court, was on the same wavelength as the Supreme Court in Boyle.

In coming to its conclusion, the Chateaugay court relied heavily not only on the Ninth Circuit's decision in McKay but also on Nielsen v. George Diamond Vogel Paint Co, a recent Ninth Circuit decision. Nielsen, decided after Boyle, concluded that the government contractor defense was based on uniquely military concerns. In this regard, the Chateaugay court noted that application of the defense to the military context was founded on a fear that contractors would raise their prices to insure against potential liability. These same concerns do not arise with readily available commercial products or products that have not been designed and developed with the special needs of the military in mind. For this proposition, the Chateaugay court relied on the Hawaii Federal Asbestos Cases decision which stated:

The products have not been developed on the basis of involved judgments made by the military but in response to the broader needs and desires of end-users in the private sector. The contractors, furthermore, already will have factored the costs of ordinary tort liability into the price of their goods. That they will not enjoy immunity from tort liability with respect to the goods sold to one of their customers, the

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135 Id. at 349.
136 Id. (quoting McKay, 704 F.2d at 449).
137 See supra notes 10-29 and accompanying text.
138 Id. at 349 (discussing Nielsen, 892 F.2d at 1454-55 (stating that the "policy behind the defense remains rooted in considerations peculiar to the military").
139 Id. at 350.
140 Id. at 350-51 (citing In re Hawaii Fed. Asbestos Cases, 960 F.2d 806, 810-11 (9th Cir. 1992)).
Government, is unlikely to affect their marketing behavior or their pricing.\textsuperscript{144}

Additionally, the \textit{Chateaugay} court relied on the fact that the \textit{Boyle} majority focused its analysis on the military aspects of the case\textsuperscript{145} and that only in these instances did a uniquely federal interest and significant conflict between federal and state law exist.\textsuperscript{146}

**B. Cases Which Have Applied the Government Contractor Defense to Nonmilitary Contractors**

The most well-reasoned decision applying the government contractor defense to nonmilitary contractors is \textit{Carley v. Wheeled Coach.}\textsuperscript{147} In this case the plaintiff, Mary Carley, an emergency medical technician, was riding in an ambulance when it flipped over.\textsuperscript{148} Carley claimed the ambulance manufactured by the defendant was defective in that it was prone to rolling over.\textsuperscript{149} In concluding that the reasoning of \textit{Boyle} applies to nonmilitary contractors,\textsuperscript{150} the \textit{Carley} court relied on the federal interest involved.\textsuperscript{151} The court stated that the same federal interest arises regardless of whether the contractor involved is military or nonmilitary.\textsuperscript{152} This "uniquely federal interest" is the procurement of contracts, specifically the completion of government work.\textsuperscript{153} The court further elaborated on this point by saying that if liability attached to government contractors, the contractors would either decline to manufacture the product or raise the price to cover liability costs.\textsuperscript{154} Thus, either the government would not be able to acquire products or it would be more costly for it to do so.\textsuperscript{155}

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\textsuperscript{144} \textit{Hawaii Fed. Asbestos Cases,} 960 F.2d at 811.

\textsuperscript{145} \textit{Chateaugay}, 146 B.R. at 349.

\textsuperscript{146} Id. at 348.

\textsuperscript{147} 1991 F.2d 1117 (3d Cir. 1993). Other decisions have applied the government contractor defense to nonmilitary contractors. However, the most well-known of these decisions, \textit{Burgess v. Colorado Serum Co.,} 772 F.2d 844 (11th Cir. 1985), was decided before \textit{Boyle} and thus is not discussed in this Note.

\textsuperscript{148} \textit{Carley,} 991 F.2d at 1118, \textit{cert. denied,} 114 S. Ct. 191 (1993).

\textsuperscript{149} Id.

\textsuperscript{150} Id. at 1119.

\textsuperscript{151} Id. at 1120.

\textsuperscript{152} Id.

