NO "DERIVATIVE SOVEREIGN IMMUNITY" IF CONTRACTOR'S CONDUCT VIOLATES CONTRACT OR LAW

The Supreme Court rarely considers government contracting cases. Recently, in *Campbell-Ewald Co. v. Gomez,* No. 14-857, 2016 Westlaw 228345 (2016), the Court ruled on two questions, one of which concerned sovereign immunity of a government contractor, or what was called "derivative sovereign immunity" since the contractor asserted its immunity derived from the government's immunity.

The Navy contracted with Campbell to develop a recruiting campaign that included sending text messages to young adults, but the contract stated that messages could be sent only if those individuals had "opted in" to receive marketing solicitations. Campell (through its subcontractor) developed a list of cellular phone numbers for contacting 18-24 year old users, and then transmitted the Navy's message to more than 100,000 people, including Jose Gomez, a 40 year old who had not opted in by consenting to receive messages. Gomez filed a nationwide class action seeking damages and alleging that Campbell had violated the Telephone Consumer Protection Act, 47 USC 227(b)(1)(A)(iii) ("Telephone Act"), which prohibits sending a text message to a cellular telephone without the recipient's prior express consent. There was no question that the Telephone Act had been violated.

The more controversial aspect of the case was that Campbell offered to settle the case by paying the full claims of all the named plaintiffs. When the plaintiffs declined the settlement offer, Campbell sought to dismiss the case, but the Court held that an unaccepted settlement offer does not moot a plaintiff's case, and there still was a case in controversy.

On the government contracts issue, Campbell argued that, as a contractor acting on the Navy's behalf, it had acquired (i.e. had "derived") immunity from the Navy's sovereign immunity from suit under the Telephone Act. It is longstanding law that the sovereign (the Federal government) is immune from suit, unless it has consented to be sued. *United States v. Sherwood,* 312 U.S. 584 (1941), and prior cases. Government contractors are familiar with waivers of sovereign immunity, because the Contract Disputes Act of 1978 and the Federal Tort Claims Act are examples where, by statute, the Government has agreed that it can be sued.

The Supreme Court held that Campbell's status as a federal contractor did not entitle it to immunity from suit for violation of the Telephone Act. The court noted that a federal contractor who performs *as directed by the government and its government contract* may be shielded from liabilities for injuries caused by its conduct. *Yearsley v. Ross Const. Co,* 309 U.S. 18 (1940). In *Yearsley,* a contractor built a dike on the Missouri River, but a landowner asserted a claim for damages when part of his land washed away. In that case, the work which the contractor had done was authorized and directed by the government of the U.S., and was performed pursuant to an act of Congress. The Government had authority to carry out the project, and the contractor performing it was shielded by the government's immunity.

In *Campbell* however, the contractor violated both federal law (the Telephone Act), and the Government's explicit contractual instructions that messages were to be sent only to individuals who had "opted in." The Court held that when a contractor violates both federal law and the Government's explicit instructions, there is no "derivative immunity" and the contractor is not shielded from suit.