

Government Contracts MVP: Covington's Raymond Biagini

By Jimmy Hoover



Law360, Washington (November 9, 2015, 10:19 PM ET) -- With another successful year of legal wins that include the recovery of over \$30 million in legal fees from the U.S. Army on behalf of KBR, Covington & Burling LLP attorney Raymond B. Biagini has further cemented his status as one of Congress' go-to experts on the subject of contractor liability and earned a spot on Law360's list of Government Contracts MVPs.

Following an April move from his longtime firm, McKenna Long & Aldridge LLP, Biagini and his team got right to work and in August nabbed for KBR its victory at the Armed Services Board of Contract Appeals — which, citing an indemnity clause, ordered the Pentagon to cover the company for costs stemming from certain Iraq War-related toxic exposure suits.

In an interview, Biagini said the crucial factor in winning over the ASBCA was obtaining all of the documentation behind the indemnification provision to prove that it applied to claims related to toxic chemical exposure.

"The key was to take very focused discovery against the United States to obtain all the related documents that were created at the time that particular indemnification provision was being adopted," Biagini said. As discovery went on and the team deposed Army personnel, Biagini said, "it became more and more clear that the indemnity clause should be triggered in our client's favor."

The government is now reviewing the total costs KBR is entitled to.

Far from his sole victory of the year, the veteran litigator also defeated a wrongful death case brought by the family of a U.S. Border Patrol employee in Texas federal court against Science Applications International Corp. before it rebranded itself as Leidos. While the family had claimed he was exposed to excessive radiation from SAIC-made inspection systems, Biagini and his team highlighted the regulatory approvals the device had received and won a full dismissal of the case on April 1.

"We knew early on that given the incredible overlay of the footprint of the various federal regulatory agencies — ranging from Customs and Border Patrol to the Nuclear Regulatory Agency to state versions of those agencies —

that there was going to be significant evidence that demonstrated that the United States had reviewed and approved every aspect of the [inspection system] and was fully aware of all of the features of the [system.]" Biagini said.

As in many of his cases, Biagini and his team put forth a common law government contractor defense first established by the Supreme Court in the 1988 case *Boyle v. United Technologies Corp.*

Biagini's decades defending contractors in various tort suits have also taken him out of the courtroom and into the halls of Congress. In July, the Notre Dame Law School graduate testified before the House Homeland Security Committee's Subcommittee on Cybersecurity in support of expanding the SAFETY Act, which he helped author in 2002, to include liability protection for private cybersecurity contractors.

As Biagini puts it, the Support Anti-Terrorism by Fostering Effective Technologies Act protects companies that provide anti-terror technologies from being "sued out" of existence in the event of a successful terrorist attack that breaches their systems.

As written, however, the 2002 SAFETY Act does not extend the same protection to cybersecurity firms that may incur liability after a cyberattack on critical U.S. infrastructure such as energy and electrical grids, water supply and financial institutions.

While the Department of Homeland Security has done a "terrific" job of implementing the SAFETY Act, Biagini said, "the calculus has changed." Now, more than in 2002, cyberattacks are coming with increasing frequency, he said.

"You have to stimulate private industry to be willing to design, research and deploy cutting edge anti-terror technology and cybersecurity," Biagini said. "The way you would stimulate such companies to do that ... is to protect them so they do the research, so they do the design and put these [anti-terror technologies] out into the marketplace."

Though a litigator through and through, Biagini's affinity for the legislative process goes back years. Heading into his third year of law school, Biagini worked for the Senate Judiciary Committee's Subcommittee on the Constitution, where he delighted in watching the "ebb and flow" of how bills navigate the unexpected obstacles of Congress.

More recently, across the street from the Capitol building, Biagini and his team have filed numerous briefs over the years in the Supreme Court, including one in July on behalf of the National Defense Industry Association in the case, *Campbell-Ewald Co. v. Gomez*, involving contractor immunity. The justices heard oral arguments in the case last month.

In the brief, Biagini and his team compiled various legal doctrines that have emerged over the last seven decades to advise the court in the case, in which Campbell, a U.S. Navy advertising partner, is challenging the Ninth Circuit's remand of a putative Telephone Consumer Protection Act class action over allegedly unsolicited text messages.

Similar to the government contractor defense, Biagini said "there ought to be a similar level of protection [for contractors] that the government would enjoy if it was doing the work itself."

--Additional reporting by Evan Weinberger and Daniel Wilson. Editing by Mark Lebetkin.
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