University of Miami Law Review

Volume 31 | Number 5 Article 6

11-1-1977

Government Contracts: Third Party Beneficiaries and the Expanding Body of Federal Common Law

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NOTES

Government Contracts: Third Party Beneficiaries and the Expanding Body of Federal Common Law

In a recent decision the United States Supreme Court was called upon to decide whether state law or federal common law should be used to determine the rights of third party beneficiaries of a government contract. The author analyzes the competing policies and suggests that since the rights or duties of the United States were not at issue the Court correctly applied state law.

Shortly after takeoff from the DeKalb County Airport on the morning of February 26, 1973, a Lear Jet crashed, killing the seven persons aboard and severely injuring another on the ground. The plane was destroyed and property at the crash site was extensively damaged. The accident was caused by the ingestion of a large number of birds by the aircraft's engines.

In 1962, pursuant to the Federal Airport Act,[1] the Federal Aviation Administration and DeKalb County, Georgia, had entered into several Federal Grant Agreements whereby in exchange for federal funds, the county had agreed, *inter alia,* to "operate and maintain in a safe and serviceable condition the Airport and all facilities thereon . . . ."[2] Nevertheless, a county dump adjacent to the airport had been permitted to continue in existence attracting large numbers of birds which posed a hazard for aircraft. As early as March, 1970, the FAA had expressed its concern about the problem to county officials.[3] In February of 1971, the county had assured the FAA that the dump would be closed by August, 1972,[4] but the closing had never been effected. Following the crash of February 26, 1973, several actions were brought on various legal theories.[5] Most significant was the claim based on the allegation that plaintiffs[6]

1. Federal Airport Act, ch. 251, § 11, 60 Stat. 176 (1946) (repealed 1970). These provisions are now substantively contained in 49 U.S.C. § 1718 (1970), *as amended by* 49 U.S.C.A. § 1718 (Supp. Dec. 1976).

2. Miree v. United States, 526 F.2d 679, 687 n.4 (5th Cir. 1976).

3. Brief of Plaintiff-Appellant, Fireman's Fund Ins. Co., at 17, Miree v. United States, 538 F.2d 643 (5th Cir. 1976).

4. *Id.*

5. *E.g.*, negligence, nuisance, and breach of contract.

6. Miree sued as survivor to his parents; Phillips sued as survivor to her husband; Fields,

were third party beneficiaries of the contract between the FAA and DeKalb County. The United States District Court for the Northern District of Georgia dismissed the complaint finding that under Georgia law DeKalb County was immune from suit. The United States Court of Appeals for the Fifth Circuit reversed, holding that an action did lie under Georgia law.[7] On rehearing en banc, the court reversed itself, adopting Judge Dyer's dissent from the first hearing and holding that federal common law defines the rights of the third party beneficiaries of a government contract.[7.1] On writ of certiorari to the United States Supreme Court, held *reversed*: the rights of the third party beneficiaries of a government contract are determined by state law when the obligations of the United States are not in issue. *Miree v. DeKalb County*, 97 S. Ct. 2490 (1977).

The disillusionment of federal courts with the "attractive vision of a uniform body of federal law"[8] began with *Erie Railroad Co. v. Tompkins*.[9] The Erie Doctrine has been characterized as being concerned with three kinds of situations.[10] The first situation is where a federal statute is applicable to the facts of a particular case. If the federal statute is constitutional, the supremacy clause requires that the statute be followed in resolving the substantive issues presented.[11] The second situation is where a Federal Rule of Civil Procedure is applicable. If the rule is procedural *and* does not enlarge, abridge, or modify substantive state rights, the Rules Enabling Act dictates that the federal rule be followed.[12] The third situation is

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the person injured on the ground, sued for the burns he received; Fireman's Fund Insurance Company, assignee of the claim of Southeast Machinery, Inc., sued to recover for the destroyed plane; Chassion sued to recover for damage to his property at the crash site. Miree v. United States, 526 F.2d 679, 681 nn. 1-4, (5th Cir.1976).

