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INTRODUCTION

On the afternoon of April 27, 1983, off the Virginia coast, Marine First Lieutenant David A. Boyle and three crew members flew a CH-53D assault helicopter on a practice approach to the USS *Shreveport*. Lieutenant Boyle, the copilot, sat in the left seat.[1] The pilot in command sat to Boyle's right, and the two other crew members occupied the rear. Boyle's helicopter was the second of a two-ship flight.[2] As the two aircraft approached the *Shreveport*, the lead helicopter began slowing down too soon. To avoid collision, Boyle's crew decided to take the aircraft around for a second approach.[3] The pilot in command took the controls and attempted to execute the necessary maneuvers, but the helicopter was too close

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1 *See* Colin P. Cahoon, Boyle *Under Siege*, 59 J. AIR L. & COM. 815, 819, 823-25 (1994) (discussing the factual background to the *Boyle* decision); *see also* Boyle v. United Techs. Corp., 487 U.S. 500, 502 (recounting facts leading to the death of First Lieutenant Boyle), *on remand*, 857 F.2d 1468 (4th Cir.), *cert. denied*, 488 U.S. 994 (1988), *reh'g denied*, 489 U.S. 1047 (1989).

2 *See* Cahoon, *supra* note 1, at 823.

3 *See id.* at 823-24.

to the water for a successful turn.[4] As a result, the aircraft crashed into the water right side down.[5] Although the other three crew members successfully exited the sinking helicopter, Boyle was unable to open the emergency exit due to the severe pressure from the water.[6] His body was later recovered with the aircraft.[7]

When Boyle's father sued the helicopter manufacturer, the case made history. In a 1988 decision, *Boyle v. United Technologies Corp.*,[8] the United States Supreme Court barred the claim and affirmed the "[g]overnment contractor defense," now also known as the "*Boyle* defense."[9] In *Boyle*, the Court concluded that governmental contractors are immune from tort liability under certain circumstances.[10] Since then, the government contractor defense has grown in strength, shielding those successfully invoking it from liability for injuries caused by defective products they manufactured. Through *Boyle* and its progeny, the bench has placed obstacles in a plaintiff's path to recovery which become more stringent with each decision.

The purpose of this Article is to discuss the weaknesses of the *Boyle* defense and to show how, by using skillful discovery tactics, plaintiffs may defeat the defense in order to successfully recover for their injuries. Part I outlines the history of the government contractor defense.[11] Part II describes the evolution of the defense under *Boyle*.[12] Part III reviews the three independent elements set

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[4] *See id.*

[5] *See id.* at 824.

[6] *See Boyle*, 487 U.S. at 503.

[7] *See* Cahoon, *supra* note 1, at 825 n.40.

[8] 487 U.S. 500 (1988).

[9] *See id.* at 513 (referring to helicopter manufacturer's defense as the "[g]overnment contractor defense"); *see also* Cahoon, *supra* note 1, at 816 (commenting on the "*Boyle* defense").

[10] *See Boyle*, 487 U.S. at 505-06 (noting the immunity given to contractors from tort liability when they contract with the government). In *Boyle*, the Supreme Court listed the elements which a contractor must prove in order to successfully invoke the contractor defense. These elements are: (1) reasonably precise specifications approved by the United States government; (2) conformation to those specifications; and (3) a warning to the government by the contractor regarding the dangers presented by use of the equipment which were known to the contractor but were not known to the United States government. *See id.* at 512. Although not specifically enumerated in the list of elements to the *Boyle* defense, it is evident that, as a preliminary matter, the United States shall be immune from liability. *See* Michael Overly, Boyle v. United Technologies Corp.*: The Turning Point for the Government Contractor Defense?*, 21 LOY. L.A. L. REV. 935, 961-62 (1988) (providing that sovereign immunity is the underlying prong to the government contractor defense and it "is not waived unless the action is authorized under the FTCA").

[11] *See infra* notes 15-66 and accompanying text.

[12] *See infra* notes 67-105 and accompanying text.

forth in *Boyle*, and the ways by which a plaintiff may overcome each element.[13] Finally, Part IV discusses whether the collateral source rule presents an additional barrier to a plaintiff's recovery in a suit against a government contractor.[14]

I. ORIGINS OF THE GOVERNMENT CONTRACTOR DEFENSE

A. Agency Principles

The government contractor defense originated in a series of public work cases.[15] In these decisions, courts applied principles of agency to cloak the contractor with the government's sovereign immunity[16] when the contractor had complied strictly with govern-

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[13] *See infra* notes 106-88 and accompanying text.

[14] *See infra* notes 189-210 and accompanying text.

[15] *See, e.g.*, Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18, 20-21 (1940) (holding, in a case involving the building of dikes in the Missouri River, that if a contractor's "authority to carry out the project was validly conferred, . . . there is no liability on the part of the contractor for executing [the government's] will"); Paquete Habana, 189 U.S. 453, 465 (1903) (illustrating that where the contractor is carrying out an act "authorized or . . . adopted by the" government, the contractor will be protected from liability); Lamar v. Browne, 92 U.S. 187, 199-200 (1875) (finding government agent was shielded from liability because it was acting within the scope of government instructions); Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963) (holding contractor immune from liability because construction of highway allegedly resulting in injury complied with federal government specifications); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965) (holding that government contractor was not liable to plaintiff for damages allegedly caused by fumes from spoil dredged from river channel); *see also* Richard Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 47 OHIO ST. L.J. 985, 993-95 (1986) (chronicling development of the government contractor defense in area of public works cases). Ausness provides an enlightening discussion of the rationale behind the development of the contractor defense in these public works cases. The rationale includes the reasoning utilized by the court in *Yearsley* that the contractor partakes in the immunity of the government because he acts as an agent of the government, as well as the rationale espoused in *Dolphin Gardens*, namely that the government contractor defense is necessary for the government to be able to carry out its objectives. *See id.*; *see also* George E. Hurley, Jr., *Government Contractor Liability in Military Design Defect Cases: The Need for Judicial Intervention*, 117 MIL. L. REV. 219, 226 (1987) (citing *Yearsley* as a case from which the government contractor defense originated). Commander Hurley points out that while the *Yearsley* Court based its decision on agency, a relationship which has been infrequently found in contracts between the government and military manufacturers, *Yearsley* and its progeny have laid the precedent for many types of suits against government contractors. *See id.* at 227; *see also* Overly, *supra* note 10, at 936 (providing that originally, the defense was used only in cases involving public works projects).

[16] The doctrine of sovereign immunity is based on the notion that the "king can do no wrong, . . . [and it] precludes a litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to the suit." Principe Compania Naviera, S.A. v. Board of Comm'rs, 333 F. Supp. 353, 355 (E.D. La. 1971). "As a general rule, the United States Government, as 'sovereign,' is liable to third

ment-provided specifications.[17] Over time, courts have expanded this early version of the government contractor defense, applying it to products liability actions based on theories of negligence, strict liability, and breach of warranty.[18]

A seminal case illustrating this early version of the government contractor defense is the 1940 United States Supreme Court decision in *Yearsley v. W. A. Ross Construction Co.*[19] In that case, a contractor, under the direction and authority of the government, was hired to improve navigation on the Missouri River.[20] The government required the contractor to build several dikes along the river.[21] During the construction of the dikes, ninety-five acres of the plaintiff's land were flooded.[22] The plaintiff brought suit against the contractor for damages to his land.[23]

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parties only when the government expressly waives its sovereign immunity." Dawson v. Merit Sys. Protection Bd., 712 F.2d 264, 267 (7th Cir. 1983).

[17] *See, e.g., Yearsley*, 309 U.S. at 20-21 (holding that wherein contractor strictly complies, there is no liability to contractor for executing government's will); *Paquete Habana*, 189 U.S. at 465 (illustrating that where contractor acts with strict compliance, contractor will be protected from liability); *Lamar*, 92 U.S. at 199 (shielding the contractor from liability because the contractor was acting in strict compliance with government's instructions); *Myers*, 323 F.2d at 583 (holding no liability for contractor who strictly adhered to government's instructions); *Dolphin Gardens*, 243 F. Supp. at 827 (using *Yearsley* as a basis for holding that where government contractor took no part in government's decision regarding disposal of spoil dredged from river channel and contractor was not obligated under government contract to take precautions against escape of fumes, contractor was not liable to plaintiff for damages allegedly caused by fumes); *see also* Ausness, *supra* note 15, at 993 (explaining that under the government contractor defense, the work must be done "in accordance with [government] plans and specifications"); Hurley, *supra* note 15, at 226 (noting that in *Yearsley*, a case from which the government contractor defense evolved, a contractor was not held liable because his work was done in conformity with a government contract); Overly, *supra* note 10, at 939-41 (discussing the underlying agency argument in the development of the government contractor defense in public works cases).

[18] *See* Overly, *supra* note 10, at 936 (providing that although the government contractor defense began in public works cases, it grew to be used as a shield against liability in a number of circumstances).

[19] 309 U.S. 18 (1940).

[20] *See id.* at 19; *see also* Overly, *supra* note 10, at 939-40 (stating that *Yearsley* best illustrates the early government contractor defense which was based on agency theory and was invoked in public works cases).

[21] *See Yearsley*, 309 U.S. at 19 (presenting the government's instructions to the contractor that he build dikes in order to create artificial erosion, thereby improving navigability of the Missouri River).

[22] *See id.* at 20 (restating the basis for the plaintiff's claim of damages).

[23] *See id.* at 19-20 (claiming the contractor's acts resulted in the flooding and erosion of 95 acres of plaintiff's land); *see also* Overly, *supra* note 10, at 940 (reporting the facts of the *Yearsley* case wherein contractor's construction of dams according to government specifications caused an erosion of plaintiff riparian land owner's property).

Recognizing the government contractor defense for the first time, the Supreme Court held that the action of the contractor-agent is the "act of the government."[24] In addition, the Court determined that "there is no ground for holding [a governmental] agent liable [when he] is simply acting under [government authority]."[25] Therefore, under *Yearsley*, a contractor who follows the government's guidelines may avoid liability arising from the contractor's performance.[26]

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[24] *Yearsley*, 309 U.S. at 22 (quoting *United States v. Lynah*, 188 U.S. 445, 465 (1903) where, in reference to agency relationship between contractor and government, the Court said "[t]he action of the agent is 'the act of the government'"); *see* Overly, *supra* note 10, at 940 (discussing the *Yearsley* Court's agency rationale which implied that the government contractor should share in the government's sovereign immunity).

