Client Alert.

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Ninth Circuit Affirms District Court Ruling Based On Government Contractor Defense

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Today, the Ninth Circuit, issued a seminal decision regarding the Government Contractor Defense in *Getz et al. v. The Boeing Co. et al.*, No. 10-15284 (D.C. No. 4:07-cv-06396-CW) (9th Cir. Aug. 2, 2011). The decision was authored by Senior Circuit Judge Wallace and joined by Judge Noonan and Judge Clifton. The Ninth Circuit's fact-intensive analysis of the three prongs of *Boyle*, as well as the state law failure-to-warn claim, provides a well-written analysis of current Ninth Circuit precedent, and serves as a roadmap for future government contractor defense cases in the Ninth Circuit.

GOVERNMENT CONTRACTOR DEFENSE

The Government Contractor Defense establishes that government contractors can be protected from tort liability that arises as a result of the contractor's "compli[ance] with the specifications of a federal government contract." *Getz*, No. 10-15284 at 9963, citing *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1000 (9th Cir. 2008). In order to establish the government contractor defense, a contractor needs to establish: (1) government approval of reasonably precise specifications, (2) conformance to those specifications, and (3) warnings of dangers known to the contractor but not the government. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988).

ANALYSIS OF *GETZ* DECISION

The Ninth Circuit created new circuit precedent related to the second element of *Boyle*, and held that "the operative test for conformity with the reasonably precise specifications turns on whether 'the alleged defect . . . exist[ed] independently of the design itself." *Getz* at 9969, citing *Miller v. Diamond Shamrock*, 275 F.3d 414, 421 (5th Cir. 2001). The *Getz* Court continued "[t]herefore, absent some evidence of a latent manufacturing defect, a military contractor can establish conformity with reasonably precise specifications by showing '[e]xtensive government involvement in the design, review, development and testing of a product' and by demonstrating 'extensive acceptance and use of the product following production.'" *Getz*, No. 10-15284 at 969, citing *Kerstetter v. Pac. Scientific Co.*, 210 F.3d 431, 435-36 (5th Cir. 2000).

The decision by the Ninth Circuit also acts to solidify current Ninth Circuit precedent related to the Government Contractor Defense's first and third prongs. For the first prong of *Boyle*, a contractor must demonstrate that the government approved reasonably precise specifications. To achieve this, the Ninth Circuit reaffirmed previous case law establishing that a "continuous exchange" and "back and forth dialogue" was required between the contractor and the government, and that evidence was required that the approval of the specification was not a mere "rubber stamp." *See Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d 582, 585 (9th Cir. 1996); *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 747 (9th Cir. 1997). For the third prong of *Boyle*, the Ninth Circuit clarified that *Boyle* "does not require a contractor to warn about dangers of which it merely should have known." *Getz*, No. 10-15284 at 9973, citing *Boyle*, 487 U.S. at 512.

The Ninth Circuit also analyzed the plaintiffs' state law failure-to-warn claims and determined that those claims were also

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preempted by the government's discretion in issuing the Army controlled Operator Manual, and its contents. The Ninth Circuit stated that to establish preemption of a failure-to-warn claim a party need only establish that "governmental approval (or disapproval) of particular warnings 'conflict' with the contractor's 'duty to warn under state law," not that the government is required to specifically forbid the issuing of warnings altogether or that the government itself must dictate the content of the warnings. *Getz*, No. 10-15284 at 9975.

CASE BACKGROUND

On February 17, 2007, a United States Army Special Operations Aviation Regiment MH-47E Chinook helicopter crashed in the Zabul Province of Afghanistan. The subject helicopter and two other Chinook helicopters were part of a mission to drop off personnel to capture or kill someone in the Al-Qaeda network. The mission was cancelled for "intel" reasons after the target did not develop as planned. After takeoff, weather conditions deteriorated, and by thirty-five minutes after takeoff, the Chinooks encountered snow, mist, and heavy/severe icing. Several witnesses described the weather as the "worst" in which they had ever flown.

Sixty-four minutes into the flight, the helicopter crashed, resulting in eight deaths and fourteen injuries. The survivors were evacuated by combat search and rescue forces. After two series of investigations as to the cause of the crash, investigators believed that "the aircraft's engine flamed out because it ingested an inordinate amount of water and ice during the inclement weather." *Getz*, No. 10-15284 at 9958.

Lawsuits were filed against the contractors in California state court by fifteen of the twenty-two aboard alleging that a cause of the crash was a power loss on one of the engines, or alternatively, abnormalities with the aircraft's engine control system. The case was removed to federal court pursuant to the Federal Officer Removal Statute, 28 U.S.C. § 1442(a). In January 2010, Judge Claudia Wilken from the Northern District of California granted summary judgment for the Contractors based on the Government Contractor Defense adopted in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The Ninth Circuit affirmed that decision on August 2, 2011.

Morrison & Foerster represents Honeywell International Inc. in this action. If you have any questions regarding this court decision, please do not hesitate to contact the below attorneys.

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