Surrogate Immunity: The Government Contract Defense and Products Liability

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I. INTRODUCTION

The government contract defense[1] is an affirmative defense[2] that shields a

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1. Courts and commentators have used a variety of terms to describe this defense. Many courts have referred to it as the "government contractor" defense. *E.g.*, Tozer v. LTV Corp., 792 F.2d 403, 404 (4th Cir. 1986); Bynum v. FMC Corp., 770 F.2d 556, 558 (5th Cir. 1985); In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 117 (3d Cir. 1985), *cert. denied sub nom.* Eschler v. Boeing Co., 106 S.Ct. 851 (1986); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 355 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 247 (3d Cir. 1982). The court in Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 739 n.3 (11th Cir. 1985),

manufacturer from liability if the product causing injury complied strictly with design specifications set forth in a government procurement contract.[3] The defense was first used by public works contractors to bar claims against them for damage to land and other property.[4] However, in recent years, product manufacturers have invoked the government contract defense to avoid liability to third parties for defectively designed products supplied to the government.[5]

Despite widespread judicial acceptance of the government contract defense in products liability litigation, a number of issues are still being hotly debated. One controversy involves whether the government contract defense should be limited to military equipment or whether it might apply to other products such as vaccines supplied to the government under contract.[6] Another question is whether the government contract defense should be allowed when the contractor participates extensively in the design of the product.[7] In addition, the courts disagree about whether the government contract defense is controlled by state law or federal common law.[8]

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called it the "military contractor" defense. Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986). Other courts have used the term "government contract" defense. *E.g.*, Burgess v. Colorado Serum Co., 772 F.2d 844, 844 (11th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 596 (7th Cir. 1985); Price v. Tempo, Inc., 603 F. Supp. 1359, 1360 (E.D. Pa. 1985); In re All Maine Asbestos Litig., 575 F. Supp. 1375, 1377 (D. Me. 1983); Johnston v. United States, 568 F. Supp. 351, 353 (D. Kan. 1983); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 792 n.37 (E.D.N.Y. 1980), *cert. denied sub nom.* Diamond Shamrock Chem. Co., 465 U.S. 1067 (1984); Mackey v. Maremont Corp., 350 Pa. Super. 415, 419, 504 A.2d 908, 910 (1986).

2. Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985) *cert. denied*, 106 S.Ct. 72 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 453 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982), *cert. denied, sub nom.* Diamond Shamrock Chem. Co., 465 U.S. 1067 (1984); Mackey v. Maremont Corp., 350 Pa. Super. 415, 420, 504 A.2d 908, 911 (1986); Comment, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?* 36 U. MIAMI L. REV. 489, 495 (1982).

3. *E.g.*, Price v. Tempo, Inc., 603 F. Supp. 1359, 1360 (E.D. Pa. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 553 F. Supp. 340, 342 (E.D. Pa. 1982), *aff'd* 755 F.2d 352 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1986). The government contract defense is not applicable to manufacturing defects. Bynum v. FMC Corp., 770 F.2d 556, 573 (5th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

4. *E.g.*, Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18 (1940); Green v. ICI Am. Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965). *See also* Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. REV. 1025, 1049–55 (1982).

5. *E.g.*, Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985); Burgess v. Colorado Serum Co., 772 F.2d 844 (11th Cir. 1985); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); In re Air Crash Disaster at Mannheim Ger., 769 F.2d 115 (3rd Cir. 1985), *cert. denied, sub nom.* Eschler v. Boeing Co., 106 S.Ct. 851 (1986); Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986); Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982), *appeal after remand*, 741 F.2d 656 (3d Cir. 1984); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Price v. Tempo, Inc., 603 F. Supp. 1359 (E.D. Pa. 1985); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980), *and related proceeding*, 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984), *later proceeding*, 597 F. Supp. 740 (E.D.N.Y. 1984); Mackey v. Maremont Corp., 350 Pa. Super. 415, 504 A.2d 908 (1986); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764 (1983); Sanner v. Ford Motor Co., 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); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S. 2d 400 (Sup. Ct. 1980), *aff'd*, 79 A.D. 2d 1117 (1981).

6. *See infra* notes 241–60 and accompanying text.

7. *See infra* notes 272–322 and accompanying text.

8. *See infra* notes 341–78 and accompanying text.

To a large extent, the answers to these questions depend on the underlying rationale behind the government contract defense. Again, there is no consensus among courts or commentators. One theory is that the defense depends on the existence of an agency relationship between the contractor and the government.[9] A more popular explanation is that protection for contractors is necessary to carry out the policy that underlies the *Feres* doctrine.[10] Others have argued that the defense is grounded on broader considerations of sovereign immunity and separation of powers.[11]

This article takes the position that the real objective of the government contract defense is to protect governmental decisionmaking against collateral attacks in the courts. This concern is similar to the interest promoted by the discretionary function exception to the Federal Tort Claims Act.[12] The discretionary function exception prevents litigants from bringing tort suits against the government in order to challenge the correctness of policy decisions by members of the executive branch;[13] the government contract defense bars tort actions against suppliers in a similar manner when such litigation would threaten the exercise of discretion by government officials in the procurement area.[14]

It has been suggested that tort actions brought by injured parties against government contractors do not impair government decisionmaking to the same extent as suits against the government itself. If this is so, the government contract defense is not necessary to protect any governmental interest and merely insulates product manufacturers from liability at the expense of injured victims.[15] On the other hand, limitations on contractor liability are warranted in situations where such lawsuits do pose a threat to government decisionmakers. The problem, therefore, is to fashion a rule that protects the government without providing unnecessary immunity to contractors.

Part I of this article introduces some of the principles that have influenced the modern government contract doctrine and provides an overview of significant recent decisions. Part II analyzes the policies which underlie the concept of strict products liability and examines the rationale for the government contract defense. Finally, Part III discusses some aspects of the government contract defense that have not been completely resolved by the courts.

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9. *See, e.g.*, Comment, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity After* McKay v. Rockwell International Corp., 37 BAYLOR L. REV. 181, 221–25 (1985).

10. *See, e.g.*, Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986); Bynum v. FMC Corp., 770 F.2d 556, 560–63 (5th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449–50 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

11. *See, e.g.*, Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 742 (11th Cir. 1985); Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985).

12. 28 U.S.C. § 2680(a) (1976). *See infra* notes 22–35 and accompanying text.

13. Rogers, *A Fresh Look at Agency "Discretion,"* 57 TUL. L. REV. 776, 807 (1983).

14. Brown v. Caterpillar Tractor Co., 696 F.2d 246, 250 (3d Cir. 1982); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 9, 364 A.2d 43, 47 (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). *See also* Comment *supra* note 9, at 190.

15. Comment, *The Government Contractor Defense: Preserving the Government's Discretionary Design Decisions*, 57 TEMP. L.Q. 697, 719 (1984).

II. INTRODUCTORY CONCEPTS

A. *Limitations on Federal Tort Liability*

The concept of sovereign immunity prohibits a private citizen from suing the government without its consent.[16] Congress partially waived the federal government's tort immunity in 1946 when it enacted the Federal Tort Claims Act (FTCA).[17] However, the FTCA contains a number of limitations on this statutory waiver of immunity. One of these limitations is the discretionary function exception.[18] In addition, the United States Supreme Court has upheld the government's claim of immunity against liability to military personnel for service-related injuries.[19] This is known as the *Feres* doctrine.[20]

The discretionary function exception and the *Feres* doctrine are concerned with maintaining military discipline, controlling government procurement costs, and protecting the integrity of governmental decisionmaking. Although the government contract defense limits the liability of private contractors rather than the government, its underlying rationale is similar to that of the discretionary function exception and the *Feres* doctrine.[21] Therefore, it will be helpful to examine these concepts in more detail before analyzing the government contract defense itself.

1. *The Discretionary Function Exception*

Although the FTCA[22] waives the federal government's immunity against tort liability in many cases, a provision of the Act retains sovereign immunity for any claim "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."[23] The purpose of

16. Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1846); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821). *See also* Note, *Military Medical Malpractice and the Feres Doctrine*, 20 GA. L. REV. 497, 499 (1986) [hereinafter cited as Note, *Military Medical Malpractice*]; Note, *If You Can't Save Us, Save Our Families: The Feres Doctrine and Servicemen's Kin*, 1983 U. ILL. L. REV 317, 319 (1983).

17. 28 U.S.C. §§ 1291, 1346(b), (c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671–2680 (1976, Supp. 1986).

18. 28 U.S.C. § 2680(a) (1976). *See also* Comment, *Scope of the Discretionary Function Exception Under the Federal Tort Claims Act*, 67 GEO. L. J. 879 (1979).

19. Feres v. United States, 340 U.S. 135, 146 (1950).

20. *See* Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH L. REV. 1099 (1979).

21. *See* Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985); In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 121 (3d Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354(3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986); McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 250 (3d Cir. 1982); Hubbs v. United Technologies, 574 F. Supp. 96, 98 (E.D. Pa. 1983); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965); Comment, *supra* note 15, at 705–06. *But see infra* notes 189–240 and accompanying text.

22. 28 U.S.C. §§ 1291, 1346(b), (c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671–2680 (1976, Supp. 1986).

23. 28 U.S.C. § 2680(a) (1976). *See also* Harris & Schnepper, *Federal Tort Claims Act: Discretionary Function Exception Revisted*, 31 U. MIAMI L. REV. 161, 168 (1976).

this provision is to allow members of the executive branch of government to carry out policy decisions without unwarranted judicial interference.[24]

Dalehite v. United States,[25] decided in 1953, was the first Supreme Court case to interpret the FTCA's discretionary function language. The *Dalehite* decision arose out of the celebrated Texas City disaster. Shortly after World War II, the government commissioned private contractors to manufacture fertilizer from surplus explosive compounds as part of a plan to export vital materials to Europe and Asia. These contracts provided detailed specifications for the manufacture, packaging, labeling, and shipping of this fertilizer.[26] A cargo vessel loaded with fertilizer and other volatile substances exploded while in port, causing many deaths and extensive property damage in the port area of Texas City.

Many people brought suit against the United States, alleging that the government and its contractors were negligent in bagging the fertilizer at a dangerously high temperature, coating the bags with a flammable paraffin compound, and failing to label the bags properly.[27] The trial court held in the plaintiff's favor, but the circuit court reversed, holding that the government was immune from suit for injuries relating to a discretionary act by the War Department.[28] On appeal, the United States Supreme Court held that the government was immune under the discretionary function exception to the FTCA because the acts in question were mandated by decisions made at the planning rather than at the operational level.[29]

Although the planning-operational distinction is sometimes difficult to apply,[30] it remains the most widely used formula for determining when a suit is barred by the discretionary function rule.[31] Generally, planning decisions contain an evaluation of factors such as the political, economic, or social effects of a particular plan or policy.[32] Operational level decisions, on the other hand, relate to the ordinary day-to-day operations of the government.[33] Decisions at the operational level do not involve the evaluation of policy factors.[34] The distinction between

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24. Payton v. United States, 636 F.2d 132, 143 (5th Cir. 1981); Rogers, *supra* note 13, at 807.

25. 346 U.S. 15 (1953).

26. *Id.* at 20.

27. *Id.* at 39–42.

28. In re Texas City Disaster Litig., 197 F.2d 771, 778–81 (5th Cir. 1952), *Aff'd*, Dalehite v. United States, 346 U.S. 15 (1953).

29. Dalehite v. United States, 346 U.S. 15, 42 (1952).

30. Comment, *supra* note 2, at 519.

31. *See* Note, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 U. CHI. L. REV. 1030, 1034 (1981); Comment, *supra* note 18, at 888–93; Comment, *Federal Tort Claims: A Critique of the Planning Level-Operational Level Test*, 11 U.S.F.L. REV. 170, 179 (1976).

32. *E.g.*, Miller v. United States, 522 F.2d 386 (6th Cir. 1975) (promulgation of air safety regulations); Scanwell Lab., Inc. v. Thomas, 521 F.2d 941 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976) (determination of whether agency bidding requirements had been met); Smith v. United States, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967) (refusal by Attorney General to bring suit to enforce statute); United States v. Gregory, 300 F.2d 11, 13 (10th Cir. 1962) (dredging of canals pursuant to Bureau of Reclamation irrigation project).

33. *E.g.*, American Exch. Bank of Madison, Wis. v. United States, 257 F.2d 938, 941 (7th Cir. 1958) (failure by GSA to install handrail on post office steps); Eastern Airlines, Inc. v. Union Trust Co., 221 F.2d 62, 75–78 (D.C. Cir. 1955), *aff'd per curiam*, 350 U.S. 907 (1955) (negligence by air traffic controller); Hoffman v. United States, 398 F. Supp. 530 (E.D. Mich. 1975) (failure to follow FAA regulations with respect to issuance of ATCO certificate).

34. *E.g.*, Swanson v. United States, 229 F. Supp. 217, 219–220 (N.D. Cal. 1964). *See also* Harris & Schnepper, *supra* note 23, at 171; Zillman, *The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act*, 76 MIL. L. REV. 1 (1977).

planning and operational activities would, of course, be applicable to military decisions.[35]

2. *The Feres Doctrine*

The *Feres* doctrine limits the liability of the United States Government for service-related injuries to members of the armed forces. The rule originated in *Feres v. United States*[36]—a landmark case decided by the United States Supreme Court in 1950. The decedent in *Feres* died in a barracks fire while on active duty. His executrix brought suit against the United States, alleging that the government had negligently operated the heating system and had failed to maintain an adequate fire watch.[37] The government asserted a claim of sovereign immunity. The district court agreed with the government and dismissed the suit. This decision was affirmed by a federal circuit court[38] and an appeal was taken to the Supreme Court.

The Court agreed that the federal government should be immune from suit, notwithstanding the FTCA's waiver of sovereign immunity. The Court found that the relationship between the government and members of the armed forces was distinctively federal in character.[39] The Court believed that allowing local law to determine servicemen's substantive rights[40] would be inconsistent with this federal relationship.[41] In addition, the Court noted that the Veteran's Benefits Act[42] established a system of "simple, certain, and uniform compensation for injuries or death of those in armed services."[43] According to the Court, this Act, which operated on a no-fault basis, provided injured servicemen with more generous benefits than comparable state workers' compensation statutes.[44] Thus, injured

35. *E.g.*, Driscoll v. United States, 525 F.2d 136, 137–38 (9th Cir. 1975) (failure to install warning signals and crosswalk at Air Force base held to be operational); Kiiskila v. United States, 466 F.2d 626 (7th Cir. 1972) (exclusion of civilian from military base held to be discretionary); Abraham v. United States, 465 F.2d 881 (5th Cir. 1972) (decision by Strategic Air Command to fly aircraft at supersonic speeds held to be discretionary); Maynard v. United States, 430 F.2d 1264 (9th Cir. 1970) (decision by Strategic Air Command to fly aircraft at supersonic speeds held to be discretionary); United States v. Hunsucker, 314 F.2d 98, 102 (9th Cir. 1962) (negligent construction of sewage disposal system by Army engineers held to be operational); Wildwood Mink Ranch v. United States, 218 F. Supp. 67, 76–77 (D. Minn. 1963) (selection of particular flight plan for military aircraft held to be operational); Note, *supra* note 20, at 1122–25.

36. 340 U.S. 135 (1950).

37. *Id.* at 137.

38. Feres v. United States, 177 F.2d 535 (2d Cir. 1949).

39. Feres v. United States, 340 U.S. 135, 143 (1950).

40. The Federal Tort Claims Act provides that liability is to be determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1976).

41. Feres v. United States, 340 U.S. 135, 143 (1950).

42. 38 U.S.C. §§ 101–5228 (1976).

43. Feres v. United States, 340 U.S. 135, 144 (1950).

44. *Id.* at 145. The Court also declared that the Federal Tort Claims Act did not create new causes of action, but merely allowed suits to be brought against the government that would otherwise be barred by sovereign immunity. According to the Court, there was no relationship in the civilian sector comparable to that of the government and members of the military. Therefore, the Court maintained, no one could bring a common law action based on breach of any duty arising from such a relationship. *Id.* at 141–42. This reasoning, known as the "parallel liability" theory, has since been rejected by the Court. *See* United States v. Muniz, 374 U.S. 150, 159–60 (1963) (negligence by prison personnel); Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957) (negligence by government firefighters); Indian Towing Co. v. United States, 350 U.S. 61, 64–65 (1955) (failure to repair lighthouse).

military personnel would have a remedy even if the government was immune from suit.

The Court later extended the *Feres* rule to third party actions in *Stencel Aero Engineering Corp. v. United States*,[45] holding that the United States could not be joined as a third-party defendant when an injured serviceman brought suit against a government contractor.[46] In *Stencel Aero*, a member of the National Guard was injured when the ejection system of his F-100 fighter aircraft malfunctioned. The plaintiff sued both the United States and the supplier of the defective ejection system. Stencel Aero, which had manufactured the system according to the government's specification, cross-claimed against the United States for indemnity.[47] The United States moved for dismissal of both the plaintiff's suit and the manufacturer's cross-claim, arguing that both actions were barred by *Feres*.[48] The trial court accepted the government's position.[49]

On appeal, the Court enumerated three reasons why recovery should be denied for service-connected injuries: (1) the distinctly federal character of the relationship between the government and members of the armed forces; (2) the availability of adequate compensation to injured servicemen through the Veterans' Benefits Act; and (3) the effect that a suit by a serviceman against the government would have on military discipline.[50] The first two reasons given by the Court were also mentioned in the *Feres* decision, and the third was derived from *United States v. Brown*,[51] a medical malpractice case decided by the Court four years after *Feres*.[52]

The Court concluded that each of the reasons that had been invoked in the past to bar suits against the government by servicemen also precluded indemnity actions against the government by third parties. First, according to the Court, the relationship between the government and its suppliers was no less "distinctly federal in character" than the relationship between the government and military personnel. Thus, if the liability of the government to a serviceman should not depend on the situs of the injury, there was no reason to apply a different rule to determine the government's liability to a contractor.[53]

Second, the Court declared that the Veterans' Benefits Act provided adequate compensation to injured servicemen, thus precluding the need for suits against the government. Moreover, in the Court's view, Congress intended for the Veterans' Benefits Act to act as an upper limit on the government's liability for service-connected injuries. Therefore, allowing an indemnity action against the government

45. 431 U.S. 666 (1977).

