North Dakota Law Review

Volume 72 | Number 3 Article 9

1996

Contracts v. Torts: North Dakota's Aftermarket Risk Contract & (and) Aftermarket Risk Insurance, Products Liability, and the General Aviation Industry

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CONTRACTS V. TORTS: NORTH DAKOTA'S AFTERMARKET RISK CONTRACT & AFTERMARKET RISK INSURANCE, PRODUCTS LIABILITY, AND THE GENERAL AVIATION INDUSTRY

I. INTRODUCTION

The person or business who decides to purchase a general aviation airplane[1] pays for a significant insurance premium attached to the price of the plane.[2] This premium reflects approximately one-third of the cost of the plane, accounting for the expenses that manufacturers of general aviation aircraft[3] pay for product liability litigation controlled by tort principles.[4] In other words, purchasers pay a premium that allows them to sue general aviation manufacturers for both pecuniary[5] and non-pecuniary damages[6] in the event of an accident. Yet, purchasers cannot modify the premium because the state has chosen the premium for them by forcing general aviation manufacturers to insure against tort liability.

Consequently, the general aviation industry is almost nonexistent because buyers are unwilling to pay for the state mandated premium.[7] For example, in 1978, before tort law hit its prime, a total of 17,811

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1. General aviation airplanes are typically those airplanes designed to carry less than twenty passengers, but excluded are the large domestic and international commercial airplanes used for scheduled airline flights. Robert Martin, *General Aviation Manufacturing: An Industry Under Siege*, *in* THE LIABILITY MAZE 478, 478 (Peter W. Huber & Robert Litan, eds., (1991)). Some examples of general aviation include air ambulance service, air charter, flight training, pleasure flying, agricultural aerial application, air taxi, and other aviation activities that do not fall under the category of scheduled airlines. John H. Boswell & George A. Coats, *Saving the General Aviation Industry: Putting Tort Reform to the Test*, 60 J. AIR L. & COM. 533, 535 (1994-95). North Dakota defines general aviation as aircraft weighing less than 12,500 pounds, "powered and intended to fly above the ground" and "designed to carry one person or more, but with a maximum seating capacity of fewer than twenty passengers." N.D. CENT. CODE § 26.1-48-01(2) (1995).

2. George L. Priest, *Can Absolute Manufacturer Liability be Defended?*, 9 YALE J. ON REG. 237, 262 (1992).

3. Boswell & Coats, *supra* note 1, at 535. "The general aviation industry includes manufacturers of general aviation aircraft, major aircraft components [of general aviation aircraft] (such as engines and propellers), and small components." *Id.*

4. *Cf.* PETER W. HUBER, THE LEGAL REVOLUTION AND ITS CONSEQUENCES 3-4 (1988) (discussing the effect of litigation on the cost of products). This cost is called a "tort tax." *Id.*

5. Pecuniary damages are damages that "can be estimated in and compensated by money" such as lost wages, medical expenses, and the price of the good. BLACK'S LAW DICTIONARY 392 (6th ed. 1990).

6. Non-pecuniary damages include injuries that cannot be accurately calculated in monetary terms such as pain and suffering, loss of pleasure of life, or a lost limb. *Compare id.* (stating the definition of pecuniary damages).

7. *Cf.* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L. J. 1521, 1567 (1987) (noting that several plane models have been taken off the market because the cost of insurance has so greatly raised the price); James H. Andrews, *Injury Lawsuits Said to Cause Financial Crisis for Many U.S. Companies*, CHRISTIAN SCI. MONITOR, Jan. 25, 1994, at 11 (noting that difficulty in obtaining insurance caused Cessna to stop producing single-engine piston aircraft).

general aviation aircraft were sold.[8] "By 1992, only 899 general aviation aircraft were sold."[9] During the past ten years, 100,000 jobs have been lost in general aviation's service, maintenance, and related industries.[10] In 1992, unemployment in the general aviation industry was over seventy percent.[11] Essentially, the demands of tort law have almost shut down the entire general aviation industry.

In the late 1980s, an academic movement responded to the crisis by arguing that contract law should have more presence than tort law in the area of product liability.[12] The application of contract law could provide general aviation purchasers the choice of whether to pay the insurance premium tacked on to the price of the plane or to purchase an alternative insurance plan.[13] Also, the application of contract law would allow purchasers to decide whether to pay for the typical premium in the price of the product which allows the consumer to recover non-pecuniary damages or to buy a less expensive premium that limits recovery to pecuniary damages.[14] Essentially, contract principles would give general aviation manufacturers, sellers, and buyers more autonomy in the purchase of general aviation aircraft.

In 1995, North Dakota responded to both general aviation's plight and the academic arguments by providing legislation that attempts to create a legal atmosphere where general aviation manufacturers may operate free from most of the demands of tort law.[15] This Note discusses

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8. S. REP. NO. 202, 103d Cong., 1st Sess. 1 (1993) [hereinafter S. REP. NO. 202] (resulting from proposed eighteen year statute of repose for general aviation aircraft); GENERAL AVIATION MFR. ASS'N, 1994 GENERAL AVIATION STATISTICAL DATABOOK 5 (1994) [hereinafter STATISTICAL DATABOOK]. Approximately seventeen thousand of the aircraft were piston-engined aircraft. S. REP. NO. 202, *supra*, at 1. Piston-engine aircraft are generally small planes seating four to ten people. Stacy Shapiro, *Tort Costs Hurt Aircraft Manufacturers*, BUS. INS., June 10, 1991, at 34.

9. S. REP. NO. 202, *supra* note 8, at 1. Five hundred and fifty-one of the aircraft were piston-engine aircraft.

10. *Id.* at 1-2.

11. S. REP. NO. 203, 103d Cong., 1st Sess. 11 (1993) [hereinafter S. REP. NO. 203] (responding to proposed product liability reform).

12. *See infra* notes 62-65 and accompanying text (defining neocontractual principles on which their arguments are based).

13. *See* 2 THE AMERICAN LAW INSTITUTE, REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 517-536 (1991) (presenting two insurance schemes involving contract principles and product liability law).

14. PAUL H. RUBIN, TORT REFORM BY CONTRACT 3-6 (1993).

15. N.D. CENT. CODE §§ 26.1-48-01 to -05 (1995). *See, e.g.*, Bruce Gjovig, *High-Flying Business Opportunities*, DAKOTA BUS., Feb. 1995, at 21 (discussing advantages of legislation). Gjovig also points out that North Dakota is home to Fisher Flying Products, the sixth largest kit aircraft manufacturer out of 150 in the nation. *Id.* North Dakota is also home to the largest pilot training center in the country, the Center for Aerospace Sciences (CAS) at the University of North Dakota, which is in need of a new fleet of training aircraft. *Id.* North Dakota hopes these factors coupled with a friendly legal atmosphere will persuade general aviation manufacturers to locate in North Dakota. *Id.* In January 1996, Cirrus Design announced its intention to build a multi-million dollar general aviation manufacturing plant in Grand Forks, North Dakota, that will employ 250 people. Randy Bradbury, *Cirrus to Make Planes in GF*, GRAND FORKS HERALD, Jan. 13, 1996, at 1A. Cirrus specifically stated

this new legislation by beginning in Part II with the history of general aviation's struggle with tort law and the history of the relief that contract law offers to the industry. Part III analyzes the characteristics and legality of an Aftermarket Risk Contract (ARC) and offers potential clauses and agreements that may become part of an Aftermarket Risk Contract. Part IV analyzes the characteristics and legality of an Aftermarket Risk Insurance Policy (ARIP) and demonstrates how an insurance plan utilizing contract principles may withstand legal scrutiny. Part V concludes that despite any weaknesses, North Dakota's ARC and ARIP provide a workable solution based on contract law to relieve general aviation's struggle with the unpredictable demands of tort law.

The first part of the legislation creates an Aftermarket Risk Contract that covers general aviation transactions in North Dakota.[16] The ARC creates a choice-of-law clause where the buyer and seller agree to be bound by North Dakota law so that the parties may export North Dakota's disputable presumption,[17] state-of-art defense,[18] and statute of repose[19] to states other than North Dakota.[20] The ARC also attempts to export the principle that contract law should have more dominance in product liability law.[21] Whether North Dakota may export their laws and principles depends on whether a foreign state will utilize overriding fundamental policy exceptions to refuse such an application.[22]

In addition to the choice-of-law clause, the buyer and seller are free to negotiate their liability instead of paying the traditional premium tacked on to the price of the plane.[23] In short, an ARC is based on the principle that a buyer and seller should hammer out financial risks and liabilities in the contract prior to the purchase of an aircraft.[24]

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that North Dakota's legislation played a key role in the company's decision to move to Grand Forks. *Id.* at 9A.

16. N.D. CENT. CODE § 26.1-48-02 (1995); H.R. 1243, 54th Leg. Session, 1995 N.D. Laws 873.

17. N.D. CENT. CODE § 28-01.4-02 (Supp. 1995). The disputable presumption provides that the general aviation aircraft is free from defects if the aircraft is in compliance with federal standards. *Id.*

18. § 28-01.4-03. The state-of-art defense absolves the manufacturer of liability for a defective product if the general aviation aircraft is the safest aircraft or component part on the market at the time of manufacture. *Id.*

19. § 28-01.4-04. The statute of repose provides that a person cannot sue a general aviation manufacturer more than ten years after the date the aircraft is delivered to the first purchaser. *Id.*

20. *See* § 26.1-48-02 (providing that the buyer and seller must agree to be bound by North Dakota law).

21. Telephone Interview with Dwight M. Baumann, Professor of Engineering Design, Carnegie Mellon University, Pittsburgh, PA (Oct. 28, 1995) [hereinafter Baumann].

22. *See infra* notes 133-35 and accompanying text (outlining how courts rely on public policy to review the validity of a clause choosing North Dakota).

23. *See* N.D. CENT. CODE § 26.1-48-02, -04 (Supp. 1995) (providing the requirements of an ARC, but not placing limitations on the other clauses the contracting parties wish to add to the ARC).

24. Stephen Baker et al., *Clearing a Runway for Planemakers*, BUS. WK., Mar. 20, 1995, at 94 [hereinafter Baker]. North Dakota maintains that the root of the problems associated with product liability law is tort law's ascendancy over contract law. *Id.*

The second part of the legislation is triggered when the parties do not enter into an ARC. The buyer is then obligated to show proof of a fully paid ARIP[25] holding all general aviation manufacturers harmless,[26] thus enabling the seller to remove the price of the premium from the cost of the plane.[27] Consequently, in the absence of an ARC, the manufacturer is still protected from unlimited liability, the consumer has a source of recovery in the event of an accident, and the price of the plane is significantly decreased.

Thus far, North Dakota's ARC and ARIP statutes are viewed as novel and innovative laws.[28] These statutes, however, have not been tested in court. Consequently, the purpose of this Note is to predict how an ARC or ARIP will stand up against legal scrutiny, and to suggest what types of clauses and agreements could be part of an ARC or ARIP.

II. DEVELOPMENT OF NORTH DAKOTA'S AFTERMARKET RISK CONTRACTS AND AFTERMARKET RISK INSURANCE

A. HISTORY OF GENERAL AVIATION'S RELATIONSHIP WITH TORT AND CONTRACT LAW

1. Federal and State Law and the General Aviation Industry

The general aviation industry is subject to the Federal Aviation Act of 1958[29] which directs the Federal Aviation Agency (FAA) to regulate "air commerce in a way that best promotes its development and safety."[30] Though this Act seems far reaching, it does not preempt state common law; instead, state common law stands side-by-side with the system of federal regulations that Congress has created.[31] Thus, the general aviation industry is subject to both federal regulations and state law.

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25. N.D. CENT. CODE § 26.1-48-03 (1995) (setting out requirements for ARIPs). *See also infra* text accompanying note 103 (setting out the ARC statute, section 26.1-48-02 of the North Dakota Century Code).

26. § 26.1-48-03(1).

27. *See* § 26.1-48-02, -03 (implying that a seller will decrease the cost of general aviation aircraft in exchange for the purchaser's agreement to absolve the manufacturer of all liability).

28. Baker, *supra* note 24, at 94; Gjovig, *supra* note 15, at 21; Martha Middleton, *A Changing Landscape*, A.B.A. J., Aug. 1995, at 57; William B. Scott, *North Dakota Creates Aircraft Safe Haven*, AVIATION WK. & SPACE TECH., Aug. 7, 1995, at 52.

29. Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended in scattered sections of 49 U.S.C.).

30. 49 U.S.C. § 40101(d)(1) (1994).

31. Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1444 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993); *see also* Shari L. Pitko, Comment, *Aviation Law: Preemption of State Law Tort Claims by the Federal Aviation Act-Do State Law Tort Claims Survive the Attack?*, 33 WASHBURN L.J. 234, 241-42 (1993) (commenting on *Cleveland*).

"Since the early 1960's, courts have steadily expanded tort liability for injuries suffered in the context of product and service use."[32] Expanded liability ensures all victims, regardless of wealth, recovery for product-related accidents.[33] The fundamental concept of this movement, known as enterprise liability, is that manufacturers should pay for insurance premiums to cover consumer injuries resulting from product and service use.[34] Yet, the consumer pays the premium because the manufacturer adds its liability costs to the product or service price.[35]

The courts implemented the theory of enterprise liability by eliminating privity,[36] creating strict liability,[37] limiting the defense of assumption of risk and product misuse,[38] relaxing the causation requirements,[39] and accepting comparative negligence.[40] Consequently, tort law has dominated consumer-manufacturer relationships since the early 1960s.[41]

The general aviation industry was hit hard by the expansion of tort liability.[42] In the 1980s, and early 1990s, a rash of tort lawsuits hit the general aviation industry[43] causing the industry's liability insurance to

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32. Priest, *supra* note 7, at 1534.

33. *Id.* at 1525, 1534-36. By increasing the liability of manufacturers, state courts intended to motivate manufacturers to make safe products and to provide insurance for injuries that could not be prevented. *Id.* at 1534.

34. *Id.*

35. *Id.* at 1535. *See also* HUBER, *supra* note 4, at 3-4 (calling the increased price a "tort tax"). Not only has the "tax" increased the price of general aviation aircraft, but it also accounts for over 95% of the price of child vaccines, adds $300 to the cost of having a baby, accounts for 30% of the price of a stepladder, and overall, costs businesses, governments, and individuals in the United States over $80 billion a year. *Id.* However, the statistic that tort liability costs America over $80 billion a year has been criticized as inflated and unfounded. Milo Geyelin, *Tort Bar's Scourge: Star of Legal Reform Kindles Controversy but Collects Critics*, WALL ST. J., Oct. 16, 1992 at A1, A4.

36. *See, e.g.*, Henningson v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (allowing non-privity party to collect damages).

37. *E.g.*, Greenman v. Yuba Power Prods. Co., 377 P.2d 897 (Cal. 1962) (adopting strict liability for manufacturers).

38. *E.g.*, Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984) (finding that assumption of risk and misuse are no longer separate defenses).

39. *See, e.g.*, Sindell v. Abbott Lab., 607 P.2d 924 (Cal.) (creating *market share* liability), *cert. denied*, 449 U.S. 912 (1980).

40. *E.g.*, Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978) (holding that principles of comparative negligence applied to actions founded on strict products liability).

41. Priest, *supra* note 7, at 1534.

42. *See* Priest, *supra* note 2, at 259 (arguing that expanded liability has adversely affected the general aviation industry). *But see* Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 84-90 (1991) (agreeing that expanded liability has hit certain industries hard, but arguing that the impact has increased social welfare).

43. *See* Boswell & Coats, *supra* note 1, at 542-47 (listing a number of cases where crashes were determined to be caused by pilot error, yet million dollar lawsuits were filed against general aviation manufacturers); *see* also Cleveland v. Piper Aircraft Corp., 890 F.2d 1540, 1542-43, 1556-57 (10th Cir. 1989) (noting that jury determined damages of $2.5 million resulting mostly from crash worthiness negligence even though pilot modified the plane and was negligent in operating the plane, but vacating and remanding because of erroneous special verdict form); Datskow v. Teledyne Continental Motors Aircraft Prods., 826 F. Supp. 677, 689, 698 (W.D.N.Y. 1993) (observing jury award of $107 million for pain and suffering as extraordinarily high, and granting new trial on damages unless plaintiffs

increase dramatically.[44] For example, from 1976 to 1986, the expenses for paid claims and defense costs for manufacturers of light aircraft airframes, propellers, powerplants, avionics, and other component parts rose from $24 million per year to $210 million per year.[45] During a four-year period in the late eighties, Beech Aircraft was sued 203 times, expending over $107 million in defense costs for an average expenditure of $530,000 per case.[46] Beech Aircraft defended these lawsuits and ultimately Beech was found not to be at fault in any of the cases.[47] Consequently, manufacturers have had to dramatically raise their prices to keep up with liability costs.

The impact of the lawsuits on the general aviation industry has been harsh.[48] Cessna, one of the largest manufacturers of general aviation aircraft, dropped completely out of the general aviation business in 1986[49] and Piper has been in bankruptcy since 1991.[50] Beech Aircraft continues to stay aloft, but in 1992 the company manufactured only eighteen percent of the general aviation aircraft it made in 1978.[51] While the general aviation industry continues to decline, the public still demands general aviation airplanes[52] and the industry maintains a vital role in the nation's transportation system.[53]

In 1994, the United States Congress responded to the disparity between the demand for small aircraft and the industry's decline by passing the General Aviation Revitalization Act.[54] The Act intended to assist the industry by barring civil tort actions against manufacturers after eighteen years have passed from the date of delivery to the first purchaser.[55] Before the Act, a plane manufactured in 1939 presented

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agreed to remittitur).

