RISK MITIGATION FOR U.S. GOVERNMENT CONTRACTORS BOTH AT HOME AND ABROAD

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I. INTRODUCTION

2011 was a year of transition for government contractors, especially for those who support the Government's efforts in Iraq as the U.S. Military role in that conflict wound down. While the public may confuse the exit of armed forces from Iraq with the end of significant American involvement, contractors continue to supply services and significant amounts of employees in new roles supporting either U.S. civilian agencies or foreign governments. As the role contractors play in assisting the Federal Government and other entities expands and becomes increasingly complex, contractors must be ever more aware of the unique risks and uncertainties associated with working in dangerous environments, particularly when it comes to potential third party liability. Although contracting with the Government carries with it some special risks, there are also many unique defenses, the scope of which are periodically tested and evaluated by courts. The amount of discretion a government contractor has over the allegedly negligent conduct and/or the environment in which harm occurred are factors likely to affect available defenses and can mean the difference between dismissal and payment of a large judgment. Thus, the topic of risk mitigation approaches for government contractors remains important.

This paper provides an overview of some of the most significant risk mitigation cases from the past year, focusing on those involving immunity from suit. As discussed below, when contractors should enjoy "derivative" sovereign immunity is not a settled issue. Contractors performing under significant Government oversight and supervision in an active combat environment have a relatively high success rate. Contractors performing outside a combat environment (including those performing non-combat support functions in Iraq and Afghanistan), or contractors who have more discretion in how they perform, are less frequently successful in asserting immunity. We also touch briefly on an instructive line of cases in which the U.S. Government asserts it is not liable to tort plaintiffs because the harm resulted from contractors acting independently versus under Government supervision. Finally, we address some regulatory issues and developments that are likely to affect contractors attempting to mitigate their risks.

II. CONTRACTOR IMMUNITY DEFENSES

Frequently litigated contractor defenses generally fall into three categories: (i) extensions of sovereign immunity; (ii) separation of powers; and (iii) lack of jurisdiction over the dispute or parties. The government contractor defense, combatant activities defense, and Westfall immunity all rely on an extension of the Government's sovereign immunity to the contractors performing services for, or supplying goods to, the Government. The political question doctrine, and to some degree the state secrets doctrine, are based on separation of powers concerns and the concerns about courts second-guessing military decisions.

A. Sovereign Immunity Defenses—Government Contractor and Combatant Activities

Whether sound policy or not, the U.S. Military relies on tens of thousands of contractors to support its overseas operations. These contractors work side-by-side with the military, and in the past

have been responsible for a range of activities from conducting interrogations to driving convoys. Given the similarities between the activities the military and contractors are performing abroad, it is logical that, when a lawsuit arises out of these activities, contractors argue that the immunity typically granted to U.S. Government employees should extend to their employees.

B. Government Contractor Defense

The Federal Tort Claims Act ("FTCA") generally waives the United States' sovereign immunity in tort suits brought against the Government because of alleged wrongful acts of a United States employee. 28 U.S.C. §§ 1346(b), 2671-80. This waiver is subject to exceptions, which preserve the Government's sovereign immunity under certain circumstances. These exceptions do not expressly include government contractors. *Id.* § 2671 ("[T]he term 'Federal agency' . . . does not include any contractor with the United States."). Despite the statutory language, however, courts in recent years have extended some of the statutory exceptions to private contractors, including the discretionary function doctrine. The discretionary function doctrine provides that the waiver of sovereign immunity by the United States does not extend to

> 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.

Id. § 2680(a).

For this exception to apply there must be a unique federal interest and a conflict between that federal interest and state tort laws. Sovereign immunity is extended to federal contractors in such instances because it would be impossible for contractors to follow both the Government's instructions and satisfy the state's prescribed duty of care.

Contractors this year enjoyed mixed success invoking the government contractor defense. Courts continued to extend immunity to contractors operating pursuant to government instruction and engaged in construction projects financed by public funds, commonly referred to as public works. However, courts ruled against the contractor in cases where Government involvement was not pervasive.

1. CY 2011 Cases Where Immunity Was Extended to Contractors

Getz v. Boeing Co., 654 F.3d 852 (9th Cir. 2011)

Following a crash of an Army helicopter in Afghanistan, the survivors and heirs of the decedents sued the various government contractors responsible for designing, assembling and manufacturing the helicopter. Defendants moved for summary judgment from plaintiffs' claims for product liability negligence, wrongful death and loss of consortium. The district court granted the motion and the Ninth Circuit affirmed on the basis that plaintiffs' claims were preempted by the government contractor

defense as established by the Supreme Court in *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988).

The crash occurred as the helicopter traveled through inclement weather which caused the engines to shut down. Two investigations into the crash suggested that the shutdown could have been avoided if the helicopter's engine had been equipped with an automatic relight feature. The government contractors argued that the three elements of *Boyle* for determining whether there is a conflict between a federal interest and state law were satisfied, i.e.:

> (i) the Government must have provided the contractor with "reasonably precise specifications;"
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> (ii) the contractor's work must have conformed to those specifications; and
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> (iii) the contractor must have warned the Federal Government about dangers known to the contractor but not known by the United States.

The court found that the first *Boyle* element was satisfied as the Government had approved reasonably precise specifications, and that the approval consisted of more than a "rubber stamp." Under the first *Boyle* element, the Government must make a "significant policy judgment" in approving the design. The court found that the military had provided detailed specifications, reviewed the contractor's design analyses and met with the contractor, satisfying the first element of *Boyle*.

The court applied a test previously adopted by other U.S. Courts of Appeal to determine whether the product conformed to approved specifications, i.e. considering "whether the alleged defect existed independently of the design itself." A contractor meets this test by establishing extensive government involvement in the "design, review, development and testing of a product" as well as government acceptance and use of the product following production. Since the government had invested years in reviewing, developing and testing the helicopter and its engine and also had carefully reviewed and tested the finished product, this element was likewise met.

The court concluded the *Boyle* third element was met because the Army was aware of the risk of water or ice induced flameout of the engine and that an automatic relight feature might prevent this problem. The government nevertheless elected to purchase this helicopter without that feature.

Finally, the court quickly disposed of the plaintiff's claim for failure to warn because it found that the helicopter's Operator's Manual contained a complete set of warnings, thereby satisfying the test.

***Chesney v. Tenn. Valley Auth.*, 782 F. Supp. 2d 570 (E.D. Tenn. 2011)**

Residential property owners brought a class action suit against two contractors and the Tennessee Valley Authority ("TVA") asserting negli-

gence, gross negligence and nuisance in connection with operation of the Kingston Fossil Plant ("KIF plant") owned by the TVA.

The KIF plant produced coal ash as a byproduct of generating electricity. The TVA had in place an elaborate system to transport the coal ash. In November 2003, there was a blowout at the KIF plant and the TVA contracted with the defendant engineering firms to determine the cause of the blowout and advise on a solution to the problem. A second blowout occurred in November 2006, and again the TVA hired defendant contractors to investigate and make recommendations to fix the problem. Two years after the second blowout, a coal ash containment dike at the KIF plant failed and several million cubic yards of coal ash sludge spilled into the area adjacent to the plant, sparking a class action lawsuit. The TVA filed a motion to dismiss, which was granted with respect to the allegations pertaining to the TVA's discretionary conduct, i.e., the selection of coal ash disposal policies and procedures and repairs to the KIF plant, but denied as to non-discretionary conduct, i.e., maintenance of the KIF plant.

The contractors moved to dismiss, arguing that the court lacked subject matter jurisdiction because the contractors were entitled to discretionary function immunity to the same extent the immunity was granted to the TVA. In the alternative, the government contractors asserted they were entitled to immunity under the government contractor defense.

The court's decision cites several 2010 cases and builds upon *Yearsley v. W.A. Ross Construction Company*, 309 U.S. 18 (1940) and its progeny. *Yearsley* involved contractors building dikes along the Missouri River pursuant to a contract with the Federal Government. The Supreme Court held that the contractors were not liable for damage caused by the construction process. The *Yearsley* decision arguably offers almost blanket immunity to service contractors that follow the specifications of their contracts, but contains some limiting principles: (i) its primary application to the public works setting; and (ii) the requirement for non-negligent adherence to precise Government specifications. *See Shaw v. Grumman Aerospace Corp.,* 778 F.2d 736, 740 (11th Cir. 1985). A "public work" is a construction project, such as building dams or highways, financed with public funds and constructed for the benefit of the general public. Several cases this year utilized the logic in *Yearsley* to grant public works contractors immunity.

The court in *Chesney* distinguished the *Yearsley* and *Boyle* defenses based on the function the government contractor performed. Whereas derivative sovereign immunity under *Yearsley* is appropriate when contractors are providing services for a public works project, *Boyle's* government contractor defense focuses on contractors that manufacture items designed in conjunction with the Government. Since the *Chesney* case involved operation of a Government plant, the court found an analysis of derivative sovereign immunity under *Yearsley* to be appropriate.

