THE CHANGING NATURE OF CAPITALISM AND A QUESTION OF LAW IN THE UNITED STATES

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ABSTRACT

As the Federal Government in the United States deals with questions about automobile, banking and other industries during the 2008-2009 recession, the changing nature of the mixed public-private economy in this country is being considered. This paper presents a careful study of Pennsylvania statutes and case law demonstrating how private companies can avoid certain liabilities by shielding themselves behind the legal concept of governmental immunity. This example of the sharing of government immunity with private companies in certain circumstances is presented as another facet of the debate concerning the mixing of capitalism and socialism in capitalistic economies.

INTRODUCTION

The economic downturn of 2008-2009 has people in the United States, as well as most countries in the world, questioning basic distinctions between capitalism and socialism. The question often heard in the United States today is: Are we becoming a socialist nation? In April, Joseph Stiglizt commented on legislation proposed by the Obama administration to infuse $500 billion, or more, dollars into the ailing banking industry. Stiglizt characterized the proposal as follows: "What the Obama administration is doing is far worse than nationalization; it is ersatz capitalism, the privatizing of gains and the socializing of losses." [1, p. 2]

In July, Robert Peston, the BBC's business editor, summarized the changing attitude in capitalistic economies as "moving away from the Anglo-American political consensus of the past 20 years that the markets are normally right, reversing the Thatcherite/Reaganite movement of rolling back the state and expanding the domain of the private sector...." His question was: "If markets are routinely wrong, what does that mean for how we organise our economies?" [2]

The economic systems of the United States and Great Britain, and many other countries, have always been "mixed capitalistic" systems, however. Private companies in "the Anglo-American" tradition have always looked to government – warily, expectantly, and even hopefully. To greater or lesser extents, governments in capitalistic economies have always regulated, inspected, redistributed, and legislated for their economies.

Private companies have always viewed price competition as dangerous and potentially disastrous. In a news article published in the New York Times on December 28, 1908, it was reported that the formation of the General Motors Company through the assumption of stock of the Olds Motor Works and the Buick Motor Company was the first step in what promoters of the new company hoped would "be a practical consolidation of all the more prominent makers of low-priced cars." In the era of fledgling anti-trust regulation in the United States, the same report concluded: "The basic idea behind the combination proposals has been the purchase of materials in quantities, effecting a considerable saving in the cost of production, the distribution of the field so as to avoid competition in the production of cars of each given price, apportioning to each concern the type which it shall produce, and the limitation of it to that type." [3]

Perhaps the question in most countries is: How do capitalism and socialism mix in the economic system. The ongoing adjustment takes a variety of forms in various countries. The questioning stimulated by the economic downturn of 2008-2009 is most often conducted at a very general, national level. The authors of this paper offer a more specific example of the ongoing historical adjustment in the United States. This paper examines Pennsylvania statutes and case law demonstrating how various entities can avoid liability by shielding themselves behind the legal concept of governmental immunity.

PENNSYLVANIA STATUTES

In Pennsylvania there are distinct statutes that encompass governmental immunity. Under the Sovereign Immunity Act, immunity is granted to the Commonwealth of Pennsylvania, its agencies and officials acting within the scope of their authority except as provided in the exceptions outlined in the legislation. [4] Additionally, the Political Subdivision Tort Claims Act protects against any monetary liability when a local agency or anyone thereof causes harm to person and/or property unless the conduct in question comes within one of the granted exceptions. Under statute, "a local agency" is defined as a governmental unit other than the Commonwealth government. An employee of a local agency may claim such immunity when the employee's course of conduct "was authorized or required by law, or that [the employee] in good faith reasonably believed the conduct was authorized or required by law." [5]

In Jones v Southeastern Pennsylvania Transporation Authority [6], it was pointed out by Supreme Court Justice Cappy that since the Sovereign Immunity and Tort Claims Acts involve the same issue of governmental immunity, the court will interpret them in the same manner. The court in Jones went on to state that the exceptions to the governmental immunity shield should be narrowly construed. Additionally, in Smith v City of Philadelphia [7], the Pennsylvania Supreme Court indicated the main reason behind governmental immunity is to protect the public's money from massive monetary awards in tort liability cases.

EMPLOYEE IMMUNITY

Some court cases have focused on parties attempting to claim immunity by trying to prove that the party is an employee of a governmental entity. In Helsel v Complete Care Services [8], a wrongful death lawsuit was brought by the estate of the deceased against an administrator of a county owned nursing home located in Cambria County, Pennsylvania. The facility was managed by Complete Care Services, L.P., a privately owned profit motivated Pennsylvania corporation. This corporation was in the business of providing nursing care and health services and described itself as "the leader in the privatization of county nursing homes". Complete Care tried to assert a governmental immunity defense. This assertion was based upon the premise that since this business entity was working on behalf of the county and looking out for its interests, it qualified as an employee of the "local agency" (Cambria County).

