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Casenotes and Statute Notes

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Casenotes and Statute Notes

FEDERAL AVIATION ACT—RECORDATION OF AIRCRAFT CONVEYANCES—Transfers of Aircraft Interests Must Be Evidenced by Writings, and Such Instruments Must Be Recorded with the Federal Aviation Administration before Innocent Third Parties Can Be Affected. *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. 2476 (1983).

On April 19, 1978, Maurice Shacket and his wife purchased a new Piper Navajo aircraft from Roger Smith Aircraft Sales, Inc.¹ At the closing, which took place at an airport in Illinois,² the Shackets tendered full payment³ and took possession of the airplane.⁴ Citing clerical difficulties, Roger Smith did not deliver the title documents at the closing⁵ but assured the Shackets that he “would take care of the paperwork.”⁶ No effort was made by either party to record the sale with the Federal Aviation Administration (FAA) in Oklahoma City.⁷

¹ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. 2476, 2477 (1983). Maurice Shacket is a private pilot and has owned aircraft for many years. *Shacket v. Philko Aviation, Inc.*, 681 F.2d 506, 508 (7th Cir. 1982). Roger Smith ran the business of Smith Aircraft Sales, Inc. and served as president of the corporation. *Id.* at 509.

² *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. at 2477.

³ *Id.* The Shackets had earlier made a cash downpayment and relinquished possession of another airplane, which was allowed as a trade-in. *Shacket v. Philko Aviation, Inc.*, 681 F.2d 506, 508 (7th Cir. 1982). At the closing, Mr. Shacket paid the balance due on the purchase price. *Id.*

⁴ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. at 2477.

⁵ *Shacket v. Philko Aviation, Inc.*, 681 F.2d 506, 509 (7th Cir. 1982). Smith did give the Shackets photocopies of bills of sale from previous transfers of the aircraft to show proper chain of title. *Id.*

⁶ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. at 2477.

⁷ *Id.* The Shackets testified that they thought Roger Smith would record the bill of sale as part of the “paperwork.” *Id.* Conveyances of aircraft interests must be recorded with the FAA in Oklahoma City, Oklahoma before third parties are put on constructive

Several days later Mr. Smith fraudulently negotiated a sale of the same aircraft to Philko Aviation, Inc. (Philko).⁸ Telling Philko that the airplane was being fitted with new avionics in Michigan,⁹ Mr. Smith transferred the title documents to Philko¹⁰ and accepted payment.¹¹ Philko had checked the title against FAA records prior to the sale and had found no previous recordation.¹² The bill of sale was promptly recorded with the FAA.¹³ Philko, however, never received possession of the aircraft.¹⁴

After learning of the sham sale to Philko, the Shackets commenced an action for declaratory relief in the United States District Court for the Northern District of Illinois to fix their right of ownership in the airplane.¹⁵ On appeal, the Seventh Circuit affirmed the lower court's summary judgment in favor of the Shackets after concluding that federal recordation requirements did not preempt substantive state law concerning title transfers.¹⁶ The court held that under Illinois law, Roger Smith had no interest in the aircraft at the

notice that ownership transfers have occurred. *See infra* note 13, and accompanying text; text accompanying notes 19-24.

⁸ Philko Aviation, Inc. v. Shacket, 103 S. Ct. at 2477. The transaction was not a typical sale. *Id.* Philko owned the buildings and property on which Smith Aircraft was located. Shacket v. Philko Aviation, Inc., 681 F.2d 506, 509 (7th Cir. 1982). Prior to the sale to the Shackets, Philko had leased the property and operations located thereon to Smith Aircraft. *Id.* Pursuant to the lease, Philko partially guaranteed Smith Aircraft's line of credit and loaned Smith Aircraft \$80,000. *Id.* Roger Smith, the owner of Smith Aircraft, approached Philko and told its president that he had arranged to sell the aircraft, which he had previously sold to the Shackets, to a California corporation, but that the bank would not loan him enough money to buy the aircraft from the Piper distributor. *Id.* Philko then loaned Smith Aircraft the needed money and took title to the Piper Navajo as security. *Id.* Proceeds of the sale were supposed to be applied to the balance of Smith Aircraft's loan from Philko. *Id.*

⁹ Philko Aviation, Inc. v. Shacket, 103 S. Ct. at 2477.

¹⁰ *Id.* at 2478. Roger Smith gave Philko the bill of sale that he fraudulently withheld from the Shackets. *Id.*

¹¹ *Id.* at 2477-78. Philko borrowed funds for the purchase from its bank. *Id.*

¹² *Id.* at 2478 n.1.

¹³ *Id.* at 2478. An instrument of conveyance must be filed with the FAA in Oklahoma City before third parties can be deemed to have constructive notice of a transfer. 49 U.S.C. § 1403 (1976). FAA Aircraft Registry, 14 C.F.R. § 47.19 (1983). *See infra* text accompanying notes 19-24

¹⁴ Philko Aviation, Inc. v. Shacket, 103 S. Ct. at 2478.

¹⁵ Shacket v. Roger Smith Aircraft Sales, Inc., 497 F. Supp. 1262 (N.D. Ill. 1980).

¹⁶ Shacket v. Philko, 681 F.2d. 506, 510 (7th Cir. 1982).

time of the sale to Philko, and as a result, Philko did not acquire good title.¹⁷ The United States Supreme Court granted certiorari on the question of federal preemption of state law.¹⁸ *Held, reversed and remanded*: Transfers of Aircraft Interests Must Be Evidenced by Writings, and Such Instruments Must Be Recorded with the Federal Aviation Administration before Innocent Third Parties Can Be Affected. *Philko Aviation, Inc. v. Shackel*, 103 S. Ct. 2476 (1983).

I. RECORDATION UNDER THE FEDERAL AVIATION ACT

Congress in 1958 established a nationwide system for recording certain documents affecting titles or interests in aircraft.¹⁹ Section 503 of the Federal Aviation Act (Act) requires the recording of "any conveyance which affects the title to, or any interest in, any civil aircraft of the United States."²⁰ The Act additionally covers leases and security agreements affecting large aircraft engines²¹ and certain other aircraft parts.²² The purpose of section 503, as stated by one court, is to "protect persons who have dealt on the faith of recorded title."²³ Once a filing is made, third parties are put on constructive notice that an aircraft is owned or encumbered by the recording party.²⁴ It is undisputed that Congress intended the filing system to be the only system of

¹⁷ *Id.* at 512. The court relied on U.C.C. § 2-403(1), which provides in relevant part that "[a] purchaser of goods acquires all title which his transferor had or had power to transfer." *Id.*

¹⁸ *Philko Aviation, Inc. v. Shackel*, 103 S. Ct. 487 (1982). The Court granted certiorari only on the question of whether federal recordation requirements for aircraft transfers preempted state laws that permit aircraft transfers by possession alone. *Id.* See also 51 U.S.L.W. 3306 (U.S. Oct. 10, 1982) (No. 82-342).

¹⁹ Federal Aviation Act of 1958, § 503, Pub. L. No. 85-726, 72 Stat. 731, 772-74, (codified at 49 U.S.C. § 1403 (1976)). Originally, conveyances were required to be recorded under the Civil Aeronautics Act of 1938, which was later repealed and replaced by the Act of 1958. Pub. L. No. 75-706, 52 Stat. 973, 1005 (1938), *repealed by*, Federal Aviation Act of 1958, § 1401(b), Pub. L. No. 85-726, 72 Stat. 731, 806.

²⁰ See 49 U.S.C. § 1403 (1976). *Cf.* *Feldman v. Philadelphia Nat'l Bank*, 408 F. Supp. 24, 33 (E.D. Penn. 1976) (holding that FAA recording provisions do not cover leases of aircraft).

²¹ 49 U.S.C. § 1403(a)(2).

²² *Id.* § 1403(a)(3).

²³ *C.I.M. Int'l v. United States*, 641 F.2d 671, 676 (9th Cir. 1980).

²⁴ See 49 U.S.C. § 1403 (1976).

its kind in the country.²⁵ Consequently, state recording systems are preempted by section 503.²⁶

The term "validity" as used in section 503 is a source of confusion.²⁷ Section 503(c) states that "[n]o conveyance or instrument the recording of which is provided for by subsection (a) . . . shall be valid . . . against any person other than the person by whom the conveyance or other instrument is made or given . . . , until such conveyance is filed for recordation."²⁸ However, an unrecorded interest is valid against a third party with actual notice of its existence.²⁹ One commentator has interpreted this language to mean that filing does not guarantee enforceability of an interest, but simply allows a claimant the chance of enforceability.³⁰

Congress has specifically deferred to state law certain determinations concerning aircraft titles and interests.³¹ Enacted in 1964 to clarify the scope of section 503, section 506 provides as follows: "The validity of any instrument the re-

²⁵ See Sigman, *The Wild Blue Yonder: Interests in Aircraft Under Our Federal System*, 46 S. CAL. L. REV. 316 (1973). The author compares the Federal Aviation Act's recording systems to very similar systems established under the Ship Mortgage Act, 46 U.S.C. §§ 921-27 (1976) and the Federal Motor Vehicle Lien Act, 49 U.S.C. § 313 (1976), repealed by Act of Oct. 17, 1978 § 4(b), Pub. L. No. 95-473, 92 Stat. 1337, 1466-70, and concludes "[t]hat [the view that the] filing system is exclusive is the only sensible reading of the statute." Sigman, *supra*, at 319 n.15.

²⁶ *Id.* See, e.g., *Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086, 1088 (3d Cir. 1978) (holding that there has been federal preemption only to the limited extent that Congress has sensibly federalized choice of law); *Northern Ill. Corp. v. Bishop Dist. Co.*, 284 F. Supp. 121, 124 (W.D. Mich. 1968) (finding that federal law governs the rights of claimants to aircraft interests to the extent that such rights are dependent upon the fact and time of recordation); *Texas Nat'l Bank v. Aufderheide*, 235 F. Supp. 599, 603 (E.D. Ark. 1964) (holding that the right of Congress to make interests in aircraft dependent upon fact or time of recordation is not questioned). Under the preemption doctrine when a federal law conflicts with a state law, the latter must yield to the former under the Supremacy Clause. U.S. CONST. art. VI, cl. 2. For a good discussion of this doctrine, see *Fidelity Fed. Sav. & Loan Ass'n v. Cuesta*, 102 S. Ct. 3014, 3022 (1982).

²⁷ The Federal Aviation Act does not define the term. Moreover, section 1406 also uses the term in describing the areas where state substantive laws continue to apply. See Sigman, *supra* note 25, at 323.

²⁸ 49 U.S.C. § 1403(c) (1976).

²⁹ *Id.*

³⁰ Scott, *Liens in Aircraft: Priorities*, 25 J. AIR L. & COM. 193, 203 (1958) ("Recordation itself merely validates; it does not grant priority.") The Supreme Court expressly approved this view in *Philko Aviation, Inc. v. Shackel*, 103 S. Ct. 2476, 2480 (1983).

³¹ See generally 49 U.S.C. § 1406 (1976).

cording of which is provided for by section 1403 . . . shall be governed by the laws of the State . . . in which such instrument is delivered.”³² The reasons for this section are twofold. First, it preserves state laws concerning the underlying validity of instruments,³³ and second, it prevents forum shopping.³⁴ Section 506, like section 503, uses the term “validity” without defining it.³⁵ Reading the two sections together, instruments subject to the Federal Aviation Act must be recorded before they are *valid* against third parties without notice, but an instrument’s underlying *validity* is to be determined under state law.³⁶

The Act is also ambiguous in defining the types of conveyances and instruments that are subject to federal recordation under section 503.³⁷ Courts have wrestled with this question on numerous occasions.³⁸ Generally, instruments evidencing sales, security interests and other contractual liens must be recorded.³⁹ With respect to constitutional and statutory liens

³² *Id.*

³³ S. REP. NO. 1060, 88th Cong. 2d Sess. 2 (1964), reprinted in U.S. CODE CONG. & AD. NEWS 2319, 2320 (“[T]o determine the validity of . . . an instrument, one need only to look to the substantive law of the particular State in which the instrument was delivered”). For a discussion of the legislative history of section 506, see *Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086, 1088 (3d Cir. 1978).

³⁴ *Sanders v. M.D. Aircraft*, 575 F.2d 1086, 1088 (3d Cir. 1978). The Third Circuit concluded that state law is displaced by the Act only so far as choice of law is concerned in order to prevent forum shopping in aircraft financing that might arise under the holding of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). *Id.* Undesirable results would occur if competing interest holders in aircraft were able to choose among numerous forums without any limitations. Parties, by contract or otherwise, could invoke the laws of a state that would likely provide a favorable judicial outcome regardless of that forum’s connection with the transaction.

³⁵ See *supra* notes 26, 28.

³⁶ See *supra* note 28. See also 49 U.S.C. §§ 1403(c), 1406 (1976); *United States Aviation Underwriters, Inc. v. WTAE Flying Club*, 300 F. Supp. 341, 346-47 (W.D. Penn. 1969) (question of whether lender had a proper chattel mortgage was a pure question of state law).

³⁷ Section 503 requires the recording of conveyances, leases, mortgages, conditional sales and other “instruments executed for security purposes.” 49 U.S.C. § 1303(a)(2) (1976). A “conveyance” is defined in the Act as “a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property.” 49 U.S.C. § 1301(20) (Supp. V 1981).

³⁸ See generally Annot., 22 A.L.R.3d 1270, 1279 (1968 & Supp. 1981). For a discussion of the effects of recordation on various forms of aircraft financing, see Eyer, *The Sale and Financing of Aircraft*, 45 J. AIR L. & COM. 217 (1979).

³⁹ See Sigman, *supra* note 25, at 322 n.27. A mechanic’s lien is defined as a “claim

(e.g., mechanic's liens and other possessory liens) the courts have disagreed over whether these liens must be recorded under section 503 before third parties are put on constructive notice.⁴⁰

Filing requirements under section 503 of the Federal Aviation Act differ from standard filing requirements under the Uniform Commercial Code (UCC). Forty-nine states have adopted article 9 of the UCC, which covers secured transactions involving personal property.⁴¹ UCC section 9-203 generally requires that secured parties evidence their interests in collateral by executing written security agreements.⁴² Once this writing requirement is satisfied, a party must file a standardized notice form, known as a financing statement, in the state where the collateral is located or where the debtor resides.⁴³ Filing of a financing statement perfects a security interest by giving third parties constructive notice of its

created by statutes for the purpose of securing priority of payment for the price or value of work performed and materials furnished." BLACK'S LAW DICTIONARY 885 (rev. 5th ed. 1979). "A lien is possessory where the creditor has the right to hold possession of the specific property until satisfaction of the debt or performance of an obligation." BLACK'S LAW DICTIONARY at 1049.

⁴⁰ See *Crescent City Aviation, Inc. v. Beverly Bank*, 139 Ill. App. 669, 219 N.E.2d 446, 449 (1966) (mechanic's lien must be filed with FAA). *But see* *Holiday Airlines v. World Airways* (*In re* *Holiday Airlines*), 647 F.2d 977, 980 (9th Cir. 1981) (unrecorded consensual possessory lien for repair and maintenance upheld under California law); *Carolina Aircraft Corp. v. Commerce Trust Co.*, 289 So. 2d 37 (Fla. Ct. App. 1974) (unrecorded mechanic's lien given priority over prior recorded security interest under Florida law); see also *infra* notes 73, 119; Sigman, *supra* note 25, at 322 nn.25, 26.

⁴¹ U.C.C. art. 9 commentary at 5, 6 (1981). Only Louisiana has not adopted article 9. *Id.*

⁴² See, e.g., U.C.C. § 9-203 (1981). The writing requirement is not express but is implied from the requirements that a security agreement describe the collateral adequately and be signed by the debtor. A writing is not required if the creditor retains possession of the collateral. U.C.C. § 9-305 (1981). Additionally, a security interest must be supported by consideration, and the debtor must have "rights in the collateral." U.C.C. § 9-305 (1981). For an exhaustive analysis of security interests under article 9 of the U.C.C., see J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 901 (1980).

⁴³ See, e.g., U.C.C. § 9-402 (1981). Financing statements are barebones documents that provide third parties with notice that an item of personal property is encumbered in some way and by whom. *Id.* Section 9-401 contains several alternative versions regarding where financing statements are to be filed, from which states may pick and choose in adopting their respective versions of the UCC. Generally, financing statements are filed with the secretary of state of the state where the collateral is located or where the debtor resides. U.C.C. § 9-103 (1981).

existence.⁴⁴ As mentioned above, recordation under the UCC, as well as under state recording statutes for aircraft titles, is preempted by section 503 of the Federal Aviation Act.⁴⁵ Under section 503, an interest holder in an aircraft must file the actual instrument of conveyance rather than a notice form.⁴⁶ The term "conveyance" as used in the Act is defined as "a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or any other instrument affecting title to, or interest in, property."⁴⁷ In all likelihood, the drafters envisioned that a writing would be executed in every aircraft conveyance, and indeed, this is the usual practice.⁴⁸

The FAA recordation system provides a convenient and inexpensive clearinghouse that enables owners, prospective purchasers and financiers of aircraft to check for preexisting contractual liens and to verify ownership.⁴⁹ The scope of the Act is clearly intended to preempt state recordation systems.⁵⁰ Legislative history, however, suggests that questions of substantive validity are to be deferred to the states.⁵¹ Yet the statutory scheme is not without its uncertainties.⁵² Courts have been continually confronted with questions regarding the extent to which section 503 preempts state law⁵³ and the types of instruments that must be recorded with the FAA.⁵⁴

⁴⁴ U.C.C. § 9-401 (1981). A person can contact the secretary of state of a particular state by phone or by mail and easily find out whether a piece of personal property has any perfected liens on it.

⁴⁵ See *supra* text accompanying notes 19-26.

⁴⁶ See *supra* notes 20, 27 and accompanying text.

⁴⁷ See 49 U.S.C. § 1301(20) (Supp. V 1981). See also *supra* note 37.

⁴⁸ A dissenting opinion in *American Aviation, Inc. v. Aviation Ins. Managers, Inc.*, 244 Ark. 829, 427 S.W.2d 544, 548 (1968) states that "an essential element in the Congressional scheme [of section 503] is that the conveyance or other instrument be *in writing*, so that it *can* be recorded."

⁴⁹ The federal recordation system is maintained in Oklahoma City. FAA Aircraft Registry, 14 C.F.R. § 47.19 (1983). The cost to record an instrument with the FAA is approximately \$10.00.

⁵⁰ See *supra* text accompanying notes 19-26.

⁵¹ See *supra* text accompanying notes 31-36.

⁵² See *supra* text accompanying notes 27-30.

⁵³ See *supra* text accompanying notes 42-52; *infra* text accompanying notes 54-140.

⁵⁴ See *supra* text accompanying notes 42-48.

II. DECISIONS INTERPRETING THE RECORDING PROVISIONS OF THE FEDERAL AVIATION ACT

Both state and federal courts agree⁵⁵ that section 503 establishes the exclusive filing system for aircraft interests.⁵⁶ A more difficult question is whether Congress also intended for section 503 to preempt state laws recognizing unrecorded aircraft transfers and other state laws assigning priorities among various recorded interest holders.⁵⁷ Here the courts have split.⁵⁸

One of the earliest cases involving section 503 is *In re Veterans' Air Express Co.*⁵⁹ In *Veterans' Air Express*, the United States sold two airplanes to an individual and retained security interests in each plane, both of which were recorded with

⁵⁵ See, e.g., *Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086, 1088 (3d Cir. 1978); *Pacific Fin. Corp. v. Central Bank and Trust Co.*, 296 F.2d 68, 71 (5th Cir. 1961); *Cessna Fin. Co. v. Skyways Enter. Inc.*, 580 S.W.2d 491 (Ky. 1979).

⁵⁶ See *supra* note 25.

⁵⁷ See *State Securities Co. v. Aviation Enter. Inc.*, 355 F.2d 225 (10th Cir. 1966) (holding that validity of a conveyance is a state law determination); *Texas Nat'l Bank of Houston v. Aufderheide*, 235 F. Supp. 599 (E.D. Ark. 1964) (holding that validity of a conveyance must first be determined under state law); *Lochhead v. G.A.C. Fin. Corp. of Camelback*, 6 Ariz. App. 539, 434 P.2d 655 (1967) (establishing validity of title under state law as the initial inquiry where competing interests are involved); *Bank of Henderson v. Red Baron Flying Club, Inc.*, 571 S.W.2d 152, 153 (Tenn. Ct. App. 1977) (priorities are decided under state law). Compare *Pope v. National Aero Fin. Co.*, 236 Cal. App. 2d 722, 46 Cal. Rptr. 233 (1965) (holding that federal recordation totally preempts state law). For other cases addressing the validity question, see also Annot., 22 A.L.R.3d 1275 (1968 & Supp. 1981).

⁵⁸ See *Gary Aircraft Corp. v. General Dynamics Corp.*, 681 F.2d 365 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3110 (1983) (holding that assignment of priorities is a question for state law). See also *Haynes v. General Electric Credit Corp.*, 432 F. Supp. 763 (W.D. Va. 1977) (holding that priorities of interest must be decided under state law), *aff'd*, 582 F.2d 869 (4th Cir. 1978); *Northern Ill. Corp. v. Bishop Distrib. Co.*, 284 F. Supp. 121 (W.D. Mich. 1968) (federal recordation is the initial inquiry, but priorities are assigned under state law); *Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust Co.*, 82 Ill. App. 3d 1, 401 N.E.2d 1340 (1980) (validity and priority of interests decided under state law). Compare *Gary*, 681 F.2d 365 (5th Cir. 1982), and these other cases with *Dowell v. Beech Acceptance Corp.*, 3 Cal. 3d 544, 476 P.2d 401, 91 Cal. Rptr. 1 (1970) (holding that federal recordation requirements preempt state rules of priority), *cert. denied*, 404 U.S. 823 (1971); *O'Neill v. Barnett Bank of Jacksonville, N.A.*, 360 So. 2d 150 (Fla. Dist. Ct. App. 1978) (recognizing Florida statute which states that section 503 of Act entirely preempts state law in regard to priorities of aircraft interests).

⁵⁹ 76 F. Supp. 684 (D.N.J. 1948). Actually, the court was interpreting the Civil Aeronautics Act of 1938, which contained Section 503. The Federal Aviation Act of 1958 reenacted Section 503 in identical form. See *supra* note 19.

the FAA.⁶⁰ The purchaser later sent the planes to a shop for reconditioning.⁶¹ After the owner failed to pay for parts and labor, the mechanic asserted a mechanic's and materialman's lien against the aircraft under state law.⁶² A New Jersey federal district court rejected the claim made by the mechanic and granted to the United States the superior right to foreclose on its security interests in the aircraft.⁶³ The court construed the Federal Aviation Act as a comprehensive statute covering all aspects of aviation.⁶⁴ Based on this interpretation of the Act, the court held that state laws allowing unrecorded interest holders to prevail over properly recorded interest holders were necessarily preempted by the federal statutory scheme.⁶⁵

In 1970, the California Supreme Court addressed the same issue in *Dowell v. Beech Acceptance Corp.*⁶⁶ In *Dowell*, the competing interest holders in the aircraft were a prior secured party, which filed its security interest with the FAA, and a subsequent buyer in the ordinary course of business, which did not file its bill of sale with the FAA.⁶⁷ Under California's version of the UCC, the buyer in the ordinary course of business was assigned priority.⁶⁸ The court held, however, that section 503 preempted priority rules under state law and created a priority scheme based entirely on the order in which competing interests are filed (i.e., a pure race statute).⁶⁹ The

⁶⁰ 76 F. Supp. at 685.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 688. Recordation under section 503 was construed as the only means by which an aircraft interest can be transferred. *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 689.

⁶⁶ 3 Cal. 3d 544, 476 P.2d 401, 91 Cal. Rptr. 1, cert. denied, 404 U.S. 823 (1971).

⁶⁷ 476 P.2d at 401-02. The UCC defines a buyer in the ordinary course of business as:

[A] person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker

U.C.C. § 1-201(9) (1977).

⁶⁸ 476 P.2d at 403. See CAL. COM. CODE § 9307 (West 1964 & Supp. 1984).

⁶⁹ 476 P.2d at 404. Under a race statute, whoever first records his interest in an aircraft prevails, regardless of the type of interest involved or when it was created.

United States Supreme Court denied certiorari.⁷⁰

In *Dowell*, the California Supreme Court realized that if California law had been applied, the subsequent purchaser in the ordinary course of business would have prevailed, even though it had not complied with federal recordation requirements.⁷¹ Such an outcome, the court reasoned, would be a violation of the basic policy of section 503 since buyers in the ordinary course of business would have no incentive to record their purchases.⁷² To avoid this undesirable result the court held that California commercial law concerning the validity of unrecorded transfers and the assignment of priorities among competing interest holders had been displaced by the Federal Aviation Act.⁷³

Dowell has not been well-received by either the federal or state courts.⁷⁴ With the exception of Florida, which has legislatively adopted the total federal preemption view,⁷⁵ the decision has been viewed as an aberration.⁷⁶ More recent opinions have tracked the legislative history of section 503 and have concluded that Congress did not intend to preempt state law entirely, particularly in the assignment of priorities among competing interest holders in the same aircraft.⁷⁷ Commentators have also embraced this more restrictive reading of the Act.⁷⁸

The Fifth Circuit recently addressed the preemption issue

⁷⁰ *Dowell v. Beech Acceptance Corp.*, 404 U.S. 823 (1971).

⁷¹ 476 P.2d at 403.

⁷² *Id.*

⁷³ *Id.* at 404. *Cf.* *Northwestern Flyers, Inc. v. Olson Bros. Mfg. Co.*, 679 F.2d 1264, 1270 (8th Cir. 1982) (Iowa UCC law determines ownership of aircraft, not who has possession of title documents).

⁷⁴ See *infra* note 76 and accompanying text.

⁷⁵ See *O'Neill v. Barnett Bank of Jacksonville*, 360 So. 2d 150 (Fla. Dist. Ct. App. 1978) (under 1975 Fla. Laws § 329.01, Florida law relegates to section 1403 determinations of priority). *Cf.* *Carolina Aircraft Corp v. Commerce Trust Co.*, 289 So.2d 37 (Fla. Ct. App. 1974) (unrecorded mechanic's lien given priority over prior recorded security interest under Florida law).

⁷⁶ No federal court has followed the decision. See *Gary Aircraft v. General Dynamics*, 681 F.2d 365, 368-69 (5th Cir. 1982) for a thorough discussion of the majority view.

⁷⁷ See *infra* notes 79-84, 156-158 and accompanying text.

⁷⁸ See *Sigman*, *supra* note 25, at 384; *Scott*, *supra* note 30, at 202. See also *Note, Taking the Lender for a Ride: Section 1403 of this Federal Aviation Act and the Buyer in the Ordinary Course of Business*, 36 WASH. & LEE L. REV. 205 (1979).

in *Gary Aircraft Corp. v. General Dynamics Corp.* (*In re Gary Aircraft Corp.*).⁷⁹ A prior secured party and a subsequent purchaser in the ordinary course of business claimed interests in an aircraft.⁸⁰ Both parties had filed their instruments with the FAA.⁸¹ In an exhaustive opinion, the court held that section 503 lacked conclusive Congressional intent to preempt state substantive laws completely.⁸² The court construed section 503 as a national recording system only and not as a federal priority statute.⁸³ Accordingly, the court applied Texas law, which granted priority to the buyer in the ordinary course of business.⁸⁴ Because *Gary Aircraft* did not involve an unrecorded aircraft transfer, the court did not consider the extent of federal preemption in instances where an interest valid under state law is not recorded with the FAA.⁸⁵

Even before Congress enacted section 506, several courts deferred questions of validity, actual notice and good faith to state law.⁸⁶ This dual system of federal recordation and state law determination of validity and priority functioned much like the UCC scheme for contractual liens.⁸⁷ Yet federal and state law did not always operate independently. More specif-

⁷⁹ 681 F.2d 365 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3110 (1983).

⁸⁰ *Id.* at 367.

⁸¹ *Id.*

⁸² *Id.* at 372.

⁸³ *Id.* The court stated, "In sum, the legislative history suggests that the main concern of Congress was to create a central filing system, leaving the effect of filing to the states." *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* The court suggests three possible meanings of "validity":

[Validity] may mean nothing more than that recordation with the FAA will assure the instrument such "validity" as state law grants a recorded instrument. [I]f the term "valid" refers to enforceability a literal interpretation would lead to irrational results Still, we could read the statute as giving "validity" in the sense of priority to recorded interests *otherwise* "valid" under state law—that is, "valid" in the sense of complying with formalities and requirements of consideration.

Id. at 371.

⁸⁶ See *Aircraft Inv. Corp. v. Pezzani & Reid Equip. Co.*, 205 F. Supp. 80, 82 (E.D. Mich. 1962) (holding that a conveyance must be valid under state law before recordation with FAA has any effect); *Texas Nat'l Bank v. Aufderheide*, 235 F. Supp. 599 (E.D. Ark. 1964) (holding that an instrument's underlying validity must be determined under state law).

⁸⁷ Under the UCC, a financing statement evidencing the creation of a security interest must usually be filed before an interest is perfected. UCC §§ 9-302—9-305, 9-402

ically, it became unclear whether the "validity" of a conveyance should be determined under state law prior to and apart from the determination of the effects of filing or nonfiling under federal law,⁸⁸ or whether FAA recordation should be the threshold question in every case.⁸⁹

While the cases in this area involve many different fact patterns,⁹⁰ generally, for purposes of this discussion, they fall into two categories: (1) those involving competing interests, all of which have been recorded with the FAA,⁹¹ and (2) those involving competing interests where one party has filed his interest and another has not.⁹² The critical issue in the first category of cases is the assignment of priorities.⁹³ The issue in the second category of cases is the "validity" of the competing interests under both state and federal law.⁹⁴ The discussion that follows will focus on the latter issue.

In *Lochhead v. G.A.C. Finance Corp. of Camelback*,⁹⁵ the Arizona Court of Appeals squarely addressed the "validity" problem. The plaintiff purchased an airplane, paid the full purchase price and took possession.⁹⁶ The seller kept the bill of sale and promised to file it with the FAA, but did not do

(1972). Article 9 also contains specific rules regarding priorities of interests. UCC §§ 9-301, 9-307—9-316 (1972).

⁸⁸ See *infra* text accompanying notes 93-139.

⁸⁹ See, e.g., Annot., 22 A.L.R.3d 1289-99 (1968 & Supp. 1981).

⁹⁰ See *Lochhead v. G.A.C. Finance Corp. of Camelback*, 6 Ariz. App. 539, 434 P.2d 655 (1968) (first purchaser failed to record his ownership while second purchaser did); *Marsden v. Southern Flight Service, Inc.*, 227 F. Supp. 411 (M.D.N.C. 1961) (first purchaser failed to file his interest with FAA until after seller fraudulently mortgaged the same plane to a bank). See also *infra* note 91 for a list of cases in which all competing interest holders had recorded their interests with the FAA.

⁹¹ See *Gary Aircraft Corp. v. General Dynamics Corp.*, 681 F.2d 365 (5th Cir. 1982), *cert denied*, 103 S. Ct. 3110 (1983); *Haynes v. General Electric Credit Corp.*, 432 F. Supp. 763 (W.D. Va. 1977), *aff'd*, 582 F.2d 869 (4th Cir. 1978); *Sanders v. M.D. Aircraft Sales*, 575 F.2d 255 (3d Cir. 1978); *Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust*, 82 Ill App. 3d, 401 N.E.2d 1340 (1980).

⁹² See *infra* text accompanying notes 95-118, 119-135.

⁹³ For an exhaustive study of the priority question in cases where all interest holders have recorded their interests with the FAA see Comment, *The Impact of the Federal Aviation Act of 1958 on Buyers in the Ordinary Course of Business*, 48 J. AIR LAW & COM. 835 (1983).

⁹⁴ See *infra* text accompanying notes 95-104.

⁹⁵ 6 Ariz. App. 539, 434 P.2d 655 (1968).

⁹⁶ *Id.* at 656.

so.⁹⁷ The seller then fraudulently sold the same aircraft to the defendant.⁹⁸ The defendant received the bill of sale and recorded it with the FAA but never took possession of the aircraft.⁹⁹ The court held that under state law the plaintiff's title was superior because it had paid the full purchase price and taken physical possession of the airplane.¹⁰⁰ Mere recordation by the second purchaser of its void instrument of title could not defeat the first purchaser's prior ownership.¹⁰¹ In *Lochhead* the threshold issue was the underlying validity of the transfers under state law, not whether one or both parties had filed their interests pursuant to section 503.¹⁰² Indeed, other courts have held that an invalid conveyance under state law cannot be transformed into a valid conveyance through recordation with the FAA.¹⁰³

The *Lochhead* court's interpretation of section 503 directly contradicts the *Dowell* holding because under the latter's view, recordation with the FAA is the only method of conveying an interest in an aircraft, regardless of state laws to the contrary.¹⁰⁴ Along the same line, several courts have held that the only way instruments conveying interests in aircraft can be effective against third parties is by filing them with the FAA.¹⁰⁵ But these decisions did not clarify whether an unrecorded *instrument* itself is invalid against third parties or whether the *underlying conveyance* is defective if an instrument is not filed.¹⁰⁶

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 658.

¹⁰¹ *Id.* at 657-58. The court placed heavy emphasis on possession of the aircraft as an element of the sale. *Id.*

¹⁰² *Id.* at 656-57.

¹⁰³ In *Texas Nat'l Bank v. Aufderheide*, 235 F. Supp. 599, 600 (D. Ark. 1964), an Arkansas federal district court stated that "compliance with § 1403 [503] does not validate a conveyance or other instrument which is lacking in initial or inherent validity as a contract document between the original parties." *Id.* at 603. See also *Idabel Nat'l Bank v. Tucker*, 544 P.2d 1287, 1292 (Okla. Ct. App. 1975).

¹⁰⁴ See *supra* text accompanying notes 67-73.

¹⁰⁵ See *Aircraft Inv. v. Pezzani & Reid Equipment Co.*, 205 F. Supp. 80, 82 (E.D. Mich. 1962).

¹⁰⁶ See *Feldman v. Philadelphia Nat'l Bank*, 408 F. Supp. 24, 35 (E.D. Penn. 1976). The district court stated,

In *Marsden v. Southern Flight Service, Inc.*,¹⁰⁷ an aircraft dealer fraudulently mortgaged an airplane that he had previously sold to a third party. At the time the mortgagee bank checked FAA records to verify the dealer's ownership of the airplane, the third party purchaser had not recorded his purchase, though he did file his title with the FAA several months later.¹⁰⁸ Although it was decided prior to the effective date of section 506, in *Marsden* a North Carolina federal district court awarded title and possession to the third party mortgagee, who had no knowledge of the seller's wrongdoing because the real owner of the airplane neglected to promptly file his title with the FAA.¹⁰⁹ In the court's view, the critical question was if and when the first purchaser had recorded his instrument with the FAA,¹¹⁰ not whether the second conveyance was valid under applicable state law.¹¹¹

An Illinois court utilized a two-pronged test to analyze competing instruments in *Bitzer-Croft Motors, Inc. v. Pioneer Bank and Trust Co.*¹¹² The plaintiff purchased an airplane from a dealer and took possession.¹¹³ Later, after the dealer was found to be insolvent, its lender foreclosed on security interests in the dealer's inventory and repossessed the airplane purchased by the plaintiff.¹¹⁴ The court's first inquiry was whether the instrument, under state law, created the in-

The Federal Aviation Act does not adopt a notice filing system with respect to conveyances, but instead requires that the *instrument* of conveyance through which the party claims the interest must itself be filed with the Administrator for recording. The . . . instrument is invalid as to third parties without actual notice unless that instrument is on file . . .

Id. (emphasis in text).

¹⁰⁷ 227 F. Supp. 411 (M.D.N.C. 1961).

¹⁰⁸ *Id.* at 414.

¹⁰⁹ *Id.* at 418. For a case construing the 1938 Civil Aeronautics Act under the same analysis, see *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E.2d 610 (Ga. Ct. App. 1949) (subsequent purchaser of airplane prevailed over prior unrecorded purchaser of same airplane).

¹¹⁰ *Marsden v. Southern Flight Service, Inc.*, 227 F. Supp. at 415. *See also* *Dawson v. General Discount Corp.*, 82 Ga. App. 29, 60 S.E.2d 653 (1950) (unrecorded purchaser held to be inferior in right to a recorded interest holder).

¹¹¹ Compare *supra* text accompanying notes 95-103 with the court's holding.

¹¹² 82 Ill. App. 3d 1, 401 N.E.2d 1340, 1346 (1980).

¹¹³ 401 N.E.2d at 1342.

¹¹⁴ *Id.* at 1343.

terest claimed.¹¹⁵ If both instruments satisfied this initial test, the next question was the assignment of priority under applicable state law.¹¹⁶ This test assumed that both instruments had been recorded.¹¹⁷ Consequently, the court failed to decide if federal recordation is a prerequisite to validity under state law or whether it becomes relevant only after an instrument is deemed valid under applicable state law.¹¹⁸

The Tenth Circuit in *CIM International v. United States*¹¹⁹ refused to make recordation under section 503 an absolute requirement for a conveyance or instrument to be valid.¹²⁰ The case involved the seizure of an airplane by the government in satisfaction of federal tax liens filed against the owner.¹²¹ The financier of the aircraft, which held an unrecorded security interest in the airplane, filed a complaint for improper seizure.¹²² The Ninth Circuit reversed a summary judgment for the United States and remanded the case for further fact-finding.¹²³ The court stated, "Nothing in the Act makes all unrecorded interests in aircraft at all times, against all persons, under all circumstances, and for all purposes, invalid solely because they are not recorded."¹²⁴ Except in cases where a third party has actual notice of an unrecorded instrument, the court declined to enumerate any specific instances where failure to record a transfer would not effect that transfer's validity.¹²⁵

An Indiana court in *Crescent City Aviation, Inc. v. Beverly Bank*¹²⁶ concluded that the validity and priority of an instrument under state law cannot be determined until an instru-

¹¹⁵ *Id.* at 1344, 1346.

¹¹⁶ *Id.* at 1346.

¹¹⁷ *Id.* at 1346-47.

¹¹⁸ Compare *supra* text accompanying notes 66-73 with *supra* text accompanying notes 100-103 for a discussion of these two contrary views.

¹¹⁹ 641 F.2d 671 (9th Cir. 1980).

¹²⁰ *Id.*

¹²¹ *Id.* at 673.

¹²² *Id.*

¹²³ *Id.* at 680.

¹²⁴ *Id.* at 674.

¹²⁵ *Id.* at 674-75.

¹²⁶ 139 Ind. App. 669, 219 N.E.2d 446 (1966).

ment has been filed under federal law.¹²⁷ In *Crescent City*, a prior secured party challenged a mechanic's lien asserted by an aircraft dealer for parts installed on an airplane at the owner's request.¹²⁸ The court found the mechanic's lien to be defective because it was not recorded with the FAA.¹²⁹ Under this construction of the Act, "validity" under state law is hinged upon the requirement of recordation.¹³⁰ Moreover, the holding strongly suggests that all interests and liens must be evidenced by writings.¹³¹

Contrary to the holding in *Crescent City*, several courts have upheld the validity under state law of mechanics and possessory liens against third parties in the absence of recordation under section 503.¹³² An example is *Holiday Airlines v. World Airways (In re Holiday Airlines)*.¹³³ In *Holiday*, an aircraft mechanic failed to record his consensual possessory lien with the FAA, but the lien was valid under California law.¹³⁴ The Ninth Circuit, applying section 506, ruled that the lien was valid notwithstanding the creditor's failure to file his interest.¹³⁵

In summary, section 503 and section 506 are ambiguous statutes.¹³⁶ Both federal and state courts agree that the Act creates a uniform filing system that displaces similar state fil-

¹²⁷ 219 N.E.2d at 449. The court recognized that the "validity" of an interest or conveyance is determined under state law, but not until such interest or conveyance has been recorded. *Id.*

¹²⁸ *Id.* at 447.

¹²⁹ *Id.* at 448.

¹³⁰ *Id.* Accord *Catlin Aviation Co. v. Equilease Corp.*, 626 P.2d 857 (Okla. 1981). See *infra* text accompanying notes 151-155.

¹³¹ 219 N.E.2d 446, 449. See *infra* text accompanying note 154.

¹³² See *Holiday Airlines v. Pacific Propeller, Inc. (In re Holiday Airlines)*, 620 F.2d 731 (9th Cir. 1980) (holding that underlying validity of a statutory mechanic's lien is a question reserved to the states); *Industrial Nat'l Bank of Rhode Island v. Butler Aviation Int'l*, 370 F. Supp. 1012 (E.D.N.Y. 1974) (holding that Congress did not intend to subject statutory liens to FAA filing requirements); *Carolina Aircraft Corp. v. Commerce Trust Co.*, 289 So. 2d 37 (Fla. Dist. Ct. App. 1974) (unrecorded mechanic's lien held superior to prior recorded security interest).

¹³³ 647 F.2d 977 (9th Cir. 1981).

¹³⁴ *Id.* at 980-81.

¹³⁵ *Id.* The court made it clear that its holding does not extend to consensual liens where the lienholder is not in possession of the aircraft. *Id.*

¹³⁶ See *supra* text accompanying notes 27-40.

ing systems.¹³⁷ Additionally, a large majority of courts limit the scope of section 503 to recordation only.¹³⁸ Under this more limited construction state laws are properly applied to determine the inherent validity of conveyances and instruments, as well as priorities among competing interests.¹³⁹ Yet courts have been unable to consistently resolve the conflict between validity under state law and validity under section 503 in cases where the two bodies of law overlap.¹⁴⁰

III. *PHILKO AVIATION, INC. v. SHACKET*

The District Court in *Shacket v. Roger Smith Aircraft Sales, Inc.*¹⁴¹ found no need to consider the effect of the Shackets' failure to record their ownership since it concluded that Philko was not a "purchaser."¹⁴² The court found that under Illinois commercial law a bona fide purchaser is entitled to priority over a prior recorded security interest.¹⁴³ On the basis of this rule it reasoned that an unrecorded bona fide purchaser should also prevail over a subsequently recorded security interest.¹⁴⁴ In the district court's opinion, questions of validity and priority are intermingled without any consideration of the effect of recordation or nonrecordation under the Act.¹⁴⁵

On appeal, the Seventh Circuit amplified the trial court's application of section 506.¹⁴⁶ Under Illinois law title passed

¹³⁷ See *supra* note 25.

¹³⁸ See *supra* note 58.

¹³⁹ See *supra* text and accompanying notes 82-83, 86-87.

¹⁴⁰ See *supra* notes 56-140 and accompanying text.

¹⁴¹ 497 F. Supp. 1262 (N.D. Ill. 1980).

¹⁴² *Id.* at 1267.

¹⁴³ *Id.* at 1269.

¹⁴⁴ *Id.* at 1270, 1271.

¹⁴⁵ *Id.*

¹⁴⁶ *Shacket v. Philko Aviation, Inc.* 681 F.2d 506, 510 (7th Cir. 1982). The Court of Appeals first considered the "validity" of each of the two claimed titles in light of applicable Illinois law. *Id.* at 510-12. There was some dispute that the Shackets did not acquire good title from Smith because Smith had not paid the Piper distributor for the airplane at the time of the sale to the Shackets. *Id.* at 511. However, under UCC § 2-403(2), when goods are entrusted to a dealer, the dealer has power to convey all the entruster's rights to a buyer in the ordinary course of business. *Shacket v. Roger Smith Aircraft Sales, Inc.*, 497 F. Supp. 1261, 1267 (N.D. Ill. 1980). For the UCC definition of a "buyer in the ordinary course of business," see *supra* note 67.

to the Shackets, the original purchasers, when they paid the full purchase price and took possession of the aircraft.¹⁴⁷ As a result, according to the Seventh Circuit, in the second fraudulent transaction, the seller, Roger Smith, had no interest to convey to the second buyer, Philko, and thus the bill of sale transferred to Philko was void.¹⁴⁸ On this basis the court affirmed the summary judgment in favor of the Shackets.¹⁴⁹

Arguing before the Supreme Court, the second buyer did not attack the outcome under state law, but rather the analysis used by the lower courts.¹⁵⁰ It argued that while federal preemption is not absolute, section 503 does preempt substantive state law concerning oral aircraft sales.¹⁵¹ The Supreme Court agreed with this reasoning and concluded that recordation of a conveyance with the FAA is the initial inquiry in determining which of two or more competing interests will prevail.¹⁵² The Court held that although the Shackets' oral purchase gave them good title under Illinois law, their title was defective because of their failure to record a writing with the FAA.¹⁵³ The Court interpreted section 503(c) to "mean that every aircraft transfer must be evidenced by an instrument, and every such instrument must be recorded, before the rights of innocent third parties can be affected."¹⁵⁴ Consequently, state laws permitting oral aircraft transfers are now preempted by section 503(c).¹⁵⁵

In dicta, the Court gave informal approval to the Fifth Circuit's holding in *Gary Aircraft* that federal law does not control assignment of priorities once instruments are recorded.¹⁵⁶ The Court stated that it was "inclined" to adopt the Fifth

¹⁴⁷ *Shacket v. Philko Aviation, Inc.*, 681 F.2d 506, 510-12 (7th Cir. 1982).

¹⁴⁸ *Id.* at 512.

¹⁴⁹ *Id.* The parties did not contest the applicability of Illinois law over the laws of other states. The focus of the dispute concerned the relative applicability of Illinois and federal law. *Id.*

¹⁵⁰ *See Philko Aviation, Inc. v. Shacket*, 103 S. Ct. 2476, 2477 (1983).

¹⁵¹ *Id.* at 2478.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2478-79.

¹⁵⁶ *Id.* at 2480. The assignment of priority issue was not reached by the Court because the Shackets' interest was "invalid." *Id.*

Circuit's reasoning in *Gary Aircraft*, but did not expressly do so.¹⁵⁷ This language strongly suggests that preemption under section 503 is not as comprehensive as thought by the California Supreme Court in *Dowell*.¹⁵⁸ Yet it is also true that the underlying validity of a conveyance is not always a pure question of state law as was thought to be the case in *Lochhead*.¹⁵⁹ Validity under state law, as used in section 506, is dependent upon validity under section 503.¹⁶⁰ Any conflict between the two must be resolved in favor of federal law.¹⁶¹

The Supreme Court further held that failure to record a transfer affects not only the validity of the instrument evidencing the transfer but also the validity of the transfer itself with respect to third parties.¹⁶² The Court reached this conclusion by construing the statutory definition of "conveyance" more broadly than its plain language suggests.¹⁶³ The Court interpreted the term to include oral transfers of aircraft in addition to transfers evidenced by writings.¹⁶⁴

¹⁵⁷ *Id.*

¹⁵⁸ See *Gary Aircraft Corp. v. General Dynamics Corp.* (*In re Gary Aircraft Corp.*), 681 F.2d 365 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3110 (1983). In *Gary*, the Fifth Circuit held that while section 503 of the Federal Aviation Act requires aircraft interests to be recorded, priorities of recorded interests are to be determined under applicable state law. *Id.* at 377. See *supra* text accompanying notes 66-76 for a discussion of *Dowell v. Beech Acceptance Corp.*

¹⁵⁹ See *Lochhead v. G.A.C. Fin. Corp. of Camelback*, 6 Ariz. App. 539, 434 P.2d 655, 657 (1968), *discussed supra* in text and accompanying notes 95-103.

¹⁶⁰ In other words, section 1406 does not defer to state law the question of whether an unrecorded conveyance is valid, assuming that the third party to be affected by the unrecorded interest does not have actual notice of such interest. A conveyance must first be recorded with FAA before it can be valid under state law. See *supra* note 30.

