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CRIMINAL LAW

2 plead guilty in military base bribery scheme

Two former employees at a Marine Corps base in Georgia have pleaded guilty to diverting government business to the owner of local commercial trucking companies in exchange for bribes.

United States v. Philpot, No. 13-CR-24, plea agreement filed (M.D. Ga. May 8, 2013).

United States v. Potts, No. 13-CR-23, plea agreement filed (M.D. Ga. May 8, 2013).

Mitchell D. Potts was the former traffic office supervisor for the Defense Logistics Agency at the base, and Jeffrey Philpot was the former lead transportation assistant in the traffic office.

Court documents did not disclose the identity of the local business owner.

According to his plea agreement, Potts admitted to receiving \$209,800 in kickbacks from the local trucking companies' owner in exchange for funneling business to the owner. Philpot also admitted to receiving nearly \$523,700 from the owner in exchange for directing government business to the companies.

The pair admitted to additionally receiving lunches and gift cards from the local business owner. The owner would visit the base several times a week to provide the lunches and the bribes to the two defendants.



REUTERS/Carlo Allegri

The bribery scheme lasted almost three years and included several steps to ensure the business owner received the government's business.

According to a Justice Department statement, Potts and Philpot both admitted to delaying shipments for hours or days to decrease the time

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Reducing risks of operating in conflict zones through better contract drafting

By Dismas Locaria, Esq., and Alexis A. Martirosian, Esq.
Venable LLP

The legal landscape for companies operating in countries in conflict or transitioning from conflict is challenging and risky. Security contractors and construction and logistics companies, among others, play a critical support role for military forces, international institutions, aid organizations and local governments. While many conflict areas offer lucrative business opportunities, the challenges of working in these environments are myriad and include risks posed by war, local and international legal issues, and financial matters, and also involve increased operational costs.

While the risks are high, the financial benefit to U.S. companies expanding their businesses abroad can be immense. Government funds, international donor funding and private capital pour into conflict and post-conflict countries to support development and security goals. Many medium-sized companies have the capability to perform these contracts but lack the know-how to assess the accompanying risks. As a result, large companies often win contracts with little competition. Understanding and managing risk can help small to medium-sized enterprises participate in these challenging, but rewarding, markets.

LEGAL ENVIRONMENT

While criminal liability is often cited as the primary threat to U.S. businesses — for example liability under the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 — most corporations view civil liability as the more common and dangerous threat to the corporate bottom line. Over the past few years, American, host country national and international *criminal* laws have slowly and imperfectly caught up with jurisdictional and

increased civil liability and corporate and tax risks.

Businesses must find a way to operate in countries designated as “failed states,” “lawless” or “under occupation” or that have transitional governments with uncertain legal systems. Navigating legal issues in the conflict or post-conflict country is only half the battle. Recent legislation and court judgments, including those involving enforcement of the Alien Tort Claims Act, 28

While many conflict areas offer lucrative business opportunities, the challenges of working in these environments are myriad.

substantive legal issues surrounding foreign business interests in conflict zones. However, questions of *civil* liability and *civil* jurisdiction continue to trouble U.S. courts, American and foreign plaintiffs, and U.S. companies themselves.

As military deployments slow down in a conflict zone, the importance of having private industry “pick up the slack” to support continued U.S. and international reconstruction operations grows, along with

U.S.C. § 1350, have opened the door to civil suits by foreign parties that never before had access to U.S. courts.

Additionally, in many places, including Afghanistan, foreign companies must have a host country partner and a local bank account. These requirements create numerous business challenges, but importantly, they also expose U.S. companies to civil and criminal liability under the FCPA for the actions committed by their foreign partners, even if they have no involvement in, or knowledge of, the illegal behavior. The fact that fragile, transitional countries tend to have high levels of government bribery makes this a common scenario. Conflict and post-conflict countries such as Afghanistan, Iraq, Somalia, Sudan, Libya, Syria and the Congo receive the lowest marks in Transparency International’s Corruption Perceptions Index.

As a result, U.S. companies operating overseas are confronted with potential liability and skyrocketing insurance premiums. They are designing corporate liability and threat-mitigation strategies, such as reincorporating offshore and moving assets to safer international destinations such as the British Virgin Islands. Yet these are



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imperfect strategies, as many companies must maintain robust presences in the United States or in a host Western country in order to compete for contracts. Additionally, medium-sized businesses do not have the resources to pursue many of these strategies.

CONTRACT DRAFTING SOLUTIONS AND PRACTICE TIPS

Whether you are a U.S. company with established international operations or considering expansion, here are some mitigation strategies to contemplate before doing business in conflict and transitional societies.

- Develop a comprehensive compliance program to address the broad panoply of ethics and compliance issues faced when working abroad. For instance, to address the FCPA, have a robust policy that includes signed certificates from foreign partners indicating their knowledge of and compliance with the statute and other anti-corruption laws.
- Include robust termination clauses in all contracts to provide a safe “out” for your company. Be sure to address the rights of the parties in the event of increased security concerns.
- Vet potential subcontractors and carefully craft dispute resolution clauses, choice-of-law provisions and forum-selection clauses.
- Know your customers and your customers’ customers. Several federal sanctions enforced by the Treasury Department’s Office of Foreign Assets Control may apply to your company if any of your products or services end up in the wrong hands.
- Negotiate employee contracts to control potential disputes. Consult attorneys to craft employment contracts that address local laws and risks, generally, that exist when operating in conflict zones and develop contingency plans in case the security situation worsens.
- Develop a sound financial method for capturing and repatriating money. Currency and conversion risk must also be managed carefully. Countries in conflict usually have fluctuating currency rates that can significantly affect company bottom lines.
- Know the risks and pitfalls associated with contracts that require surety deposits or require your company to keep funds in a joint bank account located in the host country.
- Extend indemnification clauses. If possible, expand your company’s indemnity so that any legal actions arising from conduct in the host country are covered by your partner and not you.
- Study the basic contract law of the host country. Even with favorable forum-selection clauses and choice-of-law provisions, parties may still be able to apply prejudicial host country law or file claims against you in local courts. Additionally, many local laws related to tax, finance and physical security could apply to your company regardless of your contract provisions. Considering that sudden political changes are common in these countries, try to organize your revenue flow while knowing that the host country could adversely seize or garnish your in-country assets.
- Understand any specific U.S. laws that apply to your industry. For example, if your business deals at all with the manufacture or trade of products that use minerals originating from conflict zones, you may be subject to specific reporting laws.
- Start early in developing relationships on the ground with local officials and legal resources in the host country so that when a dispute arises, you have relationships to access.
- Take special care to protect your products if your business deals with intellectual property. Intellectual property laws in many countries tend to be inadequately enforced. Foreign governments may be interested in securing your intellectual property in order to sell it to domestic companies.

SOLVING PROBLEMS WITHOUT LITIGATING

It is one thing to ensure that all of your contracts have adequate protections, but it is another to have the time and funding to enforce your rights. Without the resources to take disputes to court, many companies end up relinquishing their contractual rights. While this is a difficult challenge, there are some possible solutions.

One way to avoid litigation but still enforce your contractual rights is to include arbitration provisions in your contracts. It is important to draft these provisions carefully and consider where and how arbitration will be pursued in the event of a dispute. There are several respected international commercial arbitration courts throughout the world that could be a good option for your business. These arbitrators can be better equipped to deal with international disputes and conflicting laws than arbitrators from a host country.

