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## ***Schoenborn v. Boeing Co.*: The Government Contractor Defense Becomes a "Windfall" for Military Contractors**

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# CASENOTES

## ***Schoenborn v. Boeing Co.: The Government Contractor Defense Becomes a "Windfall" for Military Contractors***

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### I. INTRODUCTION

The Boeing Company contracted to build CH-47C "Chinook" helicopters for the United States Army.<sup>1</sup> On September 11, 1982, one of the helicopters which Boeing manufactured crashed at an air show in Mannheim, West Germany, killing all of the occupants. A post-accident investigation revealed that clogged oil jets caused a pinion bearing in the forward rotor transmission to fail. Failure of the pinion bearing caused play in the aluminum synchronization shaft (sync shaft) which connects the forward and aft rotors.<sup>2</sup> The play caused the sync shaft to rub against Station 120, a cut-out in the fuselage through which the sync shaft runs. As a result of the rubbing the sync shaft was severed, desynchronizing the rotors and causing the forward rotor to strike the aft rotor, knocking it completely off of the aircraft. The helicopter then fell approximately 700 feet, exploding and burning on impact.<sup>3</sup> Families of American servicemen killed in the crash brought suit against Boeing under

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1. *Schoenborn v. Boeing Co.* (*In re Air Crash Disaster at Mannheim, Germany* on Sept. 11, 1982), 586 F. Supp. 711 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115 (3d Cir. 1985) [hereinafter cited as *Schoenborn I*].

2. *Schoenborn v. Boeing Co.* (*In re Air Crash Disaster at Mannheim, Germany* on Sept. 11, 1982), 769 F.2d 115 (3d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3330 (U.S. Oct. 22, 1985) (No. 85-703) [hereinafter cited as *Schoenborn II*]. Because the paths of the forward and aft rotors of the "Chinook" helicopter intersect, it is crucial that they remain synchronized to avoid contact of the rotors which would result in immediate destruction of the aircraft. Brief for Appellees at 3-4, *Schoenborn II*, 769 F.2d 115 (3d Cir. 1985).

3. *Schoenborn II*, 769 F.2d at 118.

theories of breach of warranty, negligence, and strict liability, and the district court consolidated the claims.<sup>4</sup>

After a jury verdict in favor of the plaintiffs,<sup>5</sup> the district court denied a motion for a judgment notwithstanding the verdict and held that the government contractor defense<sup>6</sup> was unavailable to Boeing because the government had not established the specifications for the aircraft's design, but rather had approved Boeing's specifications.<sup>7</sup> The court pointed out that the *Agent Orange* test,<sup>8</sup> which the Court of Appeals for the Third Circuit adopted in *Koutsoubos v. Boeing Vertol*,<sup>9</sup> required Boeing to show that: 1) the government had established the specifications for the helicopters, 2) Boeing manufactured the helicopter to those specifications, and 3) the government knew as much, or more, than Boeing about the hazards accompanying the use of the product.<sup>10</sup>

Contrary to the circuit court's holding in *Koutsoubos*, the trial

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4. *In re Air Crash Disaster at Mannheim, Germany*: On Sept. 11, 1982, 575 F. Supp. 521, 522 (E.D. Pa. 1983).

5. The jury answered special interrogatories as follows:

[a.] Was the defendant Boeing-Vertol negligent? [Yes]

[b.] Was the negligence of Boeing-Vertol a proximate cause of the accident? [Yes]

[c.] Was the Government's maintenance a superseding cause of the accident? [No]

[d.] Did the defendant Boeing-Vertol have final control of the design of the aircraft? [Yes]

[e.] Was the aircraft when delivered by defendant to the Army defective? [Yes]

[f.] Was the defect a proximate cause of the accident? [Yes]

*Schoenborn II*, 769 F.2d 115, 120 (3d Cir. 1985).

6. The government contractor defense, sometimes called the government contract defense, extends sovereign immunity to a government contractor to avoid holding him liable for the tortious conduct of the government. Although this article deals with the defense as it applies to military contractors, the defense is also available to nonmilitary contractors, despite different justifications. See *Price v. Tempo*, 603 F. Supp. 1359 (E.D. Pa. 1985); see also *infra* notes 46-47, 51 and accompanying text (discussing three policy reasons commonly offered in support of the defense). A similar defense, the contract specification defense, protects ordinary contractors from liability for damages resulting from products built according to specifications provided by another party, as long as the specifications are not obviously dangerous or defective. Conversely, the government contractor defense is available to a manufacturer who contracts directly with the government even when the specifications are obviously dangerous or defective. See *infra* notes 35-36, 41-43 and accompanying text; see also Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. Rev. 1025, 1031-64 (1982) (comparing the government contractor defense with the contract specification defense).

7. *Schoenborn I*, 586 F. Supp. 711 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115 (3d Cir. 1985).

8. See *infra* notes 35-45 and accompanying text.

9. 755 F.2d 352 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1985).

10. *Schoenborn I*, 586 F. Supp. 711, 717 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115 (3d Cir. 1985).

court refused to allow government approval of Boeing's specifications to satisfy the requirement that the government "establish" the specifications.<sup>11</sup> Because failure to satisfy the first prong of the test was dispositive of the issue, the court did not deal with the other two prongs. The United States Court of Appeals for the Third Circuit *held*, reversed: Government approval of the manufacturer's design, after a substantial review of the specifications, is sufficient to satisfy the "establishment" requirement, and the relevant knowledge which the government must possess to satisfy the third prong of the test is knowledge of a defect in an essential or key component of the mechanism. *Schoenborn v. Boeing Co.*, 769 F.2d 115 (3d Cir. 1985).

## II. SOVEREIGN IMMUNITY AND THE GOVERNMENT CONTRACTOR DEFENSE

The government contractor defense is relatively new to the area of products liability.<sup>12</sup> Although it originated in public works cases, courts have extended the scope of the defense to other areas of law involving government contractors, including the manufacturing of military products.<sup>13</sup> As this note will argue, the courts have overextended the substantive application of the defense to where it now protects a manufacturer from liability for his own negligence. Such overextension of the defense is not only unjust to the plaintiff and society in general, it is extremely dangerous because it encourages reckless conduct on the part of military contractors.

