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Failure to Warn of a Known Environmental Danger: Limits on United States Liability under the Federal Tort Claims Act (FTCA)

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I. Introduction

Failure to warn has provided the basis for personal injury claims brought against the United States in a variety of contexts. However, only in recent years has this theory of liability emerged as an issue in toxic tort actions involving the federal government. As public concern over the risks created by toxic substances and other environmental hazards has grown, exposure victims, lacking any other recourse, have turned to the courts for redress, relying on the Federal Tort Claims Act (FTCA)[1] as the basis for their claims. In deciding such claims, federal courts have had to determine, as a threshold issue, whether the discretionary function exception of the FTCA[2] protects the United States from liability for failure to warn members of the general public of a known environmental danger or hazard. Resolution of this issue has followed an uncertain path because of confusion surrounding application of the discretionary function exception.

Much of the confusion has resulted from the failure of the federal judiciary to develop a uniform standard for determining when any given governmental activity falls within the exception. Despite this confusion, most courts declined to liberally interpret the exception until the Supreme Court issued its decision in *United States v. S.A. Empresa De Viacao*

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1. Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1982). The Federal Tort Claims Act was adopted by Congress in 1946 as a limited waiver of sovereign immunity in situations of recognized private liability. For a general discussion of federal tort claims, *see* L. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies (1983).

2. 28 U.S.C. § 2680(a) (1982); *see infra* note 6 and accompanying text.

Aerea Rio Grandense (Varig Airlines).[3] Although *Varig* involved no failure to warn claims, the decision altered the course of failure to warn litigation by sharply limiting the scope of governmental liability under the FTCA.

This comment traces the development of the failure to warn theory in an environmental context, examines judicial responses on both sides of the issue, and assesses the viability of the theory in light of *Varig* and other recent Supreme Court decisions addressing the discretionary function exception. Part II examines the liability of the United States under the Federal Tort Claims Act and reviews the leading Supreme Court decisions interpreting the exception. Part III analyzes pre-*Varig* decisions which have permitted failure to warn claims. Part IV reviews recent decisions which applied the *Varig* holding to deny recovery. Part V examines the Supreme Court decision in *Berkovitz v. United States*[4] which limited the *Varig* holding. Part VI assesses the viability of the failure to warn theory in light of both *Varig* and *Berkovitz* and suggests an alternative approach for determining governmental liability under the FTCA.

II. Supreme Court Interpretation of the Discretionary Function Exception

Under the Federal Tort Claims Act, the United States may be held liable for the wrongful actions and omissions of its employees acting within the scope of their employment in circumstances in which a private person would be held liable under state law.[5] However, section 2680(a) of the Act ex-

3. 467 U.S. 797 (1984) [hereinafter *Varig*].

4. 108 S. Ct. 1954 (1988).

5. The Act permits suits against the federal government:

> [F]or injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1982).

The Act provides further that "[t]he United States shall be liable . . . relating to tort claims, in the same manner and to the same extent as a private individual under

pressly excludes any claims arising from discretionary acts or omissions, even when an abuse of discretion is involved.[6] For such claims, the exception acts as a jurisdictional bar to preclude the action.[7] In failure to warn cases, the standard defense raised by the government is that a decision not to warn is a discretionary decision covered by the exception and, therefore, beyond the jurisdiction of the court.

The Supreme Court decision in *Varig* stated that the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals."[8] However, the Court has failed to define the limits of governmental immu-

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like circumstances." 28 U.S.C. § 2674 (1982).

6. The exceptions to governmental liability under the Act are enumerated in 28 U.S.C. § 2680 (1982). The discretionary function exception, contained in section 2680(a), precludes:

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

28 U.S.C. § 2680(a) (1982).

7. There is some uncertainty among federal courts concerning whether state or federal law takes precedence in determining jurisdiction. A few courts have relied on a negligence standard to determine jurisdiction, claiming jurisdiction when the actions of a government employee in implementing a statute or regulation fall below a standard of reasonable care. *See, e.g.*, Allen v. United States, 588 F. Supp. 247, 337 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 694 (1988). However, the more prevalent view, particularly among federal appellate courts, is that the discretionary function provision determines subject matter jurisdiction. Courts subscribing to this view typically disregard state tort law principles of liability where the discretionary function is found to apply. *See* General Public Utilities Corporation v. United States, 745 F.2d 239, 243 (3d Cir. 1984), (holding that negligence is irrelevant to discretionary function inquiry), *cert. denied*, 469 U.S. 1228 (1985); Cisco v. United States, 768 F.2d 788, 790 (7th Cir. 1985) (declining to address plaintiffs' "Good Samaritan" argument that the government had undertaken to perform a service which required the exercise of due care); Wells v. United States, 655 F. Supp. 715, 719 (D.D.C. 1987) (holding that the United States' potential liability under the "Good Samaritan" theory of negligence is not controlling in the face of the discretionary function exception to liability), *aff'd*, 851 F.2d 1471 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 836 (1988).

8. 467 U.S. at 808.

nity with any precision or to provide consistent guidelines for lower courts to follow in applying the exception.

The Supreme Court first addressed the scope of the discretionary function exception in *Dalehite v. United States*.[9] *Dalehite* involved multiple personal injury and property claims brought against the United States after a massive explosion of ammonium nitrate fertilizer.[10] Plaintiffs alleged that the government had been negligent in permitting shipment of a dangerous explosive to a populated area without sufficient investigation or warning.[11] The Supreme Court, in a four-to-three decision, held all the government's actions in manufacturing, packing and transporting the fertilizer exempt from liability under the Act.[12] The Court broadly interpreted the exception to include not only policy determinations made in initiating the program, but also decisions later made by subordinates responsible for implementing policy.[13] The opinion drew a distinction between non-actionable discretion at the policy or planning level and actionable negligence at the implementation or operational level.[14] However, the decision left unclear the precise line between planning and operational level activities because the specific holding of the case extended discretionary function immunity to arguably operational acts.[15]

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9. 346 U.S. 15 (1953).

10. *Id.* at 17. The federal government had directed and controlled both production and distribution of the fertilizer. *Id.* at 18.

11. *Id.* at 23.