46. *Id.* at 673.

47. *Id.* at 667.

48. *Id.* at 668–69.

49. *Id.* at 666. The trial court's decision was upheld by the court of appeals. Stencel Aero Eng'g Corp. v. United States, 536 F.2d 765, 770 (8th Cir. 1976).

50. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671–72 (1977).

51. United States v. Brown, 348 U.S. 110, 112 (1954).

52. The plaintiff in *Brown*, a discharged veteran, alleged that he had been given negligent medical treatment in a Veterans' Adminstration Hospital. Although the Court cited the maintenance of military discipline as a reason for prohibiting suits against the government by military personnel, it allowed the plaintiff to sue because he was no longer a member of the armed forces. *Id.* at 112–13.

53. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977).

"would be to judicially admit at the back door that which has been legislatively turned away at the front door."[54]

Finally, the Court concluded that indemnity actions against the government would impair military discipline. The Court observed that a suit concerning an injury to a serviceman, whether brought by the victim or by a third party, would inevitably focus on the reasonableness of military decisions and their effect on servicemen's safety. Consequently, a trial would entail second-guessing of military orders and might even require members of the armed forces to criticize each other's decisions and actions.[55]

The *Feres* doctrine has been sharply criticized by legal scholars.[56] Nevertheless, it remains viable, and courts still rely on the doctrine to bar suits by servicemen against the government for service-connected injuries.[57] In addition, as mentioned earlier, many courts have expressly relied on the rationale of the *Feres* decision as support for limiting the liability of government contractors to servicemen injured by defectively designed products.[58]

B. *Limitations on the Tort Liability of Contractors*

Two doctrines are often used interchangeably by the courts in contractor liability cases. The first of these concepts is known as the contract specification defense, and the second is called the government contract defense. The contract specification defense is based on negligence principles and should be confined to negligence cases. The government contract defense, on the other hand, is based on the principle of shared immunity. Although this defense was first invoked by contractors in public works cases, many courts have extended it to products liability cases as well.

1. *The Contract Specification Defense*

The contract specification defense, which applies to both private[59] and government contractors,[60] provides that a contractor is not liable for damages that result

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54. *Id.* at 673 (quoting Laird v. Nelms, 406 U.S. 797, 802 (1972)).

55. *Id.* It has been suggested that the military discipline rationale actually raises three distinct concerns as follows: (1) disruption caused by the release of information from factual inquiries; (2) the chilling effect of damage awards against the government on military decisionmaking; and (3) the encouragement of disobedience against military superiors. Note, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L.J. 992, 1003–1008 (1986).

56. *See generally* Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 RUTGERS L. REV. 316 (1954); Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F.L. REV. 24 (1976); Note, *Federal Liability to Personnel of the Armed Forces*, 20 GEO. WASH. L. REV. 90 (1951); Note, *Military Rights Under the FTCA*, 43 ST. JOHN'S L. REV. 455 (1969).

57. United States v. Shearer, 105 S.Ct. 3039, 3043–44 (1985); Carter v. City of Cheyenne, 649 F.2d 827, 829 (10th Cir. 1981); Stansberry v. Middendorf, 567 F.2d 617, 618 (4th Cir. 1978). *See also* Note, *Military Medical Malpractice*, *supra* note 16, at 517; Comment, *supra* note 15, at 708–09.

58. Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72(1986); In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied sub. nom.* Eschler v. Boeing Co., 106 S.Ct. 851 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Hubbs v. United Technologies, 574 F. Supp. 96, 98 (E.D. Pa. 1983).

59. Spangler v. Kranco, Inc., 481 F.2d 373 (4th Cir. 1973); Davis v. Henderlong Lumber Co., 221 F. Supp. 129 (N.D. Ind. 1963); Moon v. Winger Boss Co., 205 Neb. 292, 287 N.W.2d 430 (1980).

60. *E.g.*, Person v. Cauldwell-Wingate Co., 187 F.2d 832 (2d Cir. 1951), *cert. denied*, 341 U.S. 936 (1951); Roth v. Great Atl. & Pac. Tea Co., 108 F. Supp. 390, 394 (E.D.N.Y. 1952); Castaldo v. Pittsburgh-Des Moines Steel Co.,

from specifications furnished by an employer unless they are so obviously defective and dangerous that a competent contractor would not have followed them.[61] The assumption behind this rule is that an ordinary contractor does not have sufficient skill to evaluate design specifications provided by an employer[62] and must rely on the employer's superior knowledge and expertise.[63]

The contract specification principle is a specialized application of the familar negligence concept of reasonable reliance.[64] Although the reasonableness of the defendant's conduct may be relevant in a negligence suit, it should not be relevant in a products liability action based on strict liability in tort. Consequently, although a few courts have recognized the contract specification doctrine in product liability litigation,[65] most courts have refused to apply it to such cases.[66]

2. *The Government Contract Defense in Public Works Cases*

The government contract defense protects a public contractor against liability for consequences that are inherent in the nature of the operation; the work must be done in accordance with plans and specifications and under the direction and supervision of government officials.[67] In such cases, the contractor is said to share in the government's immunity from suit.[68]

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376 A.2d 88, 90 (Del. 1977); Rawls v. Ziegler, 107 So. 2d 601, 605 (Fla. 1958); Arnold v. Edelman, 375 S.W.2d 167, 172 (Mo. 1964); Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 173, 121 A.2d 781, 782 (1956).

61. RESTATEMENT (SECOND) OF TORTS § 404, Comment a (1965); Note, *supra* note 4, at 1032.

62. As the New York Court of Appeals declared in *Ryan v. Feeny & Sheehan Bldg. Co.*, "[a] builder or contractor is justified in relying upon the plans and specifications which he has 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." 239 N.Y. 45, 43–44, 145 N.E. 321, 321–22 (1924).

63. Littlehale v. E.I. Du Pont de Memours & Co., 268 F. Supp. 791, 803 n.16 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967). However, a higher standard is imposed when the contractor employs an expert. *See* Person v. Cauldwell-Wingate Co., 187 F.2d 832, 834–36 (2d Cir. 1951), *cert. denied*, 341 U.S. 936 (1951); Note, *supra* note 31, at 1036–37.

64. The law of negligence provides many examples where courts have held that a person may reasonably rely on the superior skill or knowledge of another. *E.g.*, Carter v. Franklin, 243 Ala. 116, 173 So. 861 (1937) (worker reasonably relied on foreman to warn others of danger); Hackett v. Perron, 119 N.H. 419, 402 A.2d 193 (1979) (motorist reasonably relied on garage to repair brakes properly); Gobrecht v. Beckwith, 82 N.H. 415, 135 A. 20 (1926) (tenant reasonably relied on landlord to install gas heater properly); Jessup v. Sloneker, 142 Pa. 527, 21 A. 988 (1891) (worker reasonably relied on foreman to warn others of danger).

65. *E.g.*, Garrison v. Rohm & Haas Co., 492 F.2d 346, 351 (6th Cir. 1974); Spangler v. Kranco, Inc., 481 F.2d 373, 375 n.2 (4th Cir. 1973); Union Supply Co. v. Pust, 196 Colo. 162, 170–71, 583 P.2d 276, 281–82 (1978); McCabe Powers Body Co., v. Sharp, 594 S.W.2d 592, 594–95 (Ky. 1980).

66. *See* Challoner v. Day & Zimmerman, Inc., 512 F.2d 77, 83 (5th Cir. 1975), *vacated and remanded*, 423 U.S. 3 (1975) (contract specification defense relevant to negligence but not to strict products liability); Johnston v. United States, 568 F. Supp. 351, 354 (D. Kan. 1983) (same); Lenherr v. NRM Corp., 504 F. Supp. 165, 174 (D. Kan 1980) (contract specification defense would frustrate goals of strict products liability).

67. *E.g.*, Mitchell v. Hahn, 131 Ark. 286, 198 S.W. 528 (1917); Timothy J. Foohey Dredging Co. v. Mabin, 118 Ark. 1, 175 S.W. 400 (1915); Timothy J. Foohey Dredging Co. v. Lovewell, 115 Ark. 606, 170 S.W. 1012 (1914); Wood v. Drainage Dist. No. 2, 110 Ark. 416, 161 S.W. 1057 (1913); De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 39 P. 610 (1895); Fitzgibbon v. W. Dredging Co., 141 Iowa 328, 117 N.W. 878 (1908); Bennett v. Town of Mt. Vernon, 124 Iowa 537, 100 N.W. 349 (1904); Hanrahan v. Mayor and City Council of Baltimore, 114 Md. 517, 80 A. 312 (1911); Rodriguez v. New Jersey Sports & Exposition Auth., 193 N.J. Super. 39, 45, 472 A.2d 146, 149 (1983); Cobb v. Waddington, 154 N.J. Super. 11, 16, 380 A.2d 1145, 1148 (1977); Lydecker v. Board of Chosen Freeholders, 91 N.J.L. 622, 103 A. 251 (1918); Benner v. Atlantic Dredging Co., 134 N.Y. 156, 31 N.E. 328 (1892); Simons v. Tri-State Constr. Co., 33 Wash. App. 315, 322, 655 P.2d 703, 708 (1982); Smith v. Gen. Paving Co., 24 Ill. App. 3d 858, 860–61, 321 N.E.2d 689, 691 (1974). Larned v. Holt & Jeffery, Inc., 74 Wash. 274, 133 P. 460 (1913); *See also* Annot., 9 A.L.R.3d 382 (1966).

68. Note, *supra* note 4, at 1032.

The leading case is *Yearsley v. W.A. Ross Construction Co.*,[69] decided by the United States Supreme Court in 1940. *Yearsley* was a suit between a federal contractor and a riparian land owner who claimed that the construction of dikes along the Missouri River had caused erosion to his property. The plaintiff prevailed at trial, but the lower court's decision was reversed on appeal by the circuit court.[70]

The United States Supreme Court affirmed the circuit court's ruling. The Court reasoned that the immunity that protected officers and agents of the federal government acting within the scope of their authority should be extended to private contractors who also acted on the government's behalf.[71] According to the Court: " . . . [I]t is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."[72] The court also observed that the landowner could have sought compensation from the government for his injury in the court of claims.[73] Apparently, it thought that the plaintiff had attempted to circumvent the accepted statutory procedure by suing the contractor instead of the government.[74]

Over the years, courts have advanced various theories to explain the government contract doctrine. For example, the Court in *Yearsley* suggested that the contractor partakes of the government's immunity because it has acted as an agent of the government. In fact, some courts have limited the government contract defense to situations where there is an actual agency relationship between the contractor and the government.[75]

However, a more persuasive rationale for the government contract defense is that such protection is necessary to allow the government to carry out its essential functions. *Dolphin Gardens, Inc. v. United States*[76] is illustrative of this view.[77] The defendant dredged a portion of the Thames River in order to allow nuclear powered submarines to reach their base at Groton, Connecticut. Material pumped from the river was deposited upon several adjacent tracts of shoreland property. According to the plaintiff, gases and other noxious substances escaped from these deposits and damaged the exterior of his nearby apartment buildings.[78]

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69. 309 U.S. 18 (1940).

70. Yearsley v. W.A. Ross Constr. Co., 103 F.2d 589, 593 (8th Cir. 1939), *aff'd*, 309 U.S. 18 (1940).

71. *Id.* at 21.

72. *Id.* at 20–21.

73. *Id.* at 21.

74. *Id.* at 21–22. The Court, however, did not decide the question of whether erosion of the plaintiff's land constituted a taking of property that required just compensation by the federal government. *Id.* at 21.

75. Bynum v. FMC Corp., 770 F.2d 556, 564 (5th Cir. 1985) (dictum); Foster v. Day & Zimmerman, Inc., 502 F.2d 867, 873–74 (8th Cir. 1974); Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010, 1014 (5th Cir. 1969).

76. 243 F. Supp. 824 (D. Conn. 1965).

77. *See also* Green v. ICI Am., Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973). The plaintiff in that case sued the operators of the Volunteer Army Ammunition Plant in Tyner, Tennessee, arguing that fumes and vapors produced by the plant constituted a private nuisance. The plant was owned by the federal government and operated on its behalf by ICI America. There was no allegation of negligence in connection with the plant's operation. Consequently, the federal district court granted the defendant contractor's motion for summary judgment on the theory that ICI America shared in the government's immunity. The court concluded that nuisance actions against government contractors would seriously interfere with the completion of public works projects authorized by Congress. *Id.* at 1265–66.

78. Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 826 (D. Conn. 1965).

The landowner brought suit against both the contractor and the government, and each responded with a motion for summary judgment.[79] The federal government asserted the defense of sovereign immunity, arguing that its decisions relating to the channel improvement project fell within the "discretionary function" provision of the Federal Tort Claims Act.[80] The trial court agreed with this contention and dismissed the suit against the government.[81]

Having decided that the government was immune from suit, the court then concluded that the contractor should be immune as well since it had merely followed the government's instructions and had committed no independent act of negligence. In the court's opinion, the purpose of the discretionary function exception was to allow government officials to make risk allocation decisions; to impose liability upon the contractor would undermine this policy.[82]

It should be noted that the government contract defense is subject to some important limitations. First, the doctrine only protects the contractor against necessary or incidental damages and does not cover damage resulting from willful tort or negligence in the performance of the work.[83] Moreover, the contractor remains liable for the consequences of any discretionary act.[84] Furthermore, many courts have refused to recognize the government contract defense when the contractor engages in "ultrahazardous" or "inherently dangerous" activities such as blasting.[85]

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79. *Id.* at 825.

80. 28 U.S.C. § 2680(a) (1976).

81. The plaintiff claimed that the government's selection and approval of the site and method for deposit of the soil was negligence at the operational level and, therefore, outside the ambit of the discretional function provisions. The court, however, characterized the government's choice of disposing of the dredged material as discretionary even though it acknowledged that other choices were available that would have prevented harm to the plaintiff's property. Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965).

82. The court declared:

> To impose liability on the contractor under such circumstances would render the Government's immunity for the consequences of acts in the performance of a 'discretionary function' meaningless, for if the contractor was held liable, contract prices to the Government would be increased to cover the contractor's risk of loss from possible harmful effects of complying with decisions of executive oficers authorized to make policy judgments.

Id. at 827.

83. Holland v. Yellowstone Pipe Line Co., 306 F.2d 621, 625 (9th Cir. 1962); W. Contracting Corp. v. Titter, 255 Md. 581, 590, 258 A.2d 600, 605 (1969); Bounds v. Scott Constr. Co., 498 S.W.2d 765, 768 (Mo. 1973); Givens v. Sellars, 273 N.C. 44, 50, 159 S.E.2d 530, 535 (1968); Transcon Lines Corp. v. Cornell Constr. Co., 539 P.2d 1372, 1376 (Okla. 1975); Perdue v. S.J. Groves & Sons Co., 161 S.E.2d 250, 256 (W. Va. 1968).

84. Merritt, Chapman, & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 16 (9th Cir. 1961); Sam Finley, Inc. v. Waddell, 607 Va. 602, 606, 151 S.E.2d 347, 351 (1966); Note, *supra* note 4, at 1053.

85. The contractor has generally been held liable when the injury was caused by the casting of material upon the plaintiff or his property. Asheveille Constr. Co. v. Southern Ry. Co., 19 F.2d 32 (4th Cir. 1927); Hall v. Ellis & Brantley, 238 Ky. 114, 36 S.W.2d 850 (1931). When the injury resulted from concussion or vibration, some courts have still held the contractor strictly liable. Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967); Monroe v. Razor Constr. Co., 252 Iowa 1249, 110 N.W.2d 250 (1961); Guilford Realty & Ins. Co. v. Blythe Bros., 260 N.C. 69, 131 S.E.2d 900 (1963); Berg v. Reaction Motors Div., Thiokol Chem. Corp., 37 N.J. 396, 181 A.2d 487 (1962); Walczesky v. Horvitz Co., 26 Ohio St. 2d 146, 269 N.E.2d 844 (1971); Ellison v. Wood & Bush Co., 153 W. Va. 506, 170 S.E.2d 321 (1969); Whitney v. Ralph Myers Contracting Corp., 146 W. Va. 130, 118 S.E.2d 622 (1961). Other courts, however, have imposed liability only when the contractor has been negligent. Pumphrey v. J.A. Jones Constr. Co., 250 Iowa 559, 94 N.W.2d 737 (1959); Nelson v. McKenzie-Hague Co., 192 Minn. 180, 256 N.W. 96 (1934); Benner v. Atlantic Dredging Co., 134 N.Y. 156, 159, 31 N.E. 328, 330 (1892); Newberry v. Hamblen County, 157 Tenn. 491, 9 S.W.2d 700 (1928).

II. The Government Contract Defense in Products Liability Cases

Although some courts appeared reluctant to extend the government contract defense from public works to products liability cases,[86] the concept has achieved general acceptance during the past decade. Several leading cases will be reviewed in this section to provide a general overview of the doctrine as it has been applied in products liability litigation. In addition, some of the more important variations of the defense will be briefly examined.

