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SECOND CIRCUIT REVIEW

GOVERNMENT CONTRACTOR LIABILITY

MARTIN FLUMENBAUM - BRAD S. KARP

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Government Contractor Liability

In this month's column, we discuss a significant decision issued by the United States Court of Appeals for the Second Circuit earlier this month which addressed the issue of whether a *Bivens* action may be maintained against a private corporation alleged to have violated an individual's constitutional rights.

The decision vacated the district court's ruling that a private correctional services corporation was immune from suit both because a *Bivens* action may only be asserted against an individual federal agent, and because the suit was barred by the "government contractor defense" enunciated by the Supreme Court in *Boyle* v. *United Technologies Corp.*

In a case of first impression, the Second Circuit ruled both defenses inapplicable, not only to correctional corporations, but to a wide array of private corporations that provide services to the federal government. This decision highlights a split between the circuits on this important issue and permits prosecution of *Bivens* claims in this circuit against private corrections corporations and those similarly situated.

Liability Under 'Bivens'

In *Malesko* v. *Correctional Services Corporation*,[1] in an opinion written by Judge Sonia Sotomayor and joined by Judge Rosemary S. Pooler,[2] the Second Circuit rejected two defenses asserted against plaintiff's action against a private correctional services corporation under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*.[3] The court ruled that a *Bivens* action could lie against a private government contractor, and that such suits were not barred, except in narrow circumstances, by the "government contractor defense" set forth in *Boyle* v. *United Technologies Corp.*[4]

Plaintiff in this action, John E. Malesko, was convicted of federal securities fraud in 1992 and sentenced to 18 months imprisonment under supervision of the Federal Bureau of Prisons. While in the custody of the bureau, Malesko was diagnosed with a heart condition that required treatment via prescription medication. Malesko was transferred on Feb. 2, 1994 to the Le Marquis Community Correction Center, a "halfway house" operated by defendant Correctional Services Corp. (CSC) on behalf of the federal government, where Malesko was to serve the remainder of his sentence.

Malesko was assigned a room on the fifth floor of this facility and allowed to use an elevator to reach his floor; in the beginning of March 1994, however, a new policy allegedly instituted by CSC allowed only residents living on floors six and above to use the elevator.

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While the staff continued to allow Malesko to use the elevator for several weeks, in deference to his heart problems, Malesko alleged that on March 28 a CSC employee prevented him from using the elevator to reach his room, despite Malesko's protestations about his condition.

While climbing the stairs Malesko suffered a heart attack, fell, and injured himself; Malesko additionally alleges that CSC deprived him of his prescription medication during the ten days leading up to this incident.

Malesko filed a *pro se* action on March 27, 1997, in the United States District Court for the Southern District of New York, alleging that these actions by CSC violated his constitutional rights. In his complaint, Malesko named as defendants both CSC and 10 "unknown" individual CSC employees, although he later amended the complaint to identify Jorge Urena as the employee who had refused to allow him to take the elevator.

On July 28, 1999, the district court entered a judgment granting CSC's motion to dismiss, dismissing the amended complaint as against Urena, denying Malesko's motion to file a second amended complaint, and instructing the clerk of court to close the case.[5] The district court interpreted the amended complaint as asserting a claim under the *Bivens* doctrine, which provides for a cause of action for damages against federal agents who violate constitutional rights.[6]

The court held that Malesko's claims against CSC failed on two grounds: first, private corporations such as CSC could not be sued under *Bivens* because "[a] *Bivens* action may only be maintained against an individual;"[7] and second, CSC was "shielded from liability" because CSC had "contracted with the federal government to carry out a project on behalf of the government."[8] Additionally, the district court dismissed the claim against the individual employees, including Urena, and refused to allow Malesko to amend his complaint to name others because the statute of limitations had run on the *Bivens* claim as of March 28, 1997 (one day after Malesko had filed his initial complaint), and thus any amendments would be "futile" under Fed. R. Civ. P. 15 and could not "relate back" to the date of filing of the original complaint.[9]

The Second Circuit affirmed the judgment of the district court only as to its dismissal of defendant Urena and the additional individual defendants Malesko wished to name, ruling that because Malesko's claim accrued on March 28, 1994, the day he suffered his heart attack on the stairs, the three-year statute of limitations on *Bivens* actions[10] had expired on March 28, 1997; plaintiff's naming of Urena as "John Doe Defendant #1" in the Feb. 2, 1999 amended complaint would be permitted under Fed. R. Civ. P. 15(c) as a "relation back" to the original complaint only if "a mistake concerning the identity of the proper party" had been made.[11] But simple ignorance of a defendant's identity is not sufficient to satisfy this standard,[12] and the court therefore held that neither Urena nor the other individual defendants Malesko wished to name in a second amended complaint was properly a defendant in this action.

