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# **CERTIFICATION AND INSPECTION: AN OVERVIEW OF GOVERNMENT LIABILITY\***

**MARK A. DOMBROFF\*\***

## **I. INTRODUCTION**

**T**HE AREAS ENCOMPASSED by the federal government's certification and inspection process are numerous. They include, among others, aircraft, automobiles, trains, boats, mines, banks, drugs, energy and consumer items. Each of these has either been the subject of litigation in the past or is presently the object of a courtroom battle. While they are disparate in nature, the legal principles controlling the federal government's inspection and certification involvement in each are similar.

## **II. THE CERTIFICATION PROCESS**

The federal government issues countless licenses, permits and certificates each year. These permits authorize private persons to manufacture products and perform a host of other

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activities. In virtually every case, it is possible that the manufacturer may commit an act of negligence. To allow every injured party to seek recovery, not just against the manufacturer whose negligence caused the injury, but against the federal government would make the government an insurer of the conduct of every private manufacturer. The Supreme Court has held that such a result is impermissible.<sup>1</sup>

An ideal context within which to examine the federal government's certification and inspection functions in the product area is in the field of aviation. Since the federal government, through the Federal Aviation Administration (FAA), inspects and certifies aircraft manufacturers, aircraft components, airports, pilots and navigational aids, an examination of this area in some detail will provide a useful context for discussing the Government's role as an inspector and certifier in the marketplace.

The function of the United States in the manufacture of aircraft is to provide minimum standards and to determine compliance by the manufacturer with those standards. The Federal Aviation Act of 1958,<sup>2</sup> (the Act), provides for the development of a comprehensive regulatory system to *promote* aviation safety. The Act authorizes the FAA to regulate the aviation industry by establishing minimum safety standards,<sup>3</sup> not unlike parallel legislation in other areas involving government inspection or certification activities.

The Act also gives the Administrator of the FAA extensive discretion to promulgate regulations and issue orders and to perform acts as "he shall deem necessary" to exercise and perform his powers and duties under the Act.<sup>4</sup> As part of his general safety power, the Administrator may prescribe minimum standards governing the design, materials, workmanship, construction and performance of aircraft, aircraft engines and propellers as may be required in the interest of safety.<sup>5</sup>

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<sup>1</sup> Laird v. Nelms, 406 U.S. 797 (1972).

<sup>2</sup> 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301-1552 (1976 & Supp. 1981).

<sup>3</sup> 49 U.S.C. § 1421(a) (1976).

<sup>4</sup> 49 U.S.C. §§ 1303, 1354(a) (1976).

<sup>5</sup> 49 U.S.C. § 1421(a)(1) (1976).

FAA certification is a multi-tiered process. First, a manufacturer must obtain a Type Certificate by submitting blueprints and design drawings of the type design of the aircraft.<sup>6</sup> Next, the manufacturer must obtain a Production Certificate based on his ability to establish conformity of production models with the "Type" or prototype.<sup>7</sup> After manufacture of production models, and upon final assembly and distribution of the aircraft, the last stage of the certification process is the issuance of the Airworthiness Certificate.<sup>8</sup> The Airworthiness Certificate is issued when the Administrator finds that the aircraft conforms to its Type Certificate and is in condition for safe operation. Should a major change in the aircraft's design be desired, so that it no longer conforms to the type design approved in the Type Certificate(s), a Supplemental Type Certificate must be obtained.<sup>9</sup>

The certification process thus requires that the manufacturer-applicant initially submit such design and performance data as the Administrator deems necessary to determine that the design of an aircraft meets the minimum standards promulgated by the FAA. Upon evaluation of the manufacturer's data, the Administrator or the person to whom he has delegated his authority to certify, makes a final determination as to whether an applicant has sufficiently complied with regulatory minimum safety standards to receive a license. This determination is based both on objective and subjective criteria.

Certification is essentially an adjudicatory process, in which the government makes a determination of eligibility based upon a factual presentation by the applicant. While such an adjudicative determination might be reviewable under the Administrative Procedure Act for abuse of discretion, such an abuse of discretion is excepted from liability under section 2680(a) of the Federal Tort Claims Act<sup>10</sup> which provides that:

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<sup>6</sup> 49 U.S.C. § 1423(a) (1976).

<sup>7</sup> 49 U.S.C. § 1423(b) (1976).

<sup>8</sup> 49 U.S.C. § 1423(c) (1976).

<sup>9</sup> 14 C.F.R. § 21.113 (1981).

<sup>10</sup> 28 U.S.C. § 2680(a) (1976). *Cf. Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976) (disappointed bidder sought to

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>11</sup>

Many government agencies are charged by statute with a "duty" to conduct inspections, issue licenses and investigate or enforce some aspect of federal law.<sup>12</sup> Nevertheless, whether the asserted duty is created by statute or regulation, courts have consistently refused to impose an actionable duty upon such agencies' regulatory functions such as inspection, licensing or enforcement. Whether based upon the absence of a legal duty, the exercise of non-actionable executive discretion or a non-actionable misrepresentation, courts have held the federal government not to be liable for negligence in such activities.<sup>13</sup>

In *In re Franklin National Bank*,<sup>14</sup> the district court granted the government's renewed motion for summary judgment on behalf of the Comptroller of the Currency in the litigation surrounding the failure of the twentieth largest bank in the United States. Plaintiffs had sought to hold the United States liable for damages arising out of the bank failure based on federal regulatory enforcement responsibility for the bank. It was argued that the failure to detect the weakness and dis-

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allege tort claims against FAA when contract awarded to another).

<sup>11</sup> 28 U.S.C. § 2680(a) (1976).

<sup>12</sup> E.g., Federal Aviation Administration, Food & Drug Administration, Federal Deposit Insurance Commission, Securities and Exchange Commission.

<sup>13</sup> *Dalehite v. United States*, 346 U.S. 15 (1953); *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978); *First Nat'l Bank v. United States*, 522 F.2d 370 (10th Cir. 1977); *Gercey v. United States*, 540 F.2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *Davis v. United States*, 536 F.2d 758 (8th Cir. 1976); *J. H. Rutter Rex Mfg. Co. v. United States*, 515 F.2d 97 (5th Cir. 1975), cert. denied, 424 U.S. 954 (1976); *Kirk v. United States*, 270 F.2d 110 (9th Cir. 1959); *Selfors v. United States*, 16 Av. Cas. 17,186 (N.D. Ga. Sept. 30, 1980); *In re Franklin Nat'l Bank*, 478 F. Supp. 210 (E.D.N.Y. 1979); *Eckles v. United States*, 471 F. Supp. 108 (M.D. Pa. 1979); *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 181 (E.D. Tenn. 1977); *Marival, Inc. v. Planes, Inc.*, 306 F. Supp. 855 (N.D. Ga. 1969).