Under *Yearsley*, "a government contractor will not be liable when the authority to carry out the project was validly conferred and was within the constitutional power of Congress." The court notes that a "key premise" of establishing derivative sovereign immunity is that "the contractor was following the sovereign's directives." Liability will only ensue if the

plaintiff can show that the government contractor exceeded its authority, or that the authority was not validly conferred to the agency and, in turn, to the contractor.

Ultimately, the court found that the contractors were entitled to derivative sovereign immunity to the same extent the TVA received discretionary function immunity, which in this case encompassed all of the plaintiffs' allegations against the contractors. The plaintiffs did not dispute that the TVA had authority from Congress to own and operate the KIF plant, did not dispute that Congress had the authority to delegate this authority to the TVA, nor that the TVA had the authority to award the contracts. Plaintiffs also did not claim that the contractors performed functions outside of what the TVA was authorized to do. Thus, the contractors did have validly conferred authority to perform work at the KIF plant and therefore were not liable for torts relating to that work.

***Morgan v. Bill Vann Co., Inc.*, 2011 WL 6056083 (S.D. Ala. Dec. 6, 2011)**

Courts often consider whether the contractor has asserted a valid government contractor defense in the context of a motion to remove the case to federal court. Under the Federal Officers Removal Statute, there is a four-part test; a defendant must show: 1) it is a person; 2) the plaintiff's claims are based upon the defendant's conduct acting under a federal office; 3) the defendant raises a colorable federal defense; and 4) there exists a causal nexus between the claims and the conduct performed in the federal office.

The "colorable federal defense" element determines if the contractor can raise the government contractor defense as set forth in *Boyle*, emphasizing that there is a modest burden for defendants to remove. In this case, filed by a former Navy and Coast Guard employee allegedly harmed by exposure to asbestos, the court found that the defendant presented some evidence for all elements of its defense, citing to affidavits, witnesses, and articles for proof of the various elements. The evidence, taken together, created a "plausible showing" and thus defendants had raised a colorable federal defense. This case shows that defendants can succeed in removing a plaintiff's state law claims to federal court so long as some evidence is provided for all elements of the government contractor defense. This court made a point of emphasizing that there is a low bar for defendants to remove, and that the defendant need not establish a likelihood of success to have the case transfer to federal court.

2. CY 2011 Cases Where Immunity Was Not Extended to Contractors

***Spaulding v. Monsanto Co.*, 2011 WL 4482917 (S.D.N.Y. Sep. 28, 2011)**

The *Spaulding* case applies the elements of the government contractor defense in the context of disposal of toxic agents manufactured for the Government. The defendant produced a chemical used in Agent Orange and disposed of its waste materials via open "pit" burning. The plaintiffs

alleged this practice exposed them to harmful chemicals. The defendants moved for partial summary judgment claiming the government contractor defense applied to all of the plaintiffs' claims.

The contractor had to show that the Government gave "considered attention" to the precise defect alleged wherein the Government made an "express determination" that the product being manufactured posed no unacceptable health hazard for its intended uses. The court borrowed this analysis from the Second Circuit's opinion in *In re Agent Orange Litigation*, 517 F.3d 76 (2d Cir. 2008) on the use of the government contractor defense by a company that manufactured Agent Orange. The court looked to the Second Circuit decision for guidance despite the differences between that case and *Spaulding*; namely that the claims in the Second Circuit case were focused on the manufacture of Agent Orange, rather than the disposal process at issue here.

The court found there was no proof that the Government either exercised oversight over or made an "express determination" regarding the defendant's alleged waste disposal practices. The only evidence provided by the contractor were a series of annual reports showing a federal study into the pollution created by the defendant and an affidavit that government officials were often on-site at the manufacturing plant. Neither of these demonstrated that the Government "observed, supervised, or sanctioned" the defendant's waste disposal practices. Thus, the defendant did not show its waste disposal was conducted according to reasonably precise government specifications and was not entitled to summary judgment. In contrast, the Second Circuit held the government did approve reasonably precise specifications for manufacturing Agent Orange because the Government had examined the toxicity of Agent Orange in a meeting where the participants discussed the toxicity and determined it did not pose an unacceptable hazard. *In re Agent Orange Litig.*, 517 F. 3d at 94-95.

C. Combatant Activities Defense

Another exception to the FTCA's general waiver of immunity is with respect to any "claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Just as with discretionary function immunity, the combatant activities exception also relies on the *Boyle* factors to determine whether a conflict exists between a unique federal interest and state law. As compared with discretionary function immunity, the combatant activities defense applies to a much narrower range of activities, in that it can only be invoked when contractor-produced equipment is used in combat or when contractor personnel are operating alongside and under the control of service members in combat. What constitutes combatant activities is the subject of much litigation.

Nearly all federal courts discussing the combatant activities exception to the FTCA this past year recognized that the doctrine may be invoked by private contractors. From mundane functions such as operating toilet facilities to more controversial roles such as interrogating potential enemy combatants, the courts seemed inclined to extend combatant activities immunity to contractors who were operating side-by-side with the U.S. Military in Iraq.

A more difficult question in this year's case law appears to be the continued struggle to define the contours of "combatant activities." Although one federal district court set forth a concrete definition of the term, the Fourth Circuit seemed content to assume that contractors involved with interrogating enemy combatants in Iraq were engaging in "combatant activities" without providing much discourse on the scope of the term.

It is important to note that these cases all involve alleged torts that occurred in Iraq during wartime. One complication with which the courts have not yet had the opportunity to grapple is how to approach the combatant activities immunity in light of the official end of the Iraq War, even though there will be a continuing presence of American soldiers and contractors, as well as assuredly continuing violence, in the region. While this year's combatant activities case law appears to afford contractors some measure of protection from tort suits, this could change drastically in the coming years.

1. CY 2011 Cases Where Immunity Was Extended to Contractors

Aiello v. Kellogg, Brown & Root Servs., 751 F. Supp. 698 (S.D.N.Y. 2011)

The *Aiello* case presents a very well-developed articulation of the combatant activities exception. In this negligence suit against KBR, the court methodically discussed each element of a preemption defense based on combatant activities, ultimately finding the plaintiff's claims to be barred under the combatant activities exception to the FTCA.

The plaintiff, an employee of DynCorp International, was working as a police advisor at Camp Shield, located approximately three miles outside the "Green Zone" in Baghdad, Iraq, when he fell and sustained serious injuries in a toilet facility maintained by KBR. KBR was under contract with the United States Army to provide operation and maintenance services at various bases and facilities in Iraq, including the toilet facility where the plaintiff fell.

The plaintiff accused KBR of negligent design and construction of the latrine facility, as well as negligent failure to warn of a wet and slippery condition. KBR moved to dismiss on four different grounds: 1) the suit was barred by the political question doctrine; 2) the plaintiff's suit was preempted by the combatant activities exception to the FTCA; 3) KBR is immune under principles of derivative sovereign immunity; and 4) the claim was barred under the Defense Production Act of 1950. The court found there was no political question bar to the claim, discussed *infra*, but found that the combatant activities exception barred the plaintiff's negligence claims. In light of this ruling, the court did not rule on the third or fourth grounds in KBR's motion to dismiss.

The court began its analysis with the *Boyle* standard for preemption under the discretionary function to the FTCA and noted that the standard requires both a unique federal interest and a significant conflict between that federal interest and state law. The federal interest at stake in *Boyle*

was to prevent contractors from passing along the costs of judgments to the United States. These underlying considerations also apply to the combatant activities exception, noted the court, which also emphasized the unique federal interest of eliminating tort liability from the battlefield.

In *Saleh v. Titan Corporation*, 580 F.3d 1 (D.C. Cir. 2009), the United States Court of Appeals for the District of Columbia extended the combatant activities exception to cover interrogation and interpretation services in a case brought by former Abu Ghraib detainees. The D.C. Circuit held that the plaintiffs' state tort claims of abuse were preempted, ruling that "[d]uring wartime where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Saleh*, 580 F.3d at 9.

Agreeing with the *Saleh* decision, the court in *Aiello* found that the Federal Government occupies the field of warfare, and its interest in combat is contrary to the imposition of non-federal tort duty. The court also examined the contours of the unique federal interest. On one hand, the D. C. Circuit in *Saleh* articulated the federal interest as eliminating tort claims from the battlefield, but the Ninth Circuit in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) endorsed a narrower interest that "no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." Given the choice between the two unique federal interests, the *Aiello* court held the proper unique federal interest is in eliminating tort from the battlefield. The narrower Ninth Circuit standard, according to the *Aiello* court, did not accommodate the expansive language of the combatant activities exception, where any claims "arising out of" combatant activities are preempted. According to the court, the federal interest articulated in *Saleh* best protects the purposes of the combatant activities exception: 1) to avoid second-guessing military judgment; 2) to free military commanders from concern about the potential of facing civil lawsuits; and 3) to avoid the costs of imposing tort liability on government contractors, which will presumably be passed along to American taxpayers.