¹⁶¹ *Philko Aviation, Inc. v. Shackel*, 103 S. Ct. 2476, 2480 (1983). The lower courts failed to consider the conflict between the superiority of the Shackels' title under state law and the federal requirement that a conveyance be filed before third parties without notice can be affected. See *Shackel v. Philko Aviation, Inc.*, 681 F.2d 506, 506 (7th Cir. 1982); *Shackel v. Roger Smith Aircraft Sales, Inc.*, 497 F. Supp. 1261 (N.D. Ill. 1980).

¹⁶² *Philko Aviation, Inc. v. Shackel*, 103 S. Ct. 2476, 2479-80 (1983). The court recognized that mere invalidation of an unrecorded instrument would permit a purchaser in possession to prove a conveyance through other means to the detriment of an innocent third party. Such an outcome would destroy any incentive for the party in possession to file with the FAA. *Id.*

¹⁶³ *Id.* The Act's definition covers instruments only. In order to prevent the result discussed *supra* in note 162, the court was forced to construe the language differently from its plain meaning. *Id.*

¹⁶⁴ *Id.*

Though the opinion does not cite either *Marsden* or *Crescent City*, it adopts the same view that recordation is the initial inquiry where ownership of an aircraft is disputed.¹⁶⁵ Philko's title was voidable under state law,¹⁶⁶ but its recordation of the bill of sale with the FAA gave the transfer validity.¹⁶⁷ The *Philko* holding, however, does not nullify the impact of state law under section 506 entirely.¹⁶⁸ Formalities prescribed by local law must still be satisfied before a recorded instrument can be enforced against third parties.¹⁶⁹

The requirement that an aircraft transfer be evidenced by a writing is stressed, but the opinion does not rule out the possibility that an unrecorded transfer may be valid under special circumstances.¹⁷⁰ Examples of these special circumstances, however, were not given by the Court.¹⁷¹ This portion of the opinion comports with *CIM International*, which held that failure to record an interest is not always fatal.¹⁷² For this reason *Philko* does not create an inflexible statute of frauds rule for all aircraft conveyances in all situations.¹⁷³

¹⁶⁵ *Philko Aviation, Inc. v. Shackel*, 103 S. Ct. 2476, 2478 (1983). See *Marsden v. Southern Flight Service, Inc.*, 227 F. Supp. 411 (M.D.N.C. 1961), discussed *supra* in text accompanying notes 107-111. *Crescent City Aviation, Inc. v. Beverly Bank*, 139 Ind. App. 669, 219 N.E.2d 446 (1966), discussed *supra* in text accompanying notes 127-131.

¹⁶⁶ See *Shackel v. Philko Aviation, Inc.*, 681 F.2d 506, 512 (7th Cir. 1982).

¹⁶⁷ See *Philko Aviation, Inc. v. Shackel*, 103 S. Ct. at 2480. Since Illinois law regarding aircraft title transfers is now preempted, validity of title depends upon recordation. *Id.*

¹⁶⁸ State law must still be used to determine whether a recorded instrument does in fact create the interest asserted. See 49 U.S.C. § 1406 (1976).

¹⁶⁹ *Id.*

¹⁷⁰ *Philko Aviation, Inc. v. Shackel*, 103 S. Ct. at 2481. In fact, the Court left open the possibility of success by the Shackels on remand if they can show "reasonable diligence" in their efforts to record their ownership. The opinion cites *State Securities Co. v. Aviation Enter.*, 355 F.2d 255 (10th Cir. 1966) (buyer filed instrument with FAA, but recordation was refused). Justice O'Connor, in a concurring opinion, refused to adopt this language because the issue was not before the Court. *Philko v. Shackel*, 103 S. Ct. at 2481.

¹⁷¹ 103 S. Ct. at 2481. The Court left the issue open on remand. *Id.* If the trial court on remand were to find that Philko had actual knowledge of the prior sale to the Shackels, the actual knowledge exception of section 503 of the Act would cause the prior sale to be valid against Philko. See *infra* text accompanying notes 182-184.

¹⁷² See *Shackel v. Philko Aviation, Inc.*, 681 F.2d 506 (7th Cir. 1982). See also *CIM Int'l v. United States*, 641 F.2d 671 (9th Cir. 1980), discussed *supra* in text accompanying notes 119-125.

¹⁷³ See *Philko Aviation, Inc. v. Shackel*, 103 S. Ct. at 2480-81. If a recorded interest holder could always assert the absence of a writing to defeat a prior unrecorded pur-

IV. IMPLICATIONS OF *PHILKO AVIATION, INC. v. SHACKET*

Since 1938, recordation has been critical in every aircraft transfer.¹⁷⁴ Still, there will always be cases where a novice buys an aircraft, pays for it, flies it home and forgets about the purchase.¹⁷⁵ Additionally, honest people like the Shackets will continue to be hoodwinked by dishonest sellers.¹⁷⁶ Prior to *Philko*, state laws protecting good faith purchasers favored such parties.¹⁷⁷ Now, however, all interest holders in aircraft are charged with executing an instrument of conveyance and filing the instrument with the FAA.¹⁷⁸ Failure to do either will deprive a party of superior title or interest regardless of good faith.¹⁷⁹ The integrity of the federal filing system will be bolstered by the *Philko* decision since recordation is now mandatory in order to validate a conveyance.¹⁸⁰ While the relative priority of an interest will continue to be decided under state law, an innocent third party who checks FAA records prior to receiving an interest in an aircraft will not be deprived of the chance of enforceability.¹⁸¹

chaser, the effect would be the same as if the Act contained an express statute of frauds requirement.

¹⁷⁴ See *supra* note 19 and accompanying text.

¹⁷⁵ See, e.g., *Lochhead v. G.A.C. Fin. Corp. of Camelback*, 6 Ariz. App. 539, 434 P.2d 655, 656 (1968).

¹⁷⁶ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. at 2477, 2478.

¹⁷⁷ See e.g., *Shacket v. Roger Smith Aircraft Sales, Inc.*, 497 F. Supp. 1262 (N.D. Ill. 1980). Following the strong policy formulated by the UCC in favor of bona fide purchasers, the district court granted priority to the Shackets. *Id.* However, it does not appear that the Shackets would have been granted summary judgment if *Philko* had been adjudged a good faith purchaser as well. *Id.* at 1269. But see *Dowell v. Beech Acceptance Corp.*, 3 Cal. 3d 544, 476 P. 2d 401, 91 Cal. Rptr. 1 (1970), *cert. denied*, 404 U.S. 823 (1971) (holding that section 503 of the Act preempts all state laws affecting transfers of aircraft interests).

¹⁷⁸ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. at 2478. The Supreme Court made no distinction between secured parties and good faith purchasers as far as recordation is concerned. Only if competing interests are filed will the distinction become relevant in the assignment of priorities under state law. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 2479. If buyers in the ordinary course of business received protection against prior and subsequent recorded interest holders regardless of whether they complied with the filing requirement the "central clearinghouse" idea would be frustrated. *Id.* See also Amicus Brief of Aircraft Finance Association at 3, *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. 2476 (1983).

¹⁸¹ The opposite result was reached by the lower courts in *Shacket v. Roger Smith*

In disputes between buyers and sellers, state law is not preempted.¹⁸² The need for filing is obviated when the parties to a conveyance are involved.¹⁸³ This result follows because both parties have actual notice, the very aim of the FAA filing system.¹⁸⁴ Therefore, oral conveyances of aircraft will continue to be recognized in these situations.¹⁸⁵

The holding in *Philko* does not make section 503 a pure race statute.¹⁸⁶ It does require that a prior transfer of an aircraft be on file at the time a third party purchases or receives an interest in the same aircraft without actual notice.¹⁸⁷ In this respect, the first party to file would prevail. The outcome is unclear if the first transferee has not had a reasonable amount of time to file his instrument before a subsequent conveyance to a third party occurs.¹⁸⁸ Here it would seem that both interests would be valid and that state law, pursuant to section 506, would assign priority to the claims.¹⁸⁹ If section 503 were read to mean that a transferee must file an instrument instantaneously, inequitable results could occur.¹⁹⁰

Assuming that most purchasers and creditors continue to file instruments with the FAA, *Philko* will have minimal impact.¹⁹¹ Likewise, the Court's unwillingness to completely approve of *Gary Aircraft* does not rule out preemption of state

Aircraft Sales, Inc., 497 F. Supp. 1262, 1265 (N.D. Ill. 1980). *Philko* checked FAA records prior to its purchase and recorded its bill of sale promptly after the transfer. *Id.*

¹⁸² *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. at 2481. *See* *Bishop v. R.S. Evans East Point, Inc.*, 80 Ga. App. 324, 56 S.E.2d 134 (1949) (recordation irrelevant as between purchaser and seller).

¹⁸³ *Id.* *See also* 49 U.S.C. § 1403(c).

¹⁸⁴ *See supra* text accompanying notes 19-26.

¹⁸⁵ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. at 2480-81.

¹⁸⁶ *See supra* text accompanying notes 69-70.

¹⁸⁷ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. at 2478.

¹⁸⁸ 49 U.S.C. § 1403 does not contain language giving a party a set number of days or a reasonable period in which to file an instrument.

¹⁸⁹ *See, e.g., In re Gary Aircraft Corp.*, 681 F.2d 365 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3110 (1983).

¹⁹⁰ This would seem to fit within the "reasonable diligence" exception alluded to by the Supreme Court in *Philko*. *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. 2476, 2481 (1983). *See* *CIM Int'l v. United States*, 641 F.2d 671, 674-75 (9th Cir. 1980).

¹⁹¹ Where competing interests are recorded, the issue is assignment of priorities. *See, e.g., Comment, supra* note 93.

law in the assignment of priorities altogether.¹⁹² Yet it is unlikely that any court will adopt the total preemption view expressed in *Dowell*.¹⁹³

The opinion does not provide a way for oral purchasers to perfect their titles through recordation.¹⁹⁴ A conveyance must be evidenced by a writing, but the types of writings that will suffice are not specified.¹⁹⁵ This same problem applies to mechanic's lien holders as well.¹⁹⁶ It is unclear what effect *Philko* will have on these statutory liens. Although the courts are split over whether mechanic's liens and other possessory liens must be recorded with the FAA, the broad language of the *Philko* holding suggests that federal recordation is necessary.¹⁹⁷

V. CONCLUSION

The Federal Aviation Act requires that aircraft conveyances be recorded before third parties can be affected.¹⁹⁸ A necessary corollary of this rule is that a writing must be executed since section 503 requires that the instrument conveying an interest be filed.¹⁹⁹ Any state law that conflicts with this duty is displaced.²⁰⁰ State law is not preempted, however, where competing interests have been timely recorded with the FAA.²⁰¹ Once it has been recorded, an instrument

¹⁹² See *supra* text accompanying notes 156-161.

¹⁹³ See *Dowell v. Beech Acceptance Corp.*, 3 Cal. 3d 544, 476 P.2d 401, 91 Cal. Rptr. 1 (1970), discussed *supra* in text accompanying notes 66-78.

¹⁹⁴ If the Shackets had wished to notify the FAA of their purchase using some other document besides the bill of sale, it is not clear whether third parties would have received constructive notice. It appears that a writing executed by the parties to a sale must be filed. *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. 2476, 2478 (1983). Section 503(e) of the Federal Aviation Act requires that an instrument evidencing a transfer be acknowledged by a notary before the FAA may record it. See 49 U.S.C. § 1403(e) (1976).

¹⁹⁵ See generally Annot., 22 A.L.R.3d 1279. See also Sigman, *supra* note 25, at 321.

¹⁹⁶ See *supra* text accompanying notes 132-135.

¹⁹⁷ See *supra* note 132. See also *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. 2476, 2478 (1983).

¹⁹⁸ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. 2476, 2478 (1983). See *supra* text accompanying notes 150-155.

¹⁹⁹ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. at 2478.

²⁰⁰ *Id.*

²⁰¹ See 49 U.S.C. § 1406 (1976).

must also be a valid writing under state law.²⁰² Additionally, interests that are valid under section 503 and state law are assigned priorities under state law.²⁰³

The *Philko* decision reinforces the importance of filing with the FAA. Moreover, the decision clarifies the conflict between the validity of a conveyance under state law and validity under the Act. The decision shows the Court's willingness to implement the Congressional intent behind section 503, but at the same time it expresses a hesitancy to preempt state law unless the conflict is direct. If state and federal courts permit numerous exceptions to the recordation requirement, the effectiveness of the holding will be eroded. It is unlikely, however, that the Supreme Court or Congress will go so far as to make section 503 a pure race statute in the near future.

Britt D. Monts

²⁰² *Id.*

²⁰³ *Philko Aviation, Inc. v. Shacket*, 103 S. Ct. 2476, 2481 (1983). See *In re Gary Aircraft Corp.*, discussed *supra* in text accompanying notes 79-85.

TORTS—MISREPRESENTATION EXCEPTION IN FTCA ACTIONS INVOLVING GOVERNMENT INSPECTION AND CERTIFICATION—The exception to liability under the Federal Tort Claims Act for claims arising out of misrepresentation does not bar suits where a party seeks recovery for government negligence in inspection and supervision of construction. *Block v. Neal*, 103 S. Ct. 1098 (1983).

Parties seeking recovery from the federal government for negligent inspection and certification of aircraft and related products may find additional support for their contentions in a recent case involving government inspection of the construction industry.¹ Onilea Neal received a Rural Housing loan from the Farmers Home Administration (FmHA)² to finance a new home after she was unable to obtain credit from other sources.³ In August, 1977, she entered into a contract with Home Marketing Associates, Inc. (Home Marketing) for the construction of a prefabricated home.⁴ According to the

¹ *Block v. Neal*, 103 S. Ct. 1089 (1983). For a thorough discussion of the potential impact of *Neal* on aviation law, see *infra* text accompanying notes 80-183.

² *Neal*, 103 S. Ct. at 1090. The FmHA is the government agency within the Department of Agriculture authorized by statute to extend financial assistance for home construction and purchases to persons of low to moderate income residing in rural areas. Housing Act of 1949, § 502, 42 U.S.C. § 1472 (1976).

³ *Block v. Neal*, 103 S. Ct. 1089, 1090 (1983). The relevant portion of the Housing Act of 1949, § 502(a), 42 U.S.C. § 1472(a) (1976) authorizing such loans provides:

If the Secretary [of Agriculture] determines that an applicant is eligible for assistance as provided in section 1471 of this title and that the applicant has the ability to repay in full the sum to be loaned with interest, giving due consideration to the income and earning capacity of the applicant and his family from the farm and other sources, and the maintenance of a reasonable standard of living for the owner and the occupants of said farm, a loan may be made by the Secretary

42 U.S.C. § 1472(a) (1976).

⁴ *Neal*, 103 S. Ct. at 1090-91. The "contract method" chosen by the plaintiff was one of several financing options permitted by applicable federal regulations. 7 C.F.R. § 1804.4 (1977). Under the contract method, a builder is required to perform construction of the home in accordance with a contract approved by the FmHA, although the agency is not a party to it. 7 C.F.R. § 1804.4(d) (1977). FmHA regulations provided for significant involvement by the government agency. *Neal*, 103 S. Ct. at 1091 n.1.

contract, construction was to conform to plans approved by FmHA, which retained the right to inspect and test all materials and workmanship and reject any that the agency considered defective.⁵ The FmHA inspector's final report indicated that Home Marketing's construction was in compliance with the drawings and specifications approved by FmHA.⁶

Mrs. Neal moved into her new home and discovered shortly thereafter that the heat pump was not working.⁷ She notified FmHA officials, who conducted a complete inspection during which additional construction defects were discovered.⁸ The defects included deviations from the plans approved by FmHA and from the agency's Minimum Property Standards.⁹ Mrs. Neal brought suit against FmHA¹⁰

For example, an FmHA official was authorized to assist in the selection of the building contractor, review all plans and specifications, make periodic and final inspections, withhold final payment until full contract compliance was achieved, and assist the borrower with regard to claims arising under the builder's warranty. *Id.*

⁵ *Neal*, 103 S. Ct. at 1091.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* Briefs filed in the case specified the thirteen additional problems detected, such as the use of low quality paint which flaked, the use of staples in the roof truss and poor plumbing workmanship. Respondent's Brief in Opposition at 8, *Block v. Neal*, 103 S. Ct. 1089 (1983).

⁹ *Neal*, 103 S. Ct. at 1091. Examples of the deviations from the Minimum Property Standards (MPS) include the absence of grade marks on floor joist or roof truss lumber, improper caulking and inadequate fire resistance ratings in the wall assembly. Respondent's Brief in Opposition at 8, *Block v. Neal*, 103 S. Ct. 1089 (1983). A variety of problems in both materials and workmanship were also noted. *Id.*

¹⁰ *Neal*, 103 S. Ct. at 1091. The defendant in the suit was the Secretary of Agriculture. *Id.* at 1089. At the time the original complaint was filed, the Secretary was Robert Bergland. *Neal v. Bergland*, 489 F. Supp. 512 (E.D. Tenn. 1980). FmHA requested that Home Marketing correct the problems in accordance with the builder's warranty, but the contractor refused. *Id.* Plaintiff then sought compensation from FmHA, but the agency refused to pay for any defects. *Id.* By the time the suit reached the United States Supreme Court, several of the defects for which FmHA refused responsibility, including the faulty plumbing and heating and cooling system, had been corrected at FmHA's expense. Respondent's Brief in Opposition at 11, *Block v. Neal*, 103 S. Ct. 1089 (1983). The reason for FmHA's reconsideration of the matter is unclear, although the Fair Housing Act does provide for a construction defect program. 42 U.S.C. § 1479(c) (1981). Although the issue was not addressed by the Supreme Court, there is authority to indicate that the availability of an alternative remedy in fact precludes any additional recovery from the United States. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977) (third-party action for indemnity against the United States barred where Congress has provided limited recovery scheme for injuries involving military personnel). Still Mrs. Neal sought compensation for deficiencies

under the Federal Tort Claims Act (FTCA),¹¹ alleging that the defects were partly attributable to the negligent inspection and supervision of the construction of her house by FmHA employees.¹²

The district court dismissed plaintiff's complaint for failure to state a claim upon which relief could be granted.¹³ Although the court recognized that the negligence claim was premised on a duty to supervise and inspect imposed by FmHA regulations,¹⁴ it concluded that such regulations were intended solely to protect the security interest held by the government.¹⁵ The court analogized the position of the FmHA to that of a mortgagee seeking to limit its risks through inspection and supervision of the construction provided for in FmHA regulations.¹⁶ The court agreed with the government's position that "any benefit to the borrower is

and other damages not redressed. Respondent's Brief in Opposition at 11, Block v. Neal, 103 S. Ct. 1089 (1983).

¹¹ 28 U.S.C. §§ 1346(b), 2671-80 (1976). The general grant of jurisdiction to the district courts appears in 28 U.S.C. § 1346(b) (1976), which provides:

Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, 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.

Id. § 1346(b).

¹² *Neal*, 103 S. Ct. at 1090. At the trial court level, plaintiff raised two other theories of recovery: (1) breach of contract on the basis of the agency's failure to provide technical assistance, including inspection and supervision of construction, and (2) detrimental reliance for failure to perform regulatory obligations as promised. *Neal v. Bergland*, 489 F. Supp. 512, 514 (E.D. Tenn. 1980). The district court found no contractual obligation in the Act or regulations to support plaintiff's contract theory. *Id.* at 514, 515. As to the detrimental reliance theory, the court found that the promises said to induce plaintiff to enter into the contracts with Home Marketing and FmHA were made only after plaintiff had already executed these contracts. Therefore, the court's opinion was that such promises could not really have induced plaintiff. *Id.* at 515.

¹³ *Neal v. Bergland*, 489 F. Supp. 512, 516 (E.D. Tenn. 1980).

¹⁴ *Id.* at 515. See *supra* note 4.

¹⁵ *Neal v. Bergland*, 489 F. Supp. 512, 514-15 (E.D. Tenn. 1980).

¹⁶ *Id.* at 514.

purely incidental."¹⁷ Since the court found no duty running to the plaintiff,¹⁸ no actionable breach could be claimed.¹⁹

Disagreeing with the lower court's analysis regarding the negligence claim,²⁰ the Sixth Circuit Court of Appeals reversed. The government petitioned for certiorari for a review of the Sixth Circuit's holding that the district court erred in dismissing plaintiff's complaint.²¹ *Held, affirmed.* The exception to liability under the Federal Tort Claims Act for claims arising out of misrepresentation does not bar suits where a party seeks recovery for government negligence in inspection and supervision of construction. *Block v. Neal*, 103 S. Ct. 1089 (1983).

I. LEGAL BACKGROUND

A. *A Definitional Framework*

The notion that no suit may be prosecuted against the sovereign absent his consent was well ingrained in English law.²² In the United States, the doctrine of sovereign immunity was adopted early by judicial decision.²³ It was thought that there could be no legal right against the authority that makes the laws on which the right depends.²⁴ The doctrine had two facets: (1) only Congress could waive the federal government's immunity; and (2) any waivers should be strictly

¹⁷ *Id.* at 515.

¹⁸ *Id.* at 516. The court agreed with the government's argument that policy considerations, as well, limited the liability of the government in the inspection context, since "[t]o hold the FmHA liable for the shoddy work of the contractor would be tantamount to making a mortgagee the warrantor of the quality of its security." *Id.* at 515.

¹⁹ *Id.*

²⁰ *Neal v. Bergland*, 646 F.2d 1178, 1184 (6th Cir. 1981). The court of appeals agreed with the lower court's analysis regarding the contract claim and did not reach the issue of detrimental reliance. *Id.* at 1181.

²¹ *Neal*, 103 S. Ct. 1089, 1092 (1983).

²² 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 51, at 2-4 (1983). In his discussion of the "king's prerogative", Blackstone points out that "[t]he law ascribes to the king the attribute of sovereignty, or pre-eminence Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him." 1 W. BLACKSTONE, *COMMENTARIES* *241-42. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (an early elaboration on the notion of sovereign immunity as it pertained to this country).

²³ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

²⁴ W. WRIGHT, *THE FEDERAL TORT CLAIMS ACT* 2 (1957).

construed.²⁵

Relief from the doctrine was provided through a system of private bills²⁶ granting recovery for injuries caused by government agencies.²⁷ In time, this system became bogged down with a great number of petitions.²⁸ The FTCA²⁹ was passed by Congress in 1946 to simplify recovery procedures and to ameliorate the harsh results of sovereign immunity as it pertained to the federal government.³⁰ Additionally, numerous exceptions³¹ to the FTCA's broad statement of liability were also provided.³² While Congress explicitly preserved the immunity of the United States in certain areas,³³ the legislative history of the FTCA sheds little light on the purpose

²⁵ 1 L. JAYSON, *supra* note 22, at 2-4.

²⁶ W. WRIGHT, *supra* note 24, at 2. The private bill incorporated the claim of a private party and the relief sought. Congress would then consider the bill presented by one of its members, acting in a quasi-judicial role. 1 L. JAYSON, *supra* note 22, at 2-6.

²⁷ W. WRIGHT, *supra* note 24, at 2.

²⁸ *Id.* at 3.

²⁹ 28 U.S.C. §§ 1346(b), 2671-80 (1976).

³⁰ H.R. DOC. NO. 562, 77th Cong., 2d Sess. 2 (1941). See also W. WRIGHT, *supra* note 24, at 5. The doctrine is also applicable to state and local government, although somewhat different considerations are involved at that level. See Stone & Rinker, *Governmental Liability for Negligent Inspections*, 57 TUL. L. REV. 328 (1982).

³¹ 28 U.S.C. § 2680(a)-(n) (1976). Several of the exceptions are commonly raised, for example, section 2680(a), claims based upon the acts or omissions of government employees exercising a discretionary function; section 2680(b), claims arising out of the loss or negligent transmission of postal matter; section 2680(i), claims for damages caused by the fiscal operations of the Treasury; section 2680(j), claims arising out of combatant activities of the military during war. The applicability of other exceptions appears somewhat less common: for example, section 2680(f), claims for damages caused by the imposition of a quarantine; section 2680(1), claims arising from the activities of the Tennessee Valley Authority; section 2680(m), claims arising from Panama Canal Company activities.

³² 28 U.S.C. § 2674 (1976). The liability provision states:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Id. For an overview of the nature and frequency of claims brought under the FTCA, see 1 L. JAYSON, *supra* note 22, at 1.

