RECENT DEVELOPMENTS

THE THIRD CIRCUIT EXPANDS THE GOVERNMENT CONTRACTOR DEFENSE TO INCLUDE NONMILITARY CONTRACTORS

In *Carley v. Wheeled Coach*,[1] the Third Circuit extended the scope of the government contractor defense established by the Supreme Court in *Boyle v. United Technologies Corp.*[2] to contractors manufacturing products under contracts with government agencies other than the military.[3] The Third Circuit is the first circuit court to extend the government contractor defense to nonmilitary government contractors.[4]

The government contractor defense is an affirmative defense under "general federal common law."[5] If government contractors satisfy certain specific requirements,[6] they may use the defense to bar various state law

---

1. 991 F.2d 1117 (3d Cir.), *cert. denied*, 114 S. Ct. 191 (1993).

2. 487 U.S. 500 (1988).

3. *See Carley*, 991 F.2d at 1123. For criticism of the possibility of this extension, *see* Harry A. Austin, Comment, Boyle v. United Technologies Corporation: *A Questionable Expansion of the Government Contractor Defense*, 23 GA. L. REV. 227 (1988) (attributing the uncertainty surrounding the application of the *Boyle* defense to the defense's broad foundation).

4. *See Carley*, 991 F.2d at 1130 (Becker, J., dissenting). *But see* Stout v. Borg-Warner Corp., 933 F.2d 331 (5th Cir. 1991) (holding that a manufacturer of an air conditioning unit for the Hawk Missile System Mobile Repair Unit could assert the government contractor defense). *See also* Johnson v. Grumman Corp., 806 F. Supp. 212 (W.D. Wis. 1992) (holding that a manufacturer of postal vehicles was entitled to immunity under the government contractor defense).

Congress has never spoken on the issue of immunity for nonmilitary government contractors. Justice Brennan, in his *Boyle* dissent, stated that Congress' silence regarding the creation of the government contractor defense was "conspicuous," and should have signaled the Court that it should not judicially create what Congress refused to legislate. *Boyle*, 487 U.S. at 515 (Brennan, J., dissenting) (citing H.R. 4765, 99th Cong., 2d Sess. (1986) (limiting civil liability of government contractors); S. 2441, 99th Cong., 2d Sess. (1986) (same); H.R. 2378, 100th Cong., 1st Sess. (1987) (permitting indemnification of civil liability for government contractors); H.R. 5883, 98th Cong., 2d Sess. (1984) (same); H.R. 1504, 97th Cong., 1st Sess. (1981) (same); H.R. 5351, 96th Cong., 1st Sess. (1979) (same)).

5. Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242, 248 n.12 (5th Cir. 1990). The government contractor defense is not an affirmative defense to claims alleging defective manufacture, but it is a defense to claims alleging injury caused by a product manufactured for the government. *Id.* at 248.

6. For a discussion of the specific elements of the government contractor defense, see *infra* notes 40-42 and accompanying text.

tort claims[7] brought by individuals alleging injury caused by a product manufactured for the government.[8] The defense essentially extends the government's sovereign immunity to government contractors.[9] By extending this immunity to nonmilitary contractors, the Third Circuit departed from the reasoning of the other courts which have ruled on this issue subsequent to the *Boyle* decision. Focusing on the *Carley* decision, this Recent Development evaluates the arguments for and against extending the government contractor defense to nonmilitary contractors. The author ultimately concludes that expansion is inappropriate because the extension of the defense will leave many tort victims without state law remedies.

Prior to the Supreme Court's decision in *Boyle*, two circuits had applied the government contractor defense to bar a state tort claim against a nonmilitary government contractor. The Eleventh Circuit, in *Burgess v. Colorado Serum Co.*,[10] refused to limit the government contractor defense to manufacturers of military products. In *Burgess*, a veterinarian lost his finger to amputation after accidentally injecting it with a vaccine manufactured pursuant to a contract with the federal government.[11] The veterinarian and his wife brought tort claims against the manufacturer based on