After finding that a unique federal interest existed, the court held that there was a significant conflict because combatant activities preemption is field preemption which creates two conflicts between the unique federal interest and state law. The first conflict is the financial burden the U.S. Government would absorb as a result of contractor liability, and the second is that, were the claim not preempted, there would be a need for the contractor's lawyers and other agents to inspect the scene of the alleged incident and interview witnesses, who would most likely include military personnel and result in disruption of the military's combat mission. Only preemption of all claims against private contractors arising out of combatant activities would eliminate these significant conflicts with unique federal interests.

The next step in the court's inquiry involved determining whether the activity at issue—designing and maintaining toilet facilities in Iraq—constituted combatant activities. To answer this question, the court adopted

the following definition: combatant activities include not only physical violence, but also "activities both necessary to and in direct connection with actual hostilities." Activities outside the use of physical force could still be combatant activities so long as there existed a "degree of connectivity" between the activity and the use of physical force. According to the court, the creation and maintenance of toilets at Camp Shield was active logistical support of combat operations, thus qualifying as combatant activities. The facts the court cited for support include the fact that Camp Shield was located just three miles outside of Baghdad in a combat environment, the camp operated under various threat levels, the officer in charge of Camp Shield received combat pay, there had been three incidents of mortar and rocket attacks during the timeframe of the plaintiff's injury, and daily security patrols operating near the base were often involved in combat.

In the last step of the court's inquiry—determining the scope of displacement of the preempted law—the court again relied on the *Saleh* decision. Under *Saleh,* where a private contractor is integrated into combatant activities where the military retains command authority during wartime, a tort claim arising out of the contractor's engagement in the combatant activities will be preempted. In this case, the test was deemed satisfied and the plaintiff's claim was preempted.

***Al Shimari v. CACI Int'l, Inc.,* 658 F.3d 413 (4th Cir. 2011)**

In *Al Shimari*, the Fourth Circuit also ruled the combatant activities exception to be applicable to government contractors, remanding the case to be dismissed on this basis. A companion case, *Al Quraishi v. L-3 Services, Inc.*, 657 F.3d 201 (4th Cir. 2011), discussed *infra*, reached the same conclusion based on a slightly different set of facts. The *Al Shimari* lawsuit was brought by four Iraqi citizens who were detained in Iraq's Abu Ghraib prison. The Iraqi citizens sued CACI International under both the FTCA and the Alien Tort Statute alleging they were tortured during their detentions by contractor employees assisting the military in conducting interrogations. CACI's involvement in interrogation was the result of a "severe shortage" of military interrogators. The contractor interrogators were required to comply with Department of Defense interrogation policies and procedures, which sanctioned a wide variety of interrogation techniques, some of which involved infliction of physical and emotional stress.

The district court had denied the contractor's motion to dismiss based on the political question doctrine, federal preemption under *Boyle* and derivative sovereign immunity. The Fourth Circuit reversed, finding that the plaintiffs' state law tort claims were preempted under the combatant activities exception to the FTCA.

In so ruling, the Fourth Circuit followed the same reasoning applied in the *Saleh* decision, finding that the case implicated "important and uniquely federal interests," i.e., conducting and controlling the conduct of war. If contractors could be subject to liability for actions taken in connection with U.S. Military operations overseas, the court reasoned that this could negatively impact the availability and cost of using contrac-

tors. Further, imposing liability on contractors creates the potential for military commanders to have to appear in civilian court to "evaluat[e] and differentiat[e] between military and contractor decisions." Both of these factors could impact the federal interest in conducting and controlling the conduct of war. Furthermore, the Fourth Circuit declared there is a more generalized federal interest in not allowing tort law to apply to foreign battlefields, which applies to contractor and military personnel alike.

Although the Fourth Circuit articulated multiple federal interests at stake, the court did not devote any discussion to the definition of "combatant activities." The dissenting opinion pointed out that the majority opinion left open questions as to whether combatant activities can occur domestically and how to distinguish combatant activities from ordinary assault and battery. Thus, while *Al Shimari* solidly supports the proposition that combatant activities preemption does apply to government contractors, it offers little guidance with respect to the settings in which the doctrine might be applicable.

***Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir. 2011)**

Decided the same day as *Al Shimari*, the Fourth Circuit's decision in *Al-Quarashi* likewise remanded a case filed by Iraqi prisoners to district court with instructions to dismiss under the combatant activities exception to the FTCA. As in *Al Shimari*, the lower court had denied the defendant contractor's motion to dismiss, which argued for dismissal based on federal preemption and immunity conferred by the law of war. The facts in the two cases are similar, although in *Al-Quarashi* the government contractor employees were providing translation services during interrogations and the Iraqis were detained at various locations in Iraq, not just Abu Ghraib.

The majority opinion did not expound on the combatant activities exception, but simply noted the case was resolved on the same grounds as *Al Shimari*. The *Al-Quaraishi* case instead focused on the collateral order doctrine, which grants a court of appeals jurisdiction over an interlocutory appeal of an order if that order:

> (1) conclusively determines a disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment.

The majority found this standard was met. The district court conclusively determined a disputed question by ruling on the issue of whether state tort law could be applied in a battlefield context. The second element was also satisfied because the majority found the questions raised by the motion to dismiss were collateral to the case's merits. The fact that in a motion to dismiss the court must take all of the plaintiff's allegations as true without examining them was sufficient to establish that the issue was ancillary to a ruling on the merits of the plaintiff's claim. Lastly, the case presented substantial issues relating to preemption, separation of powers and immunity (the right not to have to stand trial) that could not be addressed on appeal from final judgment because the continuation of

the case would require the very judicial scrutiny of military policies and practices that the movants sought to avoid in the first instance by filing the motion. The court also noted a strong public policy interest against a civilian court's review of wartime actions within a U.S. Military prison added weight to allowing an interlocutory appeal.

The decision is significant in finding this type of issue—namely an appeal from denial of immunity and preemption in the battlefield context—appealable under the collateral order doctrine, which typically is very narrowly applied. If the court's rationale is adopted more widely, it has the potential to greatly reduce the number of cases going to trial when the defendant has a viable immunity/preemption defense.

D. Political Question Doctrine

This year's case law was encouraging for contractors asserting the political question doctrine as an affirmative defense. The six-factor test for application of the political question doctrine was set forth in the 1962 Supreme Court decision of *Baker v. Carr*, 369 U.S. 186. *Baker* held that a case may be dismissed as implicating a "political question" if any one of the following six factors is established: (i) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (ii) a lack of judicially discoverable and manageable standards for resolving the question presented; (iii) the impossibility of deciding an issue without making an initial policy determination of a kind clearly inappropriate for the judiciary; (iv) the impossibility of a court's undertaking independent resolution without showing the respect due coordinate branches of the Government; (v) an unusual need for unquestioning adherence to a political decision already made; or (vi) the potential of embarrassment from inconsistent pronouncements by various governmental departments on one question. If one of these factors is implicated, a court lacks subject matter jurisdiction to adjudicate the plaintiff's claims.

As in past years, this year's cases involving the political question doctrine turned on the amount of autonomy afforded the government contractor in performance of its contractual duties. On the one hand, the more discretion afforded the contractor to control the circumstances of performance, the more likely the court was to view the matter as a traditional tort claim within the judiciary's competence to resolve. On the other hand, where an injury occurred in a situation where the military exercised considerable control and discretion, courts tended to view the claim as one inextricably entwined with military judgments and practices such that it was inappropriate for judicial review. However, the fact that a government contractor exerted control over the situation where a tort occurred does not necessarily preclude the possibility of immunity based on the political question affirmative defense. *See, e.g., Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411-12 (4th Cir. 2011) (extending political question immunity to a contractor even though the military was not in control when the alleged tort occurred). The usual starting point for ascertaining whether the contractor or military was primarily in control of the situation giving rise to the tort is the contract's terms and conditions and statement of work.

1. CY 2011 Cases Where Immunity Was Extended to Contractors

***Amedi v. BAE Sys., Inc.*, 782 F. Supp. 2d 1350 (N.D. Ga. 2011)**

Rebar Amedi, a civilian contractor working as a translator in Iraq, was killed while riding in a convoy on a mission to capture enemy insurgents when an improvised explosive device detonated near his Mine Resistant Ambush Protected ("MRAP") vehicle. The explosion caused the rear doors of the passenger compartment to come off, and Mr. Amedi sustained fatal injuries when thrown to the ground. Mr. Amedi's wife brought suit against BAE Systems, the MRAP's manufacturer, alleging product defects, negligence, and breach of warranty. In defense, BAE Systems raised both the political question doctrine and the combatant activities exception to the FTCA.

Mr. Amedi was the only civilian in the convoy, which was undisputedly under the authority, supervision, and control of the U.S. Army; the MRAP vehicle contained two people over its maximum capacity at the time of the explosion; none of the occupants wore seat belts; the doors to the passenger compartment in the vehicle were not locked; and the equipment in the MRAP was secured by bungee and parachute cords. The defendant argued that all of these circumstances leading to Mr. Amedi's death resulted from military decisions that would necessarily have to be reviewed by the court. The plaintiff disagreed, arguing that the court need only focus on the defendant's negligence in designing and manufacturing the MRAP, asserting that the military decisions on the day of the explosion did not contribute to the failure of the defendant's design.