The government contractors defense is based on the extension of the theory of sovereign immunity to government contractors.<sup>14</sup>

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11. *Id.* at 718.

12. Note, *supra* note 6, at 1055.

13. See, e.g., *Littlehale v. E.I. duPont de Nemours & Co.*, 268 F. Supp. 791, 803 & n.17 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967) (mentioning that the defense may be applicable in a case involving a manufacturer of blasting caps for the military).

14. See *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940) (treating the contractor as an agent of the government protected by doctrine of sovereign immunity); see also *Green v. ICI Am., Inc.*, 362 F. Supp. 1263, 1266 (E.D. Tenn. 1973) (allowing contractor to "share" the government's sovereign immunity because of the government's high degree of control over the contractor's TNT plant); cf. *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) (implying that compliance with the government contract immunizes the contractor). But see *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1013 (5th Cir. 1969) (stating that sovereign immunity must be kept in its proper place). Because the defense is an extension of sovereign immunity, it is only available when the government is immune from liability. See *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

Although sovereign immunity originated from the belief that "the King can do no wrong,"<sup>15</sup> the doctrine spread to the United States when the Supreme Court of the United States adopted it in 1846.<sup>16</sup> The doctrine has lead courts to conclude that, in order to govern effectively, the government must be free from liability to citizens who are injured by its decisions.<sup>17</sup>

The first case to deal with the government contractor defense is *Yearsley v. W.A. Ross Construction Co.*<sup>18</sup> In *Yearsley*, the government selected a contractor to assist in improving the navigability of the Missouri River by accelerating erosion on the river banks. As a result, land owners whose land had partially eroded away sued the contractor. The court refused to hold the contractor liable for merely doing what the government contracted him to do, and implied that the government's immunity extended to the contractor because he was acting as an agent of the government.<sup>19</sup> Although later cases refused to extend the immunity under an "agency" theory,<sup>20</sup> the defense continued to exist, and the courts expanded it into the area of products liability based on principles of fairness and public policy.<sup>21</sup> Concerns with fairness led courts to

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15. *Elgin v. District of Columbia*, 337 F.2d 152, 154 (D.C. Cir. 1964), quoted in Comment, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?*, 36 U. MIAMI L. REV. 489, 514 (1982). In early England, those who the king wronged were without a remedy because "the King [could not] be summoned or receive a command from anyone." *Federal Legislation: Tort Claims Against The United States*, 30 GEO. L.J. 462, 462 (1942) (quoting a judgment of the King's Court in 1234, which was quoted in 1 F. POLLOCK & F. MAITLAND, HISTORY OF THE ENGLISH LAW 501 (1895)). In fact, to proceed in his court one had to obtain a writ from the king himself. *Id.*

16. Note, *The Government Contractor Defense and Manufacturers of Military Equipment*, 21 Hous. L. Rev. 855, 859 (1984) (construing *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846)); cf. Comment, *supra* note 15, at 514 & n.109 (stating that the Supreme Court has traditionally been reluctant to allow citizens to sue the government).

17. *Elgin v. District of Columbia*, 337 F.2d 152, 154 (D.C. Cir. 1964), quoted in Comment, *supra* note 15, at 514.

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

19. *Id.* at 21.

20. See *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943) (prohibiting the extension of governmental immunity to a contractor under an agency contract); see also *Powell v. United States Cartridge Co.*, 339 U.S. 497, 504-08 (1950) (determining that a munitions plant contracting with the government was an independent contractor, not an agent of the government, in a suit under the Fair Labor Standards Act); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1015 (5th Cir. 1969) (Where the defendant was a grenade fuse manufacturer who contracted with the government, the court said that "[defendant] was clearly an independent contractor and is not entitled to sovereign immunity.").

21. *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 793 (1980), *reh'g denied in part*, 534 F. Supp. 1046 (E.D.N.Y. 1982). Tort law in general is based on considerations of fairness. Although it is often easy to determine which party should be liable, courts are sometimes faced with situations in which it would be unfair to make either party bear the

allow the defense when damages resulted from the contractor's compliance with the contract.<sup>22</sup> When the contractor was negligent, however, the defense was unavailable.<sup>23</sup>

### III. THE *Feres/Stencel* DOCTRINE

In 1946, Congress limited sovereign immunity by passing the Federal Tort Claims Act;<sup>24</sup> however, some exceptions exist and it is predominantly from the exception for military personnel that the government contractor defense has evolved.<sup>25</sup> In *Feres v. United States*,<sup>26</sup> the Supreme Court interpreted the Federal Tort Claims Act "combatant activities" exception as continuing to prohibit suits by military personnel against the government for injuries arising while on active duty.<sup>27</sup> Subsequent problems developed when military personnel were injured as a result of defective products built by a government contractor.

loss. As a result, the court ends up determining which is the more innocent party and attaches liability to the other, for example, where the culpable party is insane. See, e.g., *Jolley v. Powell*, 299 So. 2d 647, 648-49 (Fla. 2d DCA 1974) (insane person liable for his own negligence); *McGuire v. Almy*, 297 Mass. 323, 328, 8 N.E.2d 760, 763 (1937) (insane party liable for assault and battery); *Moore v. Horne*, 153 N.C. 413, 414, 69 S.E. 409, 410 (1910) (holding an insane party civilly liable for torts he commits); see also PROSSER AND KEETON ON THE LAW OF TORTS § 75 (W. Keeton 5th ed. 1984) (observing that in strict liability the burden is placed on the party who can bear it best, according to the exigencies of social justice).

22. See *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978) (jeep built without seatbelts at government's request), *construed in* Note, *supra* note 6, at 1057; see also *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980) (The manufacturer built a dough mixer according to government specifications for use in field kitchens.).

