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Strictly Speaking

The Newsletter of the Product Liability Committee

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Leadership Note

From the Chair

by Anne M. Talcott

The Product Liability Committee is hard at work finalizing the program for the 2017 Product Liability Conference, scheduled for **February 7-10**, at The Cosmopolitan Hotel in Las Vegas, Nevada. Program Chair, Gretchen Miller of Greenberg Traurig, in Chicago and Vice Chair Rob Shields of Wilson Turner, in San Diego, have put together an amazing Conference. Main stage speakers include **Dean Erwin Chemerinsky**, one of the most dynamic and prolific legal scholars of our time, **Anton Valukus**, author of the GM Valukas Report, Chevron in-house counsel **Jose Martin,** who will discuss the Ecuadorian environmental litigation referred to as the "legal fraud of the century" by the Wall Street Journal, and former NCAA counsel **LaKeisha Marsh** who will discuss sports concussion litigation.

Other topics include jury selection for a catastrophic case (utilizing live mock jurors for the demonstration), defending labeling claims, silent recalls/ product improvements, and a technology focused trio of quick hits topics. Five in-house lawyers will present on the main stage and many more will speak to smaller audiences at break-out sessions held by our 18 industry focused specialized litigation groups (SLGs").

The 2017 conference will offer many opportunities to network with colleagues and clients, including a ticketed networking party, SLG lunches and dinners and nightly receptions. Plan to stay through Friday afternoon if your calendar permits because eight SLGs will hold their break-outs that day and we will finish the Conference with a final networking event Friday afternoon. Keep an eye out for more information about the Conference in the coming months.

Now is a great time to get involved with the Product Liability Committee as we appoint marketing chairs for each SLG and prepare for many Steering Committee members to roll off in October. Please reach out to me if you are interested in getting involved.

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Featured Article

Defending the Defense

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Committee Leadership

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by Jessica M. Kennedy

The defense contracting industry is slated to grow by roughly 3% in 2016, and with a spending budget estimated at over $600 billion, that 3% is significant. Of course, whoever moves into 1600 Pennsylvania Ave., later this year may play a role in causing that number to fluctuate one way or the other. Regardless, it is well settled that the defense industry is enormous. With the increase in outsourcing, and the downsizing of both active duty and reserve troops, many agree military contracting has become the juggernaut that keeps the world's most powerful army primed and ready. With such vast funding, nationwide prevalence and inherently dangerous work, how do military contractors avoid the onslaught of personal injury and products liability lawsuits that plague other industries? Well, defending the defense industry has some unique and beneficial challenges primed at reconciling the application of a body of law drafted during peacetime, to torts that occur during a distinctively different time, war.

Political Question

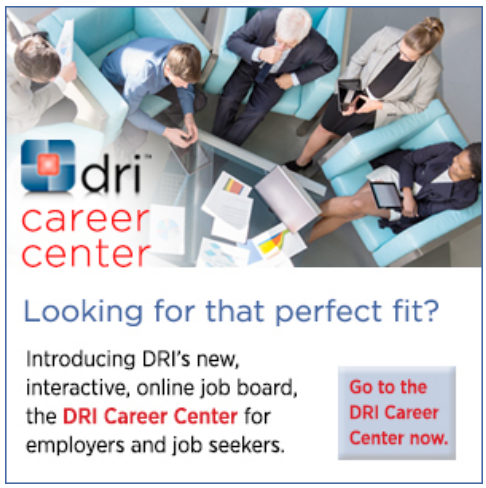
"[M]ost military decisions lie solely within the purview of the executive branch."[1] That is where the first and primary defense for contractors should begin; however, acting under orders of the military does not, in and of itself, insulate the claim from judicial review.[2] Consequently, although lawsuits involving military contractors often fall to a political question challenge, courts still review cases under the six-factor analysis discussed in *Baker v. Carr*.[3]

Pursuant to *Baker*, cases involving political questions must exhibit (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) "a lack of judicially discoverable and manageable standards for resolving" the issue, (3) "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion," (4) "the impossibility of a court's undertaking independent resolution [of the issue] without expressing lack of the respect due coordinate branches of government," (5) an "unusual need for unquestioning adherence to a political decision already made," or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[4] Applying these factors, many lawsuits are extinguished at the outset.

Following *Baker*, courts have adapted and altered its six-factor test depending on the factual situation presented. The most prevalent variation has been the *Taylor* test to come out of *Taylor v. Kellogg Brown & Root Servs*.[5] In *Taylor*, the Court adapted *Baker* to the government contractor context through a new two-factor test. Under the *Taylor* test, the first consideration is "the extent to which [the government contractor] was under the military's control."[6] And the second factor was "whether national defense interests were closely intertwined with the military's decisions governing [the government contractor's] conduct."[7] Pursuant to the second factor, the political question doctrine renders a claim nonjusticiable if deciding the issue "would require the judiciary to question actual, sensitive judgments made by the military," which can occur even if the government contractor is "nearly insulated from direct military control."[8] In determining the application of the political question doctrine in lawsuits initiated by soldiers against military contractors, courts have examined whether "military decision making or policy would be a necessary inquiry, inseparable from the claims asserted" by the soldier plaintiff.[9] Alternatively, courts ask whether the authority of the executive branch be separated from the pending claims? The courts have dictated to "look beyond the complaint, [and] consider how [the Service members] might prove [their] claim[s] and how [the contractor] would defend."[10] As examined in more detail below in relation to the *Boyle* case, the underlining methodology, approach or product design is often times governed by a policy or decision of the Department of Defense, an arm of the executive branch. Therefore, that methodology, approach or product design is immune to inquiry from the courts.

Numerous jurisdictions have now adopted variations of the "military contractor's defense". To be able to assert this defense, an independent contractor affirmatively must show that the decision to confront or create a known material risk essentially was made by the military.[11] As a corollary, the contractor must show compliance with the specifications material to the dispute at bar that were precisely prescribed and required by a contract between it and the government.[12] If the specifications are not precise and leave the contractor with substantial discretion, then the contractor must shoulder strict liability to the extent its exercise of that discretion has caused an injury.[13] Stated another

Upcoming Seminar



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way, the contractor's burden is two-fold, it must affirmatively prove: (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.[14]

Federal Preemption and Sovereign Immunity

Generally speaking, the United States is immune from suit unless it waives that immunity. The Federal Tort Claims Act ("FTCA"),[15] is one of those instances of waiver, however that waiver is subject to certain exceptions.[16] One of these exceptions is the "discretionary function exception", which renders the government immune from any claim based upon the exercise or performance of a duty, or conversely, the failure to exercise a duty, of a federal agency or an employee of the Government.[17] A discretionary function is one that involves an element of judgment or choice.[18] In the same vein, there is a specific exception under the Federal Tort Claims Act, insulating the United States from any claim arising out of the combatant activities of the military, naval forces or the Coast Guard, during time of war.[19] However, The Federal Tort Claims Act excludes independent contractors from its scope.[20] Specifically, the statute does not include government contractors in its definition of "federal agency" or "employee of the government."[21] Nonetheless, a government contractor can fall under the umbrella of the Federal Tort Claims Act and thus, not subject to suit if: (1) the government authorized the contractor's actions; and (2) the government validly conferred that authorization to the contractor, meaning it acted within its constitutional power.[22] Under this two-pronged exception, contractors acting within the scope of their employment for the United States have derivative sovereign immunity.[23]

