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Strict Product Liability Suits for Design Defects in Military Products: All the King's Men; All the King's Privileges?

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COMMENTS

STRICT PRODUCT LIABILITY SUITS FOR DESIGN DEFECTS IN MILITARY PRODUCTS: ALL THE KING'S MEN; ALL THE KING'S PRIVILEGES?

I. INTRODUCTION

The 1984 United States Defense Department budget totalled 187,490.7 million dollars.[1] Congress targeted 88,259.9 million dollars of that sum for the procurement of aircraft, missiles, combat vehicles, ammunition, torpedoes, submarines, and other military weapons and equipment from private industry.[2] The budget also included 27,303 million dollars for research, development, testing, and evaluation of products,[3] much of which will also be conducted by private concerns. This military hardware, like nonmilitary products, may contain design defects which would normally result in the manufacturer-seller shouldering the liability for any personal or property damage the defect caused.[4] However, the contractors who are the recipients of 100 billion

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1. Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, 97 Stat. 614 (1983).

2. *Id.* In the proposed 1985 defense budget, the total budget rises to 264 billion dollars. *As Defense Billions Pour into the Economy*, U.S. NEWS & WORLD REP., Mar. 12, 1984, at 57, 57. While staggering amounts are involved, the spending is concentrated on only a few companies. For example, twenty-five prime contractors received more than half of the Defense Department's business in 1983. *Id.* The contractors with the largest defense orders in 1983, and the total amount of such orders, are as follows: General Dynamics, $6.8 billion; McDonnell Douglas, $6.1 billion; Rockwell International, $4.5 billion; General Electric, $4.5 billion; Boeing, $4.4 billion; Lockheed, $4.0 billion; United Technologies, $3.9 billion; Tenneco, $3.8 billion; Howard Hughes Medical Institute, $3.2 billion; and Raytheon, $2.7 billion. *Id.* at 58.

Among industries, aerospace and electronics account for much of the work. Of the top one hundred prime contractors, twenty-seven are in the aerospace industry, while twenty are in the electronics field. *Id.* For many companies, government defense contract work is their biggest business. For example, almost ninety percent of General Dynamic's business is with the military. *Id.*

3. Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, 97 Stat. 614 (1983).

4. Product liability actions encompass three distinct theories of liability: negligence, breach of warranty, and strict liability. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1:3 (2d ed. 1974). The focus herein is primarily on strict liability actions and, in particular, on actions premised upon an alleged design defect in a military product. Strict product liability actions may also arise from allegations of a manufacturing defect or the failure to warn of a danger associated with the product. *Id.* at §§ 4:12–13.

dollars in annual revenue by way of government contracts disclaim any responsibility for the damages their products cause. They argue that they designed the products in accordance with government specifications, and because the government is immune from liability in actions based on strict product liability, they also should be immune.[5]

On the other hand, the individuals injured by the products may receive little or no compensation for their losses if the contractors can share the government's immunity. Sovereign immunity bars all actions against the federal government based on strict product liability and also bars some actions based on negligence in the design of the product.[6] While military and civilian employees may qualify for some benefits under federal laws analogous to state workers' compensation laws, nonemployees are not able to recover any of their losses unless the government has waived its immunity.[7]

Consequently, when the courts permit the manufacturers to share the government's immunity, the injured individual is left without a remedy in a situation where normal tort principles would provide for recovery. While the United States Supreme Court has recently denied a writ of certiorari in a case presenting the issue of whether a manufacturer can be immune in a strict product liability action in admiralty,[8] the lower state and federal courts are split on the applicability and

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The elements of any type of strict product liability action vary widely from jurisdiction to jurisdiction, but the RESTATEMENT (SECOND) OF TORTS § 402A (1965) contains the most commonly accepted elements. Comment, *Product Liability: The Problem of the Non-Designing Manufacturer*, 9 U. DAYTON L. REV. 81, 85–86 (1983). The RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides that:

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

Hence, in order to prove a prima facie case in most jurisdictions, the plaintiff must show that the defendant sold the product, that it contained a defect, and (according to most authorities) that it was in an unreasonably dangerous condition at the time it left the defendant's control, and that such condition caused the injuries that the plaintiff suffered. R. HURSH & H. BAILEY, *supra* note 4, at § 4:10.

5. *See infra* notes 66–80 and accompanying text.

6. *See infra* notes 16–24 and accompanying text.

7. *See infra* notes 25–30 and accompanying text.

8. McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 711 (1984).

scope of what has been misnamed the "government contract defense."[9] A clear majority of these courts have recognized the defense in actions where the plaintiff has alleged a design defect in military hardware.[10] Arguably, neither legal precedent nor sound policy reasons justifies this judicial phenomenon. However, there are no simple solutions to the complex problems presented when military products manufactured according to government specifications contain design defects.

Section II of this comment examines the potential remedies available to the plaintiff and the contractor in an action against the government, which illustrates the relative abilities of the parties to bear, shift, and minimize the loss absent the government contract defense. Section III sets forth the legal and policy arguments which support the defense and those which militate against it. Finally, proposed federal legislation creating immunity for the contractor in limited situations provides a starting point for an analysis of the alternatives to the current system of loss allocation.[11]

II. THE GOVERNMENT AS A POTENTIAL DEFENDANT

Like private commercial manufacturing contracts, government contracts for the procurement of military hardware contain specifications setting forth the characteristics of the product the government requires. Unlike private contracts, however, federal procurement regulations limit the ability of both parties to negotiate over the terms of the contract, including the design. The government's control over the design varies considerably from case to case, depending on the type of product and the type of contract. The government awards contracts after either formally advertising for bids or negotiating with select manufacturers.[12] In the former case, the government provides design specifications, performance specifications, or purchase descriptions; sometimes

9. The doctrine is not a defense, but rather an immunity. Courts and commentators have uniformly discussed the doctrine under the heading of the "Government Contract Defense." For convenience, this comment uses the same terminology.

10. *See infra* notes 111–12 and accompanying text.

11. *See infra* notes 185–92 and accompanying text.

12. Checchi, *Federal Procurement and Commercial Procurement under the U.C.C.—A Comparison*, 11 PUB. CONT. L.J. 358, 362 (1980). Federal regulations, such as the Federal Acquisition Regulations (FAR) and the Defense Acquisition Regulations (DAR), require the formal advertising procedure whenever feasible. *See* R. NASH, JR., GOVERNMENT CONTRACT CHANGES 40 (1975). However, United States Representative Jim Courter (N.J.), a member of the House Armed Services Committee, has recently argued that a majority of Defense Department contracts are awarded following private negotiations with individual companies rather than after open competitive bidding. *Giving the Pentagon an Economic Lesson*, NATION'S BUS., Dec. 1983, at 16, 16. Courter and United States Senator Charles Grassley (Iowa), have proposed a bill that would require increases of five percent annually in the level of the Pentagon's acquistion of goods through competitive bidding in order "to bring waste, fraud and abuse under control." *Id.*

it provides a hybrid of all three.[13] Contractors must comply with the specifications in framing their bids and in performing the contract.[14] On the other hand, negotiated contracts contain a request for proposals which includes references to applicable specifications and permits contractors to submit alternatives to the specifications that the government may accept, with or without modification, or reject.[15] Consequently, in every case, the government plays a role in creating the design which allegedly injured the plaintiff and thus it emerges as a potential defendant.

A. The Plaintiff's Remedies

Assuming that the procured product contains a design defect, the plaintiff faces two obstacles that preclude recovery from the government in an action based on strict product liability. First, the government rarely qualifies as a seller of the product. Rather, it is normally the buyer of the product.[16] Second, in those cases in which the government has resold the product, sovereign immunity bars any action predicated on strict liability.[17] The fact that the government is rarely a seller

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13. The Armed Services Board of Contract Appeals divides government specifications into three categories. Design specifications state "precise measurements, tolerances, materials, in-process and finished product tests, quality control and inspection requirements and other information." Aerodex, Inc., 1962 B.C.A. (CCH) ¶ 3492, at 17,822, *rev'd on other grounds*, 417 F.2d 1361 (Ct. Cl. 1969). Performance specifications state the performance characteristics desired for an item (e.g., a vehicle can attain fifty miles per hour). The design is irrelevant so long as the performance requirement is met, leaving the contractor with the "general responsibility for design." *Id.* However, the government retains the right of final inspection. *Id.* Finally, a purchase description may be used, such as a brand name, model number, or comparable product. This description can only be used when more detailed specifications are not feasible. *Id.* However, one author has noted that "almost all contracts contain mixed specifications including elements of all three types." R. NASH, *supra* note 12, at 273.

14. Formal advertised procurement requires an award to the lowest *responsive* and responsible bidder. R. NASH, *supra* note 12, at 523. The government may also insist on strict compliance with contract terms. Dynamometer Co. v. United States, 386 F.2d 855, 868 (Ct. Cl. 1967).