---

7. Tort claims that may be barred by the government contractor defense include design defect, failure to warn, strict liability, wrongful death, products liability, and breach of warranty. *See, e.g.*, Sundstrom v. McDonnell Douglas Corp., 816 F. Supp. 577 (N.D. Cal. 1992) (holding that the government contractor defense barred a design defect claim brought by widows and minor children of pilots killed in a midair collision); Wilson v. Boeing Co., 655 F. Supp. 766 (E.D. Pa. 1987) (holding that a contractor was shielded from liability for defective design because it had complied with the government's design specifications); Niemann v. McDonnell Douglas Corp., 721 F. Supp. 1019 (S.D. Ill. 1989) (holding that the government contractor defense applies to failure to warn claims); Nicholson v. United Technologies Corp., 697 F. Supp. 598 (D. Conn. 1988) (same); Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982) (holding that strict liability action was barred by the government contractor defense under Pennsylvania law); In re Aircraft Crash Litigation, Frederick, Maryland, May 6, 1981, 752 F. Supp. 1326 (S.D. Ohio 1990), *aff'd sub nom.*, Darling v. Boeing Co., 935 F.2d 269 (6th Cir. 1991) (holding that manufacturers and contractors were entitled to immunity under the government contractor defense against strict liability and breach of express or implied warranty claims); Landgraf v. McDonnell Douglas Helicopter Co., 993 F.2d 558 (6th Cir.), *cert. denied*, 114 S. Ct. 553 (1993) (finding a wrongful death action barred by the government contractor defense); Galik v. Kent Meters Ltd., 727 F. Supp. 1433 (S.D. Ala. 1989) (same); Lewis v. Babcock Indus., 985 F.2d 83 (2d Cir.), *cert. denied*, 113 S. Ct. 3041 (1993) (holding that a products liability suit was barred by the government contractor defense).

8. *See supra* note 5.

9. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). In *Boyle*, the United States Supreme Court stated: "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." *Id.*

10. 772 F.2d 844 (11th Cir. 1985).

11. *Id.* at 845.

negligence and manufacturer's liability under Alabama law.[12] The district court held that Alabama's government contractor defense barred the suits, and granted the defendant manufacturer summary judgment on both claims.[13] On appeal, the Eleventh Circuit upheld the district court's decision.[14] The circuit court conceded that the government contractor defense had been applied primarily to military contractors.[15] However, the circuit court granted immunity for the nonmilitary contractor in this case because it viewed the defense as an extension of the government's sovereign immunity:[16] if manufacturers could prove the elements of the defense,[17] and that they had acted in the place of the federal government, then the defense should be available to them regardless of the nonmilitary nature of the product.[18]

In *Boruski v. United States*,[19] the Seventh Circuit cited *Burgess* approvingly and held that Illinois' government contractor defense was available to nonmilitary contractors. In *Boruski*, a seventy-one-year-old woman contracted a paralytic and degenerative nervous system condition as the result of receiving a vaccine for which the United States government had contracted.[20] The Seventh Circuit denied the woman's claim for damages against the contractor. The court concluded that contractors acting in the place of the federal government should not be held liable if the federal government would not be held liable for performing the same work.[21]

---

12. *Id.* The plaintiffs alleged that the label on the vaccine did not provide sufficient warning of the vaccine's danger to humans. *Id.*

13. The *Burgess* court was determining whether the Alabama Supreme Court would apply the defense to a claim under the Alabama Extended Liability Manufacturer's Liability Doctrine. *Id.* The parties conceded that the government contractor defense barred recovery on the negligence claim. *Id.*

14. *Burgess*, 772 F.2d at 847.

15. *Id.* at 846.

16. *Id.*

17. The *Burgess* court used the following formulation of the government contractor defense. The defendant must prove: (1) that the government established the specifications for the product, (2) "that the product met the government specifications in all material respects"; and (3) "that the government knew as much or more than the defendant about the hazards that accompanied the use of the product." 772 F.2d at 846.

18. *Id.* The court stated: "Both the history of the defense and its general rationale lead us to the conclusion that it would be illogical to limit the availability of the defense solely to 'military' contractors." *Id.*

19. 803 F.2d 1421 (7th Cir. 1986).

20. *Id.* at 1423.