23. *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961) (defense fails if work was improper, careless, or negligent); *Green v. ICI Am., Inc.*, 362 F. Supp. 1263, 1265 (E.D. Tenn. 1973). Unlike a design defect provided by the government, a manufacturing defect involves the contractor's own negligence and is not protected by the defense. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

24. Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C. (1982)) (F.T.C.A.). The F.T.C.A. subjects the government to tort liability for the same reasons ordinary citizens are subject to tort liability.

25. See *infra* notes 26-34 and accompanying text (discussing the *Feres/Stencel* doctrine as a partial justification for the government contractor defense).

26. 340 U.S. 135 (1950).

27. *Id.* at 138, 146 (construing the Federal Tort Claims Act, 28 U.S.C. § 2680(j) (1946)). The Court based its reasoning, in part, on the fact that the government already provided servicemen with compensation for injuries, regardless of fault. 340 U.S. at 145. See also Note, *Government Contractor Defense to Strict Products Liability*, 49 J. AIR L. & COM. 671, 675-79 (1984) (explaining the evolution of *Feres* and its progeny from the Federal Tort Claims Act).

Because neither the soldier nor his family could recover from the government, they would bring an action against the contractor who would then try to seek indemnity from the government. The Supreme Court realized that this resulted in a circumvention of the doctrine of sovereign immunity as enunciated in *Feres*. Consequently, the Court ruled, in *Stencel Aero Engineering Co. v. United States*,<sup>28</sup> that where the government was not liable to the plaintiff, the Court could not make it liable through indemnification of the contractor.<sup>29</sup> This aspect of sovereign immunity which immunizes the government from liability to the serviceman and the government contractor commonly has been referred to as the *Feres/Stencel* doctrine.<sup>30</sup>

The area of products liability has been susceptible to claims of the government contractor defense because of the many products produced by independent contractors for the military's use. The inequity of holding contractors liable for defective products which they did not design is greater when the government compels contractors to produce products at fixed prices during wartime.<sup>31</sup> In this situation, the contractors can neither walk away from a risk that they do not want to assume, nor increase the contract prices to cover the expected liability.<sup>32</sup> In addition, the *Feres/Stencel* doctrine bans the contractors from seeking indemnification from the government. As a result, the contractors bear the full responsibility for defective products which they built for the government, regardless of the facts that they were not negligent at all, that the government compelled them to produce the product, and that the government provided the defective design. Although strict liability often places the loss on a party that was not at fault, one of the

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28. 431 U.S. 666, *reh'g denied*, 434 U.S. 882 (1977).

29. *Id.* at 673-74.

30. See, e.g., *Hefley v. Textron, Inc.*, 713 F.2d 1487 (10th Cir. 1983); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983).

31. During wartime or national emergency the government has broad powers under the Military Selective Service Act, which allows it to command a manufacturer to produce a product for the government within a prescribed period of time, for "fair and just compensation." 50 U.S.C. app. § 468(a)-(d) (1981 & Supp. 1985). If the manufacturer refuses or fails to comply, the government can seize the plant and operate it for production of the articles. *Id.* at § 468(c). In addition, the manufacturer faces possible imprisonment for up to three years and/or fines up to \$50,000 for noncompliance. *Id.* at § 468(f).

32. The issue, however, of whether compulsion by the government must exist before the defense applies has met with different responses over the years. Compare *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961) (compulsion required), discussed in Note, *supra* note 16, at 869 with *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 253 (3d Cir. 1982) (compulsion not required).

reasons why society can tolerate such liability is that it can shift the loss to the wrongdoer by indemnification.<sup>33</sup> In addition, even when indemnification is not available, the party bearing all of the loss often is not totally innocent because he put the defective product into the market and, therefore, should suffer the loss instead of the innocent plaintiff.<sup>34</sup>

Unfortunately, the *Feres/Stencel* doctrine prevents indemnification even when the government compels the contractor to produce the product at a fixed price. In this situation, the contractor resembles the innocent plaintiff in that he was neither at fault nor able to pass the loss on to anyone else.

#### IV. THE Agent Orange TEST

Although considerations of fairness and public policy dictated a need for applying the government contractor defense when the government compelled the contractor to produce the product under a fixed price contract, the courts did not fully establish the parameters of the defense until *In re Agent Orange Product Liability Litigation*.<sup>35</sup> In determining whether the defense was available to the manufacturers of a highly toxic defoliant, the Court of Appeals for the Second Circuit held that the manufacturer had to show that:

- 1) the government established the specifications for the product,
- 2) the manufactured product met the specifications in all material respects, and
- 3) the government knew as much or more than the manufac-

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33. See *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 97, 179 N.W.2d 64, 72 (1970) (discussing a "passive" tortfeasor's ability to indemnify against an "active" tortfeasor in strict liability); cf. *Prosser, The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1123-24 (1960) (stating that in a warranty action indemnification through each supplier in the chain of distribution is costly and that direct actions against the manufacturers should replace indemnification). See generally PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 21, at 341-45 (discussing the availability of indemnity).

34. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1963) ("The purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."); cf. RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965) (stating that by marketing the product the manufacturer has assumed a special responsibility toward any member of the community who is injured by it). For an example of a court's attempt to claim that servicemen do not rely on such an "implied representation," see *infra* note 70 (discussing implied representation and quoting *McKay v. Rockwell Int'l Corp.*, 704 F.2d. 444, 453 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

35. 534 F. Supp. 1046 (E.D.N.Y. 1982).



turer about the hazards to people that accompanied use of the product.<sup>36</sup>

Because the purpose of the first prong, the "establishment prong," is to avoid imposing liability on a contractor who merely supplied the government with a weapon that the government required, the government must have "established the design and specific characteristics."<sup>37</sup> If, however, the government only set forth "performance specifications," the court emphasized that the defense would be far more restricted.<sup>38</sup>

The second prong of the test requires a comparison of the "characteristics and quality of the product" with the government's specifications.<sup>39</sup> The defense would fail if material discrepancies existed.<sup>40</sup>

The last prong of the test, the "knowledge prong," imposes on the manufacturer a duty to warn the government of hazards which the manufacturer knows are associated with use of the product.<sup>41</sup> The warnings must be such that the government has equal or greater knowledge of the hazards involved. If the manufacturer has more knowledge than the government, then it has not given adequate warnings and the defense will fail.<sup>42</sup>

The "knowledge prong" is crucial because it allows the govern-

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36. *Id.* at 1055. The court also rejected compulsion as a requirement of the defense.

