

NOTES

LIABILITY OF A MANUFACTURER FOR PRODUCTS DEFECTIVELY DESIGNED BY THE GOVERNMENT

The federal government buys billions of dollars worth of products and equipment each year. These products, like those sold to ordinary consumers, may contain design defects which can cause injuries or death to government employees or other parties. Persons injured by defective products owned by the federal government, however, may be unable to recover damages from the government because of limitations on tort actions imposed by the doctrine of sovereign immunity which have not been fully abrogated by the Federal Tort Claims Act.¹ As a result, often the only recourse for individuals injured by products owned by the government is to sue the manufacturer of the defective product. Plaintiffs suing manufacturers, however, are faced with some long-standing defenses, which effectively can insulate from liability a manufacturer

¹ 28 U.S.C. §§ 1346(b), 2402, 2671-2680 (1976). Prior to the enactment of the Federal Tort Claims Act (FTCA) in 1946, the doctrine of sovereign immunity had barred recovery in tort actions against the government. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821). In *Cohens*, the United States Supreme Court stated that the United States cannot be sued without its consent. *Id.* at 380. The FTCA, however, allows suit for injury 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) (1976).

While the FTCA drastically alters the law concerning tort actions by private individuals against the federal government, it does not constitute a full waiver of immunity. The Act has been interpreted by the Supreme Court to preclude suit on a theory of strict liability. *Laird v. Nelms*, 406 U.S. 797, 799 (1972). Furthermore, the Act includes a list of exceptions to the federal government's waiver of immunity. 28 U.S.C. § 2680 (1976). Two exceptions are particularly relevant to cases in which a plaintiff wishes to sue the government for injuries caused by a defectively designed product owned by the government. These exceptions are the "discretionary function" exception and the exception excluding claims arising out of combatant activities of the Armed Forces during war. 28 U.S.C. § 2680(a), (j) (1976). The discretionary function exception precludes suits arising out of acts or omissions by government officials at the "planning level" of government. This exception, however, does allow suits based on acts or omissions at the "operational level" of the federal government. See *Harris & Schnepper, Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161, 168 (1976). In general, suits for injuries caused by products owned by the government may be barred by courts which view the government's decisions concerning the design and use of the products as "planning level" decisions. Decisions are particularly apt to be considered planning level decisions if the government has consciously balanced policy considerations in arriving at these decisions. See generally *Case Comment, Scope of the Discretionary Function Exception Under the Federal Tort Claims Act*, 67 GEO. L. J. 879, 884-85, 892-93 (1979). Thus, the discretionary function exception represents a substantial barrier to recovery against the government. The second exception to the FTCA pertaining to claims arising out of combatant activities also has proved to be a major hurdle to servicemen. Since the Supreme Court's ruling in *Feres v. United States*, 340 U.S. 135, 146 (1950), active-duty member of the Armed Forces generally have been denied FTCA relief for injuries incurred incident to service. *Graham, Products Liability and Tort Risk Distribution in Government Contract Programs*, 20 A.F. L. REV. 331, 397 (1978).

which has manufactured the product in accordance with the government's specifications.

The defenses available to manufacturers reflect the role which the government plays in the contracting process. When the government enters contracts for the manufacture of products, it frequently provides detailed specifications which contractors are bound to follow when they accept the contract.² Contractors which have complied with the government's contract specifications in per-

² See Checchi, *Federal Procurement and Commercial Procurement under the U.C.C. — A Comparison*, 11 PUB. CONT. L.J. 358, 362 (1980). Unlike the private consumer, the government frequently plays a direct role in determining the design of the products it buys. *Id.* at 377. The extent to which a product's design is mandated by the government may vary, depending on the method of contract formation. Two common methods of government contract formation are formal advertising and negotiation. *Id.* at 362. The Defense Acquisition Regulations and Federal Procurement Regulations direct military and civilian agencies to award contracts by formal advertising whenever "feasible" and "practicable." *Id.* Formal advertising generally is used to procure existing items which the procuring agency describes in detail in its bid specifications. *Id.* The formally advertised procurement consists of the following basic steps: (a) preparation of an Invitation for Bids (IFB) by the procuring agency; (b) publicizing the IFB; (c) submission of bids by prospective contractors; and (d) awarding the contract. J. PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 145 (1964). Among other items, the IFB may contain design specifications, performance specifications, or purchase descriptions, separately or in combination. *Id.* at 147. Bids submitted by prospective contractors must be responsive to the terms and conditions of the IFB. *Id.* at 150. The contracting officer has no authority to award a contract to a nonresponsive bidder and any contract so awarded is invalid. *Id.* Thus, when the government engages in formal advertising, the seller (contractor) is presented with a formalized contract (i.e. a contract of adhesion), with no real opportunity to negotiate or modify its terms. Checchi, *supra*, at 363. This arrangement may be contrasted with the typical private sale of a product, in which the purchasing consumer rather than the seller frequently is presented with an adhesion contract. The government, however, does not always dictate the detailed design of the product. As an alternative, the government may provide only performance specifications, leaving the details of design to the contractor. PAUL, *supra*, at 261. See note 52 *infra* for a discussion of design versus performance specifications.

If a procurement fits within the ambit of certain statutory exceptions to the general requirement of procurement by formal advertising, the procuring agency may issue a Request for Proposals (RFP) and procure an item by negotiation. PAUL, *supra*, at 163. Negotiation is the method of procurement often used to procure items not in being at the time of the RFP. Checchi, *supra*, at 362. Among other items, the RFP will contain a Statement of Work, including references to applicable specifications. PAUL, *supra*, at 172-73. Interested contractors submit technical and pricing proposals. Checchi, *supra*, at 362. Then, if a contractor is still "in the running," preliminary negotiations typically occur regarding the details of the work to be performed, cost pricing analyses and the delivery schedule. *Id.*; PAUL, *supra*, at 56. A formal contract then is executed. PAUL, *supra*, at 191. Negotiation has more flexibility with respect to the bargaining process than formal advertising. Negotiation allows alternatives to the proposed procurement and revisions to the statement of work, specifications, and other non-standard terms and conditions. *Id.* at 163. Even in negotiation, however, the opportunity to "negotiate" contract provisions is severely limited by the mandates of the procurement regulations. Checchi, *supra*, at 363. If the contractor has in-house specifications which are more suitable for performance than those initially proposed by the procuring agency, the prospective contractor must suggest them at an early stage in the negotiations, preferably in his proposal. PAUL, *supra*, at 178. A proposal may be accepted "as is" and create a binding contract without the opportunity for further negotiation. *Id.* at 171. If the prospective contractor proposes substituted specifications which differ markedly from those of the agency, however, the proposal could be considered non-responsive and may be rejected. *Id.* at 178. It is sometimes possible to avoid rejection by submitting substitute specifications as an alternative basis of contracting. *Id.*

forming work pursuant to the contract have had the benefit of two major defenses against plaintiffs injured by defectively designed products. For identification purposes, these defenses are referred to in this note as the "contract specification" defense and the "government contract" defense.³ In general, the contract specification defense allows a contractor to escape liability for the defective design of a product it manufactures if the contractor has fully complied with the government's specifications, the injury complained of is attributable to a flaw in the specifications, and the specifications were not so obviously defective and dangerous that a competent contractor would not have followed them.⁴ In contrast, the government contract defense provides a type of immunity to a public contractor who performs in accordance with government specifications.⁵ Moreover, the government contract defense may provide a more complete defense than the contract specification defense. Taken together, these defenses present major barriers to plaintiffs who attempt to recover for injuries caused by defectively designed products which were manufactured in compliance with government specifications.

Recent cases have injected considerable uncertainty into this area of the law. Although the government contract and the contract specification defenses have been recognized since at least the early 1900's, the government contract defense only recently has been applied in products liability cases. With two somewhat distinct defenses now available to manufacturers, it is unclear which of the two standards will be applied in a particular case. Furthermore, there is a split of authority as to whether the contract specification defense is viable in a products liability suit based on a theory of strict liability or breach of warranty. In addition, the courts have given scant attention to whether a manufacturer has a duty to *warn* of a product's dangers even if the contract specification or government contract defense shields it from liability for the defective *design* of the product.

This note will analyze the scope of a manufacturer's liability for design defects in products it has sold to the federal government. In order to analyze properly the scope of the manufacturer's liability, section I of this note will discuss briefly the standards of liability used by the courts in typical products liability actions for design defects not necessarily involving products sold to the government. The cause of action for failure to warn also will be discussed. These standards will be viewed in the context of the three common theories of products liability: negligence, strict liability, and breach of warranty. Section II will analyze the defenses which have evolved in cases in which a manufacturer or contractor has complied with the work or product specifications of the government. First, the contract specification defense will be examined. Next,

³ See text and notes at notes 27-98 *infra* for a discussion of the contract specification defense. See text and notes at notes 118-228 *infra* for a discussion of the government contract defense. These defenses are not always referred to in these terms; the titles have been chosen for convenience. Moreover, some courts have not treated these defenses as distinct. See note 20 *infra*.

⁴ See text and note at note 21 *infra*.

⁵ See text and note at note 136 *infra*.

the related but distinct government contract defense will be examined. Particular emphasis will be placed on cases involving the sale of products and the applicability of the defenses under the three theories of products liability. Section III will suggest appropriate standards for determining liability in future cases involving products sold pursuant to government specifications. It will be submitted that the government contract defense as articulated by some courts is overly broad and that a defense similar to the contract specification defense generally represents an appropriate standard of liability for design defects. Manufacturers should be required to warn, however, of defects or dangers associated with their products which are or should be obvious to the manufacturer but are not obvious to the government.

I. MANUFACTURER LIABILITY FOR DESIGN DEFECTS AND INADEQUATE WARNINGS

In order to comprehend and analyze the standards of liability which the courts have applied to manufacturers which have built products pursuant to government specifications, it is necessary to be familiar with the basic elements of more typical products liability actions not involving government specifications. Products liability suits involve defective products. In general, products become defective through mismanufacture, mistakes in design, or through inadequate warnings of the product's dangers.⁶ This note is concerned primarily with causes of action based on design defects and inadequate warnings. Hence, it is necessary to survey briefly the elements of a products liability suit which is predicated on either or both of these defects. This survey will examine these actions in view of each of the three common theories of products liability: negligence, strict liability, and breach of warranty. One or all of these theories may support an action for defective design or inadequate warning, depending on the jurisdiction in which the action is brought.

A. *Design Defects*

In a typical design defect case a plaintiff injured by a product tries to show that the manufacturer should have designed the product in a manner which would have avoided the injury to the plaintiff.⁷ With respect to each theory of liability for design defects, however, the elements which a plaintiff must prove are slightly different.

To prove that a product was negligently designed, a plaintiff must show that the manufacturer failed to exercise due care in designing its product so that it was reasonably safe for the purposes for which it was intended.⁸ In comparison, a plaintiff suing under a strict liability theory must prove that the product was "in a defective condition unreasonably dangerous to the user or

⁶ Graham, *supra* note 1, at 345-46.

⁷ *Id.*

⁸ See 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 7.01[1] (1981).

consumer" at the time of sale.⁹ A plaintiff suing for injuries caused by a defectively designed product also may allege a breach of warranty as a theory of recovery.¹⁰ Typically, as an incident of sale, a seller of goods impliedly warrants that the goods are merchantable.¹¹ Merchantable goods are free from defects and are fit for the ordinary purposes for which the goods are sold.¹²

⁹ RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A provides as follows:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

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

The elements necessary to state a cause of action under Section 402A have been stated as follows:

- (1) The defendant sold a product.
- (2) The product was in a defective condition.
- (3) The defective condition was unreasonably dangerous to the user or consumer.
- (4) The seller was in the business of selling said products.
- (5) Said product was expected to and did reach the user or consumer without substantial change in condition (that is, the defect existed at the time of sale).
- (6) Said defect was the proximate cause of the personal injuries or property damage incurred by the consumer or user.
- (7) Standard allegations as to jurisdiction and damages.

See Graham, *supra* note 1, at 343.

Some courts try to explain the difference between the negligence and strict liability standards by stating that the emphasis in strict liability is on the nature or condition of the product rather than the conduct of the defendant, and, thus, that fault is irrelevant. 2 FRUMER & FRIEDMAN, *supra* note 8, § 16A[4][f][iv] — 16A[4][f][iv][A]. Commentators have suggested, however, that in practice it is difficult to make meaningful distinctions between the two theories. *Id.* at 16A[4][f][iv]. The theories tend to merge because in seeking to determine what is a "defective condition unreasonably dangerous" under the strict liability theory, many courts use a risk/utility, or cost/benefit analysis. In other words, consideration is given to whether the risk of injury from design outweighs the usefulness of the product. *Id.* A similar analysis must be conducted under a negligence theory to give meaning to the standard of "due care" and to determine whether the manufacturer has made its product "reasonably safe." *Id.* Nevertheless, most states adopting strict liability continue to state that it applies to design, as well as to manufacturing defects, even though it is difficult in practice to make meaningful distinctions between the strict liability standards being applied and a negligence standard. *Id.* A few states have taken the approach that only a negligence standard applies. *Id.* The Model Uniform Products Liability Act would restrict actions for design defects to a negligence theory. 1 FRUMER & FRIEDMAN, *supra* note 8, § 7.02.

¹⁰ 2 FRUMER & FRIEDMAN, *supra* note 8, § [1]. The Uniform Commercial Code (U.C.C.) is the principal body of law governing actions based on breach of warranty. Graham, *supra* note 1, at 350. See generally 2 FRUMER & FRIEDMAN, *supra* note 8, § [1], [1][c]. Warranties may be express, U.C.C. § 2-313, or implied by law. U.C.C. §§ 2-314, 2-315.

¹¹ U.C.C. § 2-314.

¹² *Id.* See 2 FRUMER & FRIEDMAN, *supra* note 8, § [1]. Under certain circumstances,

Thus, if goods are sold in a defective condition, the seller breaches his implied warranty of merchantability.¹³ To recover from a manufacturer under breach of warranty theory, a plaintiff only needs to show that the goods were defective at the time of sale, and that some injury, economic or personal, was caused by the defect.¹⁴

B. Failure to Warn

Instead of suing under a theory of negligence, strict liability, or breach of warranty for an alleged defect in design, a plaintiff injured by a product can allege that the seller failed to warn of the dangers associated with the product.¹⁵ An otherwise properly manufactured and well-designed product may be found to be "defective" if it is sold without an adequate warning of the danger associated with the use of the product.¹⁶ Conversely, a manufacturer sometimes may avoid liability for the design defects of its products if it provides an adequate warning of such defects to the ultimate user of the product.¹⁷

A claim of failure to warn can arise in actions predicated on negligence, strict liability, or even breach of warranty.¹⁸ Commentators have suggested that under each theory the standard of liability is the same: a manufacturer is liable for an inadequate warning if it knew, or by the use of its special

where there is reliance by the buyer on the seller's skill and judgment, and where the seller has reason to know of a particular purpose for which goods are bought, an implied warranty of fitness for a particular purpose also can arise. U.C.C. § 2-315.

¹³ U.C.C. § 2-314.

¹⁴ See 2 FRUMER & FRIEDMAN, *supra* note 8, § [1]. Thus, in addition to suing under a theory of negligence and/or strict liability, a buyer seeking to recover for injuries caused by a design defect may sue for breach of warranty. Even when suing under a breach of warranty theory, however, plaintiffs still may be bound by a negligence standard in showing that a defect in design exists. See, e.g., *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447, 464 (E.D.N.Y. 1971).

Difficulties arise under a warranty theory when third parties, not the buyer, seek to recover. Traditionally, a remedy in warranty, being based on contract principles, was available only to the buyer and only against the immediate seller. 2 FRUMER & FRIEDMAN, *supra* note 8, § [1][a]. In 1960 the Supreme Court of New Jersey, in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), abolished this privity requirement, and many states have followed suit to varying degrees. See 2 FRUMER & FRIEDMAN, *supra* note 8, § [1][b]. The U.C.C. provides three alternatives for states to adopt for the partial or complete abolition of privity as a defense in breach of warranty actions. See U.C.C. § 2-318. Other provisions of the U.C.C. which may present hurdles to potential plaintiffs are those relating to disclaimer and notice. Depending on various state interpretations, a seller may be able to disclaim or limit warranties, and there may be a requirement of timely notice by the buyer to the seller in order for the buyer to invoke his right to recover. See 2 FRUMER & FRIEDMAN, *supra* note 8, § [1][c].

¹⁵ See *Graham*, *supra* note 1, at 348. *Graham* notes that this theory of recovery may be popular because often it is easier to prove that a warning was inadequate than that a product was defectively designed. The reason is that proof of failure to warn requires less expert testimony. *Id.*

¹⁶ See 2 FRUMER & FRIEDMAN, *supra* note 8, § 16A[4][f][vi].

¹⁷ See *Graham*, *supra* note 1, at 349. See also 1 FRUMER & FRIEDMAN, *supra* note 8, § 11.04[3].

¹⁸ See *Graham*, *supra* note 1, at 348.

knowledge it should have known, of the product's danger or, if it reasonably could have foreseen the dangerous use to which the product might be put.¹⁹

The foregoing discussion provides an outline of the key concepts involved in a typical products liability action based on a design defect or an inadequate warning. In a "typical" products liability case, however, the manufacturer has placed an article into the stream of commerce with little, if any, input from the intended user with respect to the design characteristics or safety features of the product. A new variable enters the equation when the manufacturer is asked to produce a product which fully complies with specifications provided by the government. The question arises whether it is appropriate to hold a manufacturer liable for a flaw in those specifications, when it had little or no discretion to change them. In response to this question, courts have recognized two closely related but distinct defenses for manufacturers: the contract specification defense and the government contract defense. In order to assess the merits of insulating manufacturers from liability under these defenses, the operation of the defenses must be examined in some detail.

II. PRODUCTS BUILT IN ACCORDANCE WITH BUYER SPECIFICATIONS

Depending upon the circumstances, there are two defenses to products liability actions available to manufacturers who build products according to government specifications.²⁰ The two defenses are referred to in this note as the

¹⁹ See W. PROSSER, *THE LAW OF TORTS* 646-47 (4th ed. 1971). See also Graham, *supra* note 1, at 348; RESTATEMENT (SECOND) OF TORTS § 402A, comments h and j (1965). The Model Uniform Products Liability Act also adopts a negligence standard of liability. See 2 FRUMER & FRIEDMAN, *supra* note 8, § 16A[4][f][vi]. In an action based on breach of warranty, the standard is likely to be substantially the same as the standard in strict liability actions, which essentially is a negligence standard of liability. See Case Comment, *The Duty to Warn within the Implied Warranty of Merchantability*: Reid v. Eckerd's Drugs, Inc., 41 OHIO ST. L.J. 747, 758-59 (1980). Frumer and Friedman, however, have suggested that there should be a different standard of liability for failure to warn in a strict liability action. They state that bringing suit under a theory of strict liability should eliminate the question of whether a manufacturer "knew or should have known" of certain dangers in the product or the need for a particular warning. In such actions, the focus of inquiry should be whether, *assuming* the manufacturer knew of the propensities of the product, the warning was reasonable. 2 FRUMER & FRIEDMAN, *supra* note 8, § 16A[4][f][vi].

Many courts hold that the duty to warn is subject to the caveat that there is no duty to warn where the danger is obvious or where the injured person, his employer or an expert or technically trained person under whom he was working, knew of the danger. See, e.g., Jacobson v. Colorado Fuel and Iron Corp., 409 F.2d 1263, 1272-73 (9th Cir. 1969); Littlehale v. E.I. duPont de Nemours & Co., 268 F. Supp. 791, 798-99 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967); Jones v. Hittle Serv., Inc., 219 Kan. 627, 639-40, 549 P.2d 1383, 1395 (1976).

²⁰ Although not all courts explicitly have recognized that there are two defenses, several courts and commentators have discerned two distinct defenses, stemming from separate lines of cases. See, e.g., Littlehale v. E.I. duPont de Nemours & Co., 268 F. Supp. at 791, 802 n.17; Lowry Hill Properties, Inc. v. Ashbach Constr. Co., 291 Minn. 429, 435, 194 N.W.2d 767, 772 (1971); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 8, 364 A.2d 43, 46 (1976), *aff'd*, 154 N.J. Super. 407, 410, 381 A.2d 805, 806 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978); *Strict*

contract specification defense and the government contract defense. In general, the contract specification defense provides that a contractor is not liable if damage or injury results from specifications provided by the party employing the contractor, so long as the specifications were not so obviously defective and dangerous that a competent contractor would have declined to follow them.²¹ This defense is based on negligence principles and applies to private as well as government contracts.²² The government contract defense provides that a public contractor is not liable for damage resulting "incidentally" or "necessarily" from the specifications, plans or directions of a government authority.²³ Many courts have described the defense as a "sharing" by the contractor of the government's immunity.²⁴ Thus, the government contract defense is based not on general tort principles, but on considerations of public policy which have led courts to conclude that under certain circumstances contractors ought to be able to share the immunity of the public body from suit.²⁵ In contrast to the contract specification defense, the government contract defense is available only where the manufacturer contracts directly with the government. In addition, unlike the contract specification defense, the government contract defense may insulate contractors from suit even when the specifications or plans provided by the government are obviously dangerous.²⁶ Because of the distinct characteristics of these defenses, it is necessary to consider each defense separately. Each defense will be examined to determine how the courts have applied it to manufacturers of products sold to the federal government and whether any consistent standards of application have emerged.

A. The Contract Specification Defense

This defense seems to have originated in *Ryan v. Feeny & Sheehan Building Co.*²⁷ In *Ryan*, a building canopy constructed for the United States government

Liability in Military Aviation Cases — Should it Apply?, FIFTEENTH ANNUAL SMU AIR LAW SYMPOSIUM E-18 (April 2-4 1981); Annot., 9 A.L.R.3d 382, 387 (1966).