Key Part of Second Circuit Decision

Of far more importance was the Second Circuit's rejection of the two defenses relied upon by the district court in dismissing the *Bivens* claim against CSC. The district court apparently rested its decision that *Bivens* claims could only be asserted against individual federal agents (and not against private corporate contractors) on the Supreme Court's opinion in *FDIC* v. *Meyer*, 510 U.S. 471 (1994). Noting initially that "the question of whether a *Bivens* claim may lie against a private corporation is an issue of first impression in this Circuit,"[13] the Court rejected this application of the *Meyer* decision and stated firmly that "a private corporation acting under color of federal law may be subject to a *Bivens* claim."[14]

Meyer involved the assertion of a *Bivens* claim against the Federal Savings and Loan Insurance Corp. based on the alleged violation of an individual plaintiff's due process rights.[15]

The Supreme Court, noting that no Court of Appeals decision other than the one on appeal had ever allowed a *Bivens* claim to be asserted directly against a federal agency, declined to do so for several reasons: first, because a principal rationale of *Bivens* had been to create a cause of action against federal officials where "a direct action against the government" was unavailable; and second, because allowing *Bivens* suits against the agencies themselves would undermine a stated goal of *Bivens* decision—i.e., to deter wrongdoing by federal officials.[16] If plaintiffs were allowed to proceed against the agency itself, the Court reasoned, no plaintiff would ever risk the qualified immunity defense available to the individual officers, and those officers would therefore remain undeterred. Finally, the Court observed that a "direct action for damages against federal agencies would be creating a potentially enormous financial burden for the Federal Government," a result the Court was unwilling to reach absent some evidence of congressional intent to have such a burden imposed upon the government.[17]

While several circuit courts before *Meyer* had recognized that *Bivens* claims could be asserted against private corporations acting under color of federal law,[18] and no circuit court had previously held that private entities were not subject to such claims, the circuits since *Meyer* have split on whether the decision applies to bar such suits against private corporations.

The 'Meyer' Holding

While *Meyer* on its face dealt only with *Bivens* claims brought against federal agencies and not private corporations, the Court of Appeals for the District of Columbia has held that *Meyer* precludes *Bivens* suits against private entities, thus overturning its own pre-*Meyer* decision allowing such claims.[19] In *Kauffman* v. *Anglo-American School of Sofia*, over a vigorous dissent by Chief Judge Mikva, the D.C. Circuit declared that its decision was controlled by *Meyer*, which the court held barred a *Bivens* suit against a "private and independent" school established by the U.S. Department of State to educate the children of

diplomats in Sofia, Bulgaria.[20] The D.C. Circuit reasoned that because a private actor like the Anglo-American School was required to act under federal law in order to be subject to *Bivens*, such an entity was "equivalent" to a federal agency and thus had to be treated identically under *Meyer*.[21] Judge Mikva, in dissent, criticized this "highly debatable extension of *Meyer's* holding" as "by no means commanded by *Meyer*," pointing out that the *Meyer* decision was both silent as to private entities and contained no indication that the Court meant to extend the protection to anything but federal agencies.[22] Moreover, Judge Mikva took issue with both the "deterrence" and the "federal purse" justifications enunciated in *Meyer*, arguing that both factors were less compelling when applied to private contractors.

Adopting Judge Mikva's dissent, the Sixth Circuit in *Hammons* v. *Norfolk Southern Corp*. concluded that "[n]othing in *Meyer* prohibits a *Bivens* claim against a private corporation that engages in federal action" and that such claims should therefore be allowed to proceed.[23] While *Meyer* had focused on the deterrence rationale set forth in *Bivens* in concluding that claims should not be permitted against federal agencies, the *Hammons* Court noted that the "primary goal of *Bivens* was to provide a remedy for victims of constitutional violations by federal agents where no other remedy exists, regardless of whether the official would be deterred in the future from engaging in such conduct."[24]