12. *Id.* at 38-42. The district court had cited four specific acts of negligence related to the manufacture of the fertilizer: (1) using a coating which rendered the fertilizer highly susceptible to explosion, (2) packing the fertilizer in paper bags which were easily ignited and subject to tearing, (3) placing the fertilizer in the bags at a very high temperature in a manner which prevented cooling, and (4) failing to label the fertilizer as a dangerous explosive and fire hazard. *Id.* at 45-47 (Appendix to Opinion of the Court). The Supreme Court determined that these allegedly negligent acts did not subject the government to liability because the decisions involved were all planning-level decisions important to the feasibility of the government's program. *Id.* at 42.

13. *Id.* at 35-36. The majority's broad language, holding that "[w]here there is room for policy judgment and decision there is discretion," suggested that almost any exercise of judgment would invoke the exception. *Id.* at 36.

14. *Id.* at 42.

15. In his dissent, Justice Jackson maintained that only the initial decision to

Two years later, in *Indian Towing Co. v. United States*,[16] the Supreme Court implicitly rejected its expansive reading of the discretionary function exception in *Dalehite* by concluding that the exception did not protect an operational activity undertaken in pursuance of a discretionary policy decision.[17] In *Indian Towing*, the Court found the government liable for damages caused by the Coast Guard's negligence in failing to properly inspect and repair a lighthouse and in failing to warn vessels that the light was not functioning properly.[18] The government conceded that the maintenance of the lighthouse was an operational activity and the discretionary function exception did not apply.[19] Nevertheless, the government argued that the operation of the lighthouse was a "uniquely governmental function" for which it could not be held liable under the FTCA.[20] The Court dismissed this argument, basing its decision on tort law negligence theory.[21] The Court commented that the Coast Guard was under no obligation to operate the lighthouse,[22] but once it made a discretionary decision to warn the public of danger by providing this service, it was obligated to use reasonable care in performing its "[G]ood Samaritan" task.[23]

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institute the fertilizer program was discretionary. He rejected the majority's characterization of the operational activities of subordinates responsible for carrying out details as "planning" level activities. *Id.* at 58.

16. 350 U.S. 61 (1955).

17. *Id.* at 69.

18. *Id.*

19. *Id.* at 64.

20. *Id.* The government argued that the FTCA provision imposing liability "in the same manner and to the same extent as a private individual under like circumstances" excluded activities that a private person could not perform. *Id.* (quoting 28 U.S.C. § 2674 (1948)).

21. *Id.* at 67-68. In rejecting the government's argument, the Court stated that the legislative history of the Act provided no support for such "finespun and capricious" distinctions. The Court also emphasized the Act's "broad and just purpose" to compensate victims of the government's negligence where a private person would be liable. *Id.* at 67-68.

22. *Id.* at 69.

23. *Id.* at 64-65, 69. *See* RESTATEMENT (SECOND) OF TORTS, §§ 323, 324A (1965) (One who undertakes to render services to another may be liable for negligent performance if his conduct contributes to the injury by increasing the risk of harm or by inducing others to rely on proper performance of the service).

The Supreme Court reaffirmed *Indian Towing* in *Rayonier, Inc. v. United States*[24] by asserting the broad scope of liability under the FTCA. As in *Indian Towing*, the Court maintained that the only test for governmental liability provided by the Act was whether a private person in similar circumstances would be held liable.[25] In fact, the Court stated that "[t]o the extent that there was anything to the contrary in the *Dalehite* case it was necessarily rejected by *Indian Towing*."[26]

In *Varig*, the Supreme Court significantly limited the scope of FTCA liability by reaffirming *Dalehite*[27] and seeming to create a blanket exclusion for all federal regulatory activity.[28] *Varig* held that the Federal Aviation Administration (FAA) was not liable under the FTCA for failure to detect and remedy specific defects before certifying aircraft for use in commercial flight.[29] After reviewing the legislative history of the FTCA, the Court identified two criteria to be used in determining whether the discretionary function exception applies to protect the actions of government agencies and employees from liability. The first is whether the conduct in question is "of the nature and quality that Congress intended

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24. 352 U.S. 315 (1957). *Rayonier* involved allegations charging the United States Forest Service with negligently allowing a fire to start on government land and failing to use due care in extinguishing the fire. *Id.* at 318-19.

25. *Id.* at 319.

26. *Id.*

27. 467 U.S. at 811-12. The Court repudiated the notion that *Dalehite* had been undermined by its subsequent decisions in *Indian Towing* and *Rayonier*. The Court maintained that since neither of these cases had specifically addressed the discretionary function exception, this aspect of the *Dalehite* decision remained essentially intact. *Id.* at 811, 813 n.10.

28. *See* Comment, *United States v. Varig Airlines: The Supreme Court Narrows the Scope of Government Liability Under the Federal Tort Claims Act*, 51 J. AIR LAW & COM. 197, 222 (1985). (The Supreme Court in *Varig* created a "regulatory/nonregulatory distinction that applies the discretionary function exception to the negligent operational acts of regulatory agencies.").

29. 467 U.S. at 821. *Varig* consolidated two Ninth Circuit airline disaster cases, United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1979) and S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. United States, 692 F.2d 1205 (9th Cir. 1982). In both cases, the court of appeals found the government liable under California's "Good Samaritan" rule. 467 U.S. at 801, 803.

to shield from tort liability."[30] The second is whether the conduct represents the exercise of discretionary regulatory authority.[31] The Court stated that the underlying purpose of the exception, as reflected in the legislative history's emphasis on protecting regulatory activities, is to prevent judicial interference with an agency's social, economic and political policy decisions.[32]

As the appellees' claims challenged the FAA's inspection and certification process itself, the Court outlined the agency's procedures for ensuring that aircraft comply with safety regulations. The Court noted that the process adopted by the FAA placed primary responsibility for ensuring compliance on the aircraft manufacturer.[33] The FAA's role was limited largely to monitoring manufacturer compliance through a spot-check system.[34] The Supreme Court found that the decision to use this system was "plainly discretionary" and explained that the agency had discretionary regulatory authority to determine the extent to which it would supervise airline safety procedures.[35]

On the basis of this reasoning, the Supreme Court rejected the court of appeals' determination that the FAA inspection and certification activities did not involve the kind of policymaking discretion contemplated by the exception.[36] "[W]hatever else the discretionary function exception may include," the Court held, "it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."[37] Thus, any tort action based on the practice of the FAA in inspecting and certifying aircraft is presumptively exempt from liability under the Act.[38]

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30. *Id.* at 813.
31. *Id.* at 813-14.
32. *Id.* at 814.
33. *Id.* at 816.
34. *Id.* at 816-17.
35. *Id.* at 819-20.
36. *Id.* at 802.
37. *Id.* at 813-14.
38. *Id.* at 815-16.