7. Miree v. United States, 526 F.2d 679 (5th Cir. 1976).

7.1. Miree v. United States, 538 F.2d 643 (5th Cir. 1976).

8. Guaranty Trust Co. v. York, 326 U.S. 99, 103 (1945).

9. 304 U.S. 64 (1938).

10. For a discussion of this approach to the Erie Doctrine, see Ely, *The Irrespressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

11. U.S. CONST. art. VI, cl. 2.

12. 28 U.S.C. § 2072 (1970). The section provides in pertinent part:

> The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement

where there is no federal statute and no federal rule applicable. Here, the Rules of Decision Act[13] requires that state law be followed.[14]

It is the third situation with which the *Erie* decision was primarily concerned.[15] But *Erie* went beyond the Rules of Decision Act and held that where jurisdiction was based on diversity of citizenship, the *Constitution* required the application of state substantive law, whether statutory or judicial, as the rules of decision in federal courts.[16]

The effect of *Erie* was that federal courts sacrified "horizontal uniformity" or interstate consistency, in order to achieve "vertical uniformity" or intrastate consistency of decisions.[17] This effect was in accord with the *Erie* policy of "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[18] If the choice of forum could dictate the disposition of the case, noncitizens, able to proceed in either federal or state court,[19] would be afforded an entirely fortuitous advantage. *Erie* was designed to prevent this type of forum-shopping and the resultant discrimination against citizens of the forum state.[20]

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of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

13. 28 U.S.C. § 1652 (1970). "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

14. For a discussion of the Rules of Decision Act, see Ely, *supra* note 10, at 707-18.

15. It is this third situation that involves *Miree*. Clearly, no federal rule applies, and if a federal statute were applicable, the court of appeals would not have used federal *common* law.

16. 304 U.S. at 78.

17. In *Miree* both the Supreme Court and the court of appeals were concerned primarily with "horizontal uniformity" or interstate consistency of decision. For a discussion of the "vertical uniformity" that troubled the *Erie* Court, see McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 888-901 (1965).

18. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

19. Unlike the citizens of the forum state, noncitizens can sue citizens in federal court by invoking diversity jurisdiction. 28 U.S.C. § 1332(a) (1970).

20. Erie R.R. v. Tompkins, 304 U.S. at 74-75. The court objected to the prior rule of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), because it "introduced grave discrimination by noncitizens against citizens. It made rights . . . vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court . . . was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law." *Id.*

Nevertheless, federal courts have since found numerous reasons for applying federal common law instead of state law in certain instances.[21] In the noted case, the court of appeals had applied federal common law[22] because the case involved a government contract entered pursuant to authority conferred by federal statute[23] and therefore might affect the rights and obligations of the United States.[24]

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21. As Judge Morgan pointed out in his dissent to the Fifth Circuit's decision in *Miree*, the Court applied federal common law to decide "'whether the water of an interstate stream must be apportioned'" on the same day it decided *Erie*. 538 F.2d 643, 645 n.4, *quoting* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). Interestingly, Justice Brandeis wrote both the *Erie* and *Hinderlider* opinions.

22. Judge Dyer, in a footnote to his dissent to the panel opinion, 526 F.2d at 686 n.1, which was later adopted as the opinion of the court by the en banc majority, argued that recovery should be denied even if state law were applied. The dissenters to the en banc opinion argued that recovery should be permitted under both federal and state law. The Supreme Court refused to find that Judge Dyer's footnote expressed the opinion of the majority and remanded to let the court of appeals consider the claim under Georgia law. 97 S. Ct. at 2495. For the purposes of this note, it will be presumed that the plaintiffs can recover only if state law is applied.