A. *An Overview of Recent Developments*

State courts in New Jersey and New York were among the first to recognize the government contract defense in products liability cases.[87] *Sanner v. Ford Motor Co.*,[88] decided in 1976, concerned a suit brought by a serviceman who was thrown from an Army jeep and injured. The plaintiff sued the manufacturer, Ford Motor Company, claiming that the jeep was defectively designed because it had no seat belts and no rollbar.[89] Ford denied that the jeep was improperly designed and also contended that it should not be held liable because it manufactured the jeep strictly in accordance with government plans and specifications.[90]

The trial court stated that the government contract defense was necessary to enable the government to formulate policy and make military decisions.[91] Accordingly, it granted a summary judgment in the defendant's favor.[92] This ruling was affirmed on appeal.[93] The appellate court acknowledged that the government contract defense had been limited in the past to negligence actions, but concluded that the rationale behind it could also be applied to suits based on strict liability in tort.[94]

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86. The government contract defense was rejected in Foster v. Day & Zimmerman, Inc., 502 F.2d 867 (8th Cir. 1974). In that case a serviceman was injured when a hand grenade exploded prematurely. The plaintiff recovered against the manufacturers of the grenade and its fuse on a theory of strict products liability.The manufacturers attempted to invoke the government contractor defense. On appeal, the circuit court held that the defense was inapplicable since the government's specifications did not call for the defendants to manufacture a defective product. *Id.* at 874. It has been suggested that the court refused to allow the government contract defense in *Foster* because the injury in question was caused by a manufacturing defect, not a defective design. Note, *supra* note 4, at 1056.

87. *See also* Littlehale v. E.I. du Pont de Nemours & Co., 268 F. Supp. 791, 803–04 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967); Hunt v. Blasius, 55 Ill. App. 3d 14, 18, 370 N.E.2d 617, 620 (1977), *aff'd*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978).

88. 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).

89. *Id.* at 5, 364 A.2d at 44–45.

90. *Id.* at 4–5, 364 A.2d at 44. The jeep in question was officially designated as an M151A1 1/4 ton four-wheel drive utility truck. It was designed to be used as a cargo and personnel carrier, battlefield ambulance, weapons platform with a 106-mm-recoiless rifle, and a communication vehicle. The Army did not believe that the installation of seat belts would be consistent with these intended uses. Similar vehicles manufactured by Ford for the Air Force were equipped with seat belts. *Id.*

91. *Id.* at 9, 364 A.2d at 47. The court declared:

> To impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army in a situation such as this would seriously impair the governments [sic] ability to formulate policy and make judgments pursuant to its war powers.

92. *Id.* at 5, 364 A.2d at 45.

93. 152 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977).

94. *Id.* at 409–10, 381 A.2d at 806.

A New York court recognized the government contract defense in 1980. In *Casabianca v. Casabianca*,[95] a young boy was injured when he caught his hand in the blades of a dough mixer in his father's pizza shop. The machine had been built according to Army specifications for use in field kitchens during World War II.[96] The plaintiff brought suit against the manufacturer, Teledyne Readco, arguing that the mixer was designed defectively because it lacked a protective guard.[97] The trial court granted Teledyne's motion for summary judgment, holding that the government contract defense absolved it from liability. Without such immunity, the court reasoned, suppliers might be encouraged to withold essential equipment from the military in time of war when they considered a particular design to be dangerous.[98]

Federal courts also rapidly accepted the government contract defense in products liability cases. The first significant case was *Agent Orange*,[99] decided in 1980. *Agent Orange* was a class action suit brought by former servicemen and their families agaist a group of chemical companies to recover for injuries resulting from the soldiers' exposure to chemical herbicides in Vietnam.[100] The manufacturers cross-claimed against the federal government for indemnification or contribution. The federal district court was required to rule upon various issues, including a motion to dismiss based on the government contract defense.[101] Although the court did not dismiss the case, it did rule that the government contract defense might be raised by the defendants at trial.[102]

The court stated that no deterrent purpose would be served by imposing liability on an "otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government."[103] The court also concluded that holding military contractors liable would undermine the government's ability to make risk allocation decisions because contractors would simply increase the cost of performing government procurement contracts to reflect their potential tort

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95. 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981).

96. *Id.* at 349, 428 N.Y.S.2d at 401.

97. *Id.*

98. *Id.* at 350, 428 N.Y.S.2d at 402.

99. In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980), *and related proceedings*, 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied sub. nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984), *later proceedings*, 597 F. Supp. 740 (E.D.N.Y. 1984).

100. The plaintiff's included Vietman veterans, spouses, children, and parents. The veterans sought to recover for personal injuries caused by exposure to Agent Orange and other defoliants while serving in Vietnam. Some of the children sought to recover for birth defects caused by their father's exposure to these chemicals. In addition, some of the wives sought to recover for miscarriages caused by genetic damage to their spouses from Agent Orange. *Id.* at 769.

101. These included the following: (1) the government's motion to dismiss the manufacturers' indeminity claim on grounds of sovereign immunity; (2) plaintiffs' motion for class actions certification; (3) defendants' motion for summary judgment; (4) plaintiffs' motion to proceed with "serial trials"; and (5) plaintiffs' motion to serve and file a fifth verified complaint. *Id.*

102. Having decided that the government contract defense was potentially applicable, the court went on to consider whether the defendants had made a sufficient showing to warrant a summary judgment at this stage of the proceeding. The chemical manufacturers argued that they were "merely agents of the government acting under the compulsion of federal law in patriotic furtherance of the Vietnam war effort" and that they "produced an effective product that met, in every respect, the government's detailed specifications and expectations." *Id.* at 795. Nevertheless, the court denied the defendants' motion for summary judgment, holding that the defendants' relationship with the government and their performance under the government contract involved disputed issues of fact that would have to be resolved at trial. *Id.* at 796.

103. *Id.* at 793.

liability.[104] Finally, the court expressed concern about subjecting government contractors to tort liability when they were unable to alter design specifications dictated by the government.[105]

At a later stage in the *Agent Orange* litigation the court proposed a formula for determining when the government contract defense should be applied. Under the court's approach, the defendant could avoid liability if it proved the following: (1) the government established the product's specifications; (2) the product supplied complied with these specifications in all material respects; and (3) the government knew as much or more than the supplier about any risks in the product's design.[106] The court later ruled that the defendants had established the first two elements of the defense,[107] but the case was settled before it could be determined whether the third requirement had been satisfied.[108]

Brown v. Caterpillar Tractor Co.,[109] decided in 1982, concerned an Army reservist, who was injured while seated in a tractor-bulldozer. He sued the manufacturer, Caterpillar, alleging that his injuries would not have occurred if the bulldozer had been equipped with a protective structure around the passenger seat.[110] Caterpillar maintained that it was insulated from liability because it had built the bulldozer according to government specifications. The district court agreed and granted summary judgment for the manufacturer.[111]

On appeal, the circuit court, applying state law, predicted that Pennsylvania courts would allow suppliers to raise the government contract defense in products liability cases.[112] At the same time, the court acknowledged that a manufacturer must strictly comply with the specifications of its contract in order to avoid liability. Observing that the contract was "a veritable tome of technical specifications, bidding notices, and communications between the government and Caterpillar," the court declared that it could not determine whether the contract called for the addition of a protective structure on the bulldozer.[113] Accordingly, it reversed the district court's summary judgment and sent the case back for trial on that issue.[114]

McKay v. Rockwell International Corp.,[115] the most significant government contract defense case to date, was decided one year after *Brown*. In that case, two Navy pilots were killed in separate accidents when they ejected from disabled RA-5C "Vigilante" reconnaissance aircraft. Their deaths were apparently caused by a design

104. *Id.* at 794.

105. *Id.*

106. In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

107. In re " Agent Orange" Prod. Liab. Litig., 565 F. Supp. 1263, 1274 (E.D.N.Y. 1983).

108. In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 843 (E.D.N.Y. 1984).

109. 696 F.2d 246 (3d Cir. 1982).

110. *Id.* at 247.

111. *Id.*

112. *Id.* at 252. Pennsylvania recently did extend the government contract doctrine to products liability actions. *See* Mackey v. Maremont Corp., 350 Pa. Super. 415, 419, 504 A.2d 908, 910 (1986).

113. Brown v. Caterpillar Tractor Co., 696 F.2d 246, 256 (3d Cir. 1982).

114. *Id.* at 257.

115. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

flaw in the aircraft's HS-1A ejection system.[116] Both the aircraft and the ejection system were manufactured by Rockwell.[117] The widows of the two pilots brought suit against Rockwell and prevailed in the district court.[118] On appeal, however, the circuit court concluded that the supplier could raise the government contract defense.

The *McKay* court held that the manufacturer could avoid liability if it could prove the following: (1) the United States was immune from suit; (2) the government established or approved reasonably precise design specifications for the product; (3) the equipment conformed to these specifications; and (4) the supplier warned the government about patent errors in the design specifications or dangers involved in the use of the product that were known to the supplier but not the government.[119] Applying these criteria, the court reversed the district court's summary judgment because it could not determine whether the United States set or approved reasonably detailed design specifications for the HS-1A ejection system.[120]

In *Bynum v. FMC Corp.*,[121] a member of the Mississippi National Guard sued the manufacturer of an M-548 cargo carrier[122] for injuries he received when his vehicle fell off a bridge and crashed into the creek below.[123] The trial court ruled that the suit was barred by the government contract defense.[124] On appeal, the circuit court declared that the government contract defense was needed to protect military decisionmaking.[125] The court also suggested that without immunity military contractors might be reluctant to bid on projects that involved new or risky technology.[126] In addition, the court felt that it would be unfair to hold an innocent contractor liable for a dangerous design when the government was actually responsible.[127] Finally, according to the court, the government contract defense encouraged suppliers to work closely with military authorities in the development and testing of equipment.[128]

The court then applied that the *McKay* formula and concluded that each of its requirements had been met. The plaintiff was a member of the armed forces and the accident was service-related. In addition, the M-548 was manufactured in accordance with precise design specifications furnished by the government, and it conformed to those specifications. Finally, the manufacturer was not aware of the risk involved in

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116. *Id.* at 446.

117. The HS-1A system was supposed to eject a crewmember into the airstream by means of a rocket thrust. After ejection, a drogue chute would open a larger parachute to enable the crewmember to descend to the ground safely. *Id.*

118. *Id.* at 447. The cases were consolidated for trial. *Id.*

119. *Id.* at 451.

120. *Id.* at 453.

121. 770 F.2d 556 (5th Cir. 1985).

122. The M-548 is a tracked vehicle that is primarily used to carry ammunition for tanks and self-propelled artillery. The specifications for the M-548 were developed by the United States Army Tank-Automatic Command (TACOM), which was responsible for designing and testing wheeled and tracked vehicles procured by the government for military use. The evidence showed that TACOM supplied FMC with a technical data package containing over 2500 sheets of detailed drawings that were to be used in the manufacture of the M-548. Under the contract, FMC was obligated to comply strictly with these design specifications in producing the M-548. *Id.* at 559.

123. *Id.* at 558.

124. Bynum v. General Motors Corp., 599 F. Supp. 155, 158 (N.D. Miss. 1984), *aff'd*, 770 F.2d 556 (5th Cir. 1985).

125. Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985).

126. *Id.* at 566.

127. *Id.*

128. *Id.*

the product's design.[129] Therefore, the court ruled that FMC was entitled to judgment as a matter of law.[130]

The decedent in *Shaw v. Grumman Aerospace Corp.*[131] was killed when his plane crashed into the Pacific Ocean shortly after taking off from an aircraft carrier. Navy investigators concluded that the crash was probaby caused by a failure of a bolt in the "stablizer actuation system" or "longitudinal flight control system" of the Grumman A-6 aircraft.[132] The personal representative of Shaw's estate sued Grumman, alleging that the aircraft's design was defective because it failed to include any warning or backup system to protect the pilot if the stablizer control failed. The trial court applied the *McKay* court's formulation of the government contract defense but found that Grumman had failed to prove its case.[133]

On appeal, the circuit court declared that the purpose of the government contract defense was to promote the separation of powers principle by protecting governmental decisions from judicial interference.[134] While acknowledging the need to screen manufacturers from liability in certain circumstances, the court stated that the defense should be a narrow one.[135] Under the *Shaw* court's approach, a manufacturer could escape liability only by showing the following: (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or (2) that it warned the military of the design's risks and notified it of alternative designs and that the military, although forewarned, clearly authorized the contractor to proceed with the design anyway.[136]

Applying these criteria, the court concluded that Grumman should not be allowed to invoke the government contract defense. It found that Grumman had exclusively designed and produced the detailed specifications for the A-6 aircraft. Furthermore, the court noted that Grumman knew of the defect in the longitudinal control system of the aircraft and that it failed to give an adequate warning to the Navy about the need for a backup system.[137] Finally, the court concluded that the Navy's formal approval for Grumman's specifications and design changes for the A-6 was not sufficiently informed to justify applying the government contract doctrine.[138] Accordingly, the judgment of the lower court was affirmed.[139]

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129. *Id.* at 576–77.

130. *Id.* at 577.

131. 778 F.2d 736 (11th Cir. 1985).

132. *Id.* at 738. This condition had caused other crashes in the past; in order to correct it Grumman advised the Navy to install "self-retaining bolts" in the stabilizer system. Shaw's aircraft was equipped with stabilizer bolts, but they apparently failed to prevent the accident from happening. *Id.*

133. Shaw v. Grumann Aerospace Corp., 593 F. Supp. 1066, 1074 (S.D. Fla. 1984), *aff'd*, 778 F.2d 736 (11th Cir. 1985).

134. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985).

135. *Id.* at 741.

136. *Id.* at 746.

137. *Id.* at 747. As to the self-retaining bolts, the trial court also found that the Navy relied on Grumman's advice that these would solve the problem. In the court's opinion, this could be interpreted as a finding by the court below that Grumman failed to warn that the bolts would not correct the underlying defect. *Id.*

138. *Id.*

139. *Id.*

The government contract defense was also upheld in *Boyle v. United Technologies Corp.*[140] A Sikorsky CH-53 helicopter crashed in the ocean near Virginia Beach. Three crewmembers got out of the aircraft through emergency exits, but the copilot, Boyle, was unable to escape and drowned.[141] The decedent's family brought suit against the manufacturer, alleging that the copilot's escape hatch on the helicopter had been improperly designed. The plaintiffs claimed that the collective, one of the control sticks, interfered with the the copilot's access to his escape hatch when it was pulled full up.[142]

The jury found in favor of the plaintiffs and the defendant asked for a judgment N.O.V. on the theory that the government contract defense shielded it from any liability associated with the escape hatch's design. The trial court denied the motion for judgment N.O.V. and the defendant appealed.[143]

The circuit court adopted the formula from the *McKay* decision and declared that the manufacturer could invoke the government contract defense if it could show that: (1) the government was immune from liability; (2) the government approved reasonably precise specifications for the equipment; (3) the equipment conformed to these specifications; and (4) the supplier warned the government about known dangers inherent in the design.[144]

The court concluded that these criteria were satisfied and held that the government contract defense was applicable.[145] The plaintiffs then petitioned the United States Supreme Court for a writ of certiorari. The Court granted the petition[146] and presumably will rule on the validity of the government contract defense later this year.

The foregoing discussion shows that the government contract defense has achieved widespread acceptance among the courts over the past decade. Nevertheless, while the principle of contractor immunity is firmly established, the courts have not yet reached a consensus about some of the government contract doctrine's basic features. For example, the court in *Agent Orange* declared that a supplier could assert a government contract defense if it proved the following: (1) the government established the specifications for the product's design or formula; (3) the product supplied by defendant met the government's specifications in all material respects; and (3) the government knew as much or more about the product's inherent risks than the defendant.[147] This expression of the government contract defense has

140. 792 F.2d 413 (4th Cir. 1986).

141. *Id.* at 414.

142. The crash itself was caused by a malfunction in the helicopter's servo. The servo functions like power steering to assist the pilot in operating the aircraft. The plaintiffs alleged that Sikorsky left a small chip of wire in the servo's pilot valve when it overhauled the helicopter. According to the plaintiffs, this chip caused the servo to stop functioning. *Id.* The court, however, observed that Navy personnel might have introduced the chip into the pilot valve when they worked on the hydraulic system. Consequently, the court concluded that the plaintiffs had failed to establish that Sikorsky was responsible for the malfunction of the helicopter's servo. *Id.* at 415–16.

143. *Id.* at 414.

144. *Id.*

145. *Id.* at 414–15.

146. 107 S.Ct. 872 (1987).

147. In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982), *cert. denied, sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

been adopted or cited with approval by a large number of federal and state courts.[148]

The court in *McKay* adopted a modified version of the *Agent Orange* formula when it recognized the government contract defense. In order to avail themselves of the government contract defense, suppliers would be required to establish the following: (1) the United States was immune from liability as a result of the *Feres* rule; (2) the government established or approved reasonably precise specifications for the military equipment; (3) the equipment conformed to the government's specifications; and (4) the supplier warned the government about patent errors in the specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the government.[149] This formulation has also received considerable judicial support.[150]

It is apparent that these two formulas are similar. Both require that the product supplied to the government meet the design specifications provided by the contract. In addition, both versions of the government contract defense require the supplier to inform the government about inherent risks associated with the product's design. There are, however, important differences as well. The *McKay* test requires proof of governmental immunity under the *Feres* doctrine. The *Agent Orange* rule, on the other hand, does not specifically require that governmental immunity exist.[151]

The *Agent Orange* and *McKay* courts also disagree about the extent of government involvement necessary to invoke the government contract defense. The *Agent Orange* formula dictates that the government "establish" the specifications in question, but the *McKay* court merely requires that the government "establish or approve" the final specifications. Thus, the *McKay* version of the government contract defense appears to be broader than the *Agent Orange* test.

The approach of the court in *Shaw* reflected its belief that the government contract defense should focus on conscious risk-taking by military authorities.[152] Accordingly, the court's formula provided that a supplier could avoid liability by satisfying one of two conditions as follows: (1) either that it did not participate (or participated only minimally) in the product's design; or (2) that it warned military authorities of the dangers involved and informed them about alternative designs, and

148. *E.g.*, Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986); In Air Crash Disaster at Mannheim Germany on 9/11/82, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied sub nom.* Eschler v. Boeing Co., 106 S.Ct. 851 (1986); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 355 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986); In re All Maine. Asbestos Litig., 575 F. Supp. 1375, 1377 (D. Me. 1983); Hubbs v. United Technologies, 574 F. Supp. 96, 98 (E.D. Pa. 1983); Mackey v. Maremont Corp., 350 Pa. Super. 415, 431, 504 A.2d 908, 915 (1986).

149. McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

150. *E.g.*, Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986); Tozer v. LTV Corp., 792 F.2d, 403, 408 (4th Cir. 1986); Bynum v. FMC Corp., 770 F.2d 556, 574 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 211–12, 195 Cal. Rptr. 764, 768 (1983).

151. *See also* Bynum v. FMC Corp., 770 F.2d 556, 567 n.14 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 598 n.4 (7th Cir. 1985). It should be noted that the Court in *Agent Orange* did find the government to be immune from suit under the *Feres* rule.Consequently, its failure to mention this as a condition to asserting the government contract defense may have merely been an oversight. In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 771 (E.D.N.Y. 1980), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

152. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 745 (11th Cir. 1985).

that the military authorities, though forewarned, clearly authorized the supplier to proceed with the original design.[153]

The *Shaw* test, like that of *Agent Orange* and *McKay*, mandates that the product conform to the design specifications provided by the contract. It also requires that the government be warned of risks from the product as designed. Unlike the other formulas, however, the *Shaw* approach also requires the supplier to suggest safer alternative designs if any are available. In addition, the formula in *Shaw* does not focus as much on who developed the design specifications as it does on whether military authorities approved them with full knowledge on the inherent risks. Moreover, *Shaw*, unlike *McKay* , does not expressly require that the government be immune from suit.

B. *Policy Considerations*

Although the government contract defense has been widely accepted, some courts and commentators have urged that it be rejected or drastically limited in its application to products liability cases.[154] Critics of contractor immunity believe that the government contract defense is inconsistent with the policies that underlie the law of products liability. On the other hand, proponents of the government contract defense contend that these policies are not applicable to products, such as military equipment, which are purchased by the government. In addition, they claim that other public policies must be considered before the issue of government contractor liability is finally resolved.

1. *The Social Objectives of Strict Products Liability*

Legal commentators have offered various justifications to support the imposition of strict liability on product manufacturers as follows: (1) manufacturers impliedly represent their products to be safe and should compensate injured consumers when defective products cause harm; (2) strict liability encourages manufacturers to improve product safety; (3) strict liability helps to ensure that the prices of products will reflect their true cost to society; and (4) strict liability allows the cost of compensating those injured by defective products to be spread among the consuming public by means of the pricing mechanism.[155]

Proponents of the government contract defense, however, point out that the defense is largely confined to government military equipment suppliers. They maintain that there is little similarity between military equipment and consumer

153. *Id.* at 746.

154. *E.g.*, McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 458–61 (9th Cir. 1983) (Alarcon, J., dissenting), *cert. denied*, 464 U.S. 1043 (1984); Challoner v. Day & Zimmerman, Inc., 512 F.2d 77, 83–84 (5th Cir. 1975), *vacated and remanded*, 423 U.S. 3 (1975); Johnston v. United States, 568 F. Supp. 351, 357–59 (D. Kan. 1983); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 213, 195 Cal. Rptr. 764, 769–70 (1983) (Weiner, J., dissenting); Note, *The Government Contract Defense: Should Manufacturer Discretion Preclude Its Availability?*, 37 ME. L. REV. 187, 187–88 (1985); Comment, *supra* note 15, at 718–721; Note, *supra* note 31, at 1048–51.

155. *See generally* Powers, *Distinguishing Between Products and Services in Strict Liability*, 62 N.C.L. REV. 415, 423–28 (1984).

goods. Moreover, it is claimed that the relationship between the government and the supplier of military hardware is not like that of an ordinary buyer and seller.[156]

a. *Implied Representation of Safety*

Manufacturers are said to impliedly represent their products to be safe by placing them into the stream of commerce.[157] In addition, manufacturers encourage consumer reliance on product quality and safety through advertising and other promotional activities.[158] Therefore, according to some commentators, the manufacturer should compensate an injured party when its product falls short of reasonable consumer expectations, even though the manufacturer has not been negligent.[159]

In response, it is claimed that servicemen do not have the same high expectations about product safety as ordinary consumers. Instead, members of the armed forces realize that they may encounter serious risks in the performance of their military duties.[160] As the court in *McKay* declared:

> [Servicemen] recognize when they join the armed forces that they may be exposed to grave risks of danger, such as having to bail out of a disabled aircraft. This is part of the job. The Nation sometimes demands their very lives. This is an immutable feature of their calling. 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.[161]

However, the *McKay* court's rhetoric is not convincing. As the dissent in *McKay* observed, military personnel are honored because "they are willing to fight for their country and risk their lives doing so," not because they are sometimes forced to use unsafe or unsatisfactory equipment.[162] Expectations about safety on the part of servicemen will necessarily vary according to the technological sophistication of the

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156. Virtually all of the cases where the government contract doctrine has arisen have involved military equipment. Most courts have declined to state whether the government contract defense is limited to military equipment or whether it might be applied to other products as well. *See* Tillett v. J.I. Case Co., 756 F.2d 591, 598 (7th Cir. 1985); McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Jenkins v. Whittaker Corp., 551 F. Supp. 110 (D. Hawaii 1982); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400, 402 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981). However, at least one federal court has recognized the defense in a case where a non-military product was produced for the government. *See* Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985).

157. *See* Phipps v. General Motors Corp., 278 Md. 337, 343, 363 A.2d 955, 958 (1976); Markle v. Mulholland's, Inc., 265 Or. 259, 266–67, 509 P.2d 529, 532–33 (1973); Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661, 688 (1974); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

158. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 684 (1980).

159. Note, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?*, 33 STAN. L. REV., 535, 544 (1981).

160. *See* Tozer v. LTV Corp., 792 F.2d 403, 407 (4th Cir. 1986); Bynum v. FMC Corp., 770 F.2d 556, 572 (5th Cir. 1983); McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 453 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). However, sometimes the soldier may also be ignorant about the weapons he uses. Comment, *supra* note 2, at 505.

161. McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 453 (9th Cir. 1983). The court in *Bynum* added that even if servicemen have the same expectations of safety as ordinary consumers, these expectations should be directed toward the government, not the military contractor, when the government is responsible for the formulation of the design specifications in question and accepts the product once it is manufactured. Bynum v. FMC Corp., 770 F.2d 556, 572 (5th Cir. 1985).

162. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 461 (9th Cir. 1983) (Alarcon, J., dissenting). *See also* McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 215–16, 195 Cal. Rptr. 764, 771 (1983) (Weiner, J., dissenting).

product involved and the conditions under which it is used. For this reason, the consumer expectation rationale retains some vitality even in the case of defective military equipment.

b. *Promotion of Product Safety*

As early as 1944, Justice Traynor of the California Supreme Court declared that responsibility should be fixed wherever it will effectively reduce the hazards inherent in defective products that reach the market.[163] In most instances, manufacturers, by virtue of their control over the production process,are in the best position to reduce injuries from defective products.[164] Strict liability forces manufacturers to internalize the cost of product injuries, and, therefore, encourages them to discover and reduce the risks associated with their products.[165]

However, it can be argued that the product safety rationale is not applicable to military equipment for two reasons. First, the government is not an unsophisticated consumer; it can recognize potential safety problems and negotiate directly with the supplier to correct them.[166] Second, the government contractor has little control over risk exposure when the government officials dictate the product's design.[167] Consequently, the imposition of strict liability on government contractors will not necessarily promote greater product safety.[168]

In response, one can maintain that military authorities may not always be aware of safety problems, particularly when the product's design originates with the supplier, rather than with the government. Moreover, government contractors may be able to influence product safety when they participate in the design process. Therefore, in some cases, strict liability will encourage suppliers to support safety measures,[169] while immunizing them will result in the production of unsafe and unreliable equipment.[170]

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163. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (Traynor, J., concurring) (1944). *See also* Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 208, 447 A.2d 539, 548 (1982); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 173–74, 406 A.2d 140, 151–52 (1979); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119–20 (1960).

164. Note, *Products Liability and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L.J. 111, 117 (1972).

165. Brown, *Toward an Economic Theory of Liability*, 2 J. LEG. STUD. 323, 338–43 (1973); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L.J. 1055, 1060–67 (1972); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1091 (1965); Note, *Strict Liability in Hybrid Cases*, 32 STAN. L. REV. 391, 393 (1980).

166. Bynum v. FMC Corp., 770 F.2d 556, 572 (5th Cir. 1983); McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 452 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

167. Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 553 F. Supp. 340, 342 (E.D. Pa. 1982); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp 762, 793–94 (E.D.N.Y. 1980), *cert. denied, sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984); Note, *supra* note 4, at 1081.

168. Bynum v. FMC Corp., 770 F.2d 556, 572 (5th Cir. 1983); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 452 (9th Cir. 1983), *cert. denied* 464 U.S. 1043 (1984); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 793 (E.D.N.Y. 1982), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

169. Note, *supra* note 154, at 207.

170. McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 215–16, 195 Cal. Rptr. 764, 771 (1983) (Weiner, J., dissenting).

c. *Enterprise Liability*

The concept of enterprise liability also supports the imposition of strict liability on product manufacturers. According to this theory, the prices of goods must reflect their true social costs if society is to achieve an efficient allocation of economic resources.[171] Consequently, the cost of injuries should be placed on the party who will cause this to be reflected in the price of the product.[172] Normally, the manufacturer is in the best position to do so.

However, those who support the government contract defense maintain that the enterprise liability rationale does not apply to military equipment.[173] First, the enterprise liability concept reflects the belief that consumers typically underestimate the risks involved in a product's use, and, therefore they will overconsume the product unless its price reflects the true costs of accidents.[174] On the other hand, military authorities, unlike civilian consumers, constantly test and evaluate the safety and performance of the military equipment they purchase. Thus, military authorities are normally fully aware of the risks involved with respect to military equipment.[175]

The theory of enterprise liability also assumes that consumer demand for products is elastic and will decrease as the price of the product increases.[176] In contrast, decisions to purchase military equipment are often based on military and political considerations and are far less affected by price.[177] As the court in *McKay* observed: "Meeting adequately the needs of national defense, not accident costs, is the ultimate standard by which purchases of military equipment must be measured."[178] Consequently, the government would not necessarily choose safer substitutes for dangerous military hardware even if the cost of such equipment was increased to reflect the full cost of compensating injured servicemen.[179]

d. *Loss-Spreading*

Loss-spreading is another important goal of products liability.[180] The concept of loss-spreading assumes that liability should be placed on the party who can best absorb and spread the cost of compensating for injuries caused by defective

171. G. CALABRESI, THE COSTS OF ACCIDENTS 70 (1970); Klemme, *The Enterprise Theory of Torts*, 47 U. COLO. L. REV. 153, 158 (1976).

172. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 505 (1961).

173. Bynum v. FMC Corp., 770 F.2d 556, 571 (5th Cir. 1983); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451–52 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

174. Note, *supra* note 159, at 537.

175. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 452 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

176. Note, *supra* note 159, at 537.

177. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 452 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). *See also* Comment, *supra* note 2, at 512.

178. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 452 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

179. Bynum v. FMC Corp., 770 F.2d 556, 571 (5th Cir. 1983); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 452 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

180. Ray v. Alad Corp., 19 Cal. 3d 22, 31, 560 P.2d 3, 8 (1977); Price v. Shell Oil Co., 2 Cal. 3d 245, 251, 466 P.2d 722, 726 (1970); Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1962); Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 206, 447 A.2d 539, 547 (1982); Calabresi, *supra* note 172, at 517–27.

products.[181] This is generally thought to be the manufacturer.[182] The expense of insuring or self-insuring against accident costs simply becomes another cost of production. Moreover, since manufacturers sell to many buyers, the added cost can be distributed in such a way that the incremental cost to each consumer is small.[183]

However, proponents of the government contract defense maintain that military suppliers cannot spread these costs through the pricing mechanism like the producers of consumer goods because their only customer is the government. Thus, imposing tort liability on military suppliers would ultimately cause the entire cost of compensation to be shifted to the government.[184] In response, one might argue that it is better for the government to bear this cost than to have it fall on individual accident victims.[185]

The loss-spreading rationale also assumes that strict liability must be imposed on manufacturers in order to ensure that injured consumers are compensated. However, those who favor limiting the liability of government contractors contend that servicemen who are injured by defective products can seek compensation directly from the government.[186]

Nevertheless, it is difficult to see why the availability of compensation from other sources should necessarily shield the supplier of military equipment from liability. First, compensation under the Veterans' Benefits Act is not the economic equivalent of a damage award in a tort action. A serviceman injured by a defectively designed product will generally recover more in a successful lawsuit against the product manufacturer than from the government under the Veteran's Benefits Act.[187] Furthermore, depending on how broadly the government contract defense is applied, civilian victims of defectively designed products may be barred from suing the supplier and yet have no statutory right to compensation from the government either.[188]

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181. Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 809–10 (1976).

182. Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1966); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 856 (1963).

183. Note, *supra* note 4, at 1080.

184. Bynum v. FMC Corp., 770 F.2d 556, 571–72 (5th Cir. 1985).

185. Johnston v. United States, 568 F. Supp. 351, 357 (D. Kan. 1983).

186. Tozer v. LTV Corp., 792 F.2d 403, 407 (4th Cir. 1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 452 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672–73 (1977).

187. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 452 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). In addition, the veterans' benefits justification implicitly assumes that military personnel have somehow bargained away protection against unsafe equipment in return for potential compensation under the Veterans' Benefits Act. As Justice Weiner, dissenting in *McLaughlin v. Sikorsky Aircraft*, pointed out, this argument resembles "a federal fireman's rule." 148 Cal. App. 3d 203, 215, 195 Cal. Rptr. 764, 771 (1983). Justice Weiner doubted that there were any statutory or public policy grounds to support the notion that servicemen bartered away their rights as consumers merely by joining the military. *Id.* Furthermore, it should be noted that servicemen who are injured by manufacturing defects may sue government contractors even though they are still eligible for compensation under the Veterans' Benefits Act. *See* Foster v. Day & Zimmerman, Inc., 502 F.2d 867, 874–75 (5th Cir. 1974); Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010, 1014 (5th Cir. 1969).

188. *See infra* notes 261–71 and accompanying text.

2. *Policies That Support the Government Contractor Defense*

Courts and legal scholars have suggested a number of reasons for protecting government contractors against tort liability. Some maintain that it would be unfair to subject suppliers to liability when they are forced to comply with design specifications provided by the government.[189] Others claim that suppliers who are held liable for design defects will pass these costs on to the government by raising their contract prices and thus defeat the government's sovereign immunity.[190] Proponents of the government contractor defense also contend that it is necessary to protect military decisions from collateral attack in the courts.[191]

a. *Preventing Unfairness to Suppliers*

Arguably, it is unfair to hold a contractor liable for design decisions made by the government when the contractor cannot alter these decisions.[192] This problem is particularly acute when the supplier is compelled to manufacture the product at a contract price which does not enable it to insure against potential liability.[193] On the other hand, suppliers can often take steps to reduce risk and thereby lower their liability exposure.[194] In addition, since most government contracts are procured by bid or negotiation, suppliers can usually obtain a contract price that will cover the cost of insuring against tort liability.[195] Consequently, the fairness rationale does not appear to justify the government contract defense except in cases where denial of immunity would force the supplier to assume financial responsibility for the government's decisions.

b. *Limiting the Cost of Government Procurement Contracts*

Those who advocate the government contract doctrine claim that contractors would pass compensation costs on to the government, either by invoking cost-overrun provisions in their contracts, by adjusting their bids to reflect the cost of liability insurance, or by charging higher prices in subsequent sales of military equipment if they are held liable for defectively designed products.[196] Each of these practices would subvert the *Feres* doctrine.[197]

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189. Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985); In re "Agent Orange" Prod. Liab. Litig., 504 F.Supp. 762, 794 (E.D.N.Y. 1980), *cert. denied, sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984); Comment, McKay v. Rockwell International Corp.: *No Compulsion Required for Government Contractor Defense*, 28 St Louis U.L.J. 1061, 1073 (1984).

190. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 794 (E.D.N.Y. 1980), *cert. denied, sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

191. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740–41 (11th Cir. 1985).

192. Comment, *supra* note 189, at 1073.

193. In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 793–94 (E.D.N.Y. 1980), *cert. denied, sub nom.* Diamond Shamrock Chem., Co. v. Ryan, 465 U.S. 1067 (1984); Note, *supra* note 9, at 191–92; Note, *supra* note 31, at 1049–50.

194. Johnston v. United States, 568 F. Supp. 351, 357–58 (D. Kan. 1983); Note, *supra* note 4, at 1072–73.

195. Note, *supra* note 154, at 207.

196. Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 794 (E.D.N.Y. 1980), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1064 (1984).

197. *E.g.*, Bynum v. FMC Corp., 770 F.2d 556, 565–66 (5th Cir. 1985); In re Air Crash Disaster at Mannheim Ger.

However, most contracts between the government and suppliers of military equipment will probably reflect the cost of potential tort liability anyway.[198] Moreover, if suppliers are held liable for defective products, suppliers with good safety records could obtain liability insurance at favorable rates and would be able to offer lower bids than their competitors.[199] Furthermore, the cost of insurance passed on to the government would be offset by the benefits of lower accident costs.[200] For this reason, the "cost pass through" rationale does not justify a rule which relieves contractors of liability for design defects.

c. *Protecting Military Autonomy*

A more persuasive argument for the government contract defense is that it is necessary to protect military autonomy. This threat to the military has been described in various ways. For example, a number of courts have stated that holding military contractors liable for design defects would undermine military discipline, contrary to the *Feres* rule.[201] Other courts have expressed concern about the willingness of manufacturers to provide the armed forces with essential military equipment if they were held liable for design defects.[202] Finally, the courts have suggested that allowing suits against military contractors would "thrust the judiciary into the making of military decisions."[203]

(i) *Effect on Military Discipline*

Courts have traditionally upheld the power of military authorities over members of the armed forces. As the Supreme Court observed: "[a]n army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left as to the right to command in the officer, or the duty of obedience in the soldier."[204] Allowing servicemen to challenge the validity of military orders in civilian courts would clearly violate this principle.[205] However, as the *Feres* court suggested,

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on 9/11/82, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied sub nom.* Eschler v. Boeing Co., 106 S. Ct. 851 (1984); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 794 (E.D.N.Y. 1980), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984); Mackey v. Maremont, 350 Pa. Super. 415, 425–26, 504 A.2d 908, 913 (1986); Comment, Mckay v. Rockwell International Corp.: *No Compulsion Required for Government Contractor Defense*, 28 St. Louis U.L.J. 1061, 1073 (1984).

198. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 674 n.8 (1977); Note, *The Government Contract Defense: Should Manufacturer Discretion Preclude Its Availability?*, 37 Me. L. Rev. 187, 205 (1985).

199. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 457 (9th Cir. 1983), (Alarcon, I., dissenting), *cert. denied*, 464 U.S. 1043 (1984).

200. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741–42 (11th Cir. 1985).

201. Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985); Mackey v. Maremont, 350 Pa. Super. 415, 424, 504 A.2d 908, 912 (1986).

202. Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

203. Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3rd Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

204. In re Grimley, 137 U.S. 147, 153 (1890).

205. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741–42 (11th Cir. 1985).

ordinary tort actions by servicemen against the government may also undermine military discipline. If a serviceman on active duty was able to sue the government for injuries sustained while carrying out military orders, civilian courts would be required to "second-guess" the judgment of military superiors.[206] In addition, members of the military might be compelled to testify against their superiors or each another. This testimony, it is feared, would have a demoralizing effect on military *esprit de corps*.[207]

Advocates of the government contract defense contend that suits by military personnel against the suppliers of military equipment will also impair military discipline, even though the government is not made a party to the suit.[208] First, any judicial determination that a piece of military equipment was defectively designed would implicitly question the judgment of military authorities who authorized the design.[209] Second, in suits against government contractors, as in suits against the government itself, members of the armed services would be compelled to testify about the correctness of each others' decisions and actions.[210]

However, as the *Shaw* court pointed out, it is questionable whether a suit against a product manufacturer would interfere with military discipline to the same extent as a suit against the government itself since such litigation would not directly affect military orders or practices.[211] Furthermore, testimony by servicemen about the correctness of military decisions is likely to occur in products liability suits against military suppliers regardless of whether the government contract defense is allowed.[212] Thus, the government contract defense is not essential to maintenance of military discipline.

(ii) *Providing for the National Defense*

The court in *McKay* declared that the government was frequently required to establish design specifications for military equipment that pushed technology to its limits and thereby subjected servicemen to risks that would be unacceptable in ordinary consumer products.[213] The court felt that suppliers would be reluctant to manufacture dangerous equipment for the government, thus impairing its ability to provide for the national defense, if they were not protected from tort liability.[214] Other courts have agreed that second-guessing military decisions by government

206. Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F.L. REV. 24, 42 (1976); Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States by Familty Members of Servicemen*, 50 FORDHAM L. REV. 1241, 1262 (1982). *See also* Jaffee v. United States, 663 F.2d 1226, 1232 (3rd Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

207. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741–42 (11th Cir. 1985).

208. Tozer v. LTV Corp., 792 F.2d 403, 406 (4th Cir. 1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

209. Tozer v. LTV Corp., 792 F.2d 403, 406 (4th Cir. 1986); Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985).

210. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

211. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 743 (11th Cir. 1985) (quoting Cole v. United States, 755 F.2d 873, 879 (11th Cir. 1985)).

212. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 743 (11th Cir. 1985).

213. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

214. *Id. See also* Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985).

contractors might limit the military's ability to make choices in the procurement area.[215]

On the other hand, potential liability for design defects would probably not discourage manufacturers from selling military equipment to the government if they could raise their contract prices to cover the cost of liability insurance.[216] Manufacturers would refuse to sell to the government only if they could not take reasonable measures to limit their exposure to liability.[217] As suggested earlier, this would seldom happen. Therefore, the prospect of supplier resistance to military design decisions is probably not substantial enough to justify a broad rule of immunity for government contractors.

(iii) *Protecting Military Decisions from Judicial Interference*

The *McKay* court also stated that holding suppliers liable for design specifications provided by the government "would thrust the judiciary into the making of military decisions."[218] One reason for this concern is that civilian courts lack sufficient expertise to evaluate military decisions competently.[219] However, as the district court pointed out in *In Re Air Crash Disaster at Mannheim Germany*,[220] not all decisions regarding the design of military equipment involve military judgments. Where design decisions do not require special knowledge the military expertise argument cannot justify a rule which insulates contractors from liability.[221]

A more appropriate concern is ensuring that the courts do not invade the military's proper area of responsibility.[222] The military must be free to decide if a particular risk is acceptable and the courts should not be allowed to independently evaluate the merits of such decisions.[223] As the court in *Agent Orange* declared:

> The purpose of a government contract defense . . . is to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Consideration of costs, risks to participants, risks to third parties, and any other factors that might weigh on the decision of whether, when, and how to use a particular weapon, are uniquely questions for the military and should be exempt from review by civilian courts.[224]

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215. Hubbs v. United Technologies, 574 F. Supp. 96, 96 (E.D. Pa. 1983); Johnston v. United States, 568 F. Supp. 351, 357 (D. Kan. 1983); In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1054 (E.D.N.Y. 1982), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984); Casabianca v. Casabianca, 104 Misc. 2d 348, 350, 428 N.Y.S.2d 400, 402 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981); Note, *supra* note 9, at 187.

216. Note, *supra* note 4, at 1068. .

217. *Id.*

218. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). *See also* Comment, *supra* note 2, at 509.

219. Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

220. 586 F. Supp. 711 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115, *cert. denied sub nom.* Eschler v. Boeing Co., 106 S. Ct. 851 (1986).

221. *Id.* at 718.

222. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 742 (11th Cir. 1985).

223. *Id.*; Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986).

224. 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982).

Other courts have expressed similar sentiments and agreed that the judiciary should not be allowed to second-guess military authorities because this would violate the separation of powers principle.[225]

3. *The Discretionary Function Rationale*

Many courts have suggested that the government contract defense reflects the same concerns as the *Feres* doctrine.[226] As discussed earlier, the *Feres* doctrine bars suits against the government by servicemen who challenge the correctness of military orders. The government contract doctrine, on the other hand, prevents injured parties from indirectly questioning the wisdom of governmental decisions by bringing tort suits against the contractors who implement these decisions. To the extent that it prevents servicemen from implicitly questioning military orders by suing military suppliers, the government contract defense does promote the same interests as the *Feres* doctrine.

Nevertheless, the governmental interest protected by the *Feres* doctrine does not correspond in every respect to the interest that is protected by the government contract defense. The *Feres* doctrine not only protects policymaking decisions by military authorities, but also insulates routine, nondiscretionary decisions from judicial scrutiny. On the other hand, the government contract doctrine is concerned with conscious risk allocation decisions, but probably not with risks created through negligence or mere inadvertence. For this reason, the government contract defense appears to be more closely related to the discretionary function exception to the Federal Tort Claims Act than to the *Feres* doctrine.[227] In fact, the discretionary function rationale has already been invoked by the courts to support contractor immunity in the public works cases,[228] and presumably could also be used in products liability cases.[229]

By barring tort suits that challenge the planning and policymaking decision of government officials, the discretionary function exception supports the separation of powers principle because the ability of the judiciary to supervise the actions of the executive branch is limited.[230] Since policy decisions may be reflected in the

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225. *E.g.*, Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740–41 (11th Cir. 1985); Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied* 464 U.S. 1043 (1984).

226. *E.g.*, Bynum v. FMC Corp., 770 F.2d 556, 565 (5th Cir. 1985); In re Air Crash Diaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied sub nom.* Eschler v. Boeing Co., 106 S. Ct. 851 (1984); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Hubbs v. United Technologies, 574 F. Supp. 96, 98 (E.D. Pa. 1983).

227. Sanner v. Ford Motor Co., 144 N.J. Super. 1, 9, 364 A.2d 43, 47 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977) (per curiam), *cert. denied*, 75 N.J. 66, 384 A.2d 846 (1978); Note, *supra* note 4, at 1068.

228. Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965).

229. Brown v. Caterpillar Tractor Co., 696 F.2d 246, 250 (3d. Cir. 1982); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 9, 364 A.2d 43, 47 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977) (per curiam), *cert. denied*, 75 N.J. 66, 384 A.2d 846 (1978); Comment, *supra* note 16, at 716.

230. Rogers, *supra* note 13, at 807. Furthermore, the Federal Administrative Procedure Act, 5 U.S.C. § 500 (1976), provides a method for allowing the courts to review agency decisions in cases where such review is appropriate. It would

provisions of government procurement contracts,[231] the government can presumably rely on the discretionary function principle to bar suits against it for faulty product design. The government contract defense bars suits against suppliers for the same reasons that the discretionary function exception prohibits them against the government.

If protection of government decisionmaking is the government contract defense's true rationale, it is appropriate to ask whether suits against government contractors sufficiently threaten government decisionmaking to justify such immunity for contractors. When damages are sought against the government, the court is required to rule on the correctness of the government officer's action, and the government is directly sanctioned if the court concludes that the officer's conduct was unreasonable. As a practical matter, the court tells the agency "what it should have done, and thus, in effect, what it should do in the future."[232] Such conduct might constitute an unwarranted intrusion into an area of responsibility allocated by the Constitution to the executive branch. For this reason, it is proper to bar tort suits against the government in the appropriate circumstances.

However, it may not be accurate to equate tort actions against government contractors with similar suits against the government. Despite what some courts have said,[233] products liability actions against government contractors do not ordinarily threaten the process of government decisionmaking to the same extent as legal proceedings against the government or its officers. Even though a court might have to rule on the suitability of the government's design specifications when a contractor is sued, a judgment against the contractor would not directly interfere with the government's decisionmaking power since the government would not be bound by the court's decision.[234] Furthermore, since the contractor, not the government, would be forced to compensate injured parties, a judgment in the plaintiff's favor would not necessarily act as a deterrent to future government conduct.[235]

On the other hand, sometimes the relationship between government and supplier is so close that the supplier may actually function as an instrument of the government.[236] In such cases, the government would be frustrated in its attempt to effectuate essential policies if suppliers were held liable for carrying out governmental directives.[237] In addition, the government's ability to make and act upon cost-benefit calculations would be impaired if suppliers routinely passed on the cost

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be undesirable to allow parties to challenge agency decisions by means of tort actions against the government instead of utilizing the procedures established for this purpose by Congress in the APA. *Id.* at 808.

231. In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1054 (E.D.N.Y. 1982), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984); Comment, *supra* note 2, at 509.

232. Rogers, *supra* note 13, at 807.

233. *E.g.*, Brown v. Caterpillar Tractor Co., 696 F.2d 246, 250 (3d Cir. 1982); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965).

234. Comment, *supra* note 15, at 715–16.

235. Depending on the circumstances, either the *Feres* doctrine or the discretionary function exception would bar suits against the government by those injured by defectively designed products. Presumably, government contractors would not be allowed to join the government as a third party defendant either. *See* Henry v. Textron, Inc., 577 F.2d 1163, 1164 (4th Cir. 1978), *cert. denied sub nom.* Textron, Inc. v. United States, 439 U.S. 1047 (1978).

236. Note, *supra* note 9, at 221–24.

237. Comment, *supra* note 2, at 509.

of damage awards to the government in the form of higher contract prices.[238] This would be undesirable in cases where cost constraints foreclosed some choices and forced government decisionmakers to settle for less effective alternatives. Finally, the government might be unable to implement its policy decisions if suppliers refused to accept contract terms that contained a high level of risk to the contractor.[239] Undoubtedly, this is what the *McKay* court had in mind when it expressed concern that military suppliers would be unwilling to fulfill the government's procurement needs, thereby frustrating national security objectives.

As mentioned earlier, these events will not occur in every case where contractors are held liable for design decisions. Nevertheless, the prospect of interference with governmental decisionmaking is substantial enough to support the general principle of contractor immunity. However, any rule which limits supplier liability must be designed to protect the government's interests, rather than the interests of its contractors.[240]

IV. Unresolved Issues

Although most courts have accepted the general principle of supplier immunity, a number of issues must still be resolved before the specific dimensions of the government contract defense are fully revealed. One question is whether suppliers of nonmilitary products should be able to claim the protection of the government contract defense. Another question is whether military suppliers can invoke the government contract defense against civilian plaintiffs. There is also uncertainty about the scope of the supplier's duty to inform the government about design risks. In addition, the courts have disagreed over whether government participation in the design process will defeat the government contract defense. Finally, there is no consensus about whether state or federal law controls in cases where the government contract defense is raised.

A. *Nonmilitary Applications of the Government Contract Defense*

It is not clear whether the government contract defense is limited to "military equipment" or whether suppliers of other products purchased by the government may also invoke its protection. Uncertainty also exists about whether supplier immunity extends to injured civilians. If the government contract defense is grounded on the *Feres* doctrine, presumably it will be limited to suits against military suppliers; however, the government contract defense may bar suits by civilians, as well as by military personnel, if it protects the same governmental interests as the discretionary function exception.

238. *Id.* at 504.
239. Hunt v. Blasius, 55 Ill. App. 3d 14, 20, 370 N.E.2d 617, 621 (1977), *aff'd*, 74 Ill.2d 203, 384 N.E.2d 368.
240. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 741 (11th Cir. 1985).

1. *Nonmilitary Products*

Very few courts have expressly considered whether the government contract defense might be raised by the suppliers of nonmilitary products. Perhaps the issue has seldom arisen because most government contract cases decided to date have concerned military equipment[241] or civilian products that have been modified to meet specific military needs.[242] A number of courts have referred to "military equipment"[243] or "military contractors,"[244] implicitly suggesting that the government contract defense does not extend to nonmilitary products.[245] However, others have expresssly reserved judgment as to whether the government contract defense is applicable to nonmilitary equipment.[246]

Limiting the government contract defense to military equipment raises two problems. First, the term "military equipment" is difficult to define. Obviously, military weapons such as tanks, rockets, artillery, or fighter aircraft qualify as military equipment. On the other hand, ordinary consumer goods, such as typewriters, telephones, or food products cannot be so regarded.[247] At the same time, there are numerous products, such as motor vehicles, airplanes, clothing, and construction equipment that are essentially civilian in nature but which have been adapted for

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241. *E.g.*, Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986) (RF-8G reconnaissance aircraft); Boyle v. United Technologies Corp., 792 F.2d 413 (4th Cir. 1986) (CH-53 military helicopter); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985) (A-6 fighter aircraft); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985) (M-548 cargo carrier); In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 769 F.2d 115 (3rd Cir. 1985), *cert. denied sub nom*, Eschler v. Boeing Co., 106 S.Ct. 851 (1984) (Chinook helicopter); Koutsoubos v. Boeing Vertol, Div. of Boeing 755 F.2d 352 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986) (CH-46A military helicopter); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984) (RA-5C fighter aircraft); Hubbs v. United Technologies, 574 F. Supp. 96 (E.D. Pa. 1983) (Navy SH-30 helicopter); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764 (1983) (HH-3A helicopter); Sanner v. Ford Motor Co., 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) (per curiam), *cert. denied*, 75 N.J. 66, 384 A.2d 846 (1978) (jeep); Mackey v. Maremont Corp., 350 Pa. Super. 415, 504 A.2d 908 (1986) (M60 machine gun).

242. *E.g.*, Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985) (front-end loader); Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982) (bulldozer); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980), *cert. denied sub nom*, Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984) (chemical herbicide); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct 1980) *aff'd*, 79 A.D.2d 1117 (1981) (dough mixer).

243. *E.g.*, In re Air Crash Diaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied sub nom*, Eschler v. Boeing Co., 106 S. Ct. 851 (1984) ("military equipment"); Tillett v. J.I. Case Co., 756 F.2d 591, 598 (7th Cir. 1985) ("military equipment"); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984) ("military equipment"); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 794 (E.D.N.Y. 1980), *cert. denied sub nom*, Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984) ("weapons of war"); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 211 n.4, 195 Cal. Rptr. 764, 768 n.4 (1983) ("military equipment").

244. *E.g.*, Bynum v. FMC Corp., 770 F.2d 556, 565–66 (5th Cir. 1985) ("military contractors"); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 211, 195 Cal. Rptr. 764, 768 (1983) ("military suppliers").

245. *See* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Johnston v. United States, 568 F. Supp. 351, 357 (D. Kan. 1983).

246. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 n.6 (11th Cir. 1985) (no need to reach the question of whether military contractor defense potentially applies to any product—a belt buckle or a can of Spam—supplied to the military); Koutsoubos v. Boeing Vertol, Div. of Boeing, Co. 755 F.2d 352, 355 (3rd Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986) (no need to decide what form government contractor defense might take in cases which do not involve products developed specially for the military); Casabianca v. Casabianca, 104 Misc. 2d 348, 350, 428 N.Y.S.2d 400, 402 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981) (no need to consider the immunities which may attach to government procurement for non-military purposes or at times other than time of war). *See also* In re All Maine Asbestos Litig., 575 F. Supp. 1375, 1378 (D. Me. 1983), *aff'd in part and vacated in part*, 772 F.2d 1023 (1985).

247. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984) (a "can of beans" would not be considered military equipment).

military use. While the courts have usually characterized these products as military,[248] the line is sometimes hard to draw.