However, the Pennsylvania Commonwealth Court held that the nursing home operator was not an "employee" of the county, but instead was a private independent contractor. Furthermore, the court pointed out it was illogical to assert that it should be able to have a governmental immunity shield merely because this nursing home manager was acting in the interest of the government and on behalf of the government. The court stated "contracts between public county entities and private actors should not constitute bridges (emphasis added) by which immunities intended to protect public funds are extended to private actions". [8] Finally, the court noted that simply because the county would have been entitled to immunity if it had managed the nursing home does not mean that the private contractor performing the management would be entitled to such immunity.

QUASI GOVERNMENTAL AGENCIES

At the same time, there has been a long line of cases involving volunteer fire companies and their attempt to be considered a "local agency" for purposes of governmental immunity. In Regester v Longwood Ambulance Co., Inc. [9], the estate of the deceased of George E. Regester III sued Longwood Ambulance Company, Inc., which provided fire protection services and ambulance service, for negligently failing to arrive at deceased's residence in a timely fashion and from preventing his death due to cardiac and respiratory problems. The Commonwealth Court held that a volunteer fire company is a local agency having governmental immunity. The decision pointed out that "local agency status is awarded to volunteer fire companies not because they are otherwise deemed agents of the local government unit under traditional concepts of principal-agency law but rather are traditionally 'accorded local agency status because of the duties performed by fire fighters are of public character' ". In the decision, the court cited the Pennsylvania Supreme Court case of Guinn v Alburtis Fire Co., [10], which held that if a volunteer fire company was established by law and recognized under the law as the fire company for a political entity then it would be considered to be a "local agency". Regester was appealed to the Pennsylvania Supreme Court, but the appeal on this issue was not granted.

Likewise, the Pennsylvania Supreme Court in Sphere Drake Insurance Company v Philadelphia Gas Works and Philadelphia Facility Management Corporation [11], held that a non-profit corporation that was the manager and operator for a Philadelphia run gas facility was a "local agency" that had immunity. The decision was based upon the fact that the city's control over the non-profit corporation was extensive. Factors that the court examined highlighting this control were the following: the city created this entity and appointed the corporate board members, the city exercised a great deal of control over it, the corporation's only revenue stream came from the city, the reason for its existence was to help the city, the breaking up of the corporation would result in its assets being vested in the city, the city indemnified the people employed at the company and these employees were eligible to participate in benefits provided to other city employees.

BUSINESS CONTRACTORS UNDER GOVERNMENTAL CONTRACTS

Other court cases involve attempts by contractors attempting to use the immunity defense when working in conjunction with government contracts. Once classic case in this area is Ference v Booth & Flinn Co. [12] Booth & Flinn Co., the defendant, was a road contractor that had entered into a contract in 1944 with the state highway department of the Commonwealth of Pennsylvania to extend Ohio River Boulevard in Allegheny County, PA. The terms of the contract specified a requirement to create a 50 foot wide divided highway near a hillside located close to the Ohio River. In order to accomplish this, there was a need to excavate at the bottom of the hillside. While doing so, Beaver Road, located at the top of this hill, was severely damaged and necessitated its closure. The plaintiffs, Ohio River Motor Coach Company, operated a bus line between Aliquippa and Pittsburgh and had been permitted to use that portion of Beaver Road in its transportation route. As a result of Beaver Road's closing, the plaintiffs lost passengers and incurred additional mileage to get around its shutdown. The plaintiffs brought suit against the defendant, a road contractor, for economic loss.

The defendant, an independent contractor, attempted to avoid liability by arguing that when a contractor performs work on behalf of a state entity following the language and specifications of its contract, it has not committed a tort and should be immune from liability for any damages that have occurred. In Ference, there was no dispute that the defendant performed its excavation work in a non-tortuous manner. However, the plaintiffs countered by stating that the Defendant did not clear Beaver Road within a reasonable time frame. The Pennsylvania Supreme Court held that the defendant was not liable for economic loss to the plaintiffs as it had sovereign immunity protection. The Court based this holding on the finding that the defendant was carrying out the specifications of the contract with the Commonwealth

of Pennsylvania's entity, the State Highway Department, when the excavation occurred and it was not tortuous when doing this or in its eventual clearing of the roadway.