23. The Supreme Court has acknowledged "that neither Congress nor the federal courts can . . . fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law." Hanna v. Plumer, 380 U.S. 460, 471-72 (1965). In *Miree* the court of appeals emphasized that the contract was entered into "pursuant to authority conferred by federal statute," 526 F.2d at 686, suggesting by implication that the application of state law would affect the government's power to contract. Thus the court held that "[t]he necessity of uniformity of decision demands that federal common law . . . control the contract's interpretation." *Id.*

In Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), the Court noted that "[w]hen the United States disburses its funds or pays its debts, it is exercising a constitutional function or power." *Id.* at 366. To subject that power to the "vagaries of the laws of the several states," allows the states to regulate the extent of that power. *Id.* at 367. Where the rights and duties of the government under a contract are unaffected by state rules, the fears expressed by *Clearfield* evaporate.

The Court in United States v. Allegheny County, 322 U.S. 174 (1944), noted that "[e]very acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power . . . . Procurement policies so settled under federal authority may not be defeated or limited by state law." *Id.* at 182. To allow state laws to regulate the procurement policies of the government restricts the constitutional grant of power to the United States. In *Miree*, however, application of state law in no way inhibits the exercise of the government's power. The United States is free to enter contracts, and federal law still controls the obligations owed to and expected of the government. But the substantive issue in *Miree* was not the interpretation of the obligations owed to or expected of the government; it was whether the county's failure to fulfill its obligations creates a cause of action in a third party. The constitution does not require that such determination be made by reference to federal law instead of state law.

When the Supreme Court reversed the court of appeals, it did so because "[t]he litigation raise[d] no question regarding the liability of the United States or the responsibilities of the United States under the contract." 97 S. Ct. at 2493.

24. In concurring with the Fifth Circuit's en banc decision, Judge Tjoflat suggested that

The argument for the application of federal common law is based primarily on the 1943 decision of the United States Supreme Court in *Clearfield Trust Co. v. United States.*[25] There the Supreme Court held that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."[26] In that case the endorsement of a check drawn on the Treasurer of the United States was forged. The check was pre-

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"government contracts, and especially those having to do with the airways, should be controlled by federal law." 538 F.2d at 644-45. It is important to recognize that federal law should not govern this action simply because the action relates to regulation of the airways. The Supreme Court pointed out that "the fact that the United States has a substantial interest in regulating aircraft travel and promoting air travel safety [is not] sufficient, given the narrow question before us, to call into play the rule of *Clearfield Trust.*" 97 S. Ct. at 2495. While Judge Tjoflat didn't argue specifically that this kind of federal interest required the application of federal common law, some of the authorities he used for support are often cited for that very principle. It therefore is appropriate to explore briefly the relevance of the cases to which he referred.

In Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972), the Court wrote that "[w]hen we deal with air or water in their ambient or interstate aspects, there is a federal common law . . . ." In *Miree,* however, the facts raise no issue dealing with air in its interestate aspect. The facts concern a Lear Jet that never left the state of Georgia. Were it not for the presence of a government contract, most courts would follow state law. *E.g.,* Uppgren v. Executive Aviation Serv., Inc., 326 F. Supp. 709 (D. Md. 1971); Quandt v. Beech Aircraft Corp., 317 F. Supp. 1009 (D. Del. 1970); Pierce v. Wienerschnitzel Int'l, Inc., 313 F. Supp. 740 (W.D. Mo. 1970); Maryland v. Capital Airlines, Inc., 280 F. Supp. 648 (S.D.N.Y. 1964); First Nat'l Bank v. Rostek, 182 Colo. 437, 514 P.2d 314 (1973); Williams v. Petroleum Helicopters, Inc., 234 So. 2d 522 (La. 1970); Moats v. Metropolitan Bank, 40 Ohio St. 2d 47, 319 N.E.2d 603 (1974); Brickner v. Gooden, 525 P.2d 634 (Okla. 1974); Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1966); Heidemann v. Rohl, 86 S.D. 250, 194 N.W.2d 164 (1972); Gridley v. Cardenas, 3 Wis. 2d 623, 89 N.W.2d 286 (1958).

In Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied* 421 U.S. 978 (1975), the court of appeals ruled that Congress had preempted state regulation of aviation. There, a large jet had collided in mid-air with a smaller aircraft. The owner of the jet and the United States were sued, and they in turn sued the owner of the small plane for contribution and indemnity. The court ruled that Congress had preempted state regulation of aviation and therefore federal law controlled. The court could easily have applied federal law under Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), since the rights and duties of the United States were at issue. Instead, the court referred to the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-04, 1321-25, 1341-55, 1371-87, 1401-06, 1421-32, 1441-43, 1461-63, 1471-74, 1481-89, 1501-12, 1521-23, 1531-42 (1970), to show that "Congress expressed the view that the control of aviation should rest exclusively in the hands of the federal government." 504 F.2d at 404. But the section cited by the court, Federal Aviation Act of 1958, § 1108(a), 49 U.S.C. § 1508(a) (1970), only refers to exclusive dominance in the airspace of the United States. The wording applies to the facts of *Kohr,* but not to the facts here. As such, it may be argued that *Kohr* does not control the disposition of *Miree.*

25. 318 U.S. 363 (1943).

26. *Id.* at 366.

sented to a store owned by the J.C. Penney Company, and endorsed by that party over to the Clearfield Trust Company. The Clearfield Trust Company collected payment from the United States, and guaranteed prior endorsements. Three years later, the United States sued for its money. Pennsylvania law prohibited recovery because "the United States unreasonably delayed in giving notice of the forgery."[27] The Supreme Court ignored state law because

> [t]he application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.[28]

Courts have subsequently applied the *Clearfield* rule to a variety of situations.[29] Where the rights and duties of the United States are at issue, very few courts have ever applied state law.[30]

In the instant case, however, the rights and duties of the United States are not at issue.[31] The federal government is not being sued

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27. *Id.*

28. *Id.* at 367.

29. United States v. Seckinger, 397 U.S. 203 (1970) (the Government's right to be indemnified by a contractor when an employee of the contractor sues for injuries under the Federal Tort Claims Act is governed by federal law); United States v. Standard Oil Co., 332 U.S. 301 (1947) (the Government's right to be indemnified by an oil company when one of its trucks injures a soldier who sues under the Federal Tort Claims Act is governed by federal law); National Metro. Bank v. United States, 323 U.S. 454 (1945) (the Government's right to be reimbursed by banks collecting on United States checks which were forged is governed by federal law); United States v. Allegheny County, 322 U.S. 174 (1944) (a county's right to tax property owned by the United States but used by a manufacturer pursuant to a government contract is controlled by federal law).

30. *But see* United States v. John Kerns Constr. Co., 140 F.2d 792 (8th Cir. 1944); Alameda County v. United States, 124 F.2d 611 (9th Cir. 1941); United States v. Brookridge Farm, 111 F.2d 461 (10th Cir. 1940); Rhode Island Discount Co. v. United States, 94 F. Supp. 669 (Ct. Cl. 1951).

31. Judge Dyer, whose dissent to the Fifth Circuit's panel decision was later adopted by the en banc majority, suggested that the obligations of the United States *were* being litigated. He argued that if the plaintiffs were third party beneficiaries with respect to one party to the contract, then they also must be third party beneficiaries with respect to the other party. 526 F.2d at 686 n.2. But the county was the promisor and had the obligation to make the airport safe for the plaintiffs' benefit. The United States was the promisee and cannot be sued for the county's breach. CALAMARI & PERILLO, THE LAW OF CONTRACTS § 252 (1970). The Government promised to provide funds, and it did. It did not promise to cut off funds; the county's breach would merely relieve the United States of a duty to provide funds, not create a duty to cut off funds.

