July 22, 2021

ARTICLES

# MilSpecs, Wartime Production, and Ear Plugs: More Government Contractor Defense Observations

Not every military connection or supply is sufficient to invoke the government contractor defense or serve as a basis for federal officer removal.

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Application of the government contractor defense articulated in the U.S. Supreme Court's seminal 1988 decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), continues to ebb and flow from the original scenario of a design defect in a military helicopter, as was observed in a 2019 article in this newsletter, "*Boyle* to Burn Pits and Beyond: A Government Contractor Defense Refresher" (*Mass Torts*, Apr. 24, 2019). In that article, we discussed the basis of the government contractor defense and its development: its initial application to military equipment, subsequent application of its principles to the conduct of military service contractors, and the defense's related role as a predicate for federal officer removal.



By its nature, the government contractor defense creates a tension between the immunity used to secure the government's ability to procure necessary equipment, materiel, and services, especially in the military context, and depriving an injured party of a tort remedy, or at least the injured party's chosen state forum to the extent the government contractor defense permits federal officer removal. *See Boyle*, 487 U.S. at 512 ("To put the point differently: 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. In sum, we are of the view 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.").

The mostly aircraft-related cases involved in the initial development of the defense tend to resolve the balance in favor of the contractor's immunity. However, a different scenario presenting a more difficult balance is where a "commercial" product is involved in or related to a military use. As discussed in "*Boyle* to Burn Pits," the Second Circuit has acknowledged that the government contractor defense would not apply where the government buys a product "off-the-shelf" or "as-is." *See In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 90–91 (2d Cir. 2008) (rejecting plaintiff's off-the-shelf argument because concentrations mandated by the military's Agent Orange specifications were not commercially available and the mere fact that component herbicides were commercially available did not render final product off-the-shelf; rather, inquiry is whether government was "agent of decision" regarding product's composition), *cert. denied*, 555 U.S. 1218 (2009).

Recent examples of the commercial/military dichotomy, discussed below, are aqueous film-forming foam and polychlorinated biphenyls (PCBs). Another prominent example of the tricky dividing line between commercial products and military products has been ear plugs supplied for combat use, currently the subject of multidistrict litigation in which the applicability of the government contractor defense has turned on whether the government was sufficiently involved in product design.

On a similarly difficult issue, courts have considered the application of the government contractor defense where the contractor faces environmental liability arising out of operations using goods procured by the military. The military unquestionably handles all sorts of materials on the battlefield that might become toxic with sufficient exposure, though battlefield conditions can limit the ability to exercise maximum safety precautions. Thus, as discussed in "*Boyle* to Burn Pits," the Fourth Circuit concluded that claims against the contractor performing the burn pit operations were non-justiciable under the political question doctrine. *In re KBR Inc. Burn Pit Litig.*, 893 F.3d 241 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 916 (2019). Such claims are non-justiciable "if either (1) the military exercised direct control over the contractor, or (2) 'national defense interests were closely intertwined with the military's decisions regarding [the contractor's] conduct.'" *Id.* at 260 (quoting *Taylor v. Kellogg, Brown & Root Servs.*, 658 F.3d 402, 411 (4th Cir. 2011)). But how far does this protection reach back to the contractor's production and its alleged failure to properly handle hazardous materials and wastes?

We explore several recent developments below.

## Military Specifications

A key element in a government contractor case can be whether there is a military specification, or "MilSpec," that covers procurement of the item at issue. Such a specification can provide an indication of the military's involvement in decision-making concerning the product's design and distinguish that particular product from a comparable commercial product that would not trigger the government contractor defense as an off-the-shelf purchase. The presence of a military-specific distinction has been relied on in affirming federal officer removal in cases alleging per- or polyfluoroalkyl substance (PFAS) contamination in aqueous film-forming foam (AFFF). *See, e.g.*, *In re Aqueous Film-Forming Foams Prods. Liab. Litig.* (*In re AFFF*), 2019 U.S. Dist. LEXIS 119283 (D.S.C. May 24, 2019); *Nessel v. Chemguard, Inc.*, 2021 U.S. Dist. LEXIS 39175 (W.D. Mich. Jan. 6, 2021).