²¹ RESTATEMENT (SECOND) OF TORTS § 404 comment a (1965). See also PROSSER, *supra* note 19, at 681. Courts have stated that in circumstances where the danger in a product is extraordinary or obvious, a contractor has a duty not to proceed or, if appropriate, to issue warnings. See, e.g., *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592, 595 (Ky. 1980).

²² See text and note at note 34, *infra*. One court has stated that cases allowing the defense "stand only for the proposition that there is no negligence in following the design of another unless the design is such that the defectiveness was sufficiently obvious to alert a reasonably competent technician to the danger." *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77, 83 (5th Cir. 1975), *vacated and remanded for misapplication of conflict of laws rules*, 423 U.S. 3 (1975). The rationale of the rule has been said to lie in the negligence concept of duty: "[I]liability in negligence arises only if the independent contractor has breached a duty owed to persons whose injuries proximately resulted from the breach. . . . An independent contractor owes no duty to third persons to judge the plans, specifications or instructions which he has merely contracted to follow." *Hunt v. Blasius*, 74 Ill. 2d 203, 209, 384 N.E.2d 368, 371 (1978).

²³ See text and notes at notes 134-36 *infra*.

²⁴ *Id.*

²⁵ See text and notes at notes 137-42 *infra*.

²⁶ See text and notes at notes 143-44 *infra*.

²⁷ 239 N.Y. 43, 145 N.E. 321 (1924).

by a private contractor collapsed under a heavy snow fall, killing the plaintiff's decedent, a government employee.²⁸ The New York Court of Appeals held that "[a] builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury."²⁹ Since *Ryan*, this rule has become firmly established as a defense for independent contractors against negligence actions.³⁰ The defense has been raised successfully by contractors performing federal as well as state and private contracts.³¹ It remains unclear, however, whether the defense should apply against actions based on theories of strict liability³² or breach of warranty.³³ Jurisdictions are split over the applicability of the defense to claims of strict liability and few courts have considered the question with respect to actions for breach of warranty. Thus, the success of the defense may depend on what theory of liability a plaintiff pursues. Accordingly, the defense will be discussed in the context of each theory.

²⁸ *Id.* at 47, 145 N.E. at 322.

²⁹ *Id.* at 46, 145 N.E. at 321-22. The *Ryan* court was the same court that decided the landmark case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), which abolished the privity requirement for recovery in negligence in a products liability case. This seems to have lent additional authority to the rule. See *Leininger v. Stearns-Roger Mfg. Co.*, 17 Utah 2d 37, 404 P.2d 33, 36 (1965).

³⁰ See, e.g., *Spangler v. Kranco, Inc.*, 481 F.2d 373, 375 (4th Cir. 1973); *Person v. Cauldwell-Wingate Co.*, 187 F.2d 832, 836 (2d Cir. 1951), cert. denied, 341 U.S. 936 (1951); *Davis v. Henderlong Lumber Co.*, 221 F. Supp. 129, 134 (N.D. Ind. 1963); *Roth v. Great Atlantic & Pacific Tea Co.*, 108 F. Supp. 390, 394 (E.D.N.Y. 1952); *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 376 A.2d 88, 90 (Del. 1977); *Rawls v. Ziegler*, 107 So. 2d 601, 605 (Fla. 1958); *Hunt v. Blasius*, 74 Ill. 2d 203, 209, 384 N.E.2d 368, 371 (1978); *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592, 594 (Ky. 1980); *Arnold v. Edelman*, 375 S.W.2d 167, 172 (Mo. 1964); *Moon v. Winger Boss Co.*, 205 Neb. 292, 297, 287 N.W.2d 430, 433 (1980); *Russell v. Arthur Whitcomb, Inc.*, 100 N.H. 171, 173, 121 A.2d 781, 782 (1956); *Lydecker v. Board of Chosen Freeholders*, 91 N.J.L. 622, 626, 103 A. 251, 253 (1918) (This case arguably falls under the government contract defense, discussed in text and notes at notes 118-228 *infra*, since it preceded *Ryan* and involved a government contract. The rule expressed by the court, however, virtually is identical to the *Ryan* rule.); *Tipton v. Clower*, 67 N.M. 388, 394, 356 P.2d 46, 49 (1960); *Leininger v. Stearns-Roger Mfg. Co.*, 17 Utah 2d 37, 41, 404 P.2d 33, 36 (1965).

Some courts amplify the contract specification defense by stating that if the party providing the specifications discovers the danger, or it is obvious to him, his responsibility supersedes that of the contractor. See, e.g., *Russell*, 100 N.H. at 173, 121 A.2d at 782; *Tipton*, 67 N.M. at 394, 356 P.2d at 49; *Inman v. Binghamton Hous. Authority*, 3 N.Y.2d 137, 145, 143 N.E.2d 895, 899, 164 N.Y.S.2d 699, 704 (1957); *Leininger*, 17 Utah 2d at 43, 404 P.2d at 37. See also PROSSER, *supra* note 19, at 681-82.

Some courts do not indicate whether the contractor is liable if the specifications are obviously defective and dangerous. See, e.g., *Belk v. J.A. Jones Constr. Co.*, 272 F.2d 394 (6th Cir. 1959); *Trustees of the First Baptist Church v. McElroy*, 223 Miss. 327, 78 So.2d 138 (1955). Although a negligence action, the *First Baptist Church* case was decided on warranty principles, since it was a suit by the employer against the contractor for consequential damages. This factor may explain why there was no "obviously defective and dangerous" limitation contained in the court's holding.

³¹ See, e.g., *Person v. Cauldwell-Wingate Co.*, 187 F.2d 832 (2d Cir. 1951) (federal contract); *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592 (Ky. 1980) (state contract); *Spangler v. Kranco, Inc.*, 481 F.2d 373 (4th Cir. 1973) (private contract).

³² See text and notes at notes 60-94 *infra*.

³³ See text and notes at notes 95-98 *infra*.

1. Negligence Cases

It is clear from the cases and commentaries that the contract specification defense applies in negligence actions against manufacturers selling products pursuant to private or government contracts.³⁴ Only a few cases, however, have been products liability actions against government contractors.³⁵ Furthermore, none of these products liability cases decided under a negligence theory involved contracts with the *federal* government. Nevertheless, several non-products liability cases have established the viability of the contract specification defense in actions against federal contractors.³⁶

Although the availability of the contract specification defense is well-established in negligence actions, the defense is subject to certain limitations which can present difficult problems in application.³⁷ The first difficulty concerns the interpretation and application of the exception embodied in the defense for specifications which are "obviously defective and dangerous." The courts usually state that liability is not imposed unless the specifications are so glaringly, patently or obviously defective and dangerous that the "ordinary" contractor or a "competent" contractor would realize they are unsafe and would decline to follow them.³⁸ Some courts have expressed the standard in the alternative terms of what would be sufficiently patent or obvious to a "reasonably competent technician."³⁹ Other courts would impose liability only when the danger is so obvious that no reasonable person would follow the specifications.⁴⁰ Although these statements of the rule vary in some respects, their common concern is in not holding the contractor or manufacturer to as high a standard of accountability as if he himself had drafted the specifications. Consistent with this concern, it has been suggested that the duty imposed on contractors who are bound by the specifications of another is somewhat less than the duty imposed on contractors who have complete control over the work being performed.⁴¹ The courts seem to have recognized that the average contractor does not have the knowledge or expertise to conduct a detailed reevalua-

³⁴ See, e.g., *Spangler v. Kranco, Inc.*, 481 F.2d 373 (4th Cir. 1973) (defendant had manufactured product pursuant to private contract); *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592 (Ky. 1980) (defendant had manufactured product pursuant to state government contract); see also RESTATEMENT (SECOND) OF TORTS § 404 (1965) (comment adopting contract specification defense contained in section dealing with liability of makers, rebuilders and repairers of chattels).

³⁵ See, e.g., *Hunt v. Blasius*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978); *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592 (Ky. 1980).

³⁶ See, e.g., *Person v. Cauldwell-Wingate Co.*, 187 F.2d 832 (2d Cir. 1951); *Ryan v. Feeney & Sheehan Bldg. Co.*, 239 N.Y. 43, 145 N.E. 321 (1924).

³⁷ Although these difficulties have arisen primarily in negligence cases, they can be expected to arise as well in those strict liability and breach of warranty actions in which the defense can be raised.

³⁸ See text and note at note 21 *supra*; *Littlehale*, 268 F. Supp. at 803 n.16.

³⁹ See, e.g., *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77, 83 (5th Cir. 1975), *vacated and remanded for misapplication of conflict of laws rules*, 423 U.S. 3 (1975).

⁴⁰ See, e.g., *Leininger*, 17 Utah 2d at 41, 404 P.2d at 36.

⁴¹ *Littlehale*, 268 F. Supp. at 803 n.16.

tion of the specifications.⁴² Thus, the "unless obviously defective and dangerous" limitation to the contract specification defense serves to lessen the contractor's duty to judge the specifications, and imposes liability only in extreme cases.⁴³

One of the few courts to consider the precise manner in which the "unless obviously defective" limitation is to be applied to a manufacturer which possesses special skill or expertise in the field was the Court of Appeals for the Second Circuit in *Person v. Cauldwell-Wingate Co.*⁴⁴ Judge Learned Hand, while citing the rule in *Ryan* approvingly, held that the trial court correctly instructed the jury that the contractor was liable for defects in the specifications which would have been obvious to an electrical engineer, since the contractor had employed an electrical engineer.⁴⁵ With respect to another defendant-contractor, Judge Hand stated that he was to be held to the standard of an ordinary "electrical contractor" rather than an electrical engineer since he had no engineer in his employ.⁴⁶ If this standard were applied to products liability cases, then, manufacturers would be expected to notice defects in design which would be patent or obvious to the ordinary prudent manufacturer of such products. In addition, manufacturers might be held to a higher standard of care to reflect any special knowledge, skill or expertise they possessed beyond that of other manufacturers in the field. Thus, the contract specification defense, as applied by Judge Hand,⁴⁷ approximates the usual prudent man or prudent expert test, except that instead of asking whether the manufacturer "knew or should have known" of a defect, the inquiry is whether the defect was or should have been "obvious" to the manufacturer. Presumably actual knowledge of a defect by the manufacturer, as in the case of a flaw which the manufacturer discovers in the specifications, would render the defect "obvious" to that manufacturer even though it might not be objectively obvious to a reasonably competent manufacturer.

Even where a defect was or should have been obvious to the contractor,

⁴² See *Ryan*, 239 N.Y. at 45-46, 145 N.E. at 321.

⁴³ *Littlehale*, 268 F. Supp. at 803 n.16.

⁴⁴ 187 F.2d 832 (2d Cir. 1951), cert. denied, 341 U.S. 936 (1951).

⁴⁵ *Id.* at 834-36.

⁴⁶ *Id.* at 836.

⁴⁷ Other courts have not discussed the manner in which the "unless obviously defective" limitation is to be applied as expressly as did Judge Hand in *Person*. They have looked, however, at the circumstances of the case to determine one or more of several factors. For example, courts have looked to whether the manufacturer/contractor had had much experience with providing similar products, equipment or services in the past. See, e.g., *Davis v. Henderlong Lumber Co.*, 221 F. Supp. 129, 134 (N.D. Ind. 1962). Courts have also examined whether, considering the nature of the manufacturer/contractor's contractual role, he was in a position to know of the dangerous propensities of a product he was furnishing. See, e.g., *Leininger v. Stearns-Roger Mfg. Co.*, 17 Utah 2d 37, 41, 404 P.2d 33, 36 (1965). Courts also have examined whether the manufacturer/contractor had been provided sufficient information about the final layout of a system or intended use of a product to enable him to know of its dangers in relation to that use. See, e.g., *Davis*, 221 F. Supp. 129, 134 (N.D. Ind. 1962); *Moon v. Winger Boss Co.*, 205 Neb. 292, 300, 287 N.W.2d 430, 434 (1980).

however, so that he is prevented from raising the contract specification defense, he may be able to avoid liability in many cases. Courts have held that if the party who employed the contractor discovered the danger, or if it was obvious to that party, his responsibility supersedes that of the contractor.⁴⁸ Thus, it appears that for the most part a manufacturer will be liable only when a defect was or should have been obvious to the manufacturer but was not discovered by or obvious to the government. Presumably this result could occur where, for example, the manufacturer had superior knowledge or expertise with respect to a product, or where a danger or defect which was not apparent from the specifications became apparent during the manufacturing or testing process.

Another problem in the application of the contract specification defense arises when the manufacturer is granted some discretion as to the details of the product's design.⁴⁹ At issue is whether this discretion precludes the manufacturer from raising the defense. A few courts have stated that in order for the defense properly to be invoked, the act or omission which led to the plaintiff's damage or injury must have been required by the specifications, with no discretion left to the contractor.⁵⁰ This requirement that the contractor have no discretion in the manner of performing the work seems to follow logically from the statement in *Ryan* that the contractor "is justified in relying on the specifications . . ."⁵¹ Where a contractor has discretion in the manner of accomplishing the work, so that he could have avoided the damage or injury without violating the terms of the contract, the contractor really does not rely on the specifications. Such manufacturer discretion is common in the case of government contracts. For example, instead of furnishing "design specifications" to a manufacturer, the government may furnish only "performance specifications," relying on the manufacturer to provide the detailed design of

⁴⁸ See note 30 *supra*. The shifting of responsibility from the contractor is said to result from an absence of proximate cause. See PROSSER, *supra* note 19, at 682. This qualification to the defense appears itself to be subject to further qualification. The buyer's responsibility may not supersede that of the manufacturer in particular fact situations, such as where the product is highly dangerous. See, e.g., *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592, 595 (Ky. 1980) (liability may be imposed for open and obvious design defects which are "extraordinarily dangerous"). See generally PROSSER, *supra* note 19, at 667-68, 649-50.

⁴⁹ Although this problem has arisen primarily in negligence actions, it can be expected to arise as well in those strict liability and breach of warranty actions in which the contract specification defense can be raised.

⁵⁰ See, e.g., *Arnold v. Edelman*, 375 S.W.2d 167, 172 (Mo. 1964). See also *Leininger v. Stearns-Roger Mfg. Co.*, 17 Utah 2d 37, 41, 404 P.2d 33, 36, in which the court stressed that the defendant "did not design, sell or recommend the installation of such fans, and had no discretion in their selection . . ." (emphasis added). Likewise, in *Hunt v. Blasius*, 55 Ill. App. 3d 14, 15-18, 370 N.E.2d 617, 618-21 (1977), *aff'd*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978), the Appellate Court of Illinois twice mentioned that the specifications provided the contractor in the case before it were mandatory and then quoted *Littlehale v. E.I. duPont de Nemours & Co.*, 268 F. Supp. 791, *aff'd*, 380 F.2d 274 (2d Cir. 1967) approvingly: "It is not a case where the manufacturer had any freedom of choice as to manufacture, design or use of materials. . . . [H]ere an independent contractor having no discretion or control over production and means of manufacture is directed to comply with the strict contract requirements and specifications contained therein" *Id.* at 801-02 & n.16 (emphasis added).

⁵¹ See text and note at note 29 *supra*.

the product.⁵² In such cases, it would seem inappropriate to allow the contract specification defense to bar recovery for a flaw in the design, since the rationale for the defense is not present.⁵³

Related to the issue of manufacturer discretion is the question whether a manufacturer may invoke the contract specification defense when it actually has participated in the design of the product.⁵⁴ Contracts for the purchase of

⁵² Design specifications essentially provide "how to build" detail, whereas performance specifications prescribe *what* the government requires as a final product. "Design specifications state 'precise measurements, tolerances, materials, in-process and finished product tests, quality control and inspection requirements, and other information.' The Government also may furnish performance specifications in which are stated the performance characteristics desired for the item, *e.g.*, a vehicle to attain a speed of 50 miles per hour." PAUL, *supra* note 2, at 261.

The distinction between the two types of specifications can be crucial in determining contractual liabilities between the parties if a dispute should arise due to unforeseen costs or the unsuitability of the product. If the government furnishes design specifications and the contractor follows those specifications literally, the ultimate responsibility for an unsatisfactory product will be borne by the government. An implied warranty and representation of suitability and adequacy attaches to the plans, specifications and drawings furnished by the government to the contractor. *Id.* at 262-64. See generally Dygert, *Implied Warranties in Government Contracts*, 53 MIL. L. REV. 39 (1971); Patten, *The Implied Warranty that Attaches To Government Furnished Design Specifications*, 31 FED B.J. 291 (1972). In a procurement in which the contractor is given options with respect to *how* the items are to be produced, however, an implied warranty does not attach. PAUL, *supra* note 2, at 262-64. Where an item is purchased by a performance specification, the contractor accepts general responsibility for design, engineering and achievement of stated performance requirements. He has general discretion and election as to detail, but the work or product is subject to the government's reserved right of final inspection, and approval or rejection of the work or product. *Id.*

The principles which have evolved in this area of implied warranties concern the contractual liabilities of the parties to the contract, and appear to have developed independently of tort principles affecting the liability of a contractor/manufacturer to third parties under the contract specification defense. *But c.f.* *Trustees of the First Baptist Church v. McElroy*, 223 Miss. 327, 78 So. 2d 138 (1955) (implied warranty principles relied on to decide a negligence action between employer and contractor). There seems to be no case law or commentary involving any attempt by a manufacturer to recover against the government on a breach of implied warranty theory after the manufacturer successfully has been sued for injuries caused by a defect in design attributable to government design specifications.

⁵³ This issue should probably receive greater attention by the courts, since few, if any, courts have discussed the type of specifications provided and whether there were alternate and safer means of complying with the specifications. For a related discussion of the effect of manufacturer discretion on the availability of the government contract defense, see note 146 *infra*.

⁵⁴ Another related problem concerns the liability of a manufacturer which already has designed and marketed a product which is available "off the shelf." Rather than issuing design or performance specifications, the government may issue a "purchase description," specifying the particular product or its equivalent. See PAUL, *supra* note 2, at 259-61. If the manufacturer sells such a product to the government, it is difficult to see why the contract specification defense should be available in most cases. Although purchase descriptions which call for a particular product in a sense eliminate the manufacturer's discretion to provide a different product, the manufacturer probably had discretion initially in the design of the product. The manufacturer, far from relying on the government's specifications to produce the product, may have induced the government to rely on the adequacy of the product by marketing it and making its qualities generally known through advertising. The government may not have sufficient familiarity with the product to be aware of any potential defects or hazards. As a practical matter, however, it would seem that the "unless obviously defective and dangerous" exception would still permit recovery in many such cases. Assuming the standard would be applied with reference to the

military aircraft exemplify the kind of cooperative effort between the government and a manufacturer which often precedes the government's ultimate decision on a particular design. The process may begin with an informal suggestion by the government or the manufacturer. The suggestion then may be followed by design, mock-up, prototype, test work, and final production models.⁵⁵ Compromises often are made between safety features and mission requirements.⁵⁶ Throughout this process, the manufacturer is intimately involved with the government in the design and testing of the aircraft.⁵⁷ The question arises whether the contract specification defense should be available in such circumstances, even where detailed specifications ultimately are provided to the manufacturer by the government. For the most part, this question has not been addressed by the courts.⁵⁸ Basically two types of cases are likely to arise, however, only one of which would seem to provide an appropriate opportunity for raising the defense. In some cases, the government may make a conscious design choice and perhaps overrule the manufacturer as to a particular safety feature. In such cases, a strong argument can be made that the contract specification defense should be available to the manufacturer, subject to the "unless obviously defective" limitation. The defense should be available because the manufacturer has no discretion as to the safety feature. Situations also might arise, however, where the absence of a safety feature is neither explicitly mandated by the government in its specifications nor implicitly mandated through the government's choice of certain design features which make

special knowledge and expertise of the manufacturer, the manufacturer would find it hard to argue that it was not in a position to know of certain dangers if it had designed the product. If, however, the government is aware of the dangers in the product and desires to purchase it anyway, it may be appropriate to allow the manufacturer to avoid liability in most such cases. For a discussion of the reasons supporting this conclusion, see text and notes at notes 278-306 *infra*.

⁵⁵ *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447, 456 (E.D.N.Y. 1971).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ In *O'Keefe v. Boeing Co.*, 335 F. Supp. 1104 (S.D.N.Y. 1971), the issue was touched on briefly. The case was a wrongful death and personal injury action against the manufacturer of an Air Force B-52 which crashed allegedly as a result of the manufacturer's negligence in the design and manufacturer of a welded bulkhead. *Id.* at 1111, 1117. Commenting on the defendant's claim that the design was the responsibility of the government, the court stated:

There is no question, and the court so finds, that ultimate responsibility for the design and use of the B-52 bomber rests and always has rested with the United States government. The court concludes, however, that this fact, in itself, neither exonerates the defendant, nor has it in any way altered the defendant's duty as a manufacturer in this case where there has been no showing that the defendant was totally oblivious of and/or aloof from the genesis of the design specifications in the first place or that the specifications represented either something less than the uppermost level of the art or a compromise of safety.

Id. at 1124. In this passage, the court seems to have suggested that a manufacturer which is involved in the design of a product may not have a contract specification defense available unless the alleged flaw in design was the result of a conscious choice by the government after balancing mission and safety considerations. The court did not elaborate on these comments, however, and consequently their full import remains in doubt.

the incorporation of the safety feature impractical. Instead, the manufacturer may have some discretion whether to incorporate the safety feature in the design of the product. Arguably, the presence of manufacturer discretion should preclude the successful raising of the contract specification defense.⁵⁹

In summary, the contract specification defense has been successfully asserted in negligence cases involving a variety of contract situations, including the manufacture and sale of products to state governments. The defense may not be raised where a defect in the specifications was or should have been obvious to the manufacturer. Any special knowledge or expertise possessed by the manufacturer may be a factor in determining if a defect should have been obvious. If the party employing the contractor discovered the defect, or if the defect was obvious to that party, his responsibility may supersede that of the manufacturer. The defense should not be successful when the manufacturer had discretion in the design of the product, and may not be successful where the manufacturer participated in developing the design.