The court noted that there were two controlling Eleventh Circuit cases exploring application of the political question doctrine in the context of private contractor liability for deaths in combat, and they had divergent outcomes. *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009) involved an Army sergeant who was left in a permanent vegetative state following a truck accident while transporting fuel in Iraq. The Eleventh Circuit found that the political question doctrine rendered the case improper for judicial review under both the first and second *Baker* grounds.

In contrast, *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007) found the political question doctrine was not implicated in a case where a plane crash in Afghanistan killed three American soldiers. This decision was predicated on facts suggesting that the airline flight was "routine" and the defendant could not show that military decisions were implicated in the crash.

Ultimately, the district court found the *Amedi* case more closely resembled the fact pattern in *Carmichael,* which put military decisions at issue in evaluating the negligence claims, and found the first and second *Baker* tests warranted dismissal of the plaintiff's case on political question grounds. In *Amedi,* the military, not the contractor, retained the authority over the decisions and circumstances contributing to the plaintiff's injuries, thereby implicating a political question. The military had determined the

organization and arrangement of the convoy, the convoy was comprised entirely of U.S. Military personnel aside from Mr. Amedi, and Mr. Amedi was under the control and authority of the U.S. Military. In view of these circumstances, the court could not evaluate the allegations against BAE without also evaluating the military's judgment.

The court did not rule on the combatant activities exception, but suggested that BAE Systems also might have successfully invoked the government contractor defense in response to plaintiff's allegations.

***Taylor v. Kellogg, Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. Sept. 21, 2011)**

On the same day the Fourth Circuit decided the *Al Shimari* and *Al-Quaraishi* cases, discussed *supra*, it also ruled on the political question doctrine issue raised in *Taylor*. Taylor, a soldier stationed at Camp Fallujah, was electrocuted while working in an area of the base called the "Tank Ramp." The electrical lines Taylor was working on became live after a contractor employee turned on the Camp's main generator that defendant KBR was under contract to maintain. Plaintiff appealed the district court's dismissal of his claims based on both the political question doctrine and the combatant activities exception to the FTCA.

KBR argued that the political question doctrine barred plaintiff's claims because it intended to raise a contributory negligence defense, which would require a judicial assessment of military operations and decisions made during the Iraq War. The plaintiff disagreed, arguing that the military orders could be taken as "external constraints" within which KBR's negligent conduct occurred so that KBR's negligence could be independently considered without examining the military orders and decisions.

The Fourth Circuit identified three potential *Baker* factors at play: the first regarding a textually demonstrable constitutional commitment of the issue to a coordinate political department; the second factor about the lack of a judicially manageable standard; and the fourth that a court's resolution would express a lack of respect to a coordinate branch of government. The military decisions implicated include the decisions with respect to whether backup power should be supplied to the Tank Ramp and whether the soldiers should have been authorized to install a backup generator.

To determine if any of the identified *Baker* factors would preclude judicial inquiry into plaintiff's claims, the Fourth Circuit looked to decisions from the Eleventh and Fifth Circuits. In the Eleventh Circuit's *Carmichael* case, the plaintiff unsuccessfully had raised a similar argument to Taylor that the defendant's actions could be analyzed alone and the military actions were merely "external constraints" which did not need to be reviewed. In contrast, in the Fifth Circuit's *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008) case, it had found there was no political question implicated in a case where civilian truck drivers were injured. The outcomes in those decisions turned not so much on whether the alleged acts occurred in a war zone, but rather on whether the allegedly tortious acts could be considered in isolation from military decisions. The Fourth Circuit, therefore,

noted that jurisdiction is not necessarily barred anytime a plaintiff brings a claim based on contractor activity in a war zone.

The Fourth Circuit concluded there were two factors to assess: 1) the extent to which KBR was under the military's control; and 2) whether national defense interests were closely intertwined with the military decisions governing the contractor's conduct. The opinion, however, focused only on the issue of military control and seems to have assumed that any military decisions implicated national defense interests.

Under the first factor, the court found that there was no direct military control of the contractor employee who turned on the main generator given KBR's contractual obligation to have exclusive supervisory control over contractor employees at Camp Fallujah and responsibility for the safety of residents of Camp Fallujah. Despite this lack of military control, however, a judicial decision on the claims would still require questioning military decisions that may have contributed to the injury, i.e., the military decisions about providing back-up power and assignment of the soldier to work on the Tank Ramp.

Thus, this case stands for the proposition that a contractor can have some degree of autonomy under the terms of its contract and still be able to assert the political question defense if military decision making nonetheless is implicated—even in the assertion of contributory negligence. Although the case also purports to add an additional inquiry aside from military control, i.e., whether national defense interests were closely intertwined with the military's decisions, that second prong of the test did not prove to be much of an obstacle to assertion of the defense here because the court seemed disinclined to second-guess any military decisions and judgments in this case.

2. CY 2011 Cases Where Immunity Was Not Extended to Contractors

Aiello v. Kellog, Brown & Root Servs., 751 F. Supp. 698 (S.D.N.Y. 2011)

As previously described, the plaintiff in *Aiello* alleged two counts of negligence after suffering injuries from falling in a latrine at Camp Shield in Iraq: 1) failure to warn regarding a slippery floor; and 2) negligent design and renovation of a building. The defendant, KBR, argued unsuccessfully that the court did not have subject matter jurisdiction to adjudicate the claims because the complaint was non-justiciable under the political question doctrine.

Noting that the test for non-justiciability under the political question doctrine was "a high bar" to pass, the court analyzed the case under each of the six *Baker* factors (despite the fact that the contractor had not indicated which *Baker* factor applied). The court focused mainly on whether there was "a textually demonstrable constitutional commitment of the issue to a coordinate political department," which the court deemed most relevant to suits against military contractors where the court may have to "second-guess military strategic, tactical, or policy decisions."

KBR argued that the court must consider the fact that the defendant would defend against the claims by arguing that military decisions caused the Plaintiff's injuries, even if the complaint is drafted so as to avoid implicating military decisions. The court was unconvinced with respect to the negligence claim based on failure to warn, which the court felt would not require examining military decisions. Likewise, the court ruled it could consider the negligence claim based on design or renovation, reasoning that it was possible to address this claim without second-guessing military decisions if the claim relied on KBR's performance after undertaking work under its Army contract (versus the decision for the work to be performed in the first instance). Ultimately, the court found that it was "inappropriate to dismiss under [the political question] doctrine, where there is a mere chance that a political question will present itself." As noted above, however, the case was dismissed pursuant to the combatant activities exception to the FTCA.

E. Westfall Act/Doctrine

An additional potential source of government contractor immunity is the Westfall Act, a statute granting immunity for federal employees. Although the statute only deals with federal employees, immunity for nongovernmental employees and entities acting on behalf of the government stems from a test the Supreme Court articulated in *Westfall v. Erwin*, 484 U.S. 292 (1988).

The *Westfall* case and its progeny extend government immunity to private contractors performing so-called "governmental functions." *Westfall* involved the alleged negligent handling of toxic ash by Government supervisory employees. The Supreme Court applied a two-part test to determine whether the Government supervisors were immune from state tort liability: (i) was the act within the scope of the federal officials' employment, and (ii) was the act discretionary in nature. Congress subsequently enacted legislation to annul the Supreme Court's insertion of a "discretionary act" requirement in the immunity standard as applied to Government employees. Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the "Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4563 (1988) (amending 28 U.S.C. § 2679(b), (d)). However, the requirement that an act be discretionary in nature is still applied to determine whether a private party performing a governmental function qualifies for an extension of immunity.

Few contractors invoked *Westfall* immunity this past year, but one 2011 case shows that it can be relatively easy to establish that activities under a government contract involve "discretionary action" so as to be eligible for *Westfall* immunity.

***Nicole Med. Equip. & Supply, Inc. v. TriCenturion, Inc.*, 2011 WL 1162052 (E.D. Pa. March 28, 2011)**

The plaintiff in *Nicole Medical Equipment* was a durable medical equipment supplier who filed a multitude of state law tort claims and one federal claim against TriCenturion, a Program Safeguard Contractor ("PSC"), and NHIC, a Medicare insurance carrier. The plaintiff's claims

resulted from the defendants' determination that the plaintiff had been overpaid for certain Medicare claims. Accordingly, TriCenturion instructed NHIC to institute a 100% offset of Medicare payments to the plaintiff in order to recoup the overpayments, which allegedly caused the plaintiff's business to fail. Ultimately, the Medicaid Appeals Council found that TriCenturion did not follow the proper procedures in instituting the recoupment and the plaintiff was awarded the money TriCenturion improperly withheld. Following this determination, the plaintiff filed suit in district court for damages.

Although the court dismissed the case on the grounds that it lacked subject matter jurisdiction because the plaintiff did not exhaust administrative remedies, the court ruled in the alternative that the claims should be dismissed based on sovereign immunity. The court set forth the standard for a government contractor to receive immunity under the *Westfall* decision: "a contractor operating under federal statutes and regulations and under the direction of a government official will be immune from tort liability when the actions of that contractor are discretionary and within the outer perimeter of a contractor's official duties." For an act to be "within the outer perimeter of a contractor's official duties," it must be "connected with the general matters committed by law to the contractor's control or supervision" and not outside the contractor's authority.