21. *Id.* at 1430. "If a contractor has acted in the sovereign's stead and can prove the elements of the defense, then he should not be denied the extension of sovereign immunity that is the government contractor defense." *Id.* (quoting *Burgess*, 772 F.2d at 846).

In *Boyle v. United Technologies Corp.*,[22] the Supreme Court articulated the standards for applying the government contractor defense. *Boyle* involved a wrongful death action brought against the manufacturer of a United States Marine Corps helicopter.[23] The plaintiff brought two claims under Virginia tort law and prevailed at trial.[24] On appeal, the Fourth Circuit held that the federal government contractor defense barred recovery on the state law claims.[25] The Fourth Circuit based its explanation of the defense on the rationale of *Feres v. United States*.[26] The *Feres* doctrine immunizes a government contractor from state law tort claims whenever the contractor acts in the federal government's stead and the government could not be held liable for the same act.[27] By adopting the *Feres* doctrine, the Fourth Circuit held, in effect, that general federal common law preempted

---

22. 487 U.S. 500 (1988). The Supreme Court was called on to settle a circuit split in *Boyle*. The Fourth and Ninth Circuits disagreed with the Eleventh Circuit, not on the validity of the government contractor defense, but rather on the proper formulation of the standards for determining whether a contractor can successfully raise that defense. The Fourth Circuit adopted the formulation of the government contractor defense that the Ninth Circuit had utilized in McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983). *See* Boyle v. United Technologies Corp., 792 F.2d 413 (1986). *See infra* text accompanying notes 56-57.

The Eleventh Circuit, in Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), articulated the defense differently. The *Shaw* test would bar a contractor's liability only if "(1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design." Boyle v. United Technologies Corp., 487 U.S. 500, 513 (1988) (citing *Shaw*, 778 F.2d at 746).

The Court adopted the Fourth Circuit's formulation from *Boyle*, and rejected the *Shaw* test because it did not adequately protect "the federal interest embodied in the 'discretionary function' exemption" of the Federal Tort Claims Act (FTCA). *Id.*

23. *Boyle*, 487 U.S. at 502. The decedent survived the crash of his CH-53D helicopter, but when he was unable to escape from the helicopter, he drowned in the Atlantic Ocean. *Id.*

24. *Id.* at 503. One claim asserted that the helicopter had been repaired defectively. The other claim alleged that the helicopter's escape apparatus had been designed defectively. The plaintiff received a jury verdict for $725,000. *Id.*

25. Boyle v. United Technologies, 792 F.2d 413, 414 (1986).

26. *Id. See also* Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986) (adopting, for the first time in the Fourth Circuit, this formulation of the government contractor defense).

The *Feres* doctrine arose from Feres v. United States, 340 U.S. 135 (1950). In *Feres* the Supreme Court held that the FTCA does not allow a cause of action to a member of the armed services who suffered service-related injuries. *Id.* at 146. This doctrine was extended in Stencel Aero-Engineering Corp. v. United States, 431 U.S. 666 (1977). In *Stencel* the Supreme Court held that the federal government had no duty under the FTCA to indemnify a third-party, government military subcontractor that was found liable for a serviceperson's injuries. *Id.* at 673.

27. *Boyle*, 487 U.S. at 512. *See also* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449-51 (9th Cir. 1983).

state tort law.[28] This holding was unusual because state law is typically preempted only by federal statutory law.[29]

The Supreme Court granted certiorari to settle the dispute between the circuits.[30] The Court acknowledged that absent clear statutory authorization to preempt state law, or a direct conflict between federal and state law, federal law typically would not preempt state law.[31] However, if the state law at issue significantly conflicts with a "uniquely federal interest,"[32] the state law may be preempted by federal common law. The Court decided that suits brought against contractors who manufacture products for the

---

28. *Boyle*, 487 U.S. at 507. *Cf.* Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966) (discussing the strict requirements for preemption of state law by federal common law).