37. *Id.* at 1056.

38. *Id.* The Armed Services Board of Contract Appeals categorizes government specifications into three groups: (1) Design specifications—stating "precise measurements, tolerances, materials, in-process and finished product tests, quality control and inspection requirements and other information." Comment, *Strict Product Liability Suits for Design Defects in Military Products: All the King's Men; All the King's Privileges?*, 10 U. DAYTON L. REV. 117, 120 n.13 (1984) (quoting Aerodex Inc., 1962 B.C.A. (CCH) ¶ 3492, at 17,822, *rev'd on other grounds*, 417 F.2d 1361 (Ct. Cl. 1969)). (2) Performance specifications—stating performance characteristics desired from a product (i.e. top speed, maximum range, and capacity for an airplane). Comment, *supra* note 38 at 120 n.13 (citing 1962 B.C.A. ¶ 3492, at 17,822). The contractor would have "general responsibility for the design." *Id.* (quoting 1962 B.C.A. ¶ 3492, at 17,822). (3) Purchase description—(i.e. brand name, model number). Comment, *supra* note 38, at 120 n.13 (citing 1962 B.C.A. ¶ 3492, at 17,822). When dealing with a performance specification, the government is not providing the specifications, but rather allowing the contractor to design a product to perform in the manner that the government wants. Needless to say, if in this situation the design is defective, then the contractor is not the innocent party that he would be if the government provided the specifications; therefore, the "establishment prong's" function is to allow the defense when the government, and not the contractor, is at fault.

39. 534 F. Supp. at 1057.

40. *Id.* This portion of the test is seldom in dispute. Nonetheless, whether the defect is in the manufacture or in the design of the product is important because the defense only protects the latter. See *supra* note 23 and accompanying text.

41. 534 F. Supp. at 1057.

42. *Id.* at 1057-58.

ment to weigh the risks involved against the need for the product, and to make an intelligent determination of whether it should use the product.<sup>43</sup> Because the manufacturer typically has a financial interest in the continued use of the product, however, the courts should carefully watch the "knowledge prong" to assure strict compliance with the "equal or greater knowledge" requirement, and to prevent an unscrupulous manufacturer from failing to adequately disclose the hazards of the product to the government. One problem that arises from the "knowledge prong" of the *Agent Orange* test is, by attaching liability for what the manufacturer knew but failed to disclose, the court encourages manufacturers to know as little as possible about their products.<sup>44</sup> The better standard would be to hold the manufacturer liable for what he knew or should have known, based on his skill and expertise in the area. The "should know" standard would impose on the manufacturer a higher duty to warn the government, which has less expertise, of any hazards in the product.<sup>45</sup> As a result of *Agent Orange*, when the government gives a contractor specifications for a product, if the contractor builds the product to those specifications and warns the government of any hazards it knows to be associated with the product, then the contractor is immune from liability for injuries resulting from the product.

In support of the government contractor defense, the *Agent Orange* court pointed out that, for prophylactic effect, tort liability should rest on the wrongdoer, who is in a position to correct the wrong,<sup>46</sup> and that, without the defense, contract prices would increase and render "governmental immunity" meaningless by circumventing the *Feres/Stencel* doctrine.<sup>47</sup> Interestingly, the govern-

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43. *Id.* at 1057. The *Agent Orange* test is similar to the risk/utility analysis courts use in ordinary negligence theory and to Judge Learned Hand's risk-benefit equation. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), *reh'g denied*, 160 F.2d 482 (1947) (discussing the balancing of the probability of harm and the extent of injury against the burden of taking adequate precautions, and formulating an algebraic equation ( $B < PL$ ) to reflect the proper balance for liability to attach to the burdened party). The entity most concerned with reaching a balanced outcome, here the government not the profit-minded manufacturer, must compare opposing interests.

44. Note, *supra* note 6, at 1078-79.

45. *Id.* at 1079.

46. *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 793-94 (1980), *reh'g denied in part*, 534 F. Supp. 1046 (E.D.N.Y. 1982).

47. *Id.* at 794; see also Comment, *supra* note 29, at 136 & nn.137-38 (citing cases which argue that costs will rise due to either unavailability of insurance or its increased cost). But see *id.* at 136-37 (Recent studies show, however, that the existence of the government contractor defense has little effect on manufacturer's insurance rates.).

ment apparently believes that the contractor is in a position to correct the wrong, or at least to make the wrong worse if given blanket immunity. When contractors have sought indemnification clauses or statutory immunity the government has opposed it, arguing that broader protection for contractors would reduce their economic incentive to design and produce the safest possible products.<sup>48</sup>

Although other reasons may justify the defense, the belief that, absent the defense, contractors will circumvent governmental immunity by increasing contract prices does not take into consideration the fact that the government awards most contracts under a bidding system which allows the free market to regulate the price so that contractors with safe records will not have any additional costs to pass on to the government, and will be able to provide safer products at cheaper prices.<sup>49</sup> Also, the defense does not protect manufacturers from damages caused by manufacturing defects and, other than the free market system, nothing else prevents manufacturers from passing those costs off to the government.<sup>50</sup> In addition, the threat of increased government contract prices, which the contractors claim will circumvent the *Feres/Stencel* doctrine, was just as much of a threat when the *Stencel* Court decided to prevent indemnification against the government. Yet, there is no evidence that contract prices rose as a result of *Stencel* when contractors bore the entire risk of liability. No reason suggests why the situation will be any different if the courts limit or even abolish the defense, which has developed since *Stencel*.<sup>51</sup>

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48. Comment, *supra* note 38, at 124, 143-44; see also Comment, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 U. CHI. L. REV. 1030, 1048-49 (1981) (suggesting that the contractor is the person most able to increase deterrence by demanding indemnity clauses, agreements to pay insurance, and other favorable provisions).

