

CONTRACTUAL INDEMNIFICATION OF GOVERNMENT CONTRACTORS*

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INTRODUCTION

The indemnification of government contractors is closely connected to the procurement process, the process by which the government obtains the goods and services to perform its governmental function. It is of continuing interest to government contractors and their attorneys, as well as to plaintiffs' lawyers and their clients, who have an interest in recovery for injuries and damages suffered in accidents caused by products and services supplied by government contractors. There is also a more general interest in public protection and in the protection of victims of mass injuries that may result from catastrophic accidents in government contracts.

The recurrence of newspaper and other media reports on a variety of dangerous government activities, including injuries caused by high technology products manufactured pursuant to government specifications, has sparked renewed interest in the subject of contractual indemnification. In particular, the 1986 space shuttle disaster has brought issues of governmental and manufacturer responsibility into high relief and has made issues of liability a subject of wide popular discussion.

Examples of other well-publicized sources of potential liability abound. First, the publicity given to the Agent Orange litigation and to its ongoing settlement discussions have alerted the public to possible peacetime liabilities growing out of past government action related to military operations. Second, the continuing concerns over the safety of nuclear power also raise the indemnification issue; the tenfold increase in government contractor indemnification under the most recent amendments to the Price-Anderson Act¹ indicates an awareness of the dimension of nuclear hazards. In addition, regular media attention concerning the need to find a permanent disposal site for nuclear waste, as well as the recent attention to the radon gas problem and governmental efforts to find a site to dispose of radon-polluted soil raises recurring thoughts of government responsibility and indemnification. Third, government involvement in testing for the AIDS virus and government contracts calling for the development of AIDS-immunizing agents have

1. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988) (to be codified at 42 U.S.C. § 2210).

put the government and its contractors at substantial risk, for which government indemnification will likely be sought. Fourth, news stories involving contractor-manufactured propellants for outerspace rocketry, and accounts of vast government-contracted military defense systems also raise the issue of indemnification in government contracts. Finally, biological investigation involving gene-splicