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Client Alert: SCOTUS Denies Cert in Case about Preemption When Military Contractors Perform Combat-Related Functions: United States Suggests That "Arising Out Of" Combatant Activities is Highly Fact-Specific Analysis

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Recently, the Supreme Court denied certiorari in *Midwest Air Traffic Control Service, Inc. v. Badilla*, No. 21-867, a case about the scope of federal preemption of state law claims when government contractors perform combat-related functions. The Supreme Court's denial lets stand the decision of the Second Circuit requiring that military contractors "show the military specifically authorized or directed the action giving rise to the claim."[1] It follows a brief from the United States recommending that the Court deny the case and suggesting that the preemption inquiry in this area is highly fact specific.

In October 2010, a cargo plane crashed near Kabul Afghanistan International Airport (KAIA), an airport that at the time served as a central hub for US and North Atlantic Treaty Organization (NATO) operations in Afghanistan. Though designated as a civilian airport, KAIA served a mix of military and civilian aircraft, and NATO supervised operation of KAIA's control tower. During the night of the crash, Midwest Air Traffic Control Service, Inc. (Midwest ATC), a US military subcontractor, provided the air traffic control services at KAIA. The cargo plane, which was leased to a US airline, was returning to its base of operations in Kabul from the US Bagram Air Base. The crash killed all eight people on board.

Administrators of the estates of six of the crash victims sued Midwest ATC under state tort law in New York, alleging that petitioner's controller acted negligently in his interactions with the pilot of the cargo plane. After removal to federal court, Midwest ATC asserted that the state claims were preempted by federal law, and the district court agreed. Relying on the Supreme Court's decision in *Boyle v. United Technologies Corp.*,[2] the district court determined that the claims were preempted by the federal interests embodied in the combatant activities exception in the Federal Tort Claims

Act (FTCA), which covers "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[3]

The Second Circuit reversed. Agreeing with the district court and the decisions of several other federal circuits, the Second Circuit concluded that the uniquely federal interests embodied in the FTCA's combatant activities exception may conflict with, and consequently may preempt, state-law claims against military contractors in appropriate circumstances. But the Second Circuit noted "disagreement" among the other circuits about the proper scope of displacement.[4] That led the Second Circuit to craft its own test, instructing that combatant activities exception "does not displace state-law claims against contractors unless (1) the claim arises out of the contractor's involvement in the military's combatant activities, and (2) the military specifically authorized or directed the action giving rise to the claim."[5]

Applying that test, the Second Circuit proceeded immediately to the second step and found it not met. It concluded that, at a very general level, the military had approved the international civil aviation standards that applied to Midwest ATC's air traffic operations at KAIA. But it determined that the military had not given instructions that compelled the relevant actions of Midwest ATC's air traffic controller. The Second Circuit explained that "[p]reemption arises when the Government specifically authorizes or directs the contractor action, not when the Government generally permits the contractor to undertake a range of actions."[6]

Midwest ATC filed a petition for certiorari. It emphasized that the Second Circuit acknowledged conflict regarding the applicable test and that the Supreme Court had previously requested the United States' position in at least three other cases raising questions about the scope of preemption in this context. The Supreme Court called for the views of the Solicitor General.

The United States recommended denying certiorari. It conceded that federal circuit courts had formulated different tests for defining the scope of preemption in this area. But the United States deemed the actual "degree to which there is divergence" to be "uncertain."[7] Most importantly for the dispute at hand, the United States maintained that all circuits to have weighed in agree that "a claim against a contractor cannot be preempted by the federal interests embodied in the FTCA's combatant activities exception" unless the claim "'arise[s] out of' the military's combatant activities."[8]

