

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MAR 30 2004

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE HANFORD NUCLEAR
RESERVATION LITIGATION

NO. CY-91-3015-WFN
ORDER GRANTING PLAINTIFFS'
MOTION TO STRIKE DEFENDANTS'
GOVERNMENT CONTRACTOR DEFENSE

This Order relates to: All Cases

A hearing on Plaintiffs' Motion to Strike Defendants' "Government Contractor" Defense [pursuant to Fed. R. Civ. P. 12(f)], filed January 16, 2004 (Ct. Rec. 1399), was held March 17, 2004, in Spokane, Washington. Peter Nordberg presented Plaintiffs' argument; Kevin Van Wart¹ presented Defendants' argument. Also present were the following counsel representing the listed parties:

Plaintiffs' Lead Counsel	Louise Roselle
Plaintiffs	Counsel
Jaros	Roy S. Haber
Seaman	
Hamilton/Criswell	Merrill Davidoff (Telephonic)
Evenson	Arnold Levin John Cummings
Berg	Richard Eymann Steven Jones Connie Powell

¹Defendants' Lead Counsel.

Berg/Lumpkin	
Matthies	
Defendants	Counsel
E.I. DuPont De Nemours & Co. [DuPont]	William (Randy) Squires
General Electric Co. [GE]	
UNC Nuclear Industries, Inc. [UNC]	

The Court took the matter under advisement. The Court has reviewed the file, the briefing on the Plaintiffs' Motion to Strike, and considered the oral argument of counsel. For the reasons stated below, the Court grants the Plaintiffs' Motion to Strike the Defendants' "Government Contractor" Defense.

I. BACKGROUND

The Amended Joint Consolidated Complaint for the cases consolidated in *In Re: Hanford*, CY-91-3015-WFN, was filed August 29, 2003. Federal question jurisdiction is asserted pursuant to the Price-Anderson Act, 42 U.S.C. § 2210(n)(2). Supplemental jurisdiction is asserted pursuant to 28 U.S.C. § 1367. The Plaintiffs' eight claims against the Defendants who operated the Hanford nuclear weapons facility are alleged to arise under the Price-Anderson Act and/or state law.²

²Plaintiffs' claims include: (1) negligence; (2) absolute or strict liability; (3) trespass; (4) private nuisance; (5) public nuisance; (6) outrage; (7) negligent infliction of emotional distress; and (8) concert of action/civil conspiracy. Amended Jt. Consol. Compl., filed 8/29/03, pp. 9-16.

1 Defendants' Answer to the Amended Joint Consolidated Complaint was
2 filed September 29, 2003. The third affirmative defense, among the
3 twelve identified, is the government contractor defense. Answer filed
4 9/29/03, p. 9. The fourth defense asserts that the claims are in
5 actuality against the United States which has not waived its sovereign
6 immunity and that the decisions made by the United States are protected
7 by the discretionary functions exception to the Federal Tort Claims Act
8 [FTCA], 28 U.S.C. § 2680(a). *Id.*

9 II. STANDARD FOR STRIKING AN AFFIRMATIVE DEFENSE

10 Plaintiffs argue that the government contractor defense must be
11 stricken as it is legally inapplicable to the Plaintiffs' Price-Anderson
12 claims. The Federal Rules of Civil Procedure authorize the Court to
13 strike any insufficient defense. FED. R. CIV. P. 12(f)³; *Sidney-Vinsein*
14 *v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). "[T]he function
15 of a 12(f) motion to strike is to avoid the expenditure of time and money
16 that must arise from litigating spurious issues by dispensing with those
17 issues prior to trial" *Sidney-Vinsein*, 697 F.2d at 885; *cf.*
18 *Hart v. Baca*, 204 F.R.D. 456, 457 (C.D. Cal. 2001). Plaintiffs assert
19 that the government contractor defense should be stricken to save the
20

21 ³Rule 12(f) of the Federal Rules of Civil Procedure states:

22 [u]pon motion made by a party before responding to a pleading
23 or, if no responsive pleading is permitted by these rules, upon
24 motion made by a party within 20 days after service of the
25 pleading upon the party or upon the court's own initiative at
any time, the court may order stricken from any pleading any
insufficient defense or any redundant, immaterial, impertinent,
or scandalous matter.

