



News Release

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DRI Files Amicus Brief Seeking U.S. Supreme Court Review in *Kellogg, Brown & Root Services, Inc. v. Harris*

Case Involves Military Casualty in Iraq

CHICAGO – (February 12, 2014)—DRI – The Voice of the Defense Bar has filed an amicus brief supporting review by the United States Supreme Court in *Kellogg, Brown & Root Services, Inc. v. Harris*. The brief was submitted by DRI’s Center for Law and Public Policy in a case that involves the immunities available to contractors performing services for the U.S. military in war zones overseas.

During Operation Iraqi Freedom, military commanders opted to quarter U.S. troops in pre-existing, Iraqi-constructed buildings with known risks of poor construction and faulty wiring, rather than construct new secure housing. Staff Sgt. Ryan Maseth, a Green Beret and Army Ranger, died in a tragic accident. He was electrocuted in the Radwaniyah Palace Complex on the outskirts of Baghdad, which had been assigned as his living quarters.

Staff Sgt. Maseth’s parents filed a lawsuit in state court in Pennsylvania alleging negligence. The only defendant was Kellogg, Brown & Root Services, Inc. (KBR), which had contracted with the government to provide a specified level of maintenance on the facility in Iraq, including limited upkeep of existing systems already in place. (The United States is immune from suit under both the combatant-activities exception to the Federal Tort Claim Act (FTCA) and the holding in *Feres v. United States*, so the government was not named as a defendant.)

KBR removed the case to federal court and moved to dismiss on multiple grounds, including (1) the case presents a non-justiciable political question, and (2) the claims are preempted by the combatant-activities exception to the FTCA. After extensive discovery, the district court granted the motion to dismiss. The district court for the Western District of Pennsylvania explained that plaintiffs’ state-law negligence claims “will inextricably lead to consideration of sensitive military judgments for which no judicially manageable standards exist.” Given the military’s awareness and assessment of the risks presented by the facilities in the context other hazards present in the war zone, “the military’s involvement cannot be divorced from any negligent act or omission of KBR.” The district court also found that plaintiffs’ claims were preempted by the combatant-activities exception to the FTCA.

The Third Circuit reversed and remanded. With respect to the political question doctrine, the Third Circuit held that the case could proceed if governed by state law joint-and-several liability rules that permit recovery of all relief from KBR; but the case could not proceed if governed by state law requiring

proportional liability to be ascertained because, in that event, “damages cannot be estimated without evaluating unreviewable decisions.” Since the record did not permit the appellate court to determine whether to apply the law of Pennsylvania (in which case plaintiffs’ claims could proceed) or the law of either Texas or Tennessee (in which case the claims would be dismissed), the Third Circuit remanded for the district court to decide which state law applies. The Third Circuit also concluded that plaintiffs’ claims were not preempted by the combatant-activities exception to the FTCA.

KBR filed a petition for a writ of certiorari on January 8, 2014. The petition seeks Supreme Court review on the political question doctrine and on preemption under the FTCA. With respect to the political question doctrine, the petition explains that the Third Circuit decision conflicts with decisions of the Fourth and Eleventh Circuits. Moreover, the petition argues that the Third Circuit decision conflicts with the D.C. Circuit on FTCA preemption.

DRI argues that bedrock principles of federalism, rooted in the Supremacy Clause, require that the political question doctrine be governed by a uniform, federal standard rather than the separate tort-law standards of each state. The DRI brief also argues that the constitutional allocation of responsibility for foreign relations and military affairs to the Executive and Legislative Branches should keep torts off the battlefield and should prevent judicial second-guessing of military decisions in a war zone.

In addition, the DRI brief addresses the practical difficulties of imposing the varying tort systems of every state on the activities of a contractor subject to U.S. military command in a war zone. These practical problems include the unfairness of the Third Circuit approach, which would grant to military personnel from Pennsylvania a remedy that it would deny to military personnel from Texas, Tennessee, and other states. As the DRI amicus brief explains:

In an area of law that touches so directly on core federal constitutional issues such as the Supremacy Clause and separation of powers, and that affects on a daily basis United States military operations in combat zones, this Court should not await further percolation of the issues in the lower courts. Percolation has its costs.

DRI brief author Jerrold J. Ganzfried of Holland & Knight, Washington, D.C., is available for interview or for expert comment through DRI’s Communications Office.

For the full text of the amicus brief, click [here](#).

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