The Court's most recent decision addressing the discretionary function exception, *Berkovitz v. United States*,[39] narrowed the *Varig* holding by rejecting the notion that *Varig* created a *per se* exemption for all regulatory acts and decisions of federal agencies.[40] In *Berkovitz*, the Court held that the exception protects only discretionary actions and decisions based on considerations of public policy.[41]

The decisions of the Supreme Court in *Dalehite*, *Indian Towing*, *Rayonier*, *Varig* and *Berkowitz* have failed to delineate a clear boundary between discretionary and non-discretionary governmental acts. The Court's direction is obfuscated by its failure to establish judicial predictability and provide meaningful guidance as manifested by the inconsistency of subsequent lower court decisions.

III. Pre-*Varig* Decisions: Judicial Acceptance of the Failure to Warn Theory

Pre-*Varig* cases provide ample precedent for imposing a duty to warn where the government's exercise of a discretionary function either creates or facilitates a hazardous condition. In most of these cases, courts have treated failure to warn allegations as an independent issue to be analyzed separately from other actions and decisions, even where the underlying activity is held to be discretionary. Some courts determine liability by applying the planning/operational test set forth in *Dalehite* and finding liability when the government's failure to warn constitutes negligence at an operational level.

One case which illustrates this approach is *Smith v. United States*,[42] in which a visitor to Yellowstone National Park sued the government for damages after falling into a heated thermal pool. The Tenth Circuit acknowledged that the government's decision to leave an area of the park undeveloped was discretionary, but ruled that the subsequent deci-

39. 108 S. Ct. 1954 (1988).

40. *Id.* at 1959-61.

41. *Id.* at 1960. *See infra* notes 105-26 and accompanying text analyzing the *Berkovitz* decision.

42. 546 F.2d 872 (10th Cir. 1976).

sion not to post warnings was to be analyzed independently of other decisions.[43] The court held that the government's failure to warn of known dangers or to provide safeguards for the pool could not "rationally be deemed the exercise of a discretionary function."[44] The court reasoned that if it were to accept the government's interpretation of the discretionary function exception, a government agency would be able to avoid almost any duty under tort law by simply making a policy decision to ignore it.[45]

The Ninth Circuit applied a similar analysis in *Lindgren v. United States*.[46] In *Lindgren*, the court held that although the operation of a dam constituted a discretionary activity protected from liability, the subsequent failure to post warnings, alerting recreational users that the government had lowered the level of the river, was not necessarily entitled to the same immunity.[47] The court rejected the assumption that the failure to warn was discretionary simply because the hazard which allegedly caused the injury resulted from the exercise of a discretionary function.[48] Applying the planning/operational test, the court maintained that decisions concerned with day-to-day operations, even though they may involve an element of discretion, are not covered by the exception.[49]

In *Medley v. United States*,[50] a California district court ruled that an FAA decision not to warn pilots of the known dangers of a particular route charted by the agency was an

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43. *Id.* at 876. The government argued that the decision not to provide warnings or safety precautions was part of a policy decision to leave an area of the park undeveloped. However, the court ruled that the government could not evade responsibility for failing to warn by "assimilating this decision" into the decision to leave certain areas of the park undeveloped. The court reasoned that the duty to warn arose when the government decided to open the park to the public. *Id.* at 876-77.

44. *Id.* at 877.

45. *Id.*

46. 665 F.2d 978 (9th Cir. 1982).

47. *Id.* at 982. The allegations charged that the government failed to provide warnings even though it was aware of the recreational use of the river and the hazard created by its alteration of the water level. *Id.* at 979.

48. *Id.* at 979.

49. *Id.* at 980 (quoting Thompson v. United States, 592 F.2d 1104, 1111 (9th Cir. 1979)).

50. 543 F. Supp. 1211 (N.D. Cal. 1982).

operational decision subject to liability under the FTCA.[51] The court determined that the plaintiffs' cause of action did not arise out of the discretionary decision to chart the route but out of the hazard created by charting a dangerous mountain pass as the only route on the chart.[52]

The court first considered the decision to chart the route and likened this decision to that made by the Coast Guard to operate a lighthouse in *Indian Towing*.[53] The court found that the decision to chart a route in *Medley*, as in *Indian Towing*, involved policy considerations affecting public safety and fell squarely within the discretionary function exception.[54] To hold otherwise, the court observed, would disrupt the efficient operation of the FAA.[55] The court then addressed the failure to warn issue. Following the reasoning of *Lindgren*, the court asserted that a decision not to warn does not automatically assume the discretionary character of the decision which precipitated the danger.[56] The court noted that while failure to warn of a natural danger was generally considered discretionary, in this case the government had created the danger by charting a particularly hazardous route without alerting pilots to the risks involved.[57] Given these circumstances, the court concluded that the FAA's action fell within the general rule recognizing a duty to warn where the government's actions created a foreseeable risk of serious injury.[58]

The court further determined that the decision to chart the route was a "Good Samaritan" act which the FAA was required to perform with due care.[59] If the government breached this duty of care, it was negligent and could not es-

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51. *Id.* at 1221.
52. *Id.* at 1220.
53. *Id.* at 1218.
54. *Id.* at 1219.
55. *Id.*
56. *Id.* at 1220.
57. *Id.* The court noted the similarity between this case and Smith v. United States, 546 F.2d 872 (10th Cir. 1976), in which a duty to warn similarly arose because the plaintiff was attracted to a hazardous situation by the actions of the government. *Id.* at 1220-21.
58. *Id.* at 1221.
59. *Id.* at 1221-22.