2. Strict Liability Cases

Courts have disagreed over whether a manufacturer of a product who has fully complied with a buyer's specifications may invoke the contract specification defense in an action brought under a theory of strict liability. An action in strict liability, unlike an action in negligence, normally does not require a defect to be caused by the defendant's act or omission; it is only necessary that the product be defective when it leaves the defendant's control and that the defect be the cause of the injury.⁶⁰ Thus, some courts, particularly in cases involving private contracts, have concluded that the manufacturer's lack of control over the design of the product should not bar an action in strict liability.⁶¹

⁵⁹ There is another possible approach to determining whether a manufacturer which has helped to design a product should bear the responsibility for a flaw in the specifications. In appropriate cases courts might borrow from precedent dealing with the issue whether an implied warranty of suitability and adequacy by the government to the contractor has attached to the specifications. *See* note 52 *supra*. For example, where the government has incorporated into a contract detailed specifications recommended by the contractor as more satisfactory than the government specifications, recovery by the contractor on the theory of implied warranty has been denied when the specifications failed to result in a satisfactory product. *See generally* Dygert, *supra* note 52, at 42. By analogy, it could be argued that the contractor has not relied on the specifications for purposes of invoking the contract specification defense.

⁶⁰ *See* text and note at note 9 *supra*.

⁶¹ In cases involving private contracts, the courts seem to be split about evenly on the question whether the contract specification defense can defeat an action in strict liability. For example, in *Lenherr v. NRM Corp.*, 504 F. Supp. 165 (D. Kan. 1980), the plaintiff, an employee of the Goodyear Tire and Rubber Company, had lost his arm when it became caught in a "squeegie machine" manufactured by NRM. *Id.* at 167-68. The United States District Court for the District of Kansas held that NRM could be held strictly liable for the defective design of the machine, even though NRM had manufactured the machine in accordance with a design provided by Goodyear. *Id.* at 175-76. The court rejected the applicability of the contract specification defense to actions brought under a theory of strict liability. *Id.* at 174. The court first noted that most of the cases in which the contract specification defense had been discussed were negligence actions, and that the defense was logical under negligence principles. *Id.* The court

In cases involving government contracts, only a few courts have addressed the viability of the contract specification defense in a suit brought under a theory of strict liability. In *Challoner v. Day & Zimmerman*,⁶² the Court of Appeals for the Fifth Circuit, applying Texas law, rejected the applicability of the contract specification defense to a strict liability action.⁶³ In *Challoner*, a serviceman was killed and another injured when a howitzer round prematurely exploded during combat with the North Vietnamese.⁶⁴ The plaintiffs, the injured serviceman and the administrator of the deceased serviceman's estate, sued the manufacturer of the round on a strict liability theory,⁶⁵ and obtained a judgment in their favor.⁶⁶ On appeal, the defendants claimed that the trial judge had erred in instructing the jury that it could find the defendants liable if it found the howitzer shell was defectively designed.⁶⁷ The defendants claimed

then observed that § 402A of the RESTATEMENT (SECOND) OF TORTS imposes liability even if a seller has exercised all possible care, and that retailers are held liable for defects that they have not caused. *Id.* The *Lenherr* court cited two policy reasons for not permitting the contract specification defense in a strict liability action, terming them the reliance rationale and the loss spreading rationale. *Id.* The court stated that the reliance rationale is based on the right of the public to rely on sellers to stand behind their products and to provide compensation for those who are injured by their products. *Id.* The loss spreading rationale, according to the court, recognizes the devastating burdens visited on a consumer injured by a defective product and therefore shifts the burden of loss to manufacturers and sellers who can treat the loss as a cost of doing business. *Id.* This cost ultimately is passed on to future consumers of the product and the injured person's loss is borne by society. *Id.*

Courts which have permitted the contract specification defense in strict liability cases involving private contracts have not thoroughly discussed the policies underlying strict liability. For example, in *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276 (1978), the Colorado Supreme Court rejected the court of appeals' view that a manufacturer may be held strictly liable for a defectively designed machine even if it designed the machine in accordance with the buyer's specifications. *Id.* at 170-71, 583 P.2d at 281-82. The court gave no explanation for its rejection of the court of appeals' view. The court of appeals had rejected the applicability of the contract specification defense to a strict liability action on essentially the same grounds as had the *Lenherr* court. The appeals court reasoned that § 402A of the *Restatement (Second) of Torts* makes no distinction between manufacturers, sellers or designers, and that the policies underlying strict liability apply equally when the manufacturer or seller has not designed the product, since fault is not a prerequisite to liability under § 402A. *Pust v. Union Supply Co.*, 38 Colo. App. 435, 440-44, 561 P.2d 355, 359-60 (1976), *aff'd*, 196 Colo. 162, 583 P.2d 276 (1978). See also *Moon v. Winger Boss Co.*, 205 Neb. 292, 287 N.W.2d 430 (1980), where the court based its approval of the defense in a strict liability action almost entirely on § 404 of the *Restatement* and on cases decided under negligence principles, without commenting on the different policy considerations involved in suits brought under a theory of strict liability. *Id.* at 296-97, 287 N.W.2d at 433, (citing RESTATEMENT (SECOND) OF TORTS § 404 (1965)). See also *Spangler v. Kramco, Inc.*, 481 F.2d 373, 375 n.2 (4th Cir. 1973) (stating without discussion that even though the case was being decided under negligence principles, the contract specification defense would bar recovery under a theory of strict liability as well).

⁶² 512 F.2d 77 (5th Cir. 1975), *vacated and remanded for misapplication of conflict of laws rules*, 423 U.S. 3 (1975).

⁶³ 512 F.2d at 83.

⁶⁴ *Id.* at 78.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 82.

that the design of the shell was within the exclusive control of the government and that the contract specification defense precluded the plaintiffs' recovery.⁶⁸ In rejecting the applicability of the defense to strict liability cases, the court of appeals distinguished cases recognizing the contract specification defense as based on negligence principles. The court stated that "[a] strict liability case, unlike a negligence case, does not require that the defendant's act or omission be the cause of the defect. It is only necessary that the product be defective when it leaves the defendant's control."⁶⁹ In support of this conclusion the court cited comment f to section 402A of the *Restatement (Second) of Torts*,⁷⁰ which applies strict liability to "wholesalers, retailers, or distributors," even though these parties normally are not the ones which caused the defect.⁷¹

The court in *Challoner* also addressed the defendants' contention that the normal justifications for imposing strict liability do not apply in the case of a government contract. The court acknowledged that many of the justifications for imposing strict liability were not present in such cases.⁷² Nevertheless, the court stressed that one of the primary goals of strict liability is to allocate the costs of injuries caused by defective products to manufacturers instead of to the persons injured by the products.⁷³ This goal is justified because those injured by defective products are powerless to protect themselves.⁷⁴ The court stated that this policy extends to protecting members of the armed forces as well as the general public.⁷⁵

In contrast to *Challoner*, some courts have held that the contract specification defense can be successfully invoked in strict liability cases involving government contracts. For example, in *McCabe Powers Body Co. v. Sharp*,⁷⁶ the Supreme Court of Kentucky concluded that it would not be logical in most cases to hold a manufacturer liable for a design defect caused by another party.⁷⁷ In *McCabe*, the plaintiff, an electrician for the state Department of

⁶⁸ *Id.*

⁶⁹ *Id.* at 83.

⁷⁰ RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965).

⁷¹ *Challoner*, 512 F.2d at 83.

⁷² *Id.* at 84.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* It is not clear whether the government contract defense was raised in *Challoner*, or whether the court considered it to be equally unavailable in a strict liability action. Other courts which have considered a manufacturer's liability for design defects in military products have not adopted the *Challoner* court's position. Two such cases, *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978), and *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980), are discussed later in section two of this note under the government contract defense. Both courts produced holdings which more closely resemble the government contract defense, relying on public policy arguments and several cases involving the government contract defense. The cases are therefore discussed under the heading of the government contract defense. See text at notes 171-94 *infra*.

⁷⁶ 594 S.W.2d 592 (Ky. 1980).

⁷⁷ *Id.* at 595.

Highways, was injured when he fell through the open side of the bucket of an aerial boom.⁷⁸ The plaintiff sued under theories of negligence, strict liability, and breach of warranty, alleging in essence that the bucket had been defectively designed.⁷⁹ The trial court directed a verdict in favor of the manufacturer.⁸⁰ On appeal, the Kentucky Court of Appeals rejected the plaintiff's breach of warranty claim, but concluded that a jury question was presented as to whether the aerial boom was unreasonably dangerous when sold by the defendant.⁸¹ The court of appeals rejected the defendant's contention that compliance with the state's specifications was a defense.⁸² The Supreme Court of Kentucky reversed the opinion of the court of appeals and affirmed the trial court's decision.⁸³ The court held that the contract specification defense barred recovery for a design defect even in a strict liability action.⁸⁴ To the court, it was dispositive that the manufacturer had constructed the aerial boom in exact accordance with the specifications provided by the state.⁸⁵ The court found significant its holding in a previous case that the standard of liability for defective design was essentially the same under theories of strict liability and negligence.⁸⁶ The court also stated that the case presented a different situation than the typical products liability case, since here the buyer had specified the product's design.⁸⁷ The court reasoned that holding the defendant liable under these circumstances would be illogical as it would amount to holding a non-designer liable for a design defect.⁸⁸ The court held that since the manufacturer complied with the buyer's specifications and since the alleged defect was open and obvious to users, recovery was barred.⁸⁹ The court stated, however, that a

⁷⁸ *Id.* at 593.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 594.

⁸³ *Id.* at 595.

⁸⁴ *Id.* at 594-95.

⁸⁵ *Id.* at 595.

⁸⁶ *Id.* at 594. See note 9 *supra* for a discussion of the similarity between the negligence and strict liability standards in a defective design action.

⁸⁷ *McCabe Powers Body Co.*, 594 S.W.2d at 594.

⁸⁸ *Id.* at 595. The court's reliance on authority in this case provides an example of how courts sometimes fail to distinguish between cases involving the contract specification defense and the government contract defense. In support of its discussion concerning manufacturer's compliance with specifications, the court cited *Rigsby v. Brighton Eng'g Co.*, 464 S.W.2d 279 (Ky. 1971), a government contract defense case, and *Spangler v. Kranco, Inc.*, 481 F.2d 373 (4th Cir. 1973), a contract specification defense case. This confusion was harmless in *McCabe*, because the manufacturer would have avoided liability under either defense. As a general matter, however, courts should recognize the differences between the two lines of cases. There are differences both in the rationales offered in support of the defenses, and the rules which have been applied. Perhaps the most significant difference between the defenses is that the government contract defense has been held to absolve a contractor from liability even when the defect in specifications is obvious. See text and note at note 144 *infra*.

⁸⁹ *McCabe Powers Body Co.*, 594 S.W.2d at 594-95.

case might arise where a design defect is so "extraordinarily dangerous" that the manufacturer should decline to produce the item.⁹⁰ The court withheld judgment as to a *concealed* defect in design in a product built according to the buyer's specifications.⁹¹ Thus, the *McCabe* court appears to have adopted a slight variation of the contract specification defense, at least in cases where a defect is an open and obvious one rather than a latent one. The court apparently would require that a defect be "extraordinarily dangerous" before allowing recovery. Most courts, however, state that the contract specification defense permits recovery if the defect merely is "obviously" dangerous.⁹²

In summary, there is a split of opinion among the courts as to whether the contract specification defense should be available in a products liability action brought under a theory of strict liability. The basic rationale for not allowing the defense is that strict liability does not require that a defect be caused by the defendant.⁹³ The rationale for allowing the defense is that the standard of liability for defective design should be the same whether the action is based on negligence or strict liability theory, and that it is illogical to hold a party liable for a design defect which the party has not caused.⁹⁴

⁹⁰ *Id.* at 595.

⁹¹ *Id.*

⁹² See text and note at note 21 *supra*. The court may have adopted a somewhat more restrictive standard for recovery because the alleged defect in *McCabe* was open and obvious to the user rather than concealed. Some courts bar recovery entirely if the defect is discovered by or obvious to the buyer as well as the manufacturer. See text and note at note 48 *supra*. For a case from another jurisdiction which considered issues similar to those addressed by the court in *McCabe*, see *Hunt v. Blasius*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978). In *Hunt*, two occupants of a car were killed and three others were seriously injured when the car left the paved portion of a highway and struck the post of an exit sign. *Id.* at 206, 384 N.E.2d at 369. The plaintiffs sued the manufacturer of the sign under negligence and strict liability theories, alleging that the sign had been defectively designed. *Id.* at 206, 384 N.E.2d at 370. The manufacturer had built the sign according to state specifications. *Id.* The Appellate Court of Illinois held that strict compliance with government mandated specifications was a defense to an action in either negligence or strict liability. *Hunt v. Blasius*, 55 Ill. App. 3d 14, 20, 370 N.E.2d 617, 621-23. The court of appeals did not include, however, the "unless obviously defective and dangerous" exception in its holding, perhaps implying that compliance with specifications was a complete defense, at least when a government contract is involved. *Id.* The court reasoned that government contracts were different from private undertakings, since imposing liability on government contractors would adversely affect the cost of government contracts and the willingness of contractors to bid. *Id.* at 20, 370 N.E.2d at 621. The defense was thus needed to "preserve tax revenues." *Id.* The Supreme Court of Illinois in *Hunt* appears to have modified the holding of the court of appeals. The supreme court first considered the negligence theory, and indicated that the contract specification defense barred recovery under that theory. *Hunt*, 74 Ill. 2d at 210, 384 N.E.2d at 371. The court, however, recited the *full* defense, including the exception for obvious defects and dangers. *Id.* The supreme court did not reach the question of whether the defense would be effective against a strict liability action. Instead, the court held that the plaintiffs had failed to carry their burden of proving that the sign in fact was defective. *Id.* at 212, 384 N.E.2d at 372. It can be presumed, however, from the court's holding with regard to negligence, that under a strict liability theory a manufacturer would at least be liable if the defect were obvious.

⁹³ See text and notes at notes 68-71 *supra*.

⁹⁴ See text and notes at notes 85-88 *supra*.

3. Breach of Warranty Cases

There has been virtually no discussion in the cases concerning the applicability of the contract specification defense to a breach of warranty action. In *Spangler v. Kranco, Inc.*,⁹⁵ which involved a private contract, the United States Court of Appeals for the Fourth Circuit, applying Virginia law, allowed the contract specification defense to bar recovery under a negligence theory.⁹⁶ The court stated in a footnote that although the suit was brought under a negligence theory, the result would have been the same under a breach of warranty theory.⁹⁷ The only reason given by the court to support this statement was that in a previous decision it had held that the standard of safety imposed on a manufacturer is "essentially the same" whether the theory of liability was labeled warranty, negligence or strict liability.⁹⁸

The foregoing discussion has analyzed the applicability of the contract specification defense to products liability actions brought against federal contractors under three theories of liability for defects in product design: negligence, strict liability, and breach of warranty. The next section will analyze the relationship of the contract specification defense to a cause of action based not on a defect in design, but on an inadequate warning of a product's defects or dangers.

4. Inadequate Warning

The duty to warn of dangers or defects associated with a product frequently provides an alternative basis of recovery in many "typical" products liability cases even where the product has not been defectively designed or manufac-

⁹⁵ 481 F.2d 373 (4th Cir. 1973).

⁹⁶ *Id.* at 375.

⁹⁷ *Id.* at 375 n.2.

⁹⁸ *Id.* See notes 9 and 14 *supra* for a comparison of the three theories of recovery. Those courts which distinguish the theories of recovery presumably would not assume that the contract specification defense, which arose in cases decided under negligence principles, necessarily is applicable in an action based on breach of warranty. An action for breach of warranty normally requires application of the U.C.C. provisions. See text and notes at notes 10 and 22 *supra*. Application of the warranty provisions of the U.C.C., however, sometimes may achieve a result similar to that achieved by applying the contract specification defense. Implied warranties under the U.C.C. may arise pursuant to §§ 2-314 and 2-315. Sections 2-314 and 2-315 create implied warranties of merchantability and fitness for a particular purpose, and § 2-316 deals with their exclusion or modification. U.C.C. §§ 2-314, 2-315, 2-316. Comment 9 to § 2-316 states that a seller's implied warranty of fitness for a particular purpose normally does not arise where the buyer gives precise and complete specifications to the seller, since in such instances, the buyer does not rely on the seller to develop a product which suits the particular purpose. U.C.C. § 2-316 comment 9. As for the implied warranty of merchantability, comment 9 to § 2-316 refers to § 2-317 which provides that an express warranty displaces such an implied warranty of merchantability if the two warranties are inconsistent. *Id.* U.C.C. § 2-317. Thus, comment 9 suggests that if the buyer's specifications are faulty, a seller's express warranty that the product will comply with the buyer's specifications displaces any implied warranty of merchantability which might otherwise exist. This result occurs because an implied warranty that the product will be merchantable is inconsistent with an express warranty that it also will comply with the faulty specifications. Therefore, the seller is not liable to the buyer for breach of warranty under the U.C.C. if the

tured.⁹⁹ Thus, the issue arises whether a manufacturer has a duty to warn foreseeable users of its product even when the contract specification defense bars recovery for a design defect. One issue is whether it is appropriate to allow the contract specification defense to bar recovery for a design defect because the design was not "obviously defective and dangerous," but to hold the manufacturer to the usual standard for determining whether it should have issued a warning. The usual standard imposes liability for failure to warn if the manufacturer "knew or should have known" of a given product's dangers, without requiring that the dangers be obvious to the manufacturer.¹⁰⁰ Thus, applying the usual standard theoretically could allow plaintiffs to bypass the contract specification defense by providing a lower threshold of proof in an action for inadequate warning than in an action for a design defect.

An alternative approach which avoids the potential bypassing of the contract specification defense is to make the standard for determining if there is a duty to warn comparable to the standard for determining if a design is "obviously defective and dangerous" for purposes of avoiding the contract specification defense. Under this approach, the failure to warn would constitute an alternative grounds for suit only where the dangers associated with the product or design were so glaring, patent or obvious, that a competent manufacturer would have issued a warning (but where there may or may not have been a *defect* in design). Under this approach, plaintiffs suing either for a

product is defective due to the buyer's specifications. See, e.g., *Mohasco Indus., Inc. v. Anderson Halverson Corp.*, 90 Nev. 114, 520 P.2d 234 (1974). In *Mohasco Indus.*, the foregoing analysis was applied to bar the buyer of a carpet from recovering from the manufacturer on theories of breach of the implied warranties of fitness and merchantability where the manufacturer had fully complied with the buyer's specifications. *Id.* at 116, 119, 520 P.2d at 234-36.

Although it seems clear that a buyer who provides detailed specifications has no cause of action against a seller for breach of an implied warranty of merchantability or fitness, there is still the question of possible liability of the seller to third parties injured as a result of the defective specifications. In other words, can an implied warranty of merchantability or fitness run to an injured third party even though no such implied warranty runs to the buyer? This issue, in the context presently being discussed, does not appear to have been ruled on definitively. A similar issue, however, pertaining to the effect of *disclaimers* of warranties, has been the subject of considerable discussion by U.C.C. commentators. See generally 2A FRUMER & FRIEDMAN, *supra* note 8, § 19.07[6]. The issue is whether a disclaimer made by the seller to a buyer should bar actions by third parties. *Id.* Particular problems have arisen in trying to reconcile U.C.C. § 2-316, which allows disclaimers, with § 2-719(3), which makes limitations on consequential damages for personal injuries *prima facie* unconscionable. See 2A FRUMER & FRIEDMAN, *supra* note 8, § 19.07[6]. It has been suggested that an attempt totally to disclaim warranties would be unconscionable in the case of personal injuries. *Id.* Be that as it may, it is submitted that there is a qualitative difference between a disclaimer and the situation in which a manufacturer has fully complied with a buyer's detailed specifications. In the case of the disclaimer, the manufacturer is seeking to limit a liability which normally would attach. In the situation where the manufacturer complies with a buyer's specifications it is not seeking to limit its liability. Rather, no warranty normally would arise at all, because any implied warranties would be displaced automatically by the manufacturer's express warranty to conform to the specifications. In any event, it appears that the final resolution of this issue must await further rulings by the courts on the relevant U.C.C. provisions.

⁹⁹ See text and notes at notes 15-16 *supra*.

¹⁰⁰ See text and note at note 19 *supra*.

defect in design or for a failure to warn would have a similar burden of establishing that the defect in the specifications or the danger associated with the product was or should have been obvious to the defendant manufacturer.¹⁰¹

Definitive answers to these questions have not been provided by the courts, as issues pertaining to the existence and precise scope of a duty to warn have not commonly arisen in cases discussing the contract specification defense. There is some indication in the area of private contracts, however, that the usual standard for determining a duty to warn may apply without the requirement that the danger be "obvious."¹⁰² In cases involving government contracts, however, there is some indication that the standard for imposing liability for a failure to warn may be similar to the standard for imposing liability for a design defect under the contract specification defense. For example, in *McCabe Powers Body Co. v. Sharp*,¹⁰³ a case involving a state government contract, the Supreme Court of Kentucky stated that although there was no duty to warn in that particular case because the manufacturer had followed the buyer's specifications and because the danger was known and obvious to the user, there might be situations where the "plans and specifications furnished by a buyer could contain design defects so extraordinarily dangerous that a product manufacturer should decline to produce or, if appropriate, issue warnings"¹⁰⁴ Thus, the court appeared to equate the standard for determining a duty to warn with the standard embodied in the contract specification defense for determining when the manufacturer is liable for a defect in

¹⁰¹ Another question is whether a manufacturer, by fulfilling its duty to warn, thereby absolves itself from any further liability for manufacturing a defectively designed product. At issue is whether the "unless obviously defective and dangerous" exception to the contract specification defense still might require a manufacturer to refrain from building a product, if the design defect were too dangerous to be adequately remedied by a warning.