It is clear that the United States did not believe its rights were being litigated. The

on the breach of contract theory. DeKalb County is the party accused of breaching a contractual duty to the plaintiffs. If the plaintiffs win, the county, and not the United States, will be liable for damages.[32]

In the noted case, the Supreme Court relied on two of its earlier decisions to support its finding that state law should control. In *Bank of America National Trust & Savings Association v. Parnell,*[33] the plaintiff bank alleged that the defendants had "converted 73 Home Owners' Loan Corporation bonds which belonged to [plaintiff]."[34] Payment on the bonds was guaranteed by the United States. The determination of which party had the burden of proof to show notice and lack of good faith was held to be a question governed by state law on grounds that the litigation was between private parties and did not touch the rights or duties of the United States. The Court compared the *Parnell* situation with *Miree*:

> The parallel between *Parnell* and this case is obvious. The question of whether petitioners may sue respondent does not require decision under federal common law since the litigation is among private parties and no substantial rights or duties of the United States hinge on its outcome. On the other hand, nothing we say here forecloses the applicability of federal common law in interpreting the rights and duties of the United States under federal contracts.[35]

It should be noted that the *Parnell* Court pointed out that if interpretation of the rights and obligations created by the bonds themselves had been at issue, federal law would have controlled.[36] In *Miree,* the third party beneficiary claims *do* require an interpretation of the rights and duties created by the contract. Therefore,

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Solicitor General, waiving his right to respond, advised the Supreme Court:

> In the course of the proceedings below, the United States determined that its interests would not be directly affected by the resolution of these issue (sic) and therefore did not participate in briefing or argument in the Court of Appeals. In view of these considerations, the United States does not intend to respond to the petitions unless it is requested to do so by the court.

97 S. Ct. at 2494.

32. Actually, as Judge Morgan points out in his dissent, the interests of the United States are better served if the county loses. Such a result would encourage the county to keep its promise to operate the airport in a safe and serviceable condition. 538 F.2d at 646 n.5.

33. 352 U.S. 29 (1956); for further discussion, see 45 CALIF. L. REV. 212 (1957).

34. 352 U.S. at 30.

35. 97 S. Ct. at 2494-95.

36. 352 U.S. at 34.

it might be argued that the *Parnell* rationale calls for application of federal law in *Miree*. However, in this context, a distinction must be made between bonds and contracts even though both are instruments of the United States. When a court determines the rights created by bonds, it is determining whom the United States is required to pay on those bonds. When it determines the rights created by a contract, as in *Miree*, it may have no effect at all on the obligations or duties of the United States. Therefore, it is submitted that the reasoning in *Parnell* is not inconsistent with the Court's conclusion that state law should govern in *Miree*.

The Supreme Court also relied on *Wallis v. Pan American Petroleum Corp.*[37] There, the defendant applied for a lease of federal lands under the Mineral Leasing Act for Acquired Lands.[38] Thereafter, he entered a written agreement with one plaintiff whereby he surrendered a one-third interest in any lease granted under that application. He also sold the other plaintiff an option to acquire his remaining rights in any lease obtained under that application. Two years later, the defendant applied for land under the Mineral Leasing Act of 1920,[39] which governed Public Domain Land. He was subsequently granted a lease on the basis of this application. Both plaintiffs then sued for their interests on oral representations that their written agreement would also apply to the second application. Louisiana law excluded the oral representations by requiring a written agreement. Because the Supreme Court failed to find a "significant threat to any identifiable federal policy or interest,"[40] state law was applied. There, too, the rights and obligations of the United States would be unaffected regardless of the outcome of the litigation.

The court of appeals had tried to put *Miree* within the *Clearfield* rule by pointing to the presence of a government contract, and in fact the *Clearfield* rule has been extended to many cases involving government contracts.[41] Where the United States is a

37. 384 U.S. 63 (1966).

38. 30 U.S.C. §§ 351-59 (1964).