Relying on case law from other federal courts (as the Third Circuit had not yet decided the issue), the court found that subjecting Medicare contractors to tort suits because they made poor decisions or errors in following required procedures would have the negative effect of impinging on the contractor's independent decision-making. Both defendants' actions were discretionary and judgmental in nature. TriCenturion had to exercise its own judgment to determine to audit the plaintiff. NHIC also exercised judgment in agreeing to follow TriCenturion's directive to withhold payments to the plaintiff.

Secondly, the defendants' actions fell within the perimeter of their official duties. Under its government contract, TriCenturion was charged with investigating and auditing providers, as well as recouping overpayments. The fact that TriCenturion was negligent in carrying out these duties did not influence the court from finding that TriCenturion acted within its official duty, albeit negligently. NHIC was similarly authorized by contract to decrease payments when a Medicare overpayment occurred.

Significant in *Nicole Medical Equipment* is the lenient test the court used to find actions under contract to be "discretionary." Even though NHIC both received and followed orders from the PSC, a fact belying discretionary action, the mere fact that it potentially could have declined those orders met the standard for discretionary action.

III. JURISDICTIONAL BARS TO CLAIMS

With respect to cases involving events in foreign lands or foreign plaintiffs and/or defendants, questions often arise about a U.S. court's jurisdiction over the subject matter of claims (particularly those asserted under the Alien Tort Statute) and its personal jurisdiction over foreign defendants

who may have little, if any, contacts with the forum. As discussed below, there were some significant developments in this area in 2011. Many of the important cases in this area did not involve government contractors, but the legal standards announced in these cases are potentially applicable to government contractors, especially those conducting operations overseas.

A. Alien Tort Statute

Even as the U.S. Military transitions out of Iraq and scales back operations in Afghanistan, American contractors have continued serving on contracts overseas, sometimes in support of foreign governments. When performing on contracts overseas, questions arise as to whether foreign tort victims can sue in U.S. courts. The Alien Tort Statute ("ATS"), passed as part of the Judiciary Act of 1798, confers jurisdiction on the federal courts to decide "any civil action by an alien sounding in tort, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Yet, the grant of jurisdiction is narrowly defined. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The "law of nations" prong primarily involves (i) violation of safe conduct; (ii) infringement of the rights of ambassadors; and (iii) piracy on the high seas. The Supreme Court recognized in *Sosa* that other torts might fall under this jurisdictional grant. It therefore advised lower courts examining ATS issues to consider whether other violations of international law norms have the same level of acceptance as the specified torts had in 1798. If jurisdiction is established under the ATS, then the court will decide the merits of the case, and examine whether the contractor can invoke either government contractor or combatant activities immunity. Courts delivered mixed results to plaintiffs in 2011. Some plaintiffs enjoyed some success against companies engaged in purely commercial activities, and those cases helped advance the law in this area. Those cases involving government contractors, however, saw the hopes of plaintiffs dashed through dismissals or summary judgments.

1. CY 2011 Cases in Which Contractors Avoided ATS Jurisdiction

***Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011).**

The facts of this case hearken back to the 1980s, when the Saddam Hussein regime in Iraq was engaged in a years-long war with Iran. Among the many atrocities committed during that war, Hussein ordered the use of mustard gas and other chemical weapons against the Kurds, who he accused of lending aid to Iran. Alcolac, a chemical manufacturer in Georgia, produced a chemical called TDG that has many lawful purposes but also serves as a precursor to mustard gas. Not surprisingly, TDG is subject to export restrictions due to its potential for misuse. In the late 1980s, Alcolac made four large sales to European companies without seeking an export license. All four of those shipments made their way to Iraq and were used to manufacture mustard gas. Alcolac pled guilty in 1989 for violating export restrictions, but was not prosecuted for other charges.

Several Kurdish victims and family members filed suit against Alcolac. One group of foreign nationals advanced their case under the Alien Tort Statute. The district court dismissed the ATS claims in 2010. Affirming

the district court's decision, the Fourth Circuit adopted the reasoning of the district court in holding that the Alien Tort Statute allows accessorial liability (i.e. aiding and abetting) but requires the plaintiff to plead a heightened *mens rea*. Since Alcolac was accused of aiding and abetting the Hussein regime in committing genocide, the plaintiff had to claim not only that Alcolac intentionally made the improper sale but also that Alcolac made the sale for the purpose of facilitating genocide. Since the foreign national plaintiffs did not make such an allegation (and presumably had no basis for doing so), the court upheld the dismissal of the suit.

In doing so, the Fourth Circuit fell in line with the Second Circuit's decision in *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244, 258 (2nd Cir. 2009), and diverged from the D.C. Circuit's opinion in *Doe VIII v. Exxon Mobil Corp*., 654 F.3d 11, 19 (D.C. Cir. 2011) and the Ninth Circuit's non-precedential decision in *Doe I v. Unocal Corp.*, 395 F.3d 932, 951 (9th Cir. 2002), *vacated, reh'g en banc granted,* 395 F.3d 978 (9th Cir. 2003). The main difference of opinion between the courts is which source of international law truly governs the *mens rea* standard of accessorial liability for genocide and crimes against humanity. The D.C. Circuit relied on customary international law as explained in case law handed down by the International Criminal Court and the International Criminal Tribunal for Yugoslavia. These decisions held that all that was required for accessorial liability to attach is "knowing assistance that has a substantial effect on the commission of the human rights violation." *Doe VIII*, quoted in *Aziz*, 688 F.3d at 397. The Second and Fourth Circuits, however, relied on the ICC's underlying Rome Statute, which required a finding of a "purpose of facilitating the commission of such a crime" for accessorial liability to attach. With a circuit split firmly in place, the scope of contractor liability for aiding and abetting the actions of the governments they do business with will now depend on which Federal district the plaintiffs file suit, unless the Supreme Court steps in to resolve the split in authority.

2. CY 2011 Cases in Which Contractors Were Subject to U.S. Jurisdiction Under ATS

Flomo v. Firestone Natural Rubber Co., LLC, 643 F.3d 1013 (7th Cir. 2011) (en banc).

In this opinion by Judge Posner, the Seventh Circuit considered whether it is possible for corporations to violate the "law of nations." The court also tackled a new topic, that being whether international child labor standards satisfy the heightened level of universal acceptance required by *Sosa v. Alvares-Machain*. Plaintiffs were 23 Liberian children who engaged in strenuous child labor on a rubber plantation owned by the Firestone company. The children were not employed directly by the plantation, but the adult laborers often brought their children to help them meet their production quota. The plaintiffs claimed that Firestone allowing the use of child labor on its plantation violated international child labor standards incorporated in customary international law.

Regarding corporate liability, Judge Posner noted that several circuits have found that corporations can be made to answer for violations of international law. The one court to hold otherwise was the Court of Appeals

for the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, a case appearing in last year's installment of the Year in Review. 621 F.3d 111 (2d Cir. 2010). In *Kiobel*, the Second Circuit found that since corporations have never been prosecuted in an international tribunal, they can not be found to be bound to customary international law. The *Flomo* court rejected this argument. Judge Posner explained that, after the Second World War, the Allies dissolved German corporations based on the authority of customary international law. Moreover, the mere fact that a corporation had not been prosecuted in an international tribunal to date did not mean they could not or should not be prosecuted. The court found additional support in the *in rem* prosecution of pirate ships for the proposition that corporate entities can be held to account for violations of international law.

The plaintiffs, however, saw their hopes for recovery dashed when the *Flomo* court took on the issue of whether the alleged child labor abuses condoned by Firestone amounted to violations of customary international law. Judge Posner noted that the three international conventions most applicable to the child labor allegations were far too vague to rise to the rigorous standard of international acceptance set by the Supreme Court in *Sosa.*

***Sarei v. Rio Tinto, PLC,* -- F.3d --, 2011 WL 5041927 (9th Cir. 2011) (en banc).**

In one of the most complex decisions of 2011, the Court of Appeals for the Ninth Circuit produced this gem of judicial indecision which contained no less than seven different opinions, none of them representing by itself a majority in its entirety. The plaintiffs were residents of the island of Bougainville in Papua New Guinea. Rio Tinto operated a mine on the island in the 1970s and 1980s. A popular uprising against Rio Tinto's operations led to a widespread military crackdown by the Papua New Guinea armed forces against civilians. The plaintiffs claimed that Rio Tinto's complicity in this crackdown wrongfully caused many deaths, in violation of several international legal norms, including prohibitions against genocide, war crimes, crimes against humanity (specifically, food blockading), and racial discrimination.

The opinion written by Judge Schroeder received the most support, and each part of the opinion was joined by a majority of the 11-judge en banc panel, although the majority for each part comprised of different judges. Judge Schroeder reasoned that the allegations of genocide and war crimes specified international norms sufficient under *Sosa* to invoke ATS jurisdiction. However, the plaintiffs' claims of food blockading and racial discrimination described conduct that, while heinous, did not represent norms of definite concept and wide acceptance internationally. The effect of the decision was to return the case to the district court for trial on the genocide and war crimes claims. In reaching his decision, Judge Schroeder held that corporations could be liable for violations of customary international law, including accessorial liability.