¹⁰² See, e.g., *Crane v. Sears Roebuck & Co.*, 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963). In *Crane*, the plaintiff was injured when a can of surface preparer ignited. *Id.* at 857-58, 32 Cal. Rptr. at 755-56. She sued both the manufacturer (Universal) and seller (Sears) for breach of warranty and for negligent failure adequately to warn of the product's dangerous propensities. *Id.* Universal interposed the defense that the surface preparer was not its product but the formula of Sears. *Id.* at 858-59, 32 Cal. Rptr. at 756. Universal claimed that Sears gave Universal the formula to mix the ingredients and place in a can with a label on the outside conforming to one prepared by Sears. *Id.* The court held:

One who manufactures a dangerous product cannot claim exemption from liability for injuries from the use of such product on the ground of merely carrying out the express orders of a third party with respect to its manufacture and labeling where the label does not give appropriate warning to the purchasing public In view of the latent, dangerous qualities of the surface preparer herein involved, Universal, as manufacturer, had an independent duty of determining that adequate warning was given to the public with respect to its use.

Id. at 859, 32 Cal. Rptr. at 756. As for the standard to be used to determine whether the manufacturer had satisfied its "independent duty" to warn, the court held that the ordinary standard applied: "A manufacturer or supplier of a product must give warning of any dangerous propensity of an article produced or sold by him inherent in the product or in its use of which he knows or should know, and which the user of the product would not ordinarily discover." *Id.* at 860, 32 Cal. Rptr. at 757 (emphasis added).

¹⁰³ 594 S.W.2d 592 (Ky. 1980).

¹⁰⁴ *Id.* at 595.

design.¹⁰⁵ Under this formulation, liability for failure to warn would only be imposed where the product would be extraordinarily dangerous absent a warning.¹⁰⁶

It is helpful at this point to summarize the current status of the contract specification defense in products liability actions involving defective products sold to the federal government. The contract specification defense has been raised effectively in a considerable number of negligence actions of various types, including products liability actions.¹⁰⁷ The defendants in these cases have included contractors performing contracts for federal and state governments and private parties.¹⁰⁸ Only a few cases, however, have been products liability actions involving government contracts. Furthermore, none of these products liability cases decided under negligence theory involved contracts

¹⁰⁵ A literal reading of the *McCabe* court's above quoted statement might lead to the conclusion that an action for failure to warn can only exist when the specifications contain a design defect. Yet, under traditional duty to warn principles, a duty to warn may exist where there is no design defect, but where the failure to warn would be unreasonably dangerous because of a product's propensities. See text and note at note 16 *supra*. It does not appear that the court intended to depart from traditional duty to warn principles, however, in view of its reliance on comment j to § 402A of the RESTATEMENT (SECOND) OF TORTS as authority for its result in *McCabe*. *McCabe*, 594 S.W.2d at 594. Comments h and j of the *Restatement* suggest that a product may become defective merely through the absence of a warning. The court simply may not have focused on the duty to warn issue and consequently may have failed to describe adequately the circumstances in which the duty to warn might exist.

¹⁰⁶ A similar position was expressed by the court in *Littlehale v. E.I. duPont de Nemours & Co.*, 268 F. Supp. 791 (S.D.N.Y. 1960), *aff'd*, 380 F.2d 274 (2d Cir. 1967). In *Littlehale*, the plaintiffs, a civilian employee and a Navy seaman serving on a naval vessel, were injured when some detonators (blasting caps) prematurely exploded. *Id.* at 793. They sued the manufacturer alleging that the warnings printed on the boxes containing the blasting caps were inadequate. *Id.* at 796. The defendant had fully complied with the government's specifications and there was no claim of defective manufacture or design. *Id.* at 795. The United States District Court for the Southern District of New York held that the defendants did not have a duty to warn. *Id.* at 803-04. It based this holding on the principle that ordinarily there is no duty to warn members of a profession against known risks. *Id.* at 798. In *Littlehale*, the Ordnance Department, to whom the blasting caps were sold, was an expert in the use, handling and storage of such blasting caps. *Id.* at 795. The court held that where there is no duty to warn a purchaser who is well aware of the inherent dangers of the product, there is no duty to warn the employees of that purchaser. *Id.* at 799. The court also held that the particular use made of the product was not foreseeable to the manufacturer. *Id.* at 803.

Although the court held that there was no duty to warn under the facts of the case, the court did acknowledge that there generally is a duty to adequately warn a foreseeable purchaser or user of a product of foreseeable and latent dangers in such products. *Id.* at 798. The court did not reach the issue of whether the contract specification defense would preclude a duty to warn, since it held that there was no duty to warn, anyway. The court did imply, however, that compliance with contract specifications pertaining to the type of warnings to be provided might not completely eliminate the manufacturer's duty to provide adequate warnings. The court implied that the manufacturer might have a duty to provide additional warnings when the following of plans which did not provide for an adequate warning would be a "glaringly dangerous act." *Id.* at 803 n.16.

It is not clear from either the *McCabe* or *Littlehale* opinions whether there are cases in which a manufacturer cannot avoid liability for a design defect by issuing warnings, but must decline to produce in view of the particular danger involved.

¹⁰⁷ See text and note at note 34 *supra*.

¹⁰⁸ See text and note at note 31 *supra*.

with the federal government. Thus, no court has directly held that the contract specification defense can be invoked by a federal contractor in a products liability action. In two cases, however, *Hunt v. Blasius*¹⁰⁹ and *McCabe Powers Body Co. v. Sharp*,¹¹⁰ courts have indicated that the defense is available against negligence actions for defectively designed products manufactured pursuant to state government specifications.¹¹¹ Although the *Hunt* and *McCabe* cases involved state contracts, they should have precedential value for negligence cases involving federal contracts as well. The recognition of the contract specification defense by the *Hunt* and *McCabe* courts in products liability cases involving state contracts, together with the general recognition of the defense by other courts in non-products liability cases involving federal contracts, suggests that the defense would be applicable in products liability cases involving federal contracts brought under a negligence theory.

Although the contract specification defense generally has been available in negligence actions, there is a split of authority as to whether the defense is available in an action brought under strict liability theory. One view is that the defense can be invoked in a strict liability action, since the standard of liability for a manufacturer should be the same whether the action is grounded in negligence or strict liability.¹¹² The other view is that the contract specification defense cannot defeat an action in strict liability, since recovery in a strict liability action does not require that the defendant's act or omission be the cause of the defect.¹¹³

With respect to breach of warranty theory, it still is an open question whether the contract specification defense applies in cases involving government contracts.¹¹⁴ In *Spangler v. Kranco, Inc.*,¹¹⁵ a case involving a private contract, the court indicated that the defense would apply.¹¹⁶ As for actions based on inadequate warning, there does appear to be a duty to warn in spite of the contract specification defense, but only of obvious or extraordinary dangers.¹¹⁷

B. The Government Contract Defense

A separate but interrelated defense¹¹⁸ which applies only to actions against government contractors has evolved along with the contract specification defense. This defense is referred to in this note as the government contract defense. This defense is related to the contract specification defense in that it

¹⁰⁹ 74 Ill. 2d 203, 384 N.E.2d 368 (1978).

¹¹⁰ 594 S.W.2d 592 (Ky. 1980).

¹¹¹ *Hunt*, 74 Ill. 2d at 210, 384 N.E.2d at 371; *McCabe*, 594 S.W.2d at 594-95.

¹¹² See text and notes at notes 76-92 *supra*.

¹¹³ See text and notes at notes 62-75 *supra*.

¹¹⁴ See text and notes at notes 95-98 *supra*.

¹¹⁵ 481 F.2d 373 (4th Cir. 1973).

¹¹⁶ *Spangler*, 481 F.2d at 375 n.2. See text and notes at notes 95-98 *supra*.

¹¹⁷ See text and notes at notes 100-06 *supra*.

¹¹⁸ See text and notes at notes 20-26 *supra* for a discussion of the interrelation between the two defenses.

protects a contractor from liability when he has carried out the government's wishes by following the specifications in the contract.¹¹⁹ Unlike the contract specification defense, however, the government contract defense is not based on principles of negligence or strict liability. Instead, the defense allows the contractor to "share" the government's immunity from suit¹²⁰ on grounds of public policy.¹²¹ Furthermore, the government contract defense, unlike the contract specification defense, may bar recovery even if the contract specifications are obviously defective or dangerous.¹²² Thus, the government contract defense may be a more complete defense to actions against government contractors than the contract specification defense.

Traditionally, the government contract defense was applied only to actions against government contractors performing public works projects such as highway, sewer and bridge construction, dredging of rivers, and similar public improvements.¹²³ Recently, however, several courts have relied on these cases to bar recovery in products liability actions involving military products.¹²⁴ These recent extensions of the government contract defense may threaten to render the contract specification defense superfluous in cases involving government contracts. In order to determine the proper limits of the government contract defense, the origins and underpinnings of that defense will be examined. Then, the recent extensions of the defense into products liability cases involving military products will be discussed.

1. Public Works Cases

Although a body of state case law concerning public contractor tort immunity had existed since at least the early 1900's,¹²⁵ *Yearsley v. W.A. Ross Construction Co.*,¹²⁶ decided in 1940, appears to be the only case in which the Supreme Court recognized a form of immunity for federal contractors. In *Yearsley*, the plaintiff sought to recover for erosion of his waterfront property. The erosion allegedly had been caused by the construction of dikes by the defendant pursuant to a contract with the United States Government.¹²⁷ The plaintiff argued that the erosion had constituted a taking of property for which

¹¹⁹ *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961).

¹²⁰ See text and note at note 136 *infra*.

¹²¹ See text and notes at notes 137-42 *infra*.

¹²² See text and note at note 144 *infra*.

¹²³ See, e.g., *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940) (dike construction); *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963) (road construction); *O'Grady v. City of Montpelier*, 474 F.Supp. 186 (D. Vt. 1979) (road construction); *Green v. ICI America, Inc.*, 362 F.Supp. 1263 (E.D. Tenn. 1973) (operation of TNT plant); *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965) (river dredging); see also cases cited in Annot., 9 A.L.R.3d 382 (1966).

¹²⁴ See text and notes at notes 171-228 *infra*.

¹²⁵ See Annot., 9 A.L.R.3d 382 (1966).

¹²⁶ 309 U.S. 18 (1940).

¹²⁷ *Yearsley*, 309 U.S. at 19.

he was entitled to just compensation under the fifth amendment.¹²⁸ The Court held that the contractor was not liable to the plaintiff, reasoning that the contractor had been in the position of an agent or officer of the government.¹²⁹ According to the Court, if the defendant had been authorized to carry out the project and had not exceeded his authority, he was not liable.¹³⁰ Although the Court never expressly mentioned the term immunity, it appears that by referring to the contractor as an agent or officer of the government,¹³¹ the Court was alluding to principles of immunity applied to persons who are sued in their individual capacity as agents or officers of the government.¹³²

¹²⁸ *Id.* at 19-20.

¹²⁹ *Id.* at 20-21. The court's characterization of the contractor as an agent is somewhat ambiguous. The Court made the following statement:

It is clear that if this authority to carry out the project was validly conferred . . . there is no liability on the part of the contractor for executing [the Government's] will. . . . Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.

Id. It is not clear from this statement whether the Court was saying that all contractors with the government are agents of the government, or that because this particular contractor was in fact an agent of the government, it was shielded from liability. Still another interpretation seems possible. The Court simply may have been analogizing the position of a government contractor to that of a government agent or officer, in order to support its conclusion that the contractor should be shielded from liability. Lower courts have construed *Yearsley* broadly. Most of the courts have allowed the government contract defense to be raised by public works contractors without inquiring into whether any formal agency relationship existed between the contractor and the government. See, e.g., *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963); *O'Grady v. City of Montpelier*, 474 F. Supp. 186 (D. Vt. 1979); *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965).

¹³⁰ *Yearsley*, 309 U.S. at 20-21.

¹³¹ *Id.*

¹³² In *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1942), the Court cited *Yearsley* for the following proposition: "It is, of course, true that government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States." *Id.* at 583. For a discussion of tort immunity for public officers and agents, see RESTATEMENT (SECOND) OF TORTS § 895A, comment c and § 895D (1965), H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 1410-23 (2d ed. 1973). It has been suggested that the issue whether a contractor shares the immunity of the federal government is a federal question. See *Smith v. Lockheed Propulsion Co.*, 247 Cal. App.2d 774, 787 n.5, 56 Cal. Rptr. 128, 139 n.6 (1967). Although the Supreme Court in *Yearsley* did not explicitly state that the immunity of a federal contractor is to be governed by federal common law, it relied on federal precedent as authority for its holding that the contractor was not liable. See *Yearsley*, 309 U.S. at 20-21. In *Yearsley*, however, the plaintiff's cause of action itself was grounded on a federal claim. See text and note at note 128 *supra*. Furthermore, the Court characterized the contractor in *Yearsley* as an agent of the federal government. See text and note at note 129 *supra*. By so characterizing the contractor, the Court could readily apply federal precedent concerning the immunity of government agents and officers. Thus, the Court did not make clear whether federal precedent would control in cases in which state law claims are brought against independent contractors with the federal government. Cases subsequent to *Yearsley* have not explicitly addressed whether federal common law or state law controls in determining the scope of the government contract defense in actions brought against federal contractors. In cases in which the plaintiff's cause of action was based on a federal claim, courts have followed *Yearsley* and other federal precedent. See, e.g., *Meyers*, 323 F.2d at 583; *O'Grady*, 474 F. Supp. at 187-88. In cases in which the cause of action was based on state law, however, courts have seemed disposed to follow state precedent. See, e.g., *Merritt*, 295 F.2d at 16; *Green*, 362 F. Supp. at 1264-65.

Since *Yearsley*, a long line of cases has recognized the government contract defense in public works cases involving federal and state contractors.¹³³ The defense provides that one who contracts with a public body for the performance of public work is not liable for damages resulting incidentally or necessarily from the performance of the contract, although he will be liable if the damage results from the negligent manner in which the work is completed.¹³⁴ Thus, if a contractor complies with the government's plans and specifications and if the act or failure to act which causes an injury results from some inadequacy in the specifications rather than from the negligent manner of doing the work, the government contract defense protects the contractor from liability.¹³⁵ In this respect, courts frequently characterize the government contract defense as a "sharing" of the government's immunity by the contractor.¹³⁶

Various rationales have been offered to support the defense. In *Yearsley*, the Court implied that it was improper to look to the contractor for payment, since he merely was carrying out his duty as an agent or officer of the government.¹³⁷ Some courts have reasoned that if the contractor were not provided with immunity, nuisance actions effectively could tie the government's hands.¹³⁸ Other courts have reasoned that refusing to allow the contractor to

¹³³ See, e.g., *Meyers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963); *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961); *O'Grady v. City of Montpelier*, 474 F. Supp. 186, 187 (D. Vt. 1979); *Green v. ICI America, Inc.*, 362 F. Supp. 1263, 1265 (E.D. Tenn. 1973); *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965); see also cases cited in Annot., 9 A.L.R.3d 382 (1966). Although the annotation includes the *Ryan* case, the author, for reasons already discussed, feels that *Ryan* represents another line of cases involving the contract specification defense. See text and notes at notes 27-30 *supra*.

¹³⁴ *Green*, 362 F. Supp. at 1265.

¹³⁵ *Merritt, Chapman & Scott Corp.*, 295 F.2d at 16.

¹³⁶ E.g., *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 792 (E.D.N.Y. 1980). Since the government contract defense frequently is characterized as a sharing of the government's immunity, it has been suggested that the contractor's immunity may exist only when the government itself is immune. See, e.g., *Green*, 362 F. Supp. at 1266-67; *Littlehale*, 268 F. Supp. at 803 n.17; Annot., 9 A.L.R.3d 382, 385 (1966). It is not clear that the government contract defense is so restricted, however. In *Yearsley* and other cases, courts have implied that the government might be liable when the contractor is not. *Yearsley*, 309 U.S. at 21-22. See *Jemison v. The Duplex*, 163 F. Supp. 947, 949-51 (S.D. Ala. 1958). This result seems consistent with RESTATEMENT (SECOND) OF TORTS § 895D, comment j (1965) which states:

As a general rule, the immunity of a public officer is coterminous with that of his government. But this is not necessarily true . . . [D]uties or obligations may be placed on the government that are not imposed on the officer and statutes sometimes make the government liable when its employees are immune.

Furthermore, some courts seem to characterize the government contract defense as a defense rather than an immunity, which suggests that it may be available regardless of the government's immunity. See, e.g., *Merritt*, 295 F.2d 14 (9th Cir. 1961). Other courts have characterized the defense more as a privilege, reasoning that technically a contractor is not entitled to a government's immunity. See *Valley Forge Gardens, Inc. v. James F. Morissey, Inc.*, 385 Pa. 477, 483-84, 123 A.2d 888, 891 (1956). Regardless of whether the defense is characterized as a defense, immunity or privilege, the effect is essentially the same, in that it allows a contractor to avoid liability for acts performed pursuant to a government contract.

¹³⁷ *Yearsley*, 309 U.S. at 21-22. The Court expected that if the damage to the plaintiff's property actually constituted a taking of property under the fifth amendment, the government would compensate the plaintiff. *Id.*

¹³⁸ See, e.g., *Green*, 362 F. Supp. at 1265-66, where the court, quoting from *Chattanooga*

share in the government's immunity would undermine the "discretionary function" exception to the Federal Tort Claims Act.¹³⁹ For example, it has been suggested that if contractors were held liable, they would increase their prices to cover the risk of loss from possible damage actions.¹⁴⁰ The cause of this risk, however, would be compliance with the decisions of executive officers authorized to make policy judgments.¹⁴¹ This arrangement is said to be unsatisfactory because the government would be paying, through higher contract prices, for claims which the "discretionary function" exception was designed to avoid.¹⁴²

Certain aspects of the government contract defense need to be emphasized in order to comprehend its scope and limitations. First, although there is authority to the contrary,¹⁴³ there is some indication in cases involving state contractors that the defense may be effective even if the government's specifications were obviously defective and dangerous.¹⁴⁴ In contrast, the contract

& Tenn. River Power Co. v. Lawson, 139 Tenn. 354, 373, 201 S.W. 165, 169 (1917), stated that private corporations engaged in works of internal improvement must be insulated from nuisance actions. The court reasoned that the government has the right to erect public improvements and therefore has the right to employ servants who will be free from suit where they act strictly in the line of their employment. *Id.* The court stated that if the rule were to the contrary, it would be impossible for the United States to serve the public by the erection of great works of internal improvement for the benefit of all. *Id.*

¹³⁹ See, e.g., *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965). See note 1 *supra*, for an explanation of the "discretionary function" exception of the FTCA.

¹⁴⁰ *Dolphin Gardens*, 243 F. Supp. at 827.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See, e.g., *Lydecker v. Board of Chosen Freeholders*, 91 N.J.L. 622, 626, 103 A. 251, 253 (1918); *Hamilton v. Harkins*, 146 Cal. App.2d 566, 573-74, 304 P.2d 82, 87-88 (1956).

¹⁴⁴ E.g., *Engler v. Aldridge*, 147 Kan. 43, 45-48, 75 P.2d 290, 292-93 (1938). In *Engler*, this issue was specifically raised. The plaintiff alleged that plans and specifications provided to a contractor for highway improvements were so fundamentally defective and so obviously unsound from an engineering standpoint that an ordinary prudent man could have foreseen that the plans and specifications would cause unnecessary damage to the plaintiff's land. *Id.* at 45, 75 P.2d at 292. Nevertheless, the Supreme Court of Kansas held that the contractor was entitled to share the immunity of the state. *Id.* at 48, 75 P.2d at 293. The court reasoned that the contractor was obligated by his contract and bound to perform according to the plans and specifications furnished by the state. *Id.* at 46, 75 P.2d at 292. The contractor could neither change the plans nor quit the work, even though he believed the improvement as projected was bad from an engineering standpoint. *Id.* The court also based its holding in part on the principle that an independent contractor is not liable to a third person for injuries which occur after the work has been completed and accepted by the contractor. *Id.* at 47, 75 P.2d at 293. In a subsequent case, *Talley v. Skelly Oil Co.*, 199 Kan. 767, 433 P.2d 425 (1967), the Supreme Court of Kansas disapproved of *Engler* to the extent that it had relied on the rationale pertaining to completed and accepted work. *Talley*, 199 Kan. at 776-78, 433 P.2d at 432-34. The court, however, left intact its holding in *Engler*, pointing out that there were other grounds for the holding. *Talley*, 199 Kan. at 778, 433 P.2d at 434. See also *Barnthouse v. California Steel Bldgs. Co.*, 215 Cal. App.2d 72, 76-78, 29 Cal. Rptr. 835, 838 (1963) (concurring opinion interpreted majority holding to be that compliance with specifications was a complete defense; concurring judge would have allowed jury to consider whether the specifications were obviously defective and dangerous); *Sherman v. Miller Constr. Co.*, 90 Ind. App. 462, 465, 467, 158 N.E. 255, 256 (1927) (plaintiff had no cause of action against defendant contractor even though complaint alleged that defendant knew that construction of school entryway in accordance with plans would constitute a menace and danger).

Although few cases have expressly stated that a contractor is protected even if the

specification defense permits recovery when the specifications are obviously defective and dangerous.¹⁴⁵ Second, the defense is available only when the act which caused the damage was compelled by the contract. The defense is not available when the act which caused the damage was subject to the discretion of the contractor.¹⁴⁶ The contract specification defense has the similar requirement that the act or omission complained of must be mandated by the specifications and not be subject to the discretion of the contractor.¹⁴⁷ Third, many courts have held that the government contract defense does not shield a contractor from liability when the contract requires him to engage in

specifications are obviously dangerous, a close reading of the cases suggests this conclusion. See cases cited in Annot., 9 A.L.R.3d 382 (1966). In the first place, the overwhelming majority of courts fail to append any "unless obviously dangerous" exception onto their statement of the defense. *E.g.*, *Green v. ICI America, Inc.*, 362 F. Supp. 1263, 1265-66 (E.D. Tenn. 1973). It is doubtful that the failure to do so has been inadvertent or has resulted merely from a desire not to address the issue unless it is raised. Second, many of the public works cases involved inverse condemnation actions in which contractors were acting pursuant to contracts with public bodies authorized to exercise the power of eminent domain. *E.g.*, *O'Grady v. City of Montpelier*, 474 F. Supp. 186, 187 (D. Vt. 1979). If the defense failed whenever the likelihood of damage to property was "obvious," the defense would have had little usefulness to such contractors. Large scale public works projects almost inevitably involve personal property damage. See note 138 *supra*.