49. See *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 457 (9th Cir. 1983) (Alarcon, J., dissenting), cert. denied, 464 U.S. 1043 (1984); see also, *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 254 n.16 (1982) (quoting Comment, *Requests for Proposals in State Government Procurement*, 130 U. PA. L. REV. 179, 181 (1981): "In 1980, '85-90% of all federal contract dollars . . . were let through negotiated procurements'"); see also Comment, *supra* note 48, at 137 (contractors admit that they are unable to shift increased costs to the government).

50. See Comment, *supra* note 48, at 134 (citing *Johnston v. United States*, 568 F. Supp. 351 (D. Kan. 1983)); see also *supra* note 23 and accompanying text (pointing out that the defense does not protect contractors for injuries caused by manufacturing defects).

51. On the other hand, if manufacturers are given too much protection from liability, costs, as measured in lives and equipment, will surely rise. Brief for Appellee at 29 n.16, *Shaw v. Grumman Aerospace Corp.*, No. 84-5803 (11th Cir. 1985); cf. *Stencel Aero Eng'g Co. v. United States*, 431 U.S. 666, 674 n.8 (1977) (implicitly recognizing that actions against a military contractor are proper because the contractor has had sufficient notice to take into

As a third policy reason for the defense, the court stated that the judiciary should not become involved in second-guessing the military on military decisions.<sup>52</sup> Although generally true, this argument ignores the fact "that not all decisions regarding the design of military equipment involve military judgments."<sup>53</sup> The military may have its reasons for leaving seatbelts out of its jeeps<sup>54</sup> or for designing machines for its field kitchens in a way that would be unreasonably dangerous in the normal market,<sup>55</sup> however, no military decision exists when the government does not tell the manufacturer to build the product according to a particular design. Where discretion exists, it is not a military decision.<sup>56</sup>

Nonetheless, the *Agent Orange* test serves an important function: it limits the availability of the government contractor defense to situations where the contractor merely supplied the government with the product which it requested and where the contractor was neither involved in the design of the product, nor negligent in its manufacture. Unfortunately, expansion of the *Agent Orange* test in recent cases has provided government contractors with a "wind-fall" and defeated one of the main policy reasons for the defense by causing innocent plaintiffs to bear the entire loss for something that they could not have prevented.<sup>57</sup>

## V. UNWARRANTED EXPANSION OF THE *Agent Orange* TEST

Despite the fact that the *Agent Orange* court emphasized the

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account the risk of not being able to get indemnification from the government).

52. *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1054 (E.D.N.Y. 1982).

53. *Schoenborn I*, 586 F. Supp. 711, 718 (E.D. Pa. 1984), *rev'd*, 769 F.2d 115 (3d Cir. 1985).

54. *See*, *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978) (jeep built without seatbelts at government's request because seatbelts would be dangerous in battlefield conditions).

55. *Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980) (dough mixer manufactured according to government specifications for use in field kitchens).

56. Note, *The Government Contract Defense: Should Manufacturer Discretion Preclude Its Availability?*, 37 *Mt. L. Rev.* 187, 201 (1985) ("The existence of manufacturer discretion demonstrates that the military has made no decision as to the ultimate design of the particular aspect of the product involved."); *see also*, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 460 (9th Cir. 1983) (Alarcon, J., dissenting), *cert. denied*, 464 U.S. 1043 (1984) (argument that it would involve second guessing military orders would also be present if injured civilian sued, but the *Feres/Stencel* doctrine does not bar such a suit).

57. *See supra* note 46 and accompanying text (noting that in order to have a deterrent effect the court must place liability on the party who is in a position to correct the tortious wrong).

importance of a manufacturer's inability to negotiate specifications and contract prices or terms,<sup>58</sup> courts recently have applied the three-prong test in these situations, regardless of such crucial issues as the extent of the contractor's involvement in the design of the product. In *McKay v. Rockwell International Corp.*,<sup>59</sup> a case involving a faulty ejection system designed by a contractor for use in a military airplane, the Ninth Circuit adopted the *Agent Orange* test; but its version of the first prong was critically different than the one it claimed to adopt. The court stated that government "approval" of the specifications was sufficient to satisfy the requirement that the specifications be governmentally "established."<sup>60</sup>

Although seemingly a harmless change, it completely undermined the effectiveness of the *Agent Orange* test because manufacturers could now defectively design a product and escape liability for their own negligence by slipping the defect past the less knowledgeable government inspectors. It seems illogical to allow the manufacturer to shift the responsibility for a defect-free product to the government, who has no fear of liability and less expertise. Ironically, the court points out that the defense does not protect contractors for a product which they negligently manufactured.<sup>61</sup> Yet it fails to explain why the defense protects contractors for negligently designing a product, when a design defect is more dangerous than a manufacturing defect because it is more likely to repeat itself. Consequently, under the *McKay* test, manufacturers can escape liability for many defects which the government cannot find by testing but which develop with time as a result of the improper design.<sup>62</sup> To support its version of the defense, the *McKay* court offered the same policy reasons as in *Agent Orange*.<sup>63</sup> Furthermore, the court argued that war sometimes requires the United States to push technology to its limits and, thereby, incur risks which would

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58. See *In re Agent Orange Prod. Liab. Litig.*, 506 F. Supp. 762, 794 (1980), *rev'd. on other grounds*, 635 F.2d 987 (1980).

59. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

60. *Id.* at 451. The court also explicitly provided in its test that the government must be immune for the defense to apply. *Id.*

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

62. The clogged lubrication jets and inadequate shaft clearance in *Schoenborn* are examples of such defects. See *infra* note 74 and accompanying text. Fortunately, some courts have declined to follow *McKay*. See, e.g., *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036 (5th Cir. 1984), *cited in* Brief for Appellee at 21, *Shaw v. Grumman Aerospace Corp.*, No. 84-5803 (11th Cir. 1985) (listing cases which reject *McKay*); *Johnston v. United States*, 568 F. Supp. 351 (D. Kan. 1983).