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id.
However, this argument is over-reaching. Certainly a federal interest in obtaining contracts and having them completed exists, but this interest is not "unique" to the federal government. All governments (state and local) and all private parties have the same interest in obtaining products and in having contracts completed. One cannot make something unique simply by stating that it is so. However, the significant interest involved in military contracts — national security — is unique to the federal government. In nonmilitary matters, national security is usually not at stake; thus, no "uniquely" federal interest exists.

The argument that allowing liability to be imposed against nonmilitary contractors will result in higher acquisition costs for the government suffers from additional flaws. This argument is certainly valid in the military arena, where no other market for the contractors' products exists. However, in the area of normal, nonmilitary products, another market does exist. Thus, the price that contractors charge will be determined, in large part, by what they charge in the civilian market where the contractors are already subject to liability.\(^\text{156}\) Put simply, imposing liability on contractors in the nonmilitary arena will not increase the price they charge to the government because their largest market is the nongovernment sector, and that sector sets the price.\(^\text{157}\)

The Carley court continued, stating that the strongest reason for granting immunity to nonmilitary contractors is the Boyle Court's reliance on the discretionary function exception as the basis of the government contractor defense.\(^\text{158}\) The Carley court stated that the considerations underlying the discretionary function exception apply equally to military and nonmilitary contractors.\(^\text{159}\) These considerations are the fear of "second-guessing" of federal policy decisions, the concern for pass-through costs being imposed on the governments, and the perceived need for allowing the government the freedom to engage in complex analyses — which may sometimes involve a sacrifice of safety for other economical, technological, or societal considerations.\(^\text{160}\) In sum, the discretionary function exception is based on separation of powers — "to allow members of the executive branch of government to carry out policy decisions without unwarranted judicial interference."\(^\text{161}\)

\(^{156}\) See \textit{In re Hawaii Fed. Asbestos Cases}, 960 F.2d 806, 811 (9th Cir. 1992).

\(^{157}\) See \textit{id.}

\(^{158}\) \textit{Carley}, 991 F.2d at 1120.

\(^{159}\) \textit{Id.} at 1121-22.

\(^{160}\) \textit{Id.}

\(^{161}\) Ausness, \textit{supra} note 4, at 988-89.
One need only look at the Boyle decision itself to see the limits it placed on the discretionary function exception. The Boyle Court addressed the considerations underlying the discretionary function exception; however, it limited its discussion to matters of military concern. First, when discussing the problem of "second-guessing," the Boyle Court spoke in the context of choosing "the appropriate design for military equipment to be used by our Armed Forces," and balancing between "greater safety and greater combat effectiveness."

Likewise, when discussing the problem of pass-through costs, the Boyle Court spoke only of military defense contractors. "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."

Finally, when evaluating the complex analyses that manufacturers and the government perform, the Court spoke only of the unique area of military decisions. "It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness."

When looking at exactly what the discretionary function exception encompasses, it is important to note the exact holding of the Boyle Court. This holding is that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." In considering extending the discretionary function exception and thus immunity to nongovernmental entities, one must also examine the structure of the FTCA itself.

It must be kept in mind that the discretionary function exception is a limited exception for the government to a general rule for the government. One should be careful when extending sovereign immunity to cover a private party, since the general rule is that even the government is not entitled to sovereign immunity. When the government contractor defense is stripped to its bare essentials, it is an extension of sovereign immunity to a private party. This step is one that should be taken cautiously and should be limited to the specific area of the military where the concerns
of judicial interference with executive decisions involve matters of extreme importance — national security. It is only in the area of national security where such interference could have grave and immediate consequences for the government. Sovereign immunity should be stretched to apply to a private party only in one circumstance, and this one circumstance is in the area of military contractors.