15. J. PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 143, 163 (1964).

16. *See supra* notes 1–3 and accompanying text. *But see* Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980) (plaintiff severely injured hand in dough mixer which was located in father's pizza shop, but which was formerly used in World War II field kitchens).

17. The United States Supreme Court has interpreted the Federal Tort Claims Act (FTCA) as precluding suits based on strict liability theory. Laird v. Nelms, 406 U.S. 797, 799 (1972). While the plaintiffs in *Laird* predicated their suit upon a theory of strict liability for an ultrahazardous activity, the lower courts have extended the Court's logic to find that sovereign immunity also bars suits in strict product liability. *See, e.g.*, Stewart v. United States, 486 F. Supp. 178 (C.D. Ill. 1980) (sovereign immunity precludes strict product liability suit for failure to warn by government as seller of asbestos); *In re* Bomb Disaster, 438 F. Supp. 769 (E.D. Cal. 1977) (government did not waive sovereign immunity in strict product liability suits by enacting the FTCA; therefore, plaintiff cannot recover on this ground for damages due to explosion of boxcars).

of military products and the plaintiff rarely a buyer of them means that a breach of warranty claim would also fail for lack of privity.

Therefore, the plaintiff's only hope for recovery from the government in a product liability case depends upon the availability of an action in negligence. The Federal Tort Claims Act (FTCA)[18] permits suits against the federal government based upon negligence with three relevant exceptions. First, the FTCA does not extend to any claim arising out of the combatant activities of the armed services during time of war.[19] Next, the *Feres*[20] doctrine bars all primary and derivative claims for injuries sustained by service members incident to active military service.[21] Finally, the "discretionary function" exception[22] bars many claims by nonmilitary plaintiffs who allege negligence in the design of a military product.

The United States Supreme Court in *Dalehite v. United States*,[23] considered the applicability of the discretionary function exception to government specifications in an action based on injuries caused by an explosion of ammonium nitrate fertilizer produced and shipped under the government's control. In analyzing the reach of the government's immunity, the Court made a distinction between decisions at the planning level (no waiver of immunity) and those at the operational level (waiver of immunity). It held that the exception bars suits based upon determinations of a discretionary nature made by executives and administrators in "establishing plans, specifications or schedules of operation."[24] When the courts allow the contractors to share the govern-

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18. Act of Aug. 6, 1946, ch. 753, 60 Stat. 842 (codified primarily at 28 U.S.C. § 2671–80 (1982)).

19. 28 U.S.C. § 2680(j) (1982).

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

21. The Court held that there was no cause of action stated for the death or injury of service personnel caused by the negligence of other members of the armed services. *Id.* at 146.

22. The discretionary function exception states that the government is immune from liability for

> [a]ny 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).

23. 346 U.S. 15 (1953).

24. *Id.* at 35–36. *Compare Dalehite with* Stanley v. United States, 347 F. Supp. 1088 (D. Me. 1972) (design of radio tower without guardrail not a discretionary function unless related to policy considerations underlying decision to engage in activity), *vacated on other grounds*, 476 F.2d 606 (1st Cir. 1973), *and* Moyer v. Martin Marietta Corp., 481 F.2d 585 (5th Cir. 1973) (selection of aircraft by Air Force secretary was discretionary, but acceptance of aircraft system was not). Basically, the lower courts have found no waiver when the design reflects a government policy decision, but otherwise permit liability. For example, the decision to utilize a bulldozer without a protective canopy guard in a particular project is not a discretionary function. United

ment's immunity in this regard, the contractor will also be immune.

In addition to suits premised upon product liability under the FTCA, government employees may recover benefits for injuries that arise out of the course of their employment in accordance with federal statutes that are analogous to state workers' compensation legislation. The Federal Employees Compensation Act (FECA)[25] covers civilian employees, and contains an express clause stating that recovery under FECA precludes recovery under the FTCA.[26] The Veterans' Benefit Act[27] provides compensation for military employees injured in the course of their employment. The United States Supreme Court relied upon the existence of this latter act as one reason for holding that the FTCA does not extend to claims arising from injuries incident to military service.[28] Hence, recovery under the Veterans' Benefit Act is also an exclusive remedy. Some relief may also be available via special legislation such as the Swine Flu Act[29] or the Military Claims Act.[30]

B. The Contractor's Remedies

A contractor that has paid damages to a plaintiff due to injuries caused by a product the contractor manufactured in accordance with government specifications has two potential remedies against the government, one sounding in tort and the other in contract. The contractor may recover the damages it paid the plaintiff by way of a claim for tort indemnification[31] in those cases where the plaintiff could have recovered damages from the government under the FTCA.[32] For example,

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States v. DeCamp, 478 F.2d 1188 (9th Cir.), *cert. denied*, 414 U.S. 924 (1973). However, the decision to order jeeps without seatbelts to facilitate quick escapes is discretionary. Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), *certification denied*, 75 N.J. 616, 384 A.2d 846 (1978).

25. 5 U.S.C. §§ 8101–93 (1982).

26. *Id.* § 8116(c).

27. 28 U.S.C. §§ 101–5228 (1982).

28. *Feres*, 340 U.S. at 144–45.

29. National Swine Flu Immunization Program of 1976, 42 U.S.C. § 247(j) (1976 & Supp. V 1981). The act arose after vaccine manufacturers refused to aid in the immunization program designed to avoid a predicated swine flu epidemic on the grounds that their insurers refused to underwrite strict product liability policies. Hunt v. United States, 636 F.2d 580, 589–90 (D.C. Cir. 1980).

30. 10 U.S.C. §§ 2731–37 (1982). This act permits settlement of claims in the maximum amount of $25,000 for damage to persons or property caused by certain employees of the military acting within the scope of their employment. *Id.* § 2733(a).

31. Indemnity has been defined as follows:

> A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor [indemnitee] is barred by the wrongful nature of his conduct.

RESTATEMENT OF RESTITUTION § 76 (1936).

32. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 669–70 (1977) (citing United

the contractor could not recover damages it paid on a claim due to injuries incident to military service,[33] but could recover payments to nongovernmental employees.[34] In a surprise move,[35] the United States Supreme Court recently held in *Lockheed Aircraft Corp. v. United States*[36] that an indemnification claim was possible for payments to civilian employees who had received FECA benefits, despite the fact that the employees had no claim against the government under the FTCA.[37] As a result of these limits, indemnification is not available in those situations where the plaintiff cannot recover tort damages from the government and is most likely to sue the contractor.

The contractor's most viable remedy against the government is contractual indemnification. Congress has provided contractors with a right of indemnification in various situations. Peripherally, there are numerous statutes creating indemnification in narrowly defined situations.[38] Also, research or development contracts may provide for indem-

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States v. Yellow Cab Co., 340 U.S. 543 (1951)).

33. *Stencel*, 431 U.S. at 666. In *Stencel*, the plaintiff was injured when the egress life-support system of his F-100 fighter aircraft malfunctioned during a midair emergency. *Id.* The plaintiff received a $1,500-a-month lifetime pension under the Veterans Benefit Act and then sued both the government and Stencel. Stencel had supplied the system to North American Rockwell, the prime contractor, and consequently had no contract with the government, precluding its use of the government contract defense. Stencel settled with the plaintiff's estate for $207,500. Insurance covered the entire claim. *Hearing on H.R. 1504 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 1st Sess., 28 (1981). Stencel cross-claimed against the government for indemnification. It had discovered design problems in the parachute pack while testing the product and urged the Air Force to change the design in order to eliminate the problem. The Air Force refused and Stencel produced the system according to the government's specifications. *Id.* at 9–30. The Air Force conceded that the plaintiff's death was due to the defect Stencel had discovered. The United States Supreme Court granted the government's motion for summary judgment against the plaintiff and its motion to dismiss Stencel's cross-claim for indemnification based upon *Feres*, 340 U.S. 135. *Stencel*, 431 U.S. at 672. *See supra* note 21 for an explanation of the *Feres* doctrine.

United States Senator Charles Grassley (Iowa), the sponsor of a bill which would provide immunity for both contractors and subcontractors in certain actions where the product conformed to government specifications, has pointed to *Stencel* as the main reason why federal legislation is needed. 129 CONG. REC. S12216 (daily ed. Sept. 14, 1983). However, based upon the current status of the law, *Stencel* is the exception and not the rule. The courts have shielded contractors from liability while permitting suits against subcontractors.

34. United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom.*, United Air Lines, Inc. v. United States, 379 U.S. 951 (1964). The decision in Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983) modifies the *United Air Lines* decision to the extent that the court denied indemnity for payments to civilian employees.

35. In addition to the court in *United Air Lines*, other lower courts had also denied indemnity for payments to civilian employees. *See, e.g.*, Galimi v. Jetco, Inc., 514 F.2d 949 (2d Cir. 1975); Travelers Ins. Co. v. United States, 493 F.2d 881 (3d Cir. 1974).