cape liability by invoking the discretionary function exception.[60]

IV. Post-*Varig* Decisions: Judicial Rejection of the Failure to Warn Theory

As applied by lower courts, *Varig* significantly restricted plaintiffs' prospects for recovery in actions against the United States. Courts which formerly recognized a cause of action for the government's failure to warn of a dangerous condition abandoned the mode of analysis suggested by the *Indian Towing* line of cases in favor of *Varig's* more expansive view of the discretionary function exception.[61] Some of these courts have held that *Varig* presumptively precludes all tort claims arising from the government's regulatory activities.[62] These courts generally treated a decision to warn as incidental to other regulatory decisions and, therefore, entitled to the same immunity. Other courts have taken a somewhat more conservative approach, holding that the exception protects only discretionary policy decisions.[63] The inquiry in these cases usually centers on whether any balancing of social, political, or economic factors entered into the decision. From the plaintiff's perspective, however, this distinction has had little practical significance since, as a review of recent cases suggests, under either analysis, the discretionary function defense has proven to be virtually insurmountable.[64]

One case which dismissed the plaintiffs' claim on the theory that *Varig* presumptively exempts all regulatory activity

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60. *Id.*

61. In light of the *Varig* decision, the Ninth Circuit implicitly abandoned the planning/operational test used in Lindgren v. United States, 665 F.2d 978 (9th Cir. 1982).

62. *See* Bacon v. United States, 810 F.2d 827 (8th Cir. 1987); Allen v. United States, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 694 (1988).

63. *See* General Public Utilities Corp. v. United States, 745 F.2d 239 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); Shuman v. United States, 765 F.2d 283 (1st Cir. 1985).

64. The discretionary function exception has been held not to apply when government action violates a pre-existing safety policy. *See* Aslakson v. United States, 790 F.2d 688 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 694 (1988); Mandel v. United States, 793 F.2d 964 (8th Cir. 1986).

is *Bacon v. United States*.[65] In *Bacon*, road workers sued the federal government to recover for injuries allegedly caused by exposure to dioxin[66] while they were repairing roads in Times Beach, Missouri.[67] The complaint charged that both the United States Department of Housing and Urban Development (HUD), which had provided a block grant for the repair work, and the Environmental Protection Agency, which had conducted tests for dioxin in the area, had been negligent in failing to warn the road workers of the dioxin contamination.[68] In upholding governmental immunity, the Eighth Circuit Court of Appeals stated that in *Varig* the Supreme Court "recognized that Congress clearly intended for the exception to apply when the government was involved in regulatory activity."[69] The court distinguished cases in which failure to warn of a hazardous condition violated a pre-existing agency policy.[70] Since, in the present case, the EPA had not adopted any safety policy requiring the agency to warn persons exposed to dioxin, the court characterized its failure to do so as a discretionary decision covered by the exception.[71]

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65. 810 F.2d 827 (8th Cir. 1987).

66. Dioxin, a byproduct of many chemical processes, has been found to cause cancer, damage to the immune system and birth defects when tested on animals, even in extremely low doses. Based on these tests, the Environmental Protection Agency classifies dioxin as an "acutely toxic" substance and a human carcinogen. 48 Fed. Reg. 14, 514-01 (1983).

67. 810 F.2d at 827.

68. *Id.* at 828. Repair of the roads in Times Beach, Missouri occurred in November and December 1982. *Id.* In late November and early December of the same year, the EPA conducted extensive testing which confirmed the presence of dioxin along the roadways. Because dioxin, in the language of the EPA, is "one of the most toxic substances known to man . . . carcinogenic and suspected to have effects in reproductive systems," 48 Fed. Reg. 9311-01 (1983), the agency proposed to add Times Beach to its National Priorities List in March 1983. *Id.*

69. *Id.* at 829.

70. *Id.* The court cited Aslakson v. United States, 790 F.2d 688 (8th Cir. 1986), and Mandel v. United States, 793 F.2d 964 (8th Cir. 1986), as holding that the exception does not apply once the government has adopted a specific safety policy requiring warnings.

71. *Id.* at 830. The court reasoned as follows:

Although the EPA was conducting tests in Times Beach for the presence of hazardous wastes at the time of appellants' alleged injury, it had not reached any conclusions regarding the presence of dioxin, nor had it adopted a safety policy requiring warnings to persons exposed to areas *potentially* contaminated by dioxin. Appellants'

In *Allen v. United States*,[72] the Tenth Circuit relied on *Varig* to reverse a district court finding of governmental liability for failure to adequately inform the public and monitor off-site exposure to radioactive fallout from open-air atomic bomb tests held in Nevada in the 1950s and 1960s.[73] Comparing the regulatory function of the Atomic Energy Commission (AEC) with that of the Federal Aviation Administration (FAA) in *Varig*, the court found that the AEC enjoyed even broader discretion than the FAA in determining how to protect public safety.[74] That discretion embraced not only AEC policy determinations but lower level operational decisions as well.[75] The court held further that whether the alleged failure to warn was a matter of "deliberate choice" or "mere oversight" was of no consequence[76] because despite broad congressional directives to protect the public health and minimize the danger from explosion, the discretionary function exception protected "all challenged actions" surrounding the government's testing program.[77]

Some post-*Varig* decisions expressly or impliedly reject the notion that all regulatory conduct is discretionary con-

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claim is thus based upon a "failure to exercise or perform a discretionary function," within the meaning of 28 U.S.C. § 2680(a).
Id.

In denying recovery, the *Bacon* court closely followed the reasoning of the Seventh Circuit in Cisco v. United States, 768 F.2d 788 (7th Cir. 1985), which denied a similar claim against the EPA for failure to warn property owners that dioxin-contaminated soil had been used in a residential landfill. *Id.* at 829.

72. 816 F.2d 1417 (10th Cir. 1987).

73. *Id.* at 1424. *Allen* involved nearly 1200 plaintiffs alleging 500 deaths and injuries. Twenty-four of these claims were heard by the district court which found for the government on fourteen of the claims and against the government on nine, with one outstanding. *Id.* at 1418-19. On appeal by the government, the Tenth Circuit held that the lower court ruling could not stand in light of *Varig* which was decided after the district court judgment. *Id.* at 1421.