44. Priest, *supra* note 7, at 1521.

45. S. REP. NO. 202, *supra* note 8, at 3. Martin, *supra* note 1, at 484-85.

46. Chuck Stewart, *Land of Opportunity*, AIR PROGRESS, Aug. 15, 1995 at 12. Congress asked Beech Aircraft to analyze 203 lawsuits filed against Beech. Martin, *supra* note 1, at 485. All of the accidents in the study were investigated by the National Transportation Safety Board and the Federal Aviation Administration. *Id.* These investigations concluded that pilot error was responsible for 118 of the 203 accidents. *Id.* Maintenance and weather accounted for another 43 of the accidents. *Id.*

47. Boswell & Coats, *supra* note 1, at 548 n.86 (citing Martin, *supra* note 1).

48. Other industries hit hard by tort law include manufacturers of vaccines, sports equipment, ski lifts, IUDs, and the commercial trucking industry. Priest, *supra* note 7, at 1521. Professions such as medicine have also been affected. *Id.* at 1526.

49. S. REP. NO. 202, *supra* note 8, at 3.

50. *Id.*

51. *Id.*

52. The United States, as of 1993, had over 600,000 active pilots who fly general aviation aircraft over 25 million hours annually. STATISTICAL DATABOOK, *supra* note 8, at 12, 15-16.

53. General aviation also serves over 5,000 public airports throughout the nation. *Id.* at 20-21.

54. 49 U.S.C. § 40101 (1994) [hereinafter Revitalization Act].

55. *Id.*

the same product liability risk as a new plane.[56] Now, the general aviation industry is protected from liability after a reasonable amount of time.[57] Yet, the general aviation industry is still exposed to the same tort liability for aircraft less than eighteen years old.[58] Thus, despite the federal government's efforts, a significant portion of the general aviation industry is still confronted with the same tort law that has nearly shut down the entire industry.[59]

2. *Contracts as a Participant with Torts in Product Liability Law*

As previously mentioned, the main culprit for general aviation's decline is the imposition of enterprise liability.[60] Recently, states have backed away from this position while implementing tort reform by capping damages, reforming joint tortfeasor liability, and limiting strict liability.[61] In addition to typical tort reforms, a neocontractual movement has developed without much opposition.[62] The movement argues that product liability law should include principles of contract law[63] and proposes that manufacturers, sellers, and consumers should be allowed to allocate liability in a contract rather than on tort law.[64] The movement

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56. Boswell & Coats, *supra* note 1, at 554. In 1994, the average age of a general aviation aircraft was 27 years old and one-third of the general aviation fleet is over 32 years old. STATISTICAL DATABOOK, *supra* note 8, at 11; S REP. NO. 202, *supra* note 8, at 3. Compare this to the shorter life of products such as cars and appliances. Boswell & Coats, *supra* note 1, at 553.

57. 49 U.S.C. § 40101 (1991).

58. *See supra* notes 32-42 and accompanying text (discussing liability to which the general aviation manufacturer is subject).

59. S. REP. NO. 202, *supra* note 8, at 3 (stating that the average age of general aviation aircraft is 27 years). Even though more than half of the general aviation industry will not be protected from liability under the General Aviation Revitalization Act, the industry is expected to gear up production again. Boswell & Coats, *supra* note 1, at 556. Based on this Act, Cessna's chairman stated that Cessna will begin manufacturing light aircraft again, and will build 2,000 planes in the first year of renewed manufacturing. *Id.* But note that each of these planes will be exposed to full liability for the first eighteen years of use. 49 U.S.C. § 40101 (1991).

60. *See supra* notes 32-35 and accompanying text (discussing enterprise liability and laws based on enterprise liability adopted by states).

61. Middleton, *supra* note 28, at 56-61.

62. *But see* Croley & Hanson, *supra* note 42, at 8 (arguing that "courts should complete the shift towards enterprise liability").

63. *See* Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 518-19 (1984) (stating that a victim's compensatory award should be determined by the amount of insurance he or she would have chosen prior to the accident); Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2202 (1989) (stating that tort law's anti-contract bias has had a devastating effect on product liability law); Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 TEX. L. REV. 803, 807 (1994) (defining a neocontract); Peter Huber, *Flypaper Contracts and the Genesis of Modern Tort Law*, 10 CARDOZO L. REV. 2263 (1989) (outlining a detailed history of contract law's demise).

64. Geistfeld, *supra* note 63, at 808. Geistfeld adopted the term "neocontracts" from Peter Huber. *Id.* at 804 n.4.

does not eliminate torts in most proposals; instead, the movement proposes tort reform by allowing contract principles to participate with tort law in product liability litigation.[65]

The neocontractual movement challenges tort law's basic principle that manufacturers, not consumers, should insure for injuries resulting from product use.[66] This insurance plan is called third-party insurance. Under third-party insurance, the injured person relies on a third party to provide insurance to cover injuries. The premium and damages are determined and administered by the courts.[67] Thus, the main criticism of third-party insurance is that manufacturers' liability is determined by courts and damages awarded by juries.[68] As a result, neither the consumer nor the manufacturer can negotiate a limit on an insurance policy, which results in the manufacturer being subject to uncertain and almost unlimited liability.[69]

Neocontracts, on the other hand, would allow consumers to purchase first-party insurance to cover injuries under product liability law.[70] One of the benefits of first-party insurance is that it allows the insurer to deal with insureds individually; whereas tort law combines all consumers into one group, regardless of legitimate differences and risks.[71] For example, first-party insurance allows insurers to consider differences such as wealth, age, and experience, while allowing the insured to be grouped into levels of risks.[72] Creating different risk pools allows the insurer to predict a premium that reflects that risk.[73] Third-party insurance, on the other hand, cannot predict risk efficiently because all insureds and their risks are lumped together.[74] Consequently, the insurer cannot predict a premium that reflects their risks accurately.[75] Lack of predictability may force the insurer to overprice the premium charged to

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65. RUBIN, *supra* note 14, at 3-6. Rubin proposes that contractual tort reform is simple to implement because parties may voluntarily write the contracts they desire without having to wait for legislation. *Id.* at 9-10.

66. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law*, 14 J. LEGAL STUD. 461, 462-64 (1985).

67. Priest, *supra* note 7, at 1548.

68. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 244-45 (1995). Non-pecuniary damages are not traded on the market so there is no certain value to which juries can refer in assessing such damages. RUBIN, *supra* note 14, at 58.

69. *See* Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 668 (1985) (stating that third party insurance is dependent on a jury estimate of almost unlimited actual and punitive damages). It would be more sensible for "the contingency of an accident [to] be addressed ahead of time, when tempers are cool and minds clear." Huber, *supra* note 63, at 2267.

70. Priest, *supra* note 7, at 1582-83.

71. *Id.* at 1571.

72. *Id* . at 1542.

73. *Id.*

74. *Id.*

75. Priest, *supra* note 7, at 1542-43.

the manufacturer. This in turn affects the consumer's price of the product.

Neocontracts are also based on the premise that consumers do not desire to pay for the extra insurance tacked on to the price of a product to cover non-pecuniary damages such as pain and suffering or hedonic damages.[76] Under economic theory "[p]ecuniary losses shift the consumer downward along a utility function and thus increase the marginal utility of wealth. It is therefore desirable to insure against pecuniary losses . . . . Nonpecuniary losses, conversely, do not increase the marginal utility of wealth."[77] For example, life insurance may be purchased to cover a breadwinner whose death would cause the family to suffer pecuniary losses such as lost wages. These lost wages have high marginal utility.[78] Life insurance, on the other hand, is not necessarily purchased for a child; even though the family suffers non-pecuniary damages, such as pain and suffering.[79] It appears that if consumers were given the choice, they would be willing to pay for insurance that covers pecuniary damages, such as medical costs and lost wages, but would accept the risk of not being able to recover for non-pecuniary damages such as pain and suffering.[80]

In short, neocontracts allow consumers to be a part of the equation that determines liability. The neocontractual theory also demonstrates how consumers are benefitted when contract law becomes part of product liability law. North Dakota is attempting to provide a legal atmosphere where the general aviation industry may regain its strength and meet society's demand for general aviation aircraft by adopting many neocontractual principles.[81]

B. NORTH DAKOTA'S RESPONSE TO GENERAL AVIATION'S STRUGGLE WITH TORT LAW

North Dakota's version of product liability tort reform based on neocontractual principles provides an Aftermarket Risk Contract (ARC)

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76. RUBIN, *supra* note 14, at 29-48; Priest, *supra* note 7, at 1546-47. There is no market available for pain and suffering insurance. Priest, *supra* note 7, at 1547.

77. RUBIN, *supra* note 14, at 36.

78. Priest, *supra* note 7, at 1546-47.

79. *Id.*

80. RUBIN, *supra* note 14, at 39-40. This conclusion is based on the consumer's behavior before the accident occurs (*ex ante*). *Id.* at 29. After the accident occurs (*ex post*), the consumer will most often take whatever the court will give. *Id.* at 29-30.