¹⁴⁵ See text and note at note 21, *supra*.

¹⁴⁶ See, *e.g.*, *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961). In *Merritt*, the court said:

We find nothing in the record either by way of terms of the contract, or even 'in the context of surrounding circumstances,' to convince us that the appellants were required by any government directive or authority to do that which was charged against them as negligent acts. . . . It is elementary that [government] compulsion must exist before the 'government contract defense' is available.

Id.

The requirement of compulsion may be a difficult standard to apply in a case where a plaintiff bases his claim not on some act of the defendant done pursuant to the contract, but on a claimed omission not specifically required by the contract. The question in this case is whether a contractor, given a fairly complete set of specifications, is responsible for providing safeguards absent from the specifications. At least one court appears to have answered this question in the negative. In *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965) the court held that:

The question of foreseeability of harm and the possible need to protect against it arose when the Government framed its terms. There is no charge that what the contractor did was not what it was required to do. Rather, it is that it was negligent in failing to provide some safeguard against the subsequent escape of the fumes. Yet, as stated above, this was a decision which rested with the Government. The Government did not provide for such additional precautions in the plans, and the Western Contracting Corp. is not to be held liable for this omission.

Id. at 827. On closer examination, however, it is not clear that the court intended that contractors could escape liability for allegedly negligent omissions more easily than for allegedly negligent acts not explicitly required by the relevant specifications. Earlier in the opinion, the court found that the government's failure to specify precautions was the result of the government's exercise of a discretionary function. *Id.* Thus, the ability of a contractor to escape liability for the omission of a safeguard may turn on whether the omission was the result of an affirmative decision by the government not to require the safeguard. It would seem, therefore, that in cases involving claimed omissions, courts may have to determine whether the government's specifications were intended to be all-inclusive. In making this determination, it may be useful to ascertain whether the government provided the contractor design specifications or performance specifications. See text and note at note 52 *supra* for a discussion of design versus performance specifications.

¹⁴⁷ See text and notes at notes 49-59 *supra*.

"ultrahazardous" or "inherently dangerous" activity.¹⁴⁸ The position of the courts in many of these cases arguably can be reconciled with the principles of the government contract defense on the grounds that there was no specific direction by the government as to the manner and place in which the activity was to be conducted.¹⁴⁹ Some courts, however, have laid down a broad rule, rejecting the defense in cases involving ultrahazardous activities even when the government has provided specific directions.¹⁵⁰

Thus, the essential difference between the government contract defense and the contract specification defense is that the government contract defense may be broader, possibly barring recovery even where government specifications are obviously defective or dangerous.¹⁵¹ Until recently, however, the government contract defense does not appear to have been recognized in products liability actions. Rather, the defense had been raised exclusively in cases involving public works projects.¹⁵² Typically, the defense has been successful against claims of inverse condemnation,¹⁵³ nuisance,¹⁵⁴ trespass,¹⁵⁵ and negligent destruction of property.¹⁵⁶ In public works cases involving personal injury claims, however, the government contract defense generally has not been successful.¹⁵⁷ Where contractors have sought to avoid liability for personal injuries by raising the defense of shared immunity, courts usually have found that the contractor was negligent in the performance of actions not specifically required by the contract.¹⁵⁸ Occasionally, courts have strained to

¹⁴⁸ See, e.g., *Lowry Hill Properties, Inc. v. Ashbach Constr. Co.*, 291 Minn. 429, 436-37, 194 N.W.2d 767, 772 (1971), and cases cited in Annot., 9 A.L.R.3d 382, 402-09 (1966). But see *Pumphrey v. J.A. Jones Constr. Co.*, 250 Iowa 559, 567-71, 94 N.W.2d 737, 741-43 (1959).

¹⁴⁹ See *Berg v. Reaction Motors Div.*, 37 N.J. 396, 417-18, 181 A.2d 487, 497-98 (1962).

¹⁵⁰ See, e.g., *Smith v. Lockheed Propulsion Co.*, 247 Cal. App.2d 774, 790-91, 56 Cal. Rptr. 128, 140-41 (1967); *Ellison v. Wood & Bush Co.*, 170 S.E.2d 321, 325 (W. Va. 1969); *Lowry Hill Properties, Inc. v. Ashbach Constr. Co.*, 291 Minn. 429, 434-37, 194 N.W.2d 767, 771-72 (1971). In *Lowry*, it appears that the court could have narrowed its decision by holding that the contractor in that case had discretion to use alternative and safer means to accomplish the construction. Instead, the court flatly held that the immunity defense is not available in the case of ultrahazardous activities. *Id.* at 436-37, 194 N.W.2d at 772.

¹⁵¹ See text and notes at notes 143-44 *supra*.

¹⁵² See text and note at note 123 *supra*.

¹⁵³ See, e.g., *O'Grady v. City of Montpelier*, 474 F. Supp. 186 (D. Vt. 1979).

¹⁵⁴ See, e.g., *Green v. ICI America, Inc.*, 362 F. Supp. 1263 (E.D. Tenn. 1973).

¹⁵⁵ See, e.g., *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963).

¹⁵⁶ See, e.g., *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir. 1961).

¹⁵⁷ See, e.g., *Dick v. Scott Constr. Co.*, 539 S.W.2d 688, 692 (Mo. App. 1973); *Best v. Fred Weber Constr. Co.*, 525 S.W.2d 102, 108 (Mo. App. 1975); *Transcon Lines v. Cornell Constr. Co.*, 539 P.2d 1372, 1376 (Okla. 1975); *Toler v. Hawkins*, 188 Okla. 58, 105 P.2d 1041, 1042-43 (1940); *Strakos v. Gehring*, 360 S.W.2d 787, 794 (Tex. 1962); *Clifton v. Struck Constr. Co.*, 2 Ohio Op. 142, 144 (C.P. 1935). See cases cited in Annot., 9 A.L.R.3d 382 (1966). But see *Sherman v. Miller Constr. Co.*, 90 Ind. App. 462, 467, 158 N.E. 255, 256 (1927); *Cobb v. Waddington*, 154 N.J. Super. 11, 18-19, 380 A.2d 1145, 1148-49 (1977), *cert. denied*, 76 N.J. 235, 386 A.2d 859 (1978).

¹⁵⁸ See, e.g., *Dick*, 539 S.W.2d at 692; *Best*, 525 S.W.2d at 108; *Transcon Lines*, 539 P.2d at 1376; *Strakos*, 360 S.W.2d at 794.

reach this result.¹⁵⁹ Thus, in view of the history of the government contract defense, it is clear that the defense traditionally has not been associated with products liability case law. In several recent products liability cases, however, courts have relied on the government contract defense to bar recovery for design defects. These recent cases will be examined in order to determine the reasons cited by the courts for extending the government contract defense to products liability cases.

2. Recent Cases: Defectively Designed Military Products

In several recent cases, the government contract defense has been raised in an effort to defeat products liability actions. Coincidentally, all these cases have involved the sale of military equipment or materials to the government, and all the plaintiffs in these cases have grounded their suits on a theory of strict liability.¹⁶⁰ Although there has been some ambiguity in the courts' holdings, most courts have held that the defense successfully can be invoked in such cases.

Foster v. Day & Zimmerman, Inc.,¹⁶¹ appears to be the first case to have addressed the applicability of the government contract defense to a products liability action brought against a federal contractor.¹⁶² In *Foster*, the plaintiff

¹⁵⁹ See, e.g., *Best*, 525 S.W.2d 102, 108 (Mo. App. 1975). In *Best*, the plaintiff, who had been injured when the driver of the car in which she was riding did not see a sharp curve at the top of a highway ramp, sued the contractor who constructed the ramp because no warning signs were visible. *Id.* at 105. The contractor tried to introduce evidence that the ramp had been constructed in compliance with specifications of the State Highway Department and that a state engineer had supervised all work, including the number and location of warning devices and had ordered the defendant to open the ramp before subcontractors installed guardrails and permanent signs. *Id.* at 107. The Missouri Court of Appeals, however, held that the evidence was properly excluded. *Id.* at 108. The court stated that the defendant was merely trying to shift onto the state a "non-delegable" duty of care which existed in spite of any contractual requirements. *Id.* It seems difficult to reconcile an independent duty of care on the part of the contractor with the government contract defense. Such a duty seems to make compliance with state specifications an irrelevant factor. See also *Transcon Lines v. Cornell Constr. Co.*, 539 P.2d 1372, 1376 (Okla. 1975). Cf. *Clifton v. Struck Constr. Co.*, 2 Ohio Op. 142, 144 (C.P. 1935) (plaintiff's motion to strike that portion of defendant's answer raising the government contract defense granted; defendant would be liable for any negligent acts whether or not they were caused by following the discretion of state architects).

¹⁶⁰ In several cases plaintiffs sued on other theories of recovery as well.

¹⁶¹ 502 F.2d 867 (8th Cir. 1974).

¹⁶² A variation of the government contract defense was considered in *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969), *reh'g denied*, 424 F.2d 549, 551 (5th Cir. 1970), decided several years previous to *Foster*. In *Whitaker*, the plaintiff, a former serviceman, had been injured during basic training when a grenade prematurely exploded. *Id.* at 1012. He sued the grenade and fuse manufacturers on theories of negligence, strict liability and, breach of warranty, alleging defective manufacture of the grenade. *Id.* Both defendant manufacturers claimed that they were immune from suit because they were agents of the government, and therefore their actions had been the actions of the United States. *Id.* at 1013-14. In support of its claim of agent status, one of the defendants, Day & Zimmerman, claimed that its facility was wholly owned by the government, that all component parts of the product had been the property of the government, and that the assembly of the grenades had rigidly followed the government specifications. *Id.* at 1013. The United States Court of Appeals for the Fifth Circuit rejected the

had been injured when a hand grenade exploded in his hand while he was undergoing an army training exercise.¹⁶³ He sued the grenade and fuse manufacturers on a theory of strict liability and obtained a judgment in his favor.¹⁶⁴ On appeal the defendants claimed that they were protected from liability by the government contract defense.¹⁶⁵ The United States Court of Appeals for the Eighth Circuit noted that the government contract defense had been recognized in cases involving the construction of public improvements,¹⁶⁶ but rejected the defendants' claim to the defense.¹⁶⁷ The court stated: "The doctrine of sovereign immunity may not be extended to cover the fault of a private corporation"¹⁶⁸ In a footnote, however, the court stated that "[t]he government's specifications did not call for the defendants to assemble a defectively made grenade."¹⁶⁹ Thus, the court apparently left open the possibility that a manufacturer could invoke the defense where an injury-causing defect can be traced to nondiscretionary government specifications. The court's refusal to allow the defense in *Foster* thus seems attributable to the court's determination that the defect was one in manufacture and not in design.¹⁷⁰

defendant's claim that it was acting as the agent of the government, relying on a prior Supreme Court ruling that Day & Zimmerman was an independent contractor under the Fair Labor Standards Act. *Id.* at 1014. The court also noted that the government contract expressly stated that the defendant was not an agent. *Id.* Thus, it appears that the defense rejected by the court was a slightly different version of the shared immunity defense discussed above. The defendants do not appear to have claimed the limited form of shared immunity, applicable to contractors sued in their individual capacity. Rather, they seem to have claimed that such a close agency relationship existed between themselves and the government that the suit amounted to a suit against the *United States* and therefore the suit should have been barred under the doctrine of sovereign immunity. Compare RESTATEMENT (SECOND) OF TORTS § 895A, comment c (1965) with RESTATEMENT (SECOND) OF TORTS § 895D (1965).

¹⁶³ *Foster*, 502 F.2d at 869.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 873.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 874.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 874 n.5.

¹⁷⁰ It should be noted that apparently there is nothing in either the government contract defense or the contract specification defense which automatically prevents a manufacturer from raising the defense in cases involving manufacturing as opposed to design defects. The defenses are not phrased in terms of a design/manufacturing defect dichotomy. It is clear, however, that a manufacturer would have an uphill battle in convincing a court that it had no discretion in its manufacturing process, or that the manufacture of the product was entirely mandated by the contract specifications. Nevertheless, a few manufacturers, including Day and Zimmerman, have raised the defenses in such situations, with mixed results. *Id.* at 873. See, e.g., *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964). *Montgomery* was an admiralty action which arose out of the crash of a navy dirigible allegedly caused by faulty manufacture of the dirigible. *Id.* at 449. The defendant argued that the government had exercised almost complete control over manufacture and that the work had been completed according to specifications and under the government's inspection. *Id.* at 451. The court refused to grant summary judgment for the defendant, stating that there was a question of fact as to whether the government had directed the exact methods to be used in manufacturing the dirigible. *Id.* See also *Maryland Cas. Co. v. Independent Metal Prod. Co.*, 203 F.2d 838 (8th Cir. 1953). *Maryland*

Although the *Foster* court did not explicitly recognize the viability of the government contract defense, several other courts have held that the defense can be invoked successfully in a strict liability action involving defective military products.¹⁷¹ For example, in *Sanner v. Ford Motor Co.*,¹⁷² a passenger in an army jeep was thrown from the jeep and injured.¹⁷³ The jeep had been manufactured by Ford in accordance with government specifications.¹⁷⁴ The passenger sued Ford on a strict liability theory, claiming that the jeep was defectively designed because it had no seat belts and no rollbar.¹⁷⁵ The defendant claimed that it was immune from liability because it had manufactured the jeep in strict conformance with government specifications.¹⁷⁶ The Superior Court of New Jersey, citing cases involving both the contract specification and the government contract defenses, held that Ford could not be held liable.¹⁷⁷ Because the court cited to both lines of cases without clearly indicating which line it was adopting, the doctrinal basis for its holding is somewhat ambiguous. It probably is significant, however, that the court did not inquire whether the alleged defect was obviously dangerous, that it relied heavily on considerations of public policy, and that it spoke in terms of the manufacturer being "insulated from liability."¹⁷⁸ These aspects of the decision, together with the defendant's claim of immunity, indicate that the court probably adopted the government contract defense.

The New Jersey Superior Court, Appellate Division, affirmed the superior court's decision.¹⁷⁹ The court interpreted the trial court's decision to mean that a defendant who has manufactured a product in strict compliance with government specifications cannot be held liable for any defect in the product "under any circumstances."¹⁸⁰ This interpretation by the appellate court tends to confirm that both the trial court and appellate court adopted the government contract defense. The court stated that although the cases upon which the trial court relied involved negligence actions, the underlying policy reasons for shielding a manufacturer from liability for acts done in manufactur-

Cas. Co. was a private contract case in which a defense similar to the contract specification defense was raised. The court held that where the manufacturer was given plans for a gasoline trailer tank by the purchaser, where every phase of manufacture was supervised by the purchaser, who had authority to reject work for defects in material and workmanship, and where the purchaser did not require the manufacturer to make tests or inspections but did so itself, the manufacturer was not liable for failing to discover a piece of welding rod in the tank which subsequently lodged in a valve and prevented its closing. *Id.* at 843-44.

¹⁷¹ See text and notes at notes 172-228 *infra*.

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

¹⁷³ *Sanner*, 144 N.J. Super. at 3, 364 A.2d at 43-44.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 5, 364 A.2d at 44-45.

¹⁷⁶ *Id.* at 4-5, 364 A.2d at 44.

¹⁷⁷ *Id.* at 8-9, 364 A.2d at 46-47.

¹⁷⁸ *Id.*

¹⁷⁹ *Sanner v. Ford Motor Co.*, 154 N.J. Super. at 410, 381 A.2d at 806.

¹⁸⁰ *Id.* at 409, 381 A.2d at 806.

ing a product according to government plans were equally applicable to suits brought under a theory of strict liability.¹⁸¹ Presumably, the policy reasons referred to by the court were those discussed by the lower court. One such reason relied upon by the trial court was that imposing liability "would seriously impair the governments [sic] ability to formulate policy and make judgments pursuant to its war powers. The government is the agency charged with the responsibility of deciding the nature and type of military equipment that best suits its needs, not a manufacturer such as Ford."¹⁸² The lower court also quoted the passage from *Dolphin Gardens, Inc. v. United States*,¹⁸³ which noted that imposing liability on manufacturers would undermine the policy behind the FTCA and would raise contract prices.¹⁸⁴ Both the appellate and trial courts emphasized that Ford was entitled to the protection of the government contract defense because under the terms of the contract it could not exercise discretion in determining whether to provide the safety features.¹⁸⁵ The trial judge found that there had been a conscious, intentional determination by the United States government that the installation of seat belts would be incompatible with the intended use of the vehicle.¹⁸⁶

In 1980, two courts followed the *Sanner* court's lead and acknowledged the applicability of the government contract defense to products liability actions. In *Casabianca v. Casabianca*,¹⁸⁷ an infant plaintiff severely injured his hand in a machine in his father's pizza shop.¹⁸⁸ The machine had been built according to army specifications for use in field kitchens during World War II.¹⁸⁹ The plaintiff sued the manufacturer of the machine under theories of negligence, strict liability and breach of warranty, alleging that the design of the machine was faulty.¹⁹⁰ In granting the manufacturer's motion for summary judgment, the Supreme Court of Bronx County, New York held that the manufacturer's adherence to the government's specifications provided it a complete defense to any action based upon design, whether the design was faulty or not.¹⁹¹ The court stated that a supplier to the military in time of war has a right to rely upon specifications and is not obligated to withhold from the United States

¹⁸¹ *Id.* at 409-10, 381 A.2d at 806.

¹⁸² *Sanner*, 144 N.J. Super. at 9, 364 A.2d at 47.

¹⁸³ 243 F. Supp. 824 (D. Conn. 1965).

¹⁸⁴ *Sanner*, 144 N.J. Super. at 9, 364 A.2d at 47.

¹⁸⁵ *Id.* *Sanner v. Ford Motor Co.*, 154 N.J. Super. at 410, 381 A.2d at 806.

¹⁸⁶ *Id.*

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

¹⁸⁸ 104 Misc. 2d at 349, 428 N.Y.S.2d at 401.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 350, 428 N.Y.S.2d at 402. The court seems to have implied that compliance with specifications is a complete defense even to an action based on breach of warranty. The court cited no authority for this proposition, however. The court first disposed of the breach of warranty claim by saying that there was no privity between the parties, but went on to say that "... all of the causes of action alleged appear to involve an issue ... not previously determined ... in this state" *Id.* at 349, 428 N.Y.S.2d at 401. The court then decided that conformance with specifications is a complete defense to "any" action based on design. *Id.* at 350, 428 N.Y.S.2d at 402.

armed forces material believed by the government to be necessary even if the manufacturer considers the design to be imprudent or dangerous.¹⁹² Thus, the court echoed the *Sanner* court's concern with the prospect of manufacturers, and consequently courts, sitting in judgment over military policy decisions.¹⁹³ In view of the court's statement that compliance with specifications is a complete defense, even if the manufacturer believes the specifications to be imprudent or dangerous, it seems evident that the court adopted some version of the government contract defense. This conclusion is buttressed by the court's reference to the defense in *Casabianca* as an "immunity" which attaches to government procurements for military purposes or in time of war.¹⁹⁴

The most recent case dealing with the government contract defense is *In re Agent Orange Product Liability Litigation*.¹⁹⁵ The plaintiffs, Vietnam war veterans and members of their families, claimed to have suffered injuries resulting from the veterans' exposure in Vietnam to a variety of herbicides, including Agent Orange.¹⁹⁶ The plaintiffs sued the manufacturers of Agent Orange, asserting numerous theories of liability, including strict liability, negligence, and breach of warranty.¹⁹⁷ The defendants moved for summary judgment, asserting the government contract defense.¹⁹⁸ They claimed that they had manufactured Agent Orange in strict compliance with government specifications, and that the specifications had contained no obvious or "glaring" defects.¹⁹⁹ The defendants also claimed that the government had invented Agent Orange, had experimented with herbicides, and had known of the product's dangers.²⁰⁰ In addition, the defendants claimed that they had been compelled to manufacture and sell Agent Orange at a price set by the government²⁰¹ under the authority of the Defense Production Act.²⁰²

¹⁹² *Id.* at 350, 428 N.Y.S.2d at 402.

¹⁹³ See text and note at note 182 *supra*.

¹⁹⁴ *Casabianca*, 104 Misc. 2d at 350, 428 N.Y.S.2d at 402.

¹⁹⁵ 506 F. Supp. 762 (E.D.N.Y. 1980); 534 F. Supp. 1046 (E.D.N.Y. 1982).

¹⁹⁶ 506 F. Supp. at 768.

¹⁹⁷ *Id.* at 769.

¹⁹⁸ *Id.* at 792.

¹⁹⁹ *Id.* at 795. By asserting that the specifications contained no obvious defects, the defendants apparently attempted to protect themselves from the possibility that a defense similar to the contract specification defense would be applied instead of a complete defense.

²⁰⁰ *Id.* at 794-95.