36. 460 U.S. 190 (1983).

37. *Id.* at 199.

38. For example, the Price-Anderson Act, 42 U.S.C. § 2210 (1982), creates a right of indemnification for liability arising from nuclear acts, and the Agricultural Act of 1970, 7 U.S.C. § 450(i)–(*l*) (1982), creates a right of indemnification for dairy products contaminated by nuclear

nification of contractors and subcontractors for personal and property damage to third parties that arises from a risk which the contract identifies as unusually hazardous, which arises out of the direct performance of the contract, and which is not compensated for by insurance or otherwise.[39] Public Law 85-804[40] also permits the Defense Department to agree to indemnify contractors and subcontractors for amounts paid for third party claims when the department decides that it will facilitate national defense and the contract involves an unusually hazardous risk or a nuclear risk.

However, contractor efforts to convince federal agencies to include standard indemnification clauses in federal contracts have failed to date,[41] despite contractor complaints that the current statutory scheme is too narrow to fulfill its objective of insulating contractors from liability in potentially high-risk undertakings.[42] The government counters these complaints by pointing out that considerable competition exists for government contracts despite limited indemnification, and that broader provisions would reduce the contractors' economic incentive to design and produce the safest possible products.[43]

In summary, the contractor's tort remedies against the government are nearly equal to those of the injured plaintiff and can be more inclusive, as in the *Lockheed*[44] case. Additionally, a contractor may be able to recover under a contract theory from the government in a narrow set of circumstances. The extensive limits on recovery in actions by plaintiffs and contractors who sue the government result in the government ultimately absorbing only a small portion of the damages for military product-related injuries. Consequently, responsibility for the brunt of those damages falls upon the contractors and the plaintiffs. The government contract defense is a crucial factor in allocating the loss between these two parties. When applicable, the plaintiff bears the entire loss; when inapplicable, the loss shifts to the contractor and, presumably, to

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radiation or toxic chemicals.

39. 10 U.S.C. § 2354(a) (1982).

40. 50 U.S.C. § 1431–1435 (1982) (commonly known as Public Law 85-804). Unlike 10 U.S.C. § 2354(a), Public Law 85-804 is not limited to research and development contracts. Neither statute is consistently applied. Some agencies are reluctant to utilize their indemnification power, primarily because they do not want to classify the work as "unusually hazardous." Comment, *Catastrophic Accidents: Indemnification of Contractors*, 10 J. SPACE LAW 1, 10 (1982).

41. *Industry Groups Want Indemnity Reform, but Justice Department Favors Status Quo*, 10 PROD. SAFETY & LIAB. REP. (BNA) 693, 694 (Oct. 15, 1982) (testimony of National Association of Manufacturers spokesman T. Richard Brown before the Senate Judiciary Subcommittee on Agency Administration) [hereinafter cited as *Industry Groups*].

42. *Id.*

43. *Id.* at 694 (testimony of Assistant Attorney General J. Paul McGrath).

44. 460 U.S. 190.

its insurer, and is thereby spread across a wide segment of society.[45]

III. The Contractor as a Potential Defendant

The plaintiff who seeks to recover damages for injuries due to a design defect from a contractor which has complied with the government's contract specifications faces two hurdles to recovery.[46] The first is what one commentator has labeled the "contract specification defense,"[47] and the second is the government contract defense. Both, neither, or only one of these defenses may apply in a single case, depending on the jurisdiction and the law which governs.

A. The Contract Specification Defense

The contract specification defense first surfaced in negligence actions involving both private and public contracts in which it did not operate as a defense at all.[48] Rather, the doctrine amounted to a restatement of the principle that a contractor did not breach its duty of care to the plaintiff if it followed the plans of another (in construction or manufacture), and such plans would not alert the reasonably prudent contractor to any danger. Predictably, negligence's child has come of age in the context of strict product liability actions because some courts have extended this principle to absolve nondesigning manufacturers of liability for design defects.[49] Other courts, recognizing that fault principles play no part in strict product liability actions, have rejected the "defense."[50]

Case law dealing with the contract specification defense in strict product liability suits involving government contracts for military hardware is sparse, but the Fifth Circuit Court of Appeals has rejected the defense in one case. The defendant manufacturer in *Challoner v. Day*

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45. The relevance of insurance is considered fully herein at notes 14–47 and accompanying text.

46. *See infra* notes 47–184 and accompanying text.

47. Comment, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. Rev. 1025, 1027 (1982).

48. In Ryan v. Feeny & Sheehan Bldg. Co., 239 N.Y. 43, 145 N.E. 321 (1924), the collapse of a canopy built pursuant to government plans killed plaintiff's decedent. The court held that the contractor's reliance upon the plans absolved it of liability unless the plans were so apparently defective that an ordinary builder of ordinary prudence would be put on notice that the work was likely to cause injury. For a more recent restatement of the rule in a product liability action, see Lenherr v. N.R.M. Corp., 504 F. Supp. 165 (D. Kan. 1980). In *Lenherr*, the court held that a manufacturer is liable in negligence only if the defect in design is sufficiently obvious to alert a reasonably competent manufacturer to the danger. *Id.* at 174.

49. *See, e.g.*, Spangler v. Kranco, Inc., 481 F.2d 373 (4th Cir. 1973); Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978) (private contract). *See generally* Comment, *supra* note 4.

50. *See, e.g., Lenherr*, 504 F. Supp. at 174.

& Zimmerman, Inc.[51] argued that it could not be held liable for a design defect in a round of ammunition which prematurely exploded because the government had exclusive control over the design, and the contractor was entitled to rely upon the design of the government unless it was so glaringly or obviously dangerous that the contractor should have been alerted to the risk of danger.[52] The court recognized that the rule set forth the contractor's standard of care in a negligence action, and therefore was not applicable in a strict product liability action.[53]

The viability of this defense in strict product liability actions is questionable and should not prove to be a stumbling block in the majority of jurisdictions. The courts which have recognized the defense have set forth no reasons for extending the principle to strict product liability suits[54] and have basically conceded that they are employing the same standard to determine whether the design is defective in strict liability actions that they utilize to determine the breach of duty issue in negligence actions.[55] Considering the availability of contribution and indemnity, the injection of the principle into strict liability actions is unwarranted. However, its existence should be considered when analyzing the case law because courts do not always distinguish between this doctrine and the government contract defense.[56]

B. The Government Contract Defense

Assuming that the contract specification defense has not come into play to bar the plaintiff's action, the second hurdle is the government contract defense. This doctrine, applicable only in public contract cases, permits a manufacturer which has complied with government specifications to escape liability by sharing the government's immunity for public policy reasons.[57]

Historically, government contractors enjoyed limited immunity in actions against them for damages arising from the performance of fed-

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51. 512 F.2d 77 (5th Cir. 1975), *vacated on choice of law grounds*, 423 U.S. 3 (1975).

52. *Id.* at 82.

53. *Id.* at 83.

54. *See, e.g., Spangler*, 481 F.2d at 375 n.2 (quoting Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971)). The standard of care imposed upon the manufacturer is "essentially the same whether the theory of liability is labeled . . . negligence or strict tort liability." *Id.*

55. *See, e.g.*, McCabe Powers Body Co. v. Sharp, 594 S.W.2d 592 (Ky. 1980) (court relied upon a case which failed to distinguish between negligence and strict liability theories, while noting that the defense might not apply when the defect is "extraordinarily dangerous").

56. For example, the court in Jenkins v. Whittaker Corp., 551 F. Supp. 110 (D. Hawaii 1982), relied upon *Challoner* and Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 451 A.2d 179 (1982), both of which involved the contract specification defense, in determining the applicability of the government contract defense. *Jenkins*, 551 F. Supp. at 114.

57. *See infra* notes 58-184 and accompanying text.

eral public works projects such as bridge, road and sewer construction.[58] In the seminal case of *Yearsley v. W.A. Ross Construction Co.*,[59] the United States Supreme Court first recognized that a contractor could avoid liability by reason of its government contract. The plaintiff in *Yearsley* sought compensation for property damage allegedly caused by the defendant's work in constructing dikes for the federal government,[60] upon the theory that the damage amounted to a taking of his property without just compensation in violation of the fifth amendment.[61] The Court absolved the contractor on the basis that it had acted as an agent of the government,[62] while indicating that liability would attach if the contractor's authority had not been validly delegated or if the contractor had exceeded its authority.[63] Many of the cases following *Yearsley* have also been inverse condemnation cases in which the result was based upon an agency rationale with little discussion on the difference between an independent contractor and an agent.[64] The FTCA, enacted after *Yearsley*, provides for vicarious liability when a corporation acts primarily as an agent of the United States, but expressly excludes "any contractor with the United States" from that category.[65]

The principle that has evolved from this line of public works cases provides that the contractor is not liable for damages resulting necessarily from the performance of the contract, but is liable if the damage arises from the negligent manner in which the work is performed.[66] This is a restatement of the *Yearsley* principle that the contractor remains liable for acts outside the scope of the agency relationship. Consequently, if the damage arises from the nature of the plans as opposed

58. *See infra* notes 59–64 and accompanying text.