Fragile, transitional countries tend to have high levels of government bribery.

However, arbitration is not a perfect solution. It can become as expensive and as time-consuming as litigation. More concerning is the fact that any and all evidence can be presented to the arbitrator. Parties have immense latitude to present incorrect or misleading information to the arbitrator, resulting in the mishandling of your legal claims.

The best way to solve problems without litigating or submitting to arbitration is for parties to account for potential disputes in advance and devise workable and efficient processes to deal with these disputes on a rolling basis. The contract can provide for specific steps to be taken in the event of a dispute and put certain officers in charge of communicating with the other party. During the negotiation phase, the parties should have a frank dialogue on expectations and consider detailing them in writing to avoid misunderstandings. At the beginning of business relationships, parties are optimistic and want to keep positive relations in order to close a deal. Addressing potential disputes at this stage is challenging because parties do not want to impede negotiations. However, dealing with these issues up front shows a sophisticated business perspective that some parties may appreciate and respect, and it will certainly protect your company in the future.

U.S. businesses can safely compete in these lucrative marketplaces by negotiating issues up front and incorporating some of the solutions mentioned above before deploying resources abroad. **WJ**

Ex-government worker was spy for Cuba, feds say

The Department of Justice has unsealed a 2004 grand jury indictment that alleges a former legal officer with the U.S. State Department was actually serving as a spy on behalf of the Cuban government for nearly 20 years.

United States v. Velazquez, No. 1:04-cr-00044, indictment unsealed (D.D.C. Apr. 25, 2013).

The indictment charges Marta Rita Velazquez, 55, with one count of conspiracy to commit espionage for allegedly recruiting and fostering another Cuban spy, Ana Belen Montes. Montes, 55, had worked as an analyst with the U.S. Defense Intelligence Agency from 1985 until her arrest on espionage charges in September 2001. She is currently serving a 25-year sentence, according to a statement by the Justice Department.

Velazquez is currently a fugitive and is living in Stockholm, Sweden, the agency says.

Velazquez, also known as "Marta Rita Kviele" and "Barbara," was born in Puerto Rico in 1957. A Princeton University alum, she earned a law degree from the Georgetown University Law Center and a master's degree from John Hopkins University School of Advanced International Studies, prosecutors say.

The indictment says
Marta Rita Velazquez
was a Cuban spy while at
USAID and helped
recruit other spies.

The Justice Department says Velazquez took a post as an attorney adviser for the U.S. Department of Transportation and later served as a legal officer with the U.S. Agency for International Development from 1989 to 2002, where she held a top-secret security clearance.



REUTERS/Enrique De La Osa

A man stands on a balcony next to a Cuban flag in Havana. A recent indictment says Marta Rita Velazquez had conspired with the Cuban Intelligence Service since the early 1980s to transmit documents and information relating to U.S. national defense.

According to the indictment, Velazquez had conspired with the Cuban Intelligence Service since the early 1980s to transmit documents and information relating to U.S. national defense. She was also allegedly tasked with recruiting U.S. citizens holding national security positions, or those who could potentially gain those positions, to the cause.

The indictment alleges Velazquez and Montes forged a relationship while at Johns Hopkins together due to their shared political leanings. By 1984 Velazquez had introduced Montes to Cuban secret service officials, and in 1985 personally escorted her to Cuba for spy training, the charges say.

Velazquez helped her friend land the post at the DIA, where Montes had access to classified national defense information.

Montes was able to transmit information, including the identities of U.S. intelligence officers, to the Cuban government, the Justice Department claims.

Montes pleaded guilty to a single charge of conspiracy to commit espionage in March 2002. When press reports indicated in June 2002 that Montes was cooperating with authorities, Velazquez resigned from her post at USAID and fled the country, according to the indictment.

If convicted, she faces a potential life sentence in U.S. federal prison, the Justice Department said. **WI**

Related Court Document:
Indictment: 2004 WL 6234862

See Document Section C (P. 30) for the indictment.

Former Army sergeant admits to deceiving security clearance investigators

A former U.S. Army sergeant has pleaded guilty to one count of making false statements during a background check for top secret security clearance by failing to disclose payments he received from an Iraqi contractor.

United States v. Elmery, No. 1:13-cr-00158, plea agreement filed (E.D. Va. Apr. 12, 2013).

Ramy Onsy Elmery, 43, of Woodbridge, Va., admitted he lied when he told government investigators in 2011 that he had never had a foreign bank account or close contact with foreign nationals in the prior seven years, U.S. Attorney Neil H. MacBride said in a statement.

According to a plea agreement filed in the U.S. District Court for the Eastern District of Virginia, Elmery had dealings with an Iraqi contractor identified in court documents as "S.H.A." during a deployment to Iraq in 2006 and 2007.

Prosecutors said Ramy Onsy Elmery never told security clearance investigators that he maintained a foreign bank account or had dealings with an Iraqi contractor.

During this time period Elmery performed Arabic language interpretation services on behalf of the U.S. Army during contract negotiations with the Iraqi company.

MacBride said that after Elmery returned to the United States he emailed the contractor in April 2008 and asked the company to pay him \$500,000 in incremental payments. Prosecutors have not revealed why Elmery asked for the money.

S.H.A. began wiring payments to a Commerce International Bank account in Egypt maintained by Elmery's brother, who is identified as "R.E." in court documents. The contractor also transferred a payment



to another account that Elmery himself held at HSBC Bank in Egypt. In all, Elmery received more than \$47,000 from S.H.A., MacBride said.

Prosecutors said that after retiring from the Army, Elmery worked in the defense contracting industry and in February 2011 applied to the government for a top-secret security clearance. When he applied for the clearance he failed to disclose the two bank accounts or his relationship with S.H.A. and he also did not reveal this information during a June 2011 interview with a representative from the U.S. Office of Personnel Management.

As part of his plea agreement, Elmery will turn over to the United States the funds he received from the Iraqi contractor. Elmery faces up to five years in prison when he is sentenced July 12 before U.S. District Judge T.S. Ellis III. [WJ](#)

Related Court Document:

Criminal information: 2013 WL 1562341

U.S. sues Lance Armstrong, sponsors for fraud

The federal government has filed suit against disgraced bicyclist Lance Armstrong and some of his sponsors for alleged False Claims Act violations, breach of contract and fraud in connection with Armstrong's admitted use of performance-enhancing drugs.

United States ex rel. Landis v. Tailwind Sports Corp. et al., No. 10-0976, complaint filed (D.D.C. Apr. 23, 2013).

The U.S. Postal Service gave the seven-time Tour de France champion and his cycling team more than \$40 million in sponsorship funds from 1996 through 2004 while they were secretly using performance-enhancing drugs, the suit says.

The seven-count complaint, filed in the U.S. District Court for the District of Columbia, names Armstrong, team owner Tailwind Sports Corp. and Johan Bruyneel, the manager of Armstrong's cycling team, as defendants. The government seeks unspecified damages and the maximum civil penalties allowed.

The complaint comes two months after the government said it would join the whistle-blower suit filed by Armstrong's former

teammate Floyd Landis, who makes many of the same allegations.

According to the government's complaint, Tailwind used the U.S. Postal Service's sponsorship money to pay Armstrong's \$17.9 million and Bruyneel's \$1.7 million salaries.