26 FED. R. CIV. P. 12(f) (West 2003).

1 expenditure of resources that would be necessary if the issue was to be
2 addressed simultaneously legally and factually. The courts do not favor
3 motions to strike, however, and will grant them only if the insufficiency
4 of the defense is clearly apparent. *Klemens v. Air Line Pilots Ass'n*
5 *Intern*, 500 F. Supp. 735, 738 (W.D. Wash. 1980); 5A CHARLES WRIGHT & ARTHUR
6 MILLER, FEDERAL PRACTICE & PROCEDURE § 1381 p. 672, 677-78 (2d ed. 1990).
7 Under this standard the question is whether the government contractor
8 defense is clearly insufficient as a matter of law and should be
9 stricken.

10 Defendants argue that the Motion to Strike is untimely. However,
11 the Court may raise the issue at any time and this discretion renders the
12 20 day rule unimportant. FED. R. Civ. P. 12(f); *Empresa Cubana Del*
13 *Tabaco v. Culbro Corp.*, 213 F.R.D. 151, 155 (S.D.N.Y. 2003). Moreover,
14 the Court gave the Plaintiffs express permission to file the Motion to
15 Strike.

16 III. DISCUSSION

17 The issue before the Court is whether the Defendants may assert
18 the government contractor defense against Plaintiffs' Price-Anderson
19 Act [P-AA] claims or whether the defense is clearly insufficient as
20 a matter of law. This presents a question of first impression as
21 no court has directly addressed the issue raised by the Plaintiffs
22 in this case. In such circumstances, the Court's ultimate decision
23 must comport with common sense after careful consideration is given
24 to the statute enacted by Congress, the common law defense created by
25 the Court, and the broader dictates of sovereign immunity and separation
26 of powers.

1 Government Immunity. The United States enjoys sovereign immunity
2 and cannot be sued unless it unequivocally waives its immunity. *Irwin*
3 *v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). Congress waived
4 the government's sovereign immunity in the Federal Tort Claims Act [FTCA]
5 but excepted from the waiver discretionary decisions of the federal
6 government. 28 U.S.C. § 2680(a); *Earles v. United States*, 935 F.2d 1028,
7 1030 (9th Cir. 1991). A discretionary decision is one in which a
8 government actor, of whatever status, takes an action that involves
9 consideration of social, economic or political policy. *Earles*, 935 F.2d
10 at 1031. Courts have reasoned that the "principle of separation of
11 powers requires that the judiciary refrain from interfering in those
12 executive branch actions that involve questions of public policy,
13 economic expediency and administrative practicality." *U.S. Fire Ins. Co.*
14 *v. United States*, 806 F.2d 1529, 1534-35 (11th Cir. 1983) (Public Vessels
15 Act implicitly contains discretionary function exception to waiver of
16 sovereign immunity).

17 An example of how the United States is shielded from suit by the
18 discretionary function exception of the FTCA is provided by Judge
19 Panner's decision in *Seaman v. E.I. Dupont and General Electric*,
20 CV-88-0197-PA (D. OR 6/27/91).⁴ In *Seaman*, plaintiffs sued the United

21 _____
22 'Local Rule 7.1(g)(2) precludes parties from citing unpublished
23 cases unless limited exceptions exist, none of which apply in this case.
24 Therefore, Defendants' citation to *Seaman* was barred by Local Rule.
25 Since the case was raised as one related to this litigation, however, the
26 Court will briefly discuss the limited holding of the case.

1 States and two Hanford government contractors, E.I. DuPont de Nemours &
2 Company and General Electric. Judge Panner held that the FTCA claims
3 against the United States had to be dismissed because the government's
4 decisions to discharge I-131 at Hanford were protected by the discre-
5 tionary function exception to the FTCA. Claims against the government
6 contractors were not addressed in this order and were not dismissed by
7 the order. Here, there are no FTCA claims asserted against the United
8 States. The United States is not a Defendant. The claims are brought
9 against the Hanford government nuclear contractors under the P-AA.