81. Boswell & Coats, *supra* note 1, at 541. "General aviation aircraft fly over 30 million hours annually, carrying 120 million passengers over 4 billion miles . . . [and] provides the exclusive means of transportation for over 5,000 communities." *Id.*

and an Aftermarket Risk Insurance Policy (ARIP).[82] In addition to adopting neocontractual principles, North Dakota's ARC and ARIP are expected to create a favorable environment to entice general aviation manufacturers to set up shop in North Dakota.[83] Prior to North Dakota's legislation, the state maintained the same tort law that adversely hindered the general aviation industry.[84] Now, in an ARC, a general aviation seller and buyer may agree upon liability before the purchase of a general aviation aircraft rather than paying the premium previously mandated by tort law. For example, if the manufacturer decreased the price of a plane by $40,000 in exchange for relief from liability for non-pecuniary damages, the number of purchasers would probably increase, which in turn would probably increase the number of planes manufactured.

In addition to the ability to contractually determine liability, an ARC attempts to export to other states the neocontractual principles behind the ARC.[85] The ARC accomplishes this goal by mandating that parties in an ARC be bound by North Dakota law in their ARC.[86] The choice-of-law clause also attempts to export North Dakota's product liability laws specifically tailored for the general aviation industry.[87] These statutes include a disputable presumption,[88] a state-of-art defense[89]

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82. N.D. CENT. CODE §§ 26.1-48-01 to -05 (1995). *See infra* text accompanying note 103 (setting forth language of North Dakota Century Code section 26.1-48-02).

83. LEGISLATIVE COUNCIL OF N.D., REPORT TO THE 54TH LEG. ASSEMBLY, at 169-70 (1995); Baker, *supra* note 24, at 94; Gjovig, *supra* note 15, at 21.

84. *See* N.D. CENT. CODE § 32-03.2-02 (Supp. 1995) (governing the doctrine of comparative negligence); Johnson v. American Motors Corp., 225 N.W.2d 57, 66 (N.D. 1974) (adopting strict liability in tort); Wentz v. Deseth, 221 N.W.2d 101, 104-05 (N.D. 1974) (adopting the doctrine of comparative negligence to ameliorate the effects of assumption of risk); Lang v. General Motors Corp., 136 N.W.2d 805, 810 (N.D. 1965) (eliminating the requirement of privity).

85. Baumann, *supra* note 21.

86. N.D. CENT. CODE § 26.1-48-02 (1995).

87. §§ 28-01.4-01 to -04 (Supp. 1995). A complete discussion of these statutes is beyond the scope of this note, but they are discussed to illustrate why the parties entering into an Aftermarket Risk Contract would want to be bound by North Dakota law.

88. § 28-01.4-02. This section provides "a disputable presumption that a product is free from any defect or defective condition if the product was in compliance with . . . [g]overnment standards" or "applicable industry standards." *Id.* The presumption "is not available if the plaintiff proves by clear and convincing evidence that the aviation manufacturer or product seller . . . made misrepresentations, . . . committed fraud, or concealed evidence." *Id.* The statute also provides an absolute defense to any product liability action if the pilot "used alcohol or illicit drugs while operating or using an aircraft or aircraft component." *Id.* Oregon also provides a product liability statute with a similar presumption, that the product "is not unreasonably dangerous for its intended use." OR. REV. STAT. § 30.910 (1995). North Dakota's and Oregon's statutes apparently have not been scrutinized by the courts.

89. N.D. CENT. CODE § 28-01.4-03. This section provides that a general aviation manufacturer or seller cannot "be held liable for any personal injury, death, or damage to property" caused by a "defect in a state-of-the-art product." *Id*; *see* Hohlenkamp v. Rheem Mfg. Co., 655 P.2d 32, 37 (Ariz. Ct. App. 1982) (allowing state-of-art evidence to show whether product was defective and unreasonably dangerous); FMC Corp. v. Brown, 526 N.E.2d 719, 729 (Ind. 1988) (stating that state-of-art defense in product liability action is a statutory affirmative defense); Fell v. Kewanee

and a statute of repose.[90] Thus, if the choice-of-law clause is honored in other states, parties with an ARC suffering an accident in North Dakota or a state other than North Dakota will have the benefit of North Dakota's product liability laws.

If either party refuses to enter into an ARC, the buyer must then provide proof of a fully paid ARIP.[91] The ARIP holds harmless all general aviation manufacturers[92] and can include other clauses agreed to by the contracting parties.[93] This plan allows sellers of general aviation aircraft to offer the aircraft to the buyer at a lower price because the seller is "held harmless."

In sum, North Dakota allows parties involved in the purchase and manufacture of general aviation aircraft to take advantage of North Dakota law. The parties are allowed to freely negotiate liability rather than being forced to adhere solely to tort doctrines. Whether North Dakota's novel approach to product liability law will withstand legal scrutiny, however, is subject to debate.

C. LEGISLATIVE DEBATE: OPPONENTS AND PROPONENTS

Prior to the adoption of North Dakota's new ARC and ARIP laws, concerns with an ARC or ARIP were voiced by the North Dakota Trial Lawyers Association (NDTLA).[94] One concern was the constitutionality of the law. The NDTLA argued that an ARC "probably violates the prohibition against unfair restraint of trade and interferes with the protections of interstate commerce provided under the U.S. Constitu-

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Farm Equip. Co., 457 N.W.2d 911, 920 (Iowa 1990) (stating that state-of-art defense is a complete defense against liability for design defects); Spieker v. Westgo, Inc., 479 N.W.2d 837, 844 (N.D. 1992) (finding that trial court did not err by not giving state-of-the-art instruction in strict liability case).

90. N.D. CENT. CODE § 28-01.4-04. This section provides that no claim for damages may arise after the useful safe life of the aircraft or component part. *Id.* Also, a disputable presumption that the useful safe life has expired is created ten years after the first delivery of the aircraft. *Id.* In 1993, fourteen states had "statutes of repose in effect, most of which are shorter than 15 years and typically range between 6 and 12 years." S. REP. 202, *supra* note 8, at 3 n.12. State statutes of repose have been found both constitutional and unconstitutional. *Compare* Dague v. Piper Aircraft Corp., 418 N.E.2d 207, 212-15 (Ind. 1981) (holding that a 10 year statute of repose is constitutional and that the state supreme court is not in office to question the wisdom of the legislature's enactments) *with* Berry v. Beech Aircraft Corp, 717 P.2d 670, 680 (Utah 1985) (finding a 10 year statute of limitation unconstitutional because it violates the open court provisions and guarantees accorded in a wrongful death action).

91. N.D. CENT CODE § 26.1-48-02.

92. § 26.1-48-03(1).

93. §§ 26.1-48-03 to -04 (providing the requirements of an ARIP and limiting additional clauses and agreements to the confines of insurance law).

94. *Hearings on H.B. 1051 and H.B. 1243 Before the Senate Judiciary Committee*, 54th Leg., Sess. 3, 1-14 (1995) (statement of Sharon Gallagher, of the North Dakota Trial Lawyers Association) [hereinafter Gallagher]. Gallagher also argued that the disputable presumption is poor public policy and that the state-of-art defense and statute of repose are unconstitutional. *Id.* at 2-14.

tion."[95] For example, a citizen's freedom to travel could be inhibited by having to show proof of an ARIP prior to boarding the plane.[96]

Another of NDTLA's concerns involved conflicts of law. The NDTLA argued that North Dakota is not free to impose its law on the other forty-nine states because federalism will not allow one state to impose its will on another state.[97] Additionally, NDTLA argued that instead of reduced product liability litigation, the ARC and ARIP will create an "avalanche of litigation" based on contract law.[98] Thus, the opponents argued that the law is not workable.

Proponents for the law did not voice an opinion on the constitutionality of an ARC or ARIP. Instead, they argued that an ARC is a contract based on sound public policy similar to a marriage license, an auto insurance policy, a pre-nuptial agreement, or a will.[99] Since contracts based on sound public policy are able to cross state lines without much resistance, an ARC should be able to do the same.[100]

The proponents utilized South Dakota's usury laws as an example of state legislation that was upheld in other states.[101] Also, it can be argued that insurance companies may be more willing to insure the risks of aviation under a plan that limits liability and allows the company to identify and pool its risks.[102] Thus, if an ARC or ARIP meets North Dakota's expectations of allowing contract law more say in product liability law, the general aviation industry may find safe haven in North Dakota. If contract law enters into product-related accidents, North Dakota's law will be one more step in neocontract's continued march to tort reform by contract.

III. AFTERMARKET RISK CONTRACT: CHOICE OF LAW CLAUSE AND OTHER CHARACTERISTICS

North Dakota's Aftermarket Risk Contract statute provides the following stipulations:

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95. *Id.* at 3, 13.
96. *Id.* at 13.
97. *Id.*
98. Gallagher, *supra* note 94, at 13.
99. Baker, *supra* note 24, at 94.
100. *Id.*
101. Gjovig, *supra* note 15, at 21. But, South Dakota's usury laws are not analogous to North Dakota's ARC. *See* Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 308 (1978) (stating that "a national bank may charge interest 'on any loan' at the rate allowed by the laws of the State in which the bank is 'located'") (quoting National Bank Act, 12 U.S.C. § 85 (1989)). North Dakota's ARC provisions have not received the same backing as interstate banking.
102. *Hearings on H.B. 1051 and H.B. 1243 Before the Senate Judiciary Committee*, 54th Leg., Sess. 3 (1995) (statement of Gary Ness, Director of the North Dakota Aeronautics Commission).

