Ninth Circuit Affirms Dismissal of Helicopter Crash Case

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The Ninth Circuit recently decided a products case that raised issues of the government contractor defense, and a seldom litigated federal Rule of Civil Procedure. *Getz v. Boeing Co., et al.,* No. 10-15284 (9th Cir. 8/2/11). The appeals court affirmed the district court's dismissal of one defendant for lack of personal jurisdiction and the trial court's summary judgment in favor of the other defendants.

The suit arose from the crash of an Army-operated MH-47E Chinook helicopter in the Kabul Province of Afghanistan. The helicopter was transporting military personnel to Bagram Airbase when it encountered snow, rain, and ice. An initial Army investigation suggested that the aircraft's engine control system unexpectedly shut down, causing the engine to fail. According to these investigators, the engine's Digital Electronic Control Unit (DECU)—the onboard computer that controls fuel flow to the engine—malfunctioned due to some kind of electrical anomaly. A different investigation suggested that the aircraft's engine flamed out because it ingested an inordinate amount of water and ice during the inclement weather. This other investigation further suggested, however, that the flameout might have been avoided if the MH-47E's ignition system had been equipped with a continuous or automatic relight feature, which would have allowed the engine to restart automatically in the event of a water- or ice-induced flameout.

Plaintiffs sued the designers and manufacturers of the aircraft, and ATEC, a British company that designed the hardware and software for the DECU. Defendants removed the action to federal court pursuant to the Federal Officer Removal Statute, 28 U.S.C. § 1442(a), which allows federal officers and agents to remove state-law claims to federal court by asserting a federal defense.

The court addressed first the dismissal of ATEC for lack of personal jurisdiction. According to plaintiffs, ATEC was subject to personal jurisdiction in California pursuant to Federal Rule of Civil Procedure 4(k)(2). This rule, which is commonly known as the federal long-arm statute, permits federal courts to exercise personal jurisdiction over a defendant that lacks contacts with any single state if the complaint alleges federal claims and the defendant maintains sufficient contacts with the United States as a whole. The Ninth Circuit concluded that the arising-under-federal-law element of Rule 4(k)(2) is limited to substantive federal claims, a federally created cause of action. See *World Tanker Carriers Corp. v. M/V Ya Mawlaya,* 99 F.3d 717, 722 (5th Cir. 1996); *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 45 (1st Cir. 1999).

Whereas foreign defendants lacking sufficient contacts with any single state could previously avoid responsibility for civil violations of federal laws, the revised rule allows federal courts to exercise jurisdiction over these defendants, subject only to the limitations of the Fifth Amendment's due process clause. Rule 4(k)(2) provides aggrieved plaintiffs with a mechanism for vindicating their federal rights in cases involving defendants that lack single-state contacts,

but who possess minimum contacts with the United States as a whole. However, Rule 4(k)(2) was narrowly tailored so as to avoid conflict with the Fourteenth Amendment's jurisdictional limits in cases alleging only state-law claims.

Here, none of the purely state law claims by plaintiffs alleged any violation of a federal right and none sought the enforcement of federal law. The invocation of removal jurisdiction by a federal officer/agent does not revise or alter the underlying law to be applied. The only federal interest at issue—the contractors' eligibility for a federal defense—had no bearing on plaintiffs' ability to vindicate a federal right and it did not constitute an essential element of plaintiffs' well-pleaded complaint.

The government contractor defense protects government contractors from tort liability that arises as a result of the contractor's compliance with the specifications of a federal government contract. To invoke the defense successfully, the contractor must establish three elements: (1) the United States approved the specifications; (2) the equipment conformed to those specifications; and (3) the supplier 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.

On the first, a contractor must demonstrate that the government approved reasonably precise specifications, meaning more than a cursory "rubber stamp" approving the design. Plaintiffs argued that the necessary specifications were lacking, but the court was confident that the United States Army approved reasonably precise specifications. Among other things, the Army's specification included diagrams and drawings for engine controls; engine configuration requirements; and tests for the engine's ignition system. The government specifically reviewed defendant's design analyses, reports, and test plans, and attended multiple formal design meetings. The contractor's discretion was limited to "implementation" of the specific design requirements contained within the approved specifications and this did not defeat the government contractor defense. See, e.g., *McKay v. Rockwell Int'l Corp.,* 704 F.2d 444, 450 (9th Cir. 1983) (government contractor defense may still apply if the specifications leave some "discretion to the supplier in the formulation of the product's design"); *Oliver v. Oshkosh Truck Corp*., 96 F.3d 992, 999 (7th Cir. 1996) (fact that Oshkosh may have retained some discretion to position the fuel tanks and exhaust system within the envelope permitted by the specifications, standing alone, does not defeat the government contractor defense),

The court also concluded that it makes no difference, for purposes of the government contractor analysis, that a similar engine control system had previously been developed for Great Britain's Royal Air Force. If the court were to hold otherwise, the potential for increased liability could dissuade contractors from providing the United States with sophisticated military equipment that they had initially designed for another nation's armed forces. This ultimately would put the United States military at a competitive disadvantage: either the government would be unable to obtain necessary equipment or it would be forced to pay higher prices to offset the contractor's increased risk of liability.

Second, the court held that the operative test for conformity with reasonably precise specifications turns on whether the alleged defect existed independently of the design itself. To

say that a product generally failed to conform to specifications is just another way of saying that it was defectively manufactured. *Harduvel v. Gen. Dynamics Corp*., 878 F.2d 1311, 1321 (11th Cir. 1989). Therefore, absent some evidence of a latent manufacturing defect, a military contractor can establish conformity with reasonably precise specifications by showing extensive government involvement in the design, review, development and testing of a product and by demonstrating extensive acceptance and use of the product following production. Here, the MH-47E conformed with the approved specifications for both the ignition system and the DECU. The government contractor defense does not depend upon satisfaction of some general performance goal. Otherwise, a product involved in a design-induced accident would, as a definitional matter, always be deemed not to comply with such generalities since no performance specifications approved by the government would purposely allow a design that would result in an accident. *Kleemann v. McDonnell Douglas Corp*., 890 F.2d 698, 703 (4th Cir. 1989). For the defense to have any substance, non-conformance to precise specifications must mean more than that the design does not work in compliance with some general admonition against an unwanted condition.

Third, the contractors satisfied the final requirement. With respect to the potential for a water- or ice-induced flameout, it is clear that the Army was already aware of this particular risk. And, at most, plaintiffs' evidence suggests that the contractors should have been aware of the alleged defect, but the defense does not require a contractor to warn about dangers of which it merely should have known.