²⁰¹ *Id.*

²⁰² 50 U.S.C. app. § 2061-2169 (1976). Section 2071 of the Act provides in pertinent part:

The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by a person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

50 U.S.C. § 2071. Penalties for violating § 2071 are provided in § 2073:

The United States District Court for the Eastern District of New York recognized the viability of the government contract defense under the facts presented in the *Agent Orange* case, but it denied defendants' motion for summary judgment because there still were unresolved questions of fact concerning whether the defendants had satisfied the elements necessary to invoke the defense.²⁰³ In reaching its decision the court relied primarily on the line of cases involving public works projects.²⁰⁴ The court reasoned that tort principles seek to impose liability on a wrongdoer whose act or omission caused the injury and not on an "innocent" contractor.²⁰⁵ The court also cited *Dolphin Gardens*²⁰⁶ for the proposition that to impose liability would increase contract prices and subvert the government's immunity.²⁰⁷ The court then added a significant reason for its decision:

These considerations take on increased significance when the government contracts with manufacturers of military ordnance in wartime. Where, as here, manufacturers claim to have been compelled by federal law to produce a weapon of war without ability to negotiate specifications, contract price or terms, the potential for unfairly imposing liability becomes great. Without the government contract defense a manufacturer capable of producing military goods for government use would face the untenable position of choosing between severe penalties for failing to supply products necessary to conduct a war, and producing what the government requires but at a contract price that makes no provision for the need to insure against potential liability for design flaws in the government's plans.²⁰⁸

Thus, the court concluded that basic fairness outweighs imposing liability on manufacturers who are compelled by the full powers of the government to produce a defective product. The court quoted approvingly that portion of the court's opinion in *Casabianca v. Casabianca*²⁰⁹ which stated that a manufacturer's adherence to government specifications is a complete defense to any action based on defective design, regardless of whether the design is faulty or whether the manufacturer considers the design imprudent or dangerous.²¹⁰

Despite the *Agent Orange* court's reliance on the broad expression of the government contract defense contained in the *Casabianca* opinion, the court issued a subsequent opinion which somewhat narrowed the circumstances in

Any person who willfully performs any act prohibited, or willfully fails to perform any act required, by the provisions of this title [§§ 2071-2074 of this appendix] or any rule, regulation, or order thereunder, shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

²⁰³ 506 F. Supp. at 796.

²⁰⁴ *Id.* at 792-94.

²⁰⁵ *Id.* at 792-93.

²⁰⁶ *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965).

²⁰⁷ *In re Agent Orange*, 506 F. Supp. at 794.

²⁰⁸ *Id.*

²⁰⁹ 104 Misc. 2d 350, 428 N.Y.S.2d 400 (Sup. Ct. 1980).

²¹⁰ *In re Agent Orange*, 506 F. Supp. at 794.

which the defense can be raised.²¹¹ This subsequent opinion focused more closely on the elements which the defendants must establish in order to invoke the government contract defense.²¹² The defendants claimed that the government contract defense could be invoked regardless of whether the specifications contained glaring or patent defects.²¹³ The court largely rejected this contention by stating that the defendants would be able to invoke the defense only if they could prove three elements. The defendants would have to prove that the government established the specifications for the product; that the product complied with the government specifications in all material respects; and that the government knew as much as or more than the defendants did about the hazards that accompanied use of the product.²¹⁴ With respect to the third element, that the government's knowledge of a product's dangers be at least equal to that of the manufacturer, the court imposed on manufacturers a duty to warn of a product's dangers.²¹⁵ The court stated that if the manufacturers knew of hazards which might reasonably have affected the government's use of the product, and if the manufacturers failed to disclose the hazards to the government, then the government contract defense would fail.²¹⁶ Thus, it would appear that under the *Agent Orange* court's formulation of the defense, failure to warn of a product's dangers would have a two-fold effect. First, plaintiffs would presumably have a cause of action for failure to warn. Second, the failure to warn would preclude the raising of the government contract defense, thus giving rise to a cause of action for a defect in design.²¹⁷ It appears, however, that the court may have imposed on manufacturers a duty to warn only of dangers of which the manufacturers had actual knowledge.²¹⁸ The court did not explicitly state that manufacturers have a duty to warn of dangers of which they *should* have known.

By recognizing the government contract defense only in cases in which the manufacturer's knowledge of a product's dangers is not superior to that of the government, the *Agent Orange* court introduced an element not mentioned in the *Sanner* or *Casabianca* opinions. Under the *Agent Orange* court's formulation of the defense, compliance with government specifications alone does not provide a complete defense. Such compliance provides a defense only if the government's knowledge about a product is at least equal to that of the manufacturer.²¹⁹

²¹¹ *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046 (E.D.N.Y. 1982).

²¹² *Id.* at 1053-54.

²¹³ *Id.* at 1057.

²¹⁴ *Id.* at 1055.

²¹⁵ *Id.* at 1055, 1057.

²¹⁶ *Id.* at 1057.

²¹⁷ The court did not explicitly address this apparent two-fold effect. The court merely stated that in the event the defense could not be established, the litigation would proceed to issues of negligence, strict liability, causation and damages. *Id.* at 1056.

²¹⁸ *Id.* at 1055, 1057-58. Nevertheless, by placing on defendants the burden of proving that the government had as much knowledge as defendants did, the court may have made it difficult for defendants to establish the defense.

²¹⁹ *Id.* at 1055.

Thus, under the *Agent Orange* court's interpretation, it may be more difficult for manufacturers to invoke the defense.

In summary, the *Sanner*, *Casabianca* and *In re Agent Orange* cases have established the viability of the government contract defense for manufacturers of defectively designed military products. As construed in *Casabianca* and *In re Agent Orange*, the government contract defense bars actions for defective design based on *any* theory of recovery, including negligence, strict liability and breach of warranty.²²⁰ In contrast, there is a split of authority on the issue whether the contract specification defense can be invoked in a strict liability action.²²¹ In addition, the government contract defense, as construed by the *Sanner* and *Casabianca* courts, bars recovery for a defect in design under any circumstances, even when the design is faulty, and even when the manufacturer considers the design imprudent or dangerous.²²² In contrast, the contract specification defense does not protect manufacturers where the design specifications are obviously defective and dangerous.²²³ Because the government contract defense may bar recovery for a design defect even where a design is obviously defective and dangerous, the defense may be more complete than the contract specification defense. The government contract defense may not operate as a bar to recovery in an action for failure to warn, however. One court has indicated that manufacturers who fail to disclose hazards in their products of which they are aware and of which the government is ignorant may not claim the protection of the government contract defense.²²⁴ Similarly, there is some indication that courts recognizing the contract specification defense also may impose on manufacturers a limited duty to warn of a product's dangers.²²⁵

Although the government contract defense appears to be broader than the contract specification defense, it may be limited to special circumstances. One limiting factor with respect to the availability of the government contract defense may be that the defendants in all these recent cases were manufacturers of military products. Indeed, the *Casabianca* court specifically limited its holding to procurements for military purposes in time of war.²²⁶ In addition, the

²²⁰ *Id.* at 1055-56; *Casabianca v. Casabianca*, 104 Misc. 2d 348, 350, 428 N.Y.S.2d 400, 402 (Sup. Ct. 1980). See note 191 *supra*.

²²¹ See text and notes at notes 60-94 *supra*.

²²² See text and notes at notes 180 and 191-92 *supra*.

²²³ See text and note at note 21 *supra*.

²²⁴ *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1057 (E.D.N.Y. 1982).

²²⁵ See text and notes at notes 100-06 *supra*.

²²⁶ *Casabianca*, 104 Misc. 2d at 350, 428 N.Y.S.2d at 402. It might be argued that *Sanner* and *In re Agent Orange* also limited the applicability of the government contract defense to military procurements during wartime, since the sales of the equipment took place during the Vietnam War. The appellate court in *Sanner* did not so confine its holding, however. See *Sanner v. Ford Motor Co.*, 154 N.J. Super. 407, 409-10, 381 A.2d 805, 806 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978). Furthermore, it would seem that the reasoning offered by the court in *In re Agent Orange* is equally applicable to military procurements during peacetime. For example, the court stressed the potential unfairness of imposing liability on manufacturers who were compelled to produce under the authority of the Defense Production Act. *In re Agent Orange*, 506 F. Supp. at 794. The Defense Production Act does not appear to limit the power of the government to compel production to time of war. See note 202 *supra*.

government contract defense has been successfully invoked mainly in cases in which one would expect a court to be sympathetic to a defendant's claims of unfairness. For instance, the defense has been successfully invoked when the challenged design was consciously chosen by the military agencies of the government after a weighing of the risks and benefits.²²⁷ The viability of the government contract defense in cases where a defect in design was or should have been obvious to the manufacturer but was unknown to the government seems doubtful. The court in *In re Agent Orange* stated that a manufacturer which has actual knowledge of dangerous defects and which fails to share this knowledge with the government will be unable to invoke the government contract defense.²²⁸ Thus, under the *Agent Orange* court's formulation of the defense, there may be little practical distinction between the government contract defense and the contract specification defense in those cases in which the manufacturer actually knew of the defect. The court's opinion still leaves some open questions, however. The court did not indicate whether the government contract defense would fail in cases where a defect *should* have been obvious to a manufacturer, but where the manufacturer nevertheless was not aware of the defect. Furthermore, the *Sanner* and *Casabianca* opinions did not limit the availability of the defense to cases in which the government had as much knowledge about a product's hazards as the manufacturer. Thus, it is still not clear whether the position taken by the *Agent Orange* court will be followed by other courts or whether compliance with specifications will be a complete defense regardless of the respective knowledge of the government and the manufacturer.

Nevertheless, certain tentative trends can be discerned with respect to the availability of the contract specification defense and government contract defense to manufacturers selling products to the federal government. In cases involving nonmilitary products it appears that the contract specification defense can be raised in a suit for negligent design.²²⁹ It is not clear, however, whether the contract specification defense can defeat an action brought under a theory of strict liability or breach of warranty.²³⁰ In cases involving military products, the trend is to allow the government contract defense to defeat any action for

²²⁷ The *Sanner* case clearly is in this mold. Even in *Casabianca*, the court said: "A supplier to the military in time of war has a right to rely upon such specifications and is not obligated to withhold from the United States armed forces materials *believed by the latter to be necessary*" (emphasis added). *Casabianca*, 104 Misc. 2d at 350, 428 N.Y.S.2d at 402. The court may have felt that the design specified by the government was a conscious choice. Courts can be expected to be more sympathetic where the government has made a conscious design choice, since these are the cases in which the "discretionary function" exception to the FTCA seems most clearly applicable. Courts are most likely to view a government decision as discretionary where there has been a balancing of policy considerations, such as a cost/benefit analysis or risk/utility analysis. See note 1 *supra* for a discussion of the discretionary function exception. Other types of design defects also may arise, such as those resulting from inadvertent errors or miscalculations by the government. The plight of the manufacturer in such cases may not arouse as much sympathy, however, at least where the defect was one which was or should have been obvious to the manufacturer.

²²⁸ *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1057 (E.D.N.Y. 1982).

²²⁹ See text and notes at notes 107-111 *supra*.

²³⁰ See text and notes at notes 60-98 *supra*.

defective design, regardless of the theory of recovery.²³¹ It is unclear, however, whether the government contract defense also can be successfully raised in cases involving nonmilitary products. If the government contract defense could be successfully raised by manufacturers of nonmilitary products, it would seem to make the contract specification defense superfluous.

The lack of certainty and consistency in these trends indicates that courts have not fully focused on the possible distinctions between the government contract defense and the contract specification defense. In addition, courts have not explicitly discussed whether a different standard of liability should apply to manufacturers of military products than to manufacturers of other products sold to the government. Indeed, recent cases concerning the liability of a government contractor for defectively designed products have raised more issues than they have resolved. The remainder of this note will analyze several of these unresolved issues in order to determine appropriate standards of liability for manufacturers selling products to the federal government. One question which will be analyzed is whether a manufacturer which complies with government specifications should be entitled to a complete defense in any products liability action for defective design, even where the defect was or should have been obvious to the manufacturer. Consideration will be given to whether a complete defense is justified only in cases involving the sale of military products. It will be suggested that in most cases such a complete defense is overly broad. A more limited defense, similar to the contract specification defense, will be proposed for cases involving both military and nonmilitary products. Appropriate standards for determining a manufacturer's liability for failure to warn also will be suggested. Finally, the question of whether the more limited proposed defense should be available in a strict liability or breach of warranty action as well as a negligence action will be addressed. It will be submitted that the proposed defense should be available regardless of the theory of recovery under which a plaintiff sues.

III. PROPOSED STANDARDS FOR DETERMINING A MANUFACTURER'S LIABILITY

The remainder of this note will attempt to determine the appropriate standards of liability for government contractors who manufacture defectively designed products. The first question in this inquiry is whether compliance with government specifications should provide a complete bar to any cause of action based on defective design even when a dangerous defect was or should have been obvious to the manufacturer. Some recent cases have suggested that

²³¹ See text and notes at notes 160-228 *supra*. A significant exception to this trend is *Challoner v. Day & Zimmerman, Inc.* 512 F.2d 77 (5th Cir. 1975), *vacated and remanded for misapplication of conflict of laws rules*, 423 U.S. 3 (1975). In *Challoner*, the court rejected the applicability of the contract specification defense, indicating that a manufacturer of a military product could be held strictly liable for a design defect. See text and notes at notes 68-75 *supra*. It is not clear, however, whether the government contract defense was specifically raised in *Challoner*.

compliance with government specifications operates as a complete shield for manufacturers of military products,²³² but the issue has not been definitively resolved either with respect to manufacturers of military products or with respect to manufacturers of nonmilitary products sold to the federal government. Specifically, the court in *In re Agent Orange* stated that compliance with specifications does not provide a defense unless the government's knowledge about a product's dangers is at least equal to that of the manufacturer.²³³ If compliance with specifications should be a complete defense to an action for defective design in all cases, then any further consideration of more limited defenses is unnecessary. If such a complete shield to liability cannot be justified, however, it must be determined whether a more limited defense, similar to the contract specification defense, is more appropriate, and whether it should be available in a strict liability or breach of warranty action as well as in a negligence action. In determining merit of a defense similar to the contract specification defense, the relative merit of the more restrictive version of the government contract defense adopted by the *Agent Orange* court must be considered. Furthermore, in determining the appropriate defense in design defect cases, the scope of a manufacturer's liability for failure to warn of a product's dangers also must be examined.

*A. Should Manufacture in Accordance with Government Specifications
Constitute a Complete Defense Under All Circumstances?*

In recent products liability cases involving the sale of military products to the federal government, some courts have concluded that by virtue of the government contract defense, a manufacturer who has fully complied with government specifications cannot be held liable for a product's defective design under any circumstances.²³⁴ Recovery is barred under this theory even if the product in fact is defective and was considered dangerous by the manufacturer.²³⁵ The question arises whether the adoption of such a complete defense by the courts in products liability cases was dictated by precedent, or whether it was primarily a response to serious policy concerns. If the recognition of the defense in products liability cases is the result of policy concerns, the question is whether these policy concerns justify a defense as broad as the formulation of the government contract defense articulated by some courts.

Precedent demonstrates that the government contract defense traditionally was almost entirely a creature of public works cases.²³⁶ There was virtually no precedent for extending the government contract defense to products liability actions.²³⁷ Even in the public works cases, the defense rarely was allowed in

²³² See text and note at note 222 *supra*.

²³³ See text and note at note 214 *supra*.

²³⁴ See text and notes at note 180 and notes 191-92 *supra*.

²³⁵ See text and notes at notes 191-92 *supra*.

²³⁶ See text and note at note 123 *supra*.

²³⁷ *Id.*

cases involving personal injuries.²³⁸ In addition, courts in many public works cases had held that the government contract defense should not apply to ultrahazardous activities, and that contractors which engaged in such activities are strictly liable for any damage or injury they cause.²³⁹ This background of case law hardly seems to have required the extension of the government contract defense to products liability cases. Indeed, had the courts desired not to extend the defense to products liability cases, they could have cited three reasons in this body of precedent for not extending it. First, the defense was traditionally relegated to public works cases. Second, products liability cases generally involve personal injuries, and even in the public works cases the defense rarely was allowed in cases involving personal injuries. Third, refusing to extend the government contract defense to products liability cases would have been consistent with the refusal in earlier public works cases to extend the defense to contractors engaged in ultrahazardous activities. The growth of strict liability theory in the area of products liability and the growth of strict liability theory in the area of ultrahazardous activities share a common underlying rationale. That rationale is that commercial enterprises which are in the best position to distribute the risk of harm should not be allowed to shift a ruinous loss to the shoulders of an injured and innocent plaintiff, but should "pay their way."²⁴⁰ Thus, precedent did not require extending the government contract defense to products liability cases.

Even if one accepts the public works cases as valid precedent for allowing the government contract defense in products liability actions, there is little direct support in those cases for the broad statement of the defense articulated by the court in *Casabianca*.²⁴¹ The *Casabianca* court stated that a manufacturer is not liable even if the design is defective and even if the manufacturer believes it to be dangerous.²⁴² This statement suggests that a manufacturer is shielded from liability even if the government's specifications are obviously defective and dangerous. The *Casabianca* court's reference to the defense as a "complete" defense²⁴³ supports this interpretation of the court's ruling. The *Casabianca* court cited little authority for its broad interpretations of the government contract defense, however.²⁴⁴ Moreover, the authority in the public works cases is scarce and conflicting as to whether a contractor is protected

²³⁸ See text and notes at notes 157-59 *supra*.

²³⁹ See text and notes at notes 148-50 *supra*.

²⁴⁰ See PRÖSSER, *supra* note 19, at 22, 509.

²⁴¹ *Casabianca v. Casabianca*, 104 Misc. 2d 348, 350, 428 N.Y.S. 2d 400, 402 (Sup. Ct. 1980).

²⁴² *Casabianca*, 104 Misc. 2d at 350, 428 N.Y.S.2d at 402.

²⁴³ *Id.*

²⁴⁴ The only authority cited by the *Casabianca* court which provides any support for its position was *Sanner v. Ford Motor*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978). The *Casabianca* court also cited *Hunt v. Blasius*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978). The *Hunt* court, however, adopted the contract specification defense, not the government contract defense. See note 92 *supra*.

when the government's specifications are obviously defective and dangerous.²⁴⁵

Although precedent does not appear to have mandated extending the government contract defense to products liability cases or construing the defense as broadly as the *Casabianca* court did, the fact remains that several courts recently have allowed the defense in cases involving military products. These courts apparently have been persuaded that policy considerations justified extending the scope of the defense.²⁴⁶ These policy considerations will be examined and tested for their merit in order to determine the propriety of the defense in products liability suits. In doing so, it is important to bear in mind that the question is first whether these policy considerations justify *some* limitations on the liability of manufacturers, and second whether these policy considerations justify a complete bar to recovery under all circumstances when a manufacturer complies with government specifications.²⁴⁷

Several policy reasons suggest that the shared immunity defense should protect a manufacturer who complies with the express requirements of a government contract. Strong counterarguments, however, suggest that the government contract defense as articulated by some courts is too absolute, and that tort principles can be fashioned which take account of legitimate public policy concerns while eliminating some of the potential inequities of the defense.

1. Frustration of Government Endeavors

One rationale which could be cited in support of limiting manufacturer liability is that allowing liability to be imposed on manufacturers for a design furnished by the government would result in manufacturers being either unable or unwilling to provide their products to the government. This reluc-

²⁴⁵ See text and notes at notes 143-44 *supra*.

²⁴⁶ See text and notes at notes 171-228 *supra*.

²⁴⁷ To the extent the government contract defense is viewed as a sharing of the federal government's immunity, the issue may arise whether the proper scope of manufacturer immunity is to be governed by federal common law. See note 132 *supra*. In *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 737 (E.D.N.Y. 1979) *rev'd for lack of subject jurisdiction* 635 F.2d 987 (2nd Cir. 1980), *cert. denied*, 50 U.S.L.W. 3487 (1981), the plaintiffs argued that their claims against the defendant manufacturers should be governed by federal common law. *Id.* at 743. The trial court's decision to apply federal common law was reversed on appeal. *In re Agent Orange*, 635 F.2d at 995. In *In re Agent Orange*, however, the issue was whether the plaintiffs had a federal cause of action so as to provide the district court with subject matter jurisdiction. *Id.* at 988. The court of appeals did not focus on the more narrow question whether any immunities claimed by the defendants were to be governed by federal common law. This note does not attempt to resolve whether state law or federal law should define the scope of a manufacturer's defense against actions for design defects in products sold to the federal government. It is expected, however, that similar policy concerns will guide a determination of the proper scope of a manufacturer's defense or immunity, regardless of whether the standard applied is based on federal or state law. For this reason, the discussion which follows is relevant whether the goal is to fashion a federal or state standard.

tance of manufacturers to deal with the government would inhibit the government from carrying out its essential functions. Although this rationale has not appeared explicitly in the recent products liability cases, it was expressed in the cases involving public works improvements. For example, it was suggested by one court that the availability of a private nuisance action would prevent contractors from fulfilling their public works functions.²⁴⁸ This rationale, however, is far less cogent in the area of products liability. A manufacturer already faces the threat of substantial liability for defects in the manufacturing process. Therefore, it is doubtful that the additional incremental risk of liability for defective design would prevent a manufacturer from selling a product to the government. A more likely result of an increased exposure to liability would be that manufacturers would raise their contract prices, passing on to the government the cost of added insurance. The only conceivable exception to the manufacturer's willingness to sell a product might be where a product is so dangerous that its sale might involve potentially unlimited liability against which a manufacturer would have difficulty insuring itself. The potential for unlimited liability, however, already exists in the case of manufacturing as opposed to design defects. Nevertheless, courts have not allowed any concern for the willingness of manufacturers to enter contracts to prevent them from imposing liability for manufacturing defects. Furthermore, cases of potentially unlimited liability would be rare, at least in the case of nonmilitary products. These rare cases do not justify an overly broad shared immunity defense. Any serious chilling effect on manufacturers resulting from such rare cases presumably will be noticed by government agencies seeking to award contracts. In exceptional cases, the legislature could limit liability as it did in the area of nuclear energy with the Price-Anderson Act²⁴⁹ and in the immunization area with the Swine Flue Immunization Act.²⁵⁰

2. Circumvention of the "Discretionary Function" Exception of the FTCA

An additional rationale for the government contract defense is that if liability is imposed on a manufacturer for defects in design resulting from faulty government specifications, the manufacturer will pass on to the government the cost of added insurance. Thus, in effect, the government will be paying for injuries resulting from its discretionary decisions as to design. The "discretionary function" exception to the Federal Tort Claims Act (FTCA), however, was intended to foreclose suits against the government which challenge such discretionary decisions.²⁵¹ Thus, by imposing liability on the manufacturer, the discretionary function exception to the FTCA would be circumvented. This

²⁴⁸ See text and note at note 138 *supra*. Although the court in *In re Agent Orange* did not mention this argument, the argument was present in one of the public works cases on which the court relied. *In re Agent Orange*, 506 F. Supp. at 793 (citing *Green v. ICI America, Inc.*, 363 F. Supp. 1263 (E.D. Tenn. 1973)).