B. Personal Jurisdiction

A foreign defendant may be able to avoid lawsuits filed against it in the United States based on the court's lack of personal jurisdiction over

the defendant. However, legislation pending in Congress would require that foreign contractors waive objections to jurisdiction in cases of serious bodily injury, sexual assault, rape, and death when contracting with the U.S. Government. The proposed legislation would also require an amendment to the Federal Acquisition Regulation to allow agencies to suspend or debar contractors that attempt to frustrate the legal process by evading service. In December 2010, Senate Bill 2782, the "Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed by Contractors Act," was placed on the Senate Legislative Calendar. S. 2782 (111th) was reintroduced as S. 235 on January 31, 2011 before the 112th Congress. It has been read twice and referred to Committee on Homeland Security and Governmental Affairs. As of the date of this writing, however, there has been no further activity on the bill.

1. CY 2011 Cases Where There Was No Personal Jurisdiction

Bootay v. KBR, Inc., 437 Fed. Appx. 140 (3d. Cir. 2011)

Sergeant Bootay was an Army noncommissioned officer serving near a KBR facility that utilized and was contaminated with the harmful chemical sodium dichromate. Bootay suffered a panoply of health problems after his return from Iraq that he attributed to exposure to chemicals utilized by KBR. The court readily dismissed the claims against KBR Services and KBR Technical Services because the complaint failed to state a claim; Bootay failed to show a contractual duty or a general duty to warn a stranger of the harms posed by sodium dichromate. Two of KBR's other corporate units escaped state tort liability in the *Bootay* case because of a lack of personal jurisdiction.

As to the parent KBR Inc. and its subsidiary KBR Overseas, the court found that they failed to have enough connections with the state in which the suit was filed (Pennsylvania) to warrant personal jurisdiction. The court recognized that KBR Overseas recruited workers in Pennsylvania to work for KBR Services and KBR Technical Services. However, the court noted that this, without more, was not sufficient to show that KBR Inc. and KBR Overseas failed to respect the corporate status of its subsidiaries. Therefore, the court refused to pierce the corporate veil and attribute the actions of KBR Services and KBR Technical Services to KBR Overseas and their corporate parent KBR Inc.

Bixby v. Kellogg, Brown & Root Servs., Inc., 2011 WL 2971848 (D. Or. June 16, 2011)

As in *Bootay*, plaintiffs were soldiers in the Army who were exposed to sodium dichromate used by KBR in Iraq and claimed severe health problems as a result. This decision of the U.S. Court for the District of Oregon focuses on the personal jurisdiction over co-defendants Halliburton Company and Halliburton Energy Services, Inc. Halliburton served as the corporate parent of KBR, Inc. until 2004.

Halliburton Company was found not to have any personal contacts with the State of Oregon, and Halliburton Energy had only minimal con-

tacts with Oregon. The plaintiffs' theory of personal jurisdiction against Halliburton centered on the allegation that Halliburton orchestrated a unified medical and legal response coordinated with its KBR corporate downstream subsidiaries that injured the plaintiffs, all members of the Oregon National Guard. The court rejected this argument, finding that the contractual documents between Halliburton and KBR failed to demonstrate that the level of cooperation amounted to joint venture status. While Halliburton and KBR did form teams to perform oil production operations in Iraq, including the use of sodium dichromate, plaintiffs did not allege that the different subsidiaries shared profits or liability for losses such that Halliburton exerted control over the fulfillment of KBR's contractual obligations. Consequently, the District Court refused to pierce the corporate veil and attribute the alleged actions of KBR to Halliburton so the personal jurisdiction might attach for Halliburton.

2. CY 2011 Cases Where Personal Jurisdiction Was Established

***Genocide Victims of Krajina v. L-3 Services, Inc.*, -- F.Supp.2d. ---, 2011 WL 3625055 (N.D.Ill. Aug. 17, 2011).**

American government contractors often extend their services to foreign governments, which can present unique risks. MPRI, later purchased by L-3 Services, allegedly contracted with the Government of Croatia to train military forces in preparation for Operation Storm. This military operation invaded the ethnically Serb area of Krajina in what has been described by some as an instance of ethnic cleansing. The plaintiffs, all ethnic Serb survivors of Operation Storm, also alleged that MPRI assisted and advised Croatian troops during the conflict and were thus largely responsible for the atrocities they committed.

L-3 Services, the corporate successor of MPRI, argued that personal jurisdiction should not attach in the State of Illinois. L-3 was a Delaware corporation with its principal place of business in Alexandria, Virginia. Its corporate parent, L-3 Communications Corp., was headquartered in New York City. L-3 Services was licensed to do business in Illinois, and conducted approximately $42 million in business in Illinois during the three years examined by the court. L-3 also had approximately 100 employees working in Illinois during that time period. It visited five trade shows in Illinois during one year, and admitted to sending agents into Illinois to solicit additional business in Illinois. Based on this showing, the District Court found that L-3 Services had substantial contacts in Illinois that, while those activities were unrelated to the actions a decade removed in Croatia, they were sufficient enough for personal jurisdiction to attach. Although this is an Alien Tort Statute case, the issue of Alien Tort Statute jurisdiction was not addressed in the opinion.

IV. GOVERNMENT DEFENSES

A. Independent Contractor Defense

The corollary to contractor immunity cases under the FTCA are those in which the Government is sued under the FTCA and attempts to ex-

tricate itself from the lawsuit by claiming that it was *not* controlling the contractor's actions. Although the "independent contractor" defense is available only to the Government, not contractors, it is worth examining because these cases deal with similar issues, i.e., what does or does not amount to Government "control" over a contractor's activities. Courts usually find that the exception applies when the United States has delegated the duty of care to an independent contractor. The two key factors courts evaluate are the Government's ability to "control the detailed physical performance of the contractor," *Logue v. United States*, 412 U.S. 521 (1973), and to supervise the contractor's "day-to-day operations," *United States v. Orleans*, 425 U.S. 807 (1976). If the contractor substantially controls its own performance and judgment, then it remains liable for resulting torts. However, if the Government directs the contractor's work as if the contractor were an employee or agent, then the Government may be held liable for the contractor's torts committed in performance of the contract.

The importance of government control was highlighted in *Carroll v. United States*, 661 F.3d 87 (1st Cir. 2011). The plaintiff, a young child, sued the Government for injuries caused by a landscaping company that was performing lawn mowing services at a Federal building maintained by GSA. A lawnmower being used by the company ejected a foreign object that struck the child in the head as she rode a tricycle at a nearby childcare center. The court found that the government had effectively delegated the day-to-day landscaping duties to the contractor, and that government employees did not direct the actions of the contractor on a regular basis. Since the government had given discretion to the landscaping contractor, the Government could not be held to account for the independent actions of the landscaper. In a similar case, the Southern District of New York held in *Brown v. United States*, No. 10-Civ.-7758(SAS), 2011 WL 1676327 (May 3, 2011), that the Department of Labor did not exercise sufficient control over a building maintenance contractor to expose the Federal Government to tort liability.

In contrast, the Government unsuccessfully asserted this defense in *Mailer v. United States*, 2011 WL 5117730 (M.D.Tenn. Oct. 24, 2011). This case involved a nurse acting under a Veterans Administration (VA) Hospital contract who mistakenly gave the plaintiff prescription medications intended for another patient, causing severe complications. The VA argued that the independent contractor defense applied because the nurse's employer contracted with the Government and directed the day-to-day activities of the nurse. The court disagreed and seemed to rest its opinion on the testimony of the VA Hospital's nurse manager. The manager testified that she provided daily supervision of all nurses, including the nurse under contract. While the nurse was ultimately responsible to her employer, VA employees provided significant oversight over the contract nurses, and the contractor nurses had to comply with numerous medical policies set by the VA Hospital. As such, the VA employees exercised significant control over the nurse's day-to-day duties and substantially limited the discretion of the contractor in performing the contracted tasks. Therefore, the independent contractor defense was unavailable to the VA. On these facts, a contractor joined as a defendant in this case likely would have a viable argument that the nurse was effectively a "government em-

ployee" under the Westfall Act, pursuant to which the U.S. Government would be substituted as the defendant.

B. *Feres* Doctrine

In *Feres v. United States*, 340 U.S. 135 (1950), the Supreme Court created an exception to the FTCA for "activity incident to military service," thereby precluding soldiers from suing the Government for service-related injuries. One of several rationales for the *Feres* doctrine was that a court should not get involved in "sensitive military affairs at the expense of military discipline and effectiveness." The defense continues to be asserted in some cases involving soldier plaintiffs. However, private party defendants so far have been unable to convince a court to extend *Feres* immunity to government contractors supporting the military. Instead of affording protection to contractors, the doctrine more often comes into play to thwart contractor efforts to seek indemnification from the Government or to seek contribution on a contributory negligence theory, as was the case in *Vulcan Materials Co. v. Massiah v. United States*, 645 F.3d 249 (4th Cir. 2011).