Tailwind's initial sponsorship agreement included provisions that barred the use of certain performance-enhancing drugs, the complaint says. But from 1998 through 2004, Armstrong and team members used performance-enhancing drugs, contrary to the provisions of the sponsorship agreement, the complaint says.

The suit says that during that time, the USPS continued to financially support Tailwind for each claim it submitted under to the terms of the agreement. Tailwind was submitting

false claims, however, because the cycling team members were violating the agreement by using drugs, the complaint says.

In 2000 French authorities began to investigate allegations that Armstrong and the U.S. cycling team were using banned substances, which the cyclists denied, according to the complaint.

As a result of the French investigation, the USPS added provisions to the sponsorship contract that Tailwind would be in default of the agreement if it failed to take immediate action against any rider related to a morals or drug clause violation.

Contrary to the provisions of the contract and the frequent denials of drug use, Armstrong's team routinely used performance-enhancing drugs, the suit says.

The government alleges Armstrong personally used the drugs and facilitated doping by other team members and that Bruyneel knew about the illicit use of drugs.

The team's doping conduct "reflects a coordinated effort by the defendants to flout the rules of professional cycling throughout the period from 1998 to 2004 and to hide their rule-breaking during that period and for years afterward," the complaint says.

Armstrong, Tailwind and Bruyneel repeatedly and falsely denied that the team engaged in any prohibited practices throughout the term of the USPS' sponsorship, the complaint says.

The denials continued through 2012, with Armstrong going so far as to sue those who accused him of doping, the government says.

Armstrong publicly admitted his doping in a televised interview with Oprah Winfrey in January.

The suit, which seeks unspecified treble and punitive damages, asserts four False Claims Act counts and fraud against all the defendants. It alleges unjust enrichment against Armstrong and Bruyneel and breach of contract against Tailwind. **WJ**

Attorneys:

Plaintiff: Acting Assistant Attorney General Stuart F. Delery; U.S. Attorney Ronald C. Machen Jr.; Assistant U.S. Attorneys Daniel F. Van Horn, Darrell C. Valdez and Mercedeh Momeni; Michael D. Granston; Robert E. Chandler, and David M. Finkelstein, Department of Justice, Washington

Related Court Document:

Complaint: 2013 WL 1808021

See Document Section D (P. 36) for the complaint.



REUTERS/Reuters Photographer

The complaint comes two months after the government said it would join the whistle-blower suit filed against Lance Armstrong (L) by former teammate Floyd Landis (R), who makes many of the same allegations.

Amgen settles federal drug promotion kickback claims for \$25 million

California-based biotechnology firm Amgen Inc. will pay nearly \$25 million to settle U.S. Justice Department claims that it paid kickbacks to pharmacies and encouraged “off-label” uses to increase the sales of its anemia drug Aranesp.

United States ex rel. Kurnik v. Amgen Inc., No. 3:11-cv-01464-JFA, settlement announced (D.S.C. Apr. 16, 2013).

The federal government will get \$17.8 million, with the rest to be split among several states and the District of Columbia, which joined the suit, according to a Justice Department statement.

Whistle-blower Frank Kurnik, the Amgen employee who filed the suit prompting the government investigation, stands to receive between 15 percent and 25 percent of the total settlement amount, according to his attorney **Reuben Guttman** of **Grant & Eisenhofer**.

In papers filed in the U.S. District Court for the District of South Carolina, prosecutors said Amgen made payments to Omnicare Inc., PharMerica Corp. and Kindred Healthcare Inc. for eight years in return for their efforts to switch Medicare and Medicaid beneficiaries from competing medications to Aranesp (darbepoetin alfa). The companies specialize in providing pharmaceuticals to nursing homes and other long-term-care facilities.

The Justice Department’s federal court complaint, which remains under seal, was filed as part of a 2011 suit filed under federal and false-claims law by Kurnik, an official in Amgen’s long-term-care division. Kurnik remains with Amgen, according to his attorney.

Kurnik alleged that from 2003 through 2011, Amgen worked to influence health care providers’ selection and use of Aranesp, approved for use in patients with severe anemia in danger of kidney failure from frequent blood transfusions.

Amgen allegedly paid kickbacks to the companies in the form of volume-based grants, honoraria and speaker fees, dinners and travel for their personnel, and the purchase of what the government calls “unnecessary data,” the Justice Department said.

Amgen also urged long-term-care pharmacies to expand Aranesp use by pressuring their consultant pharmacists to recommend the drug for patients who did not have “anemia associated with chronic renal failure,” as described on the drug’s

Food and Drug Administration-approved package insert.

Prosecutors say that as bills for Aranesp use by Medicare and Medicaid beneficiaries were submitted for government reimbursement, Amgen caused repeated violations of the False Claims Act, 31 U.S.C. § 3729; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; and the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801.

Guttman, Kurnik’s attorney, said the settlement “sets important precedent by clearly articulating to the medical community the covert schemes that cause prescriptions to be written for thousands of elderly patients.”

Such routine practices not only place the public health at great risk but put a “huge drain on the U.S. health care system,” he said.

Guttman added that the government should create an oversight authority for pharmaceutical industry abuse.

“There has to be a pharmaceutical safety and investigation board to make an even broader report to the public so that this never happens again. We hope this settlement is an impetus for Congress to act,” he said. **WJ**

Attorneys:

Plaintiff: Reuben A. Guttman, Traci L. Buschner and Justin K. Victor, Grant & Eisenhofer, Washington; Richard A. Harpootlian, Columbia, S.C.; U.S. Attorney William N. Nettles, Columbia

Defendant: David S. Rosenbloom, McDermott, Will & Emery, Chicago, Dwight F. Drake of Nelson Mullins Riley & Scarborough, Columbia

Hurricane victims can't sue FEMA over formaldehyde in trailers

The Federal Emergency Management Agency is immune from negligence claims brought by a group of Louisiana residents who were exposed to formaldehyde in trailers provided by the government after Hurricanes Katrina and Rita, the 5th U.S. Circuit Court of Appeals has ruled.

In re FEMA Trailer Formaldehyde Products Liability Litigation, No. 12-30635, 2013 WL 1437711 (5th Cir. Apr. 9, 2013).

A panel of three circuit judges upheld a 2010 decision by U.S. District Judge Kurt D. Engelhardt of the Eastern District of Louisiana dismissing the residents' negligence claims for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

Judge Engelhardt properly found the plaintiffs' claims are barred by the discretionary exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), which provides that the government's waiver of sovereign immunity does not apply to discretionary acts and decisions, the panel held.

The ruling stems from numerous suits filed by hurricane victims in Louisiana, Alabama and Mississippi over formaldehyde exposure from portable trailers supplied by FEMA as emergency housing units starting in 2005.



REUTERS/Eric Thayer

The judge said the United States is protected from liability from claims stemming from formaldehyde exposure from portable trailers supplied by FEMA as emergency housing units after Hurricanes Katrina and Rita struck in 2005. This photo shows FEMA trailers in Krotz Springs, La.

Thousands of disaster victims sued FEMA and dozens of trailer manufacturers over the allegedly faulty trailers they received as emergency housing after Hurricanes Katrina and Rita, which exposed them to formaldehyde.

The temporary-use trailers were provided at no cost to residents and were usually placed at their home sites.

The federal government began receiving complaints of formaldehyde odors inside the trailers in 2006 and encouraged occupants to ventilate the shelters by opening doors and windows.