29. Courts hesitate to find a state law preempted by federal law. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 479 n.7 (2d ed. 1988). Professor Tribe states: "The Supreme Court has referred to this reluctance as a presumption that 'Congress did not intend to displace state law.'" (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

Generally, federal law will preempt state law in three specific situations. First, Congress may expressly preempt state law. Second, preemption may be inferred from the structure or goal of a federal law. Finally, preemption of state law may be necessary if it conflicts with federal law, or prevents attainment of a federal goal. TRIBE, *supra*, at 481 n.14.

30. The plaintiff petitioned for certiorari arguing that, in the absence of legislation, the government contractor defense had no basis; that the Fourth Circuit's requirements were inappropriate; and further, that the Fourth Circuit erred in not remanding for a jury trial. *Boyle*, 487 U.S. at 503-04. Certiorari was granted in Boyle v. United Technologies Corp., 479 U.S. 1029 (1987).

31. *Boyle*, 487 U.S. at 504 (1988) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947); Florida Lime & Avacado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

32. *Boyle*, 500 U.S. at 507. The *Boyle* Court posed a hypothetical situation to demonstrate when a conflict will not be found. *Id.* It is conceivable, according to the *Boyle* majority, that a manufacturer who produces a product according to federal specifications could still be held liable for not installing a state-required safety feature that does not conflict with the government's specifications. *Id.* at 509. The Court also stated that when the government orders equipment from stock without specifying any of the product's features, "it is impossible to say that the Government has a significant interest in that particular feature." *Id.*

In *In re* Hawaii Federal Asbestos Cases, 715 F. Supp. 298 (D. Haw. 1988), *aff'd*, 960 F.2d 806 (9th Cir. 1992), the district court did not find a significant conflict between state law and a uniquely federal interest, because the government contract in question did not prevent the manufacturer from complying with a state-imposed duty to warn. *Id.* at 299-300. *See also In re* Joint Eastern and Southern District New York Asbestos Litigation, 897 F.2d 626 (2d Cir. 1990) (holding that the *Boyle* defense can be applied to bar state failure to warn claims if the government "dictated" the nature of the warning in addition to the specifics of the product); Dorse v. Armstrong World Indus., 716 F. Supp. 589 (S.D. Fla. 1989), *aff'd*, 898 F.2d 1487 (11th Cir. 1990) (holding that Navy specifications for a product did not conflict with a state imposed duty to warn of hazards).

For a discussion of the potential application of the *Boyle* defense to bar state tort claims against asbestos manufacturers, see S. Michael Scadron, *The New Government Contractor Defense: Will It Insulate Asbestos Manufacturers from Liability for the Harm Caused by Their Insulation Products?*, 25 IDAHO L. REV. 375 (1988-89).

government involve two "uniquely federal interests": (1) having federal contracts governed by federal law, and (2) having the liability of federal officials for actions taken in the course of their duty controlled by the federal government.[33] Therefore, the Court held that the federal judiciary is justified in creating a federal common law defense that bars contractor liability under state tort law in certain instances.[34]

The Court outlined this "significant conflict" requirement by referring to the Federal Torts Claim Act (FTCA), instead of the *Feres* doctrine as the Fourth Circuit had.[35] The FTCA statutorily waives the United States' sovereign immunity,[36] but it does not extend to suits arising out of a government employee's exercise of a discretionary duty or function.[37] The Court held that decisions regarding the design of military equipment

---

33. Boyle, 487 U.S. at 504-05. The *Boyle* Court likened the obligations of a government contractor to those of a federal employee. *Id.* at 505. The scope of the liability imposed on a federal official is governed by federal law because otherwise the liability will affect the operations of the government. The Court noted that the imposition of liability on a government contractor would similarly affect the terms of government contracts. *Id.* at 507. The imposition of liability on the contractor might cause him to raise prices, refuse to use the military specifications, or refuse to contract for the government at all. *Id.*

34. *Boyle*, 487 U.S. at 504. Since the holding in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), federal courts have been limited in their ability to create a body of federal common law that would usurp state law. However, federal courts have continued to exercise their ability to create federal common law in situations where the state law impinges on a "uniquely federal interest." *Boyle*, 487 U.S. at 504. The Court discussed two examples of this power in *Boyle*, *id.* at 508: Clearfield Trust Co. v. United States, 318 U.S. 363, 366-367 (1943) (holding that federal common law applies in cases involving the commercial paper of the United States when the United States is a party), and United States v. Little Lake Misere Land Co., 412 U.S. 580, 581 (1973) (holding that to permit state legislation to abrogate the explicit terms of a prior federal land acquisition would seriously impair federal statutory programs).