In 1956, the Pennsylvania Supreme Court again dealt with a similar issue that arose in Ference, when it decided Valley Forge Gardens, Inc. v James D. Morrissey, Inc. [13] The defendant, like in Ference, was a road contractor that had entered into a contract with a Pennsylvania entity, the State Highway and Bridge Authority, to construct a portion of the "Philadelphia Expressway". Very importantly, under the terms of the construction contract, the defendant was required to build a fill, which eroded and caused the dirt and silt to enter a stream that deposited the debris in plaintiff's cemetery ponds. The plaintiff sustained financial loss from dredging the ponds and constructing the property site in such a manner to prevent this from reoccurring. The plaintiff, accordingly, sought monetary damages from defendant to cover it from such expense.

In this case, the court found that the defendant, also in an independent contractor like in Ference, had proven that its work was done in accordance with the government construction contract specifications and, thus, defendant was not negligent in its work performance. In this case, Justice Jones specifically cited the remarks of Chief Justice Drew in Ference, stating "it is hornbook law that the immunity from suit of the sovereign state does not extend to independent contractors doing work for the state. But it is equally true that where a contractor performs his work in accordance with the plans and specifications and is guilty of neither a negligent nor a willful tort, he is not liable for any damage that might result". The Pennsylvania Supreme Court in Valley Forge pointed out that every state in the United States which decided this issue followed the same legal outcome (the Court noted cases in the states of Illinois, Kansas, Iowa, Minnesota, California, Indiana, Kentucky, New York, North Carolina, Tennessee, Virginia). Interestingly, the Court pointed out it was clearly a matter of "semantics" that the "contractor who performs work for it [the state] in conformity with a contract and without negligence...may not plead such immunity. But, if the contractor, in privity with the state or its instrumentality, performs the contract work which the state is privileged to have done, the privilege operates to relieve the contractor from liability to third persons except for negligence or willful tort in performance of the work." Finally, the Court noted that this outcome is essential or otherwise the contractor would be subject to unknown monetary damage claims by adjoining landowners.

In May 2000, the Pennsylvania Supreme Court in Conner v Quality Coach, Inc. [14] again sat in judgment on the issue at hand. Bruce Conner, whose legs were paralyzed and who had only some movement ability in his arms and hands, obtained a specially equipped van through the Office of Vocational Rehabilitation (hereinafter "OVR"). This motor vehicle had a "throttle/brake control" which contained a "palmer cuff with D-ring on Velcro" that helped to hold the driver's hand on the control. OVR had asked for bids on this type of specially equipped van and accepted one from Quality Coach, Inc., the latter of which had obtained advice on this special equipment from Moss Rehabilitation Driving School. Quality Coach, Inc. purchased the above special device from Creative Controls, Inc. and installed it in the van according to the contract requirements with OVR. Subsequently, Mr. Conner was involved in a serious accident while driving this van and sued a number of parties, including Quality Coach, Inc., Moss Rehabilitation Driving School and Creative Controls, Inc. The basis for the lawsuit claimed that the device in question was defective.

In Conner, the Pennsylvania Supreme Court cited, but distinguished the U.S. Supreme Court case of Boyle v United Technologies, [15] Boyle involved a U.S. Marine's estate suing the Sikorsky Division of United Technologies, alleging that there was a defective design in one of its manufactured helicopters that caused the marine's death. United Technologies raised the defense of a "federal government contractor", attempting to shield itself behind U.S. governmental immunity. The basis for this defense centered on the contractor manufacturing and supplying military equipment according to specifications present in the U.S. Military contract. Justice Scalia, although reluctant to supplant state tort law with "federal common law"

did so, not just because of "federal interests" present in the procurement of U.S. military equipment, but also as a result of the belief that the U.S. governmental immunity would be weakened if federal contractors, fearing legal liability, passed on additional costs to supply such equipment to the federal government. Justice Scalia stated, "it makes little sense to insulate the government against financial liability for the judgment that a particular feature of military equipment is necessary when the government produces the equipment itself, but not when it contracts for the production". The holding in Boyle was that a federal government contractor could use a U.S. government immunity defense for defective designs in U.S. military equipment when: 1). the U.S. government had placed "reasonably precise" specifications in the contract (2). the equipment followed these specifications and (3). the federal contractor had put the U.S. government on notice of any danger it had found in the equipment's use that had not been known by the U.S. government.

In Conner the Pennsylvania Supreme Court cited the precedent cases of Ference and Valley Forge as cases standing for the legal principle that a public works contractor is insulated from liability provided there was no negligence by such contractor, that there has been governmental control and guidance over such party's work and this contractor had followed the contract's specifications when performing the work. The Conner court explained that federal law in this area prior to the Boyle case seemed to mirror Ference/Valley Forge, but was then extended and broadened by Boyle. As Justice Saylor pointed out in Conner, "The threshold question in this appeal may be framed as follows: Should this court, like the United States Supreme Court in Boyle, undertake to declare a new, substantive rule of law insulating from exposure to product liability law government contractors who lay no claim to actual agency for the Commonwealth, may have actually participated in the design of the portion of the product alleged to be defective, and/or are alleged to have been negligent in the design aspect? Obviously, as a matter of federal preemption, this court is bound by Boyle concerning immunity from state tort law conferred by a contractor's status as a federal government contractor. The present case, however, does not involve a federal contractor – OVR is a Commonwealth agency".