74. *Id.* at 1421. The Atomic Energy Act of 1946, Pub. L. No. 585, 60 Stat. 755 (1946), authorized the AEC to conduct atomic bomb tests. Atomic Energy Act of 1946 §§ 6(a). The Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, the current statute, conferred the same authority. Atomic Energy Act of 1954 § 2121. The AEC was abolished in 1974 and its functions assumed by the Nuclear Regulatory Commission and the Energy Research and Development Administration. *Allen*, 816 F.2d at 1419 n.2.

75. *Id.* at 1421.

76. *Id.* at 1422 n.5.

77. *Id.* at 1424.

duct. However, this caution has not deterred these courts from attributing to regulatory agencies broad discretion in performance of their safety function.

In *General Public Utilities Corp. v. United States*,[78] the court dismissed the claims of the owners of Three Mile Island against the Nuclear Regulatory Commission for failure to warn of safety hazards. The court ruled that discretion rests with the Commission to determine which problems are important enough to merit investigation and warning.[79]

Some courts, declining to limit *Varig* to its factual context, have applied its reasoning to cases involving non-regulatory activity. In *Begay v. United States*,[80] the Ninth Circuit upheld a district court's ruling that the government's failure to alert uranium miners to the possible hazards of radiation exposure was a discretionary decision exempt from liability for breach of a "Good Samaritan" duty.[81] The plaintiffs, Navajo Indian miners, alleged that the government's inaction had exposed them to unnecessary risk, causing them to contract lung cancer and other diseases.[82] The plaintiffs' allegations centered on a medical study of the miners conducted by the United States Public Health Service (PHS) during their employment in the mines.[83] Applying the principles affirmed in *Varig*,[84] the court ruled that the PHS decision not to disclose the potential danger to the miners, which had been made in order to ensure their cooperation, constituted a judgment of "the best course of action . . . under the existing circumstances."[85] The court noted that the PHS had been aware of the potential danger to the miners and that even eight years after the original study, when statistical data left little doubt about the hazards of radiation exposure, the PHS chose not to

78. 745 F.2d 239 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).
79. 745 F.2d at 247.
80. 768 F.2d 1059 (9th Cir. 1985).
81. *Id.* at 1060, 1062.
82. *Id.* at 1060.
83. *Id.* at 1061.
84. The court acknowledged that *Begay* did not involve regulatory actions but determined that extending its application to nonregulatory activity would not be inappropriate. *Id.* at 1062.
85. *Id.* at 1065.

alert the miners.[86] These facts did not deter the court from holding that the agency's failure to warn was the type of decision Congress intended to insulate from liability under the FTCA.[87]

Two years later, the Tenth Circuit decided *Barnson v. United States*[88] on nearly identical facts, reaching the same result. Plaintiff miners charged the PHS with breaching nondiscretionary "Good Samaritan" duties in failing to disclose the results of medical and environmental studies and the AEC with violating a statutory duty to protect the miners from the effects of radiation.[89] Noting the similarity to *Begay*, the court held that the discretionary function precluded recovery on both claims, regardless of any negligence on the government's part.[90]

Finally, in *Smith v. Johns-Manville Corp.*,[91] the Court of Appeals for the Third Circuit ruled that the General Service Administration's (GSA) decision to sell surplus asbestos "as is" without warning labels fell within the discretionary function exception.[92] Present and former employees initiated the action against Johns-Manville and other suppliers for injuries resulting from exposure to asbestos.[93] The defendants then filed third party indemnity claims against the United States government.[94] In denying these claims, the court found that the GSA's use of the term "as is" was evidence of "a decision in which there was room for discretion."[95] The court reasoned

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86. *Id.* at 1065-66.

87. *Id.* at 1066.

88. 816 F.2d 549 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 229 (1987).

89. *Id.* at 551, 553.

90. *Id.* at 554-55. The court determined that the decision not to alert miners of the health risks was based on political policy rather than medical considerations. *Id.* at 553.

91. 795 F.2d 301 (3d Cir. 1986).

92. *Id.* at 304.

93. *Id.*

94. *Id.*

95. *Id.* at 308. The court relied on *Varig*, even though, as the court noted, this case concerned the government's duty as a supplier of a dangerous chattel and, therefore, did not meet the second criterion set forth in *Varig* for determining applicability of the discretionary function exception: that the challenged conduct involve the government acting in its role as a regulator of individual conduct. *Id.* at 307 (citing

further that the failure to label the asbestos, which was sold in response to a congressional directive to prevent market disturbances and increase government revenues, was not the type of common law tort which could subject the government to FTCA liability.[96] The court rejected the third-party plaintiffs' contention, with which the district court had concurred, that if isolated from the underlying decision to dispose of the asbestos, failure to warn could not be considered a discretionary policy decision.[97] The court maintained that such compartmentalization was inconsistent with *Varig's* proscription against judicial second-guessing of agency decisions.[98]

The practical effect of the *Varig* decision has been to restore the federal government to a "privileged position of legal irresponsibility."[99] As some courts have recognized, in the wake of *Varig*, the FTCA has proven to be no more than "a false promise" offering little hope of redress in all but minor "fender-bender" claims.[100] Prior to *Varig*, federal courts typically imposed a duty to warn in situations where the actions of the government created a foreseeable hazard or danger by increasing the risk of injury to others or by inducing reliance on careful performance of a service.[101] Under this theory, the government's failure to disclose the results of tests for the presence of a toxic substance,[102] or of medical studies to de-

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Varig, 467 U.S. at 813-14).

96. *Id.* at 308.

97. *Id.* at 309. The court stated that "[t]he test is not whether the government actually considered each possible alternative in the universe of options, but whether the conduct was of the type associated with the exercise of official discretion." *Id.* at 308-09. *See also* United States Fidelity & Guaranty Co. v. United States, 837 F.2d 116 (3d Cir. 1988) (In determining whether the discretionary function exception applies, "the relevant question is not whether an explicit balancing is proved, but whether the decision was susceptible to policy analysis."), *cert. denied*, 108 S. Ct. 2902 (1988).