59. 309 U.S. 18 (1940).

60. *Id.* at 19.

61. *Id.* at 19–20.

62. *Id.* at 20–21.

63. *Id.*

64. *See, e.g.*, Green v. ICI Am., Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965). *But see* Powell v. United States Cartridge Co., 339 U.S. 497 (1950), in which the Court found that a contractor was independent for purposes of liability under the Fair Labor Standards Act. The contractor in *Powell* operated a munitions plant pursuant to a government contract. The government supplied the materials and owned the land, plant, equipment, and products. However, the contract expressly stated that the contractor was not a government agent. The Court also refused to apply agency principles in a case in which the plaintiff's decedent was killed aboard a government-owned ship operated by the defendant pursuant to a government contract. *See also* Brady v. Roosevelt Steamship Co., 317 U.S. 575 (1943). The Court distinguished *Yearsley* by finding a negligent exercise of the power delegated to the defendant. *Id.* at 583. The Court assumed that the government would indemnify the contractor.

65. 28 U.S.C. § 2671 (1982).

66. *Green*, 362 F. Supp. at 1265.

to the negligent performance of the work embodied in the plans, the contractor is not liable.[67] In the past decade, however, the government contract defense has taken on a new meaning in absolving manufacturers from liability for design defects in military products in both negligence and strict liability actions.[68]

The government contract defense was first raised in *Whitaker v. Harvell-Kilgore Corp.*,[69] and again five years later in *Foster v. Day & Zimmermann, Inc.*[70] Both cases involved the premature explosion of certain hand grenades. The plaintiff in *Whitaker*, an Army private, sought recovery from the manufacturer of the grenade, Day & Zimmermann, Inc., and the manufacturer of the fuse, Harvell-Kilgore Corporation, under negligence, breach of warranty, and strict product liability theories.[71] Day & Zimmermann, Inc. moved to dismiss on the ground that it functioned only as an instrumentality of the United States, because the government owned the site, plant, materials and finished products, while Day & Zimmermann, Inc. merely assembled the component parts according to government specifications.[72] The court relied upon *Powell v. United States Cartridge Co.*[73] to reject the grenade manufacturer's claim that it was a government instrumentality. The Court in *Powell* held that the operator of the subject munitions plant at that time was not a government agent.[74] Since *Powell* and *Whitaker* both involved the same munitions plant, the *Whitaker* Court held that Day & Zimmermann was also not a government agent.[75] Additionally, the government contract in both cases expressly stated that the contractor was an independent contractor and not a government agent.[76]

Thereafter, in *Foster v. Day & Zimmermann, Inc.*,[77] an Army reservist brought suit against the same defendants, again seeking recovery for the premature explosion of a hand grenade on the theory of strict liability in tort; the defendants again raised the government contract defense.[78] The court relied upon the *Whitaker* court's finding that

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67. Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 16 (9th Cir. 1961).

68. *See infra* notes 82–134 and accompanying text.

69. 418 F.2d 1010 (5th Cir. 1969).

70. 502 F.2d 867 (8th Cir. 1974).

71. *Whitaker*, 418 F.2d at 1012.

72. *Id.* at 1012–13.

73. 339 U.S. 497 (1950).

74. *Id.* at 504–08.

75. *Whitaker*, 418 F.2d at 1014.

76. *Id.* The contract also contained an indemnification clause. *Id.*

77. 502 F.2d 867 (8th Cir. 1974).

78. *Id.* at 873.

no agency relationship existed[79] and the additional fact that the injury was caused by a manufacturing defect[80] to reject the defendant's argument. Consequently, even if the contractor had been an agent in this case, the *Yearsley* doctrine would not have applied to absolve the contractor of liability for what was akin to negligent performance of the work.

1. The Elements of the Defense

The courts in the cases arising in the decade after *Whitaker* and *Foster* have extended the government contract defense to suits based upon negligence, strict liability, and breach of warranty, with or without reliance upon the *Yearsley* agency rationale.[81] The most commonly required elements of the defense are: (1) the United States is immune from liability; (2) the United States established or approved the specifications for the defective item; (3) the item conformed to the specifications; and, (4) the contractor warned the United States about the dangers involved in the use of the item. However, the courts do not uniformly require these elements. For example, the sum of the doctrine under Pennsylvania law is that the contractor must "execute the government's specifications carefully."[82]

The first element, the requirement that the government be immune, is implicit in the majority of decisions.[83] However, one court has

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79. *Id.*

80. *Id.* at 874 n.5. The court stated: "The doctrine of sovereign immunity may not be extended to cover the fault of a private corporation, no matter how intimate its connection with the government." *Id.* at 874.

81. *See infra* notes 82–184 and accompanying text.

82. Brown v. Caterpillar Tractor Co., 696 F.2d 246, 254 (3d Cir. 1982). The federal court noted that it preferred requirements of compulsion, of compliance with a mandatory specification, and of a duty to warn of dangers unknown to the government, but was bound by the current status of Pennsylvania law. *Id.* at 254 & n.17. *See also* Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980) (the court simply stated that conformance with government specifications in time of war is a complete defense to any action based upon design, including both negligence and strict liability actions). The duty to warn requirement first arose in *In re* "Agent Orange" Product Liability Litigation, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982) and therefore was not required by courts in earlier cases such as *Casabianca* and Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976) (contractor having no discretion with respect to installation of seat belts in Army jeep and who strictly complied with government specifications cannot be held liable), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), *certification denied*, 75 N.J. 616, 384 A.2d 846 (1978).

83. *See, e.g.*, McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983) (United States immune from direct tort liability and tort indemnification of contractors for deaths of two Navy pilots killed when aircraft ejection system malfunctioned), *cert. denied*, 104 S. Ct. 711 (1984); *Brown*, 696 F.2d at 253 (contractor should share the government's privilege); Johnston v. United States, 568 F. Supp. 351, 356 (D. Kan. 1983) (defense allows the contractor to share the government's immunity)(citing Comment, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. Rev. 1025 (1982)); Koutsoubos v. Boeing Vertol, 553 F. Supp. 340, 342 (E.D. Pa. 1982) (imposing liability on contractor when government is immune is

expressly labeled it an element.[84]

The second element of the defense requires proof that the United States set or approved the specifications for the item. The extent of the government's control over the specifications is the crucial factor.[85] The courts have not agreed upon a uniform standard for determining when the defendant's involvement in the design process precludes the use of the defense. However, a few courts[86] have relied upon the formulation of elements the court set forth in *In re "Agent Orange" Product Liability Litigation.*[87] The "Agent Orange" litigation resulted from the use of a chemical herbicide by United States military forces in Vietnam where millions of American servicemen were exposed to the lethal toxin.[88] The plaintiffs' attorneys alleged that the manufacturers had marketed the herbicide since 1948,[89] and that the military specifications were drawn up from information supplied by the defendants.[90] The court rejected the plaintiffs' argument that the government contract defense required that the defendant manufacturers prove that they had no responsibility, direct or indirect, for formulation of the specifications.[91] Instead, the court stated that the defense required only

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meaningless) (quoting *Dolphin*, 243 F. Supp. at 827). The government always retains its sovereign immunity in strict liability actions. *See supra* note 17 and accompanying text.

84. *McKay*, 704 F.2d at 451.

85. The fact that the defendant, Boeing Company, had final control over the design of the transmission of a helicopter was the decisive factor in the jury's verdict for the plaintiffs in a recent product liability action. Lauter, *A Liability Defense Shapes Up*, NAT'L L.J., Dec. 12, 1983, at 3, col. 1. Transmission problems in the Army CH-47 Chinook helicopter caused it to crash in late 1982, killing all forty-six people aboard. *Id.* While the defendant argued that the government set the transmission design, the plaintiffs argued that Boeing had initially created the specifications and that the government had merely adopted them. *Id.* The jury found that Boeing had final control over the design in response to a special interrogatory. *Id.*

Other courts acknowledge that the relative control of the parties over the design is a determinative factor. For example, the court in one case denied the defendant's motion for summary judgment on liability upon finding that material issues of fact remained with respect to the defendant's involvement in or responsibility for the design of an atomic simulator. Jenkins v. Whittaker Corp., 551 F. Supp. 110, 114 (D. Hawaii 1982). The court went on to grant the plaintiff's motion *in limine* prohibiting the defendant from raising the government contract defense in the strict product liability action. *Id. See also In re* Related Asbestos Cases, 543 F. Supp. 1142, 1152 (N.D. Cal. 1982) (court implied that the fact that some defendants did not specifically manufacture asbestos products in accordance with government specifications, but rather supplied the Navy with the same products it used to fill nonmilitary orders, might bar use of the defense); *Sanner*, 154 N.J. Super. at 409, 381 A.2d at 806 (since defendant had no discretion with respect to installation of seatbelts, defendant is not liable).