Formaldehyde is a chemical found in many construction materials including plywood and particle board. Exposure to elevated levels can cause cancer, liver and kidney damage and other health conditions,

according to the Centers for Disease Control and Prevention.

Thousands of disaster victims sued FEMA and dozens of trailer manufacturers, alleging their trailers were built with substandard materials and did not meet government specifications.

The Judicial Panel on Multidistrict Litigation centralized the actions in the Eastern District of Louisiana in 2007. The plaintiffs later filed an administrative master complaint that included claims against the government under the Federal Tort Claims Act, 28 U.S.C. § 1346.

The federal government moved to dismiss the Louisiana plaintiffs' suit for lack of subject matter jurisdiction, arguing that the discretionary exception to the FTCA bars any claims related to FEMA's decision to use trailers as temporary housing for hurricane victims.

There can be no subject matter jurisdiction under the FTCA because there is no analogous private liability under Louisiana law, the government claimed.

Plaintiffs from Alabama and Mississippi faced a similar motion to dismiss, which the District Court granted.

With respect to the Louisiana plaintiffs' claims, Judge Engelhardt found the discretionary exception applied because FEMA voluntarily provided trailers for use by the plaintiffs.

The government is entitled to the same protections afforded by the “Good Samaritan” provision of Louisiana Homeland Security and Emergency Assistance and Disaster Act, La. Rev. Stat. Ann. § 29:733.1, which negates negligence liability for individuals who voluntarily allow their property to be used as shelter during a natural disaster, the judge said.

The judge also dismissed the Louisiana plaintiffs’ gross negligence claims against the government under Section 2680(h) the FTCA, which exempts any claim arising from misrepresentation, deceit or interference with contract rights from the waiver of immunity.

The multidistrict litigation proceeded, and the plaintiffs ultimately settled their class-action claims against trailer manufacturers, inspectors and contractors for \$42.6 million after three bellwether trials resulted in defense verdicts.

The Louisiana plaintiffs appealed the District Court’s dismissal of their claims against the federal government to the 5th Circuit, which affirmed April 9.

The panel said Judge Engelhardt correctly held the discretionary exception to the FTCA applied to the negligence claims because FEMA’s housing decisions were voluntary and grounded in social, economic and political policy.

The 5th Circuit declined the plaintiffs’ invitation to reverse the application of the state’s Good Samaritan provision because it contains an exception for instances where gross negligence or wanton or willful misconduct results in death or injury during the sheltering period.

The plaintiffs’ gross negligence claims fall squarely under the misrepresentation exception to the FTCA because they alleged that FEMA’s failure to publicize and take action on knowledge of formaldehyde levels and occupant risks is the proximate cause of their injuries, the panel held. [WJ](#)

Attorneys:

Appellants: Gerald E. Meunier, Matthew P. Lambert and Justin I. Woods, Gainsburgh, Benjamin, David, Meunier & Warshauer, New Orleans

Appellee: Mark R. Freeman and Henry T. Miller, U.S. Department of Justice, Washington

Related Court Documents:

Opinion: 2013 WL 1437711

United States’ brief: 2012 WL 5396319

Plaintiffs’ brief: 2012 WL 3781431

GOVERNMENT CONTRACTOR DEFENSE

Navy sailor’s asbestos suit stays in federal court

A suit alleging asbestos-containing products made by General Electric Corp. and Crane Co. caused a former Navy member’s lung cancer met requirements of the federal officer removal statute and should be tried in Kentucky federal court, a U.S. district court judge has ruled.

Stallings et al. v. Georgia-Pacific Corp. et al., No. 3:12-CV 00724-H, 2013 WL 1563231 (W.D. Ky. Apr. 12, 2013).

The Navy exercised “an extensive level of control” over the design and manufacture of the products, required the companies to conform to its specifications, and tested and reviewed the products, U.S. District Judge John G. Heyburn II of the Western District of Kentucky said. He rejected plaintiff William Stallings’ bid to send the case back to state court.

In a complaint filed with the Jefferson County Circuit Court in Kentucky in 2011, Stallings and his wife alleged he developed the lung cancer mesothelioma from exposure to asbestos used in GE’s steam turbines and Crane’s valves. Stallings said he served from 1955 to 1959 as a boiler tender on a Navy destroyer that used these products.

GE and Crane removed the case to federal court, claiming the federal officer statute applied to them as military contractors. Stallings asked the federal court to remand the back to state court, arguing the defendants had not satisfied the statute’s requirements.

The requirements for federal officer removal include that a defendant is a “person” under the law, acted under the direction of a federal officer or agency, performed the actions for which it is being sued, and raised a “colorable” defense. The parties did not dispute that the contractors were persons under the law.

Judge Heyburn agreed with the companies that they acted under the direction of a federal agency.

“GE and Crane contracted with the Navy to produce certain machines and machine parts integral to the functioning of a Navy destroyer,

furthering the federal government’s defense objectives,” he wrote in an April 12 opinion.

The judge said the defendants showed that the suit arose from the performance of their duties under the contract and that they have evidence that they made the parts at the direction of federal officers and in compliance with Navy specifications.

On the last requirement, the judge said “a colorable defense need only be plausible” and that the contractors produced sufficient evidence of a defense under the statute.

GE and Crane claimed they are entitled to the government contractor defense, which gives contractors immunity from state tort liability if they meet three requirements.

Defendants must show that the U.S. government approved reasonably precise specifications, the equipment conformed to the specifications, and the supplier warned the government about dangers in using the equipment that the supplier was aware of and the government was not, the judge said.

The contractors met the first two requirements with evidence that the government approved precise measurements and required the contractors to conform to them, according to the opinion.

Stallings alleged the defendants failed to warn the government of the dangers of asbestos. But Judge Heyburn said GE and Crane were not required to warn the government because the Navy was well aware of the dangers.

“In sum, defendants have presented enough evidence to present a plausible argument that they are entitled to the government contractor defense,” the judge said. “As such, they have satisfied this final requirement of the federal officer removal statute.” [WJ](#)

Related Court Document:

Opinion: 2013 WL 1563231

Sikorsky removes suits over Marine helicopter crash

Asserting federal question and federal officer jurisdiction, Sikorsky Aircraft Corp. has removed two California state court suits over the 2011 Hawaiian crash of a Marine training helicopter to federal court in Los Angeles.

Brandafino v. Hydro-Aire Inc. et al., No. 2:13-cv-03002; Faircloth v. Hydro-Aire Inc. et al., No. 2:13-cv-03001, removal notices filed (C.D. Cal. Apr. 29, 2013).

The suits, filed by Cpl. Ronnie E. Brandafino, who survived the crash, and the heirs of Cpl. Jonathan D. Faircloth, who died, accuse Sikorsky and several other aviation-related companies of negligently building and maintaining the Sikorsky CH-53D Sea Stallion that crashed into the ocean March 29, 2011, at Kaneohe Bay, Hawaii.

Both sets of plaintiffs filed suit March 27 in the Los Angeles County Superior Court, claiming negligence, strict product liability and breach of express and implied warranties against Sikorsky, United Technologies Corp., Bell Helicopter, Hydro-Aire Inc. and other affiliated companies.

The suits say the aircraft's primary and backup hydraulic systems failed during a



REUTERS/Thomas Peter

The plaintiffs accuse Sikorsky and other aviation-related companies of negligently building and maintaining the Sea Stallion aircraft that crashed into the ocean at Kaneohe Bay, Hawaii. In this photo cameramen film a Sikorsky helicopter during preparations for an air show.