[25] *Yearsley*, 309 U.S. at 22 (extending sovereign immunity to pubic works contractor who was acting as agent of the government); *see* Overly, *supra* note 10, at 940 (quoting the Supreme Court's language in *Yearsley* that "'there is no ground for holding [the government's] agent liable [when he] is simply acting under'" validly conferred authority (alteration in original)); Neil G. Wolf, Note, Boyle v. United Technologies Corp.: *A Reasonably Precise Immunity—Specifying the Defense Contractor's Shield*, 39 DEPAUL L. REV. 825, 837-39 (1990) (exploring the historical importance of the *Yearsley* decision in the development of a contractor's defense).

[26] *See Yearsley*, 309 U.S. at 21 (noting that an agent acting on behalf of the government is accountable for his injury-causing actions only if the agent has exceeded his authority, or if authority was invalidly conferred). In *Yearsley*, the plaintiff alleged that as a result of defendant contractor's dredging, the Missouri River shifted course so as to cause erosion of the riparian property owner's land. *See id.* at 19-20. The *Yearsley* Court held that the "plain and adequate remedy" provided for a taking of private land for public use is the payment of just compensation for the land from the government. *Id.* at 21-22. The Court further stated that there was no ground for holding liable the contractor, who was merely carrying out valid government action. *See id.* at 22. A significant number of cases followed *Yearsley* in likewise denying liability to a contractor who followed government guidelines. *See, e.g.*, Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986) (refusing liability of government contractor on negligence and strict liability grounds); Koutsoubos v. Boeing Vertol, 755 F.2d 352, 354-55 (3d Cir. 1985) (finding no liability for government contractor on theory of agency); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450-51 (9th Cir. 1983) (construing the defense broadly, and therefore concluding that unless a government contractor exceeds his authority, there is no liability); Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963) (providing that in as much as work performed by contractor in construction of federal highway conformed with terms of contract with United States, no liability could be imposed on contractor for damages claimed); *In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1054 (E.D.N.Y. 1982) ("Courts should not require suppliers of ordnance to question the military's needs or specifications for weapons during wartime. . . . [safety issues] are not sources of liability which should be thrust upon a supplier, nor are they decisions that are properly made by a court."). Still other courts have failed to extend the government contractor defense to shield defendant contractors from liability. *See, e.g.*, Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 739-40 (11th Cir. 1985) (declining to consider the defendant's *Yearsley* defense since the agency/sovereign immunity theory was not presented fully in the trial court); Bynum v. FMC Corp., 770 F.2d 556, 564 (5th Cir. 1985) (noting that if "contractors . . . fail to follow government specifications or otherwise mismanufacture a product [they] are not entitled to raise the [government contractor] defense"); Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 16 (9th Cir. 1961) (reasoning that where contract left construction and

This agency version of the government contractor defense has proved difficult to apply because the defendant contractor must show that an agency relationship existed between it and the government.[27] Manufacturers who contract with the military are not hired as employees; rather, the basis of the relationship is contractual.[28] Thus, for many military contractors, this defense is ill-suited.[29] Further, changes in military contracting procedures and the military procurement process have limited the applicability of this defense to a non-military contractor context.[30]

B. The Contract Specification Defense

A second historical means of shielding government contractors from liability is traditionally referred to as the "contract specifica-

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maintenance of cofferdam to discretion of contractors and where none of contractor's negligent acts were required by government, contractor would not be protected from liability for damages resulting from faulty cofferdam construction).

[27] An agency relationship arises when one party, the principal, authorizes another party known as the agent to serve as the principal's representative and to act for the principal in furthering the principal's interests. *See* ROBERT T. KIMBROUGH, SUMMARY OF AMERICAN LAW § 1:1 (1974); *see also Bynum*, 770 F.2d at 564 (noting, in public works cases, the requirement of an underlying agency relationship between the contractor and the government which allows the government contractor defense to be successfully invoked); Ausness, *supra* note 15, at 994 (presenting the agency relationship between the government and the contractor as one rationale behind the government contractor defense); Overly, *supra* note 10, at 940 (stating that the government contractor defense, as applied in *Yearsley*, requires the defendant to prove an agency relationship between the government and the contractor). Ausness points out that there is no consensus among courts or legal commentators regarding the policy behind the defense. *See* Ausness, *supra* note 15, at 1014-32. In addition to the agency theory, there is the theory that protection of contractors is integral to carrying out the *Feres* doctrine, as well as the broader concepts of sovereign immunity and separation of powers. *See* discussion *infra* notes 40-66 and accompanying text; *see also* Overly, *supra* note 10, at 943-48; Wolf, *supra* note 25, at 839 (recognizing the limited usefulness of the "original government contract defense" due to the requirement of an agency relationship between the contractor and government).

[28] *See* Mark Keith Sales, Comment, *Government Contractor Defense: Sharing the Protective Cloak of Sovereign Immunity After* McKay v. Rockwell Int'l Corp., 37 BAYLOR L. REV. 181, 222 n.316 (1985) (distinguishing further between agent/principal relationships and mere buyer/seller relationships and noting that in the military procurement process, many contractors have only a buyer/seller or independent contractor relationship with the government).

[29] *See Bynum*, 770 F.2d at 564 (discussing the agency requirement of the government contractor defense as set forth in *Yearsley*); Overly, *supra* note 10, at 940 (indicating that the *Yearsley* government contractor defense is difficult for military contractors to successfully use in avoiding liability because of the agency requirement); Wolf, *supra* note 25, at 839 (noting that as "the original government contract defense" was dependent upon the existence of an agency relationship between the contractor and government, the "defense proved to be only marginally useful").

[30] *See* Overly, *supra* note 10, at 940-41.

tion defense."[31] This defense is not limited to contractors who are hired by the government.[32] The contract specification defense is afforded to both private and government contractors when they follow the directions and specifications of a third party, usually the employer.[33] When a contractor is hired to manufacture or perform under very specific orders, the contract specification defense protects him from liability for any defect in the product.[34] Instead of apportioning liability to the contractor, the employer ordering a specific product design assumes responsibility for any consequence of an unsafe product.[35]

As the contract specification defense is grounded on the theory of reasonable reliance, the contractor is not protected by the defense if he follows specifications that contain obviously dangerous defects that would cause a reasonable person not to follow them.[36] Courts

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[31] *See* Ryan v. Feeney & Sheehan Bldg. Co., 145 N.E. 321, 321-22 (N.Y. 1924) (noting that a contractor is justified in relying upon specifications which he has contracted to follow unless those specifications are apparently defective such that a reasonable and prudent contractor would be on notice that to build according to the specifications would be dangerous and likely to cause injury); *see also* RESTATEMENT (SECOND) OF TORTS § 404 cmt. a (1965) (noting how the contract specification defense is utilized); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 681 (4th ed. 1971) (discussing "[o]ne important limitation" to liability for negligent design and construction whereby "the contractor is not liable if he has merely carried out carefully the plans, specifications and directions given him, since in that case the responsibility is assumed by the employer"). The reason behind the contract specification defense has traditionally been that contractors do not have the special knowledge necessary to evaluate the appropriateness of government specifications. *See* Johnston v. United States, 568 F. Supp. 351, 354 (D. Kan. 1983) (noting that "ordinary negligence principles" form the basis of this defense, as does the "presumption that a contractor will lack the expertise to evaluate the specifications given him"). However, if the contractor does in fact possess knowledge about the specific design or specification, then he may be held liable. *See id.* (recognizing that where the manufacturer has special knowledge, he may be held to the same, or even a higher standard of care, as the designer of the product).

[32] *See* Overly, *supra* note 10, at 941 ("Unlike the *Yearsley* agency defense, the contract specification defense applies to both private and government contractors.").

[33] *See Ryan*, 145 N.E. at 321-22 (discussing the availability of the contract specification defense to a builder relying upon specifications from which he had neither notice of impending danger, nor notice of the likelihood of injury).

[34] *See id.* (illustrating the protection from liability afforded by the contract specification defense).

[35] *See* PROSSER, *supra* note 31, at 681 (noting that the employer undertakes liability when a contractor simply follows the employer's specifications).

[36] The contract specification defense is based upon negligence principles. *See Ryan*, 145 N.E. at 321-22 (holding that a builder is not liable for any defects when relying on plans and specifications which he contracted to follow, unless the defects are so apparent that an ordinary builder would know of the likelihood of injury); RESTATEMENT (SECOND) OF TORTS § 404 cmt. a (1965) (discussing the "competent contractor" standard whereby a contractor avoids liability for an unsafe product "unless it is so obviously bad" that a contractor would readily realize the potential for injury); Wolf, *supra* note 25, at 840 (noting that, absent special

have determined that an average contractor cannot be expected to possess the expertise needed to examine every design it is given.[37] Therefore, when reasonable, a contractor may rely on a third-party's design specifications without fear of liability.[38] This reasonableness requirement, however, is irrelevant to cases not sounding in negligence.[39] Consequently, the contract specification theory, like the defense based on agency principles, is limited in its application.

C. *The* Feres-Stencel *Doctrine*

Both versions of the government contractor defense discussed above were limited in scope when applied to a military contractor situation.[40] As stated earlier, the military contractor's relationship with the government does not create an agency relationship; and in addition, most defective product actions are alleged under strict products liability which renders the contract specification defense useless.[41] As years passed and products liability litigation against

knowledge, "the average contractor is not expected to possess the requisite knowledge or expertise to evaluate the government's contract specifications").

[37] *See* Johnston v. United States, 568 F. Supp. 351, 354 (D. Kan. 1983) (stating that the contractor is not required to sit in judgment on the plans and specifications provided by his employer, since he "will lack the expertise to evaluate the specifications given him—just as a nurse or orderly will seldom be in a position to second guess a physician").

[38] *See* Burgess v. Colorado Serum Co., 772 F.2d 844, 846-47 (11th Cir. 1985) (allowing the manufacturer to raise the contract specification defense when it manufactured an animal vaccine in accordance with government specifications); *Johnston*, 568 F. Supp. at 354 (finding "[t]he contract specification defense applies to products manufactured to the order and specification of another, whether that other be the government or a private party" and therefore a contractor will not be held liable for following the plans and specifications of his employer); Davis v. Henderlong Lumber Co., 221 F. Supp. 129, 134 (N.D. Ind. 1963) (stating that when any danger in the plans or specifications is not obvious, it is reasonable for the contractor to adhere to the plans or specifications given to him by his employer).

[39] *See* Overly, *supra* note 10, at 943 (noting the difficulty that military contractors have in invoking the contract specification defense because most litigation involving military equipment is grounded in strict products liability); R. Todd Johnson, Comment, *In Defense of the Government Contractor Defense*, 36 CATH. U. L. REV. 219, 228 (1986) (discussing the unavailability of the contract specification defense in strict liability suits against government contractors).