<sup>14</sup> 478 F. Supp. 210 (E.D.N.Y. 1979).

honesty in the Franklin National Bank during the government's inspections and audits breached actionable duties that flowed to the shareholders of the bank. Rejecting these arguments, the court held that the inspector's failure to detect weaknesses or dishonesty at an examined bank gave rise to no cause of action against the United States under the Federal Tort Claims Act.<sup>15</sup>

In *Illinois v. Maryland Casualty Co.*,<sup>16</sup> state department of health employees insured, through inspections and testing, that water was adequately and properly treated. The Seventh Circuit Court of Appeals held that such obligation, for purposes of imposing tort liability, constituted a public duty, not a duty owed to any particular person.

In the case of *In re Pago Air Crash Disaster of January 30, 1974*,<sup>17</sup> the court held:

The general statutory language [referring to The Federal Aviation Act of 1958, 49 U.S.C. § 1301 et. seq.] empowers the F.A.A. to promulgate regulations to assure air safety, but there is *nothing* in the statutory scheme that creates a *duty to the public* to inspect the airlines, and would create a duty and in effect, *create a cause of action* against the Government for failure to inspect the airlines.<sup>18</sup>

The First Circuit Court of Appeals' decision in *Clemente v. United States*,<sup>19</sup> illustrates the manner in which some courts have approached the question of determining the existence of an actionable duty. *Clemente* involved a suit brought under the Federal Tort Claims Act,<sup>20</sup> for an aircraft accident. The plaintiffs alleged a failure on the part of the United States to inspect, investigate and prosecute violations of safety regulations. The court held as follows:

Not all acts and orders of the United States government are so

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<sup>15</sup> *Id.* at 215.

<sup>16</sup> 132 F.2d 850, 852-53 (7th Cir. 1942).

<sup>17</sup> No. 176 (J.P.M.D.L.) (United States' Motion for Partial Summary Judgment decided Jan. 6, 1978).

<sup>18</sup> *Id.*

<sup>19</sup> 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

<sup>20</sup> 28 U.S.C. § 1346(b) (1976).

sovereign that they must be treated as commands which create legal duties or standards, the violation of which involves breaking the law. A considerable part of the government's conduct is in the context of an employer-employee relationship, a relationship which includes reciprocal duties between the government and its staff, but not necessarily a legal duty to the citizenry.

Even assuming, as plaintiffs contend, that this [internal FAA] order was mandatory, the duty it creates is that of the District Office employees to perform their jobs in a certain way as directed by their superiors. [Such a duty] is owed by the employees to the government and is totally distinguishable from a duty owed by the government to the public on which liability could be based. The failure to perform the order may be grounds for internal discipline, but it does not follow that such conduct necessarily constitutes the kind of breach cognizable by tort law.<sup>21</sup>

In *United Scottish Insurance Co. v. United States*,<sup>22</sup> the Ninth Circuit addressed the problem of whether the United States negligently inspected and certified an aircraft. The court held that "[l]ack of due care in effecting the execution of a bond by another obviously is not a common-law tort; neither, it would seem, is the simple failure to inspect *another's* vehicles or machinery, or the failure to do so with due care."<sup>23</sup>

A similar result was reached in *Mercer v. United States*,<sup>24</sup> which involved alleged negligent inspection and enforcement activities under the Federal Metal and Nonmetallic Mine Safety Act.<sup>25</sup> The court stated:

A federal inspector assumes no responsibility to maintain compliance with safety standards upon which either the mine operators or their employees can rely. The responsibility remains with the operator and is not shifted to the inspector by the act

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<sup>21</sup> 567 F.2d at 1144-45.

<sup>22</sup> 614 F.2d 188 (9th Cir. 1979).

<sup>23</sup> 614 F.2d at 193.

<sup>24</sup> 460 F. Supp. 329 (S.D. Ohio 1978).

<sup>25</sup> 30 U.S.C. §§ 721-740 (1976).

of undertaking an inspection.<sup>26</sup>

In another regulatory function case brought under the Federal Tort Claims Act, *Carroll v. United States*,<sup>27</sup> a miner who was severely injured in an accident, alleged that the United States' inspectors either negligently failed to inspect the machinery in question or inspected it in a negligent manner. Their failure to detect the defective conditions was alleged to be the cause of plaintiff's injuries.

Ruling from the bench, the court held that neither the Federal Metal and Nonmetallic Mine Safety Act, nor the law of Idaho, created a duty actionable in tort, running against the government for alleged negligence in the inspection of mines, conducted by government inspectors. The court, citing a Ninth Circuit case, *Roberson v. United States*,<sup>28</sup> held that the mere conduct of regulatory enforcement inspectors in determining compliance with safety standards does not create a duty in tort of the United States.

In *Rayford v. United States*,<sup>29</sup> the district court declined to find any actionable duty in the inspection and approval of a highway design. The court pointed out that cases in which the United States has been liable involve situations "of a *direct operational* nature (such as air traffic control, firefighting, buoy tending, and lighthouse operation)."<sup>30</sup> The passive role of inspection and approval of a highway design was held to be an insufficient basis for liability.<sup>31</sup>

The district court in *Kirk v. United States*,<sup>32</sup> emphasized

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<sup>26</sup> 460 F. Supp. at 332.

<sup>27</sup> 488 F. Supp. 757 (D. Idaho 1980).

<sup>28</sup> 382 F.2d 714, 719-22 (9th Cir. 1967) (action to recover damages for personal injuries sustained when workmen fell while engaged in construction work at federal dam project).

<sup>29</sup> 410 F. Supp. 1051 (M.D. Tenn. 1976).

<sup>30</sup> *Id.* at 1052 (emphasis by the court).

<sup>31</sup> See *Daniel v. United States*, 426 F.2d 281 (5th Cir. 1970) (federal approval of design plans for highway construction does not give rise to a cause of action for negligent design against the United States); *Mahler v. United States*, 306 F.2d 713 (3d Cir.), *cert. denied*, 371 U.S. 923 (1962) (federal statutes relating to the inspection of highways does not create a duty on the part of the United States); *Delgadillo v. Elledge*, 337 F. Supp. 827 (E.D. Ark. 1972) (federal approval of highway projects and inspection of highways does not render United States liable for injuries to motorists).