> The sale of aircraft and aircraft components sold by an aviation manufacturer and the performance of any modification, maintenance, alteration, repair, or installation of components in aircraft in this state [North Dakota] are governed by an aftermarket risk contract. The contract between the seller or aviation manager and the purchaser must be executed at the time of purchase and reconsidered at each subsequent resale. The first and subsequent seller or aviation manufacturer shall agree to be bound by North Dakota law and the aftermarket risk contract or to provide a fully paid aftermarket product liability insurance policy that covers exposure to tort liability within the United States. The option of providing the insurance policy applies only to aircraft or aircraft components that sell for more than two thousand dollars.[103]

The basic premise of an ARC is that parties should be allowed to specify by contract the types of damages for which the parties will be liable.[104] This premise focuses on situations where there is a relationship between parties prior to an accident leading to product liability litigation.[105] Those situations are normally between buyer and seller. An ARC requires the buyer and seller to enter into an ARC and be governed by North Dakota law.[106] The ARC also allows those parties to add to the ARC other clauses and agreements.[107]

The parties are therefore bound by North Dakota law as a means to export to other states the neocontractual principles North Dakota has adopted.[108] The clause also intends to export North Dakota's product liability laws.[109] Yet, a state other than North Dakota could void the choice-of-law clause. If the choice-of-law clause in an ARC is not honored in a another state, then North Dakota's disputable presumption, statute of repose, and state-of-art defense are of no avail. But, the choice of-law clause may compel courts to consider neocontractual principles. Thus, the focus of the discussion about an ARC is on the choice-of-law clause.

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103. N.D. CENT. CODE § 26.1-48-02 (1995).

104. *See* RUBIN, *supra* note 14, at 8 (advocating allowing parties "to specify by contract or warranty the types of damages for which injurers will be liable").

105. Harm inflicted on third parties will normally be covered by tort law.

106. N.D. CENT. CODE §26.1-48-02.

107. *Id.*

108. Baumann, *supra* note 21.

109. N.D. CENT. CODE §§ 28-01.4-01 to -04 (Supp. 1995). *See supra* notes 88-89 and accompanying text (summarizing the disputable presumption, state-of-art defense, and statute of repose).

A. WILL THE CHOICE-OF-LAW CLAUSE FLY?

1. The Constitutionality of a Choice-of-Law Clause[110]

In the last twenty-five years, the Supreme Court addressed the constitutional limitations on choice-of-law rules[111] in *Allstate Insurance Co. v. Hague*[112] and in *Phillips Petroleum Co. v. Shutts*.[113] In both cases, the Court ruled that the conflict-of-law issue should be governed by state law.[114] Still, two federal constitutional provisions have been recognized as playing a role in the choice-of-law issue: the Due Process Clause and the Full Faith and Credit Clause.[115] In the context of choice-of-law, the Supreme Court has ruled that both clauses require similar analysis.[116]

In *Hague*, the plaintiff-decedent's wife argued that Minnesota's law should apply even though the car accident at issue occurred in Wisconsin and all persons in the accident, including the decedent, were Wisconsin residents.[117] The Court ruled that the Due Process Clause requires significant contacts between the state and the contracting parties or with the occurrence that spawned the litigation.[118] In *Hague*, the only contacts between Minnesota and the litigation were the decedent's employment in Minnesota, Allstate's business presence in Minnesota, and the decedent's wife's residence in Minnesota.[119] The Court found the aggregation of these contacts sufficient to overcome Due Process concerns and that it was fair to allow Minnesota to apply Minnesota law.[120]

In the context of an ARC, the forum state is requested to apply North Dakota's law. In *Hague*, the Court stated that, "for a State's

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110. For simplicity, the following terms and definitions will be used: (1) *forum state* refers to the state where the litigation takes place; (2) *foreign state law* refers to a law from a state other than the forum state; (3) and *contractual choice-of-law* refers to a clause in a contract stating which law should govern the contract or parts of the contract as opposed to a choice-of-forum clause that determines which court will have jurisdiction over the issues raised by the parties in their contract.

111. Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 499 (1989) (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) and Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981)).

112. 449 U.S. 302 (1981).

113. 472 U.S. 797 (1985).

114. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 307 (1981) (deferring to state's choice-of-law rules where aggregation of contracts is sufficient to overcome Due Process concerns).

115. *See, e.g., id.* at 302.

116. *Id.* at 308 n.10 (abandoning the weighing-of-interests requirement under the Full Faith and Credit Clause). *But see id.* at 320-32 (Stevens, J. concurring) (attempting to distinguish the roles of the Due Process Clause and the Full Faith and Credit Clause).

117. *Id.* at 305.

118. *Id.* at 312-13.

119. *Hague*, 449 U.S. at 313-19.

120. *Id.* at 320.

substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[121] The Supreme Court did not limit *the State* to the forum state, rather *the State* could be a foreign state such as North Dakota. As a result, the Court's analysis of a choice-of-law clause could apply to an ARC. Thus, under *Hague*, in order for a forum state to apply North Dakota's substantive law, it must find that North Dakota has significant contacts with the parties or the occurrence giving rise to the litigation. If such contacts are found, the forum state's application of North Dakota law is constitutionally sound.

One interpretation of *Hague* is that the Court's finding of sufficient significant contacts[122] is so strained that one could have the impression that there is virtually no constitutional limit on choice-of-law.[123] However, in *Burger King Corp. v. Rudzewicz*,[124] the Court stated that a choice-of-law clause alone does not have the power to invoke the will of the contracting parties, but is a significant factor in determining whether the defendant purposefully availed himself of the benefits and protection of the forum state's law.[125] Thus, a contractual choice-of-law provision can be combined with other factors to constitute sufficient significant contacts.[126]

The Due Process Clause also considers issues of federalism when determining the constitutionality of a choice-of-law clause.[127] Federalism ensures the forum state that foreign states will not force their legislation on the forum state.[128] The issue then becomes whether it is proper as a matter of federalism to allow the parties' intentions to shape legislative jurisdiction.[129] The Supreme Court has not answered this issue in the context of choice-of-law; thus, "the definition of the boundaries has been left to state conflicts rules."[130]

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121. *Id.* at 312-13.

122. *Id.*

123. Friedler, *supra* note 111, at 500 n.153 (citing Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 906, 916 (1981)). *See also* Russell J. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 34 (1981) (stating that choice of law meets little, if any, constitutional scrutiny).

124. 471 U.S. 462 (1985).

125. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985) (utilizing the choice of law clause for determination of jurisdiction rather than application of law).

126. *See id.* (finding that a choice of law clause combined with a twenty year interdependent relationship between a party from the forum state and a party that had no contact with the forum state other than the choice of law clause met the requirements of Due Process).

127. Richard J. Bauerfeld, Note, *Effectiveness of Choice-of-Law Clauses in Contracts Conflict of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659, 1664 (1982).

128. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

129. Bauerfeld, *supra* note 127, at 1667-68.

130. *Id.* at 1664.

In sum, there must be sufficient significant contacts between the foreign state, i.e., the state chosen in a contractual choice-of-law clause, and the parties or occurrence at issue before the forum court. Standing by itself, a choice-of-law clause is not necessarily a sufficient significant contact, but will be considered when the forum court is deciding whether the foreign state has enough contacts with the contracting parties or occurrence to warrant application of the foreign state's substantive law. Further, the forum court's choice-of-law decision cannot be arbitrary or unfair. Thus, a choice-of-law clause in an ARC would not likely meet constitutional scrutiny in a situation where the only contact is the provision itself. Nonetheless, if a plaintiff purchases a general aviation aircraft in North Dakota and enters into an ARC in North Dakota, but litigates in a different state, there are probably enough contacts for the forum state to constitutionally apply North Dakota's law.

2. *State Scrutiny of a Choice-of-Law Clause*

A state court determining the validity of a choice-of-law clause can "(1) give determinative effect to the clause; (2) ignore the clause; or (3) treat the clause as a relevant, but not determinative, factor."[131]

State courts may ignore a choice-of-law clause by deferring to forum state interests that override the interests of the contracting parties.[132] An overriding state interest is based on fundamental public policy. A court is justified in voiding a choice-of-law clause if such a clause is contrary to that state's public policy.[133] Fundamental public policy exceptions have considered the following: "(1) prohibitions of covenants not to compete; (2) unconscionability doctrines; (3) fair dealership

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131. *Id.* at 1660.