³³ See *supra* note 31.

underlying each exception.³⁴ Thus, the meaning of the enumerated exceptions has been developed largely in the courts.³⁵

The misrepresentation exception has been raised often as a defense in FTCA actions.³⁶ Although the Act permits tort recovery against the United States in general terms,³⁷ express exceptions are listed in section 2680.³⁸ Subsection (h) precludes recovery of "any claim arising out of misrepresentation."³⁹

Lower federal courts⁴⁰ struggled with the misrepresentation exception, absent any guidance from the United States Supreme Court.⁴¹ While willing to construe the FTCA liberally in order to effectuate its overall remedial purpose, the courts were highly reluctant to permit recovery where the facts before them indicated some form of misrepresentation.⁴² A conflict among the circuits erupted in 1961, when, in *United States v. Neustadt*,⁴³ the Fourth Circuit Court of Appeals upheld a district court finding in favor of homeowners who brought an action under the FTCA.⁴⁴

³⁴ W. WRIGHT, *supra* note 24, at 8-9.

³⁵ See, e.g., *Nieves v. United States*, 682 F.2d 1 (1st Cir. 1982) (negligent denial of social security benefits); *Augusta Aviation, Inc. v. United States*, 671 F.2d 445 (11th Cir. 1982) (negligent denial of veterans benefits); *Green v. United States*, 629 F.2d 581 (9th Cir. 1980) (failure to warn cattle farmers of the full consequences of DDT on grazing areas); *Redmond v. United States*, 518 F.2d 811 (7th Cir. 1975) (misrepresentation by government agents in securities transaction); *Saxton v. United States*, 456 F.2d 1105 (8th Cir. 1972) (erroneous diagnosis of diseased cattle); *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964) (air controllers' failure to warn of occupied flight pattern). See also *infra* note 80 and accompanying text.

³⁶ *Id.*

³⁷ 28 U.S.C. § 2674. See *supra* note 32 for text of FTCA liability provision.

³⁸ 28 U.S.C. § 2680(a)-(n). See *supra* note 31 for a list of exceptions commonly raised.

³⁹ 28 U.S.C. § 2680(h).

⁴⁰ 28 U.S.C. § 1346(b) gives the federal district courts exclusive jurisdiction over tort claims under the Federal Tort Claims Act. See *supra* note 11 for the text of section 1346(b).

⁴¹ W. WRIGHT, *supra* note 24, at 8-9.

⁴² *Id.*

⁴³ 281 F.2d 596 (4th Cir. 1960).

⁴⁴ *Id.* The cases from other courts of appeal in conflict with *Neustadt* were: *Hall v. United States*, 274 F.2d 69 (10th Cir. 1959); *Clark v. United States*, 218 F.2d 446 (9th Cir. 1954); *National Mfg. v. United States*, 210 F.2d 263 (8th Cir. 1954); and *Jones v. United States*, 207 F.2d 563 (2d Cir. 1953).

The Supreme Court granted certiorari in *Neustadt* in light of the conflict and the importance of the question.⁴⁵ That case involved an appraisal by the Federal Housing Administration (FHA) following its inspection of a home and lot to determine the eligibility of the property for FHA mortgage insurance.⁴⁶ The buyers of the home financed the purchase through a loan secured by FHA mortgage insurance.⁴⁷ Shortly after moving into their new home, they discovered numerous cracks throughout the house which were eventually traced to a severe foundation problem.⁴⁸ The homeowners brought suit against the United States under the FTCA alleging that the FHA had been negligent in conducting its inspection and appraisal and that they justifiably relied on these results in making their purchase.⁴⁹

The Supreme Court avoided the factual question of government liability,⁵⁰ instead focusing its attention on the applicability of the misrepresentation exception.⁵¹ The Court rejected the argument raised by the plaintiffs that their complaint centered on the negligent action of the government, not merely on the inaccurate representation in the appraisal.⁵² Instead, the Court deemed such an argument an attempt to circumvent the misrepresentation exception of the FTCA.⁵³ In the Court's view, the applicability of the exception must be determined by looking beyond the language of the pleading to the true cause of the complaint.⁵⁴ The Court

⁴⁵ *United States v. Neustadt*, 366 U.S. 696 (1961).

⁴⁶ *Id.* at 696-97. The FHA was authorized by the National Housing Act, 12 U.S.C. § 1709 (1976) to insure loans secured by mortgages financing the purchase of private residential property. The value included in the appraisal was used to establish the maximum amount of mortgage insurance obtainable. *Id.*

⁴⁷ *Id.* at 699.

⁴⁸ *Id.* at 700.

⁴⁹ *Id.* at 700-01. Plaintiffs sought damages based on the difference between the fair market value of the property and its purchase price, which plaintiffs claimed they would not have paid but for the negligence of FHA. *Id.*

⁵⁰ *Id.* at 705 n.15.

⁵¹ *Id.* at 701-11.

⁵² *Id.* at 706-07.

⁵³ *Id.* at 703.

⁵⁴ *Id.* at 703-04. The Court characterized plaintiffs' argument as one stating that "the bar of 2680(h) does not apply when the gist of the claim lies in *negligence* underlying the inaccurate representation, *i.e.*, when the claim is phrased as one 'arising out of

construed the language in the Act to encompass negligent, as well as willful, misrepresentation by the government.⁵⁵ Since the damage to the plaintiffs in *Neustadt* occurred when they relied upon the inaccurate FHA appraisal, their action was one, in fact, for negligent misrepresentation barred by the exception in the FTCA.⁵⁶

B. *Application of the Misrepresentation Exception*

Subsequent cases have attempted to draw the often slippery distinction raised in *Neustadt* between negligent action and negligent misrepresentation.⁵⁷ Some courts developed simple formulations which were easy to apply but led to inconsistent and often illogical results.⁵⁸ One approach built

negligence rather than 'misrepresentation.' " *Id.* The Court responded to the argument with borrowed words:

"We must then look beyond the literal meaning of the language to ascertain the real cause of complaint . . . Plaintiff's loss came about when the Government agents misrepresented the condition of the cattle, telling him they were diseased when, in fact, they were free from disease . . . This stated a cause of action predicated on a misrepresentation."

Id. at 703 (quoting from *Hall v. United States*, 274 F.2d 69, 71 (10th Cir. 1959)).

⁵⁵ *Neustadt*, 366 U.S. at 706-08. The elements of negligent misrepresentation are detailed in the RESTATEMENT (SECOND) OF TORTS § 552 (1965). The elements are: (1) the supplying of false information in the course of business, profession or employment in which the supplier of information has a pecuniary interest and he fails to exercise reasonable care in obtaining or communicating the information; (2) justifiable reliance upon the information by the person receiving the information; and (3) pecuniary loss suffered by the person receiving the information through reliance. *Id.* This aspect of the decision was significant in view of the legislative history indicating that section 2680(h) was intended to encompass deliberate or intentional torts. See Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1, 49 (1946) (citing H. R. REP. NO. 1287, 79th Cong., 1st Sess. 6 (1946) which contain references to this general exceptions clause as one aimed at "deliberate" acts). See also Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929) (discussing the distinct set of rules applicable to negligent misrepresentation and deceit or fraud); Note, *Federal Tort Claims Act—Exceptions—Intentional Torts*, 7 VAND. L. REV. 283, 284 (1954) (discussing the fact that the common thread among the exceptions is their intentional character).

⁵⁶ *Neustadt*, 366 U.S. 696, 710-11 (1961). The Court also examined the language and legislative history of the National Housing Act, which provided for the inspection and appraisal in question, and found nothing barring application of the exception to the case before it. *Id.* at 708-11.

⁵⁷ For an elaboration on the efforts by several courts in a variety of contexts, see Comment, *Negligent Misrepresentation: A New Trap for the Unwary?*, 27 LOY. L. REV. 1184 (1981).

⁵⁸ One observer has identified three distinct approaches arising from the case law:

upon the traditional understanding of an action for negligent misrepresentation which had been referred to by the *Neustadt* Court in a footnote.⁵⁹ In that footnote the Court described the action as having been confined generally "to the invasion of interests of a financial or commercial character, in the course of business dealings."⁶⁰ Thus the line defining the boundaries of the exception was similarly drawn by some courts to preclude recovery only where economic, rather than personal, harm had been suffered.⁶¹

Other courts found ways to circumvent the distinction between personal and commercial contexts when the desired outcome could not be obtained within such a framework. In *Ware v. United States*,⁶² the court articulated its own fairly vague test which turned on whether the injury was a direct or indirect result of the representation made.⁶³ Ware owned cattle which had been tested by the Department of Agriculture and found to have tuberculosis.⁶⁴ As a result, almost two

(1) a determination whether the action primarily is based on negligent inspection or on negligent misrepresentation; (2) a distinction on the basis of whether the claim is for personal injury or merely for economic or financial loss; and (3) a determination of whether any duty is owed to the plaintiff in the first place. Note, *The Federal Seal of Approval: Government Liability for Negligent Inspection*, 62 GEO. L.J. 937, 946 (1974). Of course, the last approach permits the courts to avoid the definitional problem entirely. See *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977) (containing a careful elaboration on the question, particularly from a policy standpoint, where plaintiffs alleged the government's failure to inspect or warn of aircraft's weight and crew irregularities caused the crash in which passengers and crew were killed). See also Dombroff, *Certification and Inspection: An Overview of Government Liability*, 47 J. AIR L. & COM. 229, 237-40 (1982).

⁵⁹ *Neustadt*, 366 U.S. at 706-07, 711 n.26.

⁶⁰ *Id.* at 711 n.26 (quoting from W. PROSSER, TORTS § 85 (1941)).

⁶¹ Some courts have gone so far as to say that the misrepresentation exception will always apply in a commercial context. See *Green v. United States*, 629 F.2d 581, 584-85 (9th Cir. 1980). But cf. *Vaughn v. United States*, 259 F. Supp. 286 (N.D. Miss. 1966) (where the court refused to determine applicability merely along economic lines). See also Hatfield, *The Nonliability of the Government for Certification of Aircraft*, 17 FORUM 602, 623-24 (1982) (discussing flaws in the distinction). The commercial/personal injury distinction has been variously construed by the courts to turn not only on physical personal injury alone, but on any personal matters in a general sense. *Cross Bros. Meat Packers v. United States*, 533 F. Supp. 1319, 1322 (E.D. Pa. 1982); *Park v. United States*, 517 F. Supp. 970, 979 (D. Or. 1981).

⁶² 626 F.2d 1278 (5th Cir. 1980).

⁶³ *Id.* at 1282.

⁶⁴ *Id.* at 1280.

hundred and fifty cattle were destroyed by the government, but it was subsequently determined that only three were tubercular.⁶⁵ Plaintiff sued for damages arising from the government's error.⁶⁶ The court held that the government's negligent diagnosis led directly to the destruction of the cattle and plaintiff's loss.⁶⁷ The misrepresentation exception did not apply, since plaintiff himself took no action in reliance on the government's misdiagnosis. Such reliance was an essential ingredient in actions grounded on negligent misrepresentation.⁶⁸

As in *Ware*, the opinion in *Cross Brothers Meat Packers v. United States*⁶⁹ elaborates on the distinction involving direct, as opposed to indirect, injury. In *Cross Brothers*, a meat packing company sought to recover for lost business and profits allegedly caused by the failure of employees of the Agriculture Department to grade the company's meat properly.⁷⁰ The court looked to the "essential substance" of the complaint to determine whether the suit was one for damages resulting directly from negligent inspection and grading or solely from improper grading and the plaintiff's reliance thereon.⁷¹ The court held that the action was barred by the misrepresentation exception, since conduct of the employees from the Department of Agriculture did not directly damage the meat or its value.⁷² The improper grading was a misrepresentation regarding the meat's quality upon which both Cross Brothers and its customers relied to their detriment.⁷³ The court gave little weight to the manner in which the action had been pled, since it stated a complaint grounded primarily in misrepresentation.⁷⁴

⁶⁵ *Id.*

⁶⁶ *Id.* at 1280.

⁶⁷ *Id.* at 1283.

⁶⁸ *Id.*

⁶⁹ 533 F. Supp. 1319 (E.D. Pa. 1982).

⁷⁰ *Id.* at 1322.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1325.

⁷⁴ *Id.* *Accord* Reynolds v. United States, 643 F.2d 707 (10th Cir. 1981) (involving negligent inspection of a home by FmHA).

C. *Aircraft Certification*

Common threads can be found running throughout the various cases grounded on negligent inspection by the government.⁷⁵ The misrepresentation defense is often raised in addition to the discretionary function exception⁷⁶ which protects essential governmental decisionmaking from unreasonable challenges in court.⁷⁷ While the discretionary function exception has been the focus of much of the literature,⁷⁸ the misrepresentation defense has been asserted effectively by the government to retain its sovereign immunity.⁷⁹ Its use has been particularly prevalent in cases involving the certification and inspection of aircraft, where the government has wide-ranging involvement.⁸⁰ The Supreme Court is currently considering two important cases in which the Ninth Circuit

⁷⁵ See *supra* text accompanying notes 57-74 for a discussion of these points.

⁷⁶ The discretionary function exception appears in 28 U.S.C. § 2680(a). It provides: The provisions of this chapter and section 1346(b) of this title shall not apply to—

(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.

28 U.S.C. § 2680(a) (1976).

⁷⁷ Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. REV. 497, 528 (1976).

⁷⁸ *Id.* at 527-28.

⁷⁹ See *supra* note 35 for a listing of cases.

⁸⁰ In the aviation area, see, e.g., *S.A. Empresa de Viacao Aerea Rio Grandense (V.A.R.I.G. Airlines) v. United States*, 692 F.2d 1205 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983) (certification of lavatory unit which caught fire, forcing crash landing); *United Scottish Ins. v. United States*, 692 F.2d 1209 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983) (certification of defective fuel line for gasoline-burning cabin heater in air taxi which subsequently crashed); *Garbarino v. United States*, 666 F.2d 1061 (6th Cir. 1981) (airworthiness certification of Cessna 177 which crashed shortly after takeoff); *Hoffman v. United States*, 600 F.2d 590 (6th Cir. 1979) (certification of aircraft which crashed); *Knudsen v. United States*, 500 F. Supp. 90 (S.D.N.Y. 1980) (certification of aircraft with defective propellers); *Summers v. United States*, 480 F. Supp. 347 (D. Md. 1979) (certification of defective aircraft engine); *Lloyd v. Cessna Aircraft*, 429 F. Supp. 181 (E.D. Tenn. 1977) (airworthiness certification of defective aircraft); *Marival, Inc. v. Planes, Inc.*, 306 F. Supp. 855 (N.D. Ga. 1969) (certification of defective aircraft sold to plaintiff). In other contexts, see cases cited *supra* note 35. For an extensive discussion of the problem, see generally Note, *supra* note 58 (reviewing government liability for negligent inspection in various fields).

Court of Appeals refused to permit either defense in suits involving airline crashes.⁸¹ Therefore, the aviation industry provides a useful context within which to take a closer look at the misrepresentation exception.⁸²

The Federal Aviation Act of 1958⁸³ provides for one of the most pervasive inspection programs affecting the general public.⁸⁴ The cornerstone of the program is found in section 1423, which authorizes the Federal Aviation Agency (FAA) to issue three categories of aircraft certificates.⁸⁵ First, the type certificate is based on a Type Inspection Report through which the manufacturer furnishes certain design and performance data to the FAA during the manufacturer's development and testing process.⁸⁶ Second, the production certificate is issued to permit the manufacturer to begin production in conformity with certain models.⁸⁷ Finally, the FAA issues an airworthiness certificate when it is satisfied that the aircraft is in conformity with its type certificate and capable of safe operation.⁸⁸

In airline crash cases, recovery may be sought not only from the airline and the manufacturer of the aircraft, but also from the FAA for certifying the aircraft as fit.⁸⁹ The United States thus finds itself involved in a significant portion of air-

⁸¹ *S.A. Empresa de Viacao Aerea Rio Grandense (V.A.R.I.G. Airlines) v. United States*, 692 F.2d 1205 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983); *United Scottish Ins. v. United States*, 692 F.2d 1209 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983).

⁸² For a general discussion on the extent of government involvement in aircraft certification, see Howe, *Airworthiness: The Government's Role*, 17 *FORUM* 645 (1982).

⁸³ Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C. §§ 1421, 1423 (1976)).

⁸⁴ Dombroff, *supra* note 58, at 230-32.

⁸⁵ 49 U.S.C. § 1423 (1976).

⁸⁶ 49 U.S.C. § 1423(a) (1976).

⁸⁷ 49 U.S.C. § 1423(b) (1976).

⁸⁸ 49 U.S.C. § 1423(c) (1976).

⁸⁹ See generally Tompkins, *The Liability of the United States for Negligent Certification of Aircraft*, 17 *FORUM* 569 (1982) (reviewing the case law in which negligent certification has been raised). The government is also vulnerable in other areas involving certification and inspection to ensure airline safety. See, e.g., *Takacs v. Jump Shack, Inc.*, 546 F. Supp. 76 (N.D. Ohio 1982) (certification of parachute manufacturing process); *Murray v. United States*, 327 F. Supp. 835 (D. Utah 1971) (erroneous plotting of aeronautical chart). See also Dombroff, *supra* note 58, at 229-30; Howe, *supra* note 82, at 646-54 (detailing the procedures followed by the government regarding regulation of air safety matters). Cf. Maready, *Liability of the United States for Unwarranted Certification*

craft litigation⁹⁰ as an original or third-party defendant.⁹¹ The question of whether the aircraft was properly certified raises the same issues of government liability and exemption discussed in *Neustadt*.⁹²

Case law supports the view of one observer that "with respect to certification of aircraft engines and other components . . . the misrepresentation exception defense appears to be the most difficult one to overcome in a negligent certification case against the United States under the Federal Tort Claims Act."⁹³ While the personal/commercial distinction has been of little value in aviation cases,⁹⁴ the distinction between direct and indirect injury has been used by the courts.⁹⁵ In *Marival, Inc. v. Planes, Inc.*,⁹⁶ the plaintiff claimed economic loss resulting from its purchase of an aircraft which was not in the condition represented by the defendant seller.⁹⁷ In addition to breach of express and implied warranties, the plaintiff grounded its complaint on fraudulent mis-

of Aircraft—The View of the Manufacturer, 11 FORUM 558 (1976) (describing the "partnership" between manufacturer and government in air-related certification matters).

⁹⁰ See Kennelly, *Claims and Suits for Aviation Accidents Under the Federal Tort Claims Act*, 1972 TRIAL LAW GUIDE 1.

⁹¹ See Kennelly, *The United States in Third-Party Actions in Certification Cases*, 17 FORUM 556 (1982). *But cf.* *Stencel Aero Eng'g v. United States*, 431 U.S. 666 (1977) (indicating the existence of some limits on such actions).

⁹² See *United States v. Neustadt*, 281 F.2d 596 (4th Cir. 1960), *discussed supra* in text accompanying notes 43-56. An integral but still evolving aspect of the liability question is the crashworthiness doctrine. For a general discussion of the doctrine as it pertains to aircraft, see Saba, *Aircraft Crashworthiness in the United States: Some Legal and Technical Parameters*, 48 J. AIR L. & COM. 287 (1983).

⁹³ *Tompkins*, *supra* note 89, at 600. See *infra* text accompanying notes 96-132. Regarding the discretionary function exception, some further light should be shed on its use when the Supreme Court decides *United Scottish Ins. v. United States*, 692 F.2d 1209 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983), and its companion case, *S.A. Empresa de Viacao Aerea Rio Grandense (V.A.R.I.G. Airlines) v. United States*, 692 F.2d 1205 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983).

⁹⁴ See *supra* text accompanying notes 59-61.

⁹⁵ *Ingham v. Eastern Air Lines*, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1963), *cert. dismissed*, 379 U.S. 951 (1964); *Rapp v. Eastern Air Lines*, 264 F. Supp. 673 (E.D. Pa. 1967), *aff'd on other grounds sub nom.*, *Scott v. Eastern Air Lines*, 399 F.2d 14 (3d Cir. 1968), *cert. denied*, 393 U.S. 979 (1968).

⁹⁶ 306 F. Supp. 855 (N.D. Ga. 1969).

⁹⁷ *Id.* at 856.

representation.⁹⁸ Planes, Inc. then filed a third-party complaint against the United States on the ground that it relied on a certification of airworthiness made by the FAA in making its own representations to the plaintiff.⁹⁹ The company claimed that the FAA inspector negligently inspected and certified the aircraft, if in fact the plane was found not to be airworthy.¹⁰⁰

The court recognized that the mere presence of an element of misrepresentation was insufficient to invoke the misrepresentation exception regarding the government's liability.¹⁰¹ The court's analysis was similar to that in *Cross Brothers Meat Packers*¹⁰² regarding the direct versus incidental nature of the alleged negligent conduct of the government.¹⁰³ In a well-reasoned opinion, the court discussed the limited utility of the distinction between claims for personal injury and those for economic or financial loss arising from the footnote comment in *Neustadt*.¹⁰⁴ Instead the court declared the key inquiry to be whether "the cause of action arose directly from reliance on the communication of certain erroneous facts arrived at through negligent means."¹⁰⁵

The court then turned its attention to the facts in the case before it.¹⁰⁶ The court decided that the third-party plaintiff was complaining of the FAA's misrepresentation regarding the aircraft's condition which it relied upon in making its own representations to the buyer.¹⁰⁷ The negligent inspection by the FAA was merely secondary,¹⁰⁸ because Planes, Inc. sought no recovery for "direct injuries flowing from the negligent inspection."¹⁰⁹ Thus, the misrepresentation exception

⁹⁸ *Id.* at 856-57.

⁹⁹ *Id.* at 857.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 858.

¹⁰² See *Cross Brothers Meat Packers v. United States*, 533 F. Supp. 1319 (E.D. Pa. 1982), discussed *supra* in text accompanying notes 69-74.

¹⁰³ *Marival*, 306 F. Supp. at 858.

¹⁰⁴ *Id.* See *supra* note 61 and accompanying text.

¹⁰⁵ *Marival*, 306 F. Supp. at 858.

¹⁰⁶ *Id.* at 859.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 860.

exempted the government from liability.¹¹⁰

The opposite result was reached in *In re Air Crash Disaster near Silver Plume*.¹¹¹ Plaintiffs there sought recovery from the United States for injuries and deaths resulting from the crash of an aircraft.¹¹² Among their various contentions, plaintiffs alleged that an inspector for the FAA negligently inspected and certified the aircraft in question as airworthy when it was in fact unfit to fly, thus proximately causing plaintiffs' damages.¹¹³ The United States raised the misrepresentation defense as a bar to plaintiffs' actions.¹¹⁴ After a thorough review of relevant case law, the court attempted to "synthesize the criteria necessary for successful recovery under the Tort Claims Act."¹¹⁵

First, the court noted that the Federal Aviation Act of 1958¹¹⁶ clearly established that the primary purpose of the Act revolved around the defendant's duty to promote safety through inspection and certification of planes.¹¹⁷ Secondly, the court reasoned that the passengers were the intended beneficiaries of such a duty.¹¹⁸ The court sustained plaintiffs' pleading as stating a good cause of action and refused to apply the misrepresentation exception in a summary fashion as other courts had done in cases where operational malfunctions by the government involved communications in some form.¹¹⁹ The court held that negligently-performed inspec-

¹¹⁰ *Id.*

¹¹¹ 445 F. Supp. 384 (D. Kan. 1977).

¹¹² *Id.* at 387.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 408. The court indicated that two requirements must be met: (1) there must be an actionable duty to plaintiff or his class by statute or regulation whose primary purpose is to protect them from danger which might flow directly out of such duty, and (2) negligent conduct of a government employee at an operational level must be the proximate cause of any injury alleged. *Id.*

¹¹⁶ 49 U.S.C. §§ 1421, 1423 (1976).

¹¹⁷ 445 F. Supp. at 409. *But cf.* Howe, *supra* note 82, at 645-46, 655 (attempting to clarify the true nature of the inspection and certification program undertaken by the government).

¹¹⁸ 445 F. Supp. at 409.