<sup>32</sup> 61 F. Supp. 722 (D. Idaho 1958).



that a regulatory statute which, imposed a duty on the Secretary of the Army to establish and supervise a program of river improvement and flood control, did not expose the government to civil liability for the death of a dam project construction worker, absent the express or implied approval of Congress. On appeal, the Ninth Circuit affirmed the holding of the district court, stating that the statute at bar created no legal duty on the part of the United States toward the construction worker. The circuit court also held that regulations authorized by the statute did not create a legal duty to individuals, reasoning that:

Every government employee must trace the duties of his job to some law, regulation, or order, but this does not mean that in every such case there is thereby *established a duty of care on the part of the employee and the government* toward those who may be incidentally benefited if those duties are properly performed or toward those who may be incidentally injured if those duties are not properly performed.<sup>33</sup>

Use of the federal regulations as a standard of care to which government agencies must be held, would be tantamount to holding the United States liable whenever a private person fails to fulfill his obligation under the regulations. This interpretation would generate a result clearly not intended by Congress, because the federal government would become an insurer, albeit in the context of a tort action under the Federal Tort Claims Act. Such a result is impermissible since the government is not held to a standard of strict liability.<sup>34</sup>

It would not be sound public policy to shift the financial responsibility for such accidents to the United States merely because Congress has sought to improve safety by enacting statutes which impose some minimum standards and provide for federal inspections and certifications, in an attempt to obtain compliance with those standards. The issue truly presented by these situations is whether a duty, actionable in

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<sup>33</sup> 270 F.2d 110, 118 (9th Cir. 1959) (emphasis added).

<sup>34</sup> *Laird v. Nelms*, 406 U.S. 797 (1972) (language of FTCA specifically permits imposition of liability upon Government *only* when conduct is negligent or involves some other form of misfeasance or nonfeasance).

tort can be imposed upon the United States for carrying out its regulatory functions of inspecting and certifying products or activities.

### III. NEITHER FEDERAL LAW NOR STATE LAW CREATES ANY DUTY

The Federal Tort Claims Act (FTCA) is a limited waiver of the sovereign immunity historically enjoyed by the Government.<sup>36</sup> The United States may be found liable only in the manner and to the degree to which it has consented.<sup>36</sup> Moreover, certain categories of torts are excluded from coverage by Section 2680 of the FTCA.<sup>37</sup> Due regard must be given to these exceptions, because courts lack jurisdiction to entertain an excluded claim.<sup>38</sup>

Under the Federal Tort Claims Act, the United States has expressly limited its waiver of sovereign immunity to claims for negligence arising under "circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."<sup>39</sup> A prospective plaintiff must establish initially that the United States, if treated as a private person, would owe a duty of care to plaintiffs under the law of the state in question. In *Feres v. United States*,<sup>40</sup> the United States Supreme Court held that the Federal Tort Claims Act does not create new causes of action, but merely enables the federal government to accept liability under circumstances that would impose it on private individuals in similar or analogous

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<sup>36</sup> See, e.g., *United States v. Sherwood*, 312 U.S. 584 (1941).

<sup>36</sup> *Wright v. United States*, 568 F.2d 153, 158 (10th Cir. 1977), *cert. denied*, 439 U.S. 824 (1978).

<sup>37</sup> See, e.g., 28 U.S.C. § 2680(a) (1976) (creates the discretionary function defense); *id.* § 2680(h) (excludes, among other things, claims arising out of misrepresentations); *id.* § 2680(k) (excludes foreign torts).

<sup>38</sup> *Dalehite v. United States*, 346 U.S. 15, 24, 31 n.25 (1953); *First Nat'l Bank v. United States*, 552 F.2d 370, 374 (10th Cir. 1977), *cert. denied*, 434 U.S. 835 (1978); *Smith v. United States*, 546 F.2d 872, 876 (10th Cir. 1976).

<sup>39</sup> 28 U.S.C. § 1346(b) (1976) (*emphasis added*). See 28 U.S.C. § 2674 (1976), which is similar to § 1346(b), in that the liability of the United States is equivalent to that of a private person.

<sup>40</sup> 340 U.S. 135 (1950).

situations.

*Feres* involved allegations of governmental negligence in quartering members of armed forces in barracks which were known or which should have been known to be unsafe. When the United States' involvement is in the nature of safety inspection and approval, there is no analogous "private person" liability and thus, no actionable duty.<sup>41</sup>

Since such a duty has never been recognized by the common law of any state, either, it cannot properly afford a basis of liability under the Federal Tort Claims Act. Thus, absent a recognized cause of action under state law for alleged negligence in the conduct of regulatory inspection and certification activities, which require as a threshold matter the existence of a legal duty, there is no right of recovery from the United States.<sup>42</sup> In *Clemente v. United States*,<sup>43</sup> the court held:

[E]ven where specific behavior of Federal employees is required by Federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability.<sup>44</sup>

The court in *United Scottish Insurance Co. v. United States*<sup>45</sup> stated that "pursuant to the [Federal Tort Claims] Act, courts may not determine governmental liability without

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<sup>41</sup> *Gelley v. Astra Pharmaceutical Products, Inc.*, 610 F.2d 558 (8th Cir. 1979) (FDA approval of marketing certain anesthetic drug); *McMann v. Northern Pueblos Enter., Inc.*, 594 F.2d 784 (10th Cir. 1979) (posting of surety bond); *Sellfors v. United States*, 16 Av. Cas. 17,186 (N.D. Ga. Sept. 30, 1980) (alleged negligence of FAA in implementing safety precautions to mitigate danger presented by flocks of birds near runway); *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978) (safety inspection by OSHA of machinery of private employer).

<sup>42</sup> *Thompson v. United States*, 592 F.2d 1104 (9th Cir. 1979) (issuance of permit by Bureau of Land Management to hold motorcycle race on federal land); *Harmesen v. Smith*, 586 F.2d 156 (9th Cir. 1978) (alleged negligence of comptroller of the currency in conducting bank examinations); *Builders Corp. of America v. United States*, 320 F.2d 425 (9th Cir. 1963), cert. denied, 376 U.S. 906 (1964) (alleged failure of commanding officer to comply with obligations of government contract concerning dwellings constructed by plaintiff adjacent to military installation); *Kirk v. United States*, 270 F.2d 110 (9th Cir. 1954) (Department of Army's jurisdiction over improvements on rivers for flood control); *Davis v. United States*, 395 F. Supp. 793 (D. Neb. 1975) (OSHA inspection of sewer project).

<sup>43</sup> 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

<sup>44</sup> *Id.* at 1149.