35. See *supra* note 26 and accompanying text for a discussion of the *Feres* doctrine. In *Boyle* the Supreme Court rejected the *Feres* doctrine as the basis for the government contractor defense. 487 U.S. at 510. The Court concluded that the doctrine was both too broad and too narrow:

> Too broad, because if the Government contractor defense is to prohibit suit against the manufacturer whenever *Feres* would prevent suit against the Government, then even injuries caused to military personnel by a helicopter purchased from stock . . . , or by any standard equipment purchased by the Government, would be covered . . . . On the other hand, reliance on *Feres* produces (or logically should produce) results that are in another respect too narrow. Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines.

Id. at 510-11.

36. 28 U.S.C. § 2674 (1988).

37. 28 U.S.C. § 2680(a) (1988).

are discretionary functions.[38] The Court further concluded that if these discretionary functions were allowed to be "second-guessed" through state tort suits against government contractors, the financial burden of judgments against these contractors would be passed through to the government.[39] Because the contractor in *Boyle* manufactured military products, the Court did not address whether the defense was applicable to nonmilitary contractors.

After adopting the Fourth Circuit's formulation of the government contractor defense, the Court established the standards for applying the defense. First, the manufacturer must demonstrate that the United States approved "reasonably precise specifications for the manufactured product."[40] Second, the manufacturer must show that the equipment "conformed" to those specifications.[41] Finally, the supplier must have warned the United States about the dangers in the equipment that were known to the manufacturer but not to the United States.[42]

---

38. *Boyle*, 487 U.S. at 511. Military equipment procurement decisions involve the balancing of military, technical, and social considerations, and therefore, are discretionary decisions. *Id.*

39. *Id.* "[W]e are further of the view that permitting 'second guessing' of these judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption." *Id.*

40. *Id.* at 512. Silence in a government contract regarding a specific feature has been held not to be necessarily inconsistent with a finding of conformity with specifications. Bailey v. McDonnell Douglas Corp., 989 F.2d 794 (5th Cir. 1993). However, silence with regard to a feature may beg the question whether the government articulated reasonably precise specifications. *Id.* at 799 (citing Trevino v. General, 865 F.2d 1474, 1486 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989)).

In Landgraf v. McDonnell Douglas Helicopter Co., 993 F.2d 558 (6th Cir.), *cert. denied*, 114 S. Ct. 553 (1993), the Sixth Circuit addressed the issue of whether military specifications incorporated by reference in the design specification for a helicopter involved in a fatal crash, constituted a "reasonably precise specification" with which the manufacturer was required to comply. *Id.* at 558. The Sixth Circuit held that the specifications were only a desirable goal and did not exact compliance from the manufacturer because the government was aware of and had allowed noncompliance in the past. *Id.* at 564. *See also* Chapman v. Westinghouse Elec. Corp., 911 F.2d 267 (9th Cir. 1990) (holding that the defense was not available absent a showing that the government had either provided or approved precise specifications for the design or manufacture of the product that caused the plaintiff's injury).

41. *Boyle*, 487 U.S. at 512.

42. *Id.* If the government continues to use and order the product after discovering a defect, the manufacturer's duty to inform the government is satisfied. Lewis v. Babcock Indus., Inc., 985 F.2d 83, 89 (2d Cir.), *cert. denied*, 113 S. Ct. 3041 (1993). However, if the government merely tolerates a discovered potential for hazard after the contract has been performed, knowledge of the defect will not be attributed to the government at the design stage. *Id.*

The *Boyle* Court observed:

> The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated. . . . The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying such knowledge might disrupt