132. Friedler, *supra* note 111, at 484. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). Section 187 states that:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
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> > (a) the chosen state has no substantial relationship to the parties of the transaction and there is no other reasonable basis for the parties' choice, or
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

133. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

laws; (4) boxing licensing schemes; (5) state bankruptcy laws; (6) contractor licensing schemes; (7) statutes of fraud; (8) usury statutes; and (9) insurance laws barring suicide exception clauses."[134] The fact that there are numerous examples illustrates that courts can take advantage of the fundamental policy exception under their respective choice-of-law statutes.[135] Consequently, litigants may be compelled in cases involving an ARC to determine whether the fundamental policy exception will be invoked by the court.[136]

Yet, a choice-of-law clause not only attempts to compel a forum state to follow North Dakota's product liability laws, but also asks a forum state to consider North Dakota's adoption of neocontractual principles. Whether a forum state's courts will adopt the principles via the parties' choice-of-law clause may depend on how much that court wants to cut back on tort principles and adopt contract principles in product liability law. Nonetheless, the choice-of-law clause forces a court to review fundamental policy considerations, including the principles of neocontracts. Consequently, the choice-of-law clause provides an attorney the opportunity to present to the court the virtues of neocontracts which in turn may help validate the ARC.

A court would not be making a radical move in upholding an ARC. Neocontractual principles are politically and academically attractive.[137] For example, current legislative tort reform has usually forced the consumer to rely more on contractual remedies.[138] Further, in an attempt to slow insurance rates and costs, many neocontractual reforms have been enacted in the past decade.[139] Thus, if a court honored an ARC, the court would be following a trend against tort law by adopting the same neocontractual principles North Dakota has adopted.

In addition to the neocontractual movement, arguments for upholding choice-of-law clauses honoring party autonomy are making their way into the contractual choice-of-law framework. For example, contracting parties need a degree of control and predictability with their contracts.[140] Honoring a contractual choice-of-law clause plays a key role in upholding the reasonable expectations of the parties and creates uniformity of result.[141] Business is enticed to the state where the contract-

134. Bauerfeld, *supra* note 127, at 1672-73 (footnotes omitted).
135. *Id.* at 1675.
136. *See id.* at 1676 (discussing public policy exception to choice of law clause).
137. Geistfeld, *supra* note 63, at 805.
138. *Id.* at 803.
139. *Id.* at 804-05.
140. Friedler, *supra* note 111, at 471. Friedler argues that party autonomy is incompatible with modern choice of law approaches because the focus is on the state's interest rather than the contracting party. *Id.* at 473.
141. *Id.*

ing parties are allowed to choose their governing law.[142] Overall, the probable consequence of the arguments will be that state legislatures will begin to take the lead in providing statutory solutions to the question of the validity of choice-of-law clauses.[143]

For example, New York requires their courts to enforce choice of-law clauses choosing New York state law as the governing law in a non-consumer contract involving at least $250,000. Further, the courts are not required to consider whether these contracts bear a reasonable relationship to New York.[144] As a result, the courts are obliged to honor the contractual choice-of-law clause even if neither party nor the agreement have any contact with New York and even in the presence of a fundamental policy exception.[145] The purpose of this statute is to enhance the status of New York as a leading financial center.[146] Also, this type of statute directs a state to apply its own law rather than applying the law of a foreign state with significant contacts to the parties or issue.[147] The law is limited in scope and would not extend to accept a choice-of-law clause if an ARC would ask New York to apply North Dakota's law. Still, New York law may demonstrate a trend toward honoring choice-of-law clauses.

In short, the choice-of-law clause in an ARC in most cases will be constitutional. But, parties will not be guaranteed that North Dakota's law will be applied.[148] Still, the choice-of-law clause in the ARC allows

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142. Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 249 (1993).

143. *Id.* at 249-250.

144. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1989). This section provides that:

> 1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code.
>
> 2. Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking.

California has enacted a similar law. *See* CAL. CIV. CODE § 1646.5 (West Supp. 1996).

145. See N.Y GEN. OBLIG. LAW § 5-1401(1) (providing that a contract applicable to this statute does not have to have a relationship with New York which implies that the courts would not look to a fundamental state policy).

146. Friedler, *supra* 111, at 497.

147. N.Y. GEN. OBLIG. LAW § 5-1401(1)(McKinney 1989).

148. An alternative to a choice-of-law clause is a contractual provision that limits the place or court in which the action may be brought. *See generally* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 31 A.L.R. 4th 404 (1984) (discussing use of contracts to limit where action might be brought). A choice of forum clause

the contracting parties to ask a forum court to consider neocontractual principles. Once those principles are reviewed, an ARC is more likely to be validated.

B. OTHER CONTRACTUAL CLAUSES

The choice-of-law clause is not the only clause or agreement in an ARC. By statute, an ARC must include a dispute resolution procedure and may include a provision for removal of the aircraft or aircraft component from service in case of a defect.[149] The statute allows the owner to purchase additional passenger and public risk insurance coverage to protect third parties.[150] Also, if the parties desire, the ARC may include an Aftermarket Risk Insurance Policy (ARIP).[151] If the buyer or purchaser of a general aviation aircraft refuses to enter into an ARC, the seller is required to purchase an ARIP.[152]

Additionally, the general aviation manufacturer or seller could agree to accept their duties under tort law, but specify in an ARC what types of damages for which the general aviation party will be liable in the event of a breach of their tort duties.[153] This agreement avoids the problems associated with exculpatory clauses because the manufacturing and retailing parties are still liable for negligence and strict liability.[154] In such a situation, the parties would agree in the ARC to allow damage payments for pecuniary losses including medical care and some part of lost wages, but not to allow for non-pecuniary losses such as pain and suffering, emotional distress, and lost pleasure of life.[155] The seller could then agree in the ARC to decrease the premium added to the aircraft price because the buyer will not expose the manufacturer to unpredictable non-pecuniary damages.

A similar approach is proposed in medical malpractice law.[156] A company could offer two health insurance plans, one at price X under which litigation would proceed under current rules and another plan at price Y under which recovery could be pursued only for pecuniary

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is prima facie valid if the party attacking the clause bears no additional expense, witnesses are available, the party doesn't lose a remedy, and the provision was freely bargained for. *See generally id.* (citing cases).

149. N.D. CENT. CODE §§ 26.1-48-04(1), -04(3) (1995).

150. § 26.1-48-04(3).

151. § 26.1-48-03(1).

152. § 26.1-48-02.

153. *See id.* (the ARC statute is broad enough to include this type of agreement).

154. *Cf.* Tunkl v. Regents of the Univ. of California, 383 P.2d 441 (Cal. 1963) (discussing exculpatory clauses); Emory University v. Porubiansky, 282 S.E.2d 903 (Ga. 1981) (discussing exculpatory clauses).

155. *See generally* Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333.

156. RUBIN, *supra* note 14, at 75-77.

damages.[157] Likewise, a general aviation seller could offer an aircraft at price P and agree to litigation under the current rules or offer the same aircraft at a lower price, price Q, if the buyer agrees to only hold the general aviation manufacturer liable for pecuniary damages. The buyer would still be able to recover punitive damages because the manufacturer would be liable for recklessness.[158] In all other situations the contract would be enforced.[159]

Yet, disclaiming non-pecuniary damages ignores the possibility that consumers would underestimate the cost of manufacturer liability to the point of being deprived of the benefits of the tort system.[160] But, the purpose of the tort system is to ensure consumers compensation for their damages while at the same time providing manufacturers the opportunity to produce the products society demands.[161] Disclaiming non-pecuniary damages balances the costs and benefits of the tort system and consumers need to be compensated for their injuries. Also, under an ARC, negligence and strict liability are still in place, the standard of proof isn't modified, and the injured party will recover all pecuniary damages.[162] The only item missing is non-pecuniary damages, which appears to cost the general aviation industry the most and to be the amount consumers are more unwilling to insure. Yet, whenever parties attempt to contractually limit liability, the problems of unconscionability[163] and adhesion[164] should be considered.

1. The Uniform Commercial Code's Limitations on an ARC

General aviation aircraft can be classified as "goods" under the Uniform Commercial Code (U.C.C.).[165] The U.C.C. provides that a

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157. *Id.* at 76.

158. *Id.* at 14-16, 74.

159. Courts have consistently held that "no written agreement can operate to allow a supplier of defective products to avoid strict products liability." Westlye v. Look Sports, Inc., 22 Cal. Rptr.2d 781, 196 (Cal. Ct. App. 1993). However, "the doctrine of strict products liability in tort did not apply as between parties (the manufacturer of an electric motor and the owner of a steel mill) who dealt in a commercial setting from positions of relatively equal economic strength, bargained the specifications of the product, and negotiated the risk of loss from defects in the product." *Id.* at 798 (citing Kaiser Steel Corp. v. Westinghouse Elec. Corp., 127 Cal. Rptr. 838, 845 (Cal. Ct. App. 1976).

160. Geistfeld, *supra* note 63, at 813-14.

161. *See supra* text accompanying notes 32-34 (defining enterprise liability and its goal).

