

Fourth Circuit Opinion Defines Derivative Sovereign Immunity Doctrine

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This week, the Fourth Circuit issued an opinion in *Cunningham v. General Dynamics Information Technology, Inc.* (No. 17-1592), that clearly defines the scope and nature of the derivative sovereign immunity doctrine articulated by the Supreme Court in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18, 20-21 (1940). It is a decision about which all government contractors should be aware.

In *Cunningham*, the putative class plaintiff alleged violations of the Telephone Consumer Protection Act (TCPA) by General Dynamics Information Technology (GDIT), which the plaintiff alleges autodialed—pursuant to a contract with, and at the express direction of, the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS)—the plaintiff regarding deadlines to sign up for medical insurance on the HealthCare.gov website. CMS had ordered GDIT to make that public service call—and others—pursuant to its mandate under the Affordable Care Act to establish a system to keep applicants informed about their eligibility for enrollment in a qualified health plan.

Relying on *Yearsley*, GDIT moved to dismiss the case for lack of subject matter jurisdiction. As the Fourth Circuit had previously explained, “under *Yearsley*, a government contractor is not subject to suit if (1) the government authorized the contractor’s actions and (2) the government ‘validly conferred’ that authorization, meaning it acted within its constitutional power.” *In re KBR*, 744 F.3d at 342 (citing *Yearsley*, 309 U.S. at 20–21). After 75 days of limited jurisdictional discovery, the District Court granted GDIT’s motion, finding that GDIT had followed CMS’ instructions “to a T,” thus entitling it to derivative sovereign immunity.

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The Fourth Circuit rejected each of Cunningham's arguments on appeal. First, the Court rejected Cunningham's argument that derivative sovereign immunity applies only to state law claims. According to the Fourth Circuit, the case law has been clear since *Yearsley* that derivative sovereign immunity applies to federal claims as well, and it rejected the argument that the preemption doctrine established in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), somehow narrowed the scope of derivative sovereign immunity to state law claims.

Second, the Court rejected Cunningham's argument that GDIT failed to establish either prong of the *Yearsley* analysis. With respect to the authorization prong, the Court determined that the record was clear that GDIT had not acted outside the scope of its authority in contacting Cunningham. Nor was GDIT required to take additional steps to ensure compliance with the TCPA, because it was not instructed or otherwise authorized to do so. With respect to the "validly conferred" prong, the Court found that CMS was plainly acting within its authority under the ACA in delegating to GDIT the task of informing individuals regarding their health insurance options. And the Court rejected Cunningham's argument that CMS could not "validly confer" the authority to engage in conduct that violates the law. As the Fourth Circuit explained: "The question is not whether informing applicants of their enrollment eligibility violated the law, but rather whether Congress had the authority to assign GDIT to complete that task. The purpose of *Yearsley* immunity is to prevent a government contractor from facing liability for an alleged violation of law, and thus, it cannot be that an alleged violation of law per se precludes *Yearsley* immunity."

Finally, the Court rejected Cunningham's argument that the district court erred in treating derivative sovereign immunity as immunity from suit and dismissing the case for lack of subject matter jurisdiction. The Court determined that the doctrine derives from sovereign immunity, and thus is a jurisdictional defense. The Court made clear that, as in *Cunningham*, limited discovery might be necessary to decide the issue, but that the defense is nevertheless fundamentally immunity from suit.

In *Cunningham*, the Fourth Circuit makes it clear that *Yearsley* immunity is alive and well, and the court provides a clear roadmap regarding the application of derivative sovereign immunity and how government contractors can take actions to ensure that they are entitled to such immunity when acting at the government's direction.

The authors listed on this alert represented GDIT in this lawsuit, and they have extensive experience representing government contractors in such immunity matters as well as other important litigation issues for government contractors. They can be reached as follows:

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