63. See *supra* notes 46-47, 51 and accompanying text.

otherwise be unacceptable.<sup>64</sup> The Manhattan Project, which led to the discovery of the atomic bomb, is an example of this.<sup>65</sup> Needless to say, such situations are not very common.

Lastly, the court stated that its new version of the defense encourages a close working relationship between the government and the contractor,<sup>66</sup> but the court did not explain what benefit that would have. If the assumption is that close work between the government and contractor leads to safer products, then the court may have little basis for its argument. Two parties who face no liability would hardly have more incentive to build safer products than one who does not have such immunity.

In *Koutsoubos v. Boeing Vertol*,<sup>67</sup> the Court of Appeals for the Third Circuit adopted *McKay*'s version of the test, and also claimed that if any involvement by the contractor defeated the defense, then "there would be no incentive for contractors to work closely with the military . . . ." The court failed to realize that its concern should be on what it is trying to encourage—safe products—not on a close working relationship with the government, unless a close working relationship is instrumental in obtaining safe products. In *Koutsoubos*, it was not. The court found that there had been a "back and forth" discussion between the Navy and Boeing about the specifications, yet Boeing still manufactured a defective helicopter and two servicemen died as a result.<sup>68</sup>

Nonetheless, by adopting the defense as set out in *McKay*, the court gave additional strength to a version of the defense which its original authors in the public works cases could never have envisioned,<sup>69</sup> and which flies in the face of established policy reasons for strict liability.<sup>70</sup> Yet, despite the damage done by *McKay* to the

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

65. See Comment, *supra* note 15, at 523-26 (discussing the need to extend beyond the limits of modern technology during wartime).

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

67. 755 F.2d 352 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1985).

68. *Id.* at 353-54.

69. See *supra* notes 18-23 and accompanying text. The original intent behind the government contractor defense was to avoid making innocent contractors bear the loss for a defective product of government design and compelled production, and not to give government contractors an immunity unparalleled in other areas of tort law.

70. There are four major policy reasons for strict liability: enterprise liability, market deterrence, compensation, and implied representation. See Note, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?*, 33 STAN. L. REV. 535, 536 (1981). The theory behind enterprise liability is that the price of the product rises as costs increase due to accidents. The purchaser then is able to choose the less expensive, safer, products over the costly, high risk products. Although this purpose is still served in

*Agent Orange* test, the "knowledge prong" still restricted contractors.

In *Schoenborn I*, the trial court reviewed *McKay*'s reasons for supporting the "approval" standard, then, rejecting it, refused to allow government "approval" of Boeing's helicopter specifications

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the area of military products, the "approval" standard's overly broad protection subverts it. See *supra* note 49 and accompanying text. Market deterrence is similar to enterprise liability but the effect is on the seller. Market deterrence encourages sellers to avoid increased costs and resulting lower profits by building safer products. Because government contractors have as much or more of a profit motive than other contractors, market deterrence ordinarily is as effective in the military product marketplace. By allowing manufacturers to avoid liability through government approval of their product, however, market deterrence is lost.

Although the Veteran's Benefits Act compensates servicemen and their families, the compensation they receive is less than they would under a strict liability recovery. Cf. *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 452 (9th Cir. 1983) (Alarcon, J., dissenting), *cert. denied*, 464 U.S. 1043 (1984) (arguing that while compensation would be greater with strict liability, servicemen did not anticipate such an increase at the time of enlistment). It might be observed that these servicemen probably did not anticipate being treated as second class citizens and subjected to defective equipment without a hope of recovering damages for it.

Lastly, the implied representation that a marketed product, if put to its intended use, will not be unreasonably dangerous is still present whether the market is the military or the regular marketplace. In *McKay*, the court argued that the implied representation does not exist for servicemen because "[t]hey recognize when they join the armed forces that they may be exposed to grave risks of danger, such as having to bail out of a disabled aircraft." *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 453 (9th Cir. 1983); *cert. denied*, 464 U.S. 1043 (1984). That reasoning is specious and it degrades servicemen to second class citizens. Followed to its logical conclusion, that reasoning suggests that it would be acceptable to give a police officer a defective patrol car because he recognized the danger of his job when he became a police officer.

A soldier anticipates risks associated with war and the enemy, not defective products. As Judge Alarcon stated in his *McKay* dissent: "It is the Military's, [the contractor's] and this court's duty to insure that our servicemen are provided with reliable and safe equipment." *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 461 (9th Cir. 1983) (Alarcon, J., dissenting), *cert. denied*, 464 U.S. 1043 (1984); see also *Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867 (8th Cir. 1974):

In making the grenade and its component parts the defendants knew that it was made for military personnel and that it was to be used by them. We believe the public interest in human life and health requires the protection of the law against the manufacture of defective explosives, whether they are to be used by members of the public at large or members of the public serving in our armed forces.

*Id.* at 871.

The defense is available for actions based on strict liability, negligence, and warranty. *In re Agent Orange Prod. Liab. Litig.*, 534 F. Supp. 1046, 1055-56 (E.D.N.Y. 1982); see also *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 251-53 (3d Cir. 1982) (exploring the availability of the defense in all three circumstances under Pennsylvania law). Extension of the government contractor defense, however, to allow immunity if the product meets with government approval, circumvents the policy reasons for strict liability without a sufficient reason to do so. But see *McKay*, 704 F.2d at 451-53 (stating that policy reasons for strict liability are not circumvented in cases involving injuries resulting from military products).

to satisfy the "establishment" prong.<sup>71</sup> The trial court decided against allowing the defense because the government had only provided Boeing with "performance specifications."<sup>72</sup> Because the existence of "performance specifications" indicates that Boeing and not the Army designed the helicopter, the "establishment prong" could not be satisfied without the court accepting *McKay's* "approval" standard. As a result, the government contractor defense was not available and the jury found Boeing negligent in the design of the helicopter.<sup>73</sup>

