The Military Contract Defense
Crash, Burn and Die for the Manufacturer's profit
What it is, and what it should be.

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On June 19th 1989 Justice of the Supreme Court Antonin Scalia, working for the interest of military contractors penned the opinion Broyle vs. United Technologies, 487 US 500, 108 S. Ct. 2510 and proved once again that he was chosen for a purpose. Scalia with concurring justices leapt into the kitchen as chefs for defense immunity. The military industrial complex provided the recipe. The defense was served topped with high sounding verbiage such as " The procurement of equipment by the United States is an area of uniquely federal interest " and garnished that by stating in paraphrase that " The independent Contractor performing it's obligation under a procurement Contract has the same interest in getting the government works done."

Of course this is not true. The defense contractor serves his stockholders with profit as a motive. Such can not be said about the government. In the perverted sense the military industrial complex, that exists for profit motives, was anointed with higher purposes by the court. No one doubts for a second that the military man serves his country and may be expected to give his live in that service. Nowhere in the recruiting posters does it say that a military man is supposed to become a headstone in the cemetery of engineering mistake and defect, especially in peacetime.

The Contrary is true. The Navy Fliers' Creed states "The government provides me the best aircraft money can buy. I shall fly it to the best of my abilities and training ". It is easy for black robed justices whose most dangerous job is to avoid being bored to death, to make wrong determinations since they never sit in the seats of the machinery they anoint with immunity.

Worse, it is obvious that the Ivy League law clerks that actually caucused and decided on the Boyle outcome and wording were for the most part clueless as to military procurement procedures or else the wording in Boyle would be ever so simplified. Under Broyle State tort law is displaced; immunity applies if it can be shown:

> *"A. The United States Government 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 the United States.* ***pp 2513"***

The defense is an affirmative defense available for the contractor to plead and with whom the burden of proof rests. The major problem with the contractor defense

as written by Scalia is the fact that reasonably precise specification is not defined nor is the scope of the word government approval. Scalia's vagueness of wording and meaning makes entry into the military product litigation arena a minefield of uncertainty and contradiction.

1. Did Scalia mean that a sophisticated product accompanied by reasonably precise specifications deserved immunity even if the defect complained about were not described in those specifications?

By example, he seems to suggest that a product whose specifications are silent in the area of the defect complained of should not have federal pre-emption overrule state tort law and impose immunity.

> *" If for example, the United States contracts for the purchase and installation of an air conditioner, specifying the cooling capacity, but not the precise manner of construction, the state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state prescribed duty of care. No one suggests that state law would generally be pre empted in this context* **".**

2. Did Scalia deem a level of approval sufficient to warrant immunity for the widget design?

The court further justifies its holding by stating that if elements one and two of the defense are met then the discretionary function of the Government has been shown sufficient to frustrate suits against the manufacturer. The court then states that such a discretionary function must be specific enough to consider the design feature in question and the approval must have resulted from a Government officer and not from the contractor itself. One surmises he meant a Government officer with sufficient stature to be endowed with approval authority and the ability to exercise a discretionary function. A Gs 4 janitor probably would not suffice anymore than a employee of the manufacturer.

> *" The first two of these conditions assure that the suit is within the area where the policy of the " Discretionary function " would be frustrated-- i. e. they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself"*

3. Did Scalia intend to give immunity only to products designed and developed for specific military purposes or was his purpose to immunize all products procured by the military including off the shelf items?

If one believes that the court meant that a" Federal Procurement officer purchasing

stock equipments by model number" is the same as the Government purchasing an already designed off the shelf item, then it may be the courts intention to withhold immunity for such a procurement since it would appear that the government had no significant interest in any particular design feature of the widget.

> *"If for example, 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 a craft by model number can not sue for the manufacturers negligence because he got precisely what he ordered."*

The court discarded older contractor defense rulings that relied on Feres Doctrine applications stating that imposing a Feres application would be too broad. In this paragraph he again seems to say that an off the shelf item deserves no immunity.

