New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 238—NO. 111 TUESDAY, JUNE 10, 2008 ALM

OUTSIDE COUNSEL

BY ANTHONY DiSARRO

# 'Boyle's' Law and 'Agent Orange' Litigation

This article discusses the recent application by the U.S. Court of Appeals for the Second Circuit in the *Agent Orange Product Liability Litigation* of the federal common-law *Boyle* defense, which protects military contractors from state product liability tort claims. The continued application and expansion of this defense raises serious separation of powers concerns under the U.S. Constitution.

## 'Agent Orange' and Background

In February 2008, the Second Circuit issued yet another series of rulings in the 30-plus-year-old *Agent Orange* litigation. In one of those rulings,[1] the court affirmed the grant of summary judgment against plaintiffs, a putative class consisting of military veterans who allege that they sustained injuries to their health as a result of exposure to the defoliant "Agent Orange" during the Vietnam War. The suit asserted various claims under state tort law against chemical companies that manufactured and sold Agent Orange to the U.S. government.

Those scratching their heads and exclaiming to themselves: "I thought the Agent Orange litigation had settled years ago" are remembering correctly. In May 1984, on the eve of trial, a $180 million settlement was reached between the chemical companies and the representatives of a class composed of allegedly injured veterans. The Second Circuit approved the settlement as adequate, reasoning that while the settlement amount represented a small portion of the total damages claimed, the settlement was nevertheless fair because of the significant hurdles that class members faced in terms of establishing liability.[2]

Indeed, class members who opted-out of the settlement eventually had their claims dismissed on summary judgment.[3] The district court concluded that no opt-out plaintiff could prove that any of the alleged ailments was caused by exposure to Agent Orange. Alternatively, the court concluded that, because the military often mixed the defoliants of several different manufacturers and stored them in unlabeled barrels, no opt-out could prove which

defendant manufactured the Agent Orange that allegedly cause his or her injury. Id. at 1263. A third dispositive ground for the ruling was that all claims were barred by the so-called "military contractor defense," which will be discussed shortly.

The plaintiffs in this latest wave of *Agent Orange* suits were also veterans who alleged injuries resulting from exposure to Agent Orange. But because those claimed injuries did not become manifest until after the Agent Orange settlement fund had been depleted, they claimed they were not bound by the settlement. The district court disagreed and dismissed the case, but the Second Circuit reversed, holding that those plaintiffs could not have been adequately represented in the earlier class action and thus could not, consistent with their constitutional due process rights, be bound by the settlement.[4]

Nevertheless, those plaintiffs eventually suffered the same fate as the opt-outs, a summary judgment dismissal of their claims. This time, the district court and Second Circuit based their rulings solely on the "military contractor defense."[5] That defense shields military contractors that supply goods or materials to the U.S. government, where:

(1) the government issues or approves reasonably precise specifications for the product;

(2) the product conforms to these specifications; and

(3) the supplier warns the government about any risks pertaining to the product that are not already known to the government.

## Federal Common Law

Significantly, the military contractor defense has never been enacted by any legislature, be it federal or state. It is entirely the product of judge-made federal common law, as developed by the U.S. Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

The phrase "federal common law" ought to trigger memories buried in the deep recesses of our minds of what we once learned in law school civil procedure class called the "*Erie* Doctrine." In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that federal courts lacked the power to create general common law. Writing for the court, Justice Louis Brandeis held that federal courts' creation of common law in fields of general jurisprudence constitutes an unconstitutional assumption of power that is reserved to the states. *Erie* and its progeny have also been recognized as standing for the proposition that, even in areas within the constitutional competence of the federal government, the creation of federal common law by federal courts violates the separation of powers embodied in the Constitution.[6] The creation of law is deemed to be outside the expertise of federal courts insofar as they are insulated from the political processes and unexposed to the competing policy debates that are essential to determining the content of law in a representative democracy.

