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Can the King’s Contractor Do No Wrong? An Introduction to Government Contractor Immunity under the Federal Tort Claims Act

Whether drafting a contract, drafting policies for your organization, or representing a client in a lawsuit, you would be wise to consider the implications of federal tort immunity.

Historically, citizens have not been able to sue their state. This historical principle is commonly known as sovereign immunity, sometimes expressed as “the king can do no wrong.” In the United States, this is still true. In 1946, Congress enacted the Federal Tort Claims Act (“FTCA”), acting as a limited waiver of sovereign immunity. The FTCA allows private parties to bring lawsuits for state-law torts committed by persons who are acting on behalf of the United States, subject to the exceptions enumerated in 28 U.S.C. § 2680. *See also* 28 U.S.C. § 2674. Federal courts have jurisdiction over such claims, but apply the law of the state “where the act or omission occurred.” 28 U.S.C.

§ 1346(b). To assert a claim under the FTCA, a plaintiff must exhaust the applicable administrative remedies prior to filing suit. *See* 28 U.S.C. § 2675(a).

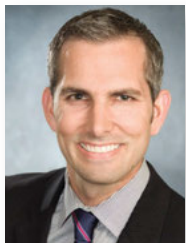
If you believe you may have a tort claim against a federal agency, employee or government contractor, you must first determine whether your suit is permitted under the FTCA. Unless your claim is allowed by the FTCA, there is a good chance that it will be barred by sovereign immunity. Often, tort claims against federal agencies and employees are defended by an attorney from the U.S. Department of Justice. More complex is the situation where government functions are being handled by a private contractor.

If you are defending a suit in which your client is a government contractor, the FTCA is one of the first places you should look to prepare your defense. This defense preempts state law and immunizes government contractors from tort claims. The rationale for so-called

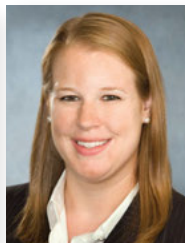
federal government-contractor immunity is based upon two basic principles: (1) state tort law is preempted by federal common law in areas of unique federal interests, and (2) the procurement of equipment by the United States is such an area. *In re Katrina Canal Breaches Litig.*, 620 F.3d 455 (5th Cir. 2010). This is rooted in one of the exceptions found in the FTCA, the so-called “discretionary function” exception found at 28 U.S.C. § 2680 (a).

The classic example implicating government-contractor immunity arises when a defendant is producing a product or structure pursuant to a government contract and pursuant to plans/specifications provided by the government and is sued in tort. The seminal case on this issue is *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

In *Boyle*, a Marine Corps co-pilot was killed when his helicopter crashed



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during a training exercise. The co-pilot's father filed a diversity action in the United States District Court for the Eastern District of Virginia against the manufacturer, a government contractor that built the helicopter for the government. In his action, the plaintiff-father asserted state tort-law claims for the death of his son. Holding that the government contractor could assert an immunity defense under the FTCA, the United States Supreme Court formulated a three-part test to evaluate government contractor immunity from negligence claims by third parties. In that test, state law which imposes liability for design defects in military equipment is displaced when (a) the United States approved reasonably precise specifications; (b) the equipment conformed to those specifications; and (c) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States. Thus, in *Boyle*, the Supreme Court extended a sort-of derivative sovereign immunity once reserved to the government to private contractors because these contractors perform "discretionary functions" which are excepted from liability under the FTCA. 28 U.S.C. § 2860.

The *Boyle* test is not limited to tort claims resulting in personal injury. In the case *In re Katrina Canal Breaches Litig.*, 620 F.3d 455 (5th Cir. 2010), the plaintiffs brought class and individual tort actions against a government contractor that provided engineering, construction and management services to the United States Army Corps of Engineers in connection with work on and near flood protection systems that failed during Hurricane Katrina. The plaintiffs argued that the government contractor's negligent and improper actions in fulfilling the contract were

a cause of flood damage resulting from Hurricane Katrina. The district court granted summary judgment for the government contractor based on government-contractor immunity.

Applying the *Boyle* analysis, the Fifth Circuit reversed summary judgment, finding that the specifications for the work at issue were not "reasonably precise" and thus the contractor was not entitled to government-contractor immunity. In its decision, the Fifth Circuit concluded that the government had provided only *general* instructions regarding work-method, which "ensured that [the government contractor] would have significant discretion over the method chosen. The exercise of that discretion by [the government contractor] is not protected by the [government contractor immunity] doctrine."

Government contracted service providers should take note as well, although it is typically more difficult to assert this defense. The issue of federal tort immunity often comes up in discrimination cases brought pursuant to 42 U.S.C. § 1983. As a preliminary matter, parties to such litigation should be aware that there is no respondeat superior for employers. For example, the Seventh Circuit Court of Appeals has held that a § 1983 claim will not support a claim based on a respondeat superior theory of liability. See e.g. *Iskander v. Village of Forest Park*, 690 F.2d 126 (7th Cir. 1982); but see *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782 (7th Cir. 2014) (questioning the logic of *Iskander* but not overturning it).

Under federal law, for a private corporation to be held *directly liable* in a § 1983 case, a plaintiff must plead and prove that the defendant-employer had an "impermissible policy" or "constitutionally forbidden" rule that served as the "moving force" or proximately caused the alleged

constitutional deprivation. See e.g. *Iskander v. Village of Forest Park*, 690 F.2d 126 (7th Cir. 1982). Thus, plaintiffs must often look to individual employees as the defendants in such claims.

Individual employees could attempt to assert qualified immunity from suit for constitutional violations as providers of services pursuant to contract with an agency of the federal government. This could be raised in a motion to dismiss, as an affirmative defense, or in a motion for summary judgment. However, this defense has some limitations.

The U.S. Supreme Court has found that the employees of a private, for-profit corporation (Corrections Corporation of America) that managed a state correctional center were not immune from suit in a §1983 case. *Richardson v. McKnight*, 521 U.S. 399 (1997). In reaching its conclusion, the Court noted that the denial of immunity was determined "narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Id.*

If there is a government connection to your suit, consider whether your facts support a government contractor defense. This will guide your discovery and help you determine the appropriate defendants. If you are negotiating a contract that includes plans and specifications or are developing policies in connection with the execution of a government contract, consider how these might impact an invocation of the government contractor defense, should litigation arise. **P**