> *" 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 (in the example above), or by any standard equipment purchased by the Government , would be covered. [Immune from liability]*

The worst part of Scalia's difficult to decipher message was that it was so misunderstood by the dissent team, that their blistering retort to Scalia's reasoned, but poorly written holding unleashed the doomsayers in interpreting Scalia's meaning to far greater extent than it appears he had intended. It is entirely possible that the dissent did more harm than the holding since everyone including other uninformed justices turned the original holding into the self fulfilling prophecy of the dissent.

Only the 5th Circuit in Trevino was able to cut the fog and reach the substance of Boyle. Simply stated Scalia wanted to bestow immunity on a government manufacturer who in designing a product was essentially doing that which the government in its discretion had understood and deemed appropriate.

To better understand why Boyle vs United Technology is incomplete and therefore a bad holding one must first focus on and understand military procurement procedures.

Generally speaking when the government buys hardware it can only purchase three varieties of hardware:

1. A full scale development of a new military product.

2: Off the shelf military items that are to be extensively modified.

3. Off the shelf items.

Generally speaking, the military as part of its procurement rules can not purchase anything of significant dollar value without competitive contracting practices being followed. (there are exceptions concerning purchase from sole suppliers). As part of the final procurement contract that comes about after standard negotiating procedures have been completed the finished contract usually includes or references a set of procurement specifications and sometimes blueprints (called control drawings) These specifications are precise enough in describing the widget about to be purchased so that the manufacturer must deliver to the government the goods that they purchased.

If you think this incorrect, I direct you to the Army Specifications for off the shelf purchased Fruit Cake for inclusion on Holiday meal trays, or try Toilet Paper specifications for humorous reading.

An attorney must arm himself with the recent copy of the **FARs(**Federal Acquisition Regulations) and **DARs** (Defense Acquisition Regulations) which precisely regulate government and defense procurements. These regulations may be purchased through the Government Bookstores of the Government Printing Office. It may be ordered in Macintosh and Cd Rom formatt at a cost of $ 33.00. These regulations define responsibilities and define terms utilized in government contracting. It is clear that not one single federal judge feels it necessary to follow the intent of precise contractual requirements for federal procurement. My bet is that no judge has even cracked a page.

With regard to most military contracts, the manufacturer is usually contracted to write these specifications whether they are for an off the shelf item or an entirely new design. These specifications then may be approved at some depth varying from automatic acceptance, rubber stamp to thorough review and approval. They are then incorporated into or reference by the contract. Some items previously accepted may be repurchased routinely if they are on a government approved purchase list. In such a case re approval is unneeded.

Two recent holdings attempt to make mud pies from quagmire. In Trevino vs General Dynamics (865 F.2d 1474) The learned Judge of the 5th Circuit Judge Higgonbotham suggests that for immunity to exist it is the manufacturers burden to show that design approval by the military consisted of more than a Rubber Stamp review.

> *" We hold that "approval " under the Boyle defense requires more than a rubber stamp.....When the government merely accepts, without any substantive review or evaluation, the decisions made by a government contractor, then the contractor, not the government, is exercising discretion. A rubber stamp is not discretionary function; therefore, a rubber stamp is not approval under Boyle."*

In Trevino, the government must actually exercise it's discretion over the specific design features to meet the first element of the Boyle defense. To wit: [A. The government approved reasonably precise specifications.] The defense applies only when the government uses its discretion in choosing a specific design feature.
In the Trevino holding the manufacturer does not meet the burden of the first element of Boyle when:

1. When it buys a product designed by a private manufacturer (off the shelf items)
2. When the government leaves critical design feature decisions to the manufacturer. (Silence as to a design feature)

Or

3. When the government issues only concept requirements and general standards while the actual design features are left to the manufacturer.

"....The government exercises its discretion over the design when it actually chooses a design feature. The government delegates the design discretion when it buys a product designed by a private manufacturer.; when it contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; or when it contracts out the design of a concept generated by the government, requiring only that the final design satisfy minimal or general standards established by the government."

The implication is clear that for immunity to exist it should be shown that reasonably precise design specifications were sufficiently reviewed by an government offices with approval authority. A continuous back and forth dialogue between manufacturer and approval authority for the government would suffice to show approval, but a rubber stamp would not.