<sup>45</sup> 614 F.2d 188 (9th Cir. 1979).

considering the liability of a private person in 'like circumstances' pursuant to relevant state law."<sup>46</sup> The court reversed and remanded this aircraft certification case, directing the trial judge to determine which state's substantive law applied, whether the state had adopted or would apply any form of the Good Samaritan rule<sup>47</sup> and if so, whether appellee's case satisfied the rule, as formulated by that state. The court then concluded:

Should state law preclude liability against a private person who undertakes an inspection *on behalf of others*, or if the Court finds that the government's activity here would not allow a finding that a duty relationship had been created . . . the district court judge must dismiss the action for failure to state a claim pursuant to the Act.<sup>48</sup>

In the first lawsuit against the United States involving alleged negligent failure to enforce the Occupational Safety and Health Act of 1970 (OSHA),<sup>49</sup> the Government successfully argued that, because no analagous private duties or liability existed arising out of OSHA violations, there should be no government liability.<sup>50</sup> In *Davis v. United States*<sup>51</sup> a compliance officer inspected a construction site pursuant to the provisions of the Occupational Safety and Health Act of 1970. Although he discovered a safety violation, he failed to follow up his discovery of the violation with the issuance of an "imminent danger" citation or by further inspections. The continued existence of the safety defect resulted in the loss of a life. In an action under the Federal Tort Claims Act, the court examined the question of a duty running from the United States to the decedent and held:

Two sources of duty arguably can be pointed to. One is the common law of Nebraska; the other, the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSHA). How-

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<sup>46</sup> *Id.* at 198.

<sup>47</sup> See *infra* notes 57-76 and accompanying text.

<sup>48</sup> 614 F.2d at 198.

<sup>49</sup> 29 U.S.C. §§ 651-678 (1976).

<sup>50</sup> *Davis v. United States*, 395 F. Supp. 793 (E.D. Neb. 1975).

<sup>51</sup> 395 F. Supp. 793 (E.D. Neb. 1975).

ever, the Federal Tort Claims Act specifically limits its application to those instances in which "the law of the place where the act or omission occurred" places liability upon the claimed wrongdoer. *Unless the law of Nebraska would declare liability — including a duty — upon a private person in the same circumstances, no jurisdiction lies in this Court.*

I find no indication that any law permits Nebraska to place upon private persons the duty cast upon Federal officers to investigate, issue citations and apply for enforcement orders by Federal Court. Nothing resembling those duties devolves on a private person under OSHA.<sup>53</sup>

In *Gelley v. Astra Pharmaceutical Products, Inc.*,<sup>54</sup> the plaintiffs alleged that the Food and Drug Administration failed to insure that the drug manufacturer complied with applicable statutes and regulations regarding the drug Xylocaine and that a duty of care arose under the Federal Food, Drug and Cosmetic Act.<sup>54</sup> The court stated that "federally imposed obligations, whether general or specific, are irrelevant under the FTCA, unless state law imposes a similar obligation upon private persons."<sup>55</sup> The court held that under the laws of Minnesota and the District of Columbia, no cause of action exists against an individual for similar activity. There is no tort duty imposed on private persons to perform activities analogous to the granting or denial of licenses for drugs, and in the absence of such duty, there can be no liability for negligence on the part of the government.<sup>56</sup>

#### IV. IS THE UNITED STATES A "GOOD SAMARITAN"?

Where "good samaritan" inspections are undertaken by the federal government, courts have consistently denied liability. They note that a "good samaritan" undertaking to inspect, even if negligent, gives rise to liability only if the inspection: (1) *specifically* engenders reliance; (2) constitutes the under-

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<sup>53</sup> *Id.* (emphasis added).

<sup>54</sup> 610 F.2d 558 (8th Cir. 1979).

<sup>55</sup> 21 U.S.C. §§ 301-392 (1976).

<sup>56</sup> 610 F.2d at 562.

<sup>57</sup> *Id.*

taking of a "duty" directly owed the employee; or (3) worsens the position of the plaintiffs.<sup>57</sup>

In order to fall within the purview of a "good samaritan" theory, a plaintiff must typically demonstrate that under the factual situation of the case, the "good samaritan" requirements of the *Restatement Second of Torts*<sup>58</sup> are satisfied. Section 323 of the *Restatement* provides:

*Negligent Performance of Undertaking to Render Services.*

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.<sup>59</sup>

First, it must be determined if there was an "undertaking" on the part of the United States. Without the actual assumption of the undertaking, there can be no correlative legal duty to perform.<sup>60</sup> Section 323 of the *Restatement* encompasses those situations in which one person "undertakes to render a service *directly* to another person" and *these are the only two parties involved*.<sup>61</sup>

The United States, by inspecting and certifying an aircraft whose engine falls off, does not undertake to render a service *directly* to the passenger, nor does it undertake a duty to insure or guarantee the safety of the users of the aircraft. Therefore, no liability can be imposed upon the United States under Section 323 of the *Restatement* because no duty was

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<sup>57</sup> *Davis v. Liberty Mut. Ins. Co.*, 525 F.2d 1204 (5th Cir. 1976); *Tillman v. Travelers Indem. Co.*, 506 F.2d 917 (5th Cir. 1975); *Stacy v. Aetna Casualty & Sur. Co.*, 484 F.2d 289 (5th Cir. 1973).

<sup>58</sup> *RESTATEMENT (SECOND) OF TORTS* §§ 323, 324A (1965).

<sup>59</sup> *Id.* § 323.

<sup>60</sup> *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978).

<sup>61</sup> *Roberson v. United States*, 382 F.2d 714, 719-22 (9th Cir. 1967) (emphasis added).

breached.

A recent case, *Kirkpatrick v. United States*,<sup>63</sup> supports the United States' position that no liability can be imposed for allegedly negligent inspection. The action was premised upon the alleged negligent activities of United States' mine inspectors who either failed to inspect or negligently inspected a mine. The plaintiff asserted that the duty to her decedent was established under the FTCA by the "good samaritan" doctrine. The United States undertook the responsibility to inspect the mine, negligently conducted the inspection, and proximately caused the death of the decedent. In reviewing the "good samaritan" doctrine, the court noted that there must be a rendering of "services" *directly* to the person injured, citing Section 323 of the *Restatement*.<sup>63</sup> The Federal Coal Mine Act (like the Federal Aviation Act and others) requires no direct services by the mine inspectors to the miners, even though the miners may indirectly benefit from the inspections.

The *Kirkpatrick* court denied recovery and concluded its opinion by stating that:

[A]bsent any direct rendering of services by the government to the person injured or to the employer, . . . [and] absent any direct benefit to the making of the inspections and absent any judicially created duty upon government regulatory officials acting to enforce regulatory statutes, there can be no claim stated upon which relief can be granted.<sup>64</sup>

*Roberson v. United States*<sup>65</sup> involved a suit against the United States by workmen who were injured while engaged in construction work at a federal dam project. The Ninth Circuit found that the services rendered by the government, on which the plaintiffs relied for a basis of liability, were those relating to the government's safety inspection program. It further found that there was no direct relationship between the government and the workmen concerning the performance of

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<sup>63</sup> No. 79-P-1106-J (N.D. Ala. March 19, 1980).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*, slip op. at 3.