The Pennsylvania Supreme Court held in Conner that since there is no Pennsylvania common law supporting sovereign immunity, the sole basis for such immunity is under statutory authority. Accordingly, the court reasoned the issue was whether legislators intended to include contractors working for a governmental authority in the language of the state's sovereign immunity statute. The court in Conner declined to find such coverage for all contractors, noting the clear straightforward language of the statute could not support such inclusion and pointing out that the legislative branch never chose to pass a separate state statute granting such immunity to these contractors. Finally, in refusing to follow Boyle, the Connor court indicated that even if the Commonwealth would gain economic advantage in government purchases by shielding contractors with governmental immunity this could be outweighed by other factors such as a state government procurement official not being adequately concerned with public safety issues thinking that the state was protected from such financial costs arising therefrom.

Therefore, in Conner, the Pennsylvania Supreme Court refused to extend immunity to contractors working under government contracts when these contractors were liable under tort law. The court in its decision distinguished Ference/Valley Forge principles noting that the present case was not a public works project and that Quality Coach, Inc. did not carefully follow the specifications of a governmental contract under governmental supervision, but instead involved itself in the decision making process concerning the "throttle/brake control". Accordingly, the court refused to extend government immunity for tortuous conduct including strict liability for defective products to contractors working with the government. However, the court in Conner did state "we do not here foreclose the possibility that state government contractors who have strictly adhered to government-generated specifications under close government supervision might avail themselves of the Ference/Valley Forge construct in defense of product liability claims, since these are not the facts before us". (Emphasis added).

Finally, the case of Coolbaugh v Com., Dept. of Transp. [16] involved a plaintiff, Joyce Coolbaugh, sustaining a horrendous permanent spinal injury when her automobile "hydroplaned" on Interstate Route 81 in Pennsylvania. She sued the Pennsylvania Department of Transportation (PennDot) for failing to construct and maintain the highway in such a manner to allow for proper and adequate water drainage on it. At the trial level, PennDot settled with the plaintiffs, but had filed a complaint against Slusser Brothers, a road contractor, joining it in the lawsuit. PennDot asserted in this complaint that Slusser Brothers had been negligent in its road work on Interstate Route 81 and did not follow the specifications of the construction contract it had with PennDot. In turn, the contractor denied these allegations and contended that since it had followed all of the contract specifications in a workman like manner, it was entitled to immunity under the Pennsylvania Sovereign Immunity Statute.

The appeal of this case to the Pennsylvania Superior Court centered on whether the trial court's summary judgment motion for the contractor against the plaintiffs was proper. Justice Johnson in the opinion pointed out that under Conner v Quality Coach, Inc. the Pennsylvania Supreme Court failed to grant immunity to a contractor working under a contract it had with a government entity when such contractor was liable for defectively manufacturing a product. Justice Johnson then analyzed the Ference and Valley Forge cases and stated that the Pennsylvania Supreme Court in these cases found the contractors not liable because of their lack of tortuous conduct in following the specifications of the government contract.

In light of the above, the Pennsylvania Superior Court in Coolbaugh held that a contractor can only assert an immunity defense if the contractor had followed the specifications of the government contract *and* was not liable for negligence. (See also Lobozzo v Adam Eidemiller, Inc. [17]) As Justice Johnson stated in Coolbaugh "*fulfillment of the contract specifications does not necessarily satisfy the standard of care owed to the plaintiff in a negligence action*".

Accordingly, the court reversed the trial court's decision in granting the summary judgment for the contractor, Slusser Brother, on the basis that the court record showed that there was an open issue of whether or not factually, the contractor was negligent when performing the roadwork.

CONCLUSION

In Pennsylvania, the Sovereign Immunity Act and the Political Subdivision Tort Claims Act, as their names indicate, provide governmental entities immunity from claims against certain conduct. These acts, also in some cases, provide that same immunity to contractors who are retained by a governmental entity to provide certain services and/or products. However, the immunity, although it applies to all the governmental entities performing the specific conduct that is protected, does not apply to all contractors performing for a governmental entity. One must, inter alia, determine the application of any immunity by obtaining the contract specifications, decide if the contract was followed by the contractor and evaluate whether the contract specifications would lead to the contractor performing negligently under this contract.

This sharing of government immunity with private companies in certain circumstances is an interesting example of the mixing of capitalism and socialism. It is an example suggesting a broader and more robust context to current discussions of the inroads socialism is making in heretofore "capitalistic" countries.

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