¹¹⁹ *Id.* See, e.g., *Cross Bros. Meat Packers v. United States*, 533 F. Supp. 1319 (E.D. Pa. 1982), *discussed supra* in text accompanying notes 69-74; *Marival, Inc. v. Planes Inc.* 306 F. Supp. 855 (N.D. Ga. 1969), *discussed supra* in text accompanying notes 96-110.

tions which fail to reveal defects and are relied upon by others may be the proximate cause of any injury to a passenger involved in a crash caused by the defect.¹²⁰ In the words of the court, "[t]he certification is a reporting of results of such inspection but was not in itself relied upon by plaintiffs"¹²¹ Since the plaintiffs' claims arose from their reliance on the negligent inspection itself, the misrepresentation exception could not be used by the government to bar their recovery.¹²²

While shying away from *Silver Plume's* formal analysis,¹²³ the court in *S.A. Empresa de Viacao Aerea Rio Grandense (V.A.R.I.G. Airlines) v. United States*¹²⁴ refused to recognize the applicability of the misrepresentation exception in an airline crash which left 124 persons dead.¹²⁵ The designs, plans, specifications and performance data of the manufacturer, Boeing Aircraft, had been inspected and certified as acceptable by the FAA.¹²⁶ Having made clear its recognition of an action against the government in negligent inspection and certification cases, the *V.A.R.I.G.* court discussed the defenses raised by the government.¹²⁷ With respect to the misrepresentation exemption, the court held that the plaintiffs' claims arose from the negligent inspection rather than any misrepresentation which followed in the form of a final certificate that merely reported the results of such inspection.¹²⁸ In a bold decision going against the trend of authority, the court held that the misrepresentation defense could not be invoked by the government.¹²⁹ The court cited the *Neal* decision from the Sixth Circuit, upon which certiorari had already been

¹²⁰ 445 F. Supp. at 409. However, the court was unable to find sufficient evidence to establish proximate cause, thereby precluding recovery by the plaintiffs. *Id.* at 410.

¹²¹ *Id.* at 409.

¹²² *Id.*

¹²³ See *supra* text accompanying notes 111-122.

¹²⁴ 692 F.2d 1205 (9th Cir. 1982), cert. granted, 103 S. Ct. 2084 (1983).

¹²⁵ *Id.* at 1207-08.

¹²⁶ *Id.* at 1207.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1208.

¹²⁹ *Id.*

granted by the Supreme Court.¹³⁰ Certiorari was also granted in *V.A.R.I.G.*,¹³¹ but only after the Supreme Court reached its decision in *Block v. Neal*.¹³²

II. A SECOND LOOK AT THE MISREPRESENTATION EXCEPTION: *BLOCK V. NEAL*

In *Block v. Neal*,¹³³ the Supreme Court reviewed the Sixth Circuit's holding¹³⁴ that the district court erred in dismissing Mrs. Neal's negligence claim.¹³⁵ The Court of Appeals relied on the Good Samaritan doctrine¹³⁶ of tort law to provide the duty which the trial court failed to find.¹³⁷ The court cited

¹³⁰ *Id.*

¹³¹ *S.A. Empresa de Viacao Aerea Rio Grandense (V.A.R.I.G. Airlines) v. United States*, 103 S. Ct. 2084 (1983).

¹³² 103 S. Ct. 1089 (1983).

¹³³ *Id.*

¹³⁴ *Neal v. Bergland*, 646 F.2d 1178 (6th Cir. 1981).

¹³⁵ *Id.* at 1092.

¹³⁶ RESTATEMENT (SECOND) OF TORTS § 323 (1965). The Good Samaritan doctrine is described as follows.

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.*

Id. Where third persons are involved, the applicable provision appears in RESTATEMENT (SECOND) OF TORTS § 324A (1965). It 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).

¹³⁷ *Neal v. Bergland*, 646 F.2d 1178, 1181-82 (6th Cir. 1981). The issue of whether the Rural Housing Loan Program imposed certain duties on the government was extensively briefed by the parties and addressed by the court of appeals. *Id.* The fact that the court found a voluntary undertaking by the government, however, limited its reliance on any such statutory duties. *Id.* The government had argued that no such duties existed, regardless of the specific statutory scheme involved. *Id.* at 1184. The government's argument was based on its reading of the most definitive case to date relating to the misrepresentation exception, *United States v. Neustadt*, 366 U.S. 696 (1961). *Id.*

substantial precedent extending the applicability of the doctrine to the government where it performed a voluntary undertaking in a negligent manner.¹³⁸ The court recognized that the exceptions to the FTCA preserve sovereign immunity in certain instances and focused on the misrepresentation defense raised by the government.¹³⁹ In the view of the Sixth Circuit,¹⁴⁰ a determination needed to be made as to the true basis for the plaintiff's claim.¹⁴¹ Mrs. Neal based her complaint on the government's failure to use due care in the voluntary undertaking of inspecting and supervising the construction of her house rather than on any misrepresentation related to such undertaking.¹⁴² The appellate court held,

The court hinted, however, that a statute may give rise to an actionable duty where Congress intended such a result. Regarding the particular legislation before it, the court stated, "It is to be noted that Congress has specifically authorized FmHA to provide technical assistance and supervision of construction." *Id.* at 1181. For one commentator's view of the relationship between a duty within a statutory scheme and a determination of government liability, see Tompkins, *supra* note 89, at 597-98.

¹³⁸ *Neal v. Bergland*, 646 F.2d 1178, 1182 (6th Cir. 1981). Some of the cases that the court cited in which government liability was established were: *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957) (government negligence in its attempts to control and extinguish a forest fire); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) (government negligence in the maintenance of a light house beacon lamp); *Seaboard Coast Line R. R. v. United States*, 473 F.2d 714 (5th Cir. 1973) (government negligence in the design and construction of a drainage ditch along a railroad route); *Ingham v. Eastern Air Lines*, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967) (government liable for its negligence in operation of the national air traffic control system); and *Barron v. United States*, 473 F. Supp. 1077 (D. Hawaii 1979) (government negligence in failing to require a subcontractor to comply with a contract's safety requirements).

¹³⁹ *Neal v. Bergland*, 646 F.2d 1178, 1182 (6th Cir. 1981). The Federal Torts Claims Act, 28 U.S.C. § 2680 (1976) provides, in pertinent part:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(h) Any claim arising out of . . . misrepresentation, deceit, or interference with contract rights

28 U.S.C. § 2680 (1976).

¹⁴⁰ The court had little difficulty distinguishing *United States v. Neustadt*, 366 U.S. 696 (1961), an early Supreme Court opinion interpreting the misrepresentation exception, notwithstanding a remarkable factual similarity in the facts to *Neal*. See *supra* text accompanying notes 43-56 for a discussion of *United States v. Neustadt*, 366 U.S. 696 (1961).

¹⁴¹ *Neal v. Bergland*, 646 F.2d 1178, 1182-83 (6th Cir. 1981).

¹⁴² *Id.* at 1184. In a footnote, the court noted its difference of opinion with the Tenth Circuit which had recently reached the opposite conclusion in *Reynolds v. United States*, 643 F.2d 707 (10th Cir.), *cert. denied*, 454 U.S. 817 (1981). The court suggested that the difference might be explained by Reynold's failure to claim that his damages

therefore, that the misrepresentation exception did not bar her cause of action.¹⁴³

The interest of the Supreme Court in providing greater elaboration on the specific question dealing with the scope of the misrepresentation exception¹⁴⁴ is underscored by its insistence on clarifying what questions were not before the Court.¹⁴⁵ The Court reviewed the *Neustadt* opinion delivered some twenty-two years earlier.¹⁴⁶ *Neustadt* stood for the proposition that the misrepresentation exception protects the government from liability for pecuniary injuries which are "wholly attributable" to the plaintiff's reliance on negligent

were the direct result of a negligent inspection. The court indicated tactfully that the Tenth Circuit also took a different view from it regarding the intent and purpose of the Fair Housing Act. *Id.* at 1184 n.7.

¹⁴³ *Id.* at 1184. It is interesting to note that later the Sixth Circuit bypassed the misrepresentation issue when confronted with it in the context of the FAA's negligent certification of a Cessna 177 for airworthiness. *Garbarino v. United States*, 666 F.2d 1061 (6th Cir. 1981). In *Garbarino*, the court considered two aspects of the negligent certification issue: whether the government could be held liable either for its decision to delegate inspection duties to an inspection department of the manufacturer or for the subsequent negligent inspection conducted by that department. *Id.* at 1065-66. With respect to the first aspect, the court held that any suit on such grounds was barred by the discretionary function exception of the FTCA without reaching the question of the applicability of the misrepresentation exception. *Id.* at 1065. With respect to the second aspect, the court explained that neither exception applied; rather the government simply could not be liable for the acts of another under a theory of respondeat superior. *Id.* at 1066. The court went on to specify that its holding was supported by policy considerations as well, since any other decision would "make the Government a joint insurer of all activity subject to safety inspection." *Id.*

¹⁴⁴ A split existed between the Sixth and Tenth Circuits on this question at the time of the decision. See *supra* note 142 and accompanying text. Also, an amicus curiae brief had been filed in support of Ms. Neal by the Oregon Legal Services Corporation on behalf of the plaintiff in *Park v. United States*, 517 F. Supp. 970 (D. Or. 1981) which was, at the time, on appeal in the Ninth Circuit, and also involved an FmHA inspection. *Id.* at 971.

¹⁴⁵ 103 S. Ct. at 1092. The Court indicated that several issues were beyond the scope of the opinion: whether the Good Samaritan doctrine was encompassed within the plaintiff's claim for negligence, whether the discretionary function exception applied to the facts before it, and whether the administrative remedies of the Housing Act were exclusive or contained an alternative basis for plaintiff's claim. *Id.* The government's brief narrowed the question to the applicability of the misrepresentation exception. Brief for the Petitioners at 1, *Block v. Neal*, 103 S. Ct. 1098 (1983). Attorneys for Ms. Neal raised the duty issue as well as the question regarding the misrepresentation exception. Brief for the Respondent at 1, *Block v. Neal*, 103 S. Ct. 1098 (1983).

¹⁴⁶ 103 S. Ct. at 1093. See *supra* text accompanying notes 43-56 for a discussion of *United States v. Neustadt*, 366 U.S. 696 (1961).

misrepresentation.¹⁴⁷ A misrepresentation claim, however, requires not only communication of information, but also reliance on such information by the aggrieved party.¹⁴⁸ The Court recognized that some overlap exists between such an action and one sounding in negligence, but found nothing in the history or language of the FTCA which would bar an action arising out of certain aspects of the government's conduct even though distinct claims arising out of other aspects are not actionable.¹⁴⁹ The Court refused to add anything further to the scope of the exception beyond the plain meaning of the statute.¹⁵⁰ The Court feared that to do so would permit artful pleading to defeat the general purpose of the statute.¹⁵¹

The Court then sifted through the underlying claims raised under the facts of the case before it.¹⁵² The plaintiff was seeking to recover damages from the United States for the breach of its duty to use due care to ensure that the builder comply with previously approved plans and to cure defects prior to completion of the construction.¹⁵³ The Court recognized that an aspect of such negligence could be said to encompass misstatements made by the FmHA.¹⁵⁴ While the agency had a duty to exercise care in its communications, the plaintiff did not base her complaint on a breach of that particular duty.¹⁵⁵

Similar to the Ninth Circuit's analysis in *V.A.R.I.G.*,¹⁵⁶ the Supreme Court looked at the relationship between the conduct at the core of plaintiff's complaint and the injury alleged.¹⁵⁷ In so doing, it had no difficulty distinguishing the

¹⁴⁷ 103 S. Ct. at 1093-94.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1094-95.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1094.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ 692 F.2d 1205 (9th Cir. 1982), discussed *supra* in text accompanying notes 124-133.

¹⁵⁷ 103 S. Ct. at 1094. The court in *V.A.R.I.G.*, like the *Neal* Court, focused on the fact that the plaintiff's claims arose from the negligence of the inspection rather than from any subsequent misrepresentation contained in the certificates issued by the FAA.

facts in *Neustadt*.¹⁵⁸ There the plaintiff had in fact been misled by a government appraisal and claimed "no injury that he would have suffered independently of his reliance on the erroneous appraisal."¹⁵⁹ The duty breached in *Neustadt*, therefore, was that of using due care in communicating information to the buyer.¹⁶⁰ In contrast, the buyer in *Neal* was alleging a breach of FmHA's duty to use due care to ensure that the builder adhere to approved plans and to cure all defects before completing construction.¹⁶¹ In the words of the *Neal* Court, "the Government's misstatements are not essential to plaintiff's negligence claim."¹⁶²

The Court conceded that Mrs. Neal's negligence claim included an element of reliance which is an essential aspect of misrepresentation.¹⁶³ The Court, however, pointed to the language in *Neustadt* which recognized that many types of negligent conduct "involve an element of 'misrepresentation,' in the generic sense of that word."¹⁶⁴ Thus the Sixth Circuit had indeed been correct in its determination that Mrs. Neal claimed no injury arising from a government misrepresentation and was not barred from seeking recovery under the FTCA.¹⁶⁵

III. CONCLUSION

The significance of the *Neal* decision lies in the Court's inclination to construe in a strict manner one of the two most widely-raised defenses to the broad liability created by the FTCA.¹⁶⁶ In airline certification cases, in particular, the re-

S. A. Empresa de Viacao Aerea Rio Grandense (V.A.R.I.G. Airlines) v. United States, 692 F.2d 1205, 1208 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983).

¹⁵⁸ 103 S. Ct. at 1095. See *supra* text accompanying notes 43-56, for a discussion of *United States v. Neustadt*, 366 U.S. 696 (1961).

¹⁵⁹ 103 S. Ct. at 1093.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1094-95.

¹⁶² *Id.* at 1094.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1093 n.7.

¹⁶⁵ *Id.* at 1094-95.

¹⁶⁶ The court quoted from *United States v. Aetna Surety Co.*, 388 U.S. 366, 383 (1949): "The exemption of the sovereign from suit involves hardship enough where

cent trend has been to shut off any route to recovery from the United States, often through the summary judgment device or the granting of motions to dismiss.¹⁶⁷ Plaintiffs have been given a boost, however, through the *Neal* decision. *Neal* has also laid the groundwork for affirmance of *V.A.R.I.G.*¹⁶⁸ *Neal* and *V.A.R.I.G.* permit plaintiffs an opportunity to go to trial with facts which may establish a claim grounded on negligent action even though such facts may appear inextricably woven into a misrepresentation claim.¹⁶⁹

Moreover, there is notably absent from the *Neal* opinion any reference to the policy arguments raised by the government to the effect that it should not be made an insurer of the conduct of private industry.¹⁷⁰ As was the case in *V.A.R.I.G.*, the Supreme Court was more concerned that the government not be permitted to shield itself entirely from tort liability by simply raising the misrepresentation defense where some form of communication was involved.¹⁷¹ Certainly this position has support in the legislative history.¹⁷² While both *Neal* and *V.A.R.I.G.* broaden the scope of potential liability of the FAA,¹⁷³ the plaintiff is still limited by the law of the state in

consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." 103 S. Ct. at 1094.

¹⁶⁷ Such motions have been used often by the government where it raises one of the "exception" defenses to allegations of liability. See *supra* text accompanying notes 59-68, 78-110. See, e.g., *Knudsen v. United States*, 500 F. Supp. 90 (S.D.N.Y. 1980) (government's motion for summary judgment granted since plaintiff's claim regarding negligent inspection barred by misrepresentation exception); *Summers v. United States*, 480 F. Supp. 347 (D. Md. 1979) (government's motion to dismiss for failure to state a claim upon which relief may be granted approved by court because action grounded on airworthiness certificate barred by misrepresentation exception); *Lloyd v. Cessna Aircraft*, 429 F. Supp. 181 (E.D. Tenn. 1977) (government's motion to dismiss for lack of subject matter jurisdiction granted because of misrepresentation exception barring manufacturer's third-party action against the United States); *Marival, Inc. v. Planes, Inc.*, 306 F. Supp. 855 (N.D. Ga. 1969) (government's motion to dismiss granted because of misrepresentation exception), *discussed supra* in text accompanying notes 96-110.

¹⁶⁸ *S. A. Empresa de Viacao Aerea Rio Grandense (V.A.R.I.G. Airlines) v. United States*, 692 F.2d 1205 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 2084 (1983), *discussed supra* in text accompanying notes 124-131.

¹⁶⁹ See *supra* text accompanying notes 163-165.

¹⁷⁰ 103 S. Ct. 1089 (1983). See *supra* note 18 and accompanying text.

¹⁷¹ 103 S. Ct. at 1091.

¹⁷² See *supra* text accompanying notes 26-34.

¹⁷³ The government included this argument in its briefs to the *Neal* Court. See, e.g., Brief for the Petitioners at 27-28, *Block v. Neal*, 103 S. Ct. 1089 (1983).

which the federal court sits¹⁷⁴ and, particularly in crash cases, by such formidable obstacles as the establishment of proximate causation.¹⁷⁵ In addition, the government's liability often will not be shouldered alone.¹⁷⁶

As in the *Neustadt* opinion, the notion that negligent misrepresentation often arises in an economic context was mentioned in a footnote in *Neal*.¹⁷⁷ The *Neal* Court otherwise bypassed the old economic/personal injury distinction which had been used by the lower courts.¹⁷⁸ Because of the facts in *Neal*, it may well be that such a distinction has little, if any, continued significance, since plaintiff there sought recovery of an economic nature.¹⁷⁹

Neal makes clear, however, that courts must continue to struggle with the slippery, often subtle, distinction between those pleadings which serve merely as a guise for actions aris-

¹⁷⁴ See *supra* note 32. See also *Perez v. United States*, 368 F.2d 320 (1st Cir. 1966) (ordinary tort rule that servant is not engaged in his master's work when traveling between home and work would be applied by federal court when the state where injury occurred had not specifically rejected rule); *Walton v. United States*, 484 F. Supp. 568 (S.D. Ga. 1980) (federal government liability when negligence occurred through independent contractor); *Vandergrift v. United States*, 500 F. Supp. 229 (E.D. Va. 1978) (Virginia wrongful death statute applies in wrongful death action against United States to determine liability); *Lloyd v. Cessna*, 434 F. Supp. 4 (E.D. Tenn. 1976) (local jurisdiction's rules on choice of law govern); *Robinson v. United States*, 408 F. Supp. 132 (N.D. Ill. 1976) (state law governs on validity of a release); *Frazier v. Nabors*, 273 F. Supp. 148 (E.D. Tenn. 1967), *rev'd on other grounds*, 412 F.2d 22 (6th Cir. 1969) (law of place where accident occurs governs in determining whether federal employee was acting within scope of employment).

¹⁷⁵ See *supra* note 120 and accompanying text. The obstacle has been significant, as can be seen by the fact that several of the plaintiffs successful on the exemption issue have proceeded only to fail on the proximate cause issue. See, e.g., *Hoffman v. United States*, 600 F.2d 590 (6th Cir. 1979) (plaintiff failed to establish proximate cause). But see also *Rapp v. Eastern Air Lines*, 264 F. Supp. 673 (E.D. Pa. 1960), *aff'd on other grounds sub nom.* *Scott v. Eastern Air Lines*, 399 F.2d 14 (3d Cir.), *cert. denied*, 393 U.S. 979 (1968) (where plaintiff successfully established liability, including the element of proximate cause).

¹⁷⁶ As pointed out in Respondent's Brief in Opposition at 11, *Block v. Neal*, 103 S. Ct. 1089 (1983), the impact of the government's liability may be minimized by the availability of a cross-claim against a joint tortfeasor, such as the contractor in *Neal* or a manufacturer in airline certification cases. Agencies may also seek to protect themselves through the establishment of a bond or escrow account. In the *Neal* case, a setoff could also be claimed. *Id.*

¹⁷⁷ *Block v. Neal*, 103 S. Ct. 1089, 1093 n.5 (1983).

¹⁷⁸ *Id.* See *supra* notes 59-61.

¹⁷⁹ *Id.* at 1090-91.

ing from negligent misrepresentations and those whose facts raise a distinct claim arising from the government's negligent conduct.¹⁸⁰ Their deliberations must necessarily include a close scrutiny of the facts before them, including the nature and extent of government involvement in the area in question. In *Block v. Neal*, the Court has reinforced its position that it will not extend the shield of sovereign immunity more broadly than has been directed by Congress.¹⁸¹ This may encourage agencies to exercise more carefully their inspection and supervisory responsibilities.¹⁸² It also permits the plaintiff a day in court which might otherwise be denied.¹⁸³

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¹⁸⁰ *Id.* at 1093-94.

¹⁸¹ See *supra* note 166 and accompanying text.

¹⁸² See *supra* note 4 and accompanying text.

¹⁸³ See *supra* note 167 and accompanying text.

TORTS—GOVERNMENT CONTRACTOR DEFENSE TO STRICT PRODUCTS LIABILITY—A supplier of military equipment is not subject to strict products liability for a design defect where: (1) the United States is immune from liability; (2) the supplier proves that the United States established or approved reasonably precise specifications for the allegedly defective military equipment; (3) the equipment conformed to those specifications; and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 711 (1984).

On August 13, 1974, Navy Lieutenant Commander Malcolm W. McKay¹ was assigned to fly a night training mission in an RA-5C,² an aircraft manufactured by Rockwell International, Inc. (Rockwell).³ During this mission, the aircraft caught fire,⁴ forcing Commander McKay and his navigator to eject.⁵ The ejection system functioned properly.⁶ The nav-

¹ Lieutenant Commander McKay had twelve years of experience as a pilot. He had accumulated over 2,000 hours of flight time and had served a tour of duty in Vietnam. He was undergoing refresher training in the RA-5C at Key West, Florida when the accident occurred. *McKay v. Rockwell Int'l Corp.*, No. CV 75-3672-DWW (C.D. Cal. March 30, 1981), *reprinted in* Opening Brief of Defendant/Appellee at A4, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983) [hereafter cited as *District Ct. Op.*, *Opening Brief of Defendant/Appellee*].

² In the mid 1950's, Rockwell, while under contract with the Navy, began developing an aircraft capable of flying at altitudes of up to 75,000 feet and with a potential speed of two and one-half times the speed of sound. This aircraft was designated the A-5A. It was designed to be a supersonic carrier-based attack bomber with a crew of two. *Id.* at A1-A2. In the early 1960's, the Navy decided to redesign the aircraft as a supersonic carrier-based reconnaissance aircraft designated the RA-5C "Vigilante." *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 446 (9th Cir. 1983).

³ *McKay v. Rockwell*, 704 F.2d at 446.

⁴ *Id.*

⁵ *District Ct. Op.*, *Opening Brief of Defendant/Appellee*, *supra* note 1, at A4-A5.

⁶ *Id.* at A5.

igator survived the ejection; Commander McKay did not.⁷ An autopsy revealed that the probable cause of death was spinal cord injury, secondary to neck traumatism.⁸

Some five months before the McKay accident, on March 5, 1974, Navy Lieutenant Frank Carson⁹ had encountered a similar fate.¹⁰ While on a similar training mission, he and his navigator also ejected from a burning RA-5C.¹¹ Once again, the navigator survived while the pilot, Lieutenant Carson, did not.¹² The autopsy surgeon concluded that the probable cause of Lieutenant Carson's death was a contusion of the spinal cord.¹³ The autopsies following both accidents revealed that the pilots' deaths were probably caused during ejection.¹⁴

The escape system on both RA-5C aircraft in these accidents was the HS-1A, a modified version of an earlier escape system¹⁵ used in RA-5C aircraft.¹⁶ Upon deployment the HS-1A system shed the canopy which covered the two crewmen, physically restrained them in their seats in a fetal position, with the exception of the head, and then ballistically ejected them by rocket thrust into the airstream.¹⁷ Both parties agreed with the expert witnesses that the injuries to the pilots occurred just as the "head/helmet/neck mass" entered

⁷ *Id.*

⁸ *Id.*

⁹ Lieutenant Carson was a pilot with eight years of experience, including combat duty in Southeast Asia and Vietnam. At the time of the accident, he was stationed in Key West, Florida for training in the RA-5C. *Id.* at A3.