[40] *See* Wolf, *supra* note 25, at 837-39 (discussing the difficulty for contractors who attempt to prove an agency relationship between the contractor and the government-employer); Johnson, *supra* note 39, at 228 (noting the limiting aspects of the early versions of the government contractor defense).

[41] *See* Overly, *supra* note 10, at 943 (noting that the contract specification defense is of no avail where an action sounds in strict products liability, the primary form of military product actions); Johnson, *supra* note 39, at 228 (examining a contractor's difficulty in invoking the contract specification defense in strict liability actions).

military contractors increased, courts formulated the *Feres-Stencel* doctrine, which did not protect the government contractor in every situation.[42] This doctrine emerged from two United States Supreme Court cases,[43] *Feres v. United States*[44] and *Stencel Aero Engineering Corp. v. United States*.[45]

In *Feres*, the Supreme Court determined that the "[g]overnment is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[46] The Court reasoned that the relationship between the government and members of the armed forces has a very distinctive character that requires unique protection.[47] Specifically, the Court determined that if suits were allowed against the military for negligent orders given or negligent acts committed, the special relationship of a soldier to his superiors would be harmed.[48]

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[42] The *Feres-Stencel* doctrine provided the government with immunity from a direct suit by a member of the military for injuries related to government service, or an action for indemnity by a contractor to recover for damages paid. *See* Overly, *supra* note 10, at 947. The doctrine presented a particularly difficult obstacle for contractors, in that they were required to adhere to government specifications, yet would be held liable for any resulting injuries, with no opportunity at redress. *See id.* This, combined with the ineffectiveness of the traditional defenses of agency and contract specification gave way to the judicially created government contractor defense. *See id.* at 947-48.

[43] *See id.* at 944 (stating that the *Feres-Stencel* doctrine emerged from two United States Supreme Court cases).

[44] 340 U.S. 135 (1950).

[45] 431 U.S. 666 (1977).

[46] *Feres*, 340 U.S. at 146.

[47] *See id.* at 143 ("The relationship between the Government and members of its armed forces is 'distinctively federal in character.'").

[48] *See id.* at 145-46 (providing a discussion of the reasoning for military actions being governed by federal law and noting that "the few cases charging superior officers or the government with neglect or misconduct . . . since the Tort Claims Act . . . have either been suits by widows or surviving dependents, or have been brought after the individual was discharged"); *see also* United States v. Brown, 348 U.S. 110, 112 (1954) (discussing the "special relationship of the soldier to his superiors" and the potentially extreme effects of allowing suits under the Federal Tort Claims Act (FTCA)). *United States v. Johnson* provides another look at the importance of the relationship of the government to those in service. *See* United States v. Johnson, 481 U.S. 681 (1987). In *Johnson*, Lieutenant Commander Johnson, a Coast Guard helicopter pilot, was dispatched to search for a vessel that was in distress. *See id.* at 683. Commander Johnson's helicopter entered inclement weather and Johnson requested radar assistance from the Federal Aviation Administration (FAA). *See id.* The FAA controllers assumed positive radar control over the helicopter, and shortly thereafter, the helicopter crashed. *See id.* Commander Johnson's family brought suit against the federal government under the FTCA. *See id.* Justice Powell, writing for a 5-4 majority, held that the *Feres* doctrine did not bar suit. *See id.* at 682-85. The circuit court made the following statement regarding this case:

Because the *Feres* decision barred members of the service from bringing suit against the military, servicemen injured by military equipment began bringing suit against manufacturers of the allegedly defective products.[49] In response, the manufacturers argued that they had little control over the design specifications that caused the injury.[50] This argument proved futile, however, and contractors were forced to pay for injuries resulting from their implementation of government specifications.[51]

In *Stencel*, Captain John Donham was seriously injured when his fighter aircraft malfunctioned during a midair emergency.[52] Donham sued both Stencel, the manufacturer of the aircraft's ejection system, and the government under the Federal Tort Claims Act (FTCA).[53] Stencel cross-claimed against the government, seeking indemnity for any damages that Stencel might have to pay.[54] The district court granted summary judgment for the government finding that Donham's injuries were within the scope of his military service, and consequently Donham could not recover under the

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> The complaint in this case alleges that plaintiff's decedent was killed because civilian FAA air traffic controllers negligently guided the helicopter he was piloting into a mountain. There is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial. . . . Since the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure, the prosecution of plaintiff's claim will not encroach upon the rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine."

Johnson v. United States, 749 F.2d 1530, 1539 (11th Cir.), *vacated*, 760 F.2d 244 (11th Cir. 1985), *reinstated*, 779 F.2d 1492 (11th Cir. 1986), *rev'd*, 481 U.S. 681 (1987).

[49] *See* W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984) (noting the effects of the *Feres* doctrine on lawsuits sounding in tort, specifically injuries related to the manufacture of military equipment).

[50] *See Stencel*, 431 U.S. at 668 (discussing defendant manufacturer's argument that it had very little control over the product, in that the government had required the design of an ejection seat which was defective and eventually caused the plaintiff's injuries); Tillett v. J.I. Case Co., 756 F.2d 591, 599 (7th Cir. 1985) (presenting manufacturer's argument that it had no authority to change the specifications set forth by the government); Sanner v. Ford Motor Co., 364 A.2d 43, 45-46 (N.J. Super. Ct. Law Div. 1976), *aff'd*, 381 A.2d 805 (N.J. Super. Ct. App. Div. 1977), *cert. denied*, 384 A.2d 846 (N.J. 1978) (stating that the contractor was entitled to immunity because government specifications required jeeps to be built without seat belts).

[51] *See Stencel*, 431 U.S. at 673-74.

[52] *See id.* at 667-68 (setting out the facts underlying the suit brought by Captain Donham).

[53] *See id.* at 668 (discussing plaintiff's suit under the FTCA); *see also* 28 U.S.C. § 2674 (1994) ("The United States shall be liable . . . relating to tort claims, in the same manner and to the same extent as a private individual" except for pre-judgment interest and punitive damages).

[54] *See Stencel*, 431 U.S. at 668.

FTCA.[55] The Supreme Court also granted the government's motion for summary judgment against Stencel, thereby disallowing Stencel to indirectly recover what Donham could not recover.[56] In so holding, the Court broadened governmental immunity and barred contractors from seeking indemnity from the military when the contractor was forced to pay for injuries sustained by a serviceman.[57] Thus, the *Feres-Stencel* doctrine was born.

Johnson v. United States[58] illustrates how the *Feres* doctrine has been broadly applied to bar a plaintiff's claim against the military. In *Johnson*, Sergeant Jimmy Ray Johnson was hospitalized for a mental illness, the doctor concluding that Johnson suffered from "severe psychosis accompanied by homicidal and suicidal tendencies."[59] Johnson was released from the hospital and then readmitted after he assaulted his wife.[60] Again released from the hospital, Johnson requested leave, which was denied by his captain.[61] Johnson's executive officer overruled the captain and granted Johnson's request.[62] On leave, Johnson "killed his brother-in-law, Carroll Johns, shot his wife and then killed himself."[63]

As a result of these events, the widow of Carroll Johns filed a wrongful death action against the United States under the FTCA.[64] Although the *Feres* doctrine exception to the FTCA only applies to injuries that "'are in the course of activity incident to service,'" the court barred the plaintiff's claim, notwithstanding that Johnson was on leave when the incident occurred.[65] The court reasoned that "medical care given servicemen in army hospitals is so entwined with the military relationship that a serviceman cannot bring an action under the FTCA."[66] Although the reasoning seemed somewhat illogical, the *Feres* doctrine prevailed again.

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55 *See id.* at 668-69.

56 *See id.* at 673 (presenting the Court's rationale for disallowing recovery for the contractor when military personnel would not be allowed to recover).

57 *See id.* at 673-74 (illustrating how the Supreme Court broadened the notion of governmental immunity in disallowing recovery to Stencel).

58 631 F.2d 34 (5th Cir. 1980).

59 *Id.* at 35.

60 *See id.*

61 *See id*

62 *See id.*

63 *Id.* (presenting the facts which led up to the *Johnson* suit).

64 *See id.*

65 *Id.* (quoting Feres v. United States, 340 U.S. 135, 146 (1950)).

66 *Id.* at 36.

Under the *Feres-Stencel* doctrine, the military had a virtually indestructible shield that forced the government contractor to adhere to government specifications without any protection for injuries resulting from those specifications. As a result, the government contractor had no choice but to utilize the outdated, ill-suited defenses of agency and contract specification.

II. THE MODERN GOVERNMENT CONTRACTOR DEFENSE

A. Extension to Manufacturers

In the 1982 decision of *In re "Agent Orange" Product Liability Litigation*,[67] the Eastern District of New York formulated the test for determining whether a government contractor could be held liable for injuries caused by a defective product.[68] *Agent Orange* involved a series of claims by injured veterans against various chemical companies that produced a defoliant herbicide for the military's use in the Vietnam conflict. After analyzing the public policy issues behind the *Feres-Stencel* doctrine, the court concluded that government contractors should not bear total responsibility for the government's specifications.[69] Consequently, the court held that government contractors should be protected from liability based on an extension of governmental immunity.[70] The *Agent Orange* court established a three-prong test in which the defendant must show that: (1) the government wrote the specifications for the product; (2) the product conforms to the government specifications in every material respect; and (3) the government knows as much as or more than the defendant about the hazards of the product.[71]

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[67] 534 F. Supp. 1046 (E.D.N.Y. 1982).

[68] *See id.* at 1055 (discussing the court's test).

[69] *See id.* (stressing that government contractors should not have to bear all of the liability which might result from a harm-producing product manufactured according to the government's specifications).

[70] *See id.* at 1055-56 (concluding that since injustice results when government contractors bear all liability resulting from a harm-producing product manufactured according to the government's specifications, the contractor should be able to receive protection from liability by sharing in the government's immunity).

[71] *See id.* at 1055 (establishing the three-prong test in order to determine whether a contractor should be able to invoke immunity from liability). The *Agent Orange* test was established during a second trial set to hear argument on the standards applicable to the government contractor defense, as well as the specific facts needed to prove the defense. *See id.* at 1055 (setting forth the applicable standard); *see also In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 798-99 (E.D.N.Y. 1980) (requiring the service and filing of briefs regarding standards and proof, and noting that the court would entertain arguments on these issues).