86. *See infra* notes 87–110 and accompanying text.

87. 534 F. Supp. 1046 (E.D.N.Y. 1982).

88. Comment, Agent Orange *and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability*?, 36 U. MIAMI L. REV 489, 490 (1982).

89. Yannacone, Kavenagh & Searcy, *Dioxin Molecule of Death*, TRIAL, Dec. 1981, at 30, 34.

90. *Id.* at 32.

91. 534 F. Supp. at 1056.

that the defendants prove that the government established the design; "that the product . . . supplied was a particular product specified by the government. If it should appear that the contract set forth merely a 'performance specification', as opposed to a specified product, then the government contract defense would be far more restricted."[92] This formulation amounts to a requirement that the government set design specifications.

On the other hand, a few courts have not required that the government create design specifications, but only that the government approve reasonably precise specifications. The court in *McKay v. Rockwell International Corp.*[93] stated the test as follows: "The supplier [must prove] that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment."[94] The court remanded the case for the lower court to determine this issue after the plaintiffs contended that the United States had merely requested, by letter, that Rockwell design a new ejection system (the component at issue) and had agreed, in advance, to purchase Rockwell's product as completely designed.[95] Cases where the government agrees, in advance, to accept whatever the manufacturer designs, thereby precluding a finding that the approval was of "reasonably precise specifications," would presumably be rare and the *McKay* test routinely satisfied.

Not all courts follow these formulations. For example, the court in *Jenkins v. Whittaker Corp.*[96] found that the test employed by the court in *"Agent Orange"* applied only to weapons manufactured during war. It accordingly held that "some involvement" by the manufacturer in the design of a nonwartime product was sufficient to avoid granting the defendants' motion for summary judgment on the basis of the government contract defense.[97]

While government practices in awarding military contracts would appear to preclude manufacturers from meeting the stricter *"Agent Orange"* test in the majority of instances, the sparsity of cases in which

92. *Id.* Other courts have also followed this definition of the element. *See, e.g., Koutsoubos*, 553 F. Supp. at 343; *Asbestos*, 543 F. Supp. at 1152.

93. 704 F.2d 444 (9th Cir. 1982).

94. *Id.* at 451. *See also* Hubbs v. United Technologies, 574 F. Supp. 96, 99 (E.D. Pa. 1983) (defendant precluded from using defense if it cannot prove that the government either set specifications which amounted to more than a general outline or approved defendant's final reasonably detailed specifications; the court went on to cite the stricter *"Agent Orange"* test as the equivalent of the *McKay* test and appeared to utilize the former test).

95. *McKay*, 704 F.2d at 453.

96. 551 F. Supp. 110 (D. Hawaii 1982).

97. *Id.* at 114.

the courts have addressed the issue provide inconclusive information.[98] The fact that the government awards the majority of contracts through the negotiation process[99] and merely approves, as opposed to creates, the contractor's proposed design means that the government has not established the design specifications in these cases. In such cases, the contractors could not meet the "*Agent Orange*" test, but could meet the *McKay* test.

The third element requires that the item conform to the government's specifications, precluding immunity for manufacturing defects. The court in "*Agent Orange*" required that the product meet the specifications in "all material respects."[100] The "material respects" are those design aspects alleged to be defective.[101] Proof that the government inspected the product and accepted it is sufficient to meet this element.[102] The court in *McKay* again created a less stringent requirement. The court stated that the equipment must conform to reasonably precise specifications approved by the government,[103] but found that the defendants had met their burden of proof by the allegation of a design defect as opposed to a manufacturing defect.[104]

Finally, the court in "*Agent Orange*" required that the defendant prove that the government knew as much as, or more than, the defendant about the hazards associated with the use of the product.[105] This element imposes a duty upon the defendant to warn of those hazards arising from the specifications which the defendant knew and the government did not know. The element is grounded in the rationale that the government's decision to use the product might have changed based

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98. *Hubbs*, 574 F. Supp. at 99 (Naval officer in charge of design work on aircraft testified that the Navy created specifications, while an engineer for defendant testified that the defendant created detailed specifications which the Navy approved); *Koutsoubos*, 553 F. Supp. at 343 (government created specifications for allegedly defective system); *Sanner*, 154 N.J. Super. at 409, 381 A.2d at 806 (government created specifications expressly precluding seat belts, the alleged defect, and solicited bids).

99. *See supra* note 12. *See also* Comment, *Requests for Proposals in State Government Procurement*, 130 U. PA. L. REV. 179, 181 (1981) (citing COMM'N ON GOV'T PROCUREMENT, 1 REPORT OF THE COMM'N ON GOV'T PROCUREMENT 20 & n.25 (1972) for the fact that eight-five to ninety percent of all federal contract dollars spent in 1980 were dispensed through negotiated procurement). However, the manufacturers claim that the government prefers advertised contracts. *Industry Groups*, *supra* note 41, at 693.

100. 534 F. Supp. at 1055. Courts following this formulation include *Hubbs*, 574 F. Supp. at 98; *Koutsoubos*, 553 F. Supp. at 342; and *Asbestos*, 543 F. Supp. at 1152.

101. *Koutsoubos*, 553 F. Supp. at 343.

102. *Id.* at 344; *Hubbs*, 574 F. Supp. at 100.

103. *McKay*, 704 F.2d at 451.

104. *Id.* at 453.

105. *"Agent Orange,"* 534 F. Supp. at 1055. *See also* McCrae v. Pittsburgh Corning Corp., 97 F.R.D. 490, 493 (E.D. Pa. 1983); *Hubbs*, 574 F. Supp. at 98; *Koutsoubos*, 553 F. Supp. at 342; *Asbestos*, 543 F. Supp. at 1152.

upon its knowledge of these hazards.[106] The duty only extends to those hazards that "might reasonably have affected the government's decision" about the use of the product.[107] The defendant's participation in the preparation of the specifications is relevant in establishing the relative degrees of knowledge of the parties.[108] The *McKay* court stated that the defense required that the defendants warn the government about "patent errors" in the specifications or about dangers involved in the use of the product which the defendant knew, but the government did not.[109] The court expressed the same rationale for imposition of this duty as the court in *"Agent Orange"* did: enabling the government to balance the risks and benefits inherent in the use of the equipment.[110]

While eight[111] courts have recognized the government contract defense as a viable defense (six since the 1982 *"Agent Orange"* decision[112]), two courts have rejected it. The court in *Jenkins v. Whittaker Corp.*[113] prohibited the defendant from arguing the defense to the jury. The court relied heavily on facts in the case which showed that the defendant had "some involvement" in the design process.[114] However, it appeared to reject the defense as a matter of law[115] after a discussion of a case involving a possible manufacturing defect,[116] one involving a private contract,[117] and after deciding that the *"Agent Orange"* holding should be limited to products manufactured for war.[118]

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106. *"Agent Orange,"* 534 F. Supp. at 1057.

107. *Id.*

108. *Id.* at 1056; *Hubbs*, 574 F. Supp. at 100; *Koutsoubos*, 553 F. Supp. at 344.

109. *McKay*, 704 F.2d at 451.

110. This duty should encourage all manufacturers to warn the government of potential hazards due to the possibility of a later claim, although some may remain reluctant to do so for fear of losing the contract. For a good example of a case in which the manufacturer, a subcontractor, allegedly failed to notify the government out of fear of such a loss, see Vandiver, *The Aircraft Brake Scandal*, HARPER'S MAG. 45 (Apr. 1972).

111. *McKay*, 704 F.2d at 451; *Brown*, 696 F.2d at 251; *Hubbs*, 574 F. Supp. at 98; *McCrae*, 97 F.R.D. at 492; *Koutsoubos*, 553 F. Supp. at 342; *"Agent Orange,"* 534 F. Supp. at 1053; *Sanner*, 154 N.J. Super. at 409, 381 A.2d at 806; *Casabianca*, 104 Misc. 2d at 350, 428 N.Y.S.2d at 402.

Courts have also recognized that the defense is available in cases which involve claims for damages due to asbestos-related injuries. *See* Tefft v. A.C. & S., Inc., No. C-30-924M (W.D. Wash. Sept. 15, 1982); *Asbestos*, 543 F. Supp. at 1152.

112. The two courts which recognized the defense prior to the 1982 *"Agent Orange"* decision are the *Sanner* court and the the *Casabianca* count.

113. 551 F. Supp. 110 (D. Hawaii 1982).