98. *Smith*, 795 F.2d at 309.

99. 1 L. Jayson, *supra* note 1, § 51, at 2-5.

100. *Allen*, 816 F.2d at 1424-25 (McKay concurring); *see also* Wells v. United States, 655 F. Supp. 715, 724 (D.D.C. 1987), *aff'd*, 851 F.2d 1471 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 836 (1989).

101. *See* RESTATEMENT (SECOND) OF TORTS, §§ 323, 324A (1965).

102. *See* Bacon v. United States, 810 F.2d 827 (8th Cir. 1987); Cisco v. United States, 768 F.2d 788 (7th Cir. 1985); Wells v. United States, 851 F.2d 1471 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 836 (1989).

termine the effects of radiation exposure on miners,[103] would arguably constitute actionable negligence. The initial decision to undertake the studies or testing would be deemed discretionary, but not the subsequent failure to warn. However, as the post-*Varig* cases demonstrate, federal courts have consistently ignored established precedent by treating failure to warn as an incidental component of other regulatory decisions and by inappropriately extending discretionary function immunity to virtually all regulatory activity. In their reluctance to entertain actions involving regulatory agencies, federal courts have incorrectly assumed that the broad statutory authority to regulate public health and safety confers discretion to ignore these interests altogether.[104]

V. The Supreme Court Clarifies and Limits *Varig* in *Berkovitz*

In *Berkovitz v. United States*,[105] the Supreme Court addressed the issue of governmental immunity in a regulatory context similar to that in *Varig*. *Berkovitz* involved allegations brought on behalf of an infant, Kevan Berkovitz, who was given a dose of Orimune, an oral polio vaccine manufactured by Lederle Laboratories.[106] Within a few weeks, the child contracted paralytic poliomyelitis, which rendered him severely paralyzed and dependent on a respirator.[107] The vaccine given to Berkovitz was part of a specific lot approved for release by the Food and Drug Administration (FDA)[108] even though the vaccine allegedly did not comply with nonvirulence standards prescribed by government regulations.[109] The Division of Biologic Standards (DBS) of the Na-

103. *See* Begay v. United States, 768 F.2d 1059 (9th Cir. 1985); Barnson v. United States, 816 F.2d 549 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 299 (1987).

104. *See* W. KEETON, PROSSER AND KEETON ON TORTS, § 131, at 1042 (1984) [hereinafter PROSSER AND KEETON], stating that courts have confused the issue of duty and negligence with the issue of discretionary immunity.

105. 108 S. Ct. 1954 (1988).

106. *Id.* at 1957.

107. *Id.*

108. *Id.*

109. *Id.* at 1964.

tional Institute of Health had licensed Lederle to produce the vaccine.[110] Berkovitz sued the United States under the FTCA, alleging that the DBS had violated federal law in issuing the drug manufacturer a license to produce Orimune and that the FDA had violated federal regulations and policy in approving its release to the public.[111]

The Supreme Court held that the discretionary function exception did not bar either claim.[112] Adhering to the principles of *Varig*, the Court reiterated that "it is the nature of the conduct" which "governs whether the discretionary function exception applies."[113] The exception protects only those governmental actions and decisions which involve a "permissible exercise of policy discretion."[114] It does not apply when a specific course of action is prescribed by federal law or policy.[115]

The Court then examined Berkovitz's allegation that the DBS had issued a product license to Lederle Laboratories without receiving test data as required by applicable statutes and regulations.[116] The Court reasoned that in these circumstances the DBS had no discretion to issue a license. Therefore, the exception did not apply to bar the claim.[117]

Regarding Berkovitz's second claim, the Court found that the regulatory scheme of the FDA, like that of the FAA in *Varig*, permitted the agency to determine the appropriate

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110. *Id.* at 1957.

111. *Id.* at 1960.

112. *Id.* at 1965.

113. *Id.* at 1958 (citing *Varig*, 467 U.S. at 813).

114. *Id.* at 1959. Citing its prior holdings in *Varig* and *Dalehite*, the Court defined as "discretionary" those decisions which involve judgment or choice and are based on considerations of public policy. *Id.* at 1958-59.

115. *Id.* at 1958.

116. Federal law requires a drug manufacturer to obtain a product license before marketing a vaccine. 42 U.S.C. § 262(a) (1982). To be eligible for such a license, the manufacturer must test the product for safety at various stages of the manufacturing process. 21 C.F.R. §§ 630.10, 630.15 (1988). After the required testing is completed, the manufacturer must submit an application for a product license to the DBS. 21 C.F.R. § 601.2 (1988). The manufacturer is also required to submit test data with a sample of the product. 21 C.F.R. § 601.2(a) (1988). The DBS may issue a product license "only upon examination of the product and upon a determination that the product complies with the standards prescribed in the regulations . . . ." 21 C.F.R. § 601.2(a) (1988).

117. 108 S. Ct. at 1062.

means of regulating the release of vaccine lots.[118] The Court stated that in this regulatory context, the discretionary function exception precludes any claim challenging an agency's formulation of policy or the action of officials with discretion to make independent judgments in carrying out policy.[119] Applying these principles, the Court ruled that the exception did not protect the FDA in this case because the agency's knowing release of a defective vaccine violated its own policy of testing all lots for compliance with safety standards and barring release of any non-complying lots.[120] Since Berkovitz's claim was directed at agency action which did not involve any policy discretion, the exception did not apply.[121]

The Supreme Court expressly rejected the notion that the exception presumptively "precludes liability for any and all acts arising out of the regulatory programs of federal agencies."[122] As the decision demonstrates, even in a regulatory context, governmental immunity has prescribed limits. A federal agency may not claim discretionary immunity when agency policy does not permit, or the act itself does not involve, the exercise of policy discretion.[123] In addition, the Court reaffirmed the decision in *Indian Towing*, imposing liability for non-discretionary acts.[124] Although the circuit courts have questioned the precedential value of *Indian Towing*,[125]

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118. *Id.* at 1964. 21 C.F.R. § 610.2(a) (1988) empowers the FDA to examine any vaccine lot to prevent distribution of a non-complying lot but does not mandate a particular course of action.