In *Vulcan Materials*, the plaintiff was the estate of a U.S. Navy sailor killed in an inflatable boat collision during training. The plaintiffs claimed that the boat operator should have placed a lookout on duty that could have spotted the potential collision with a larger Navy flotilla. The contractor, in turn, sued the U.S. Navy for contribution based on the Navy's alleged negligence in the collision. The court first found that the contractor could be liable for the alleged negligence because the District Court found sufficient facts to support all of the elements of negligence.. Further, the court found that the contribution claim against the Navy was properly dismissed on *Feres* grounds. The court noted that the Supreme Court had earlier extended *Feres* to preclude government liability based on indemnification to third parties. *See Stencel Aero Eng'g Corp. v. United States,* 431 U.S. 666 (1977). The Fourth Circuit had previously ruled that the field of admiralty law represented an exception to *Feres* that allowed for the U.S. to be liable to third party indemnification for injuries against servicemembers. The *Vulcan* court decided that its prior jurisprudence had been superseded by subsequent Supreme Court guidance. As a result, all tort contribution claims brought in the Fourth Circuit by contractors against the Government for injured servicemembers are now subject to dismissal on *Feres* grounds, including those arising under maritime jurisdiction.

V. STATUTORY DEFENSES, INDEMNIFICATION AND IMMUNITIES

In addition to common law defenses discussed above, a variety of statutes offer contractors a degree of protection from third party lawsuits. These statutory protections can be provided in different ways, sometimes by extending immunity from, or liability limits on, certain suits and sometimes providing a mechanism to obtain reimbursement from adverse judgments*, i.e.*, indemnification.

Use of indemnification for Government contractors, of course, is circumscribed by the Antideficiency Act, 31 U.S.C. § 1341, which precludes

federal agencies from entering into a contract or other obligation exceeding available appropriated funds or before an appropriation is made. In other words, the Government is prohibited from entering into open-ended indemnification agreements, unless Congress expressly permits such agreements. *See Assumption by Gov't of Contractor Liability to Third Persons—Recon.*, B-201072, 62 Comp. Gen. 361 (1983) (finding standard indemnification contract clause in Federal Procurement Regulations to violate Antideficiency Act). In prior years, we have discussed cases involving indemnification covering activities to "facilitate the national defense" under Public Law 85-804, 50 U.S.C. §§ 1431–1435, nuclear-related work under the Price-Anderson Act, 42 U.S.C. § 2210, and certain research and development work, 10 U.S.C. § 2354. Unfortunately, 2011 brought no notable decisions involving these indemnification statutes.

Another set of statutes confer immunity or imposes limitations on liability from third party suits. Included in the category are:

The Defense Base Act ("DBA"), 42 U.S.C. §§ 1651-54, a workers' compensation-like statute, that limits damages available to some contractor employees work on Government contracts outside of the United States.

The Stafford Act, 42 U.S.C. § 5148, pursuant to which contractors have been afforded derivative immunity in connection with federal government's disaster relief efforts.

The SAFETY Act, 6 U.S.C. §§ 441-444, which allows a seller of "certified" anti-terrorism technology to assert the government contractor defense for claims arising from acts of terrorism and limits a seller's liability for "designated" products or services is the amount of liability insurance that DHS determines the seller must maintain.

The Public Readiness and Emergency Preparedness ("PREP") Act, 42 U.S.C. §§ 247d-6d–247d-6e, which provides two potentially broad liability protections: (1) immunity from liability for losses arising out of the administration or use of a "declared" covered countermeasure; and (2) an alternative compensation system for those injured from the administration or use of covered countermeasures.

The recently proposed S. 413, "Cybersecurity and Internet Freedom Act of 2011," which contains language providing contractors immunity from civil liability to third parties for certain cybersecurity related actions, especially those performed during a declared cybersecurity emergency.

Plaintiffs are often forced to be creative in attempting to avoid these statutory bars to recovery. Last year, three reported decisions involved defenses asserted under the DBA.

A. Defense Base Act

The Defense Base Act ("DBA"), 42 U.S.C. §§ 1651-54, is a workers' compensation-like statute that limits damages available to some contractor employees work on Government contracts outside of the United States. The DBA provides contractors with a tool to limit liability for injuries to overseas employees. When applicable, the DBA, like workers' compensation

statutes, limits an employer's liability for on-the-job injuries. If an injured worker is covered under the DBA, he is generally entitled to the benefits and procedures set forth in the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-50. The LHWCA provides the *exclusive* remedy against a qualifying contractor for injury or death of the employee and/or their dependents. 33 U.S.C. § 905(a). Liability is limited to statutory death benefits, payment for reasonable funeral expenses, and compensation payments to surviving eligible dependents. *See* 33 U.S.C. §§ 904(a), 909. The benefits are determined and adjudicated through a comprehensive scheme administered by the Department of Labor.

***Pope v. Palmer*, 2011 WL 4502859 (E.D. Mich. Sept. 28, 2011).**

This case was lodged by the wife of a DynCorp employee who served as a diplomatic security guard in Iraq. While off duty in his room, he was accidently shot by inebriated DynCorp employees playing with a loaded handgun. Plaintiff filed a claim under the DBA and received a substantial lump sum payment and weekly death benefits. Later, plaintiff filed the suit claiming negligence on behalf of DynCorp, specifically arguing that DynCorp owed her husband a duty of care to ensure that (a) its employees were not intoxicated in facilities under DynCorp control and (b) handguns were properly stored and cleared when its employees were off duty. The court reasoned that the DBA served as the exclusive remedy for accidental injury or death arising out of and in the course of employment. Since the plaintiff alleged that the accidental death arose in the course of her husband's employment with DynCorp, the court granted summary judgment for DynCorp.

***Martin v. Halliburton*, -- F. Supp.2d --, 2011 WL 3925404 (S.D.Tex. Sept. 2, 2011).**

Plaintiff was the daughter of a Halliburton employee who was killed in Iraq when his convoy accidentally was attacked by U.S. forces. Halliburton had initially told her that her father was killed by a roadside bomb, but she subsequently was informed unofficially by an embassy worker that the cause of death was friendly fire, causing the plaintiff tremendous emotional stress. The plaintiff lodged claims of negligence, wrongful death, fraud, fraud in the inducement, and intentional infliction of emotional distress. The court reasoned that the DBA served as the exclusive remedy for wrongful death, negligence, fraud, and fraud in the inducement claims. However, it found that the intentional infliction of emotional distress claim could survive summary judgment because the alleged tortious actions of Halliburton employees when notifying the plaintiff were personal to her and distinct from any claim arising out of her father's accidental death. Rather, they were directly attributable to Halliburton's alleged wrongful handling of the notification process.

***Taylor v. KBR*, 2011 WL 2446429 (S.D.Tex. May 20, 2011).**

The District Court in *Taylor* addressed a claim of intentional infliction of emotional distress similar to that asserted in *Martin* but reached a different conclusion. The plaintiff, a female employee of KBR, claimed that, while in Afghanistan, she reported to her supervisors that her di-

rect supervisor forced local national employees to engage in illegal acts, falsified safety documents, and falsely accused her of stealing food. After a transfer as a result of the incident to another part of Afghanistan, the plaintiff made a report to Human Resources that a local national had sexually assaulted another KBR employee. The plaintiff reported retaliation from KBR managers as a result. In a separate incident, another KBR employee sexually assaulted her. Soon after she reported her assault to management, her employment was terminated.

The plaintiff leveled several claims against KBR, including employment discrimination, retaliation, sexual harassment, civil assault and battery, sexual assault, intentional infliction of emotional distress, and negligent hiring and supervision of KBR's employees. Before the decision, plaintiff abandoned the negligence claims. A motion to dismiss before the court only involved the plaintiff's civil assault and battery, sexual assault, and intentional infliction of emotional distress claims. The court noted in its decision that the plaintiff failed to demonstrate how those claims did not arise under the scope of employment. This was significant because, as mentioned in the previous cases, the sole remedy for claims arising under the scope of employment on a contract covered under the Defense Base Act is payment from the employer's DBA insurance policy. Given this apparent failure of advocacy, the court adopted the defendant's reasoning that the alleged sexual assault would have happened under the scope of employment as pled in the complaint. Considering the environment in Afghanistan, employees could be considered to be on duty a substantial portion of the day. Moreover, the sexual assault allegedly occurred in a KBR-provided breakroom during duty hours. Given the serious nature of the charge, it seems that had the plaintiff had been able to establish an off-duty nexus with the assault, the court may have been inclined to rule differently. However, the court found the underlying claims barred by the DBA because the physical and mental injuries alleged arose under the scope of her employment.

Although there were no reported cases involving other liability limiting statutes, there was some notable regulatory activity in 2011.