¹⁰ *Id.* at A3-A4.

¹¹ *Id.* at A3.

¹² *Id.* at A4.

¹³ *Id.* The autopsy on Lieutenant Carson revealed an injury to the right lateral neck, a fracture of the hyoid bone, and a broken neck. The navigator also suffered minor injuries during the ejection. *Id.*

¹⁴ *McKay v. Rockwell*, 704 F.2d at 446.

¹⁵ The earlier system, known as the FS-1 system, was capable of safely ejecting crewmen at speeds from 90 to 750 knots and at altitudes up to 70,000 feet. The HS-1A, in contrast, had a "zero-zero" low mode ejection system which could successfully eject dummies placed in an aircraft that was not moving. *District Ct. Op., Opening Brief of Defendant/Appellee*, *supra* note 1, at A9.

¹⁶ *McKay v. Rockwell*, 704 F.2d at 446.

¹⁷ *District Ct. Op., Opening Brief of Defendant/Appellee*, *supra* note 1, at A9. The ejection system was designed to be initiated by the pilot sitting in the front seat. The navigator was first ejected, then the pilot. *Id.*

the airstream,¹⁸ and the unrestrained head/helmet was forced back against the seat.¹⁹

The widows of both Navy pilots filed wrongful death actions against Rockwell in the United States District Court for the Central District of California.²⁰ They alleged defective design of the aircraft and of the ejection system.²¹ The cases were consolidated for trial with the district court determining that it had admiralty jurisdiction under the Death on the High Seas Act.²² The court found that Rockwell was liable for the design defects of the HS-1A escape system under the principles of tort law set forth in sections 388,²³ 389,²⁴ and

¹⁸ Opening Brief of Appellants at 9-10, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983).

¹⁹ Compare Opening Brief of Defendant/Appellee at 4, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983) (stating that both parties agreed as to the cause of the descendants' incapacitation) with Opening Brief of Appellants at 10, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983) (citing with approval the testimony of Rockwell's expert pathologist).

²⁰ *McKay v. Rockwell*, 704 F.2d at 446-47.

²¹ *District Ct. Op.*, Opening Brief of Defendant/Appellee, *supra* note 1, at A1.

²² *McKay v. Rockwell*, 704 F.2d at 447. The Death on the High Seas Act, 46 U.S.C. § 761 (1976), provides:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state. . . the personal representative of the decedant may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedant's wife . . . against the vessel, person or corporation which would have been liable if death had not ensued.

46 U.S.C. § 761 (1976). The district court concluded that the deaths had occurred beyond one marine league from shore and therefore based jurisdiction exclusively in admiralty. *District Ct. Op.*, Opening Brief of Defendant/Appellee, *supra* note 1, at A1.

²³ See RESTATEMENT (SECOND) OF TORTS § 388 (1965) (imposing liability for physical harm upon a supplier of a chattel who has reason to know that the chattel is dangerous for the use for which it is supplied, has no reason to believe that the users will realize the dangerous condition, and fails to inform the users of its dangerous condition). The Ninth Circuit found there was no reason for Rockwell to believe that the Navy, the user, was unaware of the potentially "dangerous condition" of the ejection system. *McKay v. Rockwell*, 704 F.2d at 454.

²⁴ See RESTATEMENT (SECOND) OF TORTS § 389 (1965) (imposing liability for physical harm upon a supplier having reason to know that the chattel supplied is unlikely to be made reasonably safe before put to its expected use although the user is informed of the chattel's dangerous character). The Ninth Circuit interpreted section 389 as applying to a chattel which is not reasonably safe. The court pointed out that the Navy's post-accident study found that the ejection system was reasonably safe, and the Navy accordingly continued its use. *McKay v. Rockwell*, 704 F.2d at 455.

402A²⁵ of the Restatement (Second) of Torts.²⁶ The court, however, found no liability under the same principles of tort law for the design of the RA-5C aircraft itself.²⁷ Judgment was rendered after a trial in favor of plaintiffs Carson and McKay for a total of \$711,553.²⁸ Carson and McKay appealed the measure and amount of damages awarded in their respective judgments to the Ninth Circuit Court of Appeals.²⁹ Rockwell appealed on the grounds that military suppliers should not be liable to servicemen for injuries caused by defective military hardware.³⁰ *Held, reversed and remanded*: A supplier of military equipment is not subject to strict products liability for a design defect where: (1) the United States is immune from liability; (2) the supplier proves that the United States established or approved reasonably precise specifications for the allegedly defective military equipment; (3) the equipment conformed to those specifications; and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 711 (1984).

²⁵ Section 402A states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) TORTS § 402A (1965).

²⁶ *McKay v. Rockwell*, 704 F.2d at 447.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

I. BACKGROUND

A. *Governmental Immunity and the Feres-Stencel Doctrine*

The English common law doctrine of sovereign immunity, premised upon the belief that allowing the King to be sued in his own courts was a contradiction of his sovereignty,³¹ precluded any suit from being brought against the King, or his officers,³² without his consent.³³ Early in American legal history, Chief Justice Marshall grafted sovereign immunity into this nation's constitutional system,³⁴ without citation of authority or explanation,³⁵ in a case that did not turn on this doctrine.³⁶ As a corollary to the rule of sovereign immunity, the Supreme Court has since recognized that any waiver of the immunity must come through Congress.³⁷

Congress finally waived immunity for tort claims with the passage of the Federal Tort Claims Act (FTCA)³⁸ in 1946.³⁹ The FTCA extended a remedy to those who previously had

³¹ W. PROSSER, *THE LAW OF TORTS* 970 (4th ed. 1971).

³² Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 9 (1963).

³³ 1 L. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 51 at 2-4 (1984).

³⁴ See *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 411-12 (1821) (extending the United States Supreme Court review of state court decisions to criminal judgments in a case involving the sale of lottery tickets, which was illegal in Virginia).

³⁵ See *Cohens v. Virginia*, 19 U.S. at 411-12. Recently, however, one court has given this justification for the theory:

If a [governing body] is to do the job of governing well, then there is something to be said for withholding the threat of answerability in damages for at least some of the actions and decisions which governing necessarily entails. He who rules must make choices among competing courses of action and in the face of conflicting considerations of policy. The capacity and the incentive to govern effectively are arguably not enhanced by the prospect of being sued by those citizens who may be adversely affected by the choice eventually made. Thus it has been thought wise to sweep this restrictive cloud from the horizon and to let those responsible for the conduct of public affairs calculate their courses of action free of this intimidating influence.

Elgin v. District of Columbia, 337 F.2d 152, 154 (D.C. Cir. 1964).

³⁶ Note, *Jaffe v. United States: Feres Doctrine at the Cliff's Edge?*, 42 U. PITT. L. REV. 115, 116 n.5 (1980).

³⁷ See 1 L. JAYSON, *supra* note 33, § 51 at 2-4 & n.10.

³⁸ 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-80 (1976).

³⁹ See 1 L. JAYSON, *supra* note 33, § 51 at 2-3—2-4, for a summary of the rather unique events leading up to the passage of the FTCA.

none.⁴⁰ The sovereign thereafter consented to be sued for its wrongs where a private person would have been liable under like circumstances.⁴¹ Likewise, the FTCA required application of local law to such actions.⁴²

The FTCA, however, did not completely abrogate sovereign immunity.⁴³ Congress created several exceptions from its waiver of immunity.⁴⁴ One of the exceptions excludes liability for any claim arising out of "combatant activities" during the time of war.⁴⁵

In *Feres v. United States*,⁴⁶ the Supreme Court faced the question of whether a serviceman who sustained an injury incident to service, which would have been an actionable wrong in a private suit, was excluded from recovery under the "combatant activities" exception to the FTCA.⁴⁷ Three cases were considered in the opinion.⁴⁸ Common to all was the fact that each claimant was on active duty, not on furlough, and was injured by the negligence of others in the armed forces.⁴⁹ Two federal courts of appeal had held that

⁴⁰ *Feres v. United States*, 340 U.S. 135, 140 (1950).

⁴¹ 28 U.S.C. § 2674 (1976). This section states in part: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." *Id.*

⁴² 28 U.S.C. § 1346(b) (1976).

⁴³ *See* 28 U.S.C. § 2680(a)-(n) (1976).

⁴⁴ *Id.*

⁴⁵ *Id.* § 2680(j) (excluding "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"). The exceptions most likely to be of significance to military activities are those which retain immunity for claims based upon a government employee's performance or failure to perform a discretionary function, claims arising out of combatant activities of the military and claims arising in a foreign country. *See* 28 U.S.C. § 2680(a), (j), (k) (1976).

⁴⁶ 340 U.S. 135 (1950).

⁴⁷ *Id.* at 138.

⁴⁸ *Id.* at 136-37. The three cases considered in the opinion were: *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949) (a wrongful death claim against the government for negligently housing the deceased in a barracks which burned because of a defective heater); *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949) (a malpractice action against the United States where an army surgeon left a towel in the plaintiff's abdomen); *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949) (a negligence claim based upon unskilled medical treatment by Army surgeons).

⁴⁹ *Feres*, 340 U.S. at 138.

the "combatant activities" exception barred the claims⁵⁰ while one held that it did not.⁵¹ In resolving the split of opinion, the Supreme Court construed the "combatant activities" exception to the FTCA as retaining immunity from liability for injuries to servicemen arising out of, or in the course of, activity incident to service.⁵² Hence, the Court denied recovery against the government in each case.⁵³

The holding in *Feres* dealt only with suits by servicemen against the government.⁵⁴ The Court did not consider whether the government was also immune from liability when a member of the Armed Forces brought a tort action against a private defendant who, in turn, sought indemnity⁵⁵ from the government.⁵⁶ This question was addressed in *Stencel Aero Engineering Corp. v. United States*.⁵⁷ In *Stencel*, a military pilot claimed permanent injuries resulting from the failure of his life support system during ejection from his aircraft.⁵⁸ The pilot brought an action to recover damages for his injuries from the Stencel Corporation, the manufacturer of the system.⁵⁹ Stencel cross-claimed against the United States for total indemnity.⁶⁰ The federal district court

⁵⁰ See *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949); *Jefferson v. United States*, 178 F.2d 518 (4th Cir. 1949).

⁵¹ See *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949).

⁵² *Feres*, 340 U.S. at 146.

⁵³ *Id.* Cf. *United States v. Brown*, 348 U.S. 110, 112 (1954) (allowing recovery to a discharged serviceman for injuries sustained while he was not on active duty or subject to military discipline); *Brooks v. United States*, 337 U.S. 49, 52-53 (1949) (allowing recovery to a serviceman whose injuries due to the negligence of government employees were not sustained incident to service).

⁵⁴ *Donham v. United States*, 536 F.2d 765, 774 (8th Cir. 1976) (an appeal from the dismissal of a cross-claim against the United States by a military contractor sued by a serviceman injured on duty), *aff'd sub nom*, *Stencel Aero Eng. Corp. v. United States*, 431 U.S. 666 (1977).

⁵⁵ Indemnity is a right inuring to a person secondarily liable who has discharged his obligation to the injured party to seek compensation from the one who is primarily liable. 41 AM. JUR. 2d *Indemnity* § 1 (1968).

⁵⁶ *Donham*, 536 F.2d at 774. As a result of the Supreme Court's failure to consider this question, a split of opinion arose among the circuits. *Stencel Aero Eng. Corp. v. United States*, 431 U.S. 666, 669 n.6 (1977).

⁵⁷ 431 U.S. 666 (1977).

⁵⁸ *Donham*, 536 F.2d at 767.

⁵⁹ *Id.*

⁶⁰ *Id.*

dismissed the cross-claim and the court of appeals affirmed.⁶¹ The Supreme Court also affirmed the dismissal of the cross-claim,⁶² holding that the right of a private third party to recover indemnity against the United States is unavailable where *Feres* would preclude a direct action by servicemen.⁶³

The immunity recognized in *Feres* and extended in *Stencel* is predicated upon three common principles.⁶⁴ The Court concluded, first, that the relationship between the government, its suppliers, and the members of the Armed Forces is distinctively federal in character,⁶⁵ and accordingly, that liability should not be determined by the disparate local law as required by the FTCA.⁶⁶ Second, through the Veterans Benefit Act,⁶⁷ the United States has limited its liability in an area in which it has broad exposure while providing an efficient, uniform compensation scheme for injured servicemen.⁶⁸ Permitting claims either by servicemen or third parties would, in the

⁶¹ *Id.* at 767, 775.

⁶² *Stencel*, 431 U.S. at 674.

⁶³ *Id.* at 673-74. The court of appeals stated that *Stencel* alleged that the ejection system was manufactured according to government specifications and that *Stencel* had cited several cases which suggested that such compliance might constitute a defense to the claims against it. The court, however, said the question was not addressed in this case. *Donham*, 536 F.2d at 768 & 768 n.2. The Supreme Court, although not explicitly addressing this question, stated that the denial of indemnity was not unfair to *Stencel*, who could take the possibility of liability into account when negotiating contracts with the government. *Stencel*, 431 U.S. at 674 & n.8.

⁶⁴ *Stencel*, 431 U.S. at 671.

⁶⁵ See *Stencel*, 431 U.S. at 671 (where the Court determined that a "distinctively federal" relationship exists between the government and its suppliers as well as members of the Armed Forces). See also *United States v. Standard Oil Co.*, 332 U.S. 301 (1947) (discussing the relationship between the government and members of the Armed Forces) cited in *Feres*, 340 U.S. at 143.

⁶⁶ See *supra* note 42 and accompanying text.

⁶⁷ Wartime disability compensation is provided for in 38 U.S.C. §§ 310-315 (1976 & Supp. V 1981). The basic rates range from \$62 per month for a 10% disability to \$1,213 per month for total disability. 38 U.S.C.A. § 314 (West Supp. 1983). Additional amounts are provided for dependents. 38 U.S.C. § 315 (1976 & Supp. V 1981).

Wartime death compensation is provided for in 38 U.S.C. §§ 321-322 (1976) (the monthly rate for a surviving spouse with no children is \$87).

Other service-connected deaths are provided for in 38 U.S.C. §§ 401-417 (1976 & Supp. V 1981). The monthly compensation for a surviving spouse varies, depending upon pay grade from \$445 for grade E-1 to \$1,391 for grade O-10. 38 U.S.C.A. § 411 (West Supp. 1983).

⁶⁸ *Stencel*, 431 U.S. at 672-73; *Feres* 340 U.S. at 144-45.

Court's opinion, circumvent this limitation.⁶⁹ Third, litigation to determine the degree of fault by government agents and testimony of members of the armed forces as to each other's decisions and actions would have an undesirable effect upon military discipline,⁷⁰ regardless of whether such suits were brought by a soldier or a third party.⁷¹

B. *The Government Contractor Defense*

The protective cloak of sovereign immunity was extended beyond government officials to those acting contractually on behalf of the government in the seminal opinion of *Yearsley v. W.A. Ross Construction Co.*⁷² The Supreme Court recognized in *Yearsley* that the immunity of the federal government⁷³ could provide a defense to liability for private contractors in the government's employ.⁷⁴ The contractor in *Yearsley*, while duly authorized and directed by the government,⁷⁵ had diverted the flow of the Missouri River in an effort to improve its navigable capacity.⁷⁶ The plaintiff brought an inverse condemnation action against the contractor, alleging the diversion had caused the erosion and loss of ninety-five acres of his land.⁷⁷ Both the district court and the court of appeals determined that the contractor alone could be held responsible for the damage, even though he was acting under the direction of the United States Government.⁷⁸ The Supreme Court, however, held to the contrary, stating that as long as

⁶⁹ *Stencel*, 431 U.S. at 673.

⁷⁰ *Id.*; *United States v. Brown*, 348 U.S. 110, 112 (1954); see generally *Feres*, 340 U.S. at 141-43.

⁷¹ *Stencel*, 431 U.S. at 673. The Sixth Circuit Court of Appeals has added that another fundamental reason for the *Feres-Stencel* doctrine is the need for governmental immunity from the results of errors in military judgment. See *Hale v. United States*, 416 F.2d 355, 357 (6th Cir. 1969).

⁷² 309 U.S. 18 (1940).

⁷³ *Id.* at 20-23. This is apparently the only case where a form of shared immunity for federal contractors has been recognized by the Supreme Court. Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. REV. 1025, 1049 (1982).

⁷⁴ *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. at 20.

⁷⁵ *Id.*

⁷⁶ *Id.* at 19.

⁷⁷ *Id.* at 20.

⁷⁸ See *W.A. Ross Constr. Co. v. Yearsley*, 103 F.2d 589, 591 (8th Cir. 1939).

the "authority to carry out the project was validly conferred, that is, if what was done was done within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."⁷⁹ In reaching its conclusion, the Court treated the contractor's relationship with the government as analogous to that of an agent or officer of the government.⁸⁰ The Court further said that liability could only exist where the authority of the contractor, if validly conferred, had been exceeded.⁸¹

Under the government contractor defense, the contractor in effect shares in the government's immunity for damage resulting necessarily or incidentally from carrying out the contract according to its terms.⁸² On a conceptual plane, this defense is based upon general tort principles,⁸³ as well as public policy,⁸⁴ which favors extending immunity to those "who

⁷⁹ *Yearsley*, 309 U.S. at 20. Cf. *Lydecker v. Board of Chosen Freeholders*, 91 N.J.L. 622, 103 A. 251 (1918). *Lydecker* involved the performance of a contract with a county to spread tar on a road. The county was negligent in setting the maximum specifications in the contract so that a sufficient amount of tar was spread to make the road slippery. 103 A. at 252. The court recognized that the county was immune from liability but stated as a rule that a contractor would only be shielded from liability where the method of performing the contract was not obviously or inherently dangerous. *Id.* at 253.

⁸⁰ *Yearsley*, 309 U.S. at 21.

⁸¹ *Id.*

⁸² Note, *supra* note 74, at 1032, 1051 nn.134-36. But see *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc.*, 385 Pa. 477, 123 A.2d 888 (1956). The court in *Valley Forge Gardens* refused to extend the "immunity" of the state to private contractors. It instead recognized a defense to liability based upon the "privilege" of being in privity of contract with the state. *Id.* at 891. The court went on to imply that the immunity of the state would not be a factor in the applicability of this defense. *Id.* at 892.

⁸³ *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 793-94 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). The "Agent Orange" court explained that tort liability principles seek to impose liability on the wrongdoer whose act or omission caused the injury, providing incentive to prevent the occurrence of future harm. The court reasoned that the deterrent effect of tort liability would not produce any societal benefit if the party suffering liability is not in a position to correct the tortious act or omission. The court believed that such is the position of a contractor whose only role in causing injury was the "proper performance of a plan supplied by the government." *Id.*

⁸⁴ One of the policy factors in favor of extending freedom from liability is the preclusion of the circumvention of government immunity. Government contractors would presumably circumvent this immunity through increased contract prices to cover the risk of any loss occasioned through compliance with governmental decisions. *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965). In addition, the

perform governmental contracts in accordance with their specifications.”⁸⁵ Hence, one authority which specifically considered the matter concluded that this defense is available to a contractor only when the governmental unit with which he contracts is immune from liability.⁸⁶

In addition to the requirement of governmental immunity, the case law following *Yearsley* has further expounded upon the defense’s limitations and application. In *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*,⁸⁷ the appellant contracted with the government to construct a dam on the American River in California.⁸⁸ This contract required the construction of temporary dams above and below the permanent dam site, with a diversion tunnel between the temporary dams.⁸⁹ The collapse of the upper temporary dam damaged the appellee’s construction work on the powerhouse installation.⁹⁰ Litigation ensued,⁹¹ with the appellant claiming a

uncertainty as to the amount of damages might interfere with the government’s ability to secure contractors to undertake public works. See *Green v. ICI America, Inc.*, 362 F. Supp. 1263, 1266 (E.D. Tenn. 1973); *Valley Forge Gardens Inc. v. James D. Morrissey, Inc.*, 385 Pa. 477, 123 A.2d 888, 891 (1956).

⁸⁵ *O’Grady v. City of Montpelier*, 474 F. Supp. 186, 188 n.1 (D. Vt. 1979), *rev’d on other grounds*, 573 F.2d 747 (2d Cir. 1978).

⁸⁶ *Littlehale v. E.I. du Pont de Nemours & Co.*, 268 F. Supp. 791, 803 n.17 (S.D.N.Y. 1966), *aff’d*, 380 F.2d 274 (2d Cir. 1967).

Similar to the government contractor defense is the defense available to independent contractors against negligence actions. This defense originated in *Ryan v. Feeney & Sheehan Bldg. Co.*, 239 N.Y. 43, 145 N.E. 321 (1924). In *Ryan* the court held that a contractor was justified in relying upon the plans and specifications he contracted to follow “unless they are so apparently defective that an ordinary builder of ordinary prudence would be put on notice that the work was dangerous and likely to cause injury.” *Ryan*, 145 N.E. at 321. The distinction between the government contractor defense as historically applied and the defense originating in *Ryan*, known as the contract specification defense, lies in the fact that the government contractor defense has been available to insulate contractors from liability even though the specifications were obviously dangerous. Note, *supra* note 74, at 1031. See, e.g., *Littlehale v. E.I. du Pont de Nemours & Co.*, 268 F. Supp. 791, 803-04 n.17 (S.D.N.Y. 1966) (noting that if the defendant was a contractor of the government, as opposed to a private individual, the defendant might be absolved of all liability when the government was immune), *aff’d*, 380 F.2d 274 (2d Cir. 1967).

⁸⁷ 295 F.2d 14 (9th Cir. 1961).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 15.

⁹¹ The plaintiff, Guy F. Atkinson Co., alleged negligence on two grounds respecting

government contract defense⁹² to avoid liability.⁹³

In rejecting the defense, the Ninth Circuit pointed out that it was only applicable where the acts complained of were required by the contract.⁹⁴ The contract in question was completely "silent as to details."⁹⁵ Thus, the court found there was no "government directive" to do those acts charged against the contractor as negligent.⁹⁶ It added "[that it found] no evidence of government compulsion with respect thereto. It is elementary that *compulsion* must exist before the 'government contract defense' is available."⁹⁷ The court also recognized as a general rule that the plans and specifications must be drawn and adopted prior to the formation of the contract⁹⁸ and that if these conditions are satisfied, the parties damaged must seek relief from the government, not the con-

struction of the temporary upstream dam. Three counts of negligence were alleged concerning the supervision of the water level. *Id.* at 15-16.

⁹² The Ninth Circuit in *Merritt* phrased the defense in terms of the government "contract" defense. *See, e.g., Merritt*, 295 F.2d at 15. Recently, however, the term government "contractor" defense has been employed. *See, e.g., McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983); *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3rd Cir. 1982).

⁹³ *Merritt*, 295 F.2d at 15-16.

⁹⁴ *Id.*

⁹⁵ *Id.* at 15.

⁹⁶ *Id.* at 16.

⁹⁷ *Id.* (emphasis in original). *Cf. Green v. ICI America, Inc.*, 362 F. Supp. 1263, 1266 (E.D. Tenn. 1973) (holding that the defendant contractor was entitled to share in the immunity of the United States because of the "high degree of control and supervision" the Army exercised over the defendants manufacturing operations). *See also Boeing Airplane Co. v. Brown*, 291 F.2d 310, 316-17 (9th Cir. 1961) (not addressing the government contractor defense, but refusing to find intervening negligence on the part of the Air Force in failing to discover a design defect and order its correction, where Boeing did not rely upon the Air Force inspections in its manufacturing process).

⁹⁸ *Accord, O'Keefe v. Boeing Co.*, 335 F. Supp. 1104 (S.D.N.Y. 1971). *O'Keefe* involved the crash of a B-52. The court determined that the negligence of Boeing in the design and production of the aircraft had not been established. Although the court did not explicitly address the government contractor defense, it stated that the government's responsibility for the design of the bomber:

"neither exonerates the defendant, nor has it in any way altered the defendant's duty as a manufacturer in this case where there has been no showing that the defendant was totally oblivious of and/or aloof from the genesis of the design specifications in the first place or that the specifications represented either something less than the uppermost level of the art or a compromise of safety."