Four justices dissented from the *Boyle* decision.[43] The dissenting justices argued that only Congress has the power to create a defense of this type,[44] and thus, state laws should not be preempted by judicially created federal laws.[45] Justice Brennan's dissent foreshadowed the confusion that the majority opinion would generate regarding the applicability of the *Boyle* defense to nonmilitary contractors. He opined that the "injustice" caused to state tort law plaintiffs would not be limited to the facts of *Boyle*, but rather would be applied just as the Third Circuit applied the defense in *Carley*.[46]

Subsequent to the *Boyle* decision, the issue of whether the government contractor defense extends to nonmilitary contractors was addressed in detail by the Ninth Circuit. In *Nielson v. George Diamond Vogel Paint Co.*,[47] a former civilian painter for the Army Corps of Engineers sued the manufacturer of paint which he had used in connection with his job and which he alleged had caused him permanent brain damage.[48] The district court held that the plaintiff's negligence and strict liability claims were barred under Idaho's "contracts specifications" defense.[49] On appeal, the Ninth Circuit considered the *Boyle* opinion, but refused to extend the

---

the contract but withholding it would produce no liability.

Boyle, 487 U.S. at 512.

43. The dissenting justices were Brennan, Marshall, Blackmun, and Stevens.

44. Justice Brennan argued: "Congress . . . has remained silent—and conspicuously so, having resisted a sustained campaign by government contractors to legislate for them some defense. The Court—unelected and unaccountable to the people—has unabashedly stepped into the breach to legislate" such a defense. *Boyle*, 487 U.S. at 515-16. (Brennan, J., dissenting). *See supra* note 4.

Explaining his belief that the creation of this type of defense is a legislative function, Justice Stevens wrote: "When [a] novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual . . . I feel very deeply that we should defer to the expertise of the Congress." *Id.* at 532 (Stevens, J., dissenting).

45. Justice Brennan warned: "*Erie* was deeply rooted in notions of federalism. . . ." *Id.* at 517 (Brennan, J., dissenting). "[F]ederal common law cannot supersede state law *in vacuo* out of no more than an idiosyncratic determination by five Justices that a particular area is 'uniquely federal.'" *Id.* at 517-18.

46. *Id.* at 516 (Brennan, J., dissenting). Brennan wrote: "[The defense] applies not only to military equipment like the [helicopter at issue in *Boyle*], 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." *Id.*

The majority in *Carley* used this language to support its conclusion that the *Boyle* defense was meant to apply to nonmilitary contractors. *See* Carley v. Wheeled Coach, 991 F.2d 1111, 1119 n.2 (3d Cir. 1993).

47. 892 F.2d 1450 (9th Cir. 1990).

48. *Id.* at 1451.

49. *Id.* at 1455.

federal government contractor defense to nonmilitary contractors.[50] However, the court affirmed the district court's holding that under Idaho law the suits were barred by the State's government contractor defense.[51]

The *Nielson* court recognized that *Boyle* had shifted the foundation of the defense from the *Feres* doctrine,[52] which focuses specifically on military activities, to the FTCA, which generally concerns all governmental actions.[53] The court acknowledged that many commentators viewed this shift as an indication that the defense is available to all government contractors.[54] However, the *Nielson* court refused to preempt state tort law with the federal contractor defense. The court held that, in the context of nonmilitary contractors, state tort laws did not significantly conflict with the "uniquely federal interests" and policies underlying the government contractor defense.[55]

The *Nielson* court read *Boyle* as an affirmation of the reasoning underlying the Ninth Circuit's prior holding in *McKay v. Rockwell International Corp.*[56] In *McKay*, the Ninth Circuit stated that the defense is necessary to assure "military discipline" and to avoid the "second-guessing" of sensitive military decisions.[57] The *Nielson* court recognized that *Boyle* expanded the scope of the government contractor defense to include contractors who manufacture a product designed by the government in the exercise of a discretionary function.[58] However, the court stated that this expansion merely allowed the defense to be applied in claims arising from nonservice military activities. According to the *Nielson* court, the reasons for shielding a contractor with the defense remain rooted in concerns unique to the military.[59] These concerns, considered together with the inherent interest the government has in preserving its ability to contract, justify the application of the defense only in cases involving military contractors. Therefore, in *Nielson*, the court refused to bar the state tort claim with the general federal common law government contractor