Most federal courts adopted, or adapted, the *Agent Orange* test and applied it to cases involving design defects in military equipment.[72] Like many federal common law rules, however, the government contractor defense was not applied uniformly.[73] For example, in *McKay v. Rockwell International*,[74] the widows of two Navy pilots brought a products liability action against the manufacturer of an aircraft that malfunctioned during a routine flight. In *McKay*, the United States Court of Appeals for the Ninth Circuit adopted a very lenient form of the *Agent Orange* government contractor defense.[75] The court allowed the manufacturer to avoid liability where the manufacturer chose the defective design, and the

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The first prong of the test is the establishment prong. *See Agent Orange*, 534 F.Supp. at 1056. It avoids the imposition of liability on a contractor who only supplied the government with a product which the government requested. *See id.* The second prong is known as the "[p]roduct [meets] the [g]overnment's [s]pecifications" prong. *Id.* at 1057. This prong requires that there not be a material discrepancy between the product produced and that which was requested according to specifications. *See id.* The third prong of the *Agent Orange* test is the "[k]nowledge" prong. *Id.* It requires that the contractor warn the government of all known risks associated with the product in order to allow the government an opportunity to weigh the risk with the need for the product. *See id.*; *see also* A.L. Haizlip, *The Government Contractor Defense in Tort Liability: A Continuing Genesis*, 19 PUB. CONT. L.J. 116, 125 (1989) (listing the three-prong test established in *Agent Orange*).

[72] *See* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746-47 (11th Cir. 1985) (denying immunity from liability, under a test slightly different from *Agent Orange*, to contractor who exclusively designed a defective airplane stabilizer system); Schoenborn v. Boeing Co., 769 F.2d 115, 121, 125 (3d Cir. 1985) (adopting the *Agent Orange* test and finding under the third prong that a contractor would not be held liable for a defect of which the government had knowledge, but nevertheless approved); Brown v. Caterpillar Tractor Co., 741 F.2d 656, 661-62 (3d Cir. 1984) (remanding for new trial in accordance with a slightly adapted government contractor defense); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450-51 (9th Cir. 1983) (remanding for determination of the facts under a modified government contractor defense); Bynum v. General Motors Corp., 599 F. Supp. 155, 158 (N.D. Miss. 1984), *aff'd*, 770 F.2d 556 (5th Cir. 1985) (denying recovery to a plaintiff who was injured in an Army cargo carrier accident because the parties to the litigation had stipulated to all three elements of the government contractor defense as set forth in *Agent Orange*); Hubbs v. United Techs., 574 F. Supp. 96, 98 (E.D. Pa. 1983) (applying the three-prong government contractor defense in a case involving alleged defective design of a Navy helicopter); Koutsoubos v. Boeing Vertol, 553 F. Supp. 340, 343-44 (E.D. Pa. 1982) (finding that the contractor failed to prove the third element of the *Agent Orange* test).

[73] The Ninth Circuit test closely mirrors the *Agent Orange* test. *See McKay*, 704 F.2d at 451 (adopting the *Agent Orange* three-prong test with a slight modification—the manufacturer need only show that the government established or approved "reasonably precise specifications" for the product). The Fifth Circuit adopted the *McKay* test. *See* Bynum v. FMC Corp., 770 F.2d 556, 567 (5th Cir. 1985) (adopting the *McKay* test at least as it applied to that specific case).

[74] 704 F.2d 444 (9th Cir. 1983).

[75] *See* Haizlip, *supra* note 71, at 128 (discussing the leniency of the test set out by the *McKay* court). Haizlip emphasized that although the test was more lenient than that used in *Agent Orange*, the *McKay* standard is limited in use to cases involving military equipment. *See id.*

government merely approved that design.[76] Modifying the *Agent Orange* test, the *McKay* court held that a plaintiff may not recover against a defendant manufacturer if the manufacturer shows that: (1) the federal government was immune from suit under the FTCA; (2) the government established or approved reasonably precise design specifications; (3) the product conformed to these specifications; and (4) the manufacturer warned the government about dangers involving the product that were known to the manufacturer but not to the government.[77] Thus, although the government had no hand in designing the specifications of the product, the manufacturer could avoid liability for its defects in the Ninth Circuit. Further, the reasonably precise design specifications element of the *McKay* test made it easier for government contractors to avoid liability than under the stricter *Agent Orange* test.[78] Instead of proving that the government drafted a very specific design that was followed in every material aspect, the manufacturer simply had to show that "reasonably precise specifications" were either established or merely approved by the government.[79]

B. Results of the Boyle *Litigation*

After Lieutenant Boyle drowned as a result of the malfunctioning of his emergency exit, Boyle's father filed a diversity action against the Sikorsky Division of United Technologies Corporation, the helicopter manufacturer, claiming negligence and breach of warranty in the design of the co-pilot's escape hatch.[80] Specifically, Boyle claimed that when one of the control sticks was pulled fully upward, it interfered with the co-pilot's access to the control of his es-

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[76] *See McKay*, 704 F.2d at 451 (insulating manufacturer from liability stemming from the defective design of military equipment which the contractor selected and which the government merely approved).

[77] *See id.* (setting forth the elements of the *McKay* test).

[78] *See* Jules F. Miller, *Liability and Relief of Government Contractors for Injuries to Service Members*, 104 MIL. L. REV. 1, 16-21 (1934) (noting the impact of the *McKay* court's ruling on liability actions directed at government contractors); June E. Wagner, Note, Tate v. Boeing Helicopters: *Government Contractors Increasingly at Risk Despite the Government Contractor Defense*, 23 N. KY. L. REV. 377, 406 (1996) (discussing the effect of *McKay* on the *Boyle* decision).

[79] *See* Haizlip, *supra* note 71, at 128 (noting the leniency of the *McKay* standard for contractors seeking to invoke the government contractor defense).

[80] *See* Boyle v. United Techs. Corp., 792 F.2d 413, 413-14 (4th Cir. 1986) (discussing the facts which allegedly led to the death of Boyle and resulted in the lawsuit by Boyle's father), *vacated*, 487 U.S. 500, *on remand*, 857 F.2d 1468 (4th Cir.), *cert. denied*, 488 U.S. 994 (1988), *reh'g denied*, 489 U.S. 1047 (1989).

cape hatch.[81] The jury returned a verdict for the plaintiff for $725,000.[82] United Technologies appealed to the Fourth Circuit, arguing immunity under the government contractor defense.[83]

Applying the lenient *McKay* test, the Fourth Circuit concluded that the military contractor defense precluded any recovery by Boyle for the design defect.[84] First, the court concluded that the FTCA did not waive the Navy's governmental immunity.[85] Next, the court noted that the Navy and United Technologies worked together to design specifications for the helicopter.[86] This team-work approach, the court concluded, established governmental approval of the design in question.[87] Because the Navy accepted the manufactured helicopter, the court determined that the product fully complied with the specifications.[88] Finally, the court concluded that there was no evidence that United Technologies knew of any hazards of which the Navy was not aware.[89] Thus, each of the elements of the military contractor defense had been met, and the jury verdict against United Technologies was reversed.[90]

Boyle's father sought review by the United States Supreme Court, and in January, 1987, the Court granted certiorari.[91] Boyle argued that, absent federal legislation specifically immunizing government contractors, federal law cannot interfere with state tort law and shield contractors from liability and defective designs.[92] In

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[81] *See id.* at 414 (recounting alleged defect in the positioning of a control stick which blocked access to the co-pilot escape hatch).

[82] *See id.* (noting the jury's general verdict).

[83] *See id.* (stating that the motion for judgment notwithstanding the verdict, based upon the military contractor defense, was brought by the Sikorsky Division of United Technologies Corporation and was denied by the district judge).

[84] *See id.* (outlining the conditions under which a military contractor avoids liability).

[85] *See id.*; *see also* Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986) (reasoning that allowing military personnel to recover from military contractors would defeat the purpose of governmental immunity by adding the costs associated with the contractors' liability to the price of the contract).

[86] *See Boyle*, 792 F.2d at 414 (discussing the steps the court went through in applying the *McKay* four-prong test to the *Boyle* facts).

[87] *See id.*

[88] *See id.* at 415 ("[T]he Navy accepted it as fully complying with specifications.").

[89] *See id.* (noting that the Navy had accepted the helicopter 13 years before Boyle's accident, thus making it unlikely that the contractor knew of any hazards unknown to the Navy).

[90] *See id.* at 414-15 (discussing application of the *McKay* test which resulted in reversal of jury verdict for plaintiff).

[91] 479 U.S. 1029 (1987) (granting certiorari).

[92] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (presenting plaintiff Boyle's argument regarding choice of law), *on remand*, 857 F.2d 1468 (4th Cir.), *cert. denied*, 488 U.S. 994 (1988), *reh'g denied*, 489 U.S. 1047 (1989).

an opinion by Justice Scalia, the Court stated that liability of independent contractors performing work for the federal government is an area of uniquely federal concern.[93] State law holding government contractors liable for design defects in military equipment may present a significant conflict with federal policy, thus requiring displacement of state law by the courts' so called "federal common law."[94]

The Court determined that

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[95]

Although the Supreme Court adopted the *McKay* elements, it rejected the Fourth Circuit's justification for the government contractor defense.[96] *McKay* barred suits against manufacturers on the basis that such suits would frustrate the policy reasons behind the *Feres-Stencel* doctrine.[97] However, in *Boyle*, the Supreme Court concluded that a justification based on the *Feres-Stencel* doctrine would produce inconsistent results, being too narrow in some instances, and too broad in others.[98] For example, Justice Scalia noted that if the government contractor defense was successfully asserted every time the government enjoyed sovereign immunity,

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[93] *See id.* at 512 (labeling the relationship between independent contractors and the government a uniquely federal concern, thereby requiring federal law to trump state law in adjudication of tort claims against contractors performing work for the government).

[94] *Id.* at 504, 512.

[95] *Id.* at 512.

[96] *Compare id.* at 509-12 (reasoning that the protection of discretionary decision-making for the federal government is the correct justification), *with* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 450-51 (9th Cir. 1983) (reasoning that frustration of the *Feres-Stencel* doctrine should be avoided).

[97] *See McKay*, 704 F.2d at 450-51 (discussing the policy basis for the *Feres-Stencel* doctrine).