The defendant says it was acting under the direction of the United States because it built the Sea Stallion helicopter "under close government supervision."

routine training flight from the nearby Marine Corps Base Hawaii, sending the helicopter crashing into the water.

In addition to killing Faircloth and causing Brandafino injuries that his suit calls "permanent," the crash wounded two other crewmen, Hawaii News Now reported March 31, 2011.

Sikorsky's removal notices, both filed April 29, say the U.S. District Court for the Central District of California has federal question jurisdiction over the actions because 28 U.S.C. §§ 1331 and 1441 gives the federal courts exclusive jurisdiction over suits arising from incidents on military bases.

Federal question jurisdiction exists when a lawsuit arises under federal law, an international treaty or the U.S. Constitution.

Sikorsky also argues for federal officer jurisdiction under 28 U.S.C. § 1442(a), which exists when the removing defendant was acting under the direction of an officer of the United States and asserts a colorable federal defense.

The manufacturer was acting under the direction of an officer of the United States because it built the Sea Stallion helicopter

"under close government supervision pursuant to comprehensive and detailed contract specifications" provided by the Department of Defense, according to the removal notice.

Sikorsky says the colorable federal defense it plans to assert is "government contractor" immunity, which bars civil suits against private contractors for carrying out government functions. [WJ](#)

Attorneys:

Plaintiffs: Stuart R. Fraenkel, Kreindler & Kreindler, Los Angeles; Brian J. Alexander, Kreindler & Kreindler, New York

Defendant: James W. Hunt and Christopher S. Hickey, Fitzpatrick & Hunt, Tucker, Collier, Pagano, Aubert, Los Angeles

Related Court Document:

Brandafino notice of removal: 2013 WL 1828451

The federal enclave doctrine: A potentially powerful defense to state employment laws

By Joshua B. Waxman, Esq., Richard W. Black, Esq., and Steven E. Kaplan, Esq.
 Littler Mendelson

The U.S. Constitution provides that the federal government has exclusive legislative rights over certain federal territories (such as military bases, courthouses and other official properties) if a state consents to the purchase of the territory. These territories are known as “federal enclaves.” In practical terms, the federal enclave doctrine provides a little known but potentially powerful defense for employers that perform work in federal enclaves because often only federal law will apply in those locations.

The application of *federal* law to work performed in federal enclaves is significant because *state* employment laws may give rise to more plaintiff-friendly remedies and longer statutes of limitations than their federal counterparts. Significantly, the doctrine has been recognized to preclude state law wage-and-hour class actions. In addition, because the doctrine gives rise exclusively to federal law claims, it may form the basis to remove a lawsuit from state to federal court.

WHAT IS A FEDERAL ENCLAVE?

A federal enclave is territory, transferred by a state through cession or consent to the United States, over which the federal

government has acquired exclusive jurisdiction. Once the federal government exerts exclusive jurisdiction over a territory, it can choose whether state or federal law will govern. The source of the federal enclave doctrine is Article I, Section 8, clause 17 of the U.S. Constitution, which provides that:

Congress shall have power ... to exercise exclusive Legislation in all cases whatsoever over such district[s] ... as may, by cession of particular states ... become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.¹

Federal enclaves thus include some federal courthouses,² military bases,³ federal buildings,⁴ and national forests and parks.⁵ Not all federal *territories* are federal *enclaves*.

In order for a territory to be considered a federal enclave, the federal government must have purchased the territory “by the consent of the Legislature of the state.” If it did not, then the United States and, by implication,



The U.S. Constitution provides that the federal government has exclusive legislative rights over certain federal territories such as military bases, courthouses, and other official properties.

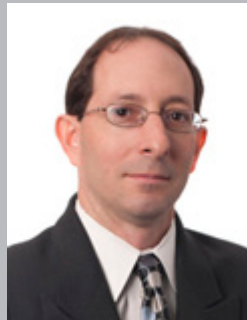
a private employer working on the federal property, does not obtain the benefits of the federal enclave doctrine. Instead, its possession is one of an “ordinary” proprietor, and state law will apply.⁶

In litigation, determining whether a federal territory is a federal enclave can be a time-intensive and fact-intensive undertaking. Given the sheer volume of federal territories in the United States and the dearth of case law addressing each territory, a party will often need to conduct this unconventional research from scratch. Such research might include digging through old deeds or sifting through old court records to determine whether the federal government in fact procured the property.

Moreover, a party must also locate the state statute consenting to the purchase by the United States. The source of this information can vary and can range from a deed of purchase to an opinion letter from the state’s attorney general explaining that the property at issue was ceded to the federal government and consented to by the state’s general assembly.⁷

HOW TO DETERMINE WHICH STATE LAWS ARE PREEMPTED

After establishing that a federal territory is a federal enclave, the next question that must be answered is: Which state laws are preempted?



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Which state laws does the federal enclave doctrine preempt?

- (1) A state law that was enacted *before* the cession continues to apply unless Congress states otherwise.
- (2) A state law that was enacted *after* the creation of the enclave does not apply to the enclave.

The general rule is that: A state law that was enacted *before* the cession continues to apply unless Congress states otherwise,⁸ and a state law that was enacted *after* the creation of the enclave does not apply to the enclave.⁹

As described more fully below, there are three notable exceptions to this general rule.¹⁰

Therefore, it is necessary in this step of the analysis to determine the date upon which the land in question became a federal enclave, as well as the date upon which the state law at issue was enacted. If the alleged claim is borne from the common law, rather than statutory law, the same analysis will still apply.¹¹

The date upon which the territory became a federal enclave may be determined from a deed of purchase or other court record, whereas traditional statutory research might provide the date on which the state law was enacted. If the state law was enacted *after* the territory became a federal enclave, the state law will not apply. By contrast, if the state law was already in existence, the general rule, as noted, is that the state law *will* apply.

The U.S. District Court for the Eastern District of New York's decision in *Sundaram v. Brookhaven National Laboratories*¹² provides a good example of this principle. In this case, the issue was whether New York's anti-discrimination statute applied to the laboratory. As a threshold matter, there was no dispute that the land on which Brookhaven National Laboratories sat was a federal enclave because the United States purchased the property from the state of New York July 17, 1933, in a transfer signed by the governor and authorized by the state Legislature. Because neither the New York Human Rights Law nor the New York Civil Rights Law was enacted before July 17, 1933,

the *Sundaram* court held that the state's anti-discrimination laws did not apply to the Brookhaven National Laboratories. In addition, the court held that the plaintiff's two common-law claims (breach of contract based upon an employee handbook and a tort for unlawful discharge) also did not apply because those claims were not recognized by New York courts until well after 1933.

WHAT ARE THE EXCEPTIONS?

There are three exceptions to the general rule that a state's law enacted after the creation of a federal enclave is preempted by federal law.

First, state law is not preempted if the state had, at the time of cession, explicitly reserved the right to legislate over the matters at issue.¹³ Second, minor regulatory changes to state programs that existed at the time of cession are not preempted "provided the basic state law authorizing such control has been in effect" since the time of cession.¹⁴ Finally, federal enclaves are not shielded from state law if Congress provides "clear and unambiguous" authorization for such state regulation over its federal enclaves.¹⁵

With respect to the first exception, neither the United States nor a private employer can rely on the federal enclave doctrine if, at the time of cession or purchase, the state expressly reserved the right to legislate the activity at issue within the territory.