Perhaps most importantly, once the government has relinquished or transferred its design discretion to the contractor that discretion remains with the contractor and does not revert back to the government even if the government retains the right of" final approval" or even an approval of a specific design without a substantive review or evaluation of the design features. The question to be decided by the tier of fact is. Who exercised actual discretion over the design feature that is defective? If it was the government, by virtue of a sufficient substantive approval, other than a rubber stamp, then the contractor deserves immunity.

" The requirement that the specifications be precise means that all significant details and critical design choices will be exercised by the government"

In the Kleeeman vs. McDonnel Douglas Corporation, 890 F.2d 698 the waters were muddied further since the fact situation was for a product that was clearly a full scale development program. Further there were included in the case a series of developments relating to the defective landing gear that had occurred years subsequent to the original design. In fact later the navy issued a notice of defect concerning the landing gears design. Still the gears design was held immune since at

the time of design the design conformed to the then in effect precise specifications, even if it may not have met some parts of the general guidelines and specifications.

> *"It is a salient fact of governmental participation in the various stages of the aircrafts development that establishes the contractor defense. Indeed, active governmental oversight is relevant to all three elements of the defendant's burden. Where as here, the Navy was intimately involved at various stages of the design and development process, the required governmental approval of the alleged design defect is more likely to be made out."*

The court extends the contractor defense beyond the design of the original aircraft to include post development and post production events. In the courts wording the implication is clear that he would give post design modifications immunity as well for so long as the modifications were conducted sufficient to meet the Boyle tests.

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> *"The ultimate design of the product is determined not only by the original procurement specifications and contract specifications, but also by specific engineering analysis developed during the actual production process."*

The Basic theory is that the government exercised its discretion in choosing specific design features and thereby exercised a semblance of design control over the manufacturer. It is a variant of the old defense "It ain't my fault, he made me do it ".

The ultimate extension of Boyle to the absurd takes place in Harduvel vs. General Dynamics(878 f.2d 1311) where the court took the greatest liberties with the evidence in creating a defense for a military product. The court actually changed the plaintiffs' nature of defect to design defect from a series of manufacturing flaws. The defendant had testified that it had no design problems only manufacturing problems and the plaintiff's had introduced many, many instances of wire chaffing in F -16 aircraft. The plaintiff had introduced evidence of sharp edges, wrong connectors, and oversized screws that would and had cut insulation. Still the learned judge enlarged the immunity with senile reasoning.

> *" If a defect is one inherent in the product or the system the government has approved it will be covered by the defense. Where a defect is an instance of shoddy workmanship, it implicates no federal interest. This distinction between " aberrational " defects and defects occurring through an entire line of products is frequently used in tort law to separate defects of manufacture from those of design."*

Even worse in Lewis vs Babcock, McDonnell Douglas Corp. and General Dynamics 985 f2d.83the court held that a continued usage by the military of a defective component in an F - 111 aircraft was enough to trigger the contract defense.
The reasoning was that since the Air Force later learned of the defect and continued

using the defective part, even re ordering and installing a second one after the first was recognized defective. That this was sufficient to trigger the defense since the continued usage amounted to government discretion and would constitute approval.

This fact situation and result clearly was not contemplated in Boyle, and it is highly speculative if this is the result desired by Scalia. There may be some justification in the result, however, since it is true that a manufacturer of the product can not unilaterally change or modify the product subsequent to it's delivery to the military. Only the military can change the form, fit or function after delivery. If the result is justified, it is realistically based on the fact that the military used it's discretionary function to assume the risk of usage of a known defective product, and therefore it was government negligence that was the 100 % real cause of the accident. The result would be the same since the soldier would be barred from recovering under the Feres Doctrine.

It is suggested by this author that the simple, direct and an appropriate writing of the Military contract defense should read.