In *Feres v. United States*[24] the Supreme Court held that the FTCA, did not waive the government's sovereign immunity with respect to "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[25] The Supreme Court carried its *Feres* decision one step further in *Stencel Aero Engineering Corp. v. United States*.[26] In that case, a National Guardsman sued the manufacturer of a faulty ejection system for injuries sustained when the egress life-support system of his fighter aircraft malfunctioned during a midair emergency.[27] The manufacturer in response filed a third-party claim against the United States.[28] The sole issue before the Supreme Court was whether the FTCA waived the government's immunity from suit by a manufacturer seeking indemnity for any damages it may be required to pay to a National Guardsman for service-related injuries.[29] The Supreme Court began its consideration of this question by reviewing its holding in *Feres*. The Court found that its *Feres* decision was based on essentially three factors: (1) the distinctive federal character of the relationship between the government and members of the armed services, (2) the availability of "generous pensions to injured servicemen" through the Veterans' Benefits Act, and (3) the effect that a suit by a member of the armed services against the government would have on discipline.[30] The *Stencel* Court addressed the first factor, stating that litigation spawned by the indemnity claim would take virtually the identical form as that of litigation on a primary claim directed against the government.[31] "The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's' decisions and actions."[32] Thus, because the considerations underlying the *Feres* decision were largely applicable to indemnity actions as well, the Supreme Court held that the right of a third party to recover in an indemnity action against the United States was limited "by the rationale of *Feres*."[33] Since *Stencel*, it has become clear that the first factor described above is the principal justification for the *Feres-Stencel* doctrine.[34] For example, in *United States v. Shearer*,[35] the Supreme Court stated explicitly that the other factors mentioned in the *Feres* and *Stencel* decisions were "no longer controlling".[36]

Ten years after the *Stencel* decision, courts began refining the scope of the preemption of law suits applicable to military contractor in the Supreme Court's decision of *Boyle v. United Technologies Corp*., holding that the federal interests inherent in combatant activities conflict with, and consequently can preempt, tort suits against government contractors when the suits arise out of combatant activities.[37] *Boyle* was brought by the father of a Marine helicopter pilot, David Boyle, who died after the helicopter he was piloting crashed in the ocean.[38] The plaintiff alleged that rather than dying on impact, Boyle drowned because he was unable to extricate himself from the helicopter.[39] A lawsuit was filed against the manufacturer of the helicopter alleging a negligent design of the

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helicopter door, which opened to the inside rather than the outside.[40] The plaintiff also argued the design of the escape hatch handle was negligent, alleging it was "obstructed by other equipment."[41] With state law design and manufacturing claims found as the basis for the action, the Court examined the scope of the preemption of the Federal Tort Claims Act. Specifically, the Court focused on the unique implication of the Government's role in the design of the helicopter and related standards, and the related "judgment as to balancing… [the] technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness."[42] As a result, the Supreme Court established a new test to delineate and narrow the immunity of the contractor to instances where the government was intricately intertwined in the exercise of discretion over the specifications and design of the product.[43] This new test provides immunity where the following three criteria are met: (1) the Government must have "approved reasonably precise specifications"; (2) the equipment or produce must have "conformed to those specifications"; and (3) the manufacturer and/or supplier must have "warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[44]

The Distinction Between Sovereign Immunity and Separation of Powers

Where this may sound like an "ends justifying the means" approach, it is important to note in some jurisdictions the basis for the "contractor's defense" is rooted in either a sovereign immunity argument, separation of powers, or a nexus of both. The concept of derivative sovereign immunity stems from the Supreme Court's decision in *Yearsley v. W.A. Ross Construction Co*.[45] In that case, the Supreme Court considered whether a private contractor could be held liable for damage resulting from a construction project that Congress authorized.[46] The contractor, at the request of the government, built dikes in the Missouri River and accidentally washed away part of petitioners' land.[47] The injured landowners sued the contractors, claiming that they had executed a taking of their property without just compensation.[48] The Supreme Court explained that

> [i]t is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will. Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.[49]

In other words, under *Yearsley*, a government contractor is not subject to suit if (1) the government authorized the contractor's actions and (2) the government "validly conferred" that authorization, meaning it acted within its constitutional power.[50] Applying this test, the Supreme Court determined that the contractors were not liable for damaging the plaintiffs' land because they acted pursuant to Congress's valid authorization.[51] Although *Yearsley* does not explicitly mention sovereign immunity, numerous courts have reached the conclusion that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity, and cite *Yearsley* as support.[52]

Conversely, some courts have held that doctrine of sovereign immunity is not the appropriate grounds in which to find a contractor exempt from liability.[53] In *Dorse v. Armstrong World Indus., Inc*., the court addressed this issue head-on stating, "[w]e do not find, as some courts have suggested, that this defense arises from the doctrine of sovereign immunity. To the contrary, an entity or business acting as an independent contractor of the government, and not as a true agent, logically cannot share in the full panorama of the government's immunity."[54] The rationale in *Dorse* was rooted in under Florida law, an independent contractor remains liable to his own workers, his principal or third parties for injuries caused by inherently dangerous or latent conditions primarily within the contractor's power to control or avoid, whether or not the principal can be sued and whether or not the principal has accepted the services or goods in question.[55] Therefore, injuries caused by means the contractor himself freely chooses to employ or not to employ, such as a failure to provide adequate

warnings or safety equipment where the contract itself is silent on these issues, are the responsibility of the contractor and not escape liability merely because his principal, for whatever reason, cannot be sued.[56] Courts aligned with *Dorse* acknowledge the contractor's defense under the separation of powers doctrine, because "litigation involving defective designs in military products would take the identical form regardless of whether the named defendant happens to be the government or the military contractor. In either case, members of the armed services would be allowed to question military decisions and obtain relief from actions of military officials."[57]

Military Contractors versus General Government Contractors

It should also be noted that when considering the scope of the "military contractor's defense", some courts have held that it is specific to military contractors, while others have extended the immunity to all government contractors.[58] Many courts that have concluded that the contractor defense is limited to military contracts and have drawn a distinction between the governmental interest at issue in the context of military weapons and the governmental interest that is generally at issue in all government contracts.[59] This rationale hinges on concerns of impinging military's decision-making processes that are not present in contracts for the purchase of products readily available on the commercial market.[60] The Ninth Circuit, in particular, has taken a very narrow view of the *Boyle* opinion, referring to the doctrine *Boyle* espoused as the "military contractor defense" and holding that it does not apply even to contracts with military agencies if the products involved are readily available on the commercial market.[61] However, as pointed out by United States District Judge in the Western District of Oklahoma, the nature of the underlying test adopted in *Boyle* for determining whether a "significant conflict" exists between state law and the federal procurement interest inherently contradicts the suggestion that the defense is available only to military contractors.[62] The *Boyle* court explicitly concluded that the contractor defense was not grounded in the *Feres*[63] doctrine, which limits liability for injuries to military personnel.[64] Rather, the defense arises within the context of the discretionary function exception to the Federal Tort Claims Act, Title 28 U.S.C. § 1346(b). [65] This exception is not limited to claims arising as a result of actions by the military, but applies to any actions requiring the exercise of discretion by "a federal agency or an employee of the Government."[66] In fact, the discretionary function exception has been applied directly in cases involving decisions by Postal Service authorities.[67] Nevertheless, before seeking to apply the contractor's defense to a general contractor of the government, a diligent search of presiding law specific to that jurisdiction is warranted.