Id. at 1124 (court's footnotes omitted).

tractor.⁹⁹ The court said that an exception existed, however, where the work was done in a careless or negligent manner.¹⁰⁰

Two years after *Merritt*, the Ninth Circuit again faced the assertion of the government contractor defense in *Myers v. United States*,¹⁰¹ another construction case. The contractor in *Myers* was constructing a public road through the plaintiffs' lands.¹⁰² The plaintiffs sued in trespass for acts done by the contractor allegedly outside of the right of way of the United States.¹⁰³ In holding that the contractor defense barred recovery, the court stated that to the extent the contractor acted in conformity with the terms of its contract, it would suffer no liability.¹⁰⁴ On this occasion, the court made no mention of the necessity of showing compulsion before one could avail himself of the defense.¹⁰⁵ In fact, the court only indicated that the defense would not be available when a contractor acted "over and beyond" the terms of the contract, or did not act in accordance therewith.¹⁰⁶

Although the government contractor defense was first recognized in cases involving construction projects, it has recently been extended to cases involving military equipment as well.¹⁰⁷ For example, in *Casabianca v. Casabianca*,¹⁰⁸ a dough

⁹⁹ *Merritt*, 295 F.2d at 16.

¹⁰⁰ *Id.* E.g., *Green v. ICI America Inc.*, 362 F. Supp. 1263, 1266 (E.D. Tenn. 1973) (applying Tennessee law which recognized that a government contractor is not liable except when guilty of negligence in performing its work); *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447, 450 (S.D.N.Y. 1964) (stating that an intentional omission of safety devices from the government contract could not give rise to liability while negligent execution of the contract could); *Valley Forge Gardens v. James D. Morrissey, Inc.*, 385 Pa. 477, 123 A.2d 888, 891 (1956) (not shielding government contractors from liability for negligent or wilful torts committed during the performance of the contract). See *supra* text accompanying note 82.

¹⁰¹ 323 F.2d 580 (9th Cir. 1963).

¹⁰² *Id.* at 581.

¹⁰³ *Id.* at 581-82.

¹⁰⁴ *Id.* at 583. *Accord*, *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1963). The question presented in *Dolphin Gardens* was whether the contractor could be held liable for the negligence of the government in failing to provide in the contract certain safeguards to protect nearby property owners from the adverse effects of dredging operations performed by the contractor. The court held that the contractor was not liable for the omission of the government. *Id.* at 827.

¹⁰⁵ *Myers*, 323 F.2d at 583.

¹⁰⁶ *Id.* See *supra* note 101.

¹⁰⁷ When the government contractor defense has been applied to cases involving

mixer originally manufactured for the Army during World War II injured an infant several years later while it was being operated in a pizza shop.¹⁰⁹ The infant plaintiff brought suit in a New York state court alleging faulty design as the cause of his injuries.¹¹⁰ The trial court, therefore, faced the narrow question of whether liability for design defects should be imposed upon the supplier of equipment to the Armed Forces during the time of war.¹¹¹ Since the machine was manufactured in accordance with governmental specifications, the court determined as a matter of public policy¹¹² that no liability should be imposed.¹¹³ The court stated that a supplier of the military in the time of war should rely upon the government's specifications because a supplier could not withhold from the armed forces equipment it believed to be imprudently or even dangerously designed.¹¹⁴ Given these unique circumstances, the court held that conformance to contractual specifications was a complete defense to any action based on defective design.¹¹⁵

Similarly, in *Sanner v. Ford Motor Co.*,¹¹⁶ the plaintiff was

military equipment, additional policy factors supporting the defense have been expressed. See *supra* note 85 (outlining the basic policy factors underlying the defense). See *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). One policy consideration the "*Agent Orange*" court saw as favoring the application of the defense was the unfairness which could result if liability were imposed on manufacturers of military equipment. The court pointed out that manufacturers could be compelled by federal law to produce military equipment without the ability to negotiate specifications, contract prices, or terms. The suppliers in such a situation would, according to the court, face choosing between penalties for failure to supply war products and potential liability for flaws in the government plans. *Id.* at 794.

¹⁰⁸ 104 Misc. 2d 348, 428 N.Y.S.2d 400 (N.Y. Sup. Ct. 1980).

¹⁰⁹ *Casabianca*, 428 N.Y.S.2d at 401.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 401-02.

¹¹² See *supra* note 108.

¹¹³ *Casabianca*, 428 N.Y.S.2d at 402.

¹¹⁴ *Id.*

¹¹⁵ *Id.* But see *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969). The Fifth Circuit refused to recognize the government contractor defense in *Whitaker*, which involved injuries to a serviceman caused by a defective hand grenade. *Id.* at 1012. The court determined that the defendant was "an independent contractor, separate from the government" and not entitled to sovereign immunity. *Id.* at 1015.

¹¹⁶ 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

injured when he was thrown out of an Army jeep.¹¹⁷ The vehicle had been manufactured by Ford in accordance with government engineering specifications and sold directly to the United States Army.¹¹⁸ The plaintiff alleged several design defects, but the only viable allegation against Ford was that the jeep should have been manufactured with seat belts.¹¹⁹ The New Jersey trial court, in denying recovery for the alleged design defect, held that reliance on a government contract was a defense to claims of both negligence and strict liability.¹²⁰

The *Sanner* court reasoned that Ford could not exercise "discretion" in the installation of safety devices in jeeps it produced.¹²¹ The omission of seat belts had been intentionally imposed by the specifications of the government through its contract with Ford.¹²² Moreover, the court stated that the procurement of military equipment was made under the government's war powers and its "inherent right and obligation to maintain an adequate defense posture."¹²³ If liability were imposed on a government contractor which had strictly complied with plans provided by the Army, the court reasoned, the government's ability to "formulate policy and make judgments pursuant to its war powers"¹²⁴ would be seriously impaired.¹²⁵ The court likewise noted that the government, not Ford, is vested with "the responsibility of deciding the nature and type of military equipment which best suits its needs."¹²⁶

¹¹⁷ *Sanner*, 364 A.2d at 44. The plaintiff was apparently not a member of the armed forces. See *Sanner*, 364 A.2d at 44. Nevertheless, the Government had immunity in this case under the "discretionary function" exception to the Federal Tort Claims Act. See *Sanner*, 381 A.2d at 806. Compare 28 U.S.C. § 2680(j) (1976) (retaining immunity for "claims arising out of the combatant activities of the [Armed Forces] during time of war") with 28 U.S.C. § 2680(a) (1976) (retaining immunity for claims based on a government employee's performance or failure to perform a discretionary function).

¹¹⁸ *Sanner*, 364 A.2d at 44.

¹¹⁹ *Id.* at 44-45.

¹²⁰ *Id.* at 45-46.

¹²¹ *Id.* at 47.

¹²² *Id.* at 45-46.

¹²³ *Id.* at 47.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* The issue of judicial intrusion into military decisions appears to have been treated uniformly by the courts in whatever context it has appeared. For example, the

A more recent treatment of the government contractor defense in a military context was set out in *In re "Agent Orange" Product Liability Litigation*.¹²⁷ In order to better focus the issues in this complex litigation, the federal district court hearing the case had ordered the parties to submit briefs setting forth their positions as to the elements of the government contractor defense.¹²⁸ The plaintiffs made the novel argument that the government contractor defense was not available when the contractor had any role, either directly or indirectly, in preparing the specifications for "Agent Orange,"¹²⁹ and when the government lacked knowledge or expertise of the hazards of "Agent Orange" commensurate with that of the manufac-

United States Supreme Court refused on constitutional grounds to allow judicial review by a federal court over the training, weaponry, and orders of the National Guard following the Kent State riots in 1970. The Court reasoned that these areas "embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government." *Gilligan v. Morgan*, 413 U.S. 1, 7 (1972). The Ninth Circuit characterized the review of military decisions as to whether a draftee was a conscientious objector as "the narrowest known to law." *Morrison v. Larsen*, 446 F.2d 250, 253 (9th Cir. 1971). Another court expressed strong reservations about second-guessing military procurement practices that were allegedly anti-competitive even in light of a Congressional mandate to the Armed Forces to provide the maximum extent of competition in its purchases. *Aero Corp. v. Department of the Navy*, 493 F. Supp. 557, 568 (D.D.C. 1981). The "*Agent Orange*" court expressed its position on this question as it relates to a products liability case, saying:

Courts should not require suppliers of ordnance to question the military's needs or specifications for weapons during wartime. Whether to use a particular weapon that creates a risk to third parties, whether the risk could be avoided at additional cost, whether the weapon could be made safer if a longer manufacturing time were allowed, indeed, whether the weapon involves any risk at all, are all proper concerns of the military which selects, buys and uses the weapon. But they are not sources of liability which should be thrust upon a supplier, nor are they decisions that are properly made by a court.

In re "Agent Orange" Product Liability Litigation, 534 F. Supp. 1046, 1054 (E.D.N.Y. 1982). See *infra* notes 128-139 and accompanying text.

¹²⁷ 534 F. Supp. 1046 (E.D.N.Y. 1982). The litigation involved claims of 2.4 million servicemen for injuries allegedly caused by exposure to the contaminated defoliant "Agent Orange" in Vietnam. Note, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. REV. 601, 602 (1980). The case had not yet gone to trial when the *McKay* decision was handed down. *McKay v. Rockwell*, 704 F.2d 444, 459 (9th Cir. 1983) (Alarcon, J., dissenting).

¹²⁸ "*Agent Orange*," 534 F. Supp. at 1053.

¹²⁹ *Id.* at 1054. "Agent Orange" is the term used by the court to collectively refer to a variety of herbicides including Agents Orange, Pink, Purple, and Green. *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 786 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

turer.¹³⁰ The defendants contended, on the other hand, that the defense should be available if the United States established specifications for "Agent Orange" and those specifications were met.¹³¹ The court rejected each party's formulation of the defense.¹³²

Instead, the district court ruled that the defense would shield the defendant contractor from liability were it to prove the following: first, that the government established the specifications¹³³ for "Agent Orange"; second, that the defendants manufactured the "Agent Orange" in accordance with the government's specifications in all material respects;¹³⁴ and third, that the government knew at least as much as the defendants about the hazards of "Agent Orange."¹³⁵ In formulating its standard, the court stated that it was compelled by public policy to add as a requisite of the defense that a contractor inform the military of the known risks of a particular weapon in order to prevent insulating a contractor from liability for harm which would never have occurred if the military had been informed of the hazards known to the contractor.¹³⁶ In addition, the court noted that the defense was premised on the inherent unfairness of imposing liability upon a contractor merely supplying the government with the material that it required.¹³⁷ Hence, the court stated that the defendant must also prove that the product was in fact a product for which the government established specific characteristics and that the government directives were not merely general specifications for gauging manufacturer

¹³⁰ "Agent Orange", 534 F. Supp. at 1054.

¹³¹ *Id.*

¹³² *Id.* at 1055.

¹³³ The court distinguished a contract that "set forth merely a 'performance specification'" from one which set forth a "specified product." It said that the defense would be far more restricted in the former case rather than the latter, implying that relative degrees of specificity in contracts could affect the degree to which a defendant was shielded from immunity. *Id.* at 1056.

¹³⁴ *Id.* at 1055. See *supra* note 101 and accompanying text (distinguishing between cases involving manufacturing defects and design defects).

¹³⁵ "Agent Orange", 534 F. Supp. at 1055.

¹³⁶ *Id.* at 1055.

¹³⁷ *Id.* at 1056.

performance.¹³⁸

C. *Strict Products Liability as Applied to the Government Contractor*

Strict products liability arose because of the inadequacies of the remedies historically available to the consumer harmed by a defective product.¹³⁹ Its theoretical justifications, likewise, have been grounded in reference to the protection of the consumer.¹⁴⁰ Yet the theory has been advanced in cases in-

¹³⁸ *Id.*

¹³⁹ Compare Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114-34 (1960) (advocating the adoption of strict products liability by pointing out the difficulties with recovery under negligence and warranty) with Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799-800 (1966) (predicating the "explosion" of strict products liability upon the public interest in the maximum protection for the consumer). Prior to products liability, negligence and warranty theories provided, for most items, a plaintiff's only possible means of redress. Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1110-14 (1960). Negligence proved to be unsatisfactory in compensating for harm by products because of the difficulties in actually proving negligence on the part of one of several independent entities in the modern manufacturing and distribution systems. *Id.* at 1116-17. Warranty theory, on the other hand, became recognized more often as a deterrent to establishing liability rather than an aid. *Id.* at 1127-28. Privity of contract under the common law was a predicate for recovery on a warranty, limiting those who could recover under this theory to the parties to the sale. *Id.* at 1128-29. Furthermore, the seller traditionally could disclaim any warranty, thus limiting his liability or even the buyer's remedies if liability were established. *Id.* at 1131-32.

¹⁴⁰ In *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), Justice Traynor became the first to establish strict liability in tort without regard to negligence or warranty. Traynor stated that the purpose of strict liability was to insure that the costs of harm caused by defective products are borne by the manufacturers who placed the products on the market rather than by the injured person. 377 P.2d at 901, 27 Cal. Rptr. at 701. In his concurring opinion in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 441 (1944), Traynor had previously reasoned that the manufacturer should bear the burden of loss from defective products because it can best insure against such loss and distribute the cost of such losses among the public as a cost of doing business. This justification for strict liability was recognized as the enterprise liability theory in *Wights v. Staff Jennings, Inc.*, 241 Or. 301, 405 P.2d 624, 627-28 (1965).

Since *Greenman* and the inclusion of section 402A in the Restatement (Second) of Torts, courts and legal scholars have identified at least four principles underlying strict products liability. Note, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?*, 33 STAN. L. REV. 535, 537 (1981). The first is enterprise liability. *Id.* Under this theory, losses to society created or caused by an enterprise should be borne by that enterprise. *Id.* Once strict liability is imposed, the product's price would reflect the costs of all harm resulting from defects in the product. *Id.* If the product's price fully reflects all the costs which that product imposes on society, the laws of

volving military as well as consumer products.¹⁴¹ The Eighth Circuit considered the applicability of the principles supporting products liability in cases involving military equipment in *Foster v. Day & Zimmerman, Inc.*¹⁴² The plaintiff, seriously injured when a hand grenade exploded in his hand during military training, filed suit against both the manufacturer of the fuse in the grenade and the assembler of the grenade.¹⁴³ The plaintiff prevailed in federal district court against both defendants on a strict products liability theory¹⁴⁴ for manufacturing defects in the grenade.¹⁴⁵

On appeal the defendants contended that the application

supply and demand will effect a more efficient allocation of resources. *Id.* at 537. A second justification is market deterrence. *Id.* Strict liability imposes costs upon producers to encourage the elimination of product defects. *Id.* Because the costs of injuries will be taken from the profits of manufacturing, producers have an incentive to supply safer products. *Id.* at 539. Compensation is another basis for strict liability. *Id.* While the cost of an injury may be overwhelming to the injured person, the manufacturer can insure against the risk of injury and distribute this cost to the consuming public. *Id.* at 543. Finally, implied representation is considered a part of the rationale behind products liability. *Id.* By offering to sell a product, a manufacturer impliedly represents that the product is not unreasonably dangerous. *Id.* If the product is defective, strict liability compensates for the lost expectations of the consumer. *Id.* at 544 & n.42.

¹⁴¹ The most recent assertion of the government contractor defense in a case involving a military product was in *In re Air Crash Disaster at Mannheim, Germany*, on September 11, 1982, 575 F. Supp. 521 (E.D. Pa. 1983) (ordering, among other things, the application of Pennsylvania law to all cases on the issue of liability in response to pretrial motion). The case arose following the crash of an Army CH-47 Chinook helicopter carrying several members of the French national skydiving team. The crash was caused by design defects in one of the helicopter's rotor transmissions. NAT'L L.J., Dec. 12, 1983 at 3, col. 2. At the close of the trial, the trial judge apparently charged the jury that it could find liability if it found that the manufacturer of the helicopter, the Boeing Company, had final control over the design. *Id.* Presented only with the question of liability, the jury found for the plaintiffs and against Boeing. *Id.*

¹⁴² 502 F.2d 867 (8th Cir. 1974).

¹⁴³ *Id.* at 869. The Day and Zimmerman Company assembled the grenade. The Mason and Hanger-Silas Mason Company, also a defendant, manufactured the fuse. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 873-74 & n.5. The Court of Appeals distinguished strict liability claims against the manufacturer of a product which did meet the contract specifications and a product which did not meet all requirements. It stated: "The doctrine of strict liability is not a doctrine of liability without fault. It merely removes the necessity for proving negligence." *Id.* at 874. "The government's specifications did not call for the defendant to assemble a defectively made grenade." *Id.* at 874 n.5. "The doctrine of sovereign immunity may not be extended to cover the *fault* of a private corporation, no matter how intimate its connection with the government." *Id.* at 874 (emphasis added). See *supra* note 101.

of strict products liability was not proper under the facts of the case.¹⁴⁶ They argued that the public interest in discouraging the entry of defective products into the stream of commerce¹⁴⁷ was not implicated in this case¹⁴⁸ because the fuse and grenade were manufactured exclusively for the government and were never placed in the stream of commerce.¹⁴⁹ The court reasoned otherwise.¹⁵⁰ It first pointed out that strict liability had been adopted primarily because of the "justice of imposing the loss on the one creating the risk and reaping the profit."¹⁵¹ The court concluded that the public interest in protecting human life required that the law protect against defective explosives whether they were used by the public or by those in the armed forces.¹⁵² The court considered the fact that the defendants profited from its sales of military equipment more persuasive than the fact that they did not solicit the public to use their product.¹⁵³

The application of products liability to sales of military equipment was taken a step further in *Challoner v. Day & Zimmerman, Inc.*¹⁵⁴ The plaintiff in *Challoner* was injured by the premature explosion of an artillery shell in Cambodia during the Vietnam conflict.¹⁵⁵ The trial court allowed recovery under strict liability principles.¹⁵⁶ Before the Fifth Circuit, the defendants objected to an instruction indicating that the

¹⁴⁶ *Id.* at 871.

¹⁴⁷ See generally *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (abandoning privity of contract and imposing strict liability under a warranty theory for products entering the stream of commerce).

¹⁴⁸ *Foster*, 502 F.2d at 871.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 871-72.

¹⁵¹ *Id.* at 871 (quoting *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965)).

¹⁵² *Foster*, 502 F.2d at 871.

¹⁵³ *Id.* In answer to the defendant's arguments, the court stated that "the defendants here did not solicit the use of their product, yet they most certainly did reap the profits from its production." *Id.* See *supra* note 141 for a discussion of enterprise liability.

¹⁵⁴ 512 F.2d 77 (5th Cir.), *rev'd on other grounds*, 423 U.S. 3 (1975).

¹⁵⁵ *Challoner*, 512 F.2d at 78.

¹⁵⁶ *Id.* The court of appeals agreed with the district judge that Texas choice-of-law rules should not apply although Texas was the place of the forum. *Id.* at 82. The Supreme Court held that Texas choice-of-law rules should apply. *Challoner*, 423 U.S. at 4-5.

jury should have found the defendant liable if it found that the shell was defectively designed.¹⁵⁷ The design of the shell was exclusively controlled by the government,¹⁵⁸ thus, the defendants maintained that the instruction was erroneous.¹⁵⁹ The court held, however, that strict liability does not require a manufacturer's act to be the cause of the defect. Rather, the court thought the manufacturer should be liable if the product was defective when it left the manufacturer's control.¹⁶⁰ As in *Foster v. Day & Zimmerman*, the Fifth Circuit likewise was persuaded that enterprise liability¹⁶¹ justified the

¹⁵⁷ *Challoner*, 512 F.2d at 82.

¹⁵⁸ *Id.* at 79. An agent of Day and Zimmerman testified that the ammunition was made precisely according to government design and that a government-approved inspection had been followed as well. *Id.*

¹⁵⁹ *Id.* at 82. One of the cases cited by the defendant was *Ryan v. Feeney & Sheehan Bldg. Co.*, 239 N.Y. 43, 145 N.E. 321 (1924). See *supra* note 87. The defense recognized in *Ryan*, which is similar to the government contractor defense, was held to be limited to claims grounded in negligence. *Challoner*, 512 F.2d at 83.

¹⁶⁰ *Id.* The court relied upon cases applying strict liability to those other than the manufacturer who were in the chain of distribution. *E.g.*, *McKisson v. Sales Affiliates*, 416 S.W. 2d 787, 790 n.3 (Tex. 1967). One of the first cases to apply strict liability in such a manner was *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). The court in this case said: "[S]trict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship." 391 P.2d at 172, 37 Cal. Rptr. at 900.

¹⁶¹ See *supra* note 141. The Oregon Supreme Court, however, declined to adopt strict products liability solely on the theory of enterprise liability. It held:

The rationale of risk spreading and compensating the victim has no special relevancy to cases involving injuries resulting from the use of defective goods. The reasoning would seem to apply not only in cases involving personal injuries arising from the sale of defective goods, but equally to any case where an injury results from the risk creating conduct of the seller in any stage of the production and distribution of goods. Thus a manufacturer would be strictly liable even in the absence of fault for an injury to a person struck by one of the manufacturer's trucks being used in transporting his goods to market. It seems to us that the enterprise liability rationale employed in the *Escola* [sic] case proves too much and that if adopted would compel us to apply the principle of strict liability in all future cases where the loss could be distributed.

Wights v. Staff Jennings, Inc., 241 Or. 301, 405 P.2d 624, 628 (1965) (emphasis in original). The causation problems associated with enterprise liability as illustrated in *Wights* were also noted in Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976). The author of this article stated that the problem encountered under enterprise liability was that no compensable tort loss is ever the result of only

imposition of strict liability.¹⁶²

Other courts, however, have not been so eager to apply strict liability to products supplied pursuant to government contractual specifications. In *Littlehale v. E.I. du Pont de Nemours & Co.*,¹⁶³ the theory was examined in a suit arising from the premature explosion of a blasting cap manufactured by Du Pont for the War Department.¹⁶⁴ The plaintiffs in *Littlehale* brought an action under a theory of strict products liability against Du Pont for failure to warn of the dangers of the caps.¹⁶⁵ Ruling in favor of Du Pont on a motion for summary judgement, the federal district court found that Du Pont had complied with all applicable government specifications¹⁶⁶ but grounded its decision upon the fact that Du Pont owed no duty to warn the plaintiffs of the dangers.¹⁶⁷ The court went on, however, to distinguish the facts of this case from the "typical" products liability case¹⁶⁸ where the manufacturer exercises sole discretion over the method of manufacture as well as all other details involved in production.¹⁶⁹ The court recognized that a defense to strict liability existed for an independent contractor¹⁷⁰ directed to

one enterprise. The author pointed out that the theory of enterprise liability does not provide a "rational answer" to which enterprise caused the loss. *Id.* at 162.

¹⁶² See *Challoner*, 512 F.2d at 84. In discussing the sufficiency of the evidence pertaining to the shell's defects, the court in *Challoner* only mentioned manufacturing defects. See *Challoner*, 512 F.2d at 83. The omission of any mention of design defects has lead one court to state that the true holding in *Challoner* may have been limited to manufacturing defects. See *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y. Supp. 2d 400, 402 (N.Y. Sup. Ct. 1980).

¹⁶³ 268 F. Supp. 791 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (3rd Cir. 1967).

¹⁶⁴ *Id.* at 793.

¹⁶⁵ *Id.* at 793, 798.

¹⁶⁶ *Id.* at 795.

¹⁶⁷ *Id.* at 801.

¹⁶⁸ "Failure to warn" was recognized as sounding in tort in the law of strict products liability. *Id.* at 797. See *Hunt v. Balsius*, 55 Ill. App. 3d 14, 370 N.E.2d 617, 620 (1977) (noting that *Littlehale* was decided as a strict liability case although not expressly stated as such in the opinion), *aff'd*, 74 Ill. 2d 203, 384 N.E.2d 368 (1979).

¹⁶⁹ *Littlehale*, 268 F. Supp. 802-3 n.16.