39. 30 U.S.C. §§ 181-287 (1964).

40. 384 U.S. at 68.

41. For a discussion of the choice of law question in government contract cases, see Gaede & Bynum, *Federal Procurement Contracts—Dispute Resolution and the Developing Federal Common Law*, 27 ALA. L. REV. 1 (1975); Pofcher, *The Choice of Law, State or Federal, in Cases Involving Government Contracts*, 12 LA. L. REV. 37 (1951). Note that *Miree* does not

plaintiff in an action under a contract involving the disposition of government property, federal law defines the rights of the parties.[42] The same is true where the United States is the defendant.[43] Even if government property is not involved, where the United States is a party to an action and its rights and obligations are involved,[44] federal law is almost always applied.[45]

In situations where the United States is not a party to the action, however, and its rights are not being litigated, the Supreme Court has looked to see if there is a conflict between an identifiable federal interest or policy, and the use of state law.[46] This identifiable federal interest could be national security,[47] the judge-jury relationship in the federal courts,[48] or a valid interest in having uniform results.[49] In *Miree* the government was not a party to the action,[50] its rights were not at issue, and there was no readily ascertainable federal interest.[51] Under these kinds of circumstances, the Supreme

involve a government contract which is controlled by federal law simply because a federal statute so requires. *See, e.g.*, FDIC v. Rectenwall, 97 F. Supp. 273 (N.D. Ind. 1951), where the court applied federal law because FDIC contracts are controlled by federal law under 12 U.S.C. 264(j) (1970). In that kind of situation, if the statute is constitutional, it controls the choice of law used.

42. United States v. Allegheny County, 322 U.S. 174 (1944); United States v. McCabe Co., 261 F.2d 539 (8th Cir. 1958); United States v. Jones, 175 F.2d 278 (9th Cir. 1949).

43. United States v. Rice, 137 U.S. 61 (1942); Seabrook Farms Co. v. Commodity Credit Corp., 206 F.2d 93 (3d Cir.1953); Penn-Ohio Steel Corp. v. United States, 354 F.2d 254 (Ct. Cl. 1965); Boy v. United States, 179 F. Supp. 67 (M.D.N.C. 1959).

44. *See generally Clearfield: Clouded Field of Federal Common Law*, 53 COLUM. L. REV. 991, 997-1001 (1953).

45. United States v. Seckinger, 397 U.S. 203 (1970); Bituminous Cas. Corp. v. Lynn, 503 F.2d 636 (6th Cir. 1974); Smith v. United States, 497 F.2d 500 (5th Cir. 1974); First Nat'l Bank v. SBA, 429 F.2d 280 (5th Cir. 1970); United States v. Le Roy Dyal Co., Inc., 186 F.2d 460 (3d Cir. 1950); Cate v. United States, 249 F. Supp. 414 (S.D. Ala. 1966); Keydata Corp. v. United States, 504 F.2d 1115 (Ct. Cl. 1974); Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268 (Ct. Cl. 1959). *But see* cases cited note 31 *supra*.

46. Wallis v. Pan American Petroleum Corp., 394 U.S. 63, 68 (1966).

47. American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961). For further discussion, see Note, 26 ALBANY L. REV. 111 (1962); 61 COLUM. L. REV. 1519 (1961); 60 MICH. L. REV. 219 (1961).

48. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

49. Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

50. The United States is not being sued on the breach of contract theory. If it were, the action would have to be in the court of claims since the district courts only have jurisdiction over contract actions against the United States when the amount in controversy is less than $10,000. 28 U.S.C. § 1346(a)(2) (1970); 28 U.S.C. § 1491 (1970).

51. *See* note 40 *supra*, and accompanying text.