Five years after *Erie*, in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), the Court limited *Erie's* holding by recognizing the right of federal courts to create federal common law in specific areas where a strong federal interest is at stake. Specifically, the interest at stake in *Clearfield Trust* involved the obligations of the federal government with respect to its commercial paper. That interest permitted the Court to apply a rule of law different from the state law that would otherwise apply. A cynical view of *Clearfield Trust* is that the federal government was able to effect a favorable change in the law that would otherwise apply to it in federal court—a truly significant home court advantage.

The limitation on *Erie* pronounced in *Clearfield Trust* was modified over time. Merely because a federal interest is present in a lawsuit, and thus the application of federal common law can be justified, does not mean that the federal common law should be created from scratch and displace existing state law. For instance, in *United States v. Kimbell Foods Inc.*, 440 U.S. 715 (1979), the Court held that while strong federal interests were at stake in cases involving the federal government's rights as

**Anthony DiSarro** *is a partner at Winston & Strawn specializing in complex litigation and an adjunct professor at New York Law School teaching on federal courts.*

a creditor vis-à-vis other creditors, federal common law would simply incorporate existing state law for its content. It is only where a federal interest is at stake, and the operation of state law would significantly conflict with the federal interest, then federal common law will be created and displace or pre-empt state law, in whole or in part.[7] *Boyle* was deemed to be such a case.

## The 'Boyle' Decision

*Boyle* involved state tort claims by the parents of a deceased Marine against a military contractor for injuries sustained in a military helicopter that was allegedly defectively designed. The court held that the strong federal interest in procuring military equipment was implicated by state tort lawsuits against government contractors. According to the majority, the military contractor's exposure to potential liability could cause it to refuse to supply needed product to the government or to supply it only at a higher cost that included a provision for contingent liabilities. Because this would significantly affect the federal interest, the court ruled that state tort law should be displaced by a common-law military contractor defense.[8]

Interestingly, majority opinion in the *Boyle* decision was authored by Justice Antonin Scalia, and joined in by Justices William Rehnquist, Byron White, Sandra Day O'Connor and Anthony Kennedy, some of the very jurists who are often referred to as models of judicial restraint who eschew the practice of "legislating from the bench." In contrast, the dissents in *Boyle* were written or joined in by Justices William Brennan, Thurgood Marshall, Harry Blackman and John Paul Stevens—frequently hailed as poster boys of judicial activism. Essentially, the dissenters argued that Congress, not the court, should be called upon to balance the conflicting policy interests attendant to the military procurement context.[9]

## 'Boyle' and 'Agent Orange'

All irony aside, *Boyle* is the law of the land and the Second Circuit was obviously obligated to consider it in *Agent Orange*. However, by relying on this defense as the sole basis for affirming a grant of summary judgment, the Second Circuit ended up in the *Agent Orange* saga in a place far different from where it began.

The earliest *Agent Orange* cases did not assert state law tort claims, they requested the application of a federal common-law cause of action. The district court agreed that federal common law should govern the plaintiffs' claims, but the Second Circuit reversed.[10] It acknowledged that there were federal interests at stake but held that they were not "monothetic." That is, there were two federal interests at stake that conflicted with each other: the federal interest in the health and welfare of its military veterans and the interest in shielding suppliers from liability that would affect the government's ability to procure materials. Because these interests were in sharp conflict, the court concluded that federal common law should not apply to the dispute:

> [B]efore federal common-law rules should be fashioned, the use of state law must prove a threat to an "identifiable" federal policy. In the present litigation, the federal policy is not yet identifiable. 635 F.2d at 995.

Now the Second Circuit believes that a federal policy is identifiable: protecting military suppliers from state tort law liability. The court did not explain what happened to the other federal interest that was identified by the earlier Second Circuit panel, and made no attempt to even address that decision. Class members looking at the entirety of the Second Circuit's rulings in *Agent Orange* thus receive this message: While there is no federal interest in providing a cause of action that can be used by you, there is a federal interest in providing a defense that can be used against you. This observation must be extremely disturbing to veterans who once sacrificed everything in service of what was once a federal interest.