10 Government Contractor Defense. "Federal courts, unlike state
11 courts, are not general common-law courts" *Milwaukee v. Illinois*
12 *and Michigan*, 451 U.S. 304, 312 (1981). If state law is to be displaced,
13 elected representatives of Congress generally do so, not federal courts.
14 *Id.* at 313. In a few instances, where there is an absence of an
15 applicable statute, federal common law has been developed, but the
16 Supreme Court has "always recognized that federal common law is 'subject
17 to the paramount authority of Congress.'" *Id.* at 313 quoting *New Jersey*
18 *v. New York*, 283 U.S. 336, 348 (1931).

19 In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the
20 Court determined that a federal common law government contractor defense
21 should be created to fill a void where no explicit statutory directive
22 existed. 487 U.S. at 504. This defense is available to a contractor who
23 performed according to a contract with the United States, when the
24 contractor's performance would render it liable under state law. *McKay*
25 *v. Rockwell Intern. Corp.*, 704 F.2d 444, 448 (9th Cir. 1983). The state
26 law is effectively preempted by the federal common law defense. The

1 defense applies to both performance and procurement contracts. *Boyle*,
2 487 U.S. at 506 (military procurement contract).

3 Defendants argue broadly that considerations of sovereign immunity
4 apply to government contractors. The government contractor defense,
5 however, is not an extension of sovereign immunity. Justice Brennan
6 dissented in *Boyle*, arguing that official [sovereign] immunity should not
7 be extended to government contractors. *Id.* at 524. The majority noted
8 that the issue of extending immunity to government contractors was not
9 before the Court. *Id.* at 505 n.1. Citing *Boyle*, the Ninth Circuit has
10 thus concluded that "the government contractor defense does not confer
11 sovereign immunity on contractors." *United States ex rel Ali v. Daniel*,
12 *Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146 (9th Cir. 2004). Like
13 the FTCA however, the government contractor defense, if applicable,
14 prevents the courts from second guessing government discretionary
15 decisions. *Boyle*, 487 U.S. at 511.

16 *Boyle* set forth two legal prerequisites to the application of the
17 government contractor defense and three factual elements. State law will
18 be displaced or preempted by the federal common law only if (1) the
19 subject matter involves "uniquely federal interests"; *id.* at 504, and
20 (2) "a significant conflict exists between an identifiable federal policy
21 or interest and the operation of state law or the application of state
22 law would frustrate specific objectives of federal legislation." *Id.* at
23 507 (internal quotations, parentheticals, and citations omitted).

24 To define a "significant conflict" the Court in *Boyle* referenced the
25 discretionary function exception to the government's waiver of its
26 sovereign immunity under the FTCA. *Boyle*, 487 U.S. at 511. This caused

1 the Ninth Circuit to observe that the defense is intellectually moored
2 to the discretionary functions exemption of the FTCA. *Nielsen v. George*
3 *Diamond Vogel Paint Co.*, 892 F.2d 1450, 1454 (9th Cir. 1990). A
4 significant conflict exists if the government's decisions are
5 discretionary functions. *Boyle*, 487 U.S. at 512. Plaintiffs correctly
6 note that the *Boyle* decision did not hold that the FTCA actually applied
7 to actions against government contractors. If it had, there would have
8 been no need to develop a common law defense for the government
9 contractor who was acting in compliance with government discretionary
10 decisions.

11 The *Boyle* court held that the three factual elements that must
12 be satisfied provided the two legal prerequisites are met, are that:
13 (1) the United States approved reasonably precise specifications; (2) the
14 contractor conformed to the specification; and (3) the contractor
15 warned of dangers it knew of which were unknown to the Government.
16 *Id.* at 512.