[98] *See Boyle*, 487 U.S. at 510 (refusing to adopt the analysis of the *McKay* court). Justice Scalia, commenting on the Court's decision not to adopt the *McKay* analysis, stated that the application of the *Feres* doctrine would be too broad in that the doctrine would prevent suit against a manufacturer in every instance where there could be no suit against the Government. *See id.* Conversely, application of the *Feres* doctrine would produce results in another respect too narrow in that the doctrine bars liability only for service-related injuries, not injuries caused by the military to civilians. *See id.* at 510-11.

claims resulting from manufacturing defects would be barred.[99] When manufacturing defects cannot be linked to government approval of specifications, applying the government contractor defense to such manufactural defect claims would distort the purpose of the defense.[100]

Abandoning the *Feres-Stencel* doctrine as the supporting rationale for the government contractor defense, the *Boyle* Court based its decision to recognize the defense on the discretionary function of the government.[101] The Court noted the need for independence in the executive branch in order to make decisions regarding the military.[102] Indeed, the Court observed that the armed forces must be able to select appropriate designs for military equipment without interference from the courts.[103] As one commentator has explained:

> There is a significant federal interest in the ability of the military to exercise its discretion in the creation of such standards, given the unique expertise and information available to that sector of the executive branch, and to allow intrusive judicial review and liability to result from such decisions could only have a chilling effect on military processes that would, in the long run, be detrimental to the best interests of national defense and security.[104]

Although critics claim that the barriers *Boyle* has erected against plaintiffs seeking to recover from government contractors are too harsh, advocates explain that the *Boyle* defense "is a necessary con-

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[99] *See id.* at 510 (discussing how justification of the military contractor defense using the *Feres-Stencel* doctrine would be too broad).

[100] *See id.* (presenting the Court's reasoning for not adopting the *McKay* justification for the military contractor defense).

[101] *See id.* at 511 (justifying the military contractor defense). The *Boyle* Court illustrated the appropriateness of recognizing the government contractor defense by stating that the selection of the design for military equipment is certainly a discretionary function of the federal government. *See id.* The Court reasoned that to allow second-guessing of the government's discretion by way of state tort suits against government contractors would be to permit what the FTCA sought to avoid. *See id.* (discussing the balancing of military, technical and social considerations in which the government engages when determining specifications for military equipment, and the deleterious effect of tort actions against government contractors on the government's discretion in setting specifications).

[102] *See id.* at 511 (stressing the unique balancing which the government must be free to conduct in designing military equipment).

[103] *See id.* (denouncing state tort actions against government contractors as interfering with the government's discretion in designing military equipment).

[104] Wayne Lindsey Robbins, Jr., Comment, *The Government Contract Defense After* Boyle v. United Technologies Corporation, 41 BAYLOR L. REV. 291, 302-03 (1989).

sequence of the incompatibility of modern products liability law and the exigencies of national defense."[105]

III. BREAKING DOWN THE BARRIERS—ONE ELEMENT AT A TIME

A. Government Approval of Reasonably Precise Specifications

The first element of the *Boyle* defense requires that the government approve reasonably precise specifications for the equipment's design.[106] Although a multitude of arguments exist as to the definition of "reasonably precise," the Fourth and Fifth Circuits have held that the approval element is satisfied when the government contractor can show that the government required the manufacturer to "strictly adhere to previously established, Government-approved specifications"[107] and that "[n]o deviations to the specifications or drawings were permitted without Government approval."[108] In other words, a government employee's mere rubber stamp or acceptance of the contractor's working drawings does not establish the first element of the *Boyle* defense.[109] Instead, the contractor must show that a team-like effort existed in all communications between the contractor and the government, with the government providing general specifications and approval at various stages of project development.[110]

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[105] Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1322 (11th Cir. 1989).

[106] *See Boyle*, 487 U.S. at 512 (setting forth the elements of the *Boyle* government contractor defense); Cahoon, *supra* note 1, at 835 (discussing the "reasonably precise specifications" element that a government contractor must prove in order to avoid liability under the government contractor defense).

[107] Cahoon, *supra* note 1, at 836 (quoting from affidavit testimony provided by the defendant in *Skyline Air Serv., Inc. v. G. L. Capps Co.*, 916 F.2d 977, 978 (5th Cir. 1990)).

[108] *Id.*

[109] *See* Trevino v. General Dynamics Corp., 865 F.2d 1474, 1479-80 (5th Cir. 1989) (noting that the first element of the *Boyle* defense requires more than a mere showing that the government agreed in a cursory fashion to designs or specifications).

[110] *See* Boyle v. United Techs. Corp., 792 F.2d 413, 414 (4th Cir. 1986) (noting the importance of the level of involvement between the contractor and the government), *vacated*, 487 U.S. 500, *on remand*, 857 F.2d 1468 (4th Cir.), *cert. denied*, 488 U.S. 994 (1988), *reh'g denied*, 489 U.S. 1047 (1989); Koutsoubos v. Boeing Vertol, 755 F.2d 352, 355 (3rd Cir. 1985) (emphasizing that the first prong of the *Boyle* defense hinges on the degree to which the government controlled the design of the product); Cahoon, *supra* note 1, at 835-36 (discussing that the first prong of the *Boyle* test requires a contractor to prove a significant level of involvement between the government and the contractor); Haizlip, *supra* note 71, at 139 (noting "that the greater the contractor's involvement, the less its chance for immunity"). In his discussion of what constitutes "reasonably precise specifications," Haizlip notes different scenarios under which a contractor might experience varying levels of governmental in-

Therefore, the plaintiff's best line of attack against the *Boyle* defense is to allege that the government did not exercise its discretion over design features.[111] Often a contractor will purchase an item off the shelf, that a private manufacturer designed and produced in advance.[112] Under these circumstances, the government has neither used discretion in the design nor approved the design of the product, and consequently the contractor would not be protected.[113] Additionally, the defendant contractor may be open to liability if the government leaves critical design features to the manufacturer's discretion and approves only the end product.[114] Leaving the "means to the end" in the manufacturer's hands will usually penetrate the first element of the *Boyle* defense.[115]

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volvement. *See id.* at 138-39 (citing Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985)). Haizlip points out that at times, a very rigorous set of plans and specifications might govern a product's manufacture; in other situations, several sets of specifications might be conflicting, and in still other situations, plans and specifications might be formulated by more than one source. *See id.*

111 *See* MYRON P. PAPADAKIS, UNDERSTANDING THE MILITARY CONTRACT DEFENSE—WHAT THE JUSTICE MEANT TO SAY 10 (June 3, 1995) (Aviation Law Section Meeting, State Bar of Texas) (suggesting that a plaintiff can best hope to defeat the *Boyle* defense by claiming that the government was not significantly involved in the design of the harm-producing product); *see also Boyle*, 487 U.S. at 512 (stating that liability can be imposed if the government did not give approval through consideration of the design feature in question).

112 *See* PAPADAKIS, *supra* note 111, at 10 (observing that a plaintiff can successfully claim lack of government involvement in a product's design when the product was purchased off the shelf).

113 *See id.* (offering that when the government purchases a product off the shelf, the government's lack of involvement in product design indicates that the contractor would not be free of liability); *see also* David E. Seidelson, *From* Feres v. United States *to* Boyle v. United Technologies Corp.*: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219, 261-62 (1994) ("If the injury-producing defect were attributable to the contractor and not to the government, there would be no impropriety in permitting the victim to recover from the contractor, even though the victim could not recover and the contractor could not secure indemnification from the government."). *But see* McKay v. Rockwell Int'l Corp., 704 F.2d 444, 453 (9th Cir. 1983) (holding that the contractor defense can be invoked even when the contractor was the sole source of the design if the government approved "final reasonably detailed specifications").

114 *See* Seidelson, *supra* note 113, at 266-67 (stating that the requirements in *Boyle* "would limit the defense to those actions in which the defect was attributable primarily to government fault, and preclude the defense where the defect was primarily attributable to contractor fault").

115 *See* PAPADAKIS, *supra* note 111, at 10 (suggesting that when a manufacturer has the final discretion regarding the construction of a product, the manufacturer likely will be unable to invoke the government contractor defense); *see also* Seidelson, *supra* note 113, at 260-67 (observing that a manufacturer who is unable to show a relatively close working relationship with the government in manufacturing a product will not meet the first element of the government contractor defense). Although it appears that a manufacturer will be unable to invoke the government contractor defense when that contractor is left with a great degree of discretion in designing and manufacturing a product, it bears pointing out that at least one

Another method by which the plaintiff may satisfy the first prong of the *Boyle* defense is to allege that the government's specifications are not reasonably precise, but instead, are general and vague.[116] This allegation, however, usually leads to a massive paper war during the discovery phase of the case, with the contractor producing the design specifications, the blueprints of the product, and any government design guidelines that were incorporated into the specifications. Because the *Boyle* decision provided little guidance in defining what is "reasonably precise," courts have struggled to formulate a consistent approach to evaluating whether such evidence meets this requirement.[117]

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case has held that even when the contractor designs a product with no input from the government, that contractor, nonetheless, can invoke the defense. *See McKay*, 704 F.2d at 453 (illustrating liberal application of the government contractor defense to facts wherein contractor was the sole source of product design if the government approved the "final reasonably detailed specifications").

[116] *See* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 745 (11th Cir. 1985) (noting that specifications for product manufacture may come from several different sources, and they may differ in detail, specificity, and range). The *Shaw* decision set forth an alternative government contractor defense. *See id.* The 11th Circuit in *Shaw* held that a contractor would not be liable for injuries if the contractor "affirmatively proves" that "it did not participate, or participated only minimally, in the design of" defective equipment and that "it timely warned" the government of risks and provided "alternative designs reasonably known by the contractor, and that" the contractor received authorization from the government "to proceed with the dangerous design" despite such warning. *Id.* at 746. Additionally, the *Shaw* court cautioned against placing too much emphasis on "reasonably precise specifications," stating: "Specifications may be minimal or detailed, quantitative or qualitative, general or specific; they may range from meticulous descriptions of each bearing and bushing required, to vague hopes for 'simple' or 'failsafe' products. At times, several sets of specifications, sometimes conflicting, may govern a product's design all at once. . . ." *Id.* at 745; *see also* Haizlip, *supra* note 71, at 138-39 (providing an enlightening discussion of what "reasonably precise specifications" means). Although the government contractor defense as set forth in *Boyle* might appear to be easy to apply, Haizlip points out that several unresolved issues remain in the *Boyle* aftermath. *See id.* Among the post-*Boyle* questions are what will suffice as "reasonably precise specifications." Other unanswered questions include: (1) whether the government contractor defense applies to all government contractors; (2) whether it prohibits suit by "all victims, military and nonmilitary"; (3) whether the government should be granted immunity before the defense can be used; (4) what constitutes "sufficient warning"; (5) whether the discretionary function makes the defense "breathtakingly sweeping"; and (6) whether the government contractor defense exceeds the bounds of public policy. *Id.* at 116.

[117] *See* Haizlip, *supra* note 71, at 138-39 (stating that since the meaning of "reasonably precise specifications" remains unanswered after the *Boyle* decision, courts will continually have to struggle when applying the government contractor defense to a given set of facts). In discussing the problem of interpreting what the *Boyle* Court meant by "reasonably precise specifications," Haizlip states that, "[u]nless Congress offers both specific guidance and a precise definition, the courts of the future will be forced to seek guidance from other courts that have addressed these issues on a case-by-case basis." *Id.* at 139.