119. *Id.* at 1964. The Court based these conclusions on *Varig*, 467 U.S. at 819-20, which held that the FAA's decision to use a process of inspection and certification that involved spot-checking of the aircraft manufacturer's compliance with FAA safety regulations and the implementation of the spot-check procedure by FAA employees were discretionary. *Id.* at 1959.

120. *Id.* at 1964.

121. *Id.*

122. *Id.* at 1959-60.

123. *Id.* at 1964.

124. *Id. Indian Towing*, 350 U.S. at 69 (government liable for failure to warn vessels that lighthouse was not functioning properly, even though initial decision to undertake and maintain lighthouse service was a discretionary policy judgment).

125. *See* Merklin v. United States, 788 F.2d 172, 175 n.2 (3d Cir. 1986) (theory that *Indian Towing* permits "Good Samaritan" claims under the FTCA undermined by *Varig*).

the *Berkovitz* Court removed any doubt that *Indian Towing* still represents the applicable rule when non-discretionary acts or omissions are at issue.[126]

VI. The Viability of the Failure to Warn Theory after *Berkovitz*

The Supreme Court decision in *Berkovitz* effectively narrowed *Varig* by limiting sovereign immunity to discretionary regulatory decisions that implicate important social, political, and economic policies inappropriate for judicial review.[127] In reaffirming *Indian Towing*, the Court also held that the government may be subject to liability for negligent performance of non-discretionary actions.[128] In spite of these limitations on governmental immunity, however, the failure to warn theory is not likely to prove any more viable an option than it had been before *Berkovitz*. Like *Varig*, the decision provides discretionary function immunity for the actions of implementing officials where agency policy permits them to exercise independent judgment.[129] As virtually every action involves some element of discretion and may be said to implement agency policy, the precise limits of "discretion" remain sufficiently broad and indefinite to afford regulatory agencies considerable immunity from tort liability. As recent cases demonstrate, federal courts have consistently equated the absence of a pre-existing safety requirement with "discretion," holding a failure to warn to be discretionary unless it represents a clear violation of federal law or agency policy.[130] Since most regulatory agencies operate under no such mandate, *Berkovitz* is unlikely to effect a significant change in subsequent failure to warn

126. *Id.* 108 S. Ct. at 1959. In an effort to reconcile *Indian Towing* with its prior holdings in *Dalehite* and *Varig*, the Court stated that *Indian Towing* "also illuminates the appropriate scope of the discretionary function exception" in circumstances when the challenged conduct does not involve "any permissible exercise of policy discretion." *Id.* n.3.

127. *Id.* at 1959.

128. *Id.* at 1964.

129. *Id.*

130. *See supra* notes 62-68 and accompanying text. *See also*, Jones v. United States, 698 F. Supp. 826 (D. Haw. 1988).

litigation.

Two cases decided since *Berkovitz* illustrate the difficulties that face plaintiffs seeking recovery on a failure to warn theory. In *Wells v. United States*,[131] plaintiffs alleged that the EPA failed to inform them of the health risks created by exposure to lead pollution, even though the agency had "continuously and gratuitously" monitored pollution levels in neighborhoods surrounding three lead smelters.[132] The plaintiffs attempted to circumvent the government's discretionary function defense by arguing that the agency's decision not to warn was based on scientific judgments rather than social, political and economic policy and, therefore, was not protected by the exception.[133] The court, however, disagreed and distinguished this case from *Berkovitz*, holding that the EPA's program permitted the exercise of policy discretion by officials responsible for its implementation.[134]

In a similar vein, *Jones v. United States*[135] ruled that the government, in authorizing an independent contractor to use the pesticide chlordane to treat a termite problem at United States Air Force bases, was exercising policy judgment within the discretionary function exception and thus could not be held liable.[136] The court reasoned that issuing warnings requires the government to determine priorities and balance the risks to the public health against the financial costs involved.[137] Finding no statutory provision requiring the Air Force to give advance notice to occupants of the bases, the court held that "any such warning would have been purely an act of discretion."[138] Furthermore, a failure to consider whether a warning should be issued was as much a discretionary function as a deliberate decision not to warn.[139]

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131. 851 F.2d 1471 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 836 (1989).

132. *Id.* at 1472.

133. *Id.* at 1476-77.

134. *Id.* at 1477.

135. 698 F. Supp. 826 (D. Haw. 1988).

136. *Id.* at 834.

137. *Id.* at 833 (quoting *Varig*, 467 U.S. at 820).

138. *Id.*

139. *Id.* (quoting In Re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982, 998-99 (9th Cir. 1987)).

The issue raised by these and other post-*Varig* decisions is whether, in the absence of any statutory provision or policy requiring warnings, courts should automatically absolve federal agencies of any obligation in this regard, thus permitting the government, "under the guise of policy-making,"[140] to deny reasonable notice to those whose health and safety may be at risk.

In his dissent in *Dalehite*, Justice Jackson observed that:

> The Government, as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence, one of the unanticipated consequences of the Tort Claims Act has been to throw the weight of government influence on the side of lax standards of care in the negligence cases which it defends.[141]

Justice Jackson's concern has proven prophetic in view of recent cases which emphasize the need for a more equitable approach.

Federal courts have justified dismissal of failure to warn claims on the basis of several unwarranted assumptions. The first assumption, that all activity not mandated by federal law is discretionary activity, is undermined by the Supreme Court decision in *Westfall v. Erwin*.[142] In *Westfall*, a civilian employee of the federal government sued his supervisors at an army depot for failing to warn him of the presence of toxic soda ash.[143] At the district court level, defendants successfully argued that they were entitled to absolute immunity as federal employees acting within the scope of their employment.[144] The Court of Appeals for the Eleventh Circuit disagreed and ruled that federal officials enjoy absolute immunity from liability *only* when actions within the scope of their employment

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140. Brown v. United States, 599 F. Supp. 877, 889 (D. Mass. 1984), *rev'd*, 790 F.2d 199 (1st Cir. 1986), *cert. denied*, 479 U.S. 1058 (1987).

141. 346 U.S. at 50 (Jackson, J., dissenting).

142. 108 S. Ct. 580 (1988).