When considering a possible extension of the government contractor defense to nonmilitary contractors, one must also consider the far-reaching implications of such a move. For instance, the defense would apply to a government contractor who defectively designed the floor of a building contained in an extensive government plan for construction of several new government buildings. This extensive construction plan would surely involve policy decisions and take into consideration any technical, political, economic, and social costs involved. Thus, in the abstract, this plan would fit under the discretionary function exception, and the contractor who defectively designed the floors in buildings which subsequently cave in and cause numerous injuries and deaths would be shielded from liability for its defective design. Surely the Boyle Court did not intend such a result. Allowing the discretionary function exception to apply to nonmilitary contractors simply is too expansive. To do so allows the exception to swallow up the rule and ignores the specific language of the Boyle Court.

The Carley court also relied on two other cases that reached similar conclusions. However, both of these decisions were rendered before Boyle and thus reliance upon them is misplaced. Additionally, these cases applied Alabama and Illinois state law rather than federal law, which even further diminishes their precedential value.

Although not specifically mentioned by the Carley court, one commentator has also noted that limiting the government contractor defense to military equipment manufacturers raises a problem in that the term “military equipment” is hard to define. Though this claim may have merit, difficulty in defining a term does not justify making bad law.

168 Boruski v. United States, 803 F.2d 1421, 1430 (7th Cir. 1986); Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985).
170 Ausness, supra note 4, at 1015. Ausness actually sees two problems in limiting the defense to military equipment. First, he finds it difficult to define the term “military equipment.” His second objection is that such a limitation would be inconsistent with the discretionary function’s underlying rationale of protecting governmental decision-making in general. Id. at 1015-16. Since the second objection has already been met in the discussion of the Carley case, it is not dealt with again here.
Just because a task may be difficult is no justification for endorsing an inequitable rule.\textsuperscript{171}

**CONCLUSION**

The government contractor defense should apply only to military contractors and not to nonmilitary contractors. The grant of immunity to civilian entities is an extraordinary one and should be employed in only limited circumstances. In *Boyle*, the United States Supreme Court announced the precise formulation of the government contractor defense,\textsuperscript{172} using as the underlying justification for the defense the discretionary function exception in the FTCA.\textsuperscript{173}

In addition, for displacement of state law to occur under the auspices of the government contractor defense, a conflict which frustrates specific federal objectives must exist between state law and a uniquely federal interest.\textsuperscript{174} Only in the area of national security does such a uniquely federal interest exist. No such interest is present in the nonmilitary arena where many of the products are standard commercial items that are being sold and marketed to the public at large.

Likewise, the nonmilitary context presents no danger of the federal government being unable to obtain needed products because of pass-through costs, as the prices for these nonmilitary products are set in the consumer market. Only in the military context does the federal government have a unique interest, namely national security, in the completion of contracts.

One need only look at the language employed by the Supreme Court in *Boyle* itself to conclude that the government contractor defense was meant to apply only to military contractors.\textsuperscript{175} Finally, the Ninth Circuit, which the Supreme Court followed in formulating the elements

\begin{itemize}
  \item 171 See McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984), in which the court stated:
  \begin{quote}
  We recognize that the term "military equipment" is somewhat imprecise, and that at some point lines will have to be drawn. We need not do so here. The line, however, 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. The latter falls within the term while the former does not.
  \end{quote}
  \item 172 Boyle, 487 U.S. at 512; see supra note 91 and accompanying text.
  \item 173 Boyle, 487 U.S. at 511; see supra notes 80-81 and accompanying text.
  \item 174 Boyle, 487 U.S. at 504-07; see supra notes 59-74 and accompanying text.
  \item 175 See supra notes 162-66 and accompanying text.
\end{itemize}
of the defense and which commands great respect in this area of the law, has been clear in its position that the government contractor defense is a limited defense and should be applied only to military contractors.176

Only in extraordinary circumstances should governmental immunity be extended to include private, nongovernmental entities. Nonmilitary contractors do not present such extraordinary circumstances and thus should not be shielded from liability for defects in the designs of their products. Therefore, the government contractor defense should be expressly limited to military contractors.

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176 See supra notes 112-25 and accompanying text.

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