A more serious objection to restricting the government contract defense to military equipment is that such a limitation would be inconsistent with the doctrine's underlying rationale. It was suggested earlier that the government contract defense, like the discretionary function exception, is not just concerned with military procurement decisons, but protects governmental decisionmaking generally. If this proposition is correct, the government contract defense should not be limited to military equipment but should include any design choice that involves an exercise of government discretion.[249]

A few courts have already applied the government contract defense to nonmilitary products. For example, the defense was raised in *Price v. Tempo, Inc.*,[250] a suit by a fireman against the manufacturers of firefighting equipment. The plaintiff alleged that his firefighting gloves and coat did not provide adequate protection against exposure to heat and flames.[251] Both manufacturers invoked the government contract defense, contending that their products conformed to specifications established by the City of Philadelphia.[252] The court adopted the *Agent Orange* formulation and granted a partial summary judgment to one of the manufacturers.[253] The plaintiff argued that the policies behind the government contract defense were only applicable to contracts for military equipment. The court, however, concluded that the defense was based on broader considerations of sovereign immunity and, therefore, should not be limited to contractors who supplied goods to the armed forces.[254]

The manufacturer of a cattle vaccine successfully invoked the government contract defense as well. In *Burgess v. Colorado Serum Co.*,[255] the plaintiff, a veterinarian, was injured when he was accidentally injected with brucellosis vaccine distributed by the defendant, Colorado Serum Company. The vaccine was manufactured pursuant to a contract with the U.S. Department of Agriculture for use in the National Brucellosis Eradication Program.[256] The federal government had developed the vaccine and the contract provided detailed specifications for its manufacture and

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248. *See supra* note 242.

249. Examples might include vans for the Postal Service, helicopters for the Coast Guard, or off-road vehicles for the National Park Service.

250. 603 F. Supp. 1359 (E.D. Pa. 1985).

251. The gloves were manufactured by Tempo, Inc.. The plaintiff claimed that the gloves should have been constructed with a vapor barrier and wool lining. The coat was manufactured by Alv, Inc.. The plaintiff alleged that the coat should have been lined with fire-retardant material. *Id.* at 1360.

252. *Id.*

253. The court found that the coat conformed to the contract specifications and that the manufacturer had not participated in the development of these specifications. However, the court still required the manufacturer of the coat to establish at trial that the city knew as much about the risks associated with the product's design as it did. *Id.* at 1363–64. The glove manufacturer's motion for summary judgment was denied because it failed to establish any of the *Agent Orange* requirements. *Id.* at 1363.

254. *Id.* at 1361 n.3.

255. 772 F.2d 844 (11th Cir. 1985).

256. Brucellosis is an incurable disease which causes abortions in cattle. The U.S. Government began using brucellosis vaccine in 1941. Accidental injection of the vaccine into humans can cause undulant fever or human brucellosis. Symptoms include fever, aches, pains, chills, weight loss, and fatigue. *Id.* at 845.

production. The contract also provided the exact language to be printed on the label of the vaccine.[257]

The plaintiff brought suit against Colorado Serum Company, alleging that the labeling on the vaccine's package was inadequate because it did not give proper warning about the vaccine's danger to humans. The manufacturer obtained a summary judgment from the trial court on the theory that the government contract doctrine barred the plaintiff's claim.[258]

On appeal, the federal circuit court ruled that the contractor would not be held liable when the government was immune from suit. The *Burgess* court declared:

> Both the history of the defense and its general rationale lead us to the conclusion that it would be illogical to limit the availability of the defense solely to "military" contractors. If a contractor has acted in the sovereign's stead and can prove the elements of the defense, then he should not be denied the extension of sovereign immunity that is the government contract defense.[259]

The court then concluded that the defendant had established each of the elements of the government contract defense under the *Agent Orange* formula and affirmed the decision of the trial court.[260]

The *Burgess* decision is correct insofar as it holds that the government contract defense is not restricted to military equipment. The governmental interest in protecting its policy choices from judicial scrutiny extends beyond the military arena.

2. *Civilian Victims*

A related issue is whether the government contract defense can be asserted against civilian victims. A negative answer to this question is dictated by the *McKay* formula.[261] One requirement under *McKay* is that the government be immune from suit under the *Feres* doctrine.[262] Because the *Feres* rule only applies to service-related injuries it would not necessarily act as a bar to nonderivative civilian claims.[263]

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257. *Id.*

258. *Id.*

259. *Id.* at 846.

260. *Id.* at 847.

261. *See also* Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985). When it recognized the government contract defense, the *Bynum* court felt that it was necessary to distinguish Hansen v. Johns-Manville Prod. Corp., 734 F.2d 1036, 1044–45 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985), an asbestos case from the fifth circuit that had refused to apply the doctrine. According to the *Bynum* court, *Hansen* was distinguishable because the plaintiff in that case was a civilian and, therefore, the federal interest in military discipline was not implicated. 770 F.2d at 573. The government contract defense has been rejected in other asbestos cases as well. However, the usual reason given for refusing to apply the doctrine is that the risks associated with exposure to asbestos were inherent in the nature of the product itself and not attributable to any conduct by the government. Nobriga v. Raybestos-Manhattan, Inc., 67 Hawaii 157, 683 P.2d 389, 392 (1984). *See also* In re Related Asbestos Cases, 543 F. Supp. 1142, 1151–52 (N.D. Cal. 1982).

262. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

263. Feres v. United States, 340 U.S. 135, 146 (1950). Derivative claims by family members of service personnel are likewise barred by the *Feres* doctrine. *See* De Font v. United States, 453 F.2d 1239, 1240 (1st Cir.), *cert. denied*, 407 U.S. 910 (1972); Shaw v. United States, 448 F.2d 1240, 1241–42 (4th Cir. 1971); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 781 (E.D.N.Y. 1980), *cert. denied sub nom*, Diamond Shamrock Chem. Co., 465 U.S. 1067 (1984) (claims of children for birth defects and gentic damage due to parents' exposure to Agent Orange barred by *Feres* doctrine). *See also* Note, *supra* note 206, at 1244–45. On the other hand, the Supreme Court has refused to extend the *Feres* doctrine to military-related injuries of civilians. *See* Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 197

The government contract defense was rejected in part for this reason in *Johnston v. United States*,[264] which contained claims against the manufacturers of aircraft instruments. The plaintiffs were employees of a company that repaired aircraft instruments. They claimed to have developed cancer as a result of exposure to radioactive compounds on the faces of many of the aircraft instruments sent to them for repair.[265] The manufacturers contended that these instruments were produced under wartime contracts with the United States government and that any injury-producing aspects of the products were mandated by contract specifications. Accordingly, they moved for summary judgment.[266] However, the court concluded that the government contract defense was not applicable. In the court's view, it was not necessary to vindicate the policies behind the governmental immunity established in *Feres* because the injured parties were not servicemen.[267] Therefore, the court refused to grant the defendants' motion for summary judgment.[268]

Casabianca v. Casabianca,[269] on the other hand, supports the view that the government contract doctrine can act as a bar to liability for civilian injuries. The plaintiff a young boy, was injured by a defective dough mixer that had been manufactured by the defendant for the Army during World War II.[270] The court dismissed the case against the manufacturer, declaring that a supplier should not be held liable as long as it followed the government's specifications. The court suggested that withholding immunity from government contractors would cause them to second-guess military decisions, a result the court regarded as contrary to public policy.[271] The court apparently went beyond the confines of the *Feres* doctrine to reach this conclusion.

Other courts have also permitted a manufacturer to invoke the government contract defense against civilian plaintiffs. For example, both *Price* and *Burgess*, discussed earlier, were not only concerned with nonmilitary equipment, but also involved civilian plaintiffs. In each case, the court allowed the defense to be asserted against civilians.

Courts that have tied the government contract defense to the *Feres* doctrine have limited it to military litigants. However, if the government contract defense is based

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n.8 (1983) (government potentially liable to manufacturer in indemnity action for damages paid to civilian killed in crash of military aircraft in Vietnam).

264. 568 F. Supp. 351 (D. Kan. 1983).

265. *Id.* at 353.

266. *Id.*

267. *Id.* at 358.

268. *Id.* at 360. It should be noted that the court in *Johnston* did not refuse to apply the government contract defense simply because the plaintiffs were civilians; rather, it evaluated each *McKay* criterion and either rejected it outright or found that it did not apply to the facts of the case. Thus, the court found that there was no danger of second-guessing military decisions and rejected the notion that the contractor would pass additional costs on to the government. The court also concluded that manufacturers would not be treated unfairly if they were required to compensate those who were injured by their defectively designed products. *Id.* at 357–58.

Significantly, the court suggested that policy behind the discretionary function exception might justify recognition of the government contract defense in some instances but observed that no discretionary function appeared to be involved in the decision to use radium dials in aircraft instruments. *Id.* at 358.

269. 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981).

270. *Id.* at 349, 428 N.Y.S.2d at 401.

271. *Id.* at 350, 428 N.Y.S.2d at 402.

on the same rationale as the discretionary function exception, it should be applied to civilian as well as military plaintiffs.

B. *Supplier Participation in the Design Process*

Another hotly disputed issue is whether involvement by the supplier in the formulation of design specification should prevent it from raising the government contract defense. Of course, the supplier's role in the development of contract specifications varies according to the nature of the procurement process. In some cases, the government establishes detailed design specifications without any significant input from the suppliers.[272] In other instances, both the government and the supplier contribute to the product's final design.[273] However sometimes the government merely sets performance criteria and delegates responsibility for the product's ultimate design to the supplier.[274]

One would assume that the case for immunity under the government contract defense becomes less persuasive as the level of supplier involvement in the design process increases. Nevertheless, the courts apparently have not agreed on where to draw the line.

1. *Design Specifications Developed by the Government*

There is no participation by the supplier in the product's design when the government develops design criteria on its own and incorporates them in nonnegotiable contract specifications. In such cases, government officials, not the supplier, are responsible for any design risk. Consequently, it is not surprising that the courts have uniformly allowed the supplier to claim immunity under the government contract defense.

Nevertheless, some commentators have argued that suppliers should not be allowed to assert the government contract defense unless the government "compels" them to follow the contract specifications exactly.[275] In its most extreme version, this compulsion requirement would limit the government contract defense to situations where the supplier is legally obligated to enter into a contract with the government.[276]

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272. *E.g.*, Burgess v. Colorado Serum Co., 772 F.2d 844, 845 (11th Cir. 1985); Bynum v. FMC Corp., 770 F.2d 556, 559 (5th Cir. 1985); In re "Agent Orange" Prod. Liab. Litig., 565 F. Supp. 1263, 1274 (E.D.N.Y. 1983), *cert. denied sub nom*, Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 3–4, 364 A.2d 43, 44 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977) (per curiam), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978); Casabianca v. Casabianca, 104 Misc. 2d 348, 349, 428 N.Y.S.2d 400, 401 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981); Mackey v. Maremont, 350 Pa. Super. 415, 419, 504 A.2d 908, 910 (1986).

273. *E.g.*, In re Air Crash Diaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 118 (3d Cir. 1985), *cert. denied sub nom*, Eschler v. Boeing Co., 106 S.Ct. 851 (1986); Tillett v. J.I. Case Co., 756 F.2d 591, 599 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 256 (3d Cir. 1982).

274. *E.g.*, Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 747 (11th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

275. Comment, *supra* note 15, at 715–16.

276. Congress has given the President considerable power over private enterprises in time of war or national emergency. *See* Katayma, *Emergency Procurement Powers*, 2 PUB. CONT. L.J. 236 (1969). For example, the Defense Production Act of 1950, 50 U.S.C. §§ 2061–269 (1976), permits the President to compel contractors to accept and

The plaintiff in *Bynum v. FMC Corp.*[277] argued for such a rule,[278] but the court concluded that it would discourage contractors from bidding on government projects or cause them to pressure the government into purchasing safer equipment. In either event, according to the court, the contractor would be thrust into the position of second-guessing military decisions.[279] Therefore, the court rejected the proposed compulsion rule.[280]

A more conventional form of compulsion rule would limit the government contract defense to situations where the contract is offered to the supplier on a "take it or leave it" basis. According to this theory, a supplier would not be able to raise the government contract defense unless all contract specifications originate with the government and the supplier has no power to negotiate contract terms or to deviate from them once it accepts the contract. However, this variation of the compulsion rule has not found favor with the courts either.

For example, in *Brown v. Caterpillar Tractor Co.*[281] the plaintiff urged the court to reject the government contract defense unless the manufacturer showed that it was compelled by the government to comply with the specifications responsible for causing the injuries.[282] The manufacturer, on the other hand, claimed that compulsion played no part in the government contract defense and that it was obligated to do nothing more than strictly comply with the design specifications.[283] The court agreed with the defendant's position and held that compulsion was not required under Pennsylvania law.[284]

The *Bynum* and *Brown* courts were correct in ruling that compulsion should not be a necessary predicate to the government contract defense. When the supplier has no role in the formulation of a product's design, one can properly attribute sole responsibility for the design to the government. If the government makes a conscious decision to accept a risk when it chooses a particular design, the government contract doctrine should be available to insulate that decision from judical review. However, this does not necessarily mean that the defense should be limited to such situations. In some cases, it may be appropriate to protect product design decisions, even though

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perform contracts when necessary to promote the national defense. 50 U.S.C. § 2071(a) (1976). Other statutes allow the President to order production during wartime or to take over possession of any plant whose owners refuse to supply the required goods at a reasonable price. 10 U.S.C. §§ 4501, 9501 (1976).

277. Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985).

278. *Id.* at 574.

279. *Id.* at 574–75.

280. The *Bynum* court, however, did not determine whether the government contract defense would only be available in cases where the defendant was required by the terms of the contract to follow the government's specificaions. Instead, it merely noted that FMC had no discretion to deviate from the design specifications provided by the government, although the manufacturer could suggest modifications. *Id.* at 575 n.25.

281. Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982).

282. *Id.* at 246.

283. *Id.* at 253.

284. *Id.* at 254. However, the court then concluded that a question of fact was presented as to whether the manufacturer had strictly complied with the specifications of its contract with the Army. Observing that the contract was "a veritable tome of technical specifications, bidding notices, and communications between the government and Caterpillar," the court disagreed with the district court's conclusion that the contract clearly did not contemplate the addition of a protective structure on the bulldozer. *Id.* at 256. Accordingly, it reversed the summary judgment and remanded the case to the district court for trial on that issue. *Id.* at 257.

others have participated in the design process, as long as the government makes the final decision.

2. *Specifications Developed by the Supplier and the Government*

Generally, the courts have allowed suppliers to raise the government contract defense even when the contract specifications did not originate entirely with the government. For example, in *Agent Orange*,[285] the plaintiffs contended that any role by the defendant manufacturer in preparation of the specifications, including advice or recommendations to the government about product design, should defeat the government contract defense. The court, however, rejected this argument and ruled that a manufacturer could assert the defense as long as the product it supplied was the particular product specified by the government.[286]

Sometimes, the government officials and suppliers may engage in a "back and forth" process of negotiation over the contract specifications. When this occurs, it is difficult to ascertain whether a particular design specification originated with the government or with the supplier. In such cases, both parties usually bear some responsibility for the product's ultimate design. Nevertheless, some courts have allowed the supplier to invoke the government contract defense in these circumstances as long as the government plays a significant role in the development of the specifications.[287]

For example, in *Koutsoubos v. Boeing Vertol, Division of Boeing Co.*,[288] the decedent was killed when his Navy helicopter crashed during a training flight. Suit was brought against Boeing, the aircraft's manufacturer. The trial court ruled that Boeing must prove that the government "established" the specifications for the helicopter in order to invoke the government contract defense.[289] The court then found that the Navy had established detailed safety features and had inspected each helicopter to ensure that it complied with contract specifications.[290] Consequently, the trial court concluded that the government contract defense was applicable and granted a summary judgment in favor of the defendant.[291]

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285. In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied sub nom,* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

286. *Id.* at 1056. *See also* Note, *supra* note 154, at 192. The court, however, also suggested that it was necessary that the government establish contract specifications for the product, and that mere ratification or approval of specifications provided by the manufacturer might not be enough to immunize the supplier from tort liability. In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y 1982). *See also* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 744 (11th Cir. 1985).

287. *E.g.*, Boyle v. United Technologies Corp., 792 F.2d 413, 414–15 (4th Cir. 1986); In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 122–23 (3d Cir. 1985), *cert. denied, sub nom,* Eschler v. Boeing Co., 106 S.Ct. 851 (1984); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 355 (3d Cir. 1985), *cert. denied,* 106 S.Ct. 72 (1986); Price v. Tempo, Inc., 603 F. Supp. 1359, 1363 (E.D. Pa. 1985).

288. 553 F. Supp. 340 (E.D. Pa. 1982).

289. *Id.* at 343.

290. *Id.*

291. *Id.* at 344.

On appeal, the circuit court agreed that the manufacturer could invoke the government contract defense.[292] Even though some of the specifications originated with Boeing, the court found that these proposals simply initiated a "back and forth" discussion between Boeing and the Navy, with the Navy making all final decisions as to the helicopter's specifications.[293] The court felt that a rule which allowed any involvement by the contractor in the design process to defeat the government contract defense would discourage suppliers from working closely with the military. Consequently, the court concluded that government "approval" of specifications developed through a continuous series of negotiations between the government and the supplier would satisfy the requirements of the government contract defense, even though some of these specifications originated with the contractor.[294]

The *Koutsoubos* approach was also followed in *In Re Air Crash Diaster at Mannheim Germany*.[295] The case concerned the crash of an Army CH-47C "Chinook" helicopter in which 46 persons were killed. The accident was apparently caused by a defect in the design of the aircraft's synchronization system.[296] A number of suits were brought against the manufacturer and consolidated before a single court for purposes of determining the liability issue.[297]

Boeing had developed the aircraft's design in response to Army mission and performance requirements. The Army then approved the design, inspected prototypes, implemented design changes, and approved the design for production.[298] After several accidents occured, which indicated flaws in the design of the forward transmission system, Boeing suggested a number of design changes; however, the Army rejected a proposed change that would have prevented the accident.[299]

At trial, the district court ruled that the government contract defense was inapplicable because Boeing had initially developed the helicopter's design based on the Army's performance specifications.[300] Accordingly, it refused to overturn a jury verdict in favor of the plaintiffs.[301] However, this view of the government contract defense was rejected on appeal. The appellate court observed that the contract between Boeing and the Army set forth explicit specifications for the design of the transmission and synchronization shaft. The court also found that the Army had

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292. Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 355 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986).