In *In re AFFF*, the court found that the military specification satisfied (at least for the low hurdle of federal officer removal) the element that the contractor was "acting under" the government's control:

> Here, New York alleges that Tyco manufactured and sold AFFF products containing PFOS/PFOA to the U.S. military, which used and stored the products at certain sites. Because the U.S. military accepts and tests AFFF products against military specifications ("MilSpec") promulgated by Naval Sea Systems Command, including specifications that AFFF product formulations include the chemical class that includes PFOA/PFOS, Tyco has demonstrated that it was manufacturing the product under the U.S. military's guidance.

*In re AFFF*, 2019 U.S. Dist. LEXIS 119283, at *6.

Similarly, the court concluded that the contractor's government-controlled conduct was causally related to the plaintiff's claims, i.e., "the acts for which they are being sued . . . occurred because of what they were asked to do by the Government," in that the "claims arise out of use of AFFF products that it claims Tyco manufactured and sold, and for which the U.S. military imposes MilSpec standards." *Id.* at *8.

In *Nessel*, the court noted the plaintiffs' own allegations differentiating between military grade and commercial grade AFFF. 2021 U.S. Dist. LEXIS 39175, at *3 ("There are two relevant types of AFFF: Commercially available AFFF and military grade ('MilSpec') AFFF. MilSpec AFFF is used on military bases and at federally regulated civilian airports (Id. at ¶ 4). Commercial AFFF is used in industrial facilities and in some state and local fire departments (Id. at ¶ 18)."). Faced with federal officer removal based on a military specification product, the plaintiffs tried to argue that their claims concerned only commercial AFFF. The court rejected this

attempted limitation at the removal stage, noting that the plaintiffs "cannot prevent Defendants from raising the production of MilSpec AFFF as a defense or an alternate theory," and "that Plaintiffs' artful pleading does not obviate the facts on the ground." *Id.* at *10–11. *But see Young v. Chemguard, Inc.*, 2021 U.S. Dist. LEXIS 98101 (D. Ariz. May 21, 2021) (denying federal officer removal where plaintiff firefighter only alleged exposure to AFFF in course of training and work, i.e., commercial AFFF, despite defendant's contention that plaintiff would have been exposed to groundwater contaminated with military AFFF from nearby base).

In contrast to federal officer removal in the AFFF cases, federal officer removal has been rejected in cases against a PCB manufacturer, Monsanto. In *New Mexico ex rel. Balderas v. Monsanto Co.*, 454 F. Supp. 3d 1132 (D.N.M. 2020), the court accepted the state's points that Monsanto did not qualify as a federal officer because "(i) Monsanto was a mere vendor and not an arm of the Government, (ii) Monsanto did not act under the direction of a federal officer that is causally connected to the claims presented in this case, and (iii) Monsanto did not produce PCBs under any government contract or specifications." *Id.* at 1139.

Unlike the courts in the AFFF cases, which addressed military specifications in the record, the *Balderas* court found the record devoid of federal specifications or a specific federal requirement for the production or use of PCBs. At most, various sources reflect that PCBs could be used as a component in military goods or equipment, commonly for their heat-resistant qualities. But the government "did not supervise Monsanto's manufacture of PCBs or direct Monsanto to produce PCBs in a particular manner," as would have been evinced by a military specification. *Id.* The court explicitly distinguished PCBs from Agent Orange, which the manufacturers produced "under specifications that required a chemical formulation far more concentrated than they used for commercial herbicide production and even control[s on] its packaging and delivery." *Id.* at 1142.

Plainly, the existence of a military specification provides strong support for federal officer removal, while its absence might prevent clearing even this generally low hurdle.