Thus, the goal of providing a remedy for constitutional violations favored permitting such claims to be asserted against private entities, regardless of the deterrent effect or lack thereof. Moreover, the *Hammons* court dismissed the second *Meyer* concern — that of the effect of such lawsuits on federal liability — stating that claims against private corporations did not impact the federal budget in the same way as a direct suit against a federal agency, and thus "do not implicate federal fiscal policy" in the manner which concerned the Court in *Meyer*. Having disposed of *Meyer*, the Sixth Circuit observed that *Bivens* claims against federal officers had consistently been treated in the same manner as claims against such officers under 42 U.S.C. § 1983 (1994), which claims had always been held to lie against private corporations engaging in state action.[25] Accordingly, the *Hammons* court held that *Bivens* claims could be brought against private corporations.[26]

Adopting 'Hammons'

The Second Circuit in *Malesko* expressly adopted the *Hammons* court's reasoning in holding that a *Bivens* action might lie against CSC. Rejecting the reading adopted by the D.C. Circuit, the Second Circuit held that, "[a]s an initial matter, we do not believe that *Meyer* is dispositive here because private entities acting on behalf of the federal government are not the equivalent of federal agencies."[27] The *Malesko* court agreed with the Sixth Circuit that the twin rationales enunciated in *Meyer* to deny assertion of a *Bivens* claim were "not compelling" when applied to private corporate actors acting under federal authority. Embracing the arguments in Judge Mikva's Kauffman dissent, the court wrote that "an extension of [*Bivens*] liability [would be] warranted even absent a substantial deterrent effect in order to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations."[28]

The court noted that employees of private entities might well be deterred by the imposition of liability on their employers, who would then be motivated "to prevent unlawful acts by its employees;" moreover, the court pointed out that private liability did not have the same sort of direct effect on the federal budget as concerned the Court in *Meyer*. Lastly, the Second Circuit, like the Sixth, relied on the substantial procedural similarities between *Bivens* and § 1983 actions to suggest that the Supreme Court's ruling in *Lugar* v. *Edmonson Oil Co*[29]. — holding that private corporations engaging in state action could be sued under § 1983 — applied by analogy to private actors in a *Bivens* action who allegedly caused injury while acting under the cloak of federal authority.[30]

Unlike the *Hammons* case, the defendant in *Malesko*, also asserted the "government contractor defense" to argue against assertion of plaintiff's claims. The district court held that CSC would have been immune from suit even absent the *Meyer* decision based on the immunity accorded government contractors set forth in *Boyle* v. *United Technologies Corp.*[31]

High Court in 'Boyle'

In *Boyle*, the Supreme Court held that federal law shields government contractors from state tort liability arising from alleged defects in military equipment.[32] The Court ruled that where the federal government had provided precise specifications, the equipment met those specifications, and the supplier had warned the government of all dangers within its knowledge, the imposition of liability under state tort law would be to "second-guess" the federal government in a manner that would cause an impermissible "conflict with federal policy."[33]

Although the *Boyle* doctrine might seem tailor-made to the world of military procurement, it has been extended by some courts to protect private entities in nonmilitary contracts.[34] The *Malesko* Court, however, rejected application of the *Boyle* defense to CSC's policies: because the actions of the CSC employee that led to plaintiff's injuries had not been dictated by the federal government or even by a policy developed in conjunction with any government official, the Court ruled that the defense was unavailable to CSC. The Court thus declined to reach the question of whether the government contractor defense would be available to a private nonmilitary contractor whose policies had been dictated by the federal government.

Billion-Dollar Industry

The movement towards privatization of the nation's corrections facilities over the last quarter-century has created an industry that generates more than $1 billion in revenue per year.[35] The United States has by far the largest correctional system in the world — the corrections system in California alone is larger than that of any other nation. Over 1.7 million individuals are presently incarcerated, and the number of prisoners in federal custody alone has quadrupled in the past 25 years.[36] More than 25 states have contractual relationships with private prison firms, while lobbyists from the corrections industry remain

active in both state and federal governments, promoting their services as an alternative to state-run prisons.[37]

The Federal Bureau of Prisons, meanwhile, has increased its use of, and engagement with, private corrections companies over the past few years.[38] Against this backdrop, more inmate lawsuits against such private corrections companies seem inevitable; the Second Circuit in *Malesko* has firmly stated that such claims may be heard in this circuit. This issue, given the split among the circuits, may ultimately be decided by the Supreme Court.

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Martin Flumenbaum and Brad S. Karp are partners in the New York office of Paul, Weiss, Rifkind, Wharton & Garrison.

ENDNOTES

1. 2000 U.S. App. LEXIS 25220 (2d Cir. Oct. 6, 2000).