The United States contended that although "air traffic control services would … implicate the combatant activities exception in many circumstances" they did not do so "[i]n the particular circumstances of this case."[9] The United States pointed out that at KAIA Midwest ATC served a dual role, directing traffic for both military and civilian aircraft. And the government emphasized that on the night in question, there was no military involvement: the cargo plane was a civilian craft on a civilian flight; no military flights arrived at or departed from KAIA that evening; the record was silent as to what materials (if any) the cargo plane had delivered to Bagram Base earlier in the day and

what role those materials may have played in military operations; the cargo plane was manned by a civilian crew and apparently empty of all cargo and supplies; KAIA was not under threat of attack; and the actions of the allegedly negligent controller were governed by standard civilian operating procedures. This, according to the United States, showed that Midwest ATC's activities did not arise out of military combatant activities. The United States acknowledged that the answer might well be different were the contractor "directing air traffic at a military base or utilizing special standards to safeguard military traffic."[10]

In response, Midwest ATC accused the United States of backing away from its past position in these cases. Previously, the United States had indicated that "contractors performing essential tasks in an active theater of war" should be insulated from "the laws of fifty different states."[11] But Midwest ATC asserted that the United States had receded from this position. Midwest ATC maintained that that the United States now required contractors to perform "not just an 'essential … function,' but a '*closely* combat-related' one."[12] The Supreme Court ultimately denied certiorari.

Though the Supreme Court declined review, the Second Circuit's decision and the views of the Solicitor General are notable developments in this area of the law. In the Second Circuit, cases will now likely turn on the requirement that a contractor show that the military specifically authorized or directed the action giving rise to the claim. That requirement raises important and possibly difficult questions about how general a directive to a defense contractor can be and still suffice to confer immunity from state claims. Similarly, the position of the United States, which emphasized the particular facts and circumstances of the evening and the flight in question, appears to call for what Midwest ATC called "an action-by-action … analysis."[13] Notably, the United States stated that "air traffic control services" *would* "implicate the activities exception in many [other] circumstances."[14] It suggested state law could be preempted, for instance, "in the case of a claim against a contractor directing air traffic at a military base or utilizing special standards to safeguard military traffic."[15] But despite the United States' assurance, these developments may make it more difficult for defense contractors to know whether and when their combat-support activities will be insulated from state law claims.

The Supreme Court could take up this issue in another case. Though the United States urged denial of certiorari here, it has stated that this preemption question implicates "significant national interests" and "warrants [the Supreme] Court's review in an appropriate case."[16] Our lawyers will be monitoring how this area of the law continues to develop and are ready to assist companies navigating these standards.

Footnotes

[1] *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 128 (2d Cir. 2021)

[2] 487 U.S. 500 (1988).

[3] 28 U.S.C. § 2680(j).

[4] *Midwest ATC*, 8 F.4th at 127 (quoting *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 479 (3d Cir. 2013)). The Second Circuit reached this conclusion based on its review of *Harris, In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326 (4th Cir. 2014), *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), and *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992).

[5] *Midwest ATC,* 8 F.4th at 128.

[6] *Id.* at 129-30.

[7] Brief for the United States as Amicus Curiae at 17, *Midwest Air Traffic Control Serv., Inc. v. Badilla*, No. 21-867 (U.S. Apr. 17, 2023) (quoting 28 U.S.C. § 2680(j)).

[8] *Id.* at 11.

[9] *Id.* at 13.

[10] *Id.*at 15.

[11] Brief for the United States as Amicus Curiae at 19, *KBR, Inc. v. Metzgar*, No. 13-1241 (U.S. Dec. 16, 2014).

[12] Supplemental Brief for the Petitioner at 8, *Midwest Air Traffic Control Serv., Inc. v. Badilla*, No. 21-867 (U.S. May 2, 2023) (emphasis and second omission in the original) (quoting Brief for the United States as Amicus Curiae at 14, *Midwest ATC*).

[13] *Id.* at 9.

[14] Brief for the United States as Amicus Curiae at 13, *Midwest ATC*.

[15] *Id.* at 15.

[16] Brief for the United States as Amicus Curiae at 7, *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817 (U.S. Dec. 16, 2014).

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