²⁴⁹ 42 U.S.C. §§ 2012, 2014, 2039, 2073, 2210, 2232, 2239 (1976).

²⁵⁰ 42 U.S.C. § 247(b), (j)-(1) (1976).

²⁵¹ See note 1 *supra*.

rationale was expressed by the court in the *Sanner* case.²⁵² This rationale assumes, however, that the government in fact always would be immune from a direct suit when the government contract defense successfully is invoked by a contractor. Yet some courts have indicated that it may not be necessary for the government to be immune in order for the manufacturer to invoke the government contract defense.²⁵³ In such cases, where the government would not be immune from a direct suit, but the manufacturer could raise the defense, the manufacturer would have the benefit of a form of limited immunity in its own right.²⁵⁴ The rationale that the government contract defense is necessary to prevent circumvention of the government's immunity clearly has no merit in such cases.²⁵⁵ Where the government would be unable to claim immunity, allowing injured plaintiffs to proceed against the manufacturer obviously would not result in circumventing the government's immunity.

Even where the government would be immune from suit, however, providing a complete defense under all circumstances still is an overly broad means of preventing the circumvention of the discretionary function exception to the FTCA. For example, in some cases the government might be unable successfully to invoke the "discretionary function" exception.²⁵⁶ Nevertheless, the government still could be immune from suit under another exception to the FTCA such as the "incident to service" exception. That exception bars suits by former servicemen for injuries sustained during their service.²⁵⁷ If the government contract defense were construed as providing a complete defense under all circumstances, a plaintiff serviceman would be barred from suing the manufacturer for a defect in design. The plaintiff would be barred even though the government would be unable to invoke the discretionary function exception. This result occurs despite the elimination of any potential circumvention of the discretionary function exception. The government would be immune under the "incident to service" exception to the FTCA simply because the suit

²⁵² See text and note at note 184 *supra*. The court in *In re Agent Orange* also expressed this rationale. See text and note at note 207 *supra*. The court ultimately expressed a more limited formulation of the government contract defense, however. See text and notes at notes 211-19 *supra*.

²⁵³ See note 136 *supra*.

²⁵⁴ *Id.*

²⁵⁵ Of course, one response in this particular class of cases could be to *require* that government immunity be a condition precedent to the availability of the defense. This response, however, does not answer the remaining arguments above with respect to cases in which the government is immune.

²⁵⁶ It is by no means clear that all of the government's decisions as to design are protected by the "discretionary function" exception. Commentators have suggested that the courts in the past have been somewhat inconsistent in their approach to what constitutes a "planning level" versus an "operational level" decision. Harris & Schnepfer, *Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161, 170 (1976). Furthermore, not all defects in design are attributable to conscious policy choices. The closer the defect comes to an inadvertent error in drafting the specifications as opposed to a conscious planning choice, the less likely that it would fall within the parameters of the discretionary function exception. See *id.* at 117-72.

²⁵⁷ See text and note at note 1 *supra*.

was brought by a serviceman. A possible justification for this result is the policy of preventing a manufacturer from passing on to the government the cost of added insurance in *any* circumstance in which the government would be immune from suit, regardless of whether immunity is predicated on the discretionary function exception to the FTCA or some other exception. Yet this argument does not withstand scrutiny. In the hypothetical situation just described, the serviceman who would be prevented by the government contract defense from suing the manufacturer for a defect in design could sue the manufacturer if the defect were one in manufacture.²⁵⁸ The serviceman could sue even though the manufacturer might pass along to the government the added cost of insuring itself against such claims of mismanufacture. The passing on of such costs is tolerated even though it tends to undermine the government's immunity from suit under the "incident to service" exception to the FTCA. Other cases also can be found in which courts have accepted some circumvention of the government's immunity.²⁵⁹ Thus, there are cases in which the inequities of not providing a remedy to injured plaintiffs are thought to justify some potential circumvention of government immunity. Nevertheless, the acceptance of such circumvention in some cases does not mean that the factor of circumvention of the government's immunity should be disregarded entirely in fashioning appropriate standards of liability. Although providing a complete defense under all circumstances is an overly broad means of preventing circumvention of the discretionary function exception, the courts have a legitimate concern for avoiding such circumvention as long as compelling countervailing considerations are absent.

3. Increased Cost of Government Contracts

Closely related to the circumvention of the FTCA rationale is the concern expressed in *Casabianca*²⁶⁰ that imposing liability on the manufacturer who fully complies with government specifications will cause manufacturers to shift the added cost of insurance to the government, increasing the cost of government contracts.²⁶¹ This rationale cannot withstand scrutiny. It is in the nature of the insurance and private enterprise system that manufacturers pass on to the pur-

²⁵⁸ See text and note at note 170 *supra*.

²⁵⁹ For example, such circumvention occurs in the case of ultrahazardous activities when public works contractors are prevented from invoking the government contract defense. See text and notes 148-50 *supra*. Presumably, the cost of insurance is passed on to the government in these cases, even though, had the government undertaken the work itself, it could not be held strictly liable. See *Berg v. Reaction Motors Div., Thiokol Chem. Corp.*, 37 N.J. 396, 416, 181 A.2d 487, 497 (1962), in which the court rejected the argument that the government would have been immune had it undertaken rocket testing and that therefore the defendant contractor should not be held strictly liable because he might pass the cost of insurance on to the government. *Id.* The court considered such potential circumvention not controlling, since contractors who are negligent likewise might pass on premiums or related costs but admittedly may not take advantage of the government's immunity. *Id.*

²⁶⁰ *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980).

²⁶¹ *Id.* at 350, 428 N.Y.S.2d at 402.

chasers of their products the costs attributable to products liability suits.²⁶² Whether these purchasers be individual consumers or the government, they pay for the cost of the manufacturer's insurance against risk of liability as reflected in the cost of goods and services.²⁶³ Thus, the government already pays higher contract prices than it otherwise would pay in order to insure manufacturers against the threat of liability inherent in existing tort law. In other words, the increased costs paid by the government are the unavoidable consequence of standards of liability created and modified over a number of years. Therefore, just as the increased contract prices incident to existing tort law would not justify insulating manufacturers from existing tort liability for manufacturing defects, so too the threat of increased costs is not a sufficient rationale for allowing the government contract defense to protect manufacturers against actions for defective design. Perhaps an argument can be made that considerations of cost should at least be a factor in determining whether to increase a manufacturer's liability for military products. Substantial increases in cost for military products could place a drain on the Treasury during wartime, when the nation can ill afford it. This argument is considered more fully in the following section.

4. Impairment of the Government's Ability to Formulate Policy in Wartime

In the recent cases involving suits against manufacturers of military products, the courts have shown a concern for impairing the government's ability to carry out its war powers effectively.²⁶⁴ This concern may be a significant policy reason for providing some limitations on the liability of manufacturers for injuries caused by defects in government designs. This article has suggested that the increased costs to the government and the potential unwillingness of manufacturers to contract with the government under a rule permitting manufacturer liability for design defects do not compel the adoption of a government contract defense, at least with respect to nonmilitary contracts.²⁶⁵ In the case of military products, however, such considerations are more significant. Defectively designed military products by their nature have a particularly great potential for causing large numbers of personal injuries.²⁶⁶ Exposing manufacturers to liability for defects in the government's design of these products might make manufacturers more reluctant to produce military products. Such a result could affect the government's ability to defend the country adequately. Even if manufacturers were willing to enter contracts, the potential for substantially greater contract costs could place a significant drain on the Treasury during wartime, when the nation could ill afford it. It may be argued

²⁶² See PROSSER, *supra* note 19 at 22-23, 650; see also *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

²⁶³ *Id.*

²⁶⁴ See text and note at note 182 *supra*.

²⁶⁵ See text and notes at notes 248-50 and 260-63 *supra*.

²⁶⁶ See *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980).

that if the government is concerned about ensuring supplies at reasonable prices, it can invoke its powers under the Defense Production Act to compel production at designated prices.²⁶⁷ Substantial reliance on the Defense Production Act, however, might place undesirable wartime burdens on the government by forcing government agencies to consume time and expense in compelling manufacturers to comply with military production requirements. The courts also have stressed the need to accord the government broad discretion in determining military requirements.²⁶⁸ Imposing liability for defects in government designs could involve manufacturers in second-guessing the decisions of the executive branch of the federal government on matters of military policy.²⁶⁹ Substantial second guessing and pressure by manufacturers could influence military policy makers to depart from equipment designs which they believe necessary. Furthermore, the courts also would find themselves in the difficult position of routinely second-guessing the discretionary decisions of the executive branch on matters of military policy.²⁷⁰ Some of these concerns may apply in the case of nonmilitary products as well. The concerns seem more compelling in the case of military products, however, since the security of the nation is more directly at stake. Nevertheless, it will be demonstrated that a more limited defense, such as the contract specification defense, can accommodate the need for effective formulation of military policy.

5. Basic Unfairness

In *In re Agent Orange*,²⁷¹ the United States District Court for the Eastern District of New York suggested that imposing enormous liability on a manufacturer who had been forced to produce a product on the government's terms would be unfair, since the manufacturer was not in a position to correct the act or omission which caused the injury.²⁷² The court was particularly concerned about the potential for unfairness in cases involving military products. The court feared that manufacturers might be compelled under penalty of law to build military products according to the government's terms, and then be held liable for defects in a design over which they had no control.²⁷³ Although the desire to avoid basic unfairness may justify providing a defense to manufacturers in some circumstances, the *Agent Orange* court recognized that this concern could not justify a complete defense in all cases in which manufacturers

²⁶⁷ See text and notes at notes 202 and 208 *supra*.

²⁶⁸ See text and notes at notes 182 and 192 *supra*.

²⁶⁹ *Id.*

²⁷⁰ To some extent this concern is pertinent to cases involving nonmilitary products as well. In those cases where the government is found to be exercising a discretionary function, the removal of the manufacturer's immunity would involve courts in the scrutiny of discretionary decisions committed to other branches of government. See RESTATEMENT (SECOND) OF TORTS § 895D, comment f (1965).

²⁷¹ *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980).

²⁷² *Id.* at 793-94.

²⁷³ See text at note 208 *supra*.

comply with government specifications.²⁷⁴ For example, the government specifications may be known by the manufacturer to be defective and dangerous, but the government might be unaware of the defect. If the manufacturer nevertheless produces the product, principles of fairness would militate against providing the manufacturer a defense. In any event, principles of liability should be developed which are flexible enough to accommodate concerns for basic fairness. If the government contract defense is interpreted to bar recovery whenever the manufacturer complies with government specifications, it will not provide the flexibility necessary to permit recovery when principles of fairness so dictate.

The foregoing discussion has analyzed the rationales offered in behalf of the government contract defense and has shown that some of the concerns motivating the courts to allow the defense in products liability actions may justify some limitations on manufacturer liability. Specifically, the desire to avoid circumvention of the discretionary function exception of the FTCA, the desire to prevent impairment of the government's ability to formulate military policy, and the desire for basic fairness are legitimate concerns. The arguments against the government contract defense, however, must be considered more fully. The principal criticism of the defense as articulated by some courts is that it is overly broad. Compliance with specifications is said to provide a complete defense even in cases where the government's design is defective and where the manufacturer considers the design imprudent or dangerous.²⁷⁵ If this statement of the defense were carried to its logical extreme without qualification, manufacturers would be able to escape liability for building a product in compliance with government specifications which were known beyond all doubt by manufacturers to be defective and dangerous. Presumably, the defense would extend beyond those cases in which the government has made a conscious decision in choosing a design. The manufacturer would be protected from liability even if the obviously dangerous defect were unknown to the government and caused by some inadvertent error or miscalculation on the part of the government. Cases such as those just described, while perhaps somewhat extreme, clearly are foreseeable, since many manufacturers are likely to have more expertise than the government in the manufacture of their products. Providing manufacturers with a shield from liability in such circumstances could promote reckless conduct. It is submitted that something less than a complete bar to recovery would provide incentives for manufacturers to avoid reckless conduct and would be more equitable to those injured by defective government products.

In summary, although some of the concerns motivating the courts in recent products liability cases to allow the government contract defense do have merit, there are strong arguments against allowing the defense to operate as an

²⁷⁴ See text and notes at notes 211-19 *supra*.

²⁷⁵ See text and notes at notes 191-92 *supra*.

automatic and complete bar to recovery in all cases. A standard of recovery must be fashioned which provides incentives for manufacturers to avoid reckless conduct and which at the same time takes into account legitimate policy concerns. The discussion which follows will demonstrate that a more limited defense, such as the contract specification defense, is a more appropriate standard of recovery than a complete defense.

*B. Standards By Which a Manufacturer's Liability
Should be Determined*

The contract specification defense provides manufacturers with a certain amount of protection from liability while eliminating the inequities inherent in the government contract defense. In general, this defense protects a manufacturer from liability if it has fully complied with the contract specifications and damage or injury results from a defect in those specifications. The defense is not available, however, if the specifications were so obviously defective and dangerous that a competent manufacturer would have been put on notice of the defect and would have refused to follow the specifications.²⁷⁶ Even where the specifications were obviously defective and dangerous, however, it has been held that if the party providing the specifications discovers the danger, or if the danger is obvious to that party, his responsibility ordinarily supercedes that of the manufacturer.²⁷⁷ The appropriateness of this standard of liability will be examined in the context of each of the three theories of recovery: negligence, strict liability, and breach of warranty. In conjunction with this examination, the issue of whether there should be a duty to warn of a product's defects and dangers also will be addressed.

1. Negligence Theory

The contract specification defense is an appropriate defense to negligence actions for defective design.²⁷⁸ The defense is consistent with negligence principles. It simply is a variation on the "reasonable man" standard, in that it recognizes that the ordinary manufacturer is not in a position to control and understand the design of a product to the same extent as if the design were its own.²⁷⁹ Where the manufacturer was given discretion as to design detail,²⁸⁰ however, or where the defect in design was or should have been obvious to a

²⁷⁶ See text and note at note 21 *supra*.

²⁷⁷ See text and note at note 48 *supra*.

²⁷⁸ Courts have agreed that the contract specification defense may be raised in a products liability action alleging negligent design. See text and notes at notes 107-11 *supra*. The courts in *McCabe Powers Body Co. v. Sharp*, 594 S.W.2d 592, 594-95 (Ky. 1980), and *Hunt v. Blasius*, 74 Ill. 2d 203, 210, 384 N.E.2d 368, 371 (1978), held that the defense successfully can be invoked in a negligence action by a manufacturer of products for a state government. By analogy, the rule seems applicable to federal contracts as well.

²⁷⁹ See text and notes at notes 22 and 41-43 *supra*.

²⁸⁰ See text and notes at notes 49-59 *supra*.

manufacturer of its skill and expertise,²⁸¹ the manufacturer should not be protected.

In those cases in which a defect was obvious to the manufacturer and known or obvious to the government as well, it is appropriate in most cases that the manufacturer be protected from liability for design defects as the defense provides.²⁸² It has been suggested that the shifting of responsibility from the manufacturer in such cases results from an absence of proximate cause.²⁸³ Whether stated in terms of causation or duty, manufacturers should in most cases be entitled to expect that when the government is aware of a defect or danger, it will remedy the defect, take appropriate precautions or order additional safety devices. This conclusion is buttressed by considerations of public policy which require that manufacturers and courts not be placed in the position of routinely second-guessing the informed discretionary decisions of the government.²⁸⁴

²⁸¹ See text and notes at notes 44-48 *supra*.

²⁸² See text and note at note 48 *supra*.

²⁸³ See note 48 *supra*.

²⁸⁴ For a discussion of the public policy considerations which support this conclusion, see text and notes at notes 251-59 and 264-74 *supra*. There may be extreme cases in which the shifting of responsibility for design defects from manufacturers can be justified neither by principles of proximate cause nor by policy considerations. For example, it may be obvious to a manufacturer that a product is so extraordinarily defective and dangerous in relation to its intended use that no precautions, safety devices or alterations can make it safe. If the government, with knowledge of the danger, insists on buying the product, principles of proximate cause would not appear to justify the shifting of responsibility from the manufacturer. See note 48 *supra*. Furthermore, public policy concerns in such extreme cases are relatively weak when nonmilitary products are involved. For example, if liability were imposed on manufacturers only in such extreme cases, courts would not be routinely second-guessing discretionary decisions of the government. Only those products which are obviously defective and extraordinarily dangerous could be sources of liability. Likewise, any potential circumvention of the discretionary function exception to the FTCA is outweighed by the need to provide manufacturers with incentives to avoid needless and certain injuries and loss of life. Furthermore, imposing liability on manufacturers only in extreme cases in which defects were obviously and extraordinarily dangerous would not result in basic unfairness, since in such cases liability can clearly be avoided. Thus, in extreme cases involving nonmilitary products it seems inappropriate to protect manufacturers from liability for design defects even if the government is aware of the hazards associated with the product. At the very least, courts should not provide a defense to manufacturers in extreme cases if the government would be unable successfully to invoke the discretionary function exception.

In extreme cases involving military products which are known by both the manufacturer and the government to be dangerous, the policy considerations in favor of a defense for manufacturers are stronger. It is difficult for manufacturers and courts to sit in judgment on military policy decisions, even when an extraordinarily dangerous defect seems apparent. See *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1054 (E.D.N.Y. 1982). Furthermore, it would be unfair to expose manufacturers to liability for a design defect after they were compelled to produce military products under threat of fines or imprisonment. See text and notes at notes 202 and 208 *supra*. Therefore, manufacturers compelled under power of the Defense Production Act to produce military products known by the government to be extraordinarily dangerous should not be exposed to liability for defects in those products. Even where manufacturers were not compelled to produce, the need to allow broad discretion to military policy-makers requires that manufacturers be held liable for producing a defectively designed military product only in exceptional cases. Therefore, in cases where the manufacturer voluntarily performed the contract,

In neither the military nor the nonmilitary context, however, do public policy considerations justify the potential inequities of barring recovery for a design defect when the defect was or should have been obvious to the manufacturer but was unknown to the government. If the contract specification defense uniformly were available against actions for negligent design, manufacturers and courts would not be second-guessing the discretionary decisions of coordinate branches of government.²⁸⁵ Since manufacturers normally would not be liable when the defect was known to the government, courts ordinarily would not have to evaluate the correctness of government decisions once it is established that the government knew of a defect or hazard.²⁸⁶ Manufacturers, for their part, would not have to second-guess government decisions. Ordinarily a warning to the government of a particular defect or hazard would discharge a manufacturer from further responsibility for the defect by making the defect known to the government.²⁸⁷ Likewise, any circumvention of the discretionary function exception to the FTCA would be practically eliminated.²⁸⁸ There should be few cases in which the government could claim immunity under the discretionary function exception for a defect or hazard of which it was unaware and did not consciously consider.²⁸⁹ Thus, any liability imposed on manufacturers in such cases would not circumvent the government's immunity. For reasons similar to those just discussed, the contract specification defense would not result in basic unfairness to manufacturers by forcing them to choose between failing to produce and thus violating the Defense Production Act²⁹⁰ or subjecting themselves to liability.²⁹¹ Manufacturers could avoid liability for design defects by warning the government of obvious defects in the design of their products.²⁹²

recovery should be permitted only if the product's design was obviously defective and extraordinarily dangerous after allowing for all possible military considerations. In other words, only when the product's dangers were so obviously out of line with the product's intended purpose that no reasonable manufacturer could presume that there were military considerations justifying the design should a manufacturer be held liable.

²⁸⁵ See text and notes at notes 268-70 *supra*.

²⁸⁶ See note 284 *supra* for a discussion of extreme cases in which manufacturer liability for defects known to the government may be appropriate.

²⁸⁷ Responsibility for a design defect is normally shifted from the manufacturer if the defect is discovered by the government. See text and notes at notes 282-84 *supra*. It follows that a warning to the government should produce the same result. The manufacturer should be entitled to assume that its warnings will be heeded, so long as the product is safe for use if the warning is followed. See RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965). Therefore, there may be extreme cases, such as those discussed in note 284 *supra*, in which a warning would not be sufficient to discharge a manufacturer's responsibility for a defect in design. In such cases the manufacturer would have to decline to produce.

²⁸⁸ See text and notes at notes 251-59 *supra* for a discussion of the concern by courts for the circumvention of the discretionary function exception to the FTCA.

²⁸⁹ See note 1 *supra*.

²⁹⁰ See note 202 *supra*.

²⁹¹ See text and note at note 271-73 *supra*.

²⁹² See notes 284 and 287 for a discussion of extreme cases in which a warning may not be adequate.