Additional Policy Considerations

The "contractor's defense" in whatever form it takes within a specific jurisdiction has been a largely judicially created proposition.[68] The policy considerations are ever evolving, but seemingly most cited are those addressed in *Feres* and *Stencel*, litigation involving defective designs in military products would take the identical form regardless of whether the named defendant happens to be the government or the military contractor.[69] In either case, members of the armed services would be allowed to question military decisions and obtain relief from actions of military officials.[70] Moreover, civilian courts would be compelled to second-guess professional military judgment concerning, at least, the proper equipping of the armed services.[71]

Additionally, holding military contractors liable for defective designs supplied by the government would circumvent the government's immunity, "[d]espite the government's immunity, [military suppliers] would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales."[72] Another concern is the pressing nature in which contractors operate. Military contractors are often unable through negotiation to alter the design specifications of their military products because of military efforts in certain contexts to push technology to the limits even if to do so would incur risks beyond those that would ordinarily be acceptable for consumer goods.[73] Without the government contractor defense, military contractors would be discouraged from bidding on essential military projects.[74] And, if a contractor were compelled by federal law to manufacture the product, the contractor would "face the untenable position of choosing between severe penalties for failing to supply products necessary to conduct a war, and producing what the government requires but at a contract price that makes no provision for the need to insure against potential liability for design flaws in the government's

plans."[75]

Lastly, by conditioning the application of the government contractor defense on full disclosure to the government of all known risks, military contractors would have an incentive to work closely with military authorities in the development and testing of equipment.[76] As a result, military procurement decisions would be made based on all readily available information.[77]

Lack of Personal Jurisdiction and Forum Non Covens

Establishing a forum for claims brought against defense contractors, arising out of instances that took place overseas, is an uphill battle. On the heels of the Supreme Court's opinion in *Daimler A.G v. Bauman*, it is clear that creating a general or "all purpose" jurisdiction in a particular state for the purposes of litigation is not easily achieved. Under *Bauman*, absent exceptional circumstances, a corporation is at home only (1) where it is incorporated and (2) where it has its principal place of business.[78] The contractor's affiliations with the state must be "so continuous and systematic as to render [it] essentially at home" in that state.[79] Moreover, establishing specific jurisdiction is rarely attainable when the actions giving rise to the cause of action often times occur in a foreign country.

Similarly, considerations regarding the convenience of the forum to the Defendant must be explored. Often potential witnesses, evidence and records may be dispersed across the country. However, should the contractor be headquartered in a jurisdiction that is both more convenient for litigation support, beneficial in law and favorable for a potential jury pool, removing the case to that forum can be a strategic win for the defendant. In any event, pursuing a claim in an alternate state from which the retained plaintiff's attorney resides presents a number of challenges that puts the company at a more favorable position for settlement or dismissal entirely.[80]

Conclusion

In the words of Dwight D Eisenhower, " when you put on a uniform, there are certain inhibitions that you accept." Similarly, when performing work for the U.S. military there are some profound considerations to consider when thinking of tort law. The immense importance of public safety, national security and prolonged peace must be weighed accordingly. As the defense budget grows, and outsourcing continues, there is no doubt that the number of suits filed against defense contractors will grow. However, with the aforementioned considerations, defending the defense industry becomes a battle more easily won.

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[1] *Taylor v. Kellogg Brown & Root Servs*., 658 F.3d 402, 407 n.9 (4th Cir. 2011); *Metzgar v. KBR, Inc.* (*In re KBR, Inc.*), 744 F.3d 326, 331 (4th Cir. 2014).

[2] *Taylor*, 658 F.3d at 411.

[3] 369 U.S. 186, 217(1962).

[4] *Id*.

[5] 658 F.3d 402 (4th Cir. 2011). In *Taylor*, the court affirmed the district court's decision to dismiss the case pursuant to the political question doctrine. *Taylor v. Kellogg Brown & Root Servs*., 658 F.3d 402, 412 (4th Cir. 2011). A Marine, Peter Taylor, was electrocuted and suffered severe injuries when the government contractor's employee turned on a generator at a military base in Iraq despite Marine Corps' instructions not to do so. *Id.* at 404. When considering the first factor, the Court held that the government contractor was not under the military's control because its contract specified that "the contractor shall have exclusive supervisory authority and responsibility over employees." *Id*. at 411 (internal quotation marks omitted). However, when considering the second *Taylor* factor, the Court explained that assessing the government contractor's contributory negligence defense would require it to evaluate Taylor's conduct and certain military decisions, such as the military's choice to employ a generator. *Id*. at 411-12. The Court therefore determined that "an analysis of [the contractor's] contributory negligence defense would 'invariably require the Court to decide whether . . . the Marines made a reasonable decision.'" Id. at 411 (second alteration in original)

(quoting *Taylor*, 2010 U.S. Dist. LEXIS 50610, at *6 (E.D. Va. Apr. 19, 2010)). Accordingly, based on the second factor alone, this Court opted to affirm the district court's decision to dismiss the case. *Id*. at 412. The Court's analysis suggests that, if a case satisfies either factor, it is nonjusticiable under the political question doctrine.

[6] 658 F.3d at 411.

[7] *Id*.

[8] *Id*. (*quoting Taylor v. Kellogg Brown & Root Servs., Inc.*, No. 2:09cv341, 2010 U.S. Dist. LEXIS 50610, at *5.

[9] *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (concluding that courts should "hesitate long before entertaining a suit which asks the court to tamper with the ...necessarily unique structure of the Military Establishment").

[10] *Metzgar v. KBR, Inc.* (*In re KBR, Inc.*), 744 F.3d 326, 334-35 (4th Cir. 2014) Id. at 409 (first and second alterations in original) (quoting *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008)) (internal quotation marks omitted).

[11] *Dorse v. Armstrong World Indus., Inc*., 513 So. 2d 1265, 1269 (Fla. 1987) (*quoting Shaw v. Grumman Aerospace Corp*., 778 F.2d 736, 745 (11th Cir. 1985))

[12] *Id.*

[13] *Id.*

[14] *Shaw*, 778 F.2d 740.

[15] 28 U.S.C.S. § 2674

[16] 28 U.S.C.S. § 2680.

[17] § 2680(a).

[18] *In re KBR, Inc*., 744 F.3d at 331.

[19] 28 U.S.C.S. § 2680; *In re KBR, Inc.*, 744 F.3d at 331.

[20] 28 U.S.C.S. § 2671.

[21] *Id.*

[22] *In re KBR, Inc.*, 744 F.3d at 342 (quoting *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940)).

[23] *Id*., at 331.

[24] 340 U.S. 135 (1950).

[25] *Id*. at 146.

[26] 431 U.S. 666 (1977).

[27] *Id.* at 667.

[28] *Id.*at 667-8.

[29] *Id.*

[30] *Id.* at 671.

[31] Id. at 673-4.

[32] Id. at 671.

[33] Id. at 674.

[34] *Bynum v. FMC Corp*., 770 F.2d 556, 562 (5th Cir. 1985).

[35] 473 U.S. 52 (1985).

[36]*Id.* at 58 n.4.