162. *See* RUBIN, *supra* note 14, at 10-11, 14-16 (discussing contractual limitation of damages).

163. Unconscionability indicates an "absence of meaningful choice on the part of one of the parties, to a contract together with contract terms which are unreasonably favorable to the other party." BLACK'S LAW DICTIONARY 1524-25 (6th ed. 1990). *See* Huber, *supra* note 63, at 2272-77 (outlining a good discussion on the history of unconscionability).

164. An adhesion contract is a standardized contract which is offered to consumers on a "take it or leave it basis." BLACK'S LAW DICTIONARY 40 (6th ed. 1990). Under these contracts, a consumer has no realistic opportunity to bargain. *Id.*

165. U.C.C. § 2-105 (1995).

contractual limitation on consequential damages, including personal injuries,[166] is prima facie unconscionable.[167] As a result, to have the contract enforced, the seller has the burden of establishing the validity of any limitation by showing that the limitation "was conspicuously printed, that it was explained to the buyer, that the parties bargained over it, and that the buyer knew the products had a tendency to be dangerous."[168]

To avoid a finding of contract unconscionability, a seller of a general aviation aircraft needs to conspicuously print the clause excluding liability for non-pecuniary damages and explain that clause to the buyer. The seller must offer the aircraft at different prices, depending on the level of liability; the buyer then chooses the level of liability and its corresponding price. The seller may argue that the public commonly knows the dangers of small aircraft. Also, since judges tend to be wary of contractual limitations on liability,[169] each of these steps should be well-documented. After these steps are taken, an ARC appears to stand a greater chance of being honored.

2. *Adhesion and an ARC*

There are two factors that contribute to problems of adhesion contracts: (1) the general aviation manufacturer's status as a big industry and (2) the probability that an ARC would become a standard form contract. The problems of adhesion could be tempered upon a showing that the contracting process gave consumers adequate opportunity to protect themselves.[170] In the ARC situation, the buyer has the opportunity to choose the ARC contract or accept the higher price. Also, most general aviation aircraft arguably are purchased by consumers who are well-educated, high-salaried, and attorney-represented.[171] Consequently, an ARC gives a purchaser a choice and probably involves parties with equal bargaining capacities.

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166. § 2-715; Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc., 794 P.2d 11, 15 (Utah 1990). "[I]t is clear that consequential damages under the UCC include personal injury to a buyer proximately resulting from a seller's breach of warranty." Di Prospero v. R. Brown & Sons, Inc., 494 N.Y.S.2d 181, 182 (N.Y. Sup. Ct. 1985).

167. U.C.C. § 2-719(3).

168. Tuttle v. Kelly-Springfield Tire Co., 585 P.2d 1116, 1120, n.11 (Okla. 1978).

169. RUBIN, *supra* note 14, at 74-75.

170. *See generally* Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981).

171. This generalization is derived from the fact that general aviation aircraft are expensive, those who fly general aviation aircraft complete complicated training to receive their licenses, and that given the cost of general aviation aircraft, the costs of hiring an attorney to assist in the purchase of the plane would be minimal in relation to the cost of the plane.

Adhesion problems can also be overcome by showing that one party is in control of the product.[172] In other words, manufacturers are not in a better position to avoid losses because at the time of injury the manufacturer does not have possession of the product.[173] Instead, the consumer has control of the product and the ability to gather information about the product.[174] Thus, an ARC may be capable of overcoming the problems of adhesion.

Overall, while a choice-of-law clause in an ARC may most often be voided by a state's fundamental policy, the rest of the contract may consist of clauses and agreements that a forum court may uphold. For example, state courts might uphold an agreement to choose a general aviation aircraft at a lower price if the buyer is willing to waive the manufacturer's liability for non-pecuniary damages. Additionally, courts faced with the decision of upholding such an agreement are aided by the choice-of-law clause choosing neocontractual principles. If the parties refuse to enter into an ARC, the buyer must then buy an ARIP.

IV. AFTERMARKET RISK INSURANCE: HOLD HARMLESS CLAUSE AND OTHER CHARACTERISTICS

North Dakota's aftermarket risk insurance law provides that an ARIP "must hold harmless all aviation manufacturers that manufactured, modified, maintained, repaired, or altered the aircraft or aircraft component assembled or first sold in" North Dakota.[175] The hold harmless clause can be viewed as an exculpatory clause[176] or indemnity clause[177] but does not constitute the complete ARIP statute.[178] The ARIP also covers the owner for injuries occurring in the event of an accident involving the aircraft.[179]

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172. Epstein, *supra* note 63, at 2205.

173. *Id.*

174. *Id.*

175. N.D. CENT. CODE § 26.1-48-03 (1995).

176. An exculpatory clause is "[a] contract clause which releases one of the parties from liability for his or her wrongful act." BLACKS LAW DICTIONARY 566 (6th ed. 1990).

177. Covenants not to sue do not apply to future or contingent claims and consequently are not included in this discussion. Hall v. Skate Escape, Ltd., 319 S.E.2d 67, 70 (Ga. Ct. App. 1984). Also, "exculpatory clauses must be clear and unambiguous;" "any ambiguity will be construed against the drafter." *Id.*

178. North Dakota's ARIP statute provides that the ARIP option "must be attached to the original sales contract as a lien on the aircraft." N.D. CENT. CODE § 26.1-48-03(2). This lien holds the first and each subsequent owner responsible for purchasing and maintaining an ARIP and an ARC. *Id.* This lien must be recorded at the federal aviation administration aircraft registry. *Id.* When a general aviation aircraft or aircraft component is resold, the subsequent purchaser agrees to buy and show proof of insurance. *Id.* § 26.1-48-04(3). A default on the insurance by both the purchaser and subsequent purchaser reinstates, "by contract, the lien back to the aviation manufacturer." *Id.* This portion of the ARIP statute is beyond the scope of this Note.

179. *See* N.D. CENT. CODE § 26.1-48-03.

While indemnity and exculpatory clauses are generally enforceable, courts have struck them down when they conflict with public policy.[180] The courts may honor the exculpatory clause in some negligence claims involving parties who voluntarily enter into a controlling contract, but public policy will still be the measuring stick for the validity of the clause.[181] For example, in California when a party litigates a negligence claim involving an exculpatory clause, the validity of the clause is determined by six questions that ultimately decide whether an overriding public policy exists.[182]

The first question used by California courts is whether the clause concerns a "business of a type generally thought suitable for public regulation."[183] General aviation aircraft is regulated by the FAA and is thus suitable for public regulation.

Second, is whether the party seeking exculpation is "engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public."[184] General aviation is in high demand by the public, but if general aviation is not available to a person there are alternatives such as commercial airlines or other ground transportation.[185] Also, general aviation aircraft are often not a matter of practical necessity because they may be purchased for pleasure flying.[186] Thus, general aviation is important to the public, but probably not a necessity or of great importance.

Third, is whether the party holds itself "out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards."[187] The general aviation industry is open to those who are willing and able to pay for the service, not necessarily to all who seek the service, and therefore may not fit this characteristic of public policy.

"As a result of the essential nature of the service, in the economic setting of the transaction," the fourth inquiry is whether "the party

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180. Eddie Lindsay, Comment, *Indemnity and Exculpation: Circle of Confusion in the Courts*, 33 EMORY L.J. 135, 138-39 (1984).

181. Hong Kong Export Credit Ins. Corp. v. Dun & Bradstreet, 414 F. Supp 153, 157-58 (S.D. N.Y. 1975); Interstate Fire Ins. Co. v. First Tape, Inc., 817 S.W.2d 142, 145 (Tex. Ct. App. 1991).

182. Tunkl v. Regents of Univ. of California, 383 P.2d 441, 445-46 (Cal. 1963). California is not the only state that provides criteria for measuring the validity of an exculpatory clause. *E.g.*, Employers Liab. Assurance Corp. v. Greenville Business Men's Ass'n, 224 A.2d 620, 622-23 (Penn. 1966) (stating four prerequisites similar to California's standard).

183. *Tunkl*, 383 P.2d at 445 (footnote omitted).

184. *Id.* (footnote omitted).

185. *See generally* STATISTICAL DATABOOK, *supra* note 8 (stating statistics that illustrate public demand for general aviation aircraft).

186. *Id.* at 10. Of the 184,434 active general aviation aircraft, 108,749 are operated for personal use. *Id.*

187. *Tunkl*, 383 P.2d at 445 (footnote omitted).

invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services."[188] The general aviation industry is in a superior bargaining position given its status as a manufacturer of a large durable good. But, the purchase of a general aviation aircraft does not usually involve an unsophisticated buyer. The typical buyer must be of substantial means because a general aviation aircraft is usually worth more than a luxury sports car.[189] Further, the purchaser is usually a licensed pilot, a feat which requires hours of training. Thus, it can be argued that parties involved in a sale/purchase of a general aviation aircraft are dealing at arm's length.

Fifth, if the party exercises "a superior bargaining power," it is asked whether "the party confronts the public with a standardized adhesion contract of exculpation" and makes "no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence."[190] In an ARIP, a party may be given the opportunity to buy the product at the normal price or at a lower price if the consumer is willing to purchase first-party insurance.