In a similar vein, the Fourth Circuit recently found federal officer removal available to pharmacy defendants in an opioid case brought by a municipality, based on their contract with the Department of Defense (DOD) to operate the mail order pharmacy of the department's TRICARE health insurance program, which serves both current and retired service members. *See Cnty. Bd. of Arlington v. Express Scripts Pharm., Inc.*, 996 F.3d 243 (4th Cir. 2021). The district court had granted the plaintiff's motion to remand, finding that the defendant lacked "a sufficiently direct relationship with a federal officer or agency to support federal officer jurisdiction." *Id.* at 250.

To support removal, the pharmacy pointed to the specifications detailed in the DOD's statement of work, its regular contact with the contracting officer, and the fact that the DOD was its second-largest client, among other things. *Id.* at 252. The circuit court concluded:

> Taken as a whole, the ESI Defendants, by operating the TMOP, were carrying out the duties of DOD by operating the TMOP and were, at all times, subject to the federal government's guidance and control. This is the type of "unusually close [relationship] involving detailed regulation, monitoring, or supervision" sufficient to satisfy the "acting under" requirement.

*Id.* at 253.

The circuit court also found that the government contractor defense was colorable and that the conduct alleged "related to" the contractor's official authority.

Thus, while the dispensing of pharmaceuticals is commonly a private, commercial matter, the federal contract provided a basis for federal officer removal.

## Wartime Production

The scope of the government contractor defense and federal officer removal is also tested by claims alleging environmental pollution from a facility used to produce military goods. The Seventh Circuit has concluded that a period of military production during

wartime will provide a basis for federal officer removal, even where the pollution is alleged to have occurred over lengthy periods during which the facility was involved with commercial, nonmilitary production. *See Baker v. Atl. Richfield Co.*, 962 F.3d 937 (7th Cir. 2020).

In *Baker*, because the defendant chemical and smelting companies were alleged to have caused contamination at their facilities between 1910 and 1965, they sought federal officer removal based on their wartime production during World War II, when they supplied needed wartime commodities such as white lead carbonate, zinc oxide, lead, Freon-12, and hydrochloric acid. *Id.* at 940–41. The district court remanded the case to state court, holding that "the companies acted under color of federal office for only a portion of the time period covered by the claims." *Id.* at 940.

The Seventh Circuit reversed. In contrast to the PCB circumstances discussed above, where certain episodes in the military supply chain were urged to be linchpins to show the requisite relationship, the production in *Baker* was clearly done in a "wartime context." The court observed, "The government's detailed specifications for the makeup of ISR's materials, 'the compulsion to provide the product to the government's specifications,' and the continuous federal supervision all reveal the necessary relationship between ISR and the government." *Id.* at 943.

The court expressly recognized, however, that the determination supported only federal officer removal and did not resolve the applicability of the government contractor defense itself. *Id.* at 947 ("This appeal, like others that come to us under the federal officer removal statute, presents 'complex issues, but the propriety of removal does not depend on the answers.' . . . Both the Residents and the Companies have reasonable theories of this case." (citations omitted)). The Seventh Circuit recognized that the period associated with wartime production did not constitute the bulk of the tortious conduct alleged, which under current precedent does not preclude federal officer removal, but the court suggested "it may make some sense, at least as a matter of policy, to require a removing defendant to allege more than a de minimis amount of federal transactions to establish jurisdiction." *Id.* at 945. *See also N.J. Dep't of Envtl. Prot. v. E.I. du Pont de Nemours & Co.*, 2020 U.S. Dist. LEXIS 74624 (D.N.J. Apr. 28, 2020) (denying motion to remand environmental contamination action to state court where company made nitrocellulose, gun powder, and insect repellant under government contracts during the First and Second World Wars).

What balance might be struck between the respective military and commercial contamination will raise interesting issues once a court begins to apply the substance of the government contractor defense (although one might imagine this would revert to basic apportionment principles).