[37] 487 U.S. 500 (1987); *See also* Harris, 724 F.3d 458; Saleh, 580 F.3d 1, 388 U.S. App. D.C. 114; *Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992); *Miller v. Raytheon Aircraft Co*., 229 S.W.3d 358 (Tex. App.–Houston [1st Dist.] 2007, no pet.).

[38]*Boyle*, 487 U.S. at 502.

[39] *Id.*

[40] *Id.* at 503.

[41] *Id.*

[42] *Id.* at 511.

[43] *Id*. at 512.

[44] *Id.*

[45] 309 U.S. 18 (1940).

[46] *Id.* at 19-20.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 20-21 (citations omitted).

[50] *Id.*;*In re KBR, Inc.*, 744 F.3d 343.

[51]*Yearsley*, 309 U.S.at 21-22.

[52] *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (holding that agents of a foreign sovereign employer enjoy derivative immunity under the Foreign Sovereign Immunities Act, 28 U.S.C.S. §§ 1602-1611,); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 206-07 (5th Cir. 2009) (determining that the district court correctly dismissed claims against a contractor when the plaintiff did not allege that the contractor exceeded its authority or that Congress did not validly confer such authority); *McMahon v. Presidential Airways, Inc*., 502 F.3d 1331, 1343 (11th Cir. 2007) (acknowledging the existence of derivative sovereign immunity and its origin in *Yearsley*); *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) (applying *Yearsley* and concluding that contractor was not liable for work it performed pursuant to a federal contract); *McKay v. Rockwell Int'l Corp* ., 704 F.2d 444, 448 (9th Cir. 1983).

[53] *Dorse v. Armstrong World Indus., Inc*., 513 So. 2d 1268 (Fla. 1987); *Shaw v. Grumman Aerospace Corp*., 778 F.2d 736, 740 (11th Cir. 1985) ("The military contractor defense is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with sovereign immunity, but because traditional separation of powers doctrine compels the defense"); *Bynum v. FMC Corp*., 770 F.2d 556, 564 5th Cir. 1985) ("The problem with applying the *Yearsley* defense in the context of the military contractor is the apparent requirement that the contractor possess an actual agency relationship with the government.); *Whitaker v. Harvell-Kilgore Corp*., 418 F.2d 1010, 1013-1015 (5th Cir.1969), (holding that manufacturers of grenades and fuses made according to government specifications, although having close contractual ties with the government, ultimately were independent contractors. "The difficulty of establishing a traditional agency relationship with the government makes the derivative sovereign immunity defense ill-suited to many manufacturers of military equipment.")

[54] *Dorse*, 513 So. 2d. at 1268.

[55] *See Slavin v. Kay*, 108 So.2d 462 (Fla. 1958); *Carter v. Livesay Window Co*., 73 So.2d 411 (Fla. 1954); *Mumby, Stockton & Knight v. Bowden & Rosenthal*, 25 Fla. 454, 6 So. 453 (1889); *Florida Freight Terminals, Inc. v. Cabanas*, 354 So.2d 1222 (Fla. 3d DCA 1978); *Simmons v. Owens*, 363 So.2d 142 (Fla. 1st DCA 1978).

[56] *Dorse*, 513 so. 2d. at 1268.

[57] *Bynum,* 770 F.2d at 565 ("In our view, the most important of these is that a trial between a serviceman and a military contractor in which government specifications are at issue would inevitably implicate the same concerns that underlie the Supreme Court's *Feres* and *Stencel* decisions.")

[58] The following cases have held that the government contractor defense is available to all government contractors: *Herrod v. Metal Powder Prods*., 886 F. Supp. 2d 1271, 1278 (D. Utah 2012); *Andrew v. Unisys Corp.*, 936 F. Supp. 821, 828 n.4 (W.D. Okla. 1996); *Carley v. Wheeled Coach*, 28 V.I. 310, 991 F.2d 1117 (3d Cir. 1993); *Boruski v. United States*, 803 F.2d 1421, 1430 (7th Cir. 1986); *Burgess v. Colorado Serum Co*., 772 F.2d 844, 846 (11th Cir. 1985); *Johnson v. Grumman Corp*., 806 F. Supp. 212 (W. D. Wis. 1992); *Price v. Tempo, Inc*., 603 F. Supp. 1359, 1361-62 n. 3 (E.D. Pa. 1985); *McDermott v. TENDUN Constructors*, 211 N.J. Super. 196, 511 A.2d 690, 696 (App. Div.), *cert. denied*, 107 N.J. 43, 526 A.2d 134 (1986). The following cases have held that the government contractor defense is available only to military contractors: *In Re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 810-12 (9th Cir. 1992); *Nielsen v. George Diamond Vogel Paint Co*., 892 F.2d 1450, 1452-55 (9th Cir. 1990); *In re Chateaugay Corp.*, 146 Bankr. 339, 348-51 (S. D. N. Y. 1992); *Johnston v. United States*, 568 F. Supp. 351, 356-58 (D. Kan. 1983); *Jenkins v. Whittaker Corp*., 551 F. Supp. 110, 114 (D. Haw. 1982); *Pietz v. Orthopedic Equipment Co*., 562 So. 2d 152, 155(Ala. 1989); *cert. denied*, 498 U.S. 823, 112 L. Ed. 2d 48, 111 S. Ct. 75 (1989); *Dorse v. Armstrong World Industries, Inc*., 513 So. 2d 1265, 1269 (Fla. 1987); *Reynolds v. Penn Metal Fabricators, Inc*., 146 Misc. 2d 414, 550 N.Y.S.2d 811, 812 (N.Y. Sup. Ct. 1990); *In Re New York City Asbestos Litigation*, 144 Misc. 2d 42, 542 N.Y.S.2d 118, 121 (N.Y. Sup. Ct. 1999); *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990).

[59] *See, e.g. In Re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 810-12 (9th Cir. 1992); *In re Chateaugay Corp*., 146 Bankr. 339, 348-51 (S. D. N. Y. 1992).

[60] *Andrew v. Unisys Corp*., 936 F. Supp. 821, 829 (W.D. Okla. 1996)

[61] *Hawaii Federal Asbestos Cases*, 960 F.2d 806, 810-812; *Nielsen*, 892 F.2d at 1452-55.

[62] *Andrew*, 936 F. Supp. 830.

[63] *Feres v. United States*, 340 U.S. 135 (1950).

[64] *Boyle*, 488 U.S. at 510.

[65] *Boyle*, 487 U.S. at 511.

[66] 28 U.S.C. § 2680(a).

[67] *See, e.g., Fazi v. United States*, 935 F.2d 535 (2d Cir. 1991); *Jurzec v. American Motors*, 856 F.2d 1116 (8th Cir. 1988); *Ford v. American Motors*, 770 F.2d 465 (5th Cir. 1985).

[68] *Johnston v. United States*, 568 F. Supp. 351, 353 (D. Kan. 1983); *Bynum*, 770 F.2d at 565.

[69] *Feres*, 340 U.S. at 146; *Stencel,* 431 U.S.at.671; *Bynum,* 770 F.2d at 565.

[70] *Id*.

[71] *Id*.

[72] *McKay*, 704 F.2d at 449; see also *In re Air Crash Disaster at Mannheim Germany*, 769 F.2d 115 (3d Cir. 1985); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 793-94 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980); *Note, McKay v. Rockwell International Corp*.: No Compulsion Required for Government Contractor Defense, 28 St. Louis U.L.J. 1061, 1073 (1984)

[73] *Bynum*, 770 F.2d at 566.