*It is only when a federal interest is at stake and the operation of state law would significantly conflict with the federal interest that federal common law will be created and displace or pre-empt state law, in whole or in part. 'Boyle' was deemed to be such a case.*

One could argue that the three-part test of *Boyle* does represent an attempt to reconcile the two competing federal interests, but the problem remains that the balance is being struck by unelected judges, who are not accountable to voters and are not accessible to interest groups. Judges have no constituents and their chambers are not open to lobbyists.

Curiously, the Second Circuit intimated that the military contractor defense is grounded in separation of power principles since it prevents "judicial second-guessing" of the government's military equipment decisions. *Agent Orange*, 818 F.2d at 190-91; see also *Agent Orange*, 304 F.Supp.2d at 439. Yet, the defense is the product of a different type of guesswork: Courts are guessing as to how legislators would balance the competing interests of protecting military service personnel and military suppliers. In this regard, the defense is more appropriately viewed as being in derogation of constitutional separation of powers constraints.

In the district court's ruling, Judge Jack B. Weinstein remarked that district courts applying *Boyle* "need to bear in mind that the legislature can step into the breach and provide compensation should the contractor defense block a private action." *Agent Orange*, 304 F.Supp.2d at 438. In other words, Congress can review particular applications of *Boyle* on a case-by- case basis and make adjustments, where appropriate. This, of course, is true, but the process would seem to be backwards. Is it not Congress' role to enact rules of general application and the role of courts to make case-by-case adjustments, where appropriate?

Moreover, the *Boyle* defense continues to expand. Recently, the Second Circuit indicated that it was prepared to extend the defense to nonmilitary contexts. The defense was raised in *In re World Trade Center Disaster Site Litigation*, 521 F.3d 169 (2d Cir. March 26, 2008), involving health claims by construction workers, policemen and firefighters involved in the clean-up following the Sept. 11 terrorist attacks. The defendants, the city of New York, Port Authority and various municipal contractors, are claiming that their actions are protected under *Boyle* because they were directed by federal entities such as the Army Corps of Engineers and the Environmental Protection Agency. The Second Circuit, now referring to the doctrine as "the government contactor" defense, stated that the "rationale" for the defense is equally applicable to "the disaster relief contest due to the unique federal interest in coordinating federal disaster assistance and streamlining the management of large-scale disaster projects." Slip Op. at 48.

## Conclusion

Before this judge-made doctrine is expanded to other arenas, it is time for Congress to intervene and either codify a defense for government contractors or abrogate it. Only Congress is positioned to assess and weigh the competing interests at stake in protecting those who are harmed in the course of serving the public interest and those who supply goods and services that are essential to that function. Congress should not abdicate its constitutional responsibilities here and rely upon the federal courts to perform this function.

1. *In re Agent Orange Prod. Liab. Lit.*, 517 F.3d 76 (2d Cir. Feb. 22, 2008).
2. *In re Agent Orange Prod. Liab. Lit.*, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).
3. *In re Agent Orange*, 611 F.Supp. 1223 (E.D.N.Y. 1985) (Weinstein, J.), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988).
4. *Stephenson v. Dow Chemical Co.* 273 F.3d 249, 261 (2d Cir. 2001), aff'd in part, 539 U.S. 111 (2003).
5. *In re Agent Orange Prod. Liab. Lit.*, 517 F.3d 76 (2d Cir. 2008).
6. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981) (*Erie's* limitation on the lawmaking power of federal courts is based on separation of powers, as well as federalism, concerns); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95 (1981) (the federal lawmaking power is vested in the legislative, not the judicial, branch of the government.")
7. *Empire Healthcare Assur. Inc. v. McVeigh*, 547 U.S. 677, 690-92 (2006).
8. 487 U.S. at 511-12.
9. Id. at 531 (Brennan, J., dissenting); id at 532 (Stevens, J., dissenting).
10. *In re Agent Orange*, 635 F. 2d 987 (2d Cir. 1980).