Consistent with general principles of negligence, the failure to warn of a product's dangers should offer a separate basis for recovery in cases involving military and nonmilitary products. This cause of action should be available even where technically the product is not defectively designed or manufactured.²⁹³ Some courts, in cases involving public contracts, have suggested that the standard for determining whether a manufacturer has a duty to warn should be consistent with the standard for determining liability under the contract specification defense.²⁹⁴ These courts have indicated that there may be a duty to warn when a product is "obviously" or "extraordinarily" dangerous.²⁹⁵ The author agrees that manufacturers should have a duty to warn the government only of obvious defects or dangers associated with their products.²⁹⁶ The rationale underlying the contract specification defense for limiting a manufacturer's liability for design defects seems applicable to failure to warn cases as well. For example, it is said that a contractor who complies with the specifications of another is in general entitled to rely on the specifications and has only a limited duty to question them.²⁹⁷ This lessened duty is said to be justified because the average contractor does not have the requisite expertise or resources to evaluate fully every set of specifications provided to him.²⁹⁸ The same rationale justifies a more limited duty to warn as well. Furthermore, the proposed standard avoids the confusion that might result from having a standard of recovery in actions for a failure to warn that is different from the standard of recovery in actions for design defects. This standard also ensures that the contract specification defense is not circumvented and rendered meaningless through the availability of a more easily satisfied standard of recovery for a failure to warn than for a defect in design.²⁹⁹ Since there is generally no duty to warn a person of a danger which is known or obvious to that person,³⁰⁰ the standard being suggested generally would require the manufacturer to alert the government only of dangers which are or should be obvious to the manufacturer but

²⁹³ See text and notes at notes 15-16 *supra*.

²⁹⁴ See text and notes at notes 100-06 *supra*.

²⁹⁵ The formulation for determining when there is a duty to warn may depend on the precise manner in which a court articulates the contract specification defense. See text and notes at notes 100-06 *supra*.

²⁹⁶ General duty to warn principles require a warning to foreseeable users of the product. See note 106 *supra*. In the case of products sold to the government, however, the government and its employees would seem ordinarily to be the foreseeable users. Furthermore, it has been held that a warning to the person in charge of the user is sufficient to discharge a duty to warn, when the user is an employee. *Jacobson v. Colorado Fuel and Iron Corp.*, 409 F.2d 1263, 1273 (9th Cir. 1969). Cf. *Littlehale v. E.I. duPont de Nemours & Co.*, 268 F. Supp. 791, 798-99 (S.D.N.Y. 1966) (if no warning is required by manufacturer to purchaser because purchaser knows of product's dangers, there is no duty to warn the employees of the purchaser), *aff'd*, 380 F.2d 274 (2d Cir. 1967). Therefore, a manufacturer normally should be able to discharge its duty to warn through written correspondence to appropriate levels of the government.

²⁹⁷ See text and notes at notes 29 and 41-43 *supra*.

²⁹⁸ See text and note at note 42 *supra*.

²⁹⁹ See text and notes at notes 99-101 *supra*.

³⁰⁰ See note 19 *supra*.

which are not known or obvious to the government. Thus, a duty to warn might arise where there was a flaw in the drafting of specifications, where the manufacturer possessed superior knowledge of the characteristics of the product or where a danger or defect which was not apparent from the specifications became apparent during the manufacturing or testing process. Thus, in the case of military as well as nonmilitary products the contract specification defense, together with a limited duty to warn, provides an appropriate standard of liability.

It is recognized that the standards of liability just described for manufacturers of military and nonmilitary products do not differ substantially from the government contract shared immunity defense. Courts which adopt the government contract defense could fashion an identical standard of liability by creating an exception to the government contract defense for obvious defects or dangers.³⁰¹ A similar exception was created by the court in *In re Agent Orange*.³⁰² The court stated that in order to invoke the government contract defense, a manufacturer has to prove that the government had as much knowledge of the particular hazard or defect which caused the plaintiff's injuries as the manufacturer did.³⁰³ The court stated that a manufacturer has a duty to disclose to the government any defects or hazards of which it is aware.³⁰⁴ Thus, to rephrase the court's standard, a manufacturer which fully complies with the government's specifications is entitled to a complete defense to any action based on defective design, unless the manufacturer knew of a design defect of which the government was unaware. This standard is very similar to the contract specification defense, except that the court did not use the word "obvious" to describe the defect in the specifications. It would seem, however, that a defect which is actually known to a manufacturer is thereby rendered obvious to that manufacturer regardless of whether it might be *objectively* obvious to a reasonably competent manufacturer. One potential difference, however, between the *Agent Orange* court's standard and the contract specification defense is that the court may require actual knowledge of a defect or hazard on the part of a manufacturer before it would refuse to allow the government contract defense.³⁰⁵ The court did not indicate whether it would impose liability if a defect were so obvious that a reasonably competent manufacturer would be put on notice, as the contract specification provides. The court's failure to indicate whether constructive knowledge of a defect precludes the raising of the defense may not be a significant departure from the contract specification defense. Nevertheless, limiting the liability of manufacturers to cases in which there was actual knowledge of a defect could produce the anomalous result of encourag-

³⁰¹ Some courts already have adopted this standard or a variation thereof. See text and note at note 143 *supra*.

³⁰² *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046 (E.D.N.Y. 1982).

³⁰³ *Id.* at 1055.

³⁰⁴ *Id.* at 1057.

³⁰⁵ See text and note at note 218 *supra*.

ing manufacturers to know as little as possible about the dangers of their products. To avoid this result, manufacturers should be liable for failure to disclose defects which are or *should* be obvious to them.

Thus, a defense similar to the contract specification defense has been shown to be an appropriate standard of liability in negligence actions. This defense was shown to be justified in part, however, because it is consistent with *negligence* principles. The question remains whether the standards of liability suggested above should apply even in strict liability actions. Since the justification that this standard of liability makes sense under negligence principles no longer will be available with respect to actions brought under a theory of strict liability, the contest will be between two competing sets of policy concerns. On the one hand, strong policy concerns support the proposed limited defense. These concerns are some of the same ones expressed in support of the shared immunity defense. On the other hand, important policies also support the theory of strict products liability. For identification purposes, the standard of liability proposed above will continue to be referred to as the contract specification defense.

2. Strict Liability Theory

Whether manufacturers of defectively designed products should be able to invoke the contract specification defense in actions based on a theory of strict liability is a difficult question. If the defense is allowed to be raised, the manufacturer's liability should be governed by the standards just described for negligence actions.³⁰⁶ If manufacturers cannot raise the defense against actions in strict liability, manufacturers will be liable for any design defects in their products to the same extent as if the product's design were their own.³⁰⁷ Courts which have addressed whether the contract specification defense should bar recovery in a strict liability action have split about evenly on the issue in actions against both private contractors and government contractors.³⁰⁸ Those courts which have rejected the availability of the contract specification defense in a strict liability action have reasoned that the contract specification defense has been applied primarily in negligence cases. These courts reason that under strict liability theory it is not necessary that the defect be caused by the act or omission of the defendant.³⁰⁹ Courts which allow the contract specification defense in a strict liability action emphasize that it is illogical to hold a party who has not designed a product liable for a design defect.³¹⁰ One way of testing which view is correct is to determine whether the policies underlying strict products liability remain valid where a manufacturer builds a product according to the government's design. Those policies which remain valid must be

³⁰⁶ See text and notes at notes 278-300 *supra*.

³⁰⁷ See text and notes at notes 68-71 *supra*.

³⁰⁸ See text and notes at notes 61-94 *supra*.

³⁰⁹ See text and notes at notes 61 and 69 *supra*.

³¹⁰ See text and note at note 88 *supra*.

weighed against the public policy concerns which support providing a defense for manufacturers. Some of the same public policy concerns cited by courts in favor of the government contract defense also support the proposed contract specification defense. The policies supporting the theory of strict liability for manufacturers of defectively designed products will be addressed first.

Holding manufacturers of defective products strictly liable for injuries caused by those products has been justified on several grounds. First, it is asserted that by marketing a product, the manufacturer represents to the public that the product is safe for its intended use. Therefore, the manufacturer should be held liable for any breach of this representation.³¹¹ This policy justification is analogous to the theory of an implied warranty running from a seller to the ultimate user of a product. Where the design of a product is dictated by the government, however, it is difficult to see how a manufacturer makes such an implied representation. Under traditional warranty principles, normally the only warranty made by a manufacturer who builds a product in response to a purchaser's specifications is the express warranty that the product will comply with the purchaser's specifications.³¹² Implied warranties either are displaced by this express warranty or fail to come into existence due to the absence of reliance by the buyer on the manufacturer.³¹³ Therefore, this policy justification supporting strict liability does not seem consistent with the warranty theory on which it is based.

A second justification for holding manufacturers strictly liable for defects in their products is that they can allocate the risk of harm among all the purchasers of their products.³¹⁴ This theory is premised upon the manufacturer selling a large volume of products to a large number of customers. The manufacturer's cost of insurance simply becomes an additional cost of producing the products. Under these circumstances, the added cost of insurance is distributed in such a way that the incremental cost to each consumer is small. Where a manufacturer sells a specially designed product to the government, however, the entire cost of insurance is passed directly to the government as the sole consumer. Thus, the issue becomes whether the ability of manufacturers to allocate to the government the increased cost of insurance resulting from exposure to potential tort claims justifies holding manufacturers of defectively designed government products strictly liable. Significantly, the same allocation of cost principle has been cited by courts as a reason to limit the liability of manufacturers.³¹⁵ These courts suggest that it is undesirable to add to the cost of government.³¹⁶ The author has argued that increased government cost is not a valid reason for limiting the liability of manufacturers, at least in cases in-

³¹¹ See PROSSER, *supra* note 19, at 651.

³¹² See note 98 *supra*.

³¹³ *Id.*

³¹⁴ See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120-22 (1960) [hereinafter cited as Prosser, *The Assault*].

³¹⁵ See text and notes at notes 260-63 *supra*.

³¹⁶ *Id.*

volving nonmilitary products.³¹⁷ The shifting of increased costs to the government is sometimes the unavoidable consequence of legitimate changes in the tort law.³¹⁸ At the same time, however, the fact that insurance costs will be shifted to the government is not a valid rationale for imposing liability on manufacturers either. To propose increased liability for manufacturers solely because the cost will be borne by the government and ultimately by taxpayers is tantamount to advocating the use of the judicial system as a taxing mechanism. If other justifications can be found for imposing strict liability, however, then there is some basis for allowing the unavoidable, albeit undesirable, increased costs to be borne by the government. In short, the allocation of risk argument is not a valid rationale for imposing liability on the manufacturers of defectively designed government products.

Third, it is argued that manufacturers are in the best position to minimize risks associated with their products and that the threat of liability creates an incentive to the manufacturer to produce a safe product.³¹⁹ In the case where the design is completely specified by the government, however, the manufacturer has no discretion to create a safer design. The manufacturer must either accept the government's terms or lose the contract.³²⁰ Thus, manufacturers faced with the threat of strict liability basically would have two options when presented with a set of government specifications which might contain design defects. Manufacturers either could decline to produce, or could include the cost of additional insurance in their bids. Presumably, most manufacturers simply would pass along to the government the cost of additional insurance. Thus, in most cases the threat of liability will not create an effective incentive to make safer products.

Perhaps it could be argued that in a limited class of cases an effective incentive to build safer products can be created. For example, the prospect of being held strictly liable for design defects might make manufacturers more conscientious in looking for such defects which may be unknown to the government. Upon discovering such defects, the manufacturer would then point out such defects to the government, which could correct the specifications. By being more conscientious in looking for design defects, the manufacturer theoretically could reduce the cost of its insurance and remain more competitive. A nearly identical result, however, could be achieved simply by imposing liability on the manufacturer for obvious defects.³²¹ The incremental incentive to discover inadvertent errors in specifications that might be achieved by imposing strict liability for design defects where the design is exclusively controlled by the government would be highly speculative.³²²

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 454-57, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring); Prosser, *The Assault*, *supra* note 296, at 1119-20.

³²⁰ See note 2 *supra*.

³²¹ See text at notes 278-300 *supra*.

³²² See Prosser, *The Assault*, *supra* note 314, at 1119.

A fourth reason advanced to support holding manufacturers of defective products strictly liable is that it already is possible to hold manufacturers strictly liable by resort to a series of actions.³²³ The first step in this series is to hold the retailer liable on a warranty to his purchaser.³²⁴ Indemnity on a warranty then is sought successively from other suppliers, until the manufacturer finally pays the damages.³²⁵ Each step in this series of actions presupposes the existence of an express or implied warranty of merchantability or fitness running from the seller of the product to the purchaser. As each seller is held liable to his purchaser for a breach of his implied warranty, he in turn sues the one who sold him the product. Since each action in the series is based on a breach of warranty, fault is not an issue and the standard of proof essentially is the same as in a strict liability action.³²⁶ Resort to this series of actions, however, is a wasteful and time-consuming process. Instead, a direct action in strict liability against the manufacturer is considered justified.³²⁷ This reasoning, however, has no application to cases involving design specifications provided to manufacturers by the government. Plaintiffs typically are not purchasers from the government, but are employees or other third parties who have been injured by government products.³²⁸ Therefore, most plaintiffs will not have a breach of warranty action against the government.³²⁹ Since these plaintiffs do not have a breach of warranty action available, the first step in the hypothetical series of actions fails.

Those plaintiffs who have purchased the defective product from the government may have a breach of warranty claim against the government. Unlike most retailers, however, the government generally may not seek indemnity from the manufacturer, if the government has provided design specifications for the product to the manufacturer. The reason the government cannot seek indemnity is that when the government provides a contractor with design specifications, an implied warranty of suitability and adequacy attaches to the specifications.³³⁰ As a result, where a defect in design is attributable to a defect in those specifications, the government normally would be unable to recover from the manufacturer for breach of warranty.³³¹ Thus, it can be seen that a series of warranty actions, leading ultimately to the liability of the manufac-

³²³ See PROSSER, *supra* note 19, at 651.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ See text and notes at notes 7-14 *supra*.

³²⁷ PROSSER, *supra* note 19, at 651.

³²⁸ See text and notes at notes 62-75 and 161-219 *supra*.

³²⁹ Perhaps a more relevant question is whether such employees or third parties have a direct cause of action against the manufacturer as third party beneficiaries to the contract between the manufacturer and the government. In order to answer this question in the affirmative, one must conclude that the contract specification defense is ineffective against a breach of warranty action. Yet, what little authority there is suggests that the contract specification defense is effective against a breach of warranty action. See text and notes at notes 95-98 *supra*.

³³⁰ See note 52 *supra*.

³³¹ *Id.*

turer, generally is not possible where the government has provided design specifications for a product. Therefore, this rationale has no merit in cases involving design specifications provided to manufacturers by the government.

Finally, it is argued that the public interest in health and safety requires manufacturers to bear the responsibility for any harm caused by defects in the products they sell to consumers.³³² This concern is related to the desire to provide strong incentives to manufacture safe products.³³³ It also is related to the policy reason given by the court in *Challoner v. Day & Zimmerman*³³⁴ for imposing strict liability.³³⁵ In *Challoner*, the court admitted that not all of the policies supporting the theory of strict liability were present in cases involving products sold to the government.³³⁶ The court concluded, however, that the most basic policy reason was present: to insure that the costs of injuries from defective products are borne by manufacturers who put them on the market and not by innocent users who are powerless to protect themselves.³³⁷ This rationale does seem applicable to cases where the government provides defective design specifications to a manufacturer.

Thus, the only policy reason supporting the theory of strict products liability which remains applicable in the context of design specifications dictated by the government is the desire to have the cost of injuries borne by those who manufacture defective products rather than by innocent users. Weighing against this policy, however, are some of the concerns that have influenced courts to provide manufacturers with the government contract defense. For example, it frequently may be unfair to hold a manufacturer liable when the government had exclusive control over design of a product.³³⁸ Where the defect which caused the injury was within the government's discretion and was not obvious to the manufacturer, the responsible party really is the government. The manufacturer in such cases is in no position to make the product safer. If it refuses to follow the specifications after accepting the contract, it may be in breach of contract. In addition to being unfair, holding a manufacturer strictly liable for defects in designs provided by the government would permit excessive circumvention of the discretionary function exception to the FTCA.³³⁹ Strict liability would circumvent the discretionary function exception to the FTCA in all design defect cases in which the government had exercised a discretionary

³³² See PROSSER, *supra* note 19, at 651.

³³³ See text and notes at notes 319-22, *supra*.

³³⁴ 512 F.2d 77 (5th Cir. 1975), *vacated and remanded for misapplication of conflict of laws rules*, 423 U.S. 3 (1975).

³³⁵ *Id.* at 84. See text at notes 72-74 *supra*.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ If it is in the public interest to compensate plaintiffs injured by products manufactured according to government specifications, perhaps action should be taken by Congress, the body which traditionally provides for the public welfare. Perhaps changes are needed in the Federal Tort Claims Act to ensure that when the government is responsible, it pays. See note 1 *supra*.

³³⁹ See text and notes at notes 251-59 *supra*.

function in choosing a particular design. Likewise, courts would be required routinely to sit in judgment over discretionary decisions made by policy-making branches of the government. Therefore, in conclusion, it is submitted that the policy of shifting the cost of injuries from innocent users of defectively designed products to manufacturers, standing alone, does not justify curtailing the availability of the contract specification defense in a strict liability action.

In cases involving military products, additional policy reasons support limiting the liability of manufacturers in strict liability actions. Imposing strict liability on manufacturers for defects in designs specified by the government could interfere with the government's ability to formulate policy and make judgments pursuant to its war powers.³⁴⁰ Government agencies in some cases might be forced to expend limited resources to compel reluctant manufacturers to produce highly dangerous but necessary products. Furthermore, it is particularly unfair to hold a manufacturer strictly liable for design defects in products which it has been ordered to produce under authority of the Defense Production Act according to government mandated specifications over which the manufacturer had no control.³⁴¹ In view of these considerations, the contract specification defense should be available in a strict liability action. Recovery should be permitted for defectively designed products in a strict liability action only to the extent recovery would be permitted in a negligence action. Thus, a manufacturer should be liable for a design defect only if the design was obviously defective and dangerous. If the defect was discovered by or was obvious to the government, however, the manufacturer normally should not be liable for a design defect. Therefore, a manufacturer normally should be able to protect itself from liability for design defects by warning the government of obvious defects. A manufacturer should be liable for failure to warn the government of defects or dangers which were or should have been obvious to the manufacturer but which were not obvious to the government.

3. Breach of Warranty Theory

The question whether the contract specification defense is available in an action against a government contractor based on breach of warranty has not been resolved by the courts.³⁴² It has been suggested that the contract specification defense, with its "unless obviously dangerous" limitation prescribes what essentially is a negligence standard of liability.³⁴³ Therefore, it may seem peculiar to allow a defense traditionally relegated to negligence cases to be raised in actions based on warranty theory. Yet, in an analogous situation courts have held that a failure to warn can constitute a breach of warranty although liability for failure to warn appears to be governed by a negligence

³⁴⁰ See text and notes at notes 264-70 *supra*.

³⁴¹ See text and notes at notes 271-73 *supra*.

³⁴² See text and notes at notes 95-98 *supra*.

³⁴³ See text and note at note 22 *supra*.

standard.³⁴⁴ Furthermore, one court, in a case involving a private contract, stated that the contract specification defense was available in a breach of warranty action.³⁴⁵ Thus, there would seem to be no barrier to allowing the contract specification defense in breach of warranty actions. For the sake of consistency, this defense should be available in breach of warranty actions. Thus, a manufacturer should be liable for a design defect only if the design was obviously defective and dangerous. If the defect was discovered by or was obvious to the government, however, the manufacturer normally should not be liable for a design defect. Therefore, a manufacturer normally should be able to protect itself from liability for design defects by warning the government of obvious defects. A manufacturer should be liable for failure to warn the government of defects or dangers which were or should have been obvious to the manufacturer but were not obvious to the government.

CONCLUSION

A manufacturer which constructs a defectively designed product in full compliance with government specifications can invoke two defenses against plaintiffs seeking to recover in tort for injuries caused by such products. These two defenses are the "contract specification" defense, which is based on negligence principles, and the "government contract" defense, which is based on a concept of shared immunity. The contract specification defense provides that a manufacturer is not liable for damages or injuries caused by products manufactured in accordance with government specifications, unless the specifications were so obviously defective and dangerous that a competent manufacturer would have declined to follow them. In contrast, the government contract defense, as expressed by some courts, provides that a manufacturer's compliance with government specifications is a complete defense to any action based on defective design. The manufacturer may not be liable even if the defect in the specifications was obvious. Under both defenses, if the manufacturer had discretion in the manner of performing the contract, it may be precluded from invoking the defense.

Manufacturers defending themselves in products liability actions based on the defective design of products sold to the federal government have begun to invoke these defenses, so far with moderate success. In the case of military products, the majority view is that some form of government contract defense protects the manufacturer against plaintiffs suing in negligence, strict liability, or breach of warranty. The minority view is that compliance with specifications is not a defense under a strict liability theory. In nonmilitary product liability cases there is not yet a clear indication of the standards of liability. The government contract defense has not yet been allowed in cases involving nonmilitary

³⁴⁴ See note 19 *supra*.

³⁴⁵ See text and notes at notes 95-98 *supra*.

products. The contract specification defense, however, may be raised to defeat most negligence actions for defective design. There is a split of authority, however, as to whether the contract specification defense is available to manufacturers sued under a theory of strict liability. In addition, it is unclear whether manufacturers sued for breach of warranty can raise the defense successfully. Nor is it clear to what extent a manufacturer can be held liable for a failure to warn even though it successfully can invoke either of the two defenses.

This note concludes that the government contract defense, as expressed by some courts, is overly broad and provides no incentive to manufacturers to avoid reckless conduct. In a suit for injuries caused by a defectively designed military or nonmilitary product, a manufacturer should be able to invoke a defense similar to the contract specification defense. The defense should be available to the manufacturer whether it is sued under a theory of negligence, breach of warranty, or strict liability. Thus, where a manufacturer has fully complied with government specifications which contain a defect in design, it would be liable only when the design was obviously defective and dangerous. In determining whether the design defect was or should have been obvious, any special knowledge or skill of the manufacturer should be taken into consideration. If the defect was discovered by or was obvious to the government, however, the manufacturer normally should not be liable for a design defect. Therefore, a manufacturer normally should be able to avoid liability for design defects by warning the government of obvious defects. A manufacturer should be liable for a failure to warn the government of defects and dangers in its product which were or should have been obvious to the manufacturer but which were not obvious to the government.

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