It is in cases such as *Schoenborn* that the weakness of the "approval" standard becomes apparent. Although rigorous testing may detect certain defects such as sluggish handling or nonconformance with the performance specifications, it would not detect a problem which, although present in the design, only becomes apparent with time, and then, only for a few minutes before the inevitable destruction of the helicopter and its occupants. Examination of the specifications by the less experienced government would not detect the inadequate clearance at Station 120,<sup>74</sup> and bearing failure due to oil starvation is something which, if at all detectable prior to its occurrence, would have to be within the expertise of the contractor. The shift of responsibility from the contractor to the government which results from acceptance of the "approval" standard places the burden of detecting such a defect on the party least able and with the least incentive to do so.<sup>75</sup> Nonetheless, on appeal, the circuit court upheld the "approval" standard created by *McKay* and adopted in *Koutsoubos* and went on to examine the other prongs of the test.<sup>76</sup> Plaintiffs argued that Boeing had not satisfied

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71. *Schoenborn I*, 586 F. Supp. at 717-18 ("We are holding that where a contractor establishes a product's detailed specifications and the government merely approves them, the government contractor defense is not available to the contractor.").

72. *Id.* at 715-16; see *supra* note 38 and accompanying text (discussing why performance specifications are not sufficient to entitle the manufacturer to the protections of the defense).

73. See *supra* note 5.

74. The clearance at Station 120 becomes a problem only when bearing failure occurs. One defect intensifies the other. At trial, Mr. Coronato, an expert witness, testified that if the sync shaft were made of steel, rather than aluminum, the pilot, who was 30-60 seconds away from landing, would have had an "additional 15-30 minutes of survivability," despite the inadequate clearance. Brief for Appellee at 23, *Schoenborn II*, 769 F.2d 115 (3d Cir. 1985); see *supra* notes 1-3 and accompanying text (discussing how friction at Station 120 results in severance of the sync shaft and destruction of the aircraft).

75. The government is already absolved from liability in this situation, therefore, it does not have the added incentive of fearing liability to drive it toward assuring that the product is defect free.

76. Because refusal to accept the "approval" standard was dispositive of the test at the



the "knowledge prong" and offered evidence<sup>77</sup> to show that Boeing knew that bearing failure caused the sync shaft to rub at Station 120 in two prior accidents.<sup>78</sup> This rubbing caused the severance of the aluminum sync shaft in a matter of minutes, followed by the immediate destruction of the helicopter; yet, Boeing had not notified the Army of the full extent of the hazard. Boeing had only warned the Army that bearing failure had caused the prior accidents and proposed modifications to correct the defect or warn of its presence.<sup>79</sup> This raises a question about the adequacy of Boeing's warning to the government. *Agent Orange*, *McKay*, and *Koutsoubos*, on which this court relied, had already set the standard for adequacy by requiring that the government know as much or more than the manufacturer about the hazards of the product so that it could balance the risks and benefits involved. To what avail was Boeing's recommendation that the government install a chip detector for an earlier warning of bearing failure,<sup>80</sup> if Boeing did not tell the government how much time the pilot would have between bearing failure and destruction of the aircraft? In *Berkebile v. Brantly Helicopter Corp.*,<sup>81</sup> the Supreme Court of Pennsylvania held that it is a question for the jury whether the warnings about the amount of time necessary for the helicopter pilot to achieve auto-rotation were sufficient to apprise the pilot of the dangers of delay and whether the warnings were adequate enough to convey the urgency of the situation and the need to react almost instantana-

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trial court level and because the "establishment prong" was not met, the trial court did not address the other prongs of the test.

77. Plaintiffs presented an internal memo from Boeing to show that Boeing had withheld information from the Army.

78. See Brief for Appellee at 7, *Schoenborn II*, 769 F.2d 115 (3d Cir. 1985). One of the prior accidents occurred in Vietnam in 1966 and resulted from sync shaft failure like the *Schoenborn* accident. As a result of the 1966 accident, an investigation by Boeing revealed that displacement of the pinion shaft by only two degrees would result in sync shaft failure; but this information was only kept in an internal memo which was not given to the Army.

79. Boeing did not warn the Army of any hazards at all until after two accidents had occurred, at which time Boeing proposed modifications to correct the defect. The Army adopted five of six proposed modifications prior to the accident at Mannheim. The only modification rejected, inserting a screen in the oil line prior to the point where the oil jets become clogged, was too costly to implement. This begs the question: why should the Army have to pay to eliminate a defective condition caused by the contractor? If this is a result of the government's "approval" of the product, it conflicts with the principle that the "duty to provide a non-defective product is non-delegable." *Brown v. Caterpillar Tractor Co.*, 741 F.2d 656, 659 (1984) (quoting *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975)).

80. This was referred to in the trial court as Engineering Change Proposal # 153.

81. 462 Pa. 83, 337 A.2d 893 (1975).

neously.<sup>82</sup> Although here the judge decided the question as part of deciding the applicability of the defense, it is clear that the government did not have as much knowledge of the hazard as the manufacturer. As a result, despite the circuit court's own finding that the contract contained more than just "performance specifications," and its continued support of the useless "approval" standard, the defense should have failed because the government did not have equal or greater knowledge of the hazards of the product as required by the third prong. Absent complete knowledge of the hazard, including the dangers of delay, the government did not have the full picture necessary for an informed balancing of risks and benefits.<sup>83</sup>

Nonetheless, the circuit court applied the government contractor defense and held that the relevant knowledge required by the "knowledge prong" is "knowledge of a defect in an essential or key component of the mechanism."<sup>84</sup> In so ruling, the court completely changed the test so that now the government need not have equal or greater knowledge of the hazard as long as it knows of a defect in a key component. Besides the fact that what is a "key component" remains subject to case by case determination, the modified test does not even encourage manufacturers to work closely with the government in designing a product because, now that their duty to warn is little more than a formality, their standard of liability is considerably less. In seeking to prevent contractors from passing on increased contract costs to the government, the court has condemned society to pay an even greater price, the kind that is paid with people's lives.<sup>85</sup> Granting such an expansive immunity to government contractors can only promote reckless conduct, and, although recklessness is dangerous in any sector of society, such behavior is particularly hazardous in the area of military products.<sup>86</sup>

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82. *Id.* at 100-04, 337 A.2d at 902-03.