2. The Honorable Ellsworth A. Van Graafeiland was originally assigned as a member of the panel, but due to illness was unable to participate in the disposition of this appeal.

3. 403 U.S. 388 (1971).

4. 487 U.S. 500 (1988).

5. *Malesko* v. *Corrections Servs. Corp.*, No. 97 Civ. 4080 (JSM), 1999 WL 549003 (S.D.N.Y. July 28, 1999).

6. 403 U.S. at 397. In *Bivens*, a complaint filed against agents of the Federal Bureau of Narcotics alleged that, while acting under color of federal authority, the agents conducted a warrantless search of plaintiff's apartment and arrested him without probable cause in violation of his Fourth Amendment Rights. Id. at 389-90. The *Bivens* Court held that plaintiff could recover damages against the federal agents for the injuries they allegedly inflected upon him; the rationale of *Bivens* has subsequently been extended by the Court to cover injuries stemming from Fifth and Eighth Amendment violations as well. See *Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979).

7. 1999 WL 549003 at *1.

8. Id.

9. See id. at *2-3.

10. See *Chin* v. *Bowen*, 833 F.2d 21, 24 (2d Cir. 1987).

11. Fed. R. Civ. P. 15(c)(3)(B).

12. See *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 470 (2d Cir. 1996) ("Rule 15(c) does not allow an amended complaint adding new defendants to relate back if the newly-added defendants were not named originally because the plaintiff did not know their identities.").

13. 2000 U.S. App. LEXIS 25220 at *7-8.

14. Id. at *8.

15. See *Meyer*, 510 U.S. at 484-85.

16. Id.

17. Id. at 486.

18. See, e.g., *Schowengerdt* v. *General Dynamics Corp*., 823 F.2d 1328 (9th Cir. 1987) (holding that private corporation employed by Department of Navy to provide security services would be subject to *Bivens* claims if, on remand, its actions were found to constitute federal action); *Gerena* v. *Puerto Rico Legal Serv., Inc*., 697 F.2d 447 (1st Cir. 1983) (recognizing that private entities may be subject to *Bivens* claims, but dismissing claims at issue against legal assistance corporation because it did not engage in federal action); *Dobyns* v. *E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982) (permitting *Bivens* claim against private contractor that supplied personnel, materials, transportation and services to federal government); *Yiamouyiannis* v. *Chemical Abstracts Serv.*, 521 F.2d 1392 (6th Cir. 1975) (per curiam) (remanding for factual determination of whether private corporation engaged in federal action for purposes of *Bivens*).

19. See *Kauffman* v. *Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994), *overruling Reuber* v. *United States*, 750 F.2d 1039 (D.C. Cir. 1985).

20. 28 F.3d at 1224.

21. Id. at 1227.

22. Id. at 1229-30.

23. 156 F.3d 701, 705 (6th Cir. 1998).

24. Id. at 706 (citing *Bivens*, 403 U.S. at 407-8 (Harlan, J., concurring)).

25. Id. at 707 (citing *Butz* v. *Economou*, 438 U.S. 478, 500 (1978)).

26. Id. at 708.

27. 2000 U.S. App. LEXIS 25220 at *16 (citing *Cohen* v. *Empire Blue Cross*, 176 F.3d 35 (2d Cir. 1999) (private corporation acting as a fiscal intermediary on behalf of the government was akin to an agent of the government, not a federal agency)).

28. Id. at *17.

29. 457 U.S. 922, 936-37 (1982).

30. 2000 U.S. App. LEXIS 25220 at *20.

31. See *Malesko*, 1999 WL 549003 at *1 (citing *Boyle*, 487 U.S. 500, 505-09 (1988)).

32. 487 U.S. at 512.

33. Id. at 511-12.

34. See, e.g., *Boruski* v. *United States*, 803 F.2d 1421, 1430 (7th Cir. 1986) (defense applies in "civilian relationships" where "a contractor has acted in the sovereign's stead and can prove the elements of the defense"); *Burgess* v. *Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir. 1985) ("Both the history of the defense and its general rationale lead us to the conclusion that it would be illogical to limit the availability of the defense solely to 'military' contractors.").

35. Suzanne Smalley, "A Stir Over Private Pens," *The National Journal,* May 1, 1999.

36. Jennie Fitzhugh, "Crime, Punishment, and Profit in America," *University Wire*, Dec. 9, 1998.

37. Suzanne Smalley, "A Stir Over Private Pens," *The National Journal,* May 1, 1999.

38. Id.