143. *Id.* at 582.

144. *Id.* at 583.

are discretionary in nature.[145] The Supreme Court affirmed and further rejected the contention that an action is discretionary as long as it is not mandated by law.[146] Noting that almost all official acts involve some element of choice, the Court stated that given "such a wooden interpretation," the discretionary function would lose all meaning.[147] The Court stressed the importance of weighing the benefits of official immunity against the costs. Absolute immunity, the Court held, is justified only when the benefit of avoiding interference in governmental functions outweighs the probability of recurring harm to private individuals.[148]

The significance of *Westfall* lies in its assertion that discretionary immunity does not attach simply because the particular conduct in question is not mandated by law.[149] Thus, the fact that federal law does not impose a warning in certain circumstances does not justify the conclusion that a failure to warn is discretionary. Although *Westfall* addressed the issue of sovereign immunity in a non-regulatory context and did not involve the United States government as a party to the action, there is no logical reason why the same standard should not apply in a regulatory context as well. "Discretion" cannot have one meaning for government officials and another for government agencies. To hold otherwise would create an inconsistent standard not permitted by the language of the exception.[150] Furthermore, the Court implicitly endorsed the need for consistency in holding federal officials to the same "discretionary acts" requirement as regulatory agencies.[151]

A second assumption, implicit in the federal judiciary's consistent reliance on the *Varig* rationale, is that failure to warn is a discretionary nonfeasance comparable to the FAA's

145. Westfall v. Erwin, 785 F.2d 1551-52 (11th Cir. 1986) *aff'd*, 108 S. Ct. 580 (1988).

146. 108 S. Ct. at 584.

147. *Id.*

148. *Id.* at 583.

149. *Id.* at 585.

150. 28 U.S.C. § 2680(a) (1982); *see supra* note 6.

151. 108 S. Ct. at 585.

alleged failure to inspect a particular aircraft.[152] However, this view fails to recognize the distinction between a decision not to warn and an agency's discretionary authority to formulate policy and enforce regulations.[153] In misapplying *Varig*, federal courts have incorrectly framed the issue raised by failure to warn claims. The issue should be not whether or how to provide a warning, but whether under the prevailing state law the government, in failing to warn, breached a duty of care, thereby creating an unreasonable risk of injury to the plaintiff.

Furthermore, although the law of negligence differentiates between liability for misfeasance and for nonfeasance,[154] it recognizes a duty to act where a nonfeasance adversely affects another's interest.[155] By implication, a duty to act may require a warning where failure to do so would heighten the risk of injury to another.

The third assumption, that imposing a duty to warn on regulatory agencies would seriously disrupt the efficiency of government operations, is untenable in the context of most failure to warn cases. As some courts have observed, in the typical hazard situation presented by these cases, a one-time warning would be sufficient and would not present any serious administrative or financial burden.[156] In such situations there is no justification for relieving government agencies of all responsibility to warn of risks created by discretionary decisions or to disclose information that would permit individuals to protect their own health and safety. Federal courts should recognize the distinction between failure to warn and other regulatory decisions[157] and apply a standard which balances

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152. 467 U.S. at 815.

153. The plaintiffs in *Varig* challenged the FAA's practice of ensuring compliance with minimum safety standards through a spot-check system in light of that system's failure to detect defective aircraft.

154. PROSSER AND KEETON, *supra* note 101, § 56, at 373-75. Misfeasance is defined as "active misconduct" which causes injury to others and nonfeasance as "passive inaction or a failure to take steps to protect them from harm." *Id.* at 375.

155. *Id.* at 375.

156. *See Lindgren*, 665 F.2d at 982; Molsbergen v. United States, 757 F.2d 1016, 1024 (9th Cir. 1985).

157. *See* Smith v. United States, 546 F.2d 872 (10th Cir. 1976) in which the court

the foreseeability and seriousness of the injury against the burden inflicted by imposing a duty to warn.[158] California courts, for example, impose liability for failure to warn of known or foreseeable dangers:

> [W]hen (1) a party has information relating to a serious risk to the life, safety or health of another; (2) the conduct of the party, though perhaps innocent gave rise to the risk; (3) the burden resulting from imposition of a duty to warn is not onerous; and (4) there is reason to believe that a warning would have some practical effect.[159]

This approach would encourage the exercise of reasonable care by government agencies and provide a more equitable basis for determining liability under the FTCA.

VII. Conclusion

As post-*Varig* decisions demonstrate, "the rule that 'the king can do no wrong' still prevails at the federal level."[160] Despite the precedent established by early cases permitting failure to warn claims, federal appellate courts have uniformly applied the *Varig* rationale in ruling against plaintiffs seeking recovery under the Federal Tort Claims Act. The *Berkovitz* decision, while limiting immunity to "discretionary" regulatory acts, reaffirms *Varig* by affording regulatory agencies broad discretionary authority in performing their regulatory functions. Reliance on *Varig* and *Berkovitz* to decide failure to warn claims is misguided because failure to warn does not represent the kind of regulatory decision at issue in these cases. The more equitable approach considers failure to warn as a separate and discrete issue, independent of other regula-

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differentiates between policy decisions and separate determinations on individual safety devices and warnings. *Id.* at 877 n.5-a.

158. *See* Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300 (1987) advocating broader imposition of liability on the part of the federal government based on "a theory of general dependence and foreseeable harm." *Id.* at 1306.

159. Molsbergen v. United States, 757 F.2d 1016, 1024 (9th Cir. 1985).

160. Allen v. United States, 816 F.2d 1417, 1424 (10th Cir. 1987).

tory acts and decisions, and looks to state tort law principles to determine liability.

The Federal Tort Claims Act was enacted to permit suit against the government in circumstances where negligence by a private individual would be actionable. However, the results in cases decided since *Varig* suggest that an agency's practice in issuing or not issuing warnings, unless specifically prescribed by federal statute or policy, is presumptively protected by the discretionary function exception. In according regulatory agencies such deference, federal courts frustrate the underlying purpose and intent of the Act. While regulatory agencies should have broad discretion in carrying out their objectives, such discretion should not permit decisions which expose private citizens to unnecessary risk of serious injury.

Terri Stilo