Exceptions to the general preemption rule:

- (1) State law is not preempted if the state had, at the time of cession, expressly reserved the right to legislate over the matters at issue.
- (2) Minor regulatory changes to state programs that existed at the time of cession are not preempted "provided the basic state law authorizing such control has been in effect" since the time of cession.
- (3) Federal enclaves are not shielded from state law if Congress provides "clear and unambiguous" authorization for such state regulation over its federal enclaves.

For example, some states have reserved the right to legislate civil and criminal service of process only,¹⁶ whereas other states have reserved jurisdiction to the fullest extent possible under the Constitution.¹⁷

In *Sundaram*, discussed above, the plaintiff argued that the New York laws in question were not preempted because, at the time of cession, New York reserved the right to legislate in that territory. The deed memorializing the purchase by the U.S. government stated, in part:

That the State of New York shall retain a concurrent jurisdiction with the United States on and over the property and premises so conveyed, so far as that all civil and criminal process, which may issue under the laws or authority of the state of New York, may be executed thereon in the same way and manner as if such jurisdiction had not been ceded.¹⁸

The court, however, rejected the plaintiff's argument, noting that the "express terms of the scope of concurrent jurisdiction is extremely limited ... to the state's right to serve civil and criminal process on the property."¹⁹ Thus, the deed did not provide the state with jurisdiction to legislate other activities, such as antidiscrimination laws, within the federal enclave.

The second exception relates to state programs that were enacted prior to the date of cession of the property at issue, but which require ongoing regulatory changes after that date.

In *Paul v. United States*, the U.S. Supreme Court addressed state regulatory schemes regarding milk price controls that were in place when the state ceded sovereignty over land used for federal military installations but that were subject to ongoing change by regulators. Relying on the federal enclave doctrine, the United States argued that California should be barred from trying to enforce its current milk pricing regulations, rather than the pricing regulations in effect when the United States acquired the land in question.

Rejecting that argument, the Supreme Court held that changes in milk pricing regulations would still be applicable to the federal enclave, "provided the basic state law authorizing such control had been in effect since the times of these various acquisitions"

of the land constituting the federal military installations.²⁰ The Supreme Court remanded the case to the lower court to examine the precise evolution of the current regulatory scheme.

The third exception provides that even if the state law at issue was enacted after the creation of the federal enclave, Congress may authorize such state regulation if it provides “clear and unambiguous” assent to the state law.²¹ What constitutes “clear and unambiguous” authorization, however, has been the subject of considerable debate in federal district courts.

The federal enclave doctrine has been recognized to preclude state law wage-and-hour class actions.

Some federal statutes have been found to provide clear and unambiguous authorization for state regulation without much controversy on the basis of their plain language. In *Goodyear Atomic Corp. v. Miller*, for example, the U.S. Supreme Court addressed whether Congress had authorized states to enforce their workers’ compensation laws in federal enclaves. In particular, the statute at issue provided:

Whatsoever constituted authority of each of the several states is charged with the enforcement of and requiring compliances with the state workmen’s compensation laws of said states and with the enforcement of and requiring compliance with the orders, decisions and awards of said constituted authority of said states shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any state and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any state, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the state within whose exterior boundaries such place may be.²²

The court held that this federal statute provides clear authorization for state regulation because it gives a state official charged with enforcing a state’s workers’

compensation laws “the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession.”²³

The Clean Air Act²⁴ is another example of a federal statute that expressly allows states to regulate its provision on federal properties. The CAA provides that federal facilities:

Shall be subject to, and comply with, all federal, state, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air

pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever) ... ; to the exercise of any federal, state or local administrative authority; and to any process and sanction, whether enforced in federal, state, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.²⁵

Indeed, courts have used the language of the CAA as the prototypical example of how Congress can be “clear and unambiguous” when it authorizes state regulation on federal property. In *Bouthner v. Cleveland Construction Inc.*, for example, the District Court compared the clear and unambiguous language of the CAA (i.e., that state law would apply to those federal facilities) to the Davis-Bacon Act,²⁶ which does not contain similar language. The court noted that “Congress is entirely capable of providing explicit authorization when it intends to permit a state regulation to apply in a federal enclave. The CAA is one such example.”²⁷

One issue that has not been as well addressed by the federal district courts is whether Congress has authorized the application of state wage-and-hour law claims in federal enclaves. Courts that have considered this question are split on the issue.

The primary issue with respect to state wage-and-hour laws is whether the Service Contract Act contains clear and unambiguous congressional authorization for state wage-and-hour laws. More specifically, the issue is whether congressional intent can be inferred through the SCA’s requirement that federal contractors pay prevailing wages, including minimum wages and “fringe benefits,” which are defined to include benefits “not otherwise required by federal, state or local law to be provided by the contractor or subcontractor.”²⁸

In *Lebron Diaz v. General Security Services Corp.*,²⁹ individuals employed by the defendant at a federal courthouse brought a lawsuit for unpaid bonuses and sick leave under Puerto Rico law. The employer contended that the courthouse was a federal enclave, which precluded any claims under local law. The plaintiff countered that the language in the SCA constituted clear congressional intent that local regulation of employment benefits within a federal enclave was permissible. The U.S. District Court for the District of Puerto Rico, observing that the “question is admittedly close,” explained:

While it is true that the [SCA] does not explicitly state that local laws will apply, no fair reading of the emphasized phrases makes possible any other construction of the language. A message does not have to be *in haec verba* to be “clear and unambiguous.” The only reasonable inference to be drawn from the [SCA] is that local and state laws were to provide the foundation upon which the [SCA] was to be built, to insure that contract employees received certain minimum benefits. The application of local law providing separate and independent employment benefits, such as the law of Puerto Rico here, was unambiguously assumed.³⁰

Other courts have been unable to find clear and unambiguous authorization through the SCA. In *Manning v. Gold Belt Falcon*,³¹ for example, the U.S. District Court for the District of New Jersey held:

Nothing in the Service Contract Act evinces congressional intent to apply state minimum-wage laws to federal enclaves, nor is the application of state law to federal property even mentioned. Furthermore, Congress clearly enacted

the Service Contract Act for a specific purpose: to ensure workers employed by federal employers were paid no less than workers employed by private or state employers in the same area. There is no explicit intent to abrogate the federal enclave doctrine, but rather a desire to ensure protection for service contracts.³²

The court noted further: "The distinction between the statute in *Goodyear* and the SCA is obvious: one clearly applies state law to federal land, while the other does not."³³

Relatedly, in *Bouthner*, the U.S. District Court for the District of Maryland, when analyzing similar language under the Davis-Bacon Act, held that Congress did "not explicitly authorize state wage-and-benefit laws to apply to contractors" because "Congress has shown it is capable of including language in statutes expressly stating that states have the power to apply the statute to land ceded to the United States" and therefore "the lack of an explicit authorization will often suggest that a statute is not clear and unambiguous."³⁴ The court, therefore, agreed "with the reasoning in *Manning*."³⁵

Even assuming that Congress, through the SCA, ratified the application of certain state laws to federal enclaves, courts have held that claims for overtime do not constitute "fringe benefits" as the term is used in the SCA or the Davis-Bacon Act. For example, the *Bouthner* court held that "even if this court accepted plaintiffs' interpretation of the Davis-Bacon Act, state and local law would only apply to claims for fringe benefits. Plaintiffs' allegations that they were not paid minimum wage, were misclassified as independent contractors or exempt persons, and were not timely paid their wages, do not directly relate to 'fringe benefits.'"³⁶ The court continued: "Plaintiffs' allegations that they were not paid overtime also does not amount to a claim for fringe benefits, at least within the meaning of the Davis-Bacon Act."³⁷

On the basis of the analysis in *Bouthner*, the *Diaz* decision can be distinguished because those claims related to the defendant's Christmas bonus and sick leave policy and involved "fringe benefits," rather than claims for overtime. As a result, employers can persuasively argue that a plaintiff's reliance on the *Diaz* decision to assert that the SCA provides clear and unambiguous authorization for state overtime laws in federal enclaves is misplaced.