Two Fifth Circuit cases, *Smith v. Xerox Corp.*[118] and *Trevino v. General Dynamics Corp.*,[119] illustrate this struggle. In *Smith*, an Army soldier was injured when an explosive cartridge in a shoulder-mounted weapon simulator discharged prematurely.[120] In the soldier's lawsuit against Xerox, the simulator's manufacturer, the court determined that the defendant failed to produce complete specifications for the product in question.[121] However, Xerox did produce a listing of those specifications, a copy of the original government performance criteria, and a production contract specifically referring to government-approved specifications.[122] Recognizing a distinction between "*reasonably* precise" specifications and "precise" ones, the Fifth Circuit found that Xerox had met the first element of the government contractor defense.[123] By construing the "reasonably precise specifications" standard broadly, the *Smith* court allowed Xerox to meet the first element of the *Boyle* defense merely by providing the overall specifications for the product.

In *Trevino*, decided the same day as *Smith*,[124] the Fifth Circuit attempted to define the amount of government discretion needed to meet *Boyle's* "reasonably precise specification" element.[125] In *Trevino*, five Navy divers died aboard the USS *Grayback* when a ventilation valve allowing oxygen into the submarine's diving chamber malfunctioned, causing a vacuum to form in the chamber.[126] Although a diver lock-in/lock-out system had been installed thirteen years prior to the accident, the ship had served since that time without an accident.[127] The contract in question required General Dynamics to assume full responsibility for all necessary technical

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118 866 F.2d 135 (5th Cir. 1989).

119 865 F.2d 1474 (5th Cir. 1989).

120 *See Smith*, 866 F.2d at 136 (recounting incident leading to soldier's injury and resulting litigation).

121 *See id.* at 138.

122 *See id.* (detailing evidence which manufacturer produced regarding the degree of specificity in the government's specifications followed in the design and manufacture of the simulator).

123 *Id.* (illustrating the *Smith* court's broad interpretation of the first element of the government contractor defense set forth by the *Boyle* Court).

124 *See supra* notes 118-19 and accompanying text.

125 *See* Trevino v. General Dynamics Corp., 865 F.2d 1474, 1479-80 (5th Cir. 1989) (attempting to set a standard below which there is insufficient governmental approval to afford a contractor the ability to invoke the government contractor defense, distinguishing between the government's exercise of discretion over the design and scenarios in which the government delegates its discretion).

126 *See id.* at 1476 (providing facts which led to the deaths of five Navy divers).

127 *See id.* at 1477 (discussing the *Grayback's* historical safety rating).

research and to assure quality control before issuing the product to the Navy.[128] Additionally, each blueprint or drawing "was signed by a government employee in a box marked 'approved.'"[129] Upon completion of all the redesign drawings, General Dynamics' employees departed the work site, leaving the Navy to perform all of the manufacturing and redesign work on the submarine.[130]

The plaintiffs in *Trevino* argued that, regardless of how precise General Dynamics' specifications were, the government had failed to approve those specifications.[131] Applying the *Boyle* defense, the district court held that, although each drawing contained a government employee's signature indicating approval of the design, such a minimum level of review was insufficient to constitute approval.[132] On appeal, the Fifth Circuit affirmed the lower court's decision, concluding that "approval" under the *Boyle* defense requires more than a "rubber stamp" of the design features.[133] The *Trevino* court further stated that the basis for the *Boyle* defense is to protect the discretionary function of the government, which involves the use of policy judgment.[134] As the court stated:

> The government exercises its discretion over the design when it actually chooses a design feature. The government delegates the design discretion when it buys a product designed by a private manufacturer; when it contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; or when it contracts out the design of a concept generated by the government, requiring only that the

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[128] *See id.* at 1476-77.

[129] *Id.* at 1477 (establishing the balance of control between the Navy, as agent for the government, and General Dynamics in the design and manufacture of a Navy submarine).

[130] *See id.* (detailing the working relationship between the Navy and the manufacturer in the various stages of production on the submarine in which Navy divers met their deaths).

[131] *See id.* at 1480 (setting forth the plaintiff's argument that, even though the specifications used in the manufacture and design were precise, the manufacturer should be unable to invoke the government contractor defense because the manufacturer failed to obtain actual government approval of specifications for the design and manufacturer of the Navy submarine in question).

[132] *See id.* at 1479 (stating the district court's holding that the government employees' stamp of approval was insufficient to give General Dynamics the ability to invoke the government contractor defense).

[133] *Id.* at 1480 (reasoning that a mere perfunctory governmental approval of the product design is insufficient to justify the sharing of governmental immunity with the contractor).

[134] *See id.* (echoing the *Boyle* Court's concern for the protection of the government's discretionary function as a rationale for the government contractor defense).

final design satisfy minimal or general standards established by the government.[135]

According to the *Trevino* court, the government does not exercise discretion merely because it has "final approval" of the design or because it "approved" the design without any substantive review.[136]

After *Trevino*, "approval" appears to turn on the level of substantive participation between the contractor and the government, at least in the Fifth Circuit. The more the government participates or is perceived to participate in the design process, the more apparent the government's discretionary function. Discovery techniques aimed at uncovering the extent of the government's participation enable the plaintiff to better prepare against the defendant contractor's possible invocation of the *Boyle* defense.

B. The Equipment Conforms to Specifications

Boyle's second element requires that the equipment conform to specifications provided by the government.[137] This requirement motivates the contractor to ensure that any design-feature deviations are brought to the government's attention.[138] An attack on *Boyle*'s conformance prong entails defining the specifications involved. In principle, conformance to specifications that are merely general in nature does not constitute the type of pervasive involvement in the design process that is the foundation of the government contractor defense. If a contractor deviates from the government specifications, the government is no longer exercising its discretionary function.[139] Nevertheless, the second element of the *Boyle* defense presents a formidable obstacle for plaintiffs.

Generally, unless the plaintiff has shown that the product was defectively manufactured, a contractor satisfies this second re-

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[135] *Id.*

[136] *Id.* (holding that government approval necessitates more than a cursory endorsement or determination that the design complies with general requirements, even when that approval may be considered final).

[137] *See id.* at 1479 (discussing the second prong of the contractor defense as set forth in *Boyle*).

[138] *See id.* at 1481 (discussing the rationale for the second prong of the *Boyle* test which requires conformance with government specifications).

[139] In theory, the government contractor will have the government review any necessary alterations to a design in order to ensure that the end product conforms to the government's specifications. *See* Haizlip, *supra* note 71, at 140 (intimating that a contractor should have the government review all of the specifications and warn of any risks to insure protection by the *Boyle* defense); Seidelson, *supra* note 113, at 260-63 (noting the relationship between the government contractor and the government following the *Boyle* decision).

quirement when the government accepts the product in question.[140] Another scenario has also proved successful for the government contractor. Often, the contractor will reduce the government-approved designs to drawings for government review and approval. If the contractor complies with the specifications in those drawings, he has met *Boyle*'s second prong.[141]

In *Kleemann v. McDonnell Douglas Corp.*,[142] the Fourth Circuit thoroughly analyzed the second prong of the *Boyle* defense and determined "what conformity means."[143] In *Kleemann*, a Navy pilot died when his "aircraft went out of control during landing, left the runway, and overturned."[144] The pilot's surviving spouse and children sued the manufacturer, McDonnell Douglas. The plaintiffs claimed that the landing gear did not conform to reasonably precise specifications contained in the Navy's original contract with McDonnell Douglas.[145] The court noted that

> Plaintiffs' claim is precisely the sort for which the defense was intended. . . . [The issue] is a discretionary decision involving military hardware in which the government was a substantial participant. . . . It is hard to imagine a matter more uniquely in the province of the military—and one less appropriate to second-guessing by civilian courts—than the development of a high technology, multi-mission aircraft.[146]

The *Kleemann* court found that, during the design development, the Navy required McDonnell Douglas to submit detailed drawings for approval and that changes to the aircraft's design or specifications required approval.[147] Further, the *Kleemann* court determined that because "the Navy was intimately involved at various stages of the design . . . process, the required government approval of the alleged design defect is more likely to be made out. Simi-

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[140] *See* Haizlip, *supra* note 71, at 139 (discussing the means by which a contractor may meet the second element of the *Boyle* defense).

[141] *See* Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582, 585 (9th Cir. 1996) (affirming summary judgment based on government contractor defense where contractor submitted drawings based on Navy designs, the drawings were accepted by the Navy, and the product was constructed in accordance with the drawings).

[142] 890 F.2d 698 (4th Cir. 1989).

[143] *Id.* at 699.

[144] *Id.* at 700 (recounting facts which led to the suit by Kleemann's spouse and children seeking redress from aircraft manufacturer).

[145] *See id.* (discussing plaintiff's allegations of a malfunction of the landing gear and that the landing gear did not conform to reasonably precise specifications).

[146] *Id.* at 700-01.

[147] *See id.* at 701.

larly, the Navy's extensive participation . . . enhances the likelihood of final product conformity."[148] Thus, government participation "in the various stages of" a product's development seems to be the "salient fact" that establishes the military contractor defense.[149]

Much of the evidence used in analyzing *Boyle's* first prong is also relevant when analyzing the second prong. For example, in *Landgraf v. McDonnell Douglas Helicopter Co.*,[150] the Sixth Circuit recognized that "[t]he ultimate question of whether the helicopter conformed to reasonably precise specifications depends on our determination of what constituted the 'reasonably precise specifications.'"[151] Thus, if the contractor successfully proves the first element of the defense, the second element should not pose a great obstacle to the contractor.

In *Landgraf*, McDonnell Douglas contracted with the Army to design OH-6A helicopters.[152] The design specifications precluded the possibility that the helicopter's rotor blades would strike another part of the aircraft by setting clearance minimums at "not . . . less than 9 inches, and preferably 12 inches."[153] Jerome Landgraf was aboard an OH-6A helicopter when it lost power and began to descend.[154] The main rotor lost speed, and one of the rotor blades struck and severed the tail boom.[155] "The helicopter then fell the final 100 feet of its descent and crashed violently," killing everyone aboard.[156] Landgraf's wife brought suit against McDonnell Douglas, seeking damages under state tort law.[157]

The district court granted summary judgment for McDonnell Douglas based on the government contractor defense.[158] On appeal, the plaintiff conceded that McDonnell Douglas established *Boyle's* first and third prongs, stating that the government's specifications

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148 *Id.* (citations omitted).

149 *Id.*

150 993 F.2d 558 (6th Cir. 1993).

151 *Id.* at 559.

152 *See id.*

153 *Id.* at 561.

154 *See id.* at 559 (detailing the facts which led to death of Landgraf, the ensuing litigation, and the invocation of the government contractor defense).