[74] *Id.*

[75] In re "Agent Orange" Product Liability Litigation, 506 F. Supp. at 794. See also McKay, 704 F.2d at 450; Note, Government Contract Defense, supra note 8, at 192; *Bynum*, 770 F.2d at 566.

[76]*Tillett v. J.I. Case Co*., 756 F.2d 591, 597 (7th Cir. 1985); *McKay*, 704 F.2d at 450.

[77] *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir. 1985).

[78] 134 S. Ct. at 760.

[79] *Id.* at 761 (quotations omitted).

[80] ***Jones v. Raytheon Aircraft Servs.,*** 120 S.W.3d 40 (Tex. App.– San Antonio 2003, pet. denied)

Articles of Note

Combating the "Rambo" Litigator *Learn How to Defeat Lawyers Who Employ Dirty Litigation Tactics to Win at Any Cost*

by Brannon J. Arnold and Diane L. Rohrman

Introduction

All attorneys will experience the misfortune of dealing with difficult opposing counsel at some point in their career. Some of these difficult lawyers take it to another level. We call these lawyers "Rambo" litigators. Rambo litigators confuse adversarial with acrimonious. They use rudeness as a weapon and will violate rules of procedure and professionalism to gain a tactical advantage over their opponents. It is important to remember that you are under no obligation to respond to such provocation. You can still achieve your objectives with confidence, civility and professionalism. Herein, we identify the Rambo litigator's most common dirty tactics and provide you with the proper tools to disarm and defeat this difficult adversary.

Who is a "Rambo" Litigator ?

A Rambo litigator is an overly aggressive lawyer who uses intimidation and threat tactics in representing a client and who lacks courtesy and professionalism in dealing with other lawyers. Most people are familiar with John Rambo – a troubled war veteran and former U.S. Special Forces soldier played by Sylvester Stallone in a series of action movies – who was known for responding to provocation with overwhelming force.

Like the movie character, Rambo litigators take an overly aggressive approach to their practice. Often they use unethical or illegal tactics in hopes of gaining an advantage over opposing parties and counsel. There is no perfect solution to the problem of the difficult opponent, but it is helpful to first understand the type of litigator with whom you're dealing:

The Bully Lawyer

The bully lawyer is generally rude to anyone with whom he deals. He makes insults and personal attacks. He threatens you with motions, sanctions and more. At depositions, you cannot get a question in without a speaking objection. Bully lawyers can be particularly hard on less experienced attorneys or female or minority attorneys. The bully lawyer may be trying to size you up to see if and how far he can throw you off your game. Or he's trying to show off for his clients or make you look bad in front of yours.

The Unprepared Lawyer

The unprepared lawyer knows little about the case or the applicable law but blunders through and masks his ignorance with arrogance. He does not intend to be difficult, but is likely difficult or absent because of his or her unfamiliarity with the applicable law, or because he or she is concerned that the law does not favor his/her position.

The Obstructionist Lawyer

This lawyer is generally negative and will not agree to anything no matter how reasonable you try to be. He refuses to answer calls or correspondence and causes your case to drag on unnecessarily.

The Unhappy Lawyer

The unhappy lawyer is miserable practicing law and probably in other areas of his life too. This carries over into his dealings with other lawyers and people in general.

The Paper Tiger Lawyer

This lawyer prefers to hide behind emails and letters telling you how poor your case is and why you cannot win. He will file motion after motion over issues that could have been resolved with a simple phone call. This lawyer will not return your calls and then claim by letter or email that you do not respond promptly to him or her. If and when you finally get this lawyer on the phone or in person, he actually is not so bad to deal with. But then he will send you a letter completely contradicting what was just discussed.

Dirty Tactics to Watch Out For

Written discovery

A Rambo litigator abuses the discovery process by serving excessive discovery requests that are unduly burdensome and overly broad; failing to respond to discovery requests within required timeframes; or submitting inadequate responses. He serves discovery for the purpose of harassment. The Rambo litigator loves to fax discovery requests at 4:55 p.m. on a Friday or serve a motion after hours or during holidays.

Rambo lawyers may also refuse to give extensions when requested and move for sanctions if discovery responses are received a day late.

Inspections

A Rambo litigator may initially disguise his tactics by being extremely cooperative. For example, he tells you on the phone that you and/or your client's expert may inspect the product without him. WARNING: DON'T DO IT! He or she may later accuse you of tampering with evidence, taking evidence, or destroying evidence. Always video record inspections of evidence.

Depositions

A Rambo litigator will often unilaterally notice a deposition without clearing the

date with you and then refuse to reschedule. When defending a deposition, the Rambo litigator will make inappropriate or excessive speaking objections. He may attempt to "cue" his witness during deposition with verbal or non-verbal communication, lengthy objections or other impermissible actions.

When taking depositions, Rambo litigators often use a sarcastic tone or make argumentative or repetitive inquires. They try to rattle the witness to throw him or her off, leaving the witness vulnerable to attack. A Rambo litigator may question the witness's credibility or background to put him or her on edge.

Sound-bite questions are a popular tactic used in depositions of persons most knowledgeable within an organization. These kinds of questions are intended to elicit sound-bite responses that are really only marginally relevant but can leave a strong negative impression with the jury if they somehow get into evidence. The questioning attorney asks the witness a number of propositions which are very general and difficult for an unprepared witness to deny. The goal is to get this testimony on videotape and then show it to the jury, usually in opening statement. The argument that follows is that the defendant is negligent because it did not abide by the very statements it agreed were applicable, i.e., violated its own standard of care.

Motions to compel

Rambo litigators will threaten motions and sanctions at the drop of a hat. They misrepresent your statements and actions to the court so that by the time you ever get in front of the judge he doesn't know who to believe. The Rambo lawyer likes to use colorful words like "frivolous" and "illogical" and will accuse your client of obstructing justice, intentionally hiding documents or information and purposefully misleading the court.

Trial

Rambo litigators will do whatever it takes to win over a jury, including arguing outside the record and making up facts that help his or her case. They will push the limits and see how much and for how long they can get away with it.

More and more plaintiffs' lawyers, including Rambo litigators, are employing the Reptile theory at trial, hoping that jurors' primal instincts will override logic. Made popular by the book authored by David Ball and Don Keenan, "The Reptile" is a theory for trying plaintiffs' cases by portraying the defendant's conduct as a threat to jurors' own safety and the safety of others. Sound-bite snippets from the defendant's corporate representative are used to create feelings of fear or doubt which the plaintiff's attorney then capitalizes on by empowering the jury and giving them the chance to "protect" others from such "unsafe" conduct.

Weapons for Combat

Don't engage.

As tempting as it might be to fight fire with fire, it does you and your client little good to do so. If Rambo raises his voice, lower yours. If he interrupts you, let him finish before you begin speaking. If he never returns calls promptly, make sure you always do. If you respond to Rambo tactics with Rambo tactics, you let him dictate your litigation strategy and he wins. As litigators, we don't like losing. So remember that when you take the bait, you relinquish control of the situation to Rambo, whatever his or her motives might be. Respond in your own way; not anyone else's.