B. SAFETY Act

In 2011, the Department of Homeland Security ("DHS") received 189 applications for certification or designation of technologies under the SAFETY Act, and made awards to 101 of these applications. These certifications represent a record level, 20% higher than that set in Fiscal Year 2007. The average processing time for each application was 111 days. In total, DHS certified 32 technologies in 2011. As noted above, certification allows a seller of an anti-terrorism technology to assert the government contractor defense for claims arising from acts of terrorism. Additionally, 61 technologies were designated, meaning that a seller's liability for those designated products or services is limited to the amount of liability insurance that DHS determines the seller must maintain. Finally, DHS made eight Developmental Testing and Evaluation Designations. Information on the products/technologies can be found at https://www.safetyact.gov/jsp/news/Awards.jsp.

These statistics bring the total SAFETY Act program awards as of the end of Fiscal Year 2011 to 495 out of a total of 1,219 applications. DHS has indicated it awarded its 500th approval on November 4, 2011.

C. PREP Act

The PREP Act, a follow-on to the Project BioShield Act of 2004, seeks to encourage the development of products to counter bioterrorism threats. The PREP Act provides compensation to individuals for serious physical injuries or deaths from pandemic, epidemic, or security countermeasures identified in declarations issued by the Secretary of Health and Human Services ("Secretary"). In 2011 the Department of Health and Human Services ("HHS") published a final rule establishing administrative policies, procedures and requirements for the Countermeasures Injury Compensation Program ("CICP"). 76 Fed. Reg. 62306 (Oct. 7, 2011). The CICP administers the compensation system authorized by the PREP Act. The benefits available under CICP are medical benefits, benefits for lost employment income, and survivor death benefits. The final rule adopted, with only minor technical amendments, the interim final rule previously published in October 2010.

D. S. 413, "Cybersecurity and Internet Freedom Act of 2011."

Proposed by Senator Lieberman, S. 413 represents the Senate's response to a White House initiative to give the White House greater powers to enact cybersecurity-related measures. The Act would make create a Director of Cybersecurity Policy reporting directly to the White House, and would place primary responsibility for cybersecurity with the Department of Homeland Security. While the Act is largely in line with the White House proposal, Section 249(e) contains additional language providing contractors immunity from civil liability to third parties for certain cybersecurity related actions, especially those performed during a declared cybersecurity emergency. The bill has been referred to Senate Committee on Homeland Security and Governmental Affairs, and a hearing was held on May 23, 2011.

VI. OTHER MATTERS RELEVANT TO DEFENSE OF THIRD PARTY CLAIMS

A. Choice of Law

Harris v. Kellog, Brown & Root Servs., Inc., --- F. Supp. 2d ----, 2011 WL 2462486 (W.D. Pa. 2011)

The plaintiffs in the Harris lawsuit alleged KBR's negligence resulted in a soldier's death by electrocution while showering in a building maintained by KBR. We previously discussed this case following a 2009 decision denying KBR's motion to dismiss based on the political question doctrine and the combatant activities exception to the FTCA. The 2011 decision addressed choice of law issues in tort cases predicated on incidents occurring in military zones.

After its unsuccessful effort to get the case dismissed, the contractor moved the court for the application of the Iraqi Civil Code to the case. Iraqi law offered several benefits to the defendant, i.e., a more stringent causation standard, no "pain and suffering" damages, and no punitive damages.

The court denied KBR's motion on two alternative grounds. First, the court found that KBR had not met its burden under Federal Rule of Civil Procedure ("FRCP") 44.1 to persuade the court that Iraqi law should apply. Instead, the court felt that Coalition Provisional Authority Order 17 was applicable, and that this order mandated that U.S. law apply. Second, notwithstanding FRCP 44.1, the court found that under the forum's choice of law rules, Iraqi law would not apply because Iraq lacked a sufficient interest in the lawsuit. Although, this case indicates that government contractors sued for tort claims arising out of military activities in Iraq should be prepared to litigate the merits of the case based on U.S. tort law, rather than Iraqi law, the circumstances in Iraq have since changed.

CPA Order 17 (which afforded contractors immunity Iraqi laws) has expired, and new agreements now govern the relationship between the U.S. and Iraq. On November 17, 2008, the U.S. and Iraq signed the "Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of their Activities during Their Temporary Presence in Iraq," commonly referred to as the Iraq Status of Forces Agreement ("SOFA"). The SOFA grants Iraq exclusive jurisdiction over U.S. contractors and their employees. SOFA art. 12. The term "United States contractor" is defined in such a way as to only include contractors that are operating under a contract or subcontract with or for the United States Forces. *Id.* art. 2; R. Chuck Mason, Cong. Research Serv., U.S.-Iraq Withdrawal/Status of Forces Agreement: Issues for Congressional Oversight 7 (2009) ("U.S. contactors operating in Iraq under contract to other U.S. departments/agencies are not subject to the terms of the SOFA."), *available at* http://www.fas.org/sgp/crs/natsec/R40011.pdf. The extent to which a U.S. court might deem Iraqi law applicable to the actions of contractor employees in view of the changing legal landscape remains to be determined.

B. State Secrets Doctrine

The state secrets doctrine bars suits when the very subject matter of the lawsuit is a state secret or where secret evidence would be necessary to prosecute or defend the suit. The former bar is essentially one of nonjusticiability, while the latter prevents the release of evidence that would threaten national security. Contractors sometimes can depend on the Government to invoke the state secrets doctrine to prevent a case from proceeding in federal court. (Depending on the sensitivity of the material, courts sometimes rule based only on a Government declaration as to the nature of the material versus an *in camera* review of the classified information.) Even when invocation of the state secrets doctrine will not lead to an outright dismissal, it can still be used to narrow the issues and claims.

Last year we reported on a Ninth Circuit ruling that prevented a tort case from proceeding following the United States' assertion the state secrets privilege. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d

1070 (9th Cir. 2010). That case involved foreign detainees transported by Jeppesen, a Boeing subsidiary, who alleged that they were tortured after being taken to secret CIA sites—missions that were reportedly referred to internally at Jeppesen as "the torture flights" or "spook flights." The majority *en banc* decision discussed two applications of the state secrets doctrine. The first, flowing from *Totten v. United States*, 92 U.S. 105 (1876), represents an absolute bar on litigation where the "very subject matter of the action" is a state secret. The second, derived from *United States v. Reynolds*, 345 U.S. 1 (1953) operates to exclude privileged evidence from the case and may result in dismissal of the claims. Ultimately deciding that the *Reynolds* privilege applied, the court held that "there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets." The majority reached this conclusion based on its belief that "Jeppesen's alleged role . . . cannot be isolated from aspects that are secret" and "*any* plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets. . . ."

In 2011, there were no reported decisions on this topic that involving tort suits against government contractors, but there was a very significant decision involving the states secret doctrine that could very well have application in that context. On May 23, 2011, the Supreme Court decided what was probably the year's most discussed government contracts case. In *General Dynamics Corp. v. United States*, 131 S.Ct. 1900 (2011), the Supreme Court added yet another chapter to the decades-long A-12 contract termination saga.

In the 1980s, General Dynamics teamed with McDonnell Douglas to build the A-12 stealth aircraft for the Navy. As with many major weapons systems, this contract experienced numerous schedule overruns. The Navy eventually terminated the contract for default, and the Government asserted an affirmative $1.35 billion claim for breach of contract. General Dynamics and McDonnell Douglas (later purchased by Boeing Co.), appealed the termination decision to the U.S. Court of Federal Claims, seeking to convert it to a termination for convenience. The contractors' theory for conversion of the termination was that the Government held superior knowledge about stealth technology that it withheld from the contractors, directly causing delay and increased costs.

The decision giving rise to the appeal to the Supreme Court was a ruling that the contractors could not raise the defense of superior knowledge because doing so would necessarily entail the production of classified documents that were unavailable as a result of the Government's assertion of the states secrets privilege. In a unanimous opinion by Justice Scalia, the Supreme Court agreed with the Federal Circuit that the Government could validly assert the State Secrets Privilege and prevent the discovery of classified documents for use in trial. The Supreme Court, disagreed, however, on the procedural effect of invoking the privilege. Justice Scalia reasoned that since the contractors had brought forth a valid *prima facie* case of superior knowledge against the Government, the entire case, not just the superior knowledge defense, required the hearing of evidence involving stealth technology, a state secret:

> It seems to us unrealistic to separate . . . the claim from the defense, and to allow the former to proceed while the latter is barred. It is claims and defenses ***together*** that establish the justification, or lack of justification, for judicial relief; and when public policy precludes judicial intervention for the one it should preclude judicial intervention for the other as well.

Since the entire case was nonjusticiable due to the invocation of the state secrets privilege, the Court held that the proper disposition of the case was to leave the parties as they were when the suit was filed. The effect of this ruling was to leave both the Government and the contractor unable to assert damages against each other, and to leave the termination for default decision undisturbed.

The Court was careful to note that the effect of this ruling should be limited to "Government-contracting disputes, and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment." Thus, the state secrets privilege will not prevent a case from proceeding if the court concludes that enough facts exist to obtain a reliable judgment without the use of classified evidence. Although the fact that the Government was a party to the litigation probably influenced the outcome here, the principles set forth in the decision would appear to have application in most contexts in which the states secrets doctrine is likely to be asserted (as either relevant to the plaintiff's case or to the defendant's defenses).

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