155 *See id.*

156 *Id.*

157 *See id.*

158 *See id.* (explaining the district court's holding that since plaintiff failed to bring forth "genuine issues of material fact" denying the application of the government contractor defense to the case, "McDonnell Douglas was entitled to judgment as a matter of law").

were not "general" or "qualitative," but were indeed precise.[159] However, the plaintiff argued that McDonnell Douglas failed to establish the second prong—that the helicopter conformed to the specifications provided.[160] Specifically, the plaintiff contended that it was impossible to design a helicopter meeting the clearance requirements specified, and, as a result, McDonnell Douglas had two options: "[it] could either have declined to build the OH-6A [with the specified clearances,] or it could have sought a deviation from this requirement."[161]

In response, McDonnell Douglas argued that the plaintiff failed to meet her burden because there were issues of material fact remaining.[162] In support of this contention, McDonnell Douglas pointed to an expert's affidavit submitted with its motion for summary judgment, the truth of the expert's assertion finding support in "a number of undisputed facts."[163] First, the clearance specifications were established before the OH-6A helicopter was proposed, and were, therefore, a "general and generic" set of standards applicable to most types of helicopters.[164] Second, as the Army accepted and approved each OH-6A, it compared the aircraft to the detailed specifications, not the general clearance specifications.[165] Finally, McDonnell Douglas contended that no designer could guarantee that the rotor blades will not flap and strike other parts of the aircraft when a helicopter experiences a midair power loss.[166] Although the OH-6A clearance specifications contained a statement repeating the Army's goal of obtaining helicopters that are safe from rotor blade/tail boom contact, McDonnell Douglas claimed that these statements were merely "precatory."[167]

In its opinion, the *Landgraf* court determined that when the government issues military specifications and a reported deviation follows, government acceptance of the product despite the deviation is

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159 *Id.* at 560-61 (conceding establishment of the first and third prongs); *see supra* text accompanying note 95 (presenting the three-prong test used by courts when contractors raise the government contractor defense).

160 *See Landgraf*, 993 F.2d at 560.

161 *Id.* at 561 (discussing the virtual impossibility of the contractor meeting the government's specifications, and options available to the contractor).

162 *See id.* (explaining the defendant's position that an expert's declaration that the "[d]etail [s]pecifications" are the "'governing' specifications" was not contradicted).

163 *Id.*

164 *Id.*

165 *See id.*

166 *See id.*

167 *Id.*

strong evidence that the specifications were merely a desirable goal.[168] According to the Sixth Circuit, such knowledge and acceptance of a deviation establishes that the equipment has conformed to specifications.[169] In upholding summary judgment for McDonnell Douglas, the court relied on the years of continuous contact between McDonnell Douglas and the Army during the procurement, testing, and production phases of the OH-6A.[170] The court held:

> By permitting production to continue without any change in design . . ., the Army made a discretionary decision to not insist on the clearance recommended . . . . [B]y acquiescing in the continued production without change and acceptance and certification of helicopters produced thereafter, the Army treated [the clearance specifications on rotor-to-airframe contact] as a precatory statement.[171]

Relying upon the facts presented, the court noted that the Army did not believe rotor-to-airframe strikes could be completely eliminated, but could only be reduced in probability.[172] Additionally, the court recognized that, although the Army was informed that as little as three inches of rotor-to-airframe clearance existed, the Army ordered no further changes to the configuration.[173] According to the Sixth Circuit, these facts were sufficient to establish *Boyle's* conformity element.[174]

From *Landgraf*, it appears that a government contractor can establish the second prong of the *Boyle* defense by showing that the contractor produced equipment conforming to design specifications adopted or issued by a government agency which exercised discretionary authority.[175] However, what constitutes "precise specifications" versus a "desirable goal" leaves ample room for disagreement. The Sixth Circuit clearly stated that mere government

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[168] *See id.* at 564 (opining that when the government accepts a deviation, acceptance is proof that the design was merely a means to a goal).

[169] *See id.* (reasoning that acceptance of a product, which includes a deviation, is evidence of conformity).

[170] *See id.* at 563-64 (discussing the court's reasoning for upholding summary judgment).

[171] *Id.* at 564.

[172] *See id.* (limiting its decision to the facts of the case).

[173] *See id.* (noting that the Army's specifications had called for nine to twelve inches of clearance).

[174] *See id.* ("*Boyle* makes clear that the government contractor defense is intended to protect military contractors from state tort liability when they produce equipment conforming to design specifications adopted by government agencies in exercise of their discretion. This is such a case.").

[175] *See id.*

cooperation with the contractor in design and development does not assure that the second prong of the *Boyle* defense will be satisfied.[176] Rather, when military specifications are promulgated and the contractor gives notice of his inability to meet those standards, the specifications will be deemed a goal rather than a condition requiring conformance.[177]

C. Warnings to the Government

The third and final prong of the *Boyle* defense requires that the supplier warn the government about dangers involving the equipment known to the supplier but not known to the government.[178] If the defendant contractor contends that there were no known dangers, the plaintiff must establish three things to defeat this element.[179] The plaintiff must prove: first, that the contractor knew of some danger resulting from the use of the product; second, that the government was unaware of the danger; and third, that the contractor failed to warn the government about the danger.[180] By adopting this third prong, the *Boyle* Court clearly intended to alleviate the burden of proof placed on contractors to issue warnings to the government.[181]

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[176] *See id.* (noting, further, that even approval after testing the equipment does not necessarily satisfy *Boyle*'s second prong).

[177] *See id.* (distinguishing among situations which will and will not satisfy the second prong of the *Boyle* test).

[178] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 512 (establishing the three-prong test for the application of the government contractor defense), *on remand*, 857 F.2d 1468 (4th Cir.), *cert. denied*, 488 U.S. 994 (1988), *and reh'g denied*, 489 U.S. 1047 (1989).

[179] *See* Boyle v. United Techs. Corp., 792 F.2d 413, 414 (4th Cir. 1986) (discussing what the plaintiff must do in order to defeat a government contractor's claim that there were no known dangers, therefore, no duty on the part of the contractor to make the dangers known to the government), *vacated*, 487 U.S. 500, *on remand*, 857 F.2d 1468 (4th Cir.), *cert. denied*, 488 U.S. 994 (1988), *reh'g denied*, 489 U.S. 1047 (1989). The Supreme Court agreed with the list of elements that the Fourth Circuit deemed necessary to invoke the government contractor defense. *See Boyle*, 487 U.S. at 512. The elements include: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.*

[180] *See id.* at 513 (noting immunity of contractors from tort liability when they are contracting with the government in the event that the contractor can meet a three-prong test); *see also* Harry A. Austin, Comment, Boyle v. United Technologies Corporation: *A Questionable Expansion of the Government Contract Defense*, 23 GA. L. REV. 227, 250-55 (1988) (explaining how the requirements established by the *Boyle* decision changed the law in favor of government contactors).

[181] *See Boyle*, 487 U.S. at 513 ("[I]t does not seem to us sound policy to penalize, and thus deter, active contractor participation in the designing process, placing the contractor at risk unless it identifies all design defects.").

In *Trevino*, the trial court found that the defendant failed to meet the third element of the *Boyle* defense because the defendant failed to warn the government of dangers about which it knew or should have known.[182] On appeal, the Fifth Circuit concluded that the trial court incorrectly applied the final element of the government contractor defense, holding that a "contractor is only responsible for warning the government of dangers about which it has actual knowledge."[183] The Fifth Circuit upheld the trial court's decision, however, because the government had delegated the design discretion to the contractor and "never approved reasonably precise specifications within the meaning of *Boyle*."[184]

In considering the warning element, a court must often reanalyze issues visited under *Boyle's* first two prongs.[185] Government acceptance of the product in question is evidence of the government's knowledge of any danger.[186] Also, evidence of detailed government involvement in the procurement and design process helps to establish *Boyle's* third requirement.[187] Moreover, the length of time the government uses the product may itself establish the government's knowledge of a danger.[188]

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182 *See* Trevino v. General Dynamics Corp., 865 F.2d 1474, 1487 (5th Cir. 1989) (discussing the district court's opinion).

183 *See id.* at 1487.

184 *See id.* at 1487-88 (upholding the decision of the trial court).

185 *See supra* text accompanying note 95.

186 However, it must be noted that "[i]f the government has . . . delegated its discretion to the contractor . . . substantive review and evaluation of the contractor's design choices" is necessary to invoke the defense—acceptance alone would not indicate knowledge in that scenario. *Trevino*, 865 F.2d at 1486.

187 *See id.* at 1481-82.

> The [Supreme] Court's inclusion of a warning element must indicate that approval requires some level of evaluation and review; otherwise a government contractor might argue one day that it should have the benefit of the defense despite its failure to give a warning because the government had rubber-stamped the design, because the information withheld would have been of no use to the government and was not desired by the government, and because the provision of the information would not have affected the government's 'approval' of the design. The Supreme Court noted that the warning requirement prevents the defense from creating an incentive to withhold information. . . . That purpose would be a farce if the government could approve specifications without evaluating them.

Id.

188 *See generally* Landgraf v. McDonnell Douglas Helicopter Co., 993 F.2d 558, 562-63 (6th Cir. 1993) (describing the factual background to the *Landgraf* court's decision to reverse the summary judgment granted on behalf of the defendant, particularly "the development of the OH-6A from 1966 to 1988" combined with the Army's "continued flight testing during production . . . [which] involved hundreds of hours of flying and led to many design changes").

The best method to attack *Boyle's* third element is for the plaintiff to establish intentional non-disclosure or negligence by the defense contractor. During the discovery process, the plaintiff should be alert for any memoranda or notes indicating that the contractor knew of potential problems. Furthermore, if discovery reveals that the contractor had such knowledge, the plaintiff should seek to determine whether any correspondence or documentation exists providing the government with actual or constructive notice. Additionally, the plaintiff may uncover evidence that the contractor had knowledge, but breached the duty of notice through bureaucratic mismanagement or incompetence. This situation may arise when the contractor finds a defect or deficiency in the product, but provides improper or inadequate notice, fails to give notice altogether, or destroys any relevant documentation. Examples of these situations are improper changes to an aircraft technical manual, or the government's complete failure to receive the correct change to the equipment. Proving that the contractor knew of a defect or an unreasonably dangerous aspect of the product is a difficult task. However, the plaintiff may accomplish this purpose through intense and proper discovery.