For example, do not respond to Rambo's discovery requests by issuing nearly identical discovery requests. Where does this get you? Not only do you stoop to Rambo's level, you risk credibility with the Judge. There are also ethical concerns in issuing discovery that you know is overly broad and unduly burdensome. Most states have a Rule 11 similar to the Federal Rules of Civil Procedure which provides in part that "[b]y presenting to the court a pleading, written motion, or other paper…an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief…it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation[.]" Fed. R. Civ. P. 11(b)(1). Do not put yourself at a risk for sanctions.

Keep calm and carry on.

Not only must you avoid engaging Rambo in his dirty tactics, you must also keep your composure when doing so. Many lawyers use Rambo tactics to distract, frustrate or anger their opposing counsel who then fail to uncover all relevant information. Never let your emotions take control. The Rambo lawyer will do his best to make you mad because when you're mad you make mistakes. Showing Rambo that he doesn't bother you is the best way to counter this tactic.

The hardest time to do this is during a deposition. If the Rambo litigator is bullying you or your witness, be civil but firm. Do not allow that lawyer's poor conduct to dictate how you handle the work you are there to do. Take a break if you need a few moments to collect yourself so you can avoid making a rash decision. Consider the pros and cons of whether to terminate the deposition. Will court be sympathetic to your position? Will terminating just give the Rambo lawyer another bite of the apple?

When all other tactics fail, you may have to call the court. Do not be afraid to do so, especially if you are right. A lawyer may be Rambo at a deposition in front of you and your client but will back down to a judge.

Pick up the phone.

Many Rambo lawyers, especially the Paper Tigers, hide behind emails and letters. You could spend time reacting to those communications which runs up fees and costs without doing anything to advance your client's case. Or you could try picking up the phone and calling them. Some Rambo lawyers will diffuse when you talk to them in person. Others will not – and then it's best to limit verbal communication. A simple email or letter suggesting this approach based on your past interactions might be helpful. Even if you do get them on the phone, it is always good to follow up with some form of written correspondence confirming the conversation.

Document everything.

Rambo lawyers are unreliable and untrustworthy, so be sure to protect yourself and your client by documenting everything that is said and done. It is also smart to send your communications in a way that gives you a signature showing that opposing counsel received it. Remember that any communication you send may end up in front of the court, so keep it professional. Stick with the facts and leave out any unnecessary commentary.

Have a good, qualified court reporter at arbitrations, depositions and hearings. You may want to ask them to stay on the record unless you instruct him or her to do otherwise. Note clearly and concisely your objections on the record, especially if you think it will be necessary to support a motion to compel. Do not be bullied into having conversations off the record.

If there are any nonverbal actions, make sure to describe them for the record: "Let the record reflect that counsel has just packed up his things and left the room." You may want to even videotape the deposition. Many difficult lawyers are less likely to cause trouble if the deposition is videotaped. The video record tells a different story than a written transcript.

Documentation can also be helpful in making a record of the difficult behavior itself. This may be needed down the road if you have to file a motion or otherwise involve the court or the disciplinary authorities.

Pick your battles.

It is tempting to vigorously oppose everything the Rambo lawyer does. But you're probably better off distinguishing what conduct is reasonable and what is unreasonable and then responding appropriately. Contrary to the Rambo lawyer, not every extension request or deposition location needs to turn into a major battle. Do not make every issue into a fight. Your cooperation and courtesies will ultimately benefit you when you find yourself in front of the court.

Similarly, be judicious in filing motions with the court. Not every Rambo act calls for a motion to compel or sanction. Wait until Rambo has clearly crossed the line before you call his behavior to the attention of the court. If you do so too early, the court is likely to conclude that the lawyers just do not get along.

Be prepared.

A Rambo lawyer usually uses incivility to mask his own insecurities, whether regarding the merits of his case or his own abilities. If you know the facts, the rules and the law, you will be able to battle the Rambo lawyer with brilliance. Know the facts of your case and the controlling authority. Master the rules of evidence, procedure and professional responsibility. In particular, be thoroughly familiar with the applicable rules of procedure for the jurisdiction so that you are confident in how you are conducting yourself. Many judges have their own rules, so be intimately familiar with those as well.

It is easier to be confident when you know you are legally correct. A precise, pinpoint citation to the Rule, clarifying why you are right and why Rambo is wrong, is often helpful. If you are in doubt about a particular point, call another attorney at the office and explain the situation. That person can do some research if needed on the disputed matter.

Prepare your client.

Not only must you be prepared, you must prepare your client. Advise them in advance what to expect, and direct them not to engage the Rambo lawyer on his level. Particularly important is preparing your client representative for deposition. Specify to which topics your witness will be responding ahead of time and stay within those parameters. Familiarize your witness with one or more case themes (i.e., a "home base") to which they can return when faced with a question they are unsure how to answer. Remind your witness to be credible and to stick with what he knows. Prepare him or her for potential "sound-bite" questions as discussed above. When the Rambo lawyer gets animated, the witness should remain calm and remember that his audience—whether at deposition or at trial—is ultimately a jury.

Ethics Considerations

If the Rambo lawyer creates an ethical issue, such as making a misrepresentation of fact or law to the court, you may be required to report such misconduct to the appropriate authority.

Under the Model Rules of Professional Conduct, you are required to report misconduct if it raises a "substantial question" about the other lawyer's fitness to practice law unless your knowledge of the misconduct is protected from disclosure:

Rule 8.3 Reporting Professional Conduct

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
>
> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
>
> (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Ann. Mod. Rules Prof. Cond. § 8.3. Many lawyers are reluctant to report a seemingly harmless violation of the rules, but if you know another lawyer has violated any of the rules, you should check your local rules to determine whether you have any discretion in deciding whether to report. Failure to report a lawyer's misconduct could itself be a violation of the rules.

Other Model Rules to consider when dealing with the Rambo litigator:

Rule 3.1 Meritorious Claims and Contentions

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

1. the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Conclusion

Dealing with a Rambo litigator is never easy, but armed with the proper weapons, you will be prepared for battle. Keep these tips in mind when confronted with a Rambo litigator, and remain professional. While Rambo tactics may allow him or her to come out ahead on occasion, more likely than not the Judge will catch on eventually, and hopefully justice will be served.

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Creating Effective Product Safety Labels: Warnings Designed in Compliance With the Latest Standards are Needed to Meet Global Market Requirements

by Geoffrey Peckham

For products that have residual risks associated with their lifespan, well-designed safety labels are critical components to improve safety and reduce the manufacturer's exposure to liability. Given that many companies' products are exported to global markets, the warnings that appear on those products must also comply with international design expectations. Your product engineers and risk managers must understand that the U.S. and international standards for on-product warnings provide the basis for creating labels that are meant to prevent injuries, reduce liability risk and meet global compliance requirements.

Creating a "System" of Safety Labels

A product's lifespan includes its delivery, installation, use, service, decommissioning and disposal. Your product's "system" of safety labels must be crafted to communicate a broad spectrum of potential hazards in order to protect the full range of people who could be reasonably expected to interact with it during each of these stages of life. A "system" of labels is one that uses the appropriate type of label, and appropriate components on each label, to give people the information they need to avoid accidents. In this way, your system of labels serves as a risk communication system for your product. In the U.S., the *ANSI Z535.4 Standard for Product Safety Signs and Labels* is the principle standard for on-product warnings and it does an excellent job of defining three different categories of safety labels:

- **Hazard alerting** labels communicate potential personal injury hazards and how to avoid them. This kind of label includes the signal word "DANGER," "WARNING" or "CAUTION" to indicate the proper risk severity level.
- **Safety instruction** labels communicate explanatory step-oriented information, such as how to safely shut down a boiler.
- **Notice** labels communicate information considered important but not directly personal injury-related, such as maintenance information to avoid damage to the product.