THE FEDERAL ENCLAVE DOCTRINE IS NOT AVAILABLE TO PRIVATE EMPLOYERS PERFORMING WORK IN THE DISTRICT OF COLUMBIA

Although the District of Columbia is itself a federal enclave, the federal enclave doctrine is not available as a shield for private employers performing work in the District.

In 1790 the District of Columbia was carved out of Maryland and Virginia.³⁸ In 1846, however, the portions Virginia ceded were returned. After nearly 200 years of exclusive federal government control, in one form or another, Congress enacted the District of Columbia Home Rule Act in 1973.³⁹ The act allows District citizens to elect a mayor and council. The powers and duties of the council are similar to those held by governing boards in other localities, including the authority to enact laws. One significant difference, however, is that Congress reviews all legislation passed by the council before it can become law.

The act also specifically prohibits the council from enacting certain laws, such as those that would:

- Lend public credit for private projects.
- Impose a tax on individuals who work in the District but live elsewhere.
- Make any changes to the Heights of Buildings Act of 1910.
- Change the composition or jurisdiction of the local courts.
- Enact a local budget that is not balanced.
- Gain any additional authority over the National Capital Planning Commission, the Washington Aqueduct or the District of Columbia National Guard.

Unless Congress overturns a District law, Congress has essentially assented to concurrent jurisdiction. Moreover, these District laws have been applied to private employers working in the District.⁴⁰

REMOVAL

In addition to the possible preclusion of certain state law claims, the federal enclave doctrine may also provide grounds to remove a lawsuit from state to federal court because the doctrine, if applicable, gives rise exclusively to federal law claims.⁴¹

Though it may be difficult to fully develop the factual record necessary to remove an action from state to federal court within 30 days after service of process required for removal under 28 U.S.C. § 1446, a party should be able to remove cases involving the federal enclave doctrine to federal court if, in its notice of removal, the party can plead factual allegations sufficient "to raise a right to relief above the speculative level."⁴²

Under the federal removal statute,⁴³ a defendant need only file a notice of removal, signed pursuant to Rule 11 of the Federal Rules of Civil Procedure, containing "a short and plain statement of the grounds for removal."⁴⁴ The 4th Circuit has held that a "district court should not hold a removing party's notice of removal to 'a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint.'"⁴⁵

In *Jones v. John Crane-Houdaille Inc.*, the U.S. District Court for the District of Maryland addressed whether a defendant properly removed a case to federal court based on the federal enclave doctrine.⁴⁶ The plaintiff in *Jones* worked at the Aberdeen Proving Ground which, in substantial part, is a federal enclave. In his motion to remand, the plaintiff argued that the defendant's removal was defective because it did not provide full support for the contention that the portion of the Aberdeen Proving Ground where the plaintiff worked had in fact been ceded to or purchased by the federal government. The plaintiff argued further that even assuming, *arguendo*, that the territory had been procured by the United States, the defendant failed to sufficiently plead the degree of cession. The district court disagreed, stating:

Measured against the plausibility standard of *Twombly* [*Bell Atlantic Corp. v. Twombly*], the notice of removal is not defective for failing to allege Maryland's consent to exclusive federal legislative jurisdiction. A judge in this district has previously explained, in detail, why the federal government has exclusive legislative jurisdiction over portions, at least, of the Aberdeen Proving Ground.

Other judges in this court have also noted that parts of Aberdeen Proving Ground are federal enclaves. In addition [...], opinions in several other cases in the district have referred to the Aberdeen Proving Ground, on which Edgewood Arsenal sits, as a federal enclave.⁴⁷

The court denied the motion to remand, without prejudice, pending further discovery regarding the specific location of the plaintiff's workplace, as well as the date and manner by which the land was procured by the federal government. The court concluded that if the defendant could not support its defense, the court could remand the case to state court for lack of subject matter jurisdiction.

As a result, employers who are sued in state court for an alleged violation of a state wage-and-hour law in a putative class action (subject to that state's version of Federal Rule of Civil Procedure 23) over work performed at a federal enclave have greater flexibility in removing the lawsuit to federal court if the employer can meet the "plausibility" standard under *Twombly*. This flexibility is particularly welcome since it may be difficult for an employer to develop fully the complete factual record necessary to support the application of the federal enclave doctrine prior to the statutory removal deadline.

CONCLUSION

The federal enclave doctrine is a potentially potent weapon for defendants in employment and other litigation since, if applicable, the doctrine will preclude all state law claims enacted after the creation of the enclave, including class-wide state wage-and-hour claims. As a result, and because it can be difficult to quickly develop the factual record necessary to confidently rely on the doctrine, it is important that any employers working on any federal property, such as a military base, medical facility, courthouse or other federal building or national park, determine sooner rather than later whether the federal enclave doctrine is available to them. **WJ**

NOTES

¹ U.S. Const. art. I, § 8, cl. 17.

² See, e.g., *United States v. Markiewicz*, 978 F.2d 786, 797 (2d Cir. 1992).

³ See e.g., *Bouthner v. Cleveland Constr.*, 2011 WL 2976868 (D. Md. July 21, 2011) (National Naval Medical Center in Bethesda, Md.); *Manning v. Gold Belt Falcon LLC*, 681 F. Supp. 2d 574 (D.N.J. 2010) (Fort Dix, N.J.); *Hutchison v. Andrulis Corp.*, 2004 WL 691790, at *1 (N.D. Fla. Mar. 19, 2004) (Department of the U.S. Navy, Coastal Systems Station, in Panama City, Fla.); *Kelly v. Lockheed Martin Servs. Group*, 25 F. Supp. 2d 1 (D.P.R. 1998) (Roosevelt Roads Naval Station in Ceiba, Puerto Rico).

⁴ *United States v. Windsor*, 765 F.2d 16 (2d Cir. 1985) (Knolls Atomic Power Laboratory in Windsor, Conn.).

⁵ *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234 (10th Cir. Aug. 10, 2012).

⁶ *Paul v. United States*, 371 U.S. 245, 264 (1963).

⁷ Office of the Attorney Gen. of the State of Md., 61 Op. Atty. Gen. Md. 441 (1976) (addressing whether the National Naval Medical Center in Bethesda, Md., was a federal enclave).

⁸ *Koren v. Martin Marietta Servs.*, 997 F. Supp. 196, 202 (D.P.R. 1998) (state law existing at the time of cession still applies within the enclave until a federal law abrogates the state law).

⁹ *Cooper v. S. Cal. Edison Co.*, 170 Fed. Appx. 496 (9th Cir. May 10, 2006) (federal enclave doctrine preempts state law claims that do not pre-date the acquisition of the enclave).