50. *Nielson*, 892 F.2d at 1456.
51. *Id.*
52. *See supra* note 26 for a discussion of the *Feres* doctrine.
53. See *supra* notes 36-39 and accompanying text for a discussion of the FTCA.
54. *Nielson*, 892 F.2d at 1453 (citing Scadron, *supra* note 32; Austin, *supra* note 3).
55. *Id.* at 1456.
56. McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1990).
57. *Id.* at 449.
58. *Nielson*, 892 F.2d at 1454.
59. *Id.* at 1454-55.

defense.[60]

No circuit other than the Ninth addressed the nonmilitary contractor issue until the Third Circuit decided *Carley v. Wheeled Coach*.[61] *Carley* arose from an ambulance accident. The plaintiff worked for the Virgin Islands Department of Health as an emergency medical technician at St. Croix Hospital.[62] An ambulance in which the plaintiff was a passenger flipped over en route to an emergency scene.[63] Wheeled Coach, a Florida corporation, manufactured the ambulance in accordance with a contract with the United States.[64] The plaintiff sought damages under the theories of strict liability and breach of warranty arising from Wheeled Coach's alleged defective manufacture and design of the ambulance.[65] The district court concluded that the government contractor defense barred the plaintiff's claims and granted Wheeled Coach's motion for summary judgment.[66]

The Third Circuit agreed that the government contractor defense as construed by *Boyle* should apply to nonmilitary contractors.[67] The court held that suits against government contractors implicate the government's unique interest in having its work completed, regardless of whether military

---

60. *Id.* at 1455. The court held, however, that under Idaho law the manufacturer could bar the suit using Idaho's government contractor defense. *Id.* The court remanded the case for factual determinations regarding a failure to warn claim. *Id.*

In *In re Hawaii Federal Asbestos Cases*, the Ninth Circuit again held that the government contractor defense does not apply to nonmilitary contractors. 960 F.2d 806, 813 (9th Cir. 1992). As in the *Nielson* case, the *Hawaii Asbestos* court relied heavily on the sections of the *Boyle* opinion that applied the *Boyle* test. 960 F.2d at 810.

61. Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir. 1993). The *Carley* court cited two post-*Boyle* cases, Johnson v. Grumman Corp., 806 F. Supp. 212, 217 (W.D. Wis. 1992), and *In re* Chateaugay Corp., 132 B.R. 818, 823-27 (Bankr. S.D.N.Y. 1991), *rev'd*, 146 B.R. 339 (S.D.N.Y. 1992), as evidence of a split of opinion over whether the defense should apply in nonmilitary cases. *Carley*, 991 F.2d at 1119 n.1. However, the court did not rely on either case as precedent for its holding. *Id.*

62. *Id.* at 1118.

63. *Id.* It was reported by a police officer at the scene of the ambulance accident that the ambulance was driven in a safe and reasonable manner. *Id.*

64. *Id.*

65. *Carley*, 991 F.2d at 1118.

66. *Id.* The plaintiff unsuccessfully argued that Florida law governed the case because Florida does not recognize as a matter of state law the application of the government contractor defense to nonmilitary contractors. *Id.* However, this argument would be moot if the federal version of the defense applies to nonmilitary contractors.

67. *Id.* at 1118. The court acknowledged that the *Boyle* Court applied the defense to a military contractor, but felt that the reasoning of *Boyle* broadly encompassed all government contractors. *Id.*

contractors or nonmilitary contractors are the subject of the suit.[68] The court quoted language from the *Boyle* Court stating that liability imposed on contractors will adversely affect the government's ability to contract.[69] The Third Circuit believed the government would endure this same economic hardship whether the product manufactured by the contractor was for military or civilian use.[70]

The Third Circuit reasoned that the Supreme Court's shift away from the *Feres* doctrine as the basis for the defense indicated a broadening of the application of the defense to all government contractors.[71] It also concluded that the federal government's disdain for having its decisions second-guessed through state tort law decisions is equally strong for both military and civilian products.[72] To further support its holding, the *Carley* court relied on the two pre-*Boyle* decisions, *Burgess* and *Boruski*.[73]