Considerations for Designing an Effective System of Safety Labels

There are several key fundamentals that should be considered when designing a product's system of safety labeling, including the following:

- **Perform a risk assessment on your product to identify potential hazards and measures that can be taken to reduce the risk of people interacting with these hazards.** When a hazard cannot be eliminated, a safety label is one of the methods that can be used to reduce risk. When this is the case, your risk assessment's information is useful to define the content of each safety label in your system, including the identification of the level of hazard severity, type of hazard, consequence of interaction

with the hazard, and how the hazard can be avoided. Since the time of its first publication in 1991, the ANSI Z535.4 standard has used this information to define the proper content of a product safety label. (See **Figure 1** for an example of an ANSI-formatted product safety label.)

- **Define your intended audience.** The content of your safety labels must be appropriately designed for your product's intended audience and intended market. Factors include: is the product shipped to a foreign country?; what is the education level of your anticipated product users?; how much (if any) training will the user have in the safe use of the product?; and will the product's manual be available to the user to communicate additional safety information? The level of detail, the language used, and the extent to which symbols can be used to convey all or a part of your label's message all hinge on the characteristics of your label's intended audience.
- **Ensure compliance with the latest best practices as defined by ANSI and ISO standards[1] in terms of the elements used to convey your label's content.** Such elements include:
    - **Colors** – use of the established ANSI/ISO color-coding will help to ensure visual recognition of your labels.
    - **Format/text/content** – clear and concise messaging, as well as visual consistency, will help your labels to be more easily seen and understood.
    - **Symbols** – help to efficiently communicate safety messages across language barriers. To be effective, symbols should come from the most up-to-date standards or be drawn using standards-based illustration techniques.
    - **Materials** – your safety label system's ability to communicate critical safety messages is only as good as the materials that go into its manufacture. It's important to have an understanding of the foreseeable environment of use that the product (and its labels) will be subjected to, as well as understand the surface onto which labels will be applied. Armed with this information, the appropriate materials for your each label's construction can be defined, including the right adhesive, base material, inks and overlaminates – all which must work together to achieve optimum durability.
    - **Location** – the final critical factor to the design of an effective safety label system is to intelligently define the size and placement location for each label. The size of each label takes into consideration its anticipated viewing distance, its legibility, and whether installation in multiple locations is necessary so the label's message will be able to be seen by the intended audience in time to avoid interaction with the potential hazard.

Figure 1: Example of an ANSI Z535.4 electrical hazard product safety label. (Design ©Clarion Safety Systems. All rights reserved.)

Designing effective systems of safety labels is a task that brings together a wide range of information and distills it down into a series of easily understood messages. The standards-based building blocks of a safety label risk communication system (see **Figure 2)** must be properly assembled in ways that make sense for your company's products, its audience, and its market. It's also necessary to understand that creating an effective product safety label system is a job that is not done just once. Labels must be periodically reevaluated in light of changes to standards, the standardization of new symbols for specific safety meanings, and the latest available product safety and accident information related to your company's products and its industry. Thoughtful reconsideration must be done recurrently to achieve the goal of effective product safety communication aimed at reducing risk and protecting people from harm.

Figure 2: A compilation of all the different elements (from signal words to text messages to symbols) that must be considered, and brought together cohesively, when designing effective product safety labels.

For more information on effective safety label strategies – including symbols, formatting, and the importance of using the best practice standards – product manufacturers can watch the short, educational videos produced by Clarion Safety Systems or visit the online Learning Center.

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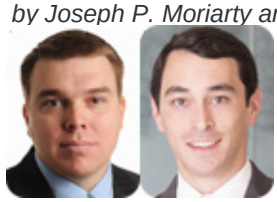
[1] The principle U.S. and international product safety label standards are the American National Standards Institute (ANSI) Z535.4 standard and the International Organization for Standardization (ISO) 3864.2 standard.

"Receipt By the Defendant": Finding More Time to Perfect Removal After Service Through a Statutory Agent

by Joseph P. Moriarty and Jonathan T. Tan



When there is a delay in case assignment or it is particularly difficult to determine the citizenship of multiple defendants, the majority rule regarding receipt of the complaint can create the precious additional time needed to remove a case to federal court. Even practitioners well-accustomed to federal practice often overlook the critical rule regarding the deadline for removal when a defendant has been served through a statutory agent, an agent appointed to receive process by operation of law, such as a state insurance commissioner or secretary of state. Most courts have held that the thirty-day window for removal in such a situation does not begin to run until the defendant has *received the complaint*. Thus, service on a statutory agent alone does not trigger the countdown to remove. Keeping the majority rule in mind when considering whether a case is removable may provide the extra time needed to remove a case that, at first glance, appeared destined to remain in state court.

An (All-Too-Common) Hypothetical

On a Friday afternoon, your telephone rings. Your client, an insurance company,

informs you that its insured, a product manufacturer, has been sued in a state-court action. The client emails you a copy of the complaint. After you have cleared conflicts, you receive the insurance company's case file as well.

The plaintiff alleges—in great detail—that the product manufacturer, multiple component manufacturers, and a distributor defectively designed or sold the product and its many components. The plaintiff alleges serious injuries, and the file already contains extensive medical bills that the plaintiff has submitted to the insurance company. Based on the amount of detail in the complaint, it probably will survive a motion to dismiss. Indeed, in the state-court forum, you also are facing an uphill battle to win motions to exclude the plaintiff's experts. Your likelihood of success on a motion for summary judgment is equally poor. In short, this looks like a challenging case for your client, made all the more difficult by an unfavorable forum.

A second reading of the complaint reveals that removal may allow you and your client to escape the unfavorable forum. Although the plaintiff is a resident of the forum, he has not sued any in-state defendants, and your client and many of the co-defendants appear to be diverse from the plaintiff. Obviously, you will need to run down the citizenship of each defendant, which may take some time because half of the co-defendants are LLCs, who have the citizenship of each state of which their members are citizens.

But there is a snag: the thirty day period for removal under 28 U.S.C. § 1446(b). Your client was served via the state's long-arm statute, through a government entity deemed to be a statutory agent for service of process on non-resident defendants. From the state court's online docket, you can tell that the plaintiff served the statutory agent with the complaint four weeks ago; however, your client did not receive the complaint until two weeks later. For one reason or another, two weeks elapsed between service on the statutory agent (not known for its dispatch) and your client's receipt of the complaint. It then took an additional two weeks for the client to forward the complaint to its insurer, and for the insurance adjuster to retain you to handle the case. Now, twenty-eight days have passed since the plaintiff served the statutory agent. Fortunately, under the state rule, you have more than ample time to file a responsive pleading, because of the way that period is calculated. However, that statute is of no help for removal purposes. Indeed, the state long-arm statute provides that the complaint is deemed served when *served on the government entity*. In other words, under a state statute, your client was deemed to have been served twenty-eight days ago. Half of the co-defendants in the case are LLCs. Thus, there is no way that you will be able to verify that there is complete diversity in the next two days, such that you will be able to remove the case within thirty days after it was deemed served under state law.[1] Because you will not be able to remove the case within that thirty-day period, your client is stuck in state court, right? Not necessarily.