<sup>66</sup> 382 F.2d 714 (9th Cir. 1967).

these services. The workmen occupied a *third-person relationship*, the government's direct relationship being with the contractors. Therefore, the government did not undertake to render safety services to the plaintiffs and Section 323 of the *Restatement* had no application.<sup>66</sup>

The *Roberson* court then turned to the second part of the "good samaritan" doctrine, Section 324A of the *Restatement*, involving liability to third persons. In order for liability to attach or a duty to be found, the United States must undertake, gratuitously or for consideration, to render services to another, which the United States should recognize as necessary for the protection of the third person (the plaintiffs), and must fail to exercise reasonable care in the performance of this undertaking. The court concluded that:

As in the case of the two-person facet of the Good Samaritan doctrine, . . . the first essential element in establishing liability under the third person branch of the doctrine is here missing. In conducting its safety inspection program, the Government was not undertaking to render services to the contractor. . . . [T]he safety inspection activities of the Government did not relieve the contractor of any of its contractual duties; quite to the contrary, it was designed only to make sure the contractor performed those duties.<sup>67</sup>

In *United Scottish Insurance Co. v. United States*,<sup>68</sup> the court distinguished inspection cases as "merely supplementing another's primary duty," unlike those cases in which one undertakes a primary duty to accomplish another's responsibility.

Although such functions (inspecting privately owned aircraft) are carried out pursuant to statute or to regulations, they do not arise from a primary duty to provide the service in question. Thus, not only would there be no potential liability if the government declined to provide such services at all, *but the government does not purport to relieve other actors of the primary duty to see that the underlying activity is accomplished*

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<sup>66</sup> *Id.* at 721.

<sup>67</sup> *Id.*

<sup>68</sup> 614 F.2d 188 (9th Cir. 1979).



safely or consistently. . . . If such undertaking automatically created a cause of action for negligent performance, the government might be less inclined to assume such tasks in future.<sup>69</sup>

The Ninth Circuit in *United Scottish Insurance Co.* makes it clear that the manufacturers, owners and operators of aircraft have the primary duty to inspect the aircraft and to insure its safety.

Assuming that there is an "undertaking" on the part of the United States under Section 323 of the *Restatement*, the following requirements must be satisfied by the courts:

(a) the inspection and certification must increase the risk of harm to plaintiffs; or

(b) the plaintiffs must actually rely on the inspection and certification and that reliance must cause the injury.<sup>70</sup>

If it is assumed that the United States negligently inspects and certifies an aircraft, it must then be established, in order to meet the requirements of Section 323 of the *Restatement*, that the inspection and certification by the FAA increased the risk of harm to the user of the aircraft or in some positive way contributed to the injury by inducing reliance on its certification and inspection.<sup>71</sup>

While the typical action or inaction of a government inspector prior to an injury may not improve matters, neither do they usually worsen them. Federal inspections of products simply do not physically increase the risk of harm to users of that product or service. The Fifth Circuit in *United States v. DeVane*,<sup>72</sup> held that under the "good samaritan" doctrine, the government's negligence in rescuing an innocent victim whose fishing boat had sunk in a storm was not actionable when the negligence did not worsen the victim's plight.<sup>73</sup>

A person who voluntarily undertakes to aid another, absent

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<sup>69</sup> *Id.* at 193 (emphasis added). See *Clemente v. United States*, 567 F.2d 1140, 1150-51 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *Blessing v. United States*, 447 F. Supp. 1160, 1193 (E.D. Pa. 1978).

<sup>70</sup> *United Scottish Ins. Co. v. United States*, 614 F.2d 188, 194 (9th Cir. 1979).

<sup>71</sup> *Blessing v. United States*, 447 F. Supp. 1160, 1193 (E.D. Pa. 1978).

<sup>72</sup> 306 F.2d 182 (5th Cir. 1962).

<sup>73</sup> *Accord Lacey v. United States*, 98 F. Supp. 219 (D. Mass. 1951).

a duty to do so, assumes only a duty to avoid making the situation worse than it was prior to his undertaking. He does not become legally bound to successfully complete the rescue, but only to avoid causing harm by his attempt.<sup>74</sup> Similarly, the United States, by undertaking to regulate the manufacturers and to require minimum standards, does not thereby become obligated to insure each member of the public against injury in the event of a product defect.

Turning now to Section 324A of the *Restatement*, a number of federal courts have examined situations in which a defendant is sued because its inspectors failed to discover, prevent or correct the negligence of another. In such cases, courts tend to rely upon the principles of *Restatement* Section 324A to determine the duty issue.<sup>75</sup> In order for a plaintiff to establish a prima facie case under *Restatement* Section 324A, and avoid dismissal for failure to state a claim under the Federal Tort Claims Act, it must be established that a "good samaritan" duty arose because: (1) the inspection and certification increased the risk of harm; or (2) the government undertook to perform a duty owed by another to the plaintiff; or (3) the plaintiff actually relied on the conduct of the government and that reliance caused the injury.

Under the increased risk of harm concept of Section 324A(a), it is clear that the federal government's inspection and certification of a product which is manufactured and tested by another would not typically increase the risk of

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<sup>74</sup> W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 56, at 343 (4th ed. 1971).

<sup>75</sup> Section 324A of the *Restatement* provides:

*Liability to Third Person for Negligent Performance of Undertaking*

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324A (1965).

harm to the user. The language of the *Restatement* establishes that, to trigger liability under Section 324A(b), more is required than a limited functional congruence of inspections or certifications. In cases brought under the FTCA involving inspection activities, where the principles of Section 324A of the *Restatement* have been applied, the government has been exonerated from liability.<sup>76</sup>

## V. GOVERNMENTAL DISCRETION IS NOT ACTIONABLE

The "discretionary function exception" to the Federal Tort Claims Act bars:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The judgmental discretion inherent in inspection and licensing actions by government agencies stands out as a classic illustration of the type of "discretionary function," even if abused, which Congress sought to place beyond the pale of judicial scrutiny by the court in tort litigation. That the words "discretionary function" encompass the function of regulation is hardly open to question, even apart from the legislative history of the exception. These words have long been familiar to the law. As used in the Act, they express "a concept of substantial historical ancestry in American law."<sup>77</sup> Congress deliberately chose them "with the intent that they should convey the same meaning traditionally accorded [them] by the Courts."<sup>79</sup>

The Federal Tort Claims Act was enacted in 1946 after some twenty-seven (27) different bills dealing with tort claims

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<sup>76</sup> See, e.g., *Mercer v. United States*, 460 F. Supp. 329 (S.D. Ohio 1979) (mine safety inspection by federal inspectors).

<sup>77</sup> 28 U.S.C. § 2680(a) (1976).