293. *Id.* at 354.

294. *Id.* at 355.

295. 769 F.2d 115, 123 (3d Cir. 1985).

296. In re Air Crash Diaster at Mannheim Ger. on 9/11/82, 586 F. Supp. 711, 715 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115 (3d Cir. 1985), *cert. denied sub nom*, Eschler v. Boeing Co., 106 S.Ct. 851 (1986). Failure of the forward transmission caused displacement of the pinion gear. This, in turn, allowed the sychronization shaft to rub against the aircraft's structure, weakening the synchronization shaft and causing the shaft to rupture when power was applied to the transmission. In re Air Crash Disaster at Mannheim Ger. on 9/11/82. 769 F.2d 115, 119 (3d Cir. 1985), *cert. denied sub nom*, Eschler v. Boeing Co., 106 S.Ct 851 (1984).

297. In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 575 F. Supp. 521 (E.D. Pa. 1983), *motion denied* 586 F. Supp. 711 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115 (3d Cir. 1985), *cert. denied sub nom.* Eschler v. Boeing Co., 106 S.Ct. 851 (1986).

298. In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 586 F. Supp. at 711, 715–16 (E.D. Pa. 1984).

299. In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 118–19 (3d Cir. 1985).

300. In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 586 F. Supp. 711, 718 (E.D. Pa. 1984).

301. *Id.* at 721.

extensively tested prototype aircraft and required design changes before it allowed Boeing to start production of the helicopters.[302] Therefore, in the court's view, the government's participation in the design process and its exercise of final decisionmaking authority was sufficient to meet the "approval" requirement of *Koutsoubos*.[303]

The court in *Tozer v. LTV*[304] also allowed the government contract defense to be invoked where the government and the supplier jointly developed a product's design. The decedent in *Tozer* was killed in a plane crash near the coast of California. The crash occurred when a panel, known as the "Buick Hood," came off in mid-flight, causing the pilot to lose control of a Navy RF-8G reconnaissance plane.[305] Suit based on negligence and strict liability was brought against the manufacturer, alleging that the panel was defectively designed. The trial court refused to overturn a jury verdict for the plaintiff and the manufacturer appealed.[306]

The appellate court found that the manufacturer, Vought, had worked closely with the Navy in developing the specifications for the aircraft. Nevertheless, it concluded that the government contract defense was still applicable. The court acknowledged that contractor participation in design was essential to the development of modern weapons. As the court declared:

> The contractor and the military pool their expertise, matching the latest advances in military technology with the specific dictates of the mission. We recognize this back-and-forth as a reality of the procurement process, as well as a valuable part of that process; indeed if military technology is to continue to incorporate the advances of science, it needs the uninhibited assistance of private contractors.[307]

In the court's opinion, a restrictive application of the government contract defense would discourage contractors from working with military authorities to design military hardware.[308] Therefore, the court held that the defense would be allowed as long as there was "genuine governmental participation in the design. . . ."[309]

The court in *Boyle v. United Technologies Corp.*[310] also concluded that "back and forth" discussions between the manufacturer and the government would satisfy the approval requirement. *Boyle* was concerned with the design of an escape hatch for the Sikorsky CH-53 helicopter. The court observed that Sikorsky and the Navy had worked together to prepare the detailed specifications for the aircraft. In addition, Sikorsky built a mockup of the cockpit with all the instruments and controls, including the emergency escape hatch. This, in the court's opinion, was sufficient to

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302. In re Air Crash Disaster at Mannheim Germany on 9/11/82, 769 F.2d 115, 118–19 (3d Cir. 1985).

303. *Id.* at 123.

304. 792 F.2d 403 (4th Cir. 1986).

305. *Id.* at 404.

306. The trial court instructed the jury that the government contract doctrine precluded liability under a theory of strict products liability, but failed to give a similar instruction with respect to the negligence count. The defendant claimed that the government contract defense could be raised in a negligence action as well as one based on strict liability. *Id.* at 405. The circuit court agreed with the defendant. *Id.* at 408–09.

307. *Id.* at 407.

308. *Id.*

309. *Id.* at 408.

310. 792 F.2d 413 (4th Cir. 1986).

establish that the Navy had approved reasonably detailed specifications for the allegedly defective escape hatch.[311]

Agent Orange, *Koutsobous*, *In Re Air Crash Disaster*, *Tozer*, and *Boyle* correctly concluded that participation by the supplier in the formulation of a product's design should not necessarily defeat the government contract defense. If the purpose of the defense is to protect discretionary descisions by government officials, then courts in products liability suits should focus on whether the supplier or the government was primarily responsible for the decision to go forward with a particular design when the inherent risks were known. A formula that focuses on the origin of a design specification, rather than the source of the decision to adopt the design, misses the point.

3. *Specifications Developed Solely by the Supplier*

It is more difficult to justify contractor immunity when the supplier is the sole source of a defective design than when the government has played a significant role in the design's development. Nevertheless, the court in *McKay v. Rockwell International Corp.*,[312] held that the government contract defense could be invoked even when the supplier alone developed the product's design. Although the court stated that the defense would not be allowed when the government set only minimal or very general requirements for the contractor, it was apparently willing to recognize the government contract defense in situations where the contractor alone developed the specifications as long as the government reviewed and approved a detailed set of specifications.[313]

However, this view of the government contract defense provoked sharp criticism from one member of the *McKay* court.[314] Judge Alarcon, dissenting in *McKay*, argued that the government contract defense should not apply in cases where the manufacturer produced the design in question, even when the government subsequently ratified the manufacturer's decision.[315] The dissent felt that contractors who designed a product should be responsible for any defects in their design and that mere ratification by the government should not be enough to immunize them from liability.[316]

Nevertheless, the holding in *McKay* is not necessarily inconsistent with the policies that underlie the government contract defense. As long as government officials have made a meaningful decision to approve a particular product design, it should not matter that the design originated entirely with the supplier as long as

311. *Id.* at 414–15.

312. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984).

313. *Id.* at 450. *See also* Note, *supra* note 9, at 200–01.

314. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 456–64 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). *See also* Note, *The Government Contractor Defense and Manufacturers of Military Equipment*, 21 Hous. L. Rev. 855, 870–71 (1984); Note, *supra* note 154, at 195–96. Comment, *supra* note 15, at 717. *but see* Comment, *supra* note 189, at 1082.

315. McKay v. Rockwell Int'l Corp., 704 F.2d 444, 459 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

316. *Id.*

government decisionmakers were fully aware of the risks involved in a particular design choice.

4. *The* Shaw *Court's Approach*

The formula employed by the court in *Shaw v. Grumman Aerospace Corp.*[317] provides another approach to the question of supplier participation in the design process. First, the court cautioned against placing too much emphasis on "specifications" as a touchstone of liability. As the court observed:

> Specifications may be minimal or detailed, quantitive or qualitative, general or specific; they may range from meticulous descriptions of each bearing and bushing required, to vague hopes for "simple" or "fail-safe" products. At times, several sets of specifications, sometimes conflicting, may govern a product's design all at once: *e.g.*, one "spec" requiring back-up or redundancy systems in all products, another urging ease of maintenance, a third mandating combat effectiveness, a forth seeking cost containment, and a fifth prescribing the dimensions of a washer. Worse still, these specifications may be promulgated by several different sources, military or civilian, at different times over the life of a product.[318]

Instead, the *Shaw* court looked at specifications as a starting point, rather than as a sole criterion, for determining whether the government contract defense was applicable to a case or not. According to the court, specifications could be divided into two types as follows: (1) detailed, precise, and typically quantitative specifications for manufacture of a particular military product; and (2) more general and more qualitative specifications, such as performance or mission criteria. This second category would encompass all product specifications not included in the first category.[319]

The court concluded that if a type one design was generated exclusively by the military, the product manufacturer would only be held liable for manufacturing defects. Furthermore, a military contractor who worked jointly with military personnel in producing type one product specifications, could escape liability if it could show that the part it played was so minimal that liability should not be warranted.[320]

However, the *Shaw* court determined that a manufacturer could also invoke the government contract defense in some cases where type two specifications were involved. According to the court, the manufacturer could avoid liability by showing that it warned the military of the reasonably known risks of the design, notified the government of alternative designs, and that the military, although forewarned, clearly authorized the contractor to proceed with the more dangerous design.[321] The court, however, insisted that authorization be "knowing" and that a mere "rubber stamp" approval would not be sufficient. In addition, the court ruled that the approval must

317. Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985).
318. *Id.* at 745.
319. *Id.*
320. *Id.* at 746.
321. *Id.*

be obviously related and responsive to the relevant warning. According to the *Shaw* court, the overriding objective of this test was to determine whether or not a military judgment to go ahead with the dangerous design was actually made.[322] The *Shaw* court's formula provides a useful analytical tool to determine whether a particular design decision implements governmental policy or merely represents government acquiescence to the supplier's decision.

C. *The Duty to Warn*

Most courts have conditioned the government contract defense on full disclosure of all known risks.[323] This disclosure requirement presumably provides suppliers with an incentive to work closely with military authorities in the development and testing of equipment.[324] In addition, a supplier who has fully informed the government about the potential risks of a proposed design can assume that the government has made a conscious decision to accept these risks when it adheres to the design.[325]

Although the courts agree that a duty to warn exists, they differ about the scope of this duty. Most courts subscribe to an "actual knowledge" standard which merely obligates the supplier to disclose known risks.[326] However, some courts have adopted a "should have known" standard which requires the supplier to disclose all risks associated with the product's design which it either knew or should have known about.[327]

Agent Orange[328] was the first case to examine the nature of the supplier's obligation to inform the government about design risks. The defendant in that case maintained that its knowledge of the risk, in the absence of a glaring or patent hazard in the specifications, was irrelevant to the existence of a government contract defense.[329] However, the court declared that a supplier should not be insulated from liability when an adequate warning would have prevented the harm. Consequently, the court held that the manufacturer was required to disclose known risks associated with any product that it supplied so that the military could properly balance the

322. *Id.*

323. In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985).

324. Bynum v. FMC Corp., 770 F.2d 556, 566 (5th Cir. 1985). *See also* Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985).

325. In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 850 (E.D.N.Y. 1984). It is not clear whether a supplier who fully informs the government about a particular risk that could be eliminated by changing the product's design is thereby also relieved of any duty to warn the ultimate user or consumer. *Compare* Mackey v. Maremont Corp., 350 Pa. Super. 415, 431, 504 A.2d 906, 916 (1986) (manufacturer can rely on government to instruct users on safe operation of M60 machine gun), *with* Brown v. Caterpillar Tractor Co., 741 F.2d 656, 660 (3d Cir. 1984) (duty to warn runs to the ultimate consumer and knowledge of employer is not imputed to employee user).

326. *E.g.*, Boyle v. United Technologies Corp., 792 F.2d 413, 415 (4th Cir. 1986); Bynum v. FMC Corp., 770 F.2d 556, 575 –76 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 599 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

327. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985); In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 849 (E.D.N.Y. 1984).

328. In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046 (E.D.N.Y. 1982), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

329. *Id.* at 1057.

product's risks and benefits.[330] At the same time, the court cautioned that the supplier was not required to conduct any testing that was not included in the contract specifications.[331]

However, at a subsequent stage in the *Agent Orange* litigation, the court shifted to a "should have known" formula.[332] The court explained that this new approach was meant to discourage suppliers from deliberately remaining ignorant about the dangers of their products.[333] The court acknowledged that this departure from its previously announced standard was influenced by the peculiar facts of the *Agent Orange* case. Specifically, the court felt that a "should have known" standard was more appropriate than an actual knowledge standard because the components of Agent Orange had long been used as herbicides in the civilian market.[334]

The court in *Shaw*[335] also adopted a "should have known" test. According to *Shaw*, when detailed specifications were not provided by the government, the contractor should be required to demonstrate that it warned the military of the risks of the product and that it informed the government of any design alternatives "reasonably known" to it.[336] The court emphasized that reasonable knowledge did not mean omniscience. Rather, an alternative would be considered to be reasonably known only if it was either actually known or if it reasonably should have been known according to good design practice in the industry.[337]

Despite the holdings in *Agent Orange* and *Shaw*, most courts still adhere to the "actual knowledge" standard.[338] For example, in *Bynum*, the plaintiff urged the court to adopt a "should have known" standard, arguing that it would increase the information flow between the military contractor and the government and allow the government to make better informed decisions.[339] The court, however, declared that a "should have known" standard would compel the military contractor to reevaluate the design specifications furnished by the government and engage in testing not required under the government contract. The court believed that decisions about testing were best left to the military.[340]

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330. *Id.* at 1055.

331. *Id.*

332. In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 849 (E.D.N.Y. 1984).

333. *Id.*

334. *Id.* The court pointed out that the "should have known" standard does not apply to the government, holding instead that actual knowledge on the government's part is required in order to relieve the supplier of its duty to inform about design risks. According to the court, if the government was not aware of the danger, a manufacturer could not assume that the government made a conscious decison to accept the particular risk. In addition, the fact that the government may have been derelict in its duty should not relieve a defendant from the consequences of its own tortious conduct. Finally, in the court's opinion, an inquiry into what the military should have known or done could come perilously close to the second-guessing of military decisions prohibited by the *Feres-Stencel* doctrine. *Id.* at 850.

335. Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985).

336. *Id.* at 746.

337. *Id.*

338. *E.g.*, Bynum v. FMC Corp., 770 F.2d 556, 575–76 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 599 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

339. Bynum v. FMC Corp., 770 F.2d 556, 575 (5th Cir. 1985).

340. *Id.* at 576. The court also acknowledged that the court in *Agent Orange* had modified its earlier version of the government contract defense to incorporate a limited "known or should have known" duty to warn. However, it

The duty to warn ensures that government officials will be able to make policy decisions on an informed basis. Therefore, the imposition of this requirement on suppliers is consistent with the rationale behind the government contract defense. Obviously, the duty to inform should include all risks actually known to the supplier. In addition, it is reasonable to impute knowledge to the supplier of risks which are commonly known within the industry. A supplier who fails to become aware of a risk because of negligence should not be allowed to invoke the government contract defense. To do so would not promote informed decisionmaking by the government, but instead would merely reward contractors who remained culpably ignorant of the risks associated with their products. On the other hand, the supplier should not be required to conduct any testing beyond that which is required by the contract. Otherwise, the supplier would be forced to substitute its judgment for that of the government as to what constituted adequate testing.

D. *The Government Contract Defense and Federal Common Law*

Another area of uncertainty is whether the government contract doctrine should be treated as a creature of state law or whether it should be regarded as an aspect of federal common law. Federal courts have uniformly applied federal admiralty law to litigants who have sued under the Death on the High Seas Act.[341] However, when injured parties have sought relief in federal court on diversity grounds, some courts have followed state law,[342] but others have applied federal common law.[343]

Brown v. Caterpillar Tractor Co.[344] was the first case to address the choice-of-law issue explicitly. In *Brown*, the manufacturer, Caterpillar, argued that the *Feres* doctrine required federal law to be applied.[345] The court, however, responded that the *Feres* and *Stencel Aero* decisions did not support the application of federal law in suits by servicemen against government contractors. Instead, the court observed that manufacturers who served a national market were often subjected to varying standards of liability in different jurisdictions. The court also concluded that suits by

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concluded that the *Agent Orange* court had limited its ruling to situations where the manufacturer had years of experience with components of the product before it was manufactured by the military and that the product was highly technical in nature. In *Bynum*, the product was designed by TACOM, a division of the Army, well versed in the design of and the problems inherent in tracked military vehicles. Consequently, the court concluded that the factors that prompted the modification of the *Agent Orange* test were not present. *Id.* at 576, n.29.

341. 46 U.S.C. §§ 761–68 (1976). *See* Tozer v. LTV Corp., 792 F.2d 403, 404 (4th Cir. 1986); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 738 (11th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 353 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

342. *E.g.*, Burgess v. Colorado Serum Co., 772 F.2d 844, 845 (11th Cir. 1985) (Alabama law applied); In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 122 (3d Cir. 1985), *cert. denied sub nom.* Eschler v. Boeing Co., 106 S.Ct. 851 (1986) (Pennsylvania law applied); Tillett v. J.I. Case Co., 756 F.2d 591, 593–94 (7th Cir. 1985) (Wisconsin law applied); Brown v. Caterpillar Tractor Co., 696 F.2d 246, 249 (3d Cir. 1982) (Pennsylvania law applied); In re All Maine Asbestos Litig., 575 F. Supp. 1375, 1377 (D. Me. 1983) *aff'd in part denied in part*, 772 F.2d 1023 (1985) (Maine law applied); Price v. Tempo, Inc., 603 F. Supp. 1359, 1360–61 (E.D. Pa. 1985) (Pennsylvania law applied).

343. *E.g.*, Bynum v. FMC Corp., 770 F.2d 556, 574 (5th Cir. 1985); In re "Agent Orange" Prod. Liab. Litig. 597 F. Supp. 740, 847 (E.D.N.Y. 1984). *See also* McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 211–12, 195 Cal. Rptr. 764, 768 (1983).

344. Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982).

345. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977).

servicemen against government contractors did not circumvent the limitations on governmental liability contained in the Veterans' Benefits Act. Furthermore, the court maintained that suits against government contractors would not require second-guessing of military decisions by the judiciary and, therefore, did not pose as much of a threat to military discipline as suits against the government itself.[346] Consequently, the court ruled that state law, not federal law, should control.