"Receipt by the Defendant" Through Service on a Statutory Agent

Title 28 of the United States Code establishes a thirty-day period for removal. The removal statute provides:

The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b)(1). Accordingly, "receipt by the defendant" of the complaint, through service of process, triggers the beginning of the thirty-day period in which the defendant can remove the action. In most cases, the application of this rule is straightforward, because the plaintiff obtains service of process on the defendant through its registered agent.

When the plaintiff serves a defendant's *statutory* agent, the analysis becomes more complicated. Statutory agents are agents appointed by operation of law to accept process for a defendant. Though the defendant does not select it, as it would a registered agent, by statute, the agent—often a government entity—is deemed to be the defendant's agent for the purposes of accepting service. If the plaintiff serves a statutory agent, in one sense, the defendant has received a copy of the complaint through its agent. After all, generally, a corporation is in "receipt" of the complaint when an agent authorized to receive service of

process on behalf of the corporation has received same. In cases involving a statutory agent, the entity that receives service has—by statute—been deemed authorized to accept service of process on behalf of the corporation. But if the entity that received service only is the defendant's agent by operation of a statute, can it truly be said that the defendant is in "receipt" of the complaint?

A few courts have answered that question in the affirmative and concluded that service of process on a statutory agent constitutes "receipt by the defendant" of the complaint, beginning the thirty-day period for the defendant to remove. For example, a Kansas district court has held that service on the Kansas state insurance commissioner qualified as "receipt by the defendant," because a statute mandated that service on the commissioner "constitute[d] service upon an insurance company's registered agent." *Ortiz v. Biscanin*, 190 F. Supp. 2d 1237, 1242 (D. Kan. 2002). In a similar case out of the Middle District of Florida, the court found that, without a "definitive interpretation" of the portion of the removal statute regarding receipt of the complaint, the removal statute was ambiguous. *Masters v. Nationwide Mut. Fire Ins. Co.*, 858 F. Supp. 1184, 1189 (M.D. Fla. 1994). Based on such ambiguity, in light of the rule that the removal statute must be strictly construed against removal, the court found that service on the Florida Insurance Commissioner was "receipt by the defendant" of the complaint because, under Florida law, the Commissioner was deemed to be an agent of the insurance company for the purposes of receiving service. *Id.*

However, the vast majority of courts that have considered the issue have concluded that service on a statutory agent does not qualify as "receipt by the defendant"; instead, the time to remove begins to run when the defendant actually has received a copy of the complaint. District courts across the country have held that, for removal purposes, a statutory agent is not a true agent of the defendant, such that a defendant is in "receipt" of the complaint when same is served on the statutory agent. *See, e.g.*, *White v. Lively*, 304 F. Supp. 2d 829, 831 (W.D. Va. 2004). Under the majority rule, the period for removal does not begin to run until the defendant actually has received a copy of the complaint. These courts have recognized that the intent of the thirty-day period is "to ensure that defendants know that they are the subject of a suit [] as well as the basis for the suit *before* the removal period begins." *Tucci v. Harford Fin. Servs. Grp., Inc.*, 600 F. Supp. 2d 630, 634 (D.N.J. 2009) (emphasis in original). Because a defendant must be able to review the complaint before it can evaluate whether it can (and should) remove the case, it follows that the removal period should be calculated based on when the defendant has received the complaint, rather than when the plaintiff has served it on the statutory agent. After all, allowing service on a statutory agent to trigger the running of the removal period effectively would shorten the period of time in which a defendant could remove, even though the defendant cannot review the complaint until it has received same from the statutory agent.

The minority rule also would force the defendant to "depend upon the rapidity and accuracy with which statutory agents inform their principals of the commencement of litigation against them." *Calderon v. Pathmark Stores, Inc.*, 101 F. Supp. 2d 246, 247 (S.D.N.Y. 2000) (quoting *Cygielman v. Cunard Line Ltd.*, 890 F. Supp. 305 (S.D.N.Y. 1995)). If the statutory agent has a serious enough backlog, the thirty-day period for removal might elapse even before the statutory agent has transmitted the complaint to the defendant. In other words, under the minority rule, a defendant might never have the opportunity to remove the case, because the statutory agent's delay will prevent it from even learning of the complaint within the thirty-day period, much less filing a notice of removal.

Given those problems with measuring the period for removal from the date of service on the statutory agent, rather than when a defendant actually has received the complaint, it is perhaps unsurprising that most district courts have rejected the former rule and embraced the latter. While no court of appeals has adopted the rule endorsed by the significant majority of district courts, the Court of Appeals for the Fourth Circuit has applied the rule in an unpublished decision. *Gordon v. Hartford Fire Ins. Co.*, 105 F. App'x 476, 480 (4th Cir. 2004) (unpublished) (per curiam).

As an important caveat, even under the majority approach, courts have distinguished between service on a *statutory* agent and service on a *registered* agent. When a defendant has specifically designated an agent to receive process on its behalf, as opposed to having one appointed for it by operation of law, service of process on the designated agent triggers the removal period, even if the defendant does not receive, from the agent, a copy of the complaint until a later time. *See, e.g.*, *Val Energy, Inc. v. Ring Energy, Inc.*, No. 14-1327-RDR,

2014 WL 5510976, at *2 (D. Kan. Oct. 31, 2014) (unpublished). Courts distinguish service on a registered agent from service on a statutory agent because of the greater degree of control exercised over a registered agent. *See, e.g.*, *Hardy v. Square D Co.*, 199 F. Supp. 2d 676, 683-84 (N.D. Ohio 2002). Because a defendant itself selects a registered agent, the registered agent likely will be more accountable to the defendant for promptly notifying it of service and forwarding process than a statutory agent. *Id.* Accordingly, the receipt rule applicable to service on a statutory agent does not apply to service on a registered agent, and the time period for removal begins to run when process is served on the registered agent.

Although the period for removal does not run from the time a defendant receives the complaint in every case, remembering the majority rule can be the difference between an unfavorable state-court venue and removal to federal court when a defendant has been served through a statutory agent. Frequently, defense counsel for an out-of-state defendant receives the case well after the statutory agent has been served with process. Especially in product liability cases involving multiple defendants, determining the citizenship of each defendant can take time. For example, it may not be immediately apparent what entities or people are members of a co-defendant LLC. Given the delay between when many statutory agents, such as secretaries of state, receive process and when they transmit it to the defendant, the majority rule may provide the additional time needed to ascertain the citizenship of each defendant. In the hypothetical at the beginning of this article, applying the majority rule, the attorney would still have at least two weeks—instead of two days—to determine whether removal was appropriate and, if so, file the requisite notice. Measuring the period for removal from the date when your client actually received the complaint may add the critical few days needed to pull together the loose ends that otherwise would prevent timely removal, if service on the statutory agent was the benchmark for calculating the removal period. Whether the majority rule applies may not alter the outcome in every case, but when an initial assessment suggests that the deadline for removal may already have passed, defense counsel should not overlook the possibility of additional time to remove following service on a statutory agent.

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[1] For the sake of simplicity, this hypothetical does not consider the applicability of Federal Rule of Civil Procedure 6(d).