17 Price-Anderson Act. In 1957, thirty-one years before the *Boyle*
18 Court defined the contours of the government contractor defense, Congress
19 enacted the P-AA. The Act specifically addresses when nuclear operators
20 have liability for nuclear accidents. The two major objectives of the
21 P-AA are:

22 to assure adequate public compensation in the case of a nuclear
accident; and

23 to set a limit on the liability of private industry to remove
24 a major deterrent to private participation in the development
of nuclear energy.

25 S. REP. No. 100-70, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 1424,
26 1426; cf. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438

1 U.S. 59, 83 (1978). Congress clearly noted that "[t]he primary concern
2 of the Federal Government is with the protection of the people who might
3 suffer damages from the new atomic energy industry." S. REP. NO. 85-296
4 (1957), reprinted in 1957 U.S.C.C.A.N. 1803, at 1816.

5 Originally Congress fashioned the Act so as not to create a
6 federal cause of action. *Id.* at 1810. It relied on state law to
7 determine damages to the public. *Id.* It channeled liability to the
8 nuclear operators and established a combination of mandatory private
9 insurance (for the operators and those associated with them) and an
10 indemnification of the operator. *Id.*; *Duke Power*, 438 U.S. at 64-65.

11 In 1966 the P-AA was amended to address Congress's concern that
12 state laws might prevent a person damaged from a nuclear incident from
13 obtaining rapid and adequate financial compensation. S. REP. NO. 89-1605
14 (1966), reprinted in 1966 U.S.C.C.A.N. 3201, 3203-04. Congress amended
15 the Act to allow the government to contractually require operators to
16 waive certain key defenses related to fault and statute of limitations
17 and defenses as to charitable or governmental immunity but only in the
18 case of a serious event or "extraordinary nuclear occurrence" [ENO]. S.
19 REP. NO. 89-1605 (1966), reprinted in 1966 U.S.C.C.A.N. 3201, 3201-02,
20 3209; *Duke*, 438 U.S. at 66 n.5; see 42 U.S.C. § 2210(n) (1).

21 Congress again amended the Act in 1988 to "better achieve the goal
22 of providing in advance of any nuclear incident a mechanism for full
23 compensation of the public that is equitable, efficient, reliable, and
24 comprehensive." S. REP. NO. 100-218, at 4 (1988), reprinted in 1988
25 U.S.C.C.A.N. 1476, 1479. In response to difficulties experienced
26 following the Three Mile Island nuclear incident, Congress provided for

1 the consolidation of claims arising out of a nuclear incident in federal
2 district court. *Id.* at 13, 1488; codified at 42 U.S.C. § 2210(n)(2); *El*
3 *Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 477 (1999). The federal
4 court was given original jurisdiction as well as removal jurisdiction
5 over all public liability actions. *Neztosie*, 526 U.S. at 477. As a
6 result, any claims that grow out of a nuclear incident are only
7 compensable under the P-AA. *In Re Berg Litigation*, 293 F.3d 1127, 1132
8 (9th Cir. 2002) citing *In Re Three Mile Island Litigation*, 940 F.2d 832,
9 854 (3d Cir. 1991) ("After the Amendments Act, no state cause of action
10 based upon public liability exists. A claim growing out of any nuclear
11 incident is compensable under the terms of the Amendments Act or it is
12 not compensable at all.") Although the claims must be addressed in
13 federal court, the "underlying rules of decision are to be derived from
14 state law." *In Re Three Mile Island Litigation*, 940 F.2d at 854; cf. 42
15 U.S.C. § 2014(hh)⁵.

16 Interface Between P-AA and the Government Contractor Defense.

17 Having considered sovereign immunity, the general contours of the
18 government contractor defense, and the history of the P-AA, the Court
19

20 ⁵42 U.S.C. § 2014(hh) provides

21 [t]he term "public liability action", as used in § 170 [42
22 U.S.C.S. § 2210], means any suit asserting public liability.
23 A public liability action shall be deemed to be an action
24 arising under § 170 [42 U.S.C.S. § 2210], and the substantive
25 rules for decision in such action shall be derived from the law
26 of the State in which the nuclear incident involved occurs,
unless such law is inconsistent with the provisions of such
section.

26 42 U.S.C.S. § 2014(hh) (1996).