The final inquiry is whether, "as a result of the transaction," the consumer is "subject to the risk of carelessness by the seller or his agents."[191] In an ARIP, the manufacturer is held harmless, but is still regulated by other systems of deterrence, such as federal regulation and reputation.[192] Accordingly, the consumer may not be subject to unreasonable risks.

In sum, an ARIP presents a liability scheme that public policy should not override because general aviation is not a necessity, the bargaining positions of parties involved in a general aviation purchase are almost equal, the problems of adhesion are weak, and consumer risks are still considered. Therefore, public policy should not override an exculpatory clause in an ARIP. Nonetheless, most states have adopted strict liability as the standard for manufacturers,[193] and an exculpatory clause in an ARIP may not overcome the liability extending from strict liability.

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188. *Id.* at 445-46 (footnote omitted).

189. For example, the cost of a new Cirrus GR20 is $140,000.00. Bradbury, *supra* note 15, at IA.

190. *Id.* at 446 (footnotes omitted).

191. *Id.* (footnote omitted).

192. *See* RUBIN, *supra* note 14, at 49-57 (indicating that government regulations, reputation, and liability for recklessness all combine to serve as a strong deterrence for avoiding harm creating risks to the consumer).

193. Thomas C. Galligan Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 485-86 (1994). Even though most states have adopted a rule of strict liability derived from RESTATEMENT OF TORTS § 402A (1964), a draft of a new Product Liability Restatement is currently being circulated and commented upon. *Id.* at 486 n.154.

A. CONTRACTING OUT OF TORT LIABILITY: TWO-PRICE SCHEMES

The American Law Institute recognizes the limitations of strict liability on contract law and proposes a two-price plan that is workable with the doctrine of strict liability.[194] In a two-price plan, strict liability would be retained unless the general aviation manufacturer "quoted two prices to consumers, a full strict liability price and a lower no-liability price. A consumer who paid the low price would be barred from suit were he or she injured."[195] This solution is consistent with an ARIP. The consumer would have a choice of either paying full price for the aircraft or paying much less if the buyer holds the manufacturer harmless.

The advantage of this solution is that the "magnitude of the difference between the two prices would inform consumers of the risk" that if an injury were to occur, the consumer would not be able to recover damages.[196] The consumer would then be held responsible to purchase first-party insurance to cover potential damages.

The problem with a two-price plan is that manufacturers may lose their incentive to make optimal safety investments.[197] Yet, tort law is not the only impetus for the general aviation industry to make optimal safety investments. The FAA extensively regulates the general aviation industry.[198] Reputation is also a strong impetus for manufacturers to make a safe product.[199] Also, in a two-price plan consumers may opt to pay for the higher priced product holding the manufacturer liable for typical tort liability. Thus, a two-price plan has other mechanisms in place to motivate manufacturers to make a safe product.

However, a two-price plan may lead to situations where a general aviation purchaser has disclaimed liability of the general aviation industry but does not have first party insurance to cover damages from an accident. "This problem could be solved by banning two-price plan disclaimers unless the buyer has complete first-party insurance."[200]

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194. 2 AMERICAN LAW INSTITUTE, *supra* note 13, at 522. *See supra* note 159 and accompanying text (discussing the circumstances in which the doctrine of strict products liability can be contractually modified).

195. 2 AMERICAN LAW INSTITUTE, *supra* note 13, at 522.

196. *Id.*

197. Geistfeld, *supra* note 63, at 823.

198. *See supra* notes 29-31 and accompanying text (discussing the federal government's role in regulating the general aviation industry).

199. RUBIN, *supra* note 14, at 53. The stock of a company accused of making an unsafe product or that is compelled to recall a product, decreases in value which motivates a manufacturer to make a safe product. *Id.* at 53-54.

200. 2 AMERICAN LAW INSTITUTE, *supra* note 13, at 523.

B. CONTRACTING OUT OF TORT LIABILITY: TWO-PRICE SCHEMES WITH MANDATORY FIRST-PARTY INSURANCE.

North Dakota's ARIP statute does not mandate first-party insurance but allows an ARIP to be included with an ARC.[201] Specifically, North Dakota's ARC statute provides that contracting parties "shall" either enter into an ARC or purchase an ARIP.[202] If a party refuses to enter into an ARC, then the language of the ARC statute seems to mandate that the party purchase an ARIP which in turn must hold all aviation manufacturers harmless.[203] Thus, an ARIP that is attached to an ARC fits the two-price plan; whereas an ARIP standing by itself fits the description of a two-price plan with mandatory insurance.

In a mandatory insurance plan, a purchaser of a general aviation aircraft would be allowed to buy the aircraft at a lower price if she has first-party insurance and agrees to hold the aviation manufacturer harmless. Yet, one problem is enforcing this requirement.[204] For example, a policyholder could buy the policy at the time of purchase then allow the policy to default a few months later. North Dakota's solution is to attach the ARIP to the ARC as a lien.[205] The lien holds the first and subsequent owners financially responsible for maintaining an ARIP and is recorded with the federal administration registry.[206] "A default on the insurance may reinstate, by contract, the lien back to the aviation manufacturer."[207] Also, the purchaser who in turn sells the used general aviation aircraft always has the option of selling the aircraft "as is," which may relieve the manufacturer of liability.[208]

Thus, both a two-price plan and mandatory first-party insurance are viable possibilities for an ARIP. Since these plans are just beginning to be proposed as alternatives, the courts have not had a chance to judge the validity of such a plan. However, principles to which the courts

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201. N.D. CENT. CODE § 26.1-48-03(2) (1995). If an ARIP is included in an ARC, the ARIP must be attached to the ARC as a lien holding all owners responsible for owning an ARIP. This lien also reverts the lien back to the manufacturer if the owner defaults on the policy. *Id.* § 26.1-48-04.

202. § 26.1-48-02.

203. § 26.1-48-03(1).

204. 2 AMERICAN LAW INSTITUTE, *supra* note 13, at 524. The Institute discusses other difficulties with this scheme and suggests that a two-price scheme without mandatory insurance is the better option. *Id.*

205. *See supra* note 178 and accompanying text (discussing North Dakota's requirements for a general aviation lien).

206. N.D. CENT. CODE § 26.1-48-03 (1995).

207. § 26.1-48-04(3) (1995). An analysis of a lien in this situation is beyond the scope of this Note.

208. Keystone Aeronautics Corp. v. R. J. Enstrom Corp., 499 F.2d 146 (3d Cir. 1974) (noting that freely negotiated and clearly expressed waivers of strict liability between business entities of relatively equal bargaining strength are allowed under Pennsylvania law, but finding that clause in case did not present a clearly expressed waiver).

commonly adhere cooperate with the two-price plans, which indicates that an ARIP may help the general aviation industry.

V. CONCLUSION

The general aviation industry once seemed to be headed toward growth approaching that of the auto industry. Tort judgments awarded against the aviation industry, based on the principle that manufacturers should be liable for all risks to consumers, has nearly smothered the once lively general aviation industry. The industry was forced to tack costs associated with tort liability onto the price of the plane. This drove up the cost of a small aircraft beyond what consumers were willing to pay, and the general aviation industry quickly declined.

In response to tort demands causing the industry's plight, it has been argued by a neocontractual movement that contract law should accompany tort law in the realm of product liability. North Dakota, through the use of the ARC and ARIP, adopts the principles of the neocontractual movement. The ARC consists of a choice-of-law clause that attempts to export North Dakota's disputable presumption, statute of repose, and state-of-art defense. The ARC also attempts to export neocontractual principles.

Other parts of the ARC and ARIP statutes are based on more plausible and acceptable solutions. Instead of focusing on broad waivers of liability or choice-of-law clauses, which may well be too much for courts to swallow, a less sweeping and seemingly less one-sided departure from the dictates of the tort system are defensible if steps are carefully taken and proper record is made.[209]

The careful approach is to maintain the manufacturer's legal duties while allowing the purchasing parties to determine how much they are willing to hold the manufacturer liable in return for a reduced price on the product. Another careful approach is a two-price plan; a lower no-liability price and higher full-liability price. The consumer is warned of the lack of coverage by the extreme difference between the full-liability price and the no-liability price. A two-price plan with mandatory insurance is another careful approach. This approach presents the consumer with a lower price if the consumer presents proof of insurance. A higher, full-liability price is charged if the consumer does not have insurance. Any of these approaches are possible solutions to lift an ARC or ARIP into workable tort reform. This in turn will benefit the general

209. *See generally* Clark C. Havighurst, *Private Reform of Tort-Law Dogma: Market Opportunities and Legal Obstacles*, 49 LAW & CONTEMP. PROBS. 143, 163-170 (1986) (discussing barriers that modifications of liability have met).

aviation industry, the most likely industry to accept tort reform by adopting contract principles into the realm of product liability.[210]

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210. RUBIN, *supra* note 14, at 79.

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