Court has applied state law to determine the rights of the parties.[52]

Nevertheless, the court of appeals in *Miree* ruled that the action should be governed by federal common law. Judge Dyer, whose earlier dissenting opinion was adopted by the court en banc, relied on several cases for support,[53] including *United States v. Seckinger*.[54] In that case the United States had entered an agreement hiring a contractor for plumbing work on a marine base in South Carolina. One of the contractor's employees was injured, and recovered under South Carolina's workmen's compensation law. He also recovered against the United States under the Federal Tort Claims Act.[55] The Government then sued the contractor for reimbursement, claiming that his negligence had caused the injury. The contractor's obligation under the contract was "to perform the work properly and safely and to provide workmanlike service in the performance of said work."[56] The Supreme Court relied on *United States v. Allegheny County*[57] and *Clearfield Trust Co. v. United States*[58] in deciding that federal common law governed the interpretation of that clause in the contract.[59]

Seckinger is immediately distinguishable from *Miree* both because the United States was a party to the action and because its rights and duties were at issue. The other cases relied upon by the Supreme Court are distinguishable for the same reasons.[60]

Since the facts of *Miree* present no "significant threat to any identifiable federal policy or interest,"[61] and the "resolution of [the] breach of contract claim . . . will have no direct effect upon the United States or its Treasury,"[61.1] there is no reason to apply

52. Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966); Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1952).

53. Smith v. United States, 497 F.2d 500 (5th Cir. 1974); First Nat'l Bank v. SBA, 429 F.2d 280 (5th Cir. 1970). In each case the United States was a party and its rights were being litigated. *See* notes 45-46 and accompanying text, *supra*.

54. 397 U.S. 203 (1970).

55. 28 U.S.C. §§ 2671-80 (1970).

56. 397 U.S. at 206.

57. 322 U.S. 174 (1944).

58. 318 U.S. 363 (1943).

59. 397 U.S. at 209.

60. In both United States v. Allegheny County, 322 U.S. 174 (1944), and Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), the federal government was a party whose rights were being litigated.

61. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966).

61.1. 97 S. Ct. at 2494.

federal common law. The Supreme Court therefore correctly reversed the court of appeals.

Application of state law, however, has traditionally been justified with reference to the "twin aims" of the *Erie* decision—discouraging forum shopping and inequitable administration of the laws.[62] Since application of state law in *Miree* is presumably more favorable to the plaintiffs in that the majority decided there could be no recovery under federal law,[63] the "twin aims" considerations are not present. There would be no occasion for forum shopping by the plaintiffs because they would wish to invoke state law; there could be no discrimination since either citizens or noncitizens could bring the action in state court. Underlying the *Erie* decision, however, is the federalist notion that certain rights are "reserved by the Constitution to the several states."[64] This constitutional basis of *Erie* would require application of state law despite the absence of "twin aims" considerations. Where, as in *Miree* there is no identifiable federal interest, it is submitted that *Erie* and the constitution require that state law be applied. Congress has no power, whether by statute, contract, or any other means, "to declare substantive rules of common law applicable in a state . . . . And no clause in the Constitution purports to confer such a power upon the federal courts."[65] Determining whether third party beneficiaries have a cause of action against a county in Georgia "substantially affects those primary decisions respecting human conduct which our constitutional system leaves to state regulation."[66] Congress has not, and constitutionally could not, regulate this determination. The federal courts, under the guise of interpreting a government contract, should not be given the kind of general lawmaking power implicit in the application of federal common law to these facts. In unanimously reversing the court of appeals, the Supreme Court has reaffirmed the principles underlying the *Erie* decision, and limited the expanding body of federal common law.

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62. Hanna v. Plumer, 380 U.S. at 468; *see* notes 17-20 *supra*, and accompanying text.

63. *See* note 22 *supra*.

64. Erie R.R. v. Tompkins, 304 U.S. at 80.

65. 304 U.S. at 78.

66. Hanna v. Plumer, 380 U.S. at 475 (Harlan, J., concurring), *citing* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL COURT SYSTEM 678 (1953).