<sup>78</sup> *Dalehite v. United States*, 346 U.S. 15 (1953).

<sup>79</sup> *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950).

had been introduced in Congress since 1923.<sup>80</sup> But while Congress was intent on making the United States subject to suit for the "ordinary common law torts," such as are involved in automobile accidents, it was the consistent view of Congress that suit should not be permitted on claims stemming from the performance of important governmental regulatory functions.<sup>81</sup>

Accordingly, many of the earlier tort claim bills had exceptions relating to specifically designated spheres of regulatory activity. There were, for instance, provisions exempting claims arising from the activities of the Federal Trade Commission and the Securities and Exchange Commission.<sup>82</sup> Exceptions of this kind, involving regulatory activities of the specific agencies, were included in the tort claims bill which was introduced in the 77th Congress.<sup>83</sup> While that bill was under consideration, however, these specific exceptions were deleted and the more general language of the discretionary function exception, as it now appears, was substituted, in order "to insure that regulatory activity by *any* administrative agency would be exempt from liability."<sup>84</sup>

A committee memorandum<sup>85</sup> explaining the revisions stated that the substituted provision was "designed to preclude . . . application of the act to a claim against a regulatory agency. . . . Since the language used . . . exempts from the act claims against federal agencies growing out of their regula-

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<sup>80</sup> For a discussion of legislative history behind FTCA, see *United States v. Spelar*, 338 U.S. 217, 219-21 nn.6-9 (1949).

<sup>81</sup> See *Dalehite v. United States*, 346 U.S. 15 (1953); H.R. REP. No. 1287, 79th Cong., 1st Sess. 5 (1945); S. REP. No. 1196, 77th Cong., 2d Sess. 7 (1942); 86 CONG. REC. 12,021-22 (daily ed. Sept. 12, 1940); H.R. REP. No. 2800, 71st Cong., 3d Sess. 13 (1930); *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 33, 38, 45, 65-66 (1941).

<sup>82</sup> See H.R. 5299, 77th Cong., 1st Sess. § 303(7) (1941); S. 2690, 76th Cong., 1st Sess. § 303(7) (1939).

<sup>83</sup> H.R. 5373, 77th Cong., 2d Sess. § 303 (1942), stated "[t]he meaning of the governmental regulatory function exception from suits, Section 2680(a), shows most clearly in the history of the Tort Claims Bill in the Seventy-seventh Congress."

<sup>84</sup> *In re Franklin Nat'l Bank*, 478 F. Supp. 210, 220 (E.D.N.Y. 1979) (emphasis added).

<sup>85</sup> See Memorandum for the Use of the Committee of the Judiciary, H.R. 5373, 77th Cong., 2d Sess. 8 (January 1942), noted in *Weinstein v. United States*, 244 F.2d 68, 71 n.3 (3d Cir.), cert. denied, 355 U.S. 868 (1957).

tory activities it is not necessary expressly to except such agencies . . . by name . . . .”<sup>86</sup> The Congressional committee reporting on the bills which ultimately became the Act stated time and again that, although the Act was intended to permit suit for claims arising from the ordinary common law torts involving vehicles of employees of regulatory agencies, the Act was designed to preclude claims based upon the regulatory activities of those agencies.<sup>87</sup>

Consistent with the legislative purpose, the words “discretionary function exception” have been construed by courts as barring claims based upon regulatory activity.<sup>88</sup> The Supreme Court’s decision in *Dalehite v. United States*<sup>89</sup> is the leading decision on the interpretation and application of the discretionary function exception. *Dalehite* arose out of a series of explosions that leveled the port area of Texas City, Texas, killing and injuring many persons. The government had been involved in a post-war fertilizer export program to the defeated nations. The fertilizer at issue, Fertilizer Grade Ammonium Nitrate (FGAN), contained a basic ingredient long used as a component in explosives. The government manufactured the fertilizer at fifteen deactivated ordnance plants, with the Army’s Chief of Ordnance carrying out the manufacturing plan.<sup>90</sup> The FGAN contained a coating subject to oxidation, was bagged at a high temperature in easily ignitable paper containers, and, as labeled, did not contain a warning of potential hazards. Longshoremen loaded the bags adjacent to a cargo of explosives aboard two French steamers. A fire broke out within the fertilizer and both ships exploded.

The Supreme Court held that the claims brought under the FTCA against the United States arising out of the explosions

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<sup>86</sup> *Weinstein v. United States*, 244 F.2d 68, 71 (3d Cir.), *cert. denied*, 355 U.S. 868 (1957) (quoting Memorandum for the Use of the Committee of the Judiciary, H.R. 5373, 77th Cong., 2d Sess. 8 (January 1942)). *See also* *Dalehite v. United States*, 346 U.S. 15, 27-30 (1953), and the Committee Reports cited and quoted therein.

<sup>87</sup> *Id.*

<sup>88</sup> *See* cases cited *infra* in note 107.

<sup>89</sup> 346 U.S. 15 (1953).

<sup>90</sup> *Id.*

were barred by the discretionary function exception.<sup>91</sup> After reviewing the legislative history of the discretionary function exception, the Court concluded that Congress did not contemplate that the "Government should be subject to liability arising from acts of a governmental nature or function."<sup>92</sup> Discussing the scope and meaning of section 2680(a), the Court stated that it extends to "all employees exercising discretion;"<sup>93</sup> that the discretion referred to includes "the discretion of the executive or the administrator to act according to one's judgment of the best course;"<sup>94</sup> and that "[w]here there is room for policy judgment and decision there is discretion."<sup>95</sup>

Turning to the specific issues before it, the Court in *Dalehite* concluded that all of the following decisions were protected by the exception: (1) the cabinet-level decision to institute the FGAN program; (2) the need for further experimentation with FGAN to determine the possibility of explosion; (3) the drafting of the basic plan of manufacture, including the decision regarding the coating, bagging temperature, and bagging materials; and (4) the failure to properly police the storage and loading of FGAN.<sup>96</sup> These holdings were not intended to exclude other types of discretion which the exemption might embrace, for the court said that "[i]t is unnecessary to define, apart from this case, precisely where discretion ends."<sup>97</sup>

It is significant that there has been no decision by the Supreme Court since *Dalehite* which has, in any way, modified these views as to this aspect of the discretionary function exception. *Indian Towing Co. v. United States*,<sup>98</sup> involving the negligent operation of a lighthouse, did not, as the Court itself noted, present any question as to the discretionary function exception. It dealt instead with the interpretation of section

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<sup>91</sup> *Id.* at 43.

<sup>92</sup> *Id.* at 28.

<sup>93</sup> *Id.* at 33.

<sup>94</sup> *Id.* at 34.

<sup>95</sup> *Id.* at 36.