In his dissent in *Carley*, Judge Becker relied heavily on a Ninth Circuit post-*Boyle* decision in concluding that the defense should not apply to nonmilitary contractors.[74] The dissenting judge noted that though certain of the Court's rationales in *Boyle* seem to apply to all government contractors, the defense still should not have been extended to nonmilitary contractors because contracts for nonmilitary products do not affect national security.[75] Judge Becker also stated that, because the courts in *Burgess* and *Boruski* applied state law versions of the government contractor defense, those decisions had no bearing on the scope of the federal government contractor defense.[76] The majority dismissed this point with the observation that both the *Burgess* and *Boruski* courts had used federal authorities to define the scope of their respective state defense.[77]

The majority and dissenting opinions of *Carley* demonstrate the problems

---

68. *Id.* at 1120.

69. *Carley*, 991 F.2d at 1120 (quoting *Boyle*, 487 U.S. at 507).

70. *Id.* Indeed, the hardship can be said to be greater when contracts involve civilian products, for ninety percent of government procurement contracts are for such goods. Austin, *supra* note 3, at 236.

71. *Carley*, 991 F.2d at 1120-21.

72. *Id.* at 1121.

73. *See supra* notes 10-21 and accompanying text. The *Carley* court also cited numerous scholars who have argued that the *Boyle* decision should apply to nonmilitary contractors. *Carley*, 991 F.2d at 1123 n.4 (citing four recent law review articles).

74. *Carley*, 991 F.2d at 1130 n.3 (Becker, J., dissenting).

75. *Id.* at 1130 (Becker, J., dissenting).

76. *Id.* at 1130 n.2 (Becker, J., dissenting).

77. *Id.* at 1123 n.5.

caused by the Supreme Court's holding in *Boyle*. By vaguely defining the scope of the government contractor defense, the Supreme Court left to the lower courts the task of adding dimension and texture to the defense. Because the *Boyle* decision is itself the primary resource available to the lower courts as they approach this task, interpretations have varied. The courts that have refused to expand the defense have focused on the specific military context of *Boyle* to limit the application of the defense to military contractors.[78] By contrast, the *Carley* majority relied on the sweeping policy rationale used by the Court in *Boyle* to justify its expansion of the defense to nonmilitary contractors.[79]

Though the Third Circuit purports to find support in the *Boyle* decision for its holding in *Carley*, it extends the government contractor defense too far. The *Boyle* defense should be narrowly construed to apply only to military contractors. The Supreme Court judicially established the scope of the government contractor defense in *Boyle*. Justice Brennan, implicitly, and Justice Stevens, explicitly, dissented in *Boyle* on the ground that the creation of a government contractor defense is a purely legislative function.[80] By interpreting the defense broadly, the *Carley* court compounded this usurpation of legislative authority.

The Third Circuit in *Carley* correctly observed that the "uniquely federal interests" cited in the *Boyle* case to justify the government contractor defense are also implicated by nonmilitary contractors.[81] However, in the absence of national security concerns, the federal interests are not sufficiently strong to justify extending the defense to nonmilitary contractors to the detriment of state law tort claimants. The *Boyle* court developed its definition of the government contractor defense in a suit involving a military contractor. A defense that so strongly implicates federalism and separation of powers concerns should be narrowly construed. Therefore, any application of the government contractor defense should be limited to the facts of *Boyle*.

Congress should pass legislation establishing the existence or nonexistence of the government contractor defense. If Congress chooses to define the defense legislatively, it should outline whether the defense encompasses all government contractors or just military contractors. In the absence of

78. *See supra* notes 46-59 and accompanying text.
79. *See supra* notes 66-71 and accompanying text.
80. *See supra* notes 43-45 and accompanying text.
81. *See supra* notes 67-69 and accompanying text.

such legislation, the Supreme Court should limit the *Boyle* holding to military contractors.

If nonmilitary government contractors are allowed to assert the government contractor defense, a large number of state tort claims will be barred and potentially thousands of plaintiffs will be left without a remedy. Such a sweeping infringement on states' rights should not be implemented without Congressional involvement.

Kelly A. Moore