114. *Id.* at 114–15.

115. *Id.* at 114.

116. The court cited Challoner v. Day & Zimmermann, Inc., 512 F.2d 77 (5th Cir. 1975), *vacated on choice of law grounds*, 423 U.S. 3 (1976) as a helpful case. *See supra* notes 51–53 and accompanying text for a discussion of *Challoner*.

117. *Michalko*, 91 N.J. 386, 451 A.2d 179.

118. *Jenkins*, 551 F. Supp. at 114.

The court in *Johnston v. United States*[119] also rejected the defense as unwarranted in that case.[120] The court traced the history of the defense from the original cases involving claims against public works contractors for property damage through the recent extension of the defense into personal injury suits grounded on strict product liability.[121] The court found that the reasons advanced by courts which had recognized the defense were inapplicable under the circumstances of *Johnston*. The plaintiffs in *Johnston*, four former employees of a company which overhauled aircraft instruments, contended that they contracted cancer or leukemia through their exposure to ionizing radiation emitted from the face of instruments the company overhauled.[122] The defendants included the government, eight manufacturers of the instruments, and fifteen defendants which had sent the instruments to the employer for repair.[123] Two of the manufacturer-defendants moved for summary judgment because they produced the aircraft instruments pursuant to wartime government contracts. The theories of action included a claim of strict product liability for a design defect and failure to warn.[124]

The *Johnston* court addressed, and found inapplicable, five rationales advanced for the defense. First, the court conceded that the government contract defense could minimize the risk to national security that might be created by judicial second-guessing of military design when the allegedly defective product was a new and technically complex one used only by the military.[125] However, the court found that rationale unpersuasive when applied to an item like the one at issue in *Johnston*, which was simply an adaptation or copy of an item already sold in private commerce.[126]

Second, the *Johnston* court rejected the justification that government costs for military products would increase absent the defense because contractors would pass their litigation expenses on to the government through higher bids. The court reasoned that manufacturers were already passing on the costs of liability for manufacturing defects, and there was no principled way to distinguish the costs for manufacturing defects from those for design defects for purposes of the increased-cost rationale. Hence it was patently unfair for a few, innocent, randomly-

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119. 568 F. Supp. 351 (D. Kan. 1983).

120. *Id.* at 357. The court stated that the policies that might justify the defense in other cases did not justify it in that case. *Id.* at 356–57.

121. *Id.* at 356.

122. *Id.* at 353.

123. *Id.*

124. *Id.* at 354.

125. *Id.* at 357. The court in *McKay* also recognized an exception for an ordinary consumer product, such as a can of beans. *McKay*, 704 F.2d at 451.

126. *Johnston*, 568 F. Supp. at 357.

selected victims to bear the entire loss for design defects when all taxpayers shared the loss for manufacturing defects.[127] Moreover, the court reasoned that imposing liability on the contractors could help control government defense costs because the manufacturers with better safety records could procure lower premiums for liability insurance, and hence make lower bids than their counterparts who paid higher premiums.[128]

A third rationale for the government contract defense is that it is inequitable to impose liability on a contractor for a defect in a product the government forced it to produce. The court acknowledged this was a "powerful justification," but found that the defendants were not compelled to produce the item at issue.[129] The court also sidestepped the argument that imposing liability on the contractors undermines the policies underlying governmental immunity pursuant to the *Feres* doctrine or the discretionary function exception.[130] The court found *Feres* inapplicable because the plaintiffs were not service personnel; the discretionary function exception was held equally inapplicable because the court was not convinced that the government could invoke it.[131]

Finally, the *Johnston* court rejected the contention that it is unfair to subject a manufacturer to liability when the manufacturer is not culpable. The court noted that the manufacturer is often not an innocent party, especially when it has had substantial input into the product's design.[132] Moreover, the court saw the defense operating to replace one unfairness (the manufacturer's liability) with another unfairness (the plaintiff's inability to recover). The court saw a solution to these inequities in the state's comparative fault scheme which apportioned liability in strict product liability suits between all "responsible" parties, whether or not immune.[133]

In addition to the opinion of the court in *Johnston*, the dissenting judge in *McKay*[134] also attacked the rationales underlying the government contract defense. The remaining courts confronted by the defense, however, have justified it as sound policy.[135]

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127. *Id.*

128. *Id.*

129. *Id.* at 357–58.

130. See *supra* notes 20–22 and accompanying text regarding the *Feres* doctrine and the discretionary function exception.

131. *Johnston*, 568 F. Supp. at 358.

132. *Id.*

133. *Id.* at 358–59.

134. 704 F.2d at 456 (Alarcon, J., dissenting).

135. Several courts have rejected the government contract defense in cases which involve claims for asbestos-related injuries, either as a matter of law or upon the facts presented. *E.g.*, Raybestos-Manhattan, Inc. v. United States, No. 79-0382 (D. Hawaii Oct. 20, 1983); Plas v.

2. The Policy Justifications for the Defense

Assuming that the contract specification defense has not barred the plaintiff's strict product liability action,[136] and that the plaintiff established a prima facie case, the plaintiff would recover for his or her injuries absent the government contract defense. As noted, the courts which have recognized the government contract defense have done so based upon policy reasons which are absent in strict liability suits that do not contain the elements of the defense.

A frequently cited reason for the defense is that imposition of liability on the manufacturer will escalate the manufacturer's costs, the increased costs will be shifted to the government,[137] and such a shift would render the government's immunity "meaningless."[138] This reasoning assumes manufacturer costs would increase due to either an unavailability of product liability insurance or the rising cost of insurance premiums. As one court speculated, cost shifting could be accomplished by way of cost overrun provisions or increased prices in later contracts.[139] Ultimately, the government becomes indirectly liable although it has not waived its immunity,[140] and the government pays for exercising its direction in making design decisions. The difficulties with this rationale are multifaceted.

A primary flaw in this reasoning is that imposition of liability has no appreciable effect on the cost of operating the manufacturer's business. The most comprehensive recent study on product liability insurance indicates that the existence or nonexistence of the government contract defense has little effect on the manufacturer's rates.[141] The rates for product liability insurance are based largely on intangible factors as opposed to actuarial considerations such as number or size of claims. The real impact of actuarial analysis on the final rate is minimal.[142] Moreover, insurance premiums do not account for a large per-

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Raymark Indus., Inc., No. C-78-946 (N.D. Ohio May 3, 1983); Nobriga v. Johns-Manville Sales Corp., No. 55624 (Hawaii Cir. Ct. May 24, 1982); Hammond v. North Am. Asbestos Corp., 97 Ill. 2d 195, 454 N.E.2d 210 (1983).

136. *See supra* notes 48–56 and accompanying text.

137. *McKay*, 704 F.2d at 449; *Hubbs*, 574 F. Supp. at 98; *Koutsoubos*, 553 F. Supp. at 342 (quoting *Dolphin*, 243 F. Supp. at 827).

138. *Koutsoubos*, 553 F. Supp. at 342 (quoting *Dolphin*, 243 F. Supp. at 827).

139. *McKay*, 704 F.2d at 449.

140. While the *McKay* court limited its reasoning to the prospect that the *Feres* doctrine would be subverted, the rationale would extend to all instances where the government is immune. *Id.* at 449–51.

141. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT OF THE INSURANCE STUDY I-40 (1977). The study reported that: "In the overwhelming majority of cases, insurance company sources did not rely on data (either in terms of number or size of claims) to support premium increases that occurred in the 1974-1976 period." *Id.* at I-22.

142. *Id.*

centage of the manufacturer's overall operating costs. For example, product liability insurance costs amounted to only two percent of the general sales from 1969 to 1973 of the thirty-five companies which manufactured over ninety percent of all aviation aircraft, engines, avionics, supplies, and components.[143] In most cases, the average cost amounted to less than one percent of the sales.[144] Consequently, even if the government contract defense were a factor considered in setting rates, the added cost would be a minimal percentage of the contractor's total bid.

Additionally, contractor complaints that product liability insurance is unavailable[145] are without substance. The previously cited study on product liability insurance concluded that "there is no widespread problem of product liability insurance being unavailable."[146] Another study of the twenty-three major insurers representing most of the product liability business in the United States confirmed that ninety-seven percent of the total bodily injury claims made from July 1, 1976, through March 15, 1977, were covered by insurance.[147]

Regardless of whether operating costs will escalate, contractors admit that they are unable to shift costs through increased prices. Contractors cite factors such as the government's preference for fixed prices and advertised contracts, statutory requirements for certification of cost and pricing data, and the government's perennial funding constraints as all precluding increased prices.[148]

A third factor which militates against the "increased costs, cost-shifting" rationale is that costs presently reflect the absence of the government contract defense. The defense was not recognized in personal injury cases until the past two years,[149] while strict product liability surfaced in the early 1960's.[150] Without the defense, the manufactur-

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143. *Id.* at I-21.

144. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP'T OF COMMERCE, FINAL REPORT xxxvii (1978).

145. *Industry Groups, supra* note 41, at 694 (testimony of Electronics Industries Association President Peter F. McCloskey). McCloskey urged Congress to recognize that the potential liability involved in some government contracts exceeds the contractor's ability to pay and therefore urged Congress to enact legislation which would require the government to indemnify the contractor when the damages are beyond the coverage of reasonably available insurance coverage. *Id.* Twenty percent of the top one hundred military contractors are electronics firms. *As Defense Billions Pour into the Economy, supra* note 1, at 58.

146. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, *supra* note 144, at xxxv.

147. Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results Highlights (1977) (on file with University of Dayton Law Review).

148. *Industry Groups, supra* note 41, at 693–94 (testimony of T. Richard Brown).

149. *But see supra* note 112 and accompanying text.

150. C. GREGORY, H. KALVEN & R. EPSTEIN, CASES AND MATERIALS ON TORTS 562–63 (2d ed. 1977).

ers' rates should not vary at all. With the defense, the rates should decrease.

Disregarding the weaknesses of the rationale, it is arguably specious to conclude that shifting costs would render the government's immunity "meaningless." This conclusion implies that the objective of sovereign immunity is to cut government costs. While lower costs are certainly a by-product of the doctrine, they are not an objective, as is illustrated by the types of cases where the government has waived its immunity and those where it has not. For example, there is no reason to believe that claims for the negligent transmission of letters[151] or for damages caused by the imposition of a quarantine[152] are any greater than claims for the negligent operation of an automobile, but the government has waived its immunity for the latter claim and retained it for the two former claims. Moreover, the government contract defense itself is not predicated upon the costs to the government, as it precludes liability for design defects, but does not preclude liability for manufacturing defects.[153] Logically, the defense should cover both types if lower costs are at issue, as the amount of the claim for one does not vary from the amount of the claim for the other, while the manufacturer is presumably passing off the costs of both to the government. Accordingly, the lack of a government contract defense cannot undermine sovereign immunity simply because the government may be indirectly shouldering costs which it would not directly bear due to its immunity.

Proponents of the defense also assume that the effect of these increased costs of liability will undermine the policies underlying sovereign immunity. In fact, no policy justification for sovereign immunity in the three relevant areas where it has been retained is impinged by denying the government contract defense. First, the absence of the defense does not undermine the discretionary function exception. This exception is designed to enhance separation of powers by curtailing judicial interference with the decision-making process of the other two branches.[154] Congress feared that the courts would substitute their judgment for that of the government official in determining the propriety of a discretionary act and thereby inhibit the official's freedom of choice.[155] The courts, and not the other two branches, could effectively dictate social policy absent the exception. Case law has recognized this rationale by acknowledging that judicial review is appropriate when

151. 28 U.S.C. § 2680(b) (1982).
152. *Id.* § 2680(f).
153. *See supra* text accompanying notes 100–04.
154. Payton v. United States, 636 F.2d 132, 142–43 & n.25 (5th Cir. 1981).
155. *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before Comm. on the Judiciary, 77th Cong., 2d Sess.* 44 (1942).

"the question is not negligence but social wisdom."[156] However, this policy is only remotely implicated when the government is not the defendant. While the courts may need to second-guess the judgment of the official who decided, for a myriad of reasons, to utilize the allegedly defective design in some cases in order to determine whether it was an unreasonably dangerous design, the manufacturer and not the government is being held accountable in these cases. The feared judicial control of the decision-making processes would hardly result from a slight increase in bid costs on government contracts. The deterrent effect of this increase would seem to be too remote to be of any significance. The courts daily make decisions which have an indirect economic impact on the government.

Additionally, the defense requires that the manufacturer warn the government of hazards which the manufacturer had discovered, but which were unknown to the government.[157] This requirement will result in increased costs that will have the same impact on the government as if no defense at all existed, while the discretionary nature of the government's decision would be the same whether the defendant warned it or not. The defense, tailored to protect the innocent manufacturer, was obviously not fashioned to protect the discretionary decisions of the government. Indeed, the fact that the defense has existed for the past quarter of a century without any noticeable circumvention of the discretionary function exception militates against the theory that the lack of the defense undermines the exception.

The second relevant area where the government has retained its immunity is in cases covered by the *Feres* doctrine.[158] The lack of the government contract defense also fails to undermine the rationales supporting this exception. First, the Court in *Feres* recognized that the relationship between the government and service personnel is federal in nature so that the government's liability should not depend on the "fortuity" of where the soldier was stationed at the time of the injury and the applicable law.[159] While the court in *McKay v. Rockwell International Corp.* feared that the failure to create a government contract defense would "subject the United States indirectly to paying for damages to injured servicemen, where the amount of damages would vary depending on the applicable law,"[160] the extreme remoteness of the connection between the increased costs to the government and the variation in the amount of damages renders this a fairly insignificant intru-

156. Blessing v. United States, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978).
157. *See supra* notes 105–10 and accompanying text.
158. *See supra* note 21 and accompanying text.
159. *Feres*, 340 U.S. at 143.
160. *McKay*, 740 F.2d at 449 & n.8.

sion on this rationale for the *Feres* doctrine. Moreover, the government is already presumably paying for the increased costs of the manufacturer's liability to service personnel for manufacturing defects, which vary depending upon the situs of the injury. Hence, the defense is again too narrowly fashioned to fulfill the objective.

A second factor cited by the *Feres* Court was that the Veteran's Benefit Act[161] establishes a no-fault scheme which provides generous pensions to injured service personnel without regard to the government's negligence.[162] Even assuming that this act fairly compensates service personnel, and that FECA[163] fairly compensates civilian employees, the defense also precludes plaintiffs who have no remedy against the government from recovering any damages. In this regard, the defense is overly broad. The final relevant government immunity is from liability in strict product liability suits.[164] The rationale for this immunity is not completely clear. The courts have relied on statutory construction of the FTCA in recognizing immunity.[165]

In summary, the defense cannot be justified upon the rationale that it is necessary in order to avoid indirect usurpation of the government's immunity through a shifting of costs to the government. The defense is ill-designed for such a task, even assuming that the costs are shifted to the government.

A second reason which the courts have cited in support of the government contract defense is that trials concerning design defects where government specifications are at issue would require second-guessing military orders, and would often require military personnel to testify about one another's actions.[166] Arguably, these trials would affect military discipline as well as national security.[167] One court which has rejected the defense admitted that this rationale had "some force" when the product at issue is technologically complex, such as the aircraft ejection seat in *McKay*, but found it inapplicable when the product is an adaption or copy of one already available to private consumers.[168]

The second-guessing of military decisions would stem from the determination of whether the product contained a design defect. That is, whether the product was unreasonably dangerous for its intended use. This factor would not seem to be a valid concern in many cases where

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161. 38 U.S.C. §§ 101–5228 (1982).
162. *Feres*, 340 U.S. at 143.
163. *See supra* note 25 and accompanying text.
164. *See supra* note 17 and accompanying text.
165. *See supra* note 17 and accompanying text.
166. *McKay*, 704 F.2d at 449 (quoting Stencel Eng'g Corp. v. United States, 431 U.S. 666, 673 (1971)); *Hubbs*, 574 F. Supp at 98.
167. *McKay*, 704 F.2d at 449.
168. *Johnston*, 568 F. Supp. at 357.

the state of the art is the crucial issue, even when the product at issue is technologically complex. For instance, the Navy had done extensive testing on the allegedly defective ejection seat at issue in the *McKay* case and was aware that the system created a risk of neck injuries upon ejection.[169] Since the purpose of an ejection seat is to avoid injury to crew members trapped inside an endangered aircraft by propelling them from the aircraft, the Navy presumably would have preferred that the ejection system accomplish its purpose and minimize injuries to the extent possible. In this case, the state of the art as opposed to military strategy was the crucial factor in the government's decision to utilize the system. Whether the system was defective would depend upon the jury's analysis of the technological feasibility of a better system and would not require a second opinion on military strategy.

In other cases, however, the jury would have to decide whether the product was reasonably safe for its military use based upon evidence about military strategy. For example, in *Sanner v. Ford Motor Co.*,[170] the army made a calculated decision to exclude seat belts from its jeeps in order to facilitate quick escapes.[171] The national security problems created by revelation of the strategic reasons for employing the product's design could be circumvented by prohibiting public inspection of the court records in those rare cases where a real threat is presented.[172] In addition, when classified evidence is at issue, trying the case to the court without a jury would be helpful, assuming the constitutional problems inherent in requiring a waiver could be overcome.