<sup>96</sup> *Id.* at 39-42.

<sup>97</sup> *Id.* at 35.

<sup>98</sup> 350 U.S. 61 (1955).

2674 of the Act.<sup>99</sup> Consistent with the intent of Congress to exclude claims predicated on Government regulatory activities, lower courts have repeatedly upheld the viability of the exception as a bar to tort suits seeking to second-guess the discretionary or judgmental decisions of Federal officials who have exercised, or refrained from exercising, their statutory regulatory powers.<sup>100</sup>

In a recent certification case, *Garbarino v. United States*,<sup>101</sup> the court granted the United States' motion for summary judgment based upon the discretionary function exception to the Federal Tort Claims Act. The cause of action arose from the crash of a Cessna 177 aircraft at Detroit City Airport in June, 1975.<sup>102</sup> It was alleged that the FAA negligently certified the aircraft as airworthy, failed to promulgate "crashworthiness" regulations which arguably would have detected a design defect in the fuel tank assembly, failed to promulgate an airworthiness directive to correct the "design" problems, and negligently tested and inspected the aircraft.<sup>103</sup>

The court dismissed all counts against the United States. In dismissing the action, the court found that the alleged negligent certification and failure to issue an airworthiness directive fell within the discretionary function exception to the Federal Tort Claims Act, expressly excluding the government from liability.<sup>104</sup> The negligent testing and inspection arguments were held to be barred by the misrepresentation exception<sup>105</sup> to the Federal Tort Claims Act.<sup>106</sup> Similarly, in other inspection and licensing cases, the courts have uniformly held that such regulatory functions in the products area are barred by the discretionary function exception to the Federal Tort

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<sup>99</sup> 28 U.S.C. § 2674 (1976).

<sup>100</sup> *Martin v. United States*, 546 F.2d 1355 (9th Cir. 1976), *cert. denied*, 432 U.S. 906 (1977); *Rubenstein v. United States*, 338 F. Supp. 654 (N.D. Cal. 1972), *aff'd*, 488 F.2d 1071 (9th Cir. 1973).

<sup>101</sup> Civil No. 87-1375 (E.D. Mich., January 31, 1980).

<sup>102</sup> *Id.*, slip op. at 1.

<sup>103</sup> *Id.*

<sup>104</sup> 28 U.S.C. § 2680(a) (1976).

<sup>105</sup> See *infra* notes 111-27 and accompanying text.

<sup>106</sup> 28 U.S.C. § 1346(b) (1976).

Claims Act.<sup>107</sup>

*Griffin v. United States*<sup>108</sup> is a case which is often cited for the proposition that the discretionary function exception does not bar recovery against the United States in the products area. In *Griffin*, the Federal Government injected itself directly into the manufacturing process by actually testing and approving batches of polio vaccine, as distinguished from attempting to insure a manufacturer's compliance with set standards. The government did not merely regulate, it actually tested and purposely released the defective vaccine.<sup>109</sup>

Similar drug cases since *Griffin* have found no liability on the part of the United States for testing and approving drugs, based upon the discretionary function exception to the Federal Tort Claims Act.<sup>110</sup> This represents the better view because, if courts are permitted to penetrate the cloak of protection afforded by the discretionary function exception and award money damages in products' liability suits against the government by asserting negligent inspection and certification, the United States will become the insurer of all who engage in manufacturing. Such a situation was certainly not within the contemplation of the Congress at the time of enacting the FTCA.

## VI. NEGLIGENT MISREPRESENTATIONS

Among the exceptions to the Federal Tort Claims Act, which limit the jurisdiction of the courts, is the following: "The provisions of the Chapter in Section 1346(b) of this title shall not apply to - any claim arising out misrepresentation

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<sup>107</sup> *Emch v. United States*, 630 F.2d 523 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1482 (1981); *Gelley v. Astra Pharmaceutical Products, Inc.*, 610 F.2d 558 (8th Cir. 1979); *Lawrence v. United States*, 381 F.2d 989 (9th Cir. 1967); *United States v. Morrell*, 331 F.2d 498 (10th Cir.), *cert. denied*, 379 U.S. 879 (1964); *In re Franklin Nat'l Bank Securities Litigation*, 478 F. Supp. 210 (E.D.N.Y. 1979); *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978); *In re Air Crash Disaster Near Silver Plume, Colorado*, 445 F. Supp. 384 (D. Kan. 1977).

<sup>108</sup> 500 F.2d 1059 (3d Cir. 1974).

<sup>109</sup> *Id.* at 1067.

<sup>110</sup> *See, e.g., Gelley v. Astra Pharmaceutical Products, Inc.*, 610 F.2d 558 (8th Cir. 1979); *Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978).



...<sup>111</sup> The leading case on the "misrepresentation exception" is *United States v. Neustadt*.<sup>112</sup> In *Neustadt*, the United States was sued under the Federal Tort Claims Act by the purchaser of a home, who claimed he relied upon a negligent inspection and appraisal by the Federal Housing Administration and was induced to pay more for the property than it was worth. The Supreme Court held that the misrepresentation exclusion under section 2680(h) barred recovery since it applied to negligent as well as intentional misrepresentations.<sup>113</sup>

The *Neustadt* Court made it abundantly clear that section 2680(h) cannot be circumvented by stating that the gist of the claim lies in "negligence" rather than in "misrepresentation." Congress simply did not intend to subject the United States to liability for its licensing activities under the Federal Tort Claims Act.<sup>114</sup>

While some parties have attempted to limit the misrepresentation exception to the context of business and common civil dealings, case law and the *Restatement (Second) of Torts*, section 311, support the principle that the misrepresentation exception is just as applicable to actions involving injury, wrongful death and property damages as it is to those actions involving only financial or commercial loss.<sup>115</sup> In *Lloyd v. Cessna Aircraft Co.*,<sup>116</sup> the third-party plaintiff, Cessna Aircraft Co., alleged negligence on the part of the Federal Avia-

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<sup>111</sup> 28 U.S.C. § 2680(h) (1981).

<sup>112</sup> 366 U.S. 696 (1961).

<sup>113</sup> *Id.* at 702.

<sup>114</sup> See also *Fitch v. United States*, 513 F.2d 1013 (6th Cir.), *cert. denied*, 423 U.S. 866 (1975) (induction into armed forces); *United States v. Croft-Mullins Elec. Co.*, 333 F.2d 772 (5th Cir. 1964), *cert. denied*, 379 U.S. 968 (1965) (government contract requiring government to furnish certain construction materials); *Hall v. United States*, 274 F.2d 69, 71 (10th Cir. 1959) (testing of cattle for disease by Department of Agriculture); *Anglo-American & Overseas Corp. v. United States*, 242 F.2d 236 (2d Cir. 1957) (sampling of tomato paste by Food and Drug Administration).

