

BAD NEWS, GOOD NEWS: SUPREME COURT CLARIFIES FEDERAL CONTRACTOR IMMUNITY STANDARDS

Insights
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The Supreme Court both limited and expanded the legal standards that relate to federal contractor immunity from lawsuits in a decision released last week. According to the January 20, 2016 decision in *Campbell-Ewald Co. v. Gomez*, a contractor's immunity from liability for work performed under contract with the federal government is qualified, rather than absolute; however, such immunity is not limited to the context of property damage resulting from public works projects.

Background

The U.S. Navy contracted with the Campbell-Ewald Company to develop a marketing campaign. The contract expressly provided that the Navy would oversee Campbell-Ewald's work and approve all deliverables provided by the company. Campbell-Ewald proposed, and the Navy approved, a plan using text messaging.

Jose Gomez was one of 100,000 cell phone users who received the text message marketing the Navy. He brought a class action against Campbell-Ewald claiming that the message violated the Telephone Consumer Protection Act, a federal statute that prohibits calls using automatic dialing systems without the consent of the recipients.

The company argued, among other things, that it should be immune from suit because it was a federal contractor. The district court dismissed the suit, and Gomez appealed. The 9th Circuit Court of Appeals reversed that dismissal, ruling that immunity applied only to claims for property damage

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caused by a public works project, and allowing the claim against Campbell-Ewald to proceed.

On appeal to the U.S. Supreme Court, Campbell-Ewald argued first that an offer it made to satisfy Gomez's individual claim rendered the entire class action moot, but the Court disagreed (read [more](#)). The Court also addressed whether the Navy's sovereign immunity from suit shielded its contractor as well.

Immunity Is Not Absolute, But Qualified

First, the bad news for federal contractors. The Court held that Campbell-Ewald's status as a federal contractor did not entitle it to absolute immunity from all lawsuits, but instead that immunity may only extend to federal contractors if certain conditions are met.

Immunity "reduces the risk that contractors will shy away from governmental work," the Court acknowledged, but does not apply if the contractor violates the government's instructions. If the contract is validly conferred and the contractor performs as the government directs, the contractor may escape liability if its performance of the contract causes injury to another. Further, the Court reminded businesses, qualified immunity can be lost if the contractor knew or should have known that its conduct violated a clearly established right.

Application Of Immunity Is Expansive

But there is a silver lining for federal contractors. In a footnote, the Court disagreed with the lower court's interpretation of a 75-year-old opinion that describes immunity principles (*Yearsley v. W. A. Ross Constr. Co.*). The 9th Circuit Court of Appeals had stated these immunity principles only apply as they were applied in *Yearsley*: to claims for property damage caused by a public works project.

The Supreme Court rejected that view and held that immunity should not be applied that narrowly. Instead, the Court stated that the critical element is whether the contractor's performance complied with all federal directions. That question would serve as the touchstone for determining whether immunity applies.

What Does This Decision Mean For Federal Contractors?

The Supreme Court's expansive interpretation of the types of claims to which qualified immunity may apply opens a

door to an additional argument federal contractors can now make. Contractors can claim they should be immune from employment claims if their actions were taken at the government's direction pursuant to contract.

Examples of such actions might include employee background screening undertaken for security reasons, wage payments, or actions taken to comply with affirmative action mandates. This decision makes it clear that, whatever the context, contractors interested in relying upon an immunity defense will need evidence of government direction and approval of their actions.

If you have any questions about this case, or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Affirmative Action and Federal Contract Compliance Practice Group.

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