83. The *Agent Orange* court set a high standard requiring absolute disclosure in order to maintain tight control over an otherwise dangerous immunity. If manufacturers are allowed to stray from that standard, then the effective limitations created by the *Agent Orange* court will be lost in constant disputes over what constitutes adequate knowledge.

84. *Schoenborn II*, 769 F.2d 115, 125 (3d Cir. 1985) (In this case the court felt that the "key component" was the entire transmission.).

85. See Brief for Appellee at 11, *Shaw v. Grumman Aerospace Corp.*, No. 84-5803 (11th Cir. 1985).

86. With this country's ever increasing supply of nuclear weapons, courts should be demanding more care rather than less from military contractors. Now, in an effort to cut costs, contractors will undoubtedly take higher risks than they would if faced with greater liability; but the real risks will be borne by us all. Cf. Pratt, *Catastrophic Nuclear Power*

Although the *Agent Orange* test suffered a blow as a result of the "approval" standard, this interpretation of the "knowledge prong" has destroyed the purpose of the defense. The court has overextended the government contractor defense to a point where it no longer serves its originally intended purpose. The defense was originally an equitable measure intended to prevent the court from imposing liability on an innocent contractor who, absent his relationship with the government, the court would not force to bear the loss. Government contractors can now escape their proper share of liability because the defense is no longer closely tailored to serve its intended purpose. Hopefully, other courts will see the inequity and refuse to extend *Agent Orange* as far as have *McKay*, *Koutsoubos*, and *Schoenborn*. These decisions have exaggerated and shifted from the contractor, who is now not so innocent, to the innocent plaintiff the unfairness that existed in a few isolated situations. Although primarily based on reasons of fairness, the current effect of the defense is to grant government contractors an undeserved immunity from liability, while other contractors carry their share of the cost to society of defective products and innocent plaintiffs bear a loss that is not rightfully theirs.

Even if other courts take action to limit the expansion of the defense, however, corrective action is necessary to repair the damage that *McKay*, *Koutsoubos* and *Schoenborn* have done. Although the *McKay* and *Schoenborn* courts claimed that they were in agreement with the *Agent Orange* court and purported to adopt the *Agent Orange* test, each court altered the test materially and, as a result, the Second, Third, and Ninth Circuits are not in harmony on how to apply the government contractor defense. In addition, other circuits are relying on these cases in applying the defense;<sup>87</sup> this disharmony will undoubtedly lead to growth in the disparity between the circuits concerning use of the government contractor defense unless the Supreme Court of the United States acts to standardize its application.<sup>88</sup>

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*Reactor Accidents: An Issue of Safety, A Question of Record*, 14 GA. L. REV. 265 (1980) (discussing risks associated with nuclear reactors manufactured by contractors under government regulation and operated by utility companies); Note, *Transportation of Nuclear Material: The Public Challenge*, 11 RUT.-CAM. L.J. 63 (1979) (examining risks associated with transportation of nuclear materials (often by common carrier)).

87. See, e.g., *Tillett v. J.I. Case Co.*, 756 F.2d 591, 596 (7th Cir. 1985) (following *McKay*).

88. On October 22, 1985, the plaintiffs filed a petition for certiorari in the *Schoenborn* case. Perhaps the Supreme Court of the United States will see the importance of promptly limiting the availability of the government contractor defense and will take steps to uni-

## VI. PROPOSAL FOR LIMITATION OF THE GOVERNMENT CONTRACTOR DEFENSE

In creating a government contractor defense, courts attempt to strike a balance between overly burdening the manufacturer and leaving innocent plaintiffs vulnerable. The closest they have come to striking a proper balance is the *Agent Orange* test. The *Agent Orange* court properly molded this test to protect the manufacturer who does everything he can to avoid placing a defective product on the market. On the other hand, a manufacturer who has not taken the extra steps to warn the government and protect society from a dangerous product which he manufactured cannot rely on the defense because the loss would then fall on the plaintiff who could not have prevented it.<sup>89</sup>

The only change that courts need to make to the *Agent Orange* test is that courts must hold manufacturers to a "should know" standard in the "knowledge prong" to encourage them to learn as much as possible about their products.<sup>90</sup> If a manufacturer has built a product to government established specifications, construing "established" in the strictest sense,<sup>91</sup> and has notified the government in full of any hazards associated with the product of which he knows or should know, then he should be entitled to the protection of the government contractor defense. This compensates the contractor for his inability to obtain indemnification from the government.

If this proposal appears to almost abolish the government contractor defense, it is because the defense should, at the very least, be severely limited. Government contractors, like ordinary contractors, are in business to earn a profit. They cannot expect to go about collecting their profits and avoiding all liability because their client is the United States Government. When, however, as a result of war, the government compels contractors to design and manufacture a product under a fixed price contract or requires contractors to push technology to its limits,<sup>92</sup> society, through its courts, should entitle contractors to protection from liability through what may amount to a fourth prong in the *Agent Orange* test.

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formly reduce its application.

89. This encourages the profit-minded manufacturer to report the product's hazards to the government.

90. See *supra* note 44-45 and accompanying text.

91. This means that the government must have provided the specifications for the product, and the contractor had no involvement in the design of the product.

92. See *supra* notes 64-65 and accompanying text.

Absent the exigencies of war, if a manufacturer finds a risk too high, then he can pass up the contract. If the government deems it necessary, it can include an indemnification clause in the contract, and thus, relieve the manufacturer of the loss. Otherwise, a government contractor should be subject to the same benefits, liabilities, and risks as the rest of us; no more, no less.

ALEX FERRER\*

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