<sup>115</sup> *Fitch v. United States*, 513 F.2d 1013 (6th Cir.), *cert. denied*, 423 U.S. 866 (1975); *Clark v. United States*, 218 F.2d 446 (9th Cir. 1954); *Summers v. United States*, 480 F. Supp. 347 (D. Md. 1979); *Castro v. United States*, 451 F. Supp. 959 (D.P.R. 1978); *Lloyd v. Cessna Aircraft Co.*, 429 F. Supp. 181 (E.D. Tenn. 1977); *Vaughn v. United States*, 259 F. Supp. 286 (N.D. Miss. 1966).

<sup>116</sup> 429 F. Supp. 181 (E.D. Tenn. 1977).

tion Administration in inspecting and testing an aircraft prior to the agency's issuance of a supplemental type certificate and an airworthiness certificate.<sup>117</sup> The court dismissed Cessna's third-party claim, relying on the misrepresentation exception.<sup>118</sup> In its Memorandum Opinion, the district court stated:

In several cases arising under the Federal Tort Claims Act, . . . the Courts have held that negligent inspections and testing by Government officials, which conduct results in incorrect information being reported and relied upon, in reality amount to a claim arising out of misrepresentation so as to be precluded by the [misrepresentation] exception to the [Federal Tort Claims Act].<sup>119</sup>

The court continued:

Where the negligence of Federal Employees, whether by inspection, testing, diagnosis or otherwise, has resulted in the conveyance of erroneous information, thereby causing damages or other loss to the plaintiff, the Courts have held that any action against a national sovereign based on the Federal Tort Claims Act, . . . is barred by the misrepresentation exception.<sup>120</sup>

Furthermore, the court stated that "the misrepresentation exception is just as applicable to actions involving injury, wrongful death or property damages as it is to those involving only financial or commercial loss."<sup>121</sup>

Another case in which a court applied the misrepresentation exception to claims of negligent licensing which resulted in property loss or personal injury is *Marival, Inc. v. Planes, Inc.*<sup>122</sup> In *Marival*, an airplane purchaser brought an action to recover damages from the defendant seller because of the latter's misrepresentation and breach of implied warranties. The defendant filed a third-party action against the United States under the Federal Tort Claims Act on the theory that the

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<sup>117</sup> *Id.* at 182.

<sup>118</sup> *Id.* at 183.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 185.

<sup>121</sup> *Id.* at 187.

<sup>122</sup> 306 F. Supp. 855 (N.D. Ga. 1969).

FAA had negligently renewed an airworthiness certificate for such aircraft, upon which the defendant had relied.<sup>123</sup> The defendant and third-party plaintiff's contention was that, if the aircraft was not airworthy, the government's authorized inspector negligently performed his annual inspection, thereby rendering the FAA negligent in the certification of the aircraft's airworthiness. The *Marival* court never decided the issue of whether an inspection performed by a person not employed by the FAA, although an authorized inspector, could result in FAA liability for erroneous certification. However, the court stated in *dicta* that certification by the FAA was "not designed as a commercial warranty upon which a party may sue the Government."<sup>124</sup>

The reasoning of the *Marival* court is understandable. To the extent that a claim against the Federal Government for negligent inspection or approval, failure to issue a license or negligent certification, states any kind of tort at all, it plainly states one for misrepresentation.<sup>125</sup> Such a complaint, however artfully drafted, cannot help but state a claim sounding in misrepresentation.<sup>126</sup> The misrepresentation exception is no mere technicality. The underlying allegation in such cases is that the government may be held liable, not for engaging in conduct itself which caused damage, but for giving its stamp of approval or certification to a product which allegedly thereafter caused damage. Were such an allegation to create a triable issue of fact, the consequences would be onerous indeed.

Virtually every tortious act or omission by a private person is committed under the aegis of some license, certificate, permit or other approval granted by the federal, state or local government. Every pilot, automobile driver, doctor, merchant, manufacturer, attorney or building contractor cannot legally act but for a license or other stamp of approval given to his

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<sup>123</sup> *Id.* at 857.

<sup>124</sup> *Id.* at 860 n.1.

<sup>125</sup> See RESTATEMENT (SECOND) OF TORTS § 311, Illustration 8 (1957).

<sup>126</sup> *Hall v. United States*, 274 F.2d 69 (10th Cir. 1959), cited with approval in *United States v. Neustadt*, 366 U.S. 696 (1961). See also *Anglo-American & Overseas Corp. v. United States*, 242 F.2d 236 (2d Cir. 1957); *Cargill, Inc. v. United States*, 426 F. Supp. 127 (D. Minn. 1976).

actions by the Federal, State or local government. Even to find that there exists an issue of fact in each such case would effectively make some branch of government a party defendant in virtually every tort suit arising out of the negligent conduct of every private person. Congress did not intend such a result.

Where the involvement of the United States is in testing, inspection or certification, notwithstanding the product liability overtones, the misrepresentation exception to the Federal Tort Claims Act has been and is a complete defense, precluding liability.<sup>127</sup>

## VII. CONCLUSION

Within the context of products liability law, as it has been and is developing, it seems clear that the waiver of sovereign immunity permitting suits against the United States has consistently been interpreted as excluding this area. Such a judicial conclusion appears overwhelmingly consistent with the intent of the Congress. The role of the federal government in the products area is, absent unusual circumstances, one which is uniquely governmental in nature and is not meant to alter or supplant theories of liability against manufacturers and purveyors of goods and services.

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<sup>127</sup> *Fitch v. United States*, 513 F.2d 1013 (6th Cir. 1975), *cert. denied*, 423 U.S. 866 (1975); *Rey v. United States*, 484 F.2d 45 (5th Cir. 1973); *In re Silver Bridge Disaster Litigation*, 381 F. Supp. 931 (S.D. W.Va. 1974); *Marival, Inc. v. Planes, Inc.*, 306 F. Supp. 855 (N.D. Ga. 1969); *United States v. Thompson*, 293 F. Supp. 1307 (E.D. Ark. 1967); *Vaughn v. United States*, 259 F. Supp. 286 (N.D. Miss. 1966); *Bartie v. United States*, 216 F. Supp. 10 (W.D. La. 1963), *aff'd* 326 F.2d 754 (5th Cir. 1964). *See also* *Garbarino v. United States*, No. 87-1375 (E.D. Mich. January 31, 1980); *Federal Express Corp. v. United States*, No. 76-0434 (D.R.I. March 11, 1980); *Summers v. United States*, 480 F. Supp. 347 (D. Md. 1979); *Hawkins v. United States*, No. G75-132 (W.D. Mich., June 25, 1978).