¹⁷⁰ Although *Littlehale* involved a suit against a contractor of the United States, the court spoke of the contract specification defense that was recognized in *Ryan v. Feeney & Sheehan Bldg. Co.* as available to independent contractors. *Littlehale*, 268 F. Supp. at 802-04 nn.16-17; see *supra* note 87. Plaintiff *Littlehale* was a civilian employed by the Navy in connection with certain tests being conducted aboard a Navy ship. Plaintiff *Zelanko*, a seaman, was a mere bystander. *Littlehale*, 268 F. Supp. at 793. Although

comply with contract specifications where those specifications were actually satisfied.¹⁷¹ The court explained that under this defense, liability, if it does exist, remains with the party whose plans were followed.¹⁷²

Although the court found there was no liability without resorting to any defenses to strict liability,¹⁷³ it elaborated upon the nature of the case before it and the law applicable thereto. The court said:

[The case presented] is not a case involving a product manufactured for sale or resale to the general public. It is not a case involving negligence in the manufacture, design or use of materials. It is not a case where the manufacturer had any freedom of choice as to manufacture, design or use of materials It is a case where the product was manufactured during wartime in accordance with detailed specifications for use by a particular branch of the Government¹⁷⁴

the issue was not raised, it is arguable in light of the court's analysis that the United States would not have been immune from liability to one or both plaintiffs under the FTCA; therefore, Du Pont should not have been immune under the traditional government contractor defense. See *Littlehale* 268 F. Supp. at 802-04 nn.16-17.

¹⁷¹ *Littlehale*, 268 F. Supp. at 803 n.16. The court considered this defense applicable to strict products liability in light of the fact that the contract requirements were followed in a proper manner. *Id.* The court distinguished *Montgomery v. Goodyear Tire & Rubber Co.*, 221 F. Supp. 447 (S.D.N.Y. 1964), where contract specifications were followed in a negligent manner. *Littlehale*, 268 F. Supp. at 803 n.16.

¹⁷² *Id.*

¹⁷³ *Id.* at 804 n.17.

¹⁷⁴ *Id.* at 801-03 (footnotes omitted). See also *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D.N.Y. 1971). *Kropp* involved a claim of negligence in the design of an aircraft manufactured by Douglas for the Navy. *Id.* at 450. The court characterized the process of designing a military aircraft by stating:

The dealings between the appropriate agency of the Government and the designer and manufacturer of the plane can be analogized to the person who orders a tailor-made suit and the tailor. The designing of a combat plane is a lengthy process covering approximately five years from the concept of the plane to its manufacture for production and use [citation omitted]. The design of such a plane begins rather informally with an idea or suggestion which may emanate either from the manufacturer or the Government — usually the latter. The gamut of plane design and construction runs from idea to design to mock-up to prototype to test work and culminates in a production craft. Along this road, many modifications and changes are suggested and considered; some are accepted; some are rejected. But there comes a time when the design is "frozen" and production begins. The order to freeze the design, in the instant case, was that of the Chief of Naval Operations.

Id. at 456. The economics of military procurement are also much different than those

In summation, the court expressed its opinion that a party acting in accordance with plans provided in a contract with the government is at the very least not judged by the same standards as an ordinary manufacturer and at the most is insulated from any liability.¹⁷⁵

The reasoning in *Littlehale* was adopted in *Hunt v. Blasius*.¹⁷⁶ The "product" in *Hunt* was a sign pole erected on an interstate highway by the defendant according to the design furnished by the State of Illinois.¹⁷⁷ The plaintiffs were the occupants and the survivors of the deceased occupants of a car which had crashed into the pole.¹⁷⁸ They claimed under a theory of products liability that anchoring the pole with solid steel and concrete within three feet of the highway was unreasonably dangerous.¹⁷⁹ The trial court granted a motion for summary judgment in favor of the defendants.¹⁸⁰ The Illinois Court of Appeals affirmed trial court's decision.¹⁸¹ The appellate court agreed with the idea of testing a manufacturer acting under the plans and specifications of another by a different standard than that of an ordinary manufacturer acting under his own discretion.¹⁸² The court denied liability even though all persons in the chain of distribution are liable regardless of fault under Illinois law.¹⁸³ The court stated that the policy behind products liability was formulated in reference to products manufactured and sold for use by the general public, not for use by a government entity which had products manufactured in accordance with its

prevailing in the private sector. See *Economics of Defense Policy: Adm. H.G. Rickover, Hearing before the Joint Economic Committee*, 97th Cong., 2d Sess., pt. 2 at 16, 22 (1983).

¹⁷⁵ *Littlehale*, 268 F. Supp. at 804 n.17.

¹⁷⁶ 55 Ill. App. 3d 14, 370 N.E.2d 617 (1977), *aff'd*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978).

¹⁷⁷ 370 N.E.2d at 618.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* It was undisputed by all of the parties, however, that the sign was manufactured and installed in accordance with the plans. The plaintiffs' theories of recovery included strict liability for the defective design of the pole. *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 621.

¹⁸³ *Id.*

specifications.¹⁸⁴

The court also pointed out that government contracts are different in their essence from private undertakings. Government contracts are let through open bidding in order to preserve tax revenues.¹⁸⁵ If liability were imposed, the court determined, bids would simply be raised to offset potential liability.¹⁸⁶ The Illinois court, therefore, concluded that "public policy dictates that bidders who comply with government specifications should be shielded from liability in any respect in which the product complies."¹⁸⁷

II. *McKAY V. ROCKWELL INT'L CORP.*

Until *McKay* came before the Ninth Circuit, an appellate court had never squarely considered whether the government contractor defense was applicable to products liability claims involving design defects in military equipment.¹⁸⁸ The court, therefore, commenced its analysis of the controlling law with the *Feres-Stencel* doctrine.¹⁸⁹ It reiterated that the principles underlying this doctrine shielded the United States from direct tort liability and similarly precluded indemnification of a manufacturer for damages that it incurred.¹⁹⁰

Consequently, the question posed by the court was whether a supplier of military equipment should be required to bear the "entire burden of the liability to an injured serviceman."¹⁹¹ The court recognized that the government contrac-

¹⁸⁴ *Id.* The case cited for the policy behind strict products liability and distinguished in this design defect case is *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965). *Suvada* is the authority relied upon in *Foster v. Day & Zimmerman* in applying strict liability in a government contract context for manufacturing defects. See *supra* text accompanying note 152.

¹⁸⁵ 370 N.E.2d at 621.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* But see Comment, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 U. CHI. L. REV. 1030 (1981) (concluding that the defense should not apply in strict liability cases where the contractor did not act under compulsion).

¹⁸⁸ See NAT'L L.J., Dec. 12, 1983, at 3, col. 2 (noting the "dearth of detailed appellate considerations of the defense" in the context of military products).

¹⁸⁹ See *supra* notes 46-72 and accompanying text.

¹⁹⁰ *McKay v. Rockwell*, 704 F.2d at 448.

¹⁹¹ *Id.* This question was addressed in Finn & Martin, *Strict Liability in Military Aviation Cases—Should it Apply?*, 48 J. AIR L. & COM. 347, 351 (1983). The authors there

tor defense had emerged to protect a contractor in compliance with government specifications from liability where the government was immune from liability.¹⁹² Moreover, the court found the reasons for applying the defense to suppliers of military equipment whose design was approved by the government parallel the principles underlying the *Feres-Stencel* doctrine.¹⁹³

The fact that the United States is not liable to servicemen, either directly or indirectly, under *Stencel*,¹⁹⁴ received primary emphasis.¹⁹⁵ The court reasoned that holding a government contractor liable, without regard to the extent of the government's involvement in the product's design, would indirectly expose the government to liability.¹⁹⁶ This liability would arise, the court said, because contractors would pass on the costs of accidents through cost overrun provisions in contracts, add the price of liability insurance¹⁹⁷ to their contracts, or simply charge higher prices in later equipment sales.¹⁹⁸

The court also applied the rationale of *Stencel* to conclude that holding military contractors liable for those design defects which were approved by the government would "thrust the judiciary into the making of military decisions."¹⁹⁹ It viewed the questioning of military actions and decisions and its deleterious effects on military discipline with the same dis-

were apparently being published as the opinion in McKay was handed down. Nevertheless, both were in agreement that the policies behind strict liability do not justify its extension to manufacturers of military aircraft in design defect cases. See *McKay v. Rockwell*, 704 F.2d at 451-53; Finn & Martin, *Strict Liability in Military Aviation Cases—Should It Apply?*, 48 J. AIR. L. & COM. 347, 349-58 (1983).

¹⁹² 704 F.2d at 448.

¹⁹³ *Id.* at 449.

¹⁹⁴ See *supra* text accompanying notes 57-63.

¹⁹⁵ 704 F.2d at 449.

¹⁹⁶ *Id.*

¹⁹⁷ See Note, *supra* note 141, at 543 n.39 (stating that products liability insurance is often unavailable or unaffordable in a number of industries).

¹⁹⁸ 704 F.2d at 449. The court quoted from *Stencel*, saying that liability on behalf of government contractors would "judicially admit at the back door that which has been legislatively been turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." *Id.* (quoting *Stencel*, 431 U.S. at 673); see *supra* text accompanying note 70.

¹⁹⁹ 704 F.2d at 449.

pleasure as the Supreme Court in *Stencel*.²⁰⁰ In addition, the court noted that national security could be compromised by judicial intrusion into the military decision-making process and that separation of powers could become a concern if the judiciary sought review of the military decisions themselves.²⁰¹

The court, however, considered two significant factors, which were not addressed in *Feres* or *Stencel*, in its decision as to the applicability of the government contractor defense. First, in setting specifications for military equipment, the Government attempts to push technology to its limits and incurs risks far beyond those found in consumer goods.²⁰² The court added that manufacturers supplying military equipment are often unable to negotiate the reduction of those risks.²⁰³ Second, the government contractor defense provides incentives for suppliers to work closely with military authorities to fix precisely the responsibility for military equipment design.²⁰⁴ As the court explained, the defense is inapplicable where only very general requirements are set out in the contract.²⁰⁵

The court held, therefore, that the government contractor defense applied to military products²⁰⁶ where, first, the gov-

²⁰⁰ *Id.*; see *supra* notes 71-72 and accompanying text.

²⁰¹ 704 F.2d at 449. See *supra* note 127 for a treatment of the authority relied upon by the *McKay* court in reaching this conclusion.

²⁰² 704 F.2d at 450. See *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964). The defendants in *Montgomery* argued that in order to keep ahead in the armaments race, sacrifice must be made on some elements of safety. The court said, "we recognize that in some cases, certain safety factors must be disregarded in order to explore new possibilities in weaponry. Similarly, it may be true that complete knowledge of all possible safety problems cannot be obtained because of the speed with which these weapons must be completed." *Id.* at 450.

²⁰³ 704 F.2d at 450 (quoting *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 794 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981)).

²⁰⁴ 704 F.2d at 450.

²⁰⁵ *Id.* See *infra* text accompanying notes 211-213. Cf. *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3d Cir. 1982) (an example of the difficulties in tracing responsibility for defects in military equipment).

²⁰⁶ 704 F.2d at 451.

ernment was immune from liability²⁰⁷ and, second, the supplier proved that the United States established or approved²⁰⁸ "reasonably precise specifications" for the equipment.²⁰⁹ The court distinguished the facts in *Merritt*²¹⁰ and its language indicating that "compulsion" was an element of the defense.²¹¹ The court determined that the contract in *Merritt* left to the discretion of the contractor the design, materials, and method of construction of the injury-causing "product."²¹² The court stated that the situation was different where, as in the present case, the United States reviewed and approved a detailed set of specifications.²¹³

A third prong of the court's holding required that, in order for the defense to be applicable, the equipment supplied must conform to government specifications.²¹⁴ Thus, the court did not shield suppliers of military equipment from liability for manufacturing defects. The court reasoned that such a rule would furnish an incentive to manufacturers to use all means to provide equipment in conformance with government specifications.²¹⁵ As a fourth requirement, the court added that the defense would only be available where the supplier warned the government about patent errors in the government's specifications or about dangers involved in the use of the equipment which were known to the supplier but not the government.²¹⁶

The court held that when these four requirements were met, the government contractor defense would bar an action in

²⁰⁷ A predicate to the government contractor defense recognized since *Yearsley* is the immunity of the government. See *supra* notes 73-82 and accompanying text.

²⁰⁸ The HS-1A was actually designed under contract by Rockwell but approved by the Navy. See Opening Brief of Defendant/Appellee at 13-14, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983); Answering and Reply Brief of Plaintiffs/Appellants at 2-6, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983).

²⁰⁹ 704 F.2d at 451.

²¹⁰ See *supra* notes 88-101 and accompanying text.

²¹¹ 704 F.2d at 450.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 451. See *supra* note 101; *supra* notes 106-107 and accompanying text.

²¹⁵ 704 F.2d at 451.

²¹⁶ *Id.*

strict liability.²¹⁷ The court reasoned that when these circumstances were present, the policy considerations behind strict liability in tort were inapposite.²¹⁸ The court supported its position by analyzing and distinguishing each policy justifying relief under the theory.²¹⁹

Enterprise liability, according to the court, rests upon two assumptions: that consumers underestimate the risks involved in a product's use, thereby overconsuming the product unless the price reflects the cost of all the harm it produces; and that demand for a product is elastic.²²⁰ The court determined that neither of these assumptions applied in sales of military equipment to the government.²²¹ The court recognized that those in the armed forces are well aware of the risks involved with military equipment.²²² The court also noted that demand for military equipment is not elastic—government purchases of military equipment are determined by military and political strategy, not sales price.²²³ The court concluded: "[m]eeting adequately the needs of national defense, not accident costs, is the ultimate standard by which purchases of military equipment must be measured."²²⁴

The court also held that the market deterrence rationale for strict products liability was not applicable to defective products supplied to servicemen.²²⁵ It relied upon the fact that the government, whose demand is inelastic, is the sole purchaser of military equipment.²²⁶ The imposition of strict liability, according to the court, would not encourage safety features but only increase defense costs since the government negotiates directly for the specifications of all equipment it

²¹⁷ *Id.* Cf. *supra* notes 155-163 and accompanying text.

²¹⁸ 704 F.2d at 451.

²¹⁹ *Id.* at 451-53. See *supra* note 141.

²²⁰ 704 F.2d at 452 (citing Note, *supra* note 141, at 537 & n.8).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

purchases.²²⁷

The court found the compensation principles underlying strict liability to be equally unpersuasive.²²⁸ It quoted from *Stencel* that servicemen were provided "a generous military compensation scheme," and "a swift, efficient remedy."²²⁹ The court thought it of controlling significance that the serviceman or his dependents would "not go uncompensated" whereas an ordinary consumer would.²³⁰

Finally, the court disposed of the implied representation justification.²³¹ It distinguished the members of the armed forces from ordinary consumers because of the servicemen's lower expectations of safety.²³² The court pointed out that, in fact, grave risks were a part of being in the service.²³³ Moreover, the court further differentiated servicemen from consumers by lauding their position in society.²³⁴ It stated: "to regard them as ordinary consumers would demean and dishonor the high station in public esteem to which, because of their exposure to danger, they are justly entitled."²³⁵

The dissent, however, disagreed in principle with the majority's opinion.²³⁶ It first objected to the extension of the governmental immunity recognized²³⁷ under the *Feres-Stencel* doctrine to private contractors. The dissent pointed out that

²²⁷ *Id.* The court also pointed out that a possible effect of increased defense costs would be a reduction in other expenditures. *Id.*

²²⁸ 704 F.2d at 452.

²²⁹ *Id.* See *supra* note 68.

²³⁰ 704 F.2d at 452.

²³¹ See *supra* note 141.

²³² 704 F.2d at 453.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* The commentators have also recognized the inapplicability of the theory of implied representation to the sale of military equipment without relying upon the same reasoning as the *McKay* court. See Finn & Martin, *supra* note 192, at 354. Implied representation rests upon the representation of safety that is implied from an offer to sell a product. See *supra* notes 139-141 and accompanying text. The commentators suggest that the government does not rely solely on the manufacturer's representations of safety when purchasing military aircraft but is involved in the design process and fully tests prototypes before purchasing any aircraft. See Finn & Martin, *supra* note 192, at 354.

²³⁶ 704 F.2d at 456-64.

²³⁷ *Id.* at 456.

neither opinion addressed nor precluded contractor liability to military personnel.²³⁸ It called attention to the fact that the Supreme Court, in a footnote to *Stencel*, had indicated that prohibiting indemnification by the government to a private contractor was not unfair because the contractor already had notice as to the risk of liability from defective products prior to any negotiations with the government.²³⁹ Furthermore, the dissent was not persuaded that contractors held liable for unsafe designs would begin passing the liability costs on to the government.²⁴⁰ The dissent determined that the competition in the process of bidding for government contracts would prevent those contractors who had suffered liability in the past from passing those costs on to the government.²⁴¹

Second, the dissent took exception to the majority's formulation of the government contractor defense.²⁴² The dissent argued that the immunity of the government should be extended only when the contractor was compelled to comply with government specifications.²⁴³ It read the previous cases extending immunity to the manufacturer of military goods as

²³⁸ *Id.*

²³⁹ *Id.* at 457. *Cf. supra* notes 195-202 and accompanying text.

²⁴⁰ 704 F.2d at 457.

²⁴¹ *Id.* at 457-58. The dissent grounded its position in the existence of a free market economy which would ensure that the transfer of liability costs from a contractor to the government would be minimized. *Id.* Admiral H.G. Rickover, however, has suggested that the economic assumptions of the dissenting judge may not reflect reality. The Admiral stated:

Competition in defense procurement is often more illusory than real. While 35 percent of the defense procurement budget is spent under contracts the Defense Department considers competitive, only about 8 percent is spent on formally advertised procurements — that is where any company may submit a bid and the contract must be awarded to the lowest responsive and responsible bidder. In some competitive procurements only two or three firms are asked to bid. In other so-called competitive procurements the competition is not based on price, but on design or other technical factors. Sixty-five percent of the defense procurement budget is awarded in contracts which the Defense Department itself labels as non-competitive.

Economics of Defense Policy: Adm. H.G. Rickover, Hearing before the Joint Economic Committee, 97TH CONG., 2D SESS., pt. 2 at 22 (1982)).

²⁴² 704 F.2d at 458.

²⁴³ *Id.* at 458-60.

limited to sales made during the time of war when the contractors had no discretion but to produce those goods according to specifications provided by the military.²⁴⁴ The dissent concluded that the majority had gone "too far" in granting immunity.²⁴⁵

III. CONCLUSION

The *McKay* decision has not only clarified the status of the government contractor defense, but it has established a practical rule of law that should endure as long as private companies provide the machinery of war to a sovereign immune from tort liability. The magnitude of potential liability from the sale of equipment designed, produced, and employed with the ultimate objective of destruction is immense. Congress has chosen to limit the government's liability through the exceptions to the FTCA.²⁴⁶ *McKay*, at last, clearly provides reciprocal treatment to the manufacturers of military equipment whose contractual relations with the government may now be predicated upon a sound legal basis. *McKay* has also recognized that the practical and constitutional limitations of the judiciary support the government contractor defense when applied to military products.²⁴⁷ Military decisions concerning the acceptability of risks in weapons, especially sophisticated weapons, are not compatible with judicial review. Those decisions are influenced heavily by political, technical, and economic considerations that are properly within the domain of the executive branch.²⁴⁸

²⁴⁴ *Id.* at 458-59. See *supra* notes 108-139 and accompanying text.

²⁴⁵ 704 F.2d at 458.

²⁴⁶ See *supra* notes 31-45 and accompanying text.

²⁴⁷ See *supra* notes 202-203 and accompanying text.

²⁴⁸ Justice Blackmun has noted the limited nature of judicial review on military matters in a case involving the judicial review of national guard orders and use of force during a riot. He stated:

This case relates to prospective relief in the form of judicial surveillance of highly subjective and technical matters involving military training and command. As such, it presents an '[inappropriate]. . . subject matter for judicial consideration,' for respondents are asking the District Court, in fashioning that prospective relief, 'to enter upon policy determinations for which judicially manageable standards are lacking.'

In short, *McKay* has redefined the government contractor defense as it applies in the sale of military products. To the extent that the previous Ninth Circuit decision in *Merritt* recognized "compulsion" as an element of the defense, it has been overruled.²⁴⁹ Now "reasonably precise specifications" are the standard. Requiring only that the contractor prove that such specifications were approved by the government is consistent with the process of negotiations between contractors and government representatives from which the details of a particular weapon finally emerge.²⁵⁰ Furthermore, contractors are now free to initiate new applications of the most advanced technology, assuring availability of the sophisticated weapons that are so vital to the maintenance of this nation's military stature. In addition, the relative knowledge of the dangers of military equipment on behalf of the contractor and the government as an element of the defense²⁵¹ adds a dimension of fairness especially germane to modern sophisticated weaponry, but not present in the bald sharing of immunity traditionally associated with the defense. Both military personnel, whose very lives may depend upon a weapon's design, and the nation as a whole stand to benefit from the resulting incentive for contractors and the military to work closely together and the consequent fact that the military will be provided with the information necessary to balance a weapon's risks and benefits.²⁵²

Gilligan v. Morgan, 413 U.S. 1, 14 (1972) (Blackmun, J., concurring) (quoting *Baker v. Carr*, 369 U.S. 186, 198, 226 (1962)).

²⁴⁹ See *supra* notes 89-101 and accompanying text.

²⁵⁰ See Opening Brief of Defendant/Appellee at 11-13, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983) (quoting from the testimony of a former manager at Rockwell who stated that the government's involvement in the design process was "enormous"). See also *supra* note 175.

²⁵¹ See *supra* note 217 and accompanying text.

²⁵² See *In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046, 1055 (E.D.N.Y.1982).

The dissent in *McKay* maintained that the immunity of the government should be extended to a contractor only when the contractor was compelled to comply with government specifications. See *supra* notes 237-246 and accompanying text. The dissent seemed to predicate its formulation of the government contractor defense on the assumption that without potential liability in the contractor, safety in the design of military equipment could not be assured. See 708 F.2d at 457-59. One recent student author echoed this thought when she observed that "[a]lthough the government is usu-

The government contractor defense is especially appropriate to strict products liability claims of design defects in military equipment. Products liability arose because of the lack of remedies available to the average consumer harmed by a defective product.²⁵³ The justifications for the theory likewise are derived in reference to the protection of the consumer.²⁵⁴ These principles are foreign to the realities that prevail in the design, sale, and use of military equipment. The only decisions allowing recovery in strict liability for defects in military equipment did so under the theory of enterprise liability.²⁵⁵ Yet sole reliance on this justification would, according to one court, favor imposing liability for harm even remotely caused by a product.²⁵⁶ The holding in *McKay*, therefore, properly allows recovery under strict liability in those situations where the government approved only general specifications or where reasonably precise specifications were not met.²⁵⁷ Only in those instances are the principles behind strict liability apposite.

McKay, however, may be less than satisfying in one respect—it fails to compensate the survivors of military personnel as fully as civilians would have been compensated in a similar disaster. But Congress has chosen to limit the government's liability to military personnel through the FTCA²⁵⁸ and the Veterans Benefit Act.²⁵⁹ Any remedy, then, for the one shortcoming in *McKay* lies not with the judiciary, whose only recourse would be to place the full brunt of liability on contractors, but with the legislature, which has the power to place liability with responsibility. It is this body, not the

ally in the best position to minimize the risk of defective design specifications, sovereign immunity reduces its incentives to calculate the costs of the risks it creates." Comment, *supra* note 188, at 1048-49 (footnotes omitted). In support of their position, however, both failed to cite any concrete evidence which would indicate that the military does not seek to preserve the safety of its personnel when making design decisions. *See generally* 704 F.2d at 456-62; Comment, *supra* note 128, at 1048-49.

²⁵³ See *supra* note 140.

²⁵⁴ See *supra* note 141.

²⁵⁵ See *supra* notes 143-163 and accompanying text.

²⁵⁶ See *supra* note 162.

²⁵⁷ See *supra* text accompanying notes 210-216.

²⁵⁸ See *supra* notes 43-45 and accompanying text.

²⁵⁹ See *supra* note 68.

courts, to which an appeal on this issue must be made. *McKay* simply offers the best available alternative within the present statutory scheme.

Roger D. Rowe