IV. ANOTHER POSSIBLE HURDLE: OFFSET AND THE COLLATERAL SOURCE RULE

Assuming that a plaintiff has overcome the *Boyle* defense, another potential barrier to recovery against a government contractor is a retreat from the collateral source rule. "The collateral source rule is both a rule of evidence and a rule of damages."[189] As a rule of evidence, the collateral source rule precludes the introduction of any benefits the plaintiff may have received from someone other than the defendant.[190] As a rule of damages, it requires that the defendant pay the entire amount of damages notwithstanding the collateral source of recovery received by the plaintiff.[191] This issue

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[189] James L. Branton, *The Collateral Source Rule*, 18 ST. MARY'S L.J. 883, 883 (1987); *see* Julie A. Schafer, Note, *The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45*, 53 OHIO ST. L. J., 587, 589 (1992).

[190] *See* Branton, *supra* note 189, at 883; *see also* Schafer, *supra* note 189, at 589 (noting the effect that the collateral source rule has on the recovery of damages and the difficulty this rule poses when the collateral source is unattainable directly, whether it be by immunity or otherwise).

[191] *See* Branton, *supra* note 189, at 883 (discussing the effects of the collateral source rule on potential recovery for the plaintiff in a civil liability suit).

often arises when an insurance or employment benefit has been paid after the injury to the plaintiff or his estate.[192]

Fueled by the insurance industry "crisis" and the recent pendulum swing toward tort reform, the collateral source rule has come under intense criticism.[193] At the extreme, some commentators have suggested that the rule be totally abolished.[194] However, most courts have been reluctant to do so, and those jurisdictions that have abolished it have done so by statute.[195] Nevertheless, defense counsel might contend that a judgment for damages in addition to other benefits constitutes a double recovery, and that the plaintiff should not be "made whole" a second time.[196]

The collateral source rule's greatest weakness is that it tends to place the plaintiff in a better position than he was in before the accident occurred.[197] As one critic has stated:

> The collateral source rule has evolved from opposing principles of tort law. First, the rule conflicts with the compensatory function of tort law. Full compensation is provided when the plaintiff is restored to the position he or she occupied before the tort occurred. If a plaintiff receives compensation from a third party . . . , receipt of these benefits should in theory be used to reduce the tortfeasor's total damages. However, the collateral source rule requires the tortfeasor to pay the judgment even though the plaintiff has already been partly or completely compensated for the injuries suffered.[198]

Another complaint about the collateral source rule is that it encourages, and even motivates, the plaintiff to litigate.[199] After a

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[192] *See* Linda J. Gobis, Note, Lambert v. Wrensch: *Another Step Toward Abrogation of the Collateral Source Rule in Wisconsin*, 1988 WIS. L. REV. 857, 861 (noting that the collateral source rule in Wisconsin applies to plaintiff's recovery via insurance policies, employment benefits, gratuities, and legislated social benefits).

[193] *See* Branton, *supra* note 189, at 887 (commenting on the modern criticism of the collateral source rule).

[194] *See* Shafer, *supra* note 189 at 588 (noting that state legislatures adopted tort reform in response to scholarship advocating that the collateral source rule should be eliminated).

[195] *See* Branton, *supra* note 189, at 887-88 (discussing abolition of the collateral source rule by statute in some jurisdictions); *see also* Schafer, *supra* note 189, at 588 (noting Ohio's statute which abolishes the rule).

[196] Branton, *supra* note 189, at 885.

[197] *See* Gobis, *supra* note 192, at 860 (noting that double recovery is possible).

[198] *Id.* (footnotes omitted).

[199] *See* Daena A. Goldsmith, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799, 803 (1988) ("[T]he col-

service member's death, his estate receives compensation in both cash and benefits through the Veterans Benefits Act.[200] Any ensuing litigation against a government defense contractor will generate attorneys' fees and consume the time of litigants, jurors, and witnesses.[201]

The standard reformist would probably argue that, at a minimum, collateral sources should be allowed in as evidence so the trier of fact has the opportunity to offset the collateral source to the damages awarded.[202] In jurisdictions where the collateral source rule has remained untouched by legislation, at least one court has admitted evidence of collateral sources into trial. In *Dietz v. Becker*,[203] the Georgia Court of Appeals ruled that admitting evidence concerning plaintiff's receipt of disability payments was not "inadmissible collateral source evidence, but rather was admissible to impeach Dietz's statement concerning financial worries."[204] Thus, so far, the collateral source rule continues to protect the plaintiff's recovery.

The plaintiff's best response to critics of the collateral source rule is that the defendant must be held responsible for his actions, and that any type of reduction in liability rewards the tortfeasor.[205] Thus, if the court must choose between two perceived evils—allowing an injured party to obtain a double recovery or allowing a culpable defendant a windfall from a collateral source—then the better choice would be to punish the culpable defendant.[206] Moreover, one could argue that an injured party can never be made

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lateral source rule encourages a plaintiff to litigate rather than to accept what he already received as payment.").

200 *See* 38 U.S.C. §§ 1110, 1131 (1994) (granting basic entitlement of benefits to surviving family members).

201 *See* Goldsmith, *supra* note 199, at 803 (noting, also, the waste of judicial resources).

202 *See* Christopher J. Eaton, Comment, *The Kansas Legislature's Attempt to Abrogate the Collateral Source Rule: Three Strikes and They're Out?*, 42 U. KAN. L. REV. 913, 921 (1994) (giving arguments for and against the rule); *see also* Banks McDowell, *The Collateral Source Rule—The American Medical Association and Tort Reform*, 24 WASHBURN L.J. 205, 213-15 (1985) (explaining how introduction of collateral source evidence could benefit plaintiffs).

203 434 S.E.2d 103 (Ga. Ct. App. 1993).

204 *Id.* at 105 (allowing evidence of a collateral source in rebuttal of plaintiff's contention of financial pressure).

205 *See* Goldsmith, *supra* note 199, at 800-01 (explaining the justification for the existence of the collateral source rule).

206 *See id.* (arguing that it is better to fully punish the tortfeasor even if to do so means that the plaintiff is made more than whole).

whole.[207] As the United States Court of Appeals for the District of Columbia stated in *Hudson v. Lazarus*:[208]

> [T]he law seeks to award compensation, and no more. . . . Legal 'compensation' . . . does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. Moreover the injured person seldom gets the compensation he 'recovers', for a substantial attorney's fee usually comes out of it."[209]

The court further reasoned that a limit exists as to what a tortfeasor must pay, but it should not be reduced by the injured person's recovery of money or benefits from a collateral source.[210]

CONCLUSION

In an attempt to defeat the government contractor defense, the plaintiff will likely focus his energy on proving that the contractor did not meet *Boyle's* first element—that the government approved reasonably precise specifications.[211] If the surrounding facts permit, the plaintiff's best option is to show that the government's approval involved little substantive review and was merely a "rubber stamp." The discovery process will quickly show whether the government was intimately involved in the design process of the product in question. If the government's involvement was minimal, the plaintiff has a strong weapon with which to resist the *Boyle* defense. However, because most of the evidence used in analyzing *Boyle's* first element is relevant to the second and third elements, a plaintiff who cannot disprove the first prong will have difficulties defeating the contractor through the second or third prongs of the test.

The second element of the government contractor defense requires that the product conform to the aforementioned reasonably precise specifications.[212] If the government accepts and uses the equipment, courts generally find that the second element of the

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[207] *See* Branton, *supra* note 189, at 885 (proffering that money damages are "inadequate at best").

[208] 217 F.2d 344 (D.C. Cir. 1954).

[209] *Id.* at 346.

[210] *See id.* (noting the determination of a negligent wrongdoer's liability should fairly balance individual and social interests).

[211] *See supra* notes 106-36 and accompanying text.

[212] *See supra* notes 137-77 and accompanying text.

Boyle defense is met.[213] The best line of attack for the plaintiff may be to show that the product in question deviated from the specifications and that the specifications were not a "desired goal" for the product, but were instructions for strict compliance.

The final prong, the "warning" element, requires that the contractor warn the government of any inherent dangers of which the contractor has actual knowledge.[214] The "actual knowledge" requirement is a low standard that is easily met by the defendant. The plaintiff's only feasible avenue is to prove that the contractor intentionally withheld information of a risk from the government.

The *Boyle* case stands as one of the twentieth century's most blatant examples of judicial activism. With its opinion, the Supreme Court created a defense which the elected legislators of the country had conscientiously refused to recognize.[215] It is the law, however, and as such must be overcome for an injured party to recover from a government contractor. Although the *Boyle* defense places difficult hurdles before a plaintiff, overcoming these hurdles is not an impossible burden. If a plaintiff seeking to recover damages from the contractor in a products liability action can prove he has overcome the elements of the defense, the plaintiff may proceed to trial. This is, however, more easily written than achieved.

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213 *See supra* notes 168-74 and accompanying text (discussing the *Landgraf* decision).

214 *See supra* notes 178-88 and accompanying text.

215 *See, e.g.*, H.R. 4765, 99th Cong. (1986) (debating the civil liability of government contractors); S. 2441, 99th Cong. (1986) (proposing limitations regarding liability for those who contract with the government); *see also* H.R. 2378, 100th Cong. (1987) (attempting to provide indemnification of government contractors from civil liability); H.R. 5883, 98th Cong. (1984) (proposing to allow an equitable reduction of liability for government contractors).

THE IMPACT OF "FAIR USE" IN THE HIGHER EDUCATION COMMUNITY: A NECESSARY EXCEPTION?

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I. INTRODUCTION

Despite legislative efforts to define it, the concept of Fair Use[1] has been the subject of aggressive debate among publishers, authors, librarians, and users of copyrighted information ("academics") at academic institutions.[2] With the advent of the Internet and the prospect of multimedia projects,[3] the debate has intensified and expanded into the international community.[4]

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[1] Fair Use has been defined as "'the privilege in others than the owner to use the copyrighted material in a reasonable manner without . . . consent, notwithstanding the monopoly granted to the owner.'" HARRY G. HENN, COPYRIGHT LAW: A PRACTITIONER'S GUIDE 179 (2d ed. 1988) (quoting Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966)).

[2] *See* Benjamin Ely Marks, Note, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-*Salinger *Decade Reconsidered*, 72 N.Y.U. L. REV. 1376, 1376, 1389 (1997) (noting that decisions in several cases limiting the applicability of fair use generated criticism and activity among these groups).

[3] "Multimedia projects" refer to projects involving the use of multiple sources of copyrighted material including, but not limited to, film, video, magazines, and newspapers. *See* MELVILLE B. NIMMER & DAVID NIMMER, 5 NIMMER ON COPYRIGHT § 21, at 61-62 (1998) (noting that a multimedia work "combines authorship in two or more media").

[4] The World Intellectual Property Organization (WIPO) held its Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, Switzerland, in December 1996. *See Diplomatic Conference on Certain Copyright and Neighboring Rights Questions* (visited Nov. 20, 1998) <http://www.wipo.org/eng/diplconf/4dc_star.htm>. The primary