## Ear Plugs

The current litigation over combat ear plugs presents another twist on government contractor defense principles, when the line between military and commercial products is skirted or blurred. *See In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 474 F. Supp. 3d 1231 (N.D. Fla. 2020) (summary judgment rulings). In contrast to military aircraft, to which the government contractor defense was originally applied, ear plugs are a generic category of equipment having both commercial and military uses. As discussed earlier, merely selling an off-the-shelf product to the military does not allow for the government contractor defense. The ear plugs cases tend to address the circumstance where the manufacturer seeks to refine a product for the military's needs, raising the question of whether the government contractor defense might protect the supposed builder of the better mousetrap.

The short answer in the multidistrict litigation court's decision granting the plaintiffs summary judgment against the government contractor defense is that a defendant still must be building the government's mousetrap:

> Defendants had no contractual relationship with the Army regarding the design of the CAEv2. True, the Army liked the dual-sided, non-linear design of Aearo's earplug and believed it would improve military readiness. Indeed, it is not too much to say that the Army wanted Aearo's earplug, and, at one point, even went so far as to make clear that it would not commit to purchasing the earplug unless it could be stored inside a military carrying case and worn underneath a Kevlar helmet. But, the design already existed—it came into existence without any input from the Army, and Aearo's subsequent actions changing the

> length of the CAEv2's stem were not compelled by the terms of any government contract. And none of the Army's purchase orders (or the much later IQC) included a design component. Thus, Aearo was never "performing [any] obligation under a procurement contract" with the Army when it came to the CAEv2's design. . . . Consequently, the uniquely federal interests that *Boyle* sought to protect are not implicated in this litigation. Stated differently, whatever federal interests there may be in a products liability dispute between private parties arising from the CAEv2's design, those interests are not "uniquely" federal within the meaning of *Boyle*.

*Id.* at 1249.

The court later phrased it another way: "[T]he design and development process for the CAEv2 could not be more different from government contractor defense cases in which courts found that a 'continuous back and forth' between the government and the contractor demonstrated meaningful approval of reasonably precise specifications as a matter of law." *Id.* at 1255.

Following the denial of summary judgment, the initial bellwether trial resulted in a verdict in favor of the plaintiffs, including an award of punitive damages.

Note also that federal officer removal was denied in other ear plug cases on grounds that the government contractor defense was not even "colorable." *See, e.g.*, *Graves v. 3M Co.*, 447 F. Supp. 3d 908, 916 (D. Minn. 2020) ("However, 3M has not demonstrated that the government had any control over the instructions or warnings. . . . [I]t appears that 3M voluntarily approached [a military audiologist] for his advice, and that he gave advice 3M found useful. . . . [T]he Court would be hard-pressed to find that 3M could reasonably say 'the Government made me do it[.]'"); *Bischoff v. 3M Co.*, 2021 U.S. Dist. LEXIS 15332, at *14 (D. Minn. Jan. 27, 2021) ("As such, 3M did not communicate to the military all dangers inherent to the use of the CAEv2 known to 3M but not to the military. Thus, the Court finds that the third [*Boyle*] criterion has not been satisfied.").

As the ear plug example shows, not every connection to a military use is enough to trigger the government contractor defense for the product manufacturer.

## Conclusion

These examples show the continued tensions created by the government contractor defense and the courts' efforts to balance those tensions. On the one hand, products associated with a military specification will be protected at least initially via federal officer removal, as will wartime production in the context of environmental contamination, even if other nonmilitary, non-wartime activity is mostly at issue. As the Seventh Circuit observed, there might be a dividing line in that analysis. On the other hand, not every military connection or supply is sufficient to invoke the government contractor defense or serve as a basis for federal officer removal, as seen in the PCB and ear plug cases.

These recent controversies will continue to percolate, and new scenarios and attempted applications will doubtlessly follow as well.

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