A third reason the *McKay* court advanced in support of the defense is that the manufacturer is unable to negotiate with the government to eliminate the risks which render the product defective.[173] This reason amounts to no reason at all: strict product liability is not based upon fault principles. Retailers, bailors, lessors and others in the chain of distribution that had no control over the product's design have been held accountable for design defects upon the rationale that they are in a better position to absorb and spread the loss than is the plaintiff.[174] Moreover, the government rarely needs to use its statutory power to force contractors to manufacture military equipment for a war, and

169. *McKay*, 704 F.2d at 454.

170. Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), *certification denied*, 75 N.J. 616, 384 A.2d 846 (1978).

171. *Id.* at 7, 364 A.2d at 46.

172. No threat would be present in a case like *Sanner*, where common sense dictates that an individual not wearing a seat belt can escape from a jeep more quickly than one not wearing a seat belt, but some cases may involve classified information.

173. *McKay*, 704 F.2d at 450.

174. Comment, *supra* note 4, at 91.

even then, the manufacturer realizes a profit. The equities are clearly with the plaintiff who has been forced to suffer physical and economic loss due to the military effort as opposed to the contractor which may have been coerced into producing a product, but which realizes a profit along the way, despite product liability losses compensated by insurance. Accordingly, this "it's unfair" argument is not a compelling reason for creating the defense.

Another justification the *McKay* court cited is that the defense provides incentives for suppliers of military equipment to work closely with the military in the development of equipment.[175] While the defense obviously makes government contracts more attractive than they would be without the defense, proponents of the defense fail to explain why such incentives are necessary. As a spokesman for the Department of Justice noted in opposing a bill which would provide for government indemnification, there is "no justification for proposals which give contractors special rights or remedies which are not generally available to others."[176] The spokesman noted that indemnification would discourage corporate efforts to generate sophisticated technology by reducing the economic incentive to design the "best and safest possible products."[177] He also cited the fact that "considerable visible effort goes into the competitive battle to secure an edge in receiving this business," so that further incentives are unnecessary.[178] Contractors also admit that the fight for government contracts is "extremely competitive."[179] For example, General Electric has been investing 100 million dollars a year in engine research, an investment which helped it win a contract for work on the Air Force's F-16 aircraft that could ultimately be worth nine billion dollars to General Electric.[180] General Electric and United Technologies' Pratt and Whitney Aircraft had been engaged in a seven-year struggle for military contracts, of which the F-16 aircraft contract was a part.[181] Accordingly, a fringe benefit, like the government contract defense, hardly seems necessary to encourage contractors to enter into government contracts.

Finally, one court has argued the flip side of the increased-costs–government-deterrent rationale: that is, no societal benefit results from imposing liability on the contractor because the contractor is in

175. *McKay*, 704 F.2d at 450.
176. *Industry Groups*, *supra* note 41, at 694.
177. *Id.*
178. *Id.*
179. *As Defense Billions Pour into Economy*, *supra* note 2, at 58.
180. *Id.*
181. *Id.*

no position to deter the government.[182] The court overlooks the fact that the compensation rationale provides a societal benefit by permitting the injured plaintiff to procure needed medical care and remain economically productive. More importantly, the risk-spreading rationale for strict product liability exists. The manufacturer is in a position where it can pass the cost to its insurer and the insurer can pass the cost to its customers. Otherwise, the entire loss falls on the plaintiff, who is unable to effectively spread the loss.

In summary, none of the justifications advanced for the defense provide a compelling reason to create immunity for the contractor. On the other hand, many of the reasons usually advanced for imposing strict liability come into play in the cases where the elements of the defense exist. Unfortunately, the clear majority of courts have recognized the government contract defense which, incidently, seems to have sprung full grown from the pen of Judge Pratt in the *"Agent Orange"* litigation, a class action involving a potential 2.4 million plaintiffs.[183]

III. ALTERNATIVES

Lobbying by government contractors has resulted in the introduction of two bills in Congress to alleviate some of the contractors' liability for injuries caused by products manufactured pursuant to government specifications. The first bill, H.R. 1504, "The Government Contractors' Product Liability Act," provided for government indemnification.[184] The Department of Justice strongly opposed the bill, arguing that contractors were not entitled to special rights, procurement costs would skyrocket, government contracts were already a highly competitive field, and indemnification would reduce the contractors' ec-

182. *Koutsoubos*, 553 F. Supp. at 342. Ironically, the court also cited the rationale that increased costs to the government would render its immunity meaningless. *Id.*

183. Comment, *supra* note 88, at 490. Predictably, the defendants in the asbestos litigation have latched onto the defense as "the only way to resolve this [litigation]." Winter, *U.S. Contracts Asserted in Asbestos Litigation*, 68 A.B.A. J. 790, 790 (1982) (quoting William Spriggs, Washington attorney representing a former asbestos manufacturer). *See supra* notes 111–12 and accompanying text for a discussion of the courts which have recognized that the defense is available. *See also supra* note 135 and accompanying text for a discussion of the courts which have rejected the defense. At least three courts have declined to rule on the merits of the defense when confronted with a motion for a bifurcated trial in which the first phase would involve the defense. *In re* Massachusetts Asbestos Cases, M.B.L. Nos. 1 & 2 (D. Mass. Sept. 13, 1983); *In re* General Dynamics Asbestos Cases, C.M.L. No. 1 (D. Conn. Apr. 22, 1983); McCrae v. Pittsburgh Corning Corp., 97 F.R.D. 490 (E.D. Pa. 1983).

One court also declined to rule on the merits of the defense when reaching its decision to deny the plaintiff's motion to strike the defense. *In re* All Maine Asbestos Litig., 575 F. Supp. 1375 (D. Me. 1983). *See generally* Rivkin, *The Government Contract Defense: A Proposal for the Expeditious Resolution of Asbestos Litigation*, 17 FORUM 1225 (1982).

184. *Industry Groups*, *supra* note 41, at 694.

onomic incentive to produce and design safe products.[185] The Department of Justice clearly thought that the contractors rather than the taxpayers ought to pay for any damages. The contractors countered with a host of complaints: the lack of liability insurance at reasonable costs;[186] that they are discouraged from accepting government contracts; government employees have little incentive to carefully use and maintain equipment; an inability to pad contract prices to pass the liability off to the government; and, an inability to pass the costs off to their customers due to a narrow customer base.[187]

Consequently, a second bill, S. 1839, surfaced. It provides contractors with immunity from liability for damages due to the government's proportion of fault, without requiring the government to pick up the tab for its share of the damages. The sponsor of the bill touted it as the solution to the "lack of fairness resulting from court decisions which allow the government to avoid contributing to payment of liability by its contractors when the government is partly or wholly at fault."[188] Interestingly enough, the bill does not require the government to contribute anything for the damages resulting from government fault. The bill applies only to negligence actions by government employees (directly or derivatively), and requires a reduction in the contractor's liability in proportion to the extent of the government's fault.[189] Keeping in mind the fact that the only time the contractor cannot now seek tort indemnification from the government is when sovereign immunity bars a direct action by the plaintiff against the government, the bill obviously does nothing to solve "the lack of fairness" the courts have allegedly created by recognizing the United States' sovereign immunity. The bill simply bars the plaintiff from recovering from the contractor what the plaintiff could now recover (absent the government contract defense), without permitting the plaintiff to recover from the government. The bill amounts to a codification of a modified "government contract defense."

Substantively, S. 1839 requires that the court consider the parties' relative responsibility for the contract specifications and their relative degrees of knowledge, skill, and expertise regarding the risks associated with compliance with the specifications.[190] If the court finds that the government was ninety-nine percent at fault for the injuries, the contractor would only be required to pay one percent of the damage

185. *Id.* at 694.
186. *Id.* at 693. *But see supra* notes 141–47 and accompanying text.
187. *Industry Groups, supra* note 41, at 693–94.
188. 129 CONG. REC. S12216 (daily ed. Sept. 14, 1983) (statement of Senator Grassley).
189. *Id.* S12217.
190. *Id.*

award. The sponsor admitted that the bill was only a starting point on the road to redressing a situation that must be altered from a "fairness perspective."[191]

IV. CONCLUSION

The 1982 *"Agent Orange"* decision provided the impetus for recognition of a defense which provides government contractors with total immunity from liability for injuries caused by design defects in military products conforming to government specifications. Neither legal precedent nor sound policy supports this judicial phenomenon that absolves manufacturers from liability in a situation where normal tort principles would provide for recovery. While either the contractors or the plaintiffs will end up absorbing a loss which is arguably more equitably placed upon the federal government, the government contract defense places the entire loss on the plaintiff, the party least able to bear or shift it. So long as either the plaintiff or the contractor must be saddled with the loss, the contractor should be the party upon which that burden should finally rest.

Janice M. Paulus

191. *Grassley Introduces Bill to Apportion Liability between Government Contractors,* 11 PROD. SAFETY & LIAB. REP. (BNA) 721, 721 (Sept. 30, 1983).