The *Agent Orange* court reached a different conclusion. The court stated that regardless of the law applied to other substantive issues, the supremacy clause required that federal law be applied to affirmative defenses in some circumstances.[347] To determine whether federal law applied to a claim or defense, the court utilized an approach derived from the Supreme Court's decision in *Clearfield Trust v. United States*.[348] The *Clearfield Trust* test requires a court to determine the following: (1) whether there exists a substantial federal interest in the outcome of the issue; (2) what the effect on this federal interest would be if state law was applied; and (3) what the effect on state interests would be if state law were displaced by federal common law.[349] Federal law will usually prevail if a substantial federal interest is involved and this interest would be adversely affected if state law is chosen. Federal law is particularly appropriate if no substantial state interest is impaired by the displacement

346. Brown v. Caterpillar Tractor Co., 696 F.2d 246, 248–49 (3d Cir. 1982).

347. In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 846 (E.D.N.Y. 1984).

348. 318 U.S. 363 (1943). The Court concluded that federal common law governed the rights and duties of the federal government in connection with the commercial paper it issued. The Court's approach required a finding that a source of authority for the creation of federal law existed and that a federal interest was sufficiently implicated to justify the subsitution of federal law for state law. *Id.* at 366–67. *See also* Note, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U.L. REV. 601, 609–611 (1980). In Miree v. DeKalb County, 433 U.S. 25 (1977), and Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966), the Court extended the *Clearfield* approach to cases where the federal government was not a defendant. The district court in *Agent Orange* expressly relied on these decisions as the basis for its three-part test.

It should be noted that the applicability of federal common law was also addressed from the jurisdictional viewpoint by the *Agent Orange* court in an earlier opinion. The plaintiffs in *Agent Orange* originally based their claims under federal common law, claiming that the court had subject matter jurisdiction because of the existence of a federal question. The plaintiffs argued that federal common law should be applied because of the unique relationship between the government and its servicemen and because of the overriding federal interests involved in the Agent Orange controversy. In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 737, 744–45 (E.D.N.Y. 1979), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

The court declared that the choice of law issue was governed by Miree v. Dekalb County, 433 U.S. 25 (1977), and Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966). In these cases, the United States Supreme Court formulated a test to determine whether federal common law would be employed. Under this approach, the court was required to establish that there was a substantial federal interest in the outcome of the litigation. If such an interest was found, the court was then supposed to consider the effect on this federal interest if state law was applied, as well as the effect on state interests if state law was displaced by federal common law. In re "Agent Orange" Prod. Liab. Litig., 506 F.Supp. 737, 744–45 (E.D.N.Y. 1979). Applying this test, the court concluded that substantial federal interests were involved in the litigation and that such intersts would be adversely affected by the application of state law. *Id.* at 746.

On appeal, the circuit court recognized that the approach followed in *Miree* and *Wallis* was applicable, but concluded that no identifiable federal policy would be threatened if state law were applied. In re "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 995 (2d Cir. 1980), *cert. denied sub nom.* Chapman v. Dow Chem. Co., 454 U.S. 1128 (1981). Therefore, the lower court's jurisdiction would have to be based on diversity of citizenship and state law would control the disposition of the case. Comment, *supra* note 9, at 210. On remand, the district court, faced with claims parties from numerous states as well as Australia and New Zealand, decided to apply a "national consensus law" with respect to the liability issue and the government contract defense. In re "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690 (E.D.N.Y. 1984). On petition for writ of mandamus, the circuit court acknowledged that the *Agent Orange* litigation required a single dispositive trial on various common issues and tacitly approved the use of a national consensus law approach. In re Diamond Shamrock, 725 F.2d 858, 861 (2d Cir. 1984), *cert. denied*, 465 U.S. 1067 (1984).

349. In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 846 (E.D.N.Y. 1984).

of state law by federal law. Applying these criteria, the *Agent Orange* court concluded that federal law should control the application of the government contract defense.

First, the court pointed out that the Supreme Court had recognized the "distinctively federal" nature of the relationship between the government and its military suppliers.[350] The court also noted that any decision about the extent of a contractor's liability would affect future dealings between the contractor and the government.[351] Furthermore, the court observed that federal law ordinarily controlled the construction and applicability of federal contracts.[352] Finally, the court declared that the federal concern was particularly great in the case of *Agent Orange* because the contracts were performed under the provisions of the Defense Production Act.[353]

The court also determined that there was a substantial federal interest in achieving a uniform liability standard for government suppliers. The court reasoned that it would be grossly unfair to subject a defense contractor, who produced war material under the compulsion of federal law, to the laws of dozens of different states for the purpose of determining what standard governed its liability for product defects.[354]

Finally, the court concluded that state interests would not be seriously impaired if state law were displaced by federal common law. The court observed that few states had developed any rule regarding the liability of a government contractor to servicemen for injuries from military equipment.[355] Consequently, the court ruled that federal law applied under the supremacy clause to the government contract defense.[356]

The court in *Bynum*[357] also declared that federal law should determine the nature and scope of the government contract defense. The court applied the *Clearfield* analysis to determine whether federal common law was applicable. According to the *Bynum* court, it was necessary to consider whether the question at issue had any substantial bearing upon "uniquely federal" interests.[358] If federal interests were implicated, the court stated that it must then determine whether it should apply federal common law or state law as the applicable rule.[359] This inquiry essentially involved

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350. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977).

351. In re "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 704 (E.D.N.Y. 1984).

352. Prieve & Sons, Inc. v. United States, 332 U.S. 407 (1947); In re "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 704 (E.D.N.Y. 1984).

353. In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 846 (E.D.N.Y. 1984).

354. *Id.*

355. *Id.* at 846–47. The court conceded that there were some decisions under state law, but all of them were suits by individual soldiers or civilians injured either by nonmilitary products such as bulldozers or dough mixers, or by defects in airplanes and explosives, objects whose misuse is frequently regulated by state tort law. None of these cases, in the court's opinion, implicated to the same extent any of the federal interests involved in the manufacture of Agent Orange. *Id.* at 847.

356. *Id.* Furthermore, the court held that the same result would be reached under *Erie* using the national consensus law approach set forth in its conflicts of law opinion. *Id.*

357. Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985).

358. *Id.* at 568 (citing Texas Indust., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)); Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1323 (5th Cir. 1985).

359. 770 F.2d at 568 (citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979); Georgia Power Co. v. Sanders, 617 F.2d 1112, 1115 (5th Cir. 1980), *cert. denied sub nom.* Georgia Power Co. v. 138.30 Acres of Land, 450 U.S. 936 (1981)).

focusing on the effect that applying state law would have on the federal interests and the extent to which imposition of federal common law would disrupt important and legitimate state policies.[360]

Applying these criteria to government contractor liability, the court in *Bynum* first concluded that a significant federal interest was involved even when the government itself was not a party to the suit. The federal interest at stake was responsibility for military decisions. The court declared that:

> The composition, training, equipping, and management of our military forces is a matter exclusively within the rights and duties of the federal government, and, as a result, any interference with the federal authority over national defense and military affairs implicates uniquely federal interests of the most basic sort.[361]

The court added that the design of military equipment was essentially a military decision. Moreover, a suit by a serviceman alleging that the government defectively designed its military equipment posed a threat to military discipline.[362] Therefore, the court concluded that a significant federal interest was at stake and that this interest would be frustrated if state law, permitting or requiring judical intervention into military decisionmaking, was applied.[363]

The court acknowledged that state products liability doctrines promoted a number of legitimate goals. However, it concluded that these interests were not as great in the case of military equipment and, in any event, were outweighed by superior federal interests.[364] Accordingly, the court ruled that a federally recognized government contract defense should be applied.[365]

A California intermediate appellate court in *McLaughlin v. Sikorsky Aircraft*[366] also concluded that federal law should apply in cases where a supplier raised the government contract defense. The plaintiff in that case was seriously injured when his Sikorsky HH-3A combat and rescue helicopter crashed. The accident occurred when the flight control linkage, which controlled the fore and aft pitch axis of the helicopter, disconnected in flight.[367] The plaintiff brough suit against Sikorsky, the manufacturer of the helicopter. The jury held in favor of the defendant, even though the trial court refused to give an instruction on the government contract defense.[368]

On appeal, the intermediate appellate court held that the manufacturer should have been allowed to raise the government contract defense.[369] In addition, the court

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360. *Id.* at 568 (citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 728–29 (1979); Georgia Power Co. v. Sanders, 617 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied sub nom.* Georgia Power Co. v. 138.30 Acres of Land, 450 U.S. 936 (1981)).

361. *Id.* at 569.

362. *Id.* at 570.

363. *Id.* at 571.

364. *Id.* at 571–72.

365. *Id.* at 574.

366. 148 Cal. App. 3d 203, 195 Cal. Rptr. 764 (1981).

367. *Id.* at 207, 195 Cal. Rptr. at 765. The linkage connection consisted of a bolt, castellated nut and a cotter pin. Navy personnel failed to replace the cotter pin during servicing. This caused the nut to vibrate loose and allowed the bolt to come out of the linkage. The plaintiff alleged that redundant self-locking fasteners in the flight control linkage system would have prevented the accident. *Id.*

368. *Id.* at 210, 195 Cal. Rptr. at 768.

369. *Id.*

concluded that the issue was one which implicated federal interests. The court observed that the relationship between servicemen and the government was derived from federal sources and governed by federal law. Furthermore, torts committed by the suppliers of military hardware against military personnel "interfered" with this relationship, thereby affecting federal interests.[370]

The *McLaughlin* court also found that federal interests would be threatened by the lack of uniformity that would result if state law were applied. Echoing the concerns of the *Agent Orange* court,[371] the California court declared that it would be unfair to both servicemen and suppliers to treat similar cases differently because of differences in state law.[372] Finally, the court determined that contrary state law on the subject would not be displaced since California courts had not yet formulated a government contract doctrine of their own for products liability cases.[373]

The *McLaughlin* court's view did not go unchallenged. A strongly worded dissent contended that the application of the government contract defense should be decided under state law.[374] The dissenting opinion pointed out that California courts historically had accorded broad protection to consumers harmed by defective products.[375] In the dissent's view, the state's interest in compensating injured consumers outweighed any federal interests in extending the government contract doctrine into the products liability area.[376]

The reasoning of *Agent Orange*, *Bynum*, and *McLaughlin* is more persuasive than that of *Brown*. A supplier who raises the government contract defense attempts to share in the federal government's sovereign immunity. Questions about the scope of such immunity should be resolved by federal law and not by state law.[377] Furthermore, at least where federal contractors are concerned, the federal interest in protecting the policy decision of its officials outweighs any competing state interest in compensating tort victims.[378] Consequently, even if the government contract defense is a narrow one, its nature and scope should be determined by federal law.

V. CONCLUSION

In the past decade, the government contract defense, which originally protected contractors who constructed public works projects for the government, has been successfully invoked by manufacturers to avoid liability for injuries caused by defectively designed products in cases where the federal government established or approved the product's design.[379]

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370. *Id.*

371. In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 737, 749 (E.D.N.Y. 1980), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

372. McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 211, 195 Cal. Rptr. 764, 768 (1981).

373. *Id.* at 211–12, 195 Cal. Rptr. at 768.

374. *Id.* at 212, 195 Cal Rptr. at 769.

375. *Id.* at 214, 195 Cal. Rptr. at 770.

376. *Id.*

377. Note, *supra* note 9, at 224–25.

378. Note, *supra* note 348, 614–24.

379. *See supra* notes 87–139 and accompanying text.

Although use of the government contract defense in products liability cases has been criticized by some commentators,[380] proponents of the doctrine have made a persuasive case to support immunity for those who supply products to the government. First, it is unfair to impose liability on product suppliers for design defects that they did not create and could not control.[381] Second, a rule of contractor immunity is needed to limit the cost of government procurement contracts.[382] Finally, military autonomy would be threatened if injured servicemen were allowed to recover against government contractors for defectively designed military equipment.[383]

Because these concerns are similar to the concerns expresssed by the Court in *Feres v. United States*,[384] many courts have assumed that the government contract defense and the *Feres* doctrine share the same rationale.[385] However, the discretionary function exception to the FTCA provides a better analogy. The discretionary function exception protects the executive branch of government against unwarranted judical interference;[386] the government contract defense responds to the same concern.[387]

Indentifying government decisionmaking as the interest protected by the government contract defense helps to delineate the doctrine's nature and scope. Hence, the government contract defense should not be limited to those who supply military equipment to the government,[388] nor should it be confined to suits by military personnel.[389] Furthermore, since the government contract defense is only concerned with protecting informed decisionmaking, suppliers should be required to disclose design risks to government officers.[390]

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380. *E.g.*, Note, *supra* note 9, at 221; Note, *supra*, note 4, at 1085–86; Note, *supra* note 154, at 208–09; Comment, *supra* note 15, at 721.

381. In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 793–94 (E.D.N.Y. 1980), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984); Comment, *supra* note 189, at 1073.

382. Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983).

383. Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 742 (11th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982), *cert. denied sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

384. 340 U.S. 135 (1950).

385. Bynum v. FMC Corp., 770 P.2d 556, 565 (5th Cir. 1985); Tillett v. J.I. Case Co. 756 F.2d 591, 597 (7th Cir. 1985); Koutsoubos v. Boeing Vertol, Div. of Boeing Co., 755 F.2d 352, 354 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 72 (1986); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); In re Air Crash Disaster at Mannheim Ger. on 9/11/82, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied sub nom.*. Eschler v. Boeing Co., 106 S. Ct. 851 (1986); Hubbs v. United Technologies, 574 F. Supp. 96, 98 (E.D. Pa. 1983).

386. Rogers, *supra* note 13, at 807.

387. Brown v. Caterpillar Tractor Co., 696 F.2d 246, 250 (3d Cir. 1982); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 9, 364 A.2d 43, 47 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977) (per curiam), *cert. denied*, 75 N.J. 66, 384 A.2d 846 (1978); Comment, *supra* note 15, at 705–06.

388. Burgess v. Colorado Serum Co., 772 F.2d 844, 846 (11th Cir. 1985); Price v. Tempo, Inc., 603 F. Supp. 1359, 1361 n.3 (E.D. Pa. 1985).

389. Burgess v. Colorado Serum Co., 772 F.2d 844 (11th Cir. 1985) (veterinarian); Price v. Tempo, Inc., 603 F. Supp. 1359 (E.D. Pa. 1985) (fireman); Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980), *aff'd*, 79 A.D.2d 1117 (1981) (resturant owner's minor child).

390. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982), *cert. denied, sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

The question of supplier participation in the design process is a difficult one. In many instances, design specifications may originate solely from the supplier, or they may be the product of an extended series of negotiations between the supplier and government officials. Although some commentators disagree,[391] the government contract defense should not be limited to situations in which the government alone formulates the product's design. Rather, it should potentially apply to any case where government officials choose to accept a particular design risk, when they have been fully informed of the risk and available design alternatives.[392]

Another unresolved issue is whether federal law or state law should be used to determine the applicability of the government contract defense. Federal law appears to be the appropriate choice in the case of federal procurement contracts since the government contract doctrine protects the interests of the federal government.[393]

One remaining task is to devise a formula for determining when contractors can seek immunity under the government contract defense. As mentioned earlier, several formulas have been proposed by the courts.[394] Of these, the approach developed by the court in *Shaw v. Grumman Aerospace Corp.*[395] provides the best starting point. The formula in *Shaw* permits a supplier to invoke the government contract defense if it does not participate in the product's design, or if the supplier informs government officials of risks and alternative designs, and the government nevertheless chooses to retain the original design.

However, the *Shaw* standard can be applied to a broader range of cases, including those that do not involve military products, if certain modifications are made. First, the government contract defense should only be available to the supplier if the government is immune from suit. This ensures that the supplier is not left defenseless when the government can avoid liability by asserting its sovereign immunity. However, the government's claim of sovereign immunity does not have to rest on the *Feres* doctrine; it can also arise from one of the exceptions to the FTCA.

If this criterion is satisfied, the supplier should be required to show that it had no input into the design, or, if it did, that government officials, not the supplier, had the final responsibility for approving the product's design. The supplier should also have to establish that it informed the government of all design risks of which it knew or should have known. When the supplier participates in the design process, it should also be required to show that it informed the government about safer design alternatives if any existed. If these conditions are met, one can assume that government officials assumed full responsibility for the product's ultimate design.

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391. Comment, *supra* note 15, at 721.

392. McKay v. Rockwell Int'l. Corp., 704 F.2d 444, 450 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985).

393. Bynum v. FMC Corp., 770 F.2d 556, 568–71 (5th Cir. 1985); In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 846–47 (E.D.N.Y. 1984); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 211–12, 195 Cal. Rptr. 764, 768 (1981).

394. *See* Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982), *cert. denied, sub nom.* Diamond Shamrock Chem. Co. v. Ryan, 465 U.S. 1067 (1984).

395. 778 F.2d 736 (11th Cir. 1985).

Since a decision of this sort would be protected by the discretionary function exception, it is appropriate to extend similar protection to the contractor as well.

The formula proposed above will insulate a supplier from liability when responsible government officials make a conscious decision to subject product users and others to a known risk. Will suppliers also avoid liability for risks that were not known at the time the product's design was approved by the government? One might argue that contractor immunity is not necessary to protect the decisionmaking processes of the government since no decision to assume a risk was made. However, this conclusion would not be consistent with the courts' interpretation of the discretionary function exception.

Government officials are often forced to make planning decisions without being fully aware of the risks involved. Nevertheless, these decisions are usually characterized as "discretionary" for purposes of invoking sovereign immunity. The *Dalehite* case provides an excellent example of this: although government officials may have been aware of the general risk of explosion from the components of nitrate fertilizer, they probably did not anticipate that packaged fertilizer could destroy a city. In spite of this, the Court held that the fertilizer export program was the product of planning level decisions. It follows that contractors should not be liable for the consequences of unknown risks, assuming that their ignorance was not culpable, when the government can escape liability by claiming its sovereign immunity.

The government contract defense, like many other doctrines in the law of products liability, is in a state of flux. Unless the United States Supreme Court issues a definitive ruling on the subject, the controversy over the defense's proper role, and even its very legitimacy, will continue for some time to come.