A military contractor defined as a supplier of goods to the military (government) of the United States may have an affirmative defense and resulting tort law immunity for a defectively designed or manufactured product if :

1. He can prove that the defect in manufacture or design complained of by plaintiff was approved by the government after a sufficient review by the government of reasonably precise specifications, control drawings, or contractual language so as to be able to state that the government knew and approved of the defect in manufacture or design and in effect the government contract made the manufacturer do it in the prescribed (defective) manner.

And

2. The Manufacturer will have resulting immunity from any claim of marketing defect if the manufacturer shows that it did not conceal defects or otherwise fail to warn of defects known to the manufacturer and unknown to the government.

The Contractor defense has nothing to do with national defense or national security. What judge can say that national security or defense is enhanced by killing a soldier or losing an expensive piece of military hardware due to defect in peacetime. I suggest a thinking judge, a defense bar or a plaintiff bar would suggest that military readiness, national security and military moral is enhanced by defect free products. Military jet aircraft that have earned the nicknames, " Ensign Eater, Widow Maker, and Lawn Dart are not in the national interest unless filling our national cemeteries are a priority.

Morale is never good during a missing man fly over at a military burial service.

No judge can believe that national interest was served as the B-1 bomber sat out Desert Storm because of design problems. Perhaps, discipline is served when we force an ensign to fly a defective aircraft. I remember that we called that sort of mission a " C.B. " or character builder. I guess that was what was meant by the phrase, “You buy your ticket ,and you take your chances."

In the interim until the military contract situation is stabilized with an understandable and universally accepted holding what is a plaintiff to do when approached about representation of a military accident from a product standpoint?

First : Do not automatically reject a military contract case. Since Boyle, I have settled two such cases in seven figures, and have had an offer in another in a similar amount.

Remember that even under Scalia a plaintiff will prevail if the product did not comply with specification. Under Boyle in Trevino a Rubber stamp approval by the government acts as no approval at all. The manufacturer will be liable for concealing a defect and may be liable in 402b for fraudulent misrepresentations equivalent of failing to comply with specifications. So it's difficult not impossible.

CONCLUSION

At this point the plaintiff's attorney is armed with enough data to proceed against a military manufacturer. In a products case a plaintiff can still prevail if he can show that

1. The design defect complained about was not actually covered by reasonably precise design specifications approved by the government.

2. The design defect complained about was actually violative of the reasonably precise design specifications.

3. The approval of the design defect by the government was only a rubber stamp of reasonably precise design specifications.

4. The approval of the design specifications came about as a result of fraud, deception or misrepresentation. (Cheating on verification and qualification testing) Here plaintiff might attempt R.I.C.O., Whistleblower, 402b actions as well as standard product causes. (There is no Contract defense to RICO or WHISTLEBLOWER)

5. The product failed to comply with reasonably precise specifications. (The classic manufacturing defect)

6. The manufacturer concealed a defect from the government that the government didn't otherwise know about.

7. In full scale development programs many subcomponents have had little or no scrutiny by the government. Many times the approval of the subcomponent was made entirely by the manufacturer and not the government. Therefore there may be no approval of specific design features by the government.

8. In off the shelf purchases the manufacturer draws up a set of specifications describing an already designed product. In many instances the government conducts no reviews or minimal reviews insufficient to warrant immunity since the reviews were mere rubber stamps.

There you have it. A military Contract case is a difficult and costly case to prepare, but not all military cases should be turned down simply because they are difficult. The fact that the law is open to many interpretations and the fact that many facets of a military products design phase undergo various amount of government scrutiny makes a military case equally difficult for the defense bar to evaluate. The defense bar will always attempt to persuade the plaintiff and the court that they are deserving of a contractor defense, while the fact situation may not support such an assertion.

For a plaintiff to have a chance to prevail in this litigation arena the only way to move forward is to discover early precisely what documents and evidence exists to support the defendant in his assertion of his affirmative military contract defense. Every effort of the plaintiff should be concentrated in discovering what the defendant relies upon to prove up facts that would show that the government used its discretionary function while approving reasonably precise design specifications. In fact the plaintiffs first set of discovery documents should smoke out all aspects of a potential contractor defense. Once the plaintiff is apprised of the evidence in support

of a contract defense she can evaluate the probabilities of prevailing in view of the various holdings.