¹⁰ First, federal law does not preempt state law if the state had, at the time of cession, expressly reserved the right to legislate over the matters at issue. Second, federal law will not preempt state regulatory schemes that were in place prior to the date of cession, but which require ongoing changes by a regulatory body. Finally, state law will apply in federal enclaves if Congress provides "clear and unambiguous" authorization for such state regulation over its federal enclave.

¹¹ See, e.g., *Allison*, 689 F.3d at 1240 ("Judge-made common law is no different than Legislature-made law in application and effect. When a state court adopts a new cause of action through its common-law powers, that cause of action functions no differently than if it had been created by the state legislature.").

¹² 424 F. Supp. 2d 545 (E.D.N.Y. 2006).

¹³ *Sundaram v. Brookhaven Nat'l Labs.*, 424 F. Supp. 2d 545 (E.D.N.Y. 2006).

¹⁴ *Paul*, 371 U.S. at 269.

¹⁵ *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

¹⁶ See, e.g., Mont. Code Ann. § 2-1-202.

¹⁷ See, e.g., Md. Code Ann., State Gov't § 14-102 ("With respect to land that the United States or any of its units leases or otherwise holds in the state, the state reserves jurisdiction and authority over the land and over persons, property, and transactions on the land to the fullest extent that is permitted by the United States Constitution and that is not inconsistent with the governmental purpose for which the land is held.") (emphasis added).

¹⁸ *Brookhaven Nat'l Labs.*, 424 F. Supp. 2d at 570.

¹⁹ *Id.*

²⁰ *Paul*, 371 U.S. at 269.

²¹ *Goodyear Atomic Corp.*, 486 U.S. at 180.

²² 40 U.S.C. § 290.

²³ *Goodyear Atomic Corp.*, 486 U.S. at 182.

²⁴ 42 U.S.C. § 7401.

²⁵ 42 U.S.C. § 7418(a).

²⁶ 40 U.S.C. §§ 3141 *et seq.*

²⁷ *Bouthner v. Cleveland Constr.*, 2011 WL 2976868, at *3 (D. Md. July 21, 2011).

²⁸ 41 U.S.C. § 351(a)(2).

²⁹ See, e.g., *Lebron Diaz v. Gen. Sec. Servs. Corp.*, 93 F. Supp. 2d 129 (D.P.R. 2000).

³⁰ *Id.* at 141-42.

³¹ See, e.g., *Manning v. Gold Belt Falcon*, 681 F. Supp. 2d 574, 577 (D.N.J. 2010).

³² *Id.*

³³ *Id.*

³⁴ *Bouthner*, 2011 WL 2976868, at *5.

³⁵ *Id.*

³⁶ *Id.* at *6.

³⁷ *Id.*

³⁸ Council of the District of Columbia, DC Home Rule.

³⁹ D.C. Code §§ 1-201.01.

⁴⁰ *Twenty Citizens of the District of Columbia v. Clinton* (D.D.C. June 30, 1998) ("The home rule government [comprised of the council of the District of Columbia, the mayor of the District of Columbia and the various administrative departments] does not constitute a republican form of government, because every action of the home rule government is subject to absolute review and veto by the Congress of the United States itself or by defendant District of Columbia Financial Responsibility and Management Assistance Authority acting as an administrative agent or instrumentality for the Congress of the United States of America and because the home-rule government was created by an act of Congress and not by an autonomous act of the citizens of the District of Columbia and because the Congress of the United States holds the exclusive power to alter or abolish the home-rule government at any time.").

⁴¹ *Morgan v. Rankin*, 436 Fed. Appx. 365 (5th Cir. Aug. 10, 2011).

⁴² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007).

⁴³ 28 U.S.C. § 1446(a).

⁴⁴ *Id.*

⁴⁵ *Ellenburg v. Spartan Motors Chassis*, 519 F.3d 192, 200 (4th Cir. 2008) (citing *Twombly*, 550 U.S. at 554-56).

⁴⁶ *Jones v. John Crane-Houdaille Inc.*, 2012 WL 1197391 (D. Md. Apr. 6, 2012).

⁴⁷ *Id.*

Bribery scheme

CONTINUED FROM PAGE 1

available to fulfill an order. This ensured that a local trucking company would be required to fulfill the order, usually one owned by the local business owner.

The defendants also admitted to “short loading” shipments for the local business owner’s companies so it would appear that more trucks than necessary were required to move the shipment. The greater the number of trucks required, the greater the payment to the local business owner, the statement says.

Additionally, Potts and Philpot would require that shipments be hauled by trailers with removable tractor connections even if it was unnecessary. This also resulted in shipments being awarded to the local business owner because his companies had these types of trailers available.

Finally, the defendants created “ghost shipments” for the local business owner. Ghost shipments were shipments that never were fulfilled, but the local business owner was paid for by the government anyway.

By favoring the local business owner, Potts and Philpot cost the federal government millions of dollars because local business owner charged the government more than his competitors.

The two defendants are scheduled for sentencing Aug. 15 and each faces a maximum penalty of 15 years in prison and a fine. They agreed to pay back their proceeds from the bribes and to pay for damages suffered by the Defense Department. **WJ**

Related Court Documents:

Philpot plea agreement: 2013 WL 1966896

Philpot indictment: 2013 WL 1966897

Potts plea agreement: 2013 WL 1966894

Potts indictment: 2013 WL 1966895

See Document Section A (P. 19) for the Philpot indictment and Document Section B (P. 22) for the Philpot plea agreement.

NEWS IN BRIEF

NEW RULE BOLSTERS CONTRACTS FOR WOMEN-OWNED FIRMS

The Small Business Administration said in a statement May 7 that the agency’s new interim final rule gives women-owned small businesses more chances to compete for federal contracts. The rule allows contracting officers to set aside contracts at any dollar amount for these companies, as well as for economically disadvantaged women-owned small businesses. Previously, contracts reserved for both types of firms could not be worth more than \$6.5 million for manufacturing work or \$4 million for all other jobs, the SBA said. The goal is for 5 percent of federal contracts to go to women-owned businesses. The new rule, which implements the requirements of the National Defense Authorization Act of 2013, is available at <http://www.gpo.gov/fdsys/pkg/FR-2013-05-07/html/2013-10841.htm>.

6 COMPANIES WIN NAVY MEDICAL STAFFING JOBS

Six small businesses have won contracts worth a combined total of \$387 million to provide health care personnel at Navy hospitals and clinics in North and South Carolina for five years, the U.S. Department of Defense announced May 7. Aliron International Inc., Arora Group Inc., Donald L. Mooney LLC d/b/a Nurses Etc. Staffing, Federal Staffing Resources LLC, International Healthcare Staffing Alliance and Medtrust LLC will place doctors, nurses, technologists, technicians and other health care workers at the facilities, the Defense Department said. The companies beat out 38 other bidders for the jobs, which were awarded by the Naval Medical Logistics Command at Fort Detrick, Md.

U.K. FIRM TO SUPPLY EJECTION SEATS FOR MILITARY PLANES

The Navy is paying British company Martin Baker Aircraft Co. Ltd. an additional \$25 million on its existing contract so the company can supply 100 ejection seats for the Navy and Marine Corps’ F/A-18 and EA-18G aircraft. The U.S. Department of Defense said in a May 6 statement that the new funding will also allow Martin Baker to provide related hardware, equipment and support services to the Navy, the Marine Corps, NASA and the government of Finland. The extra payment brings the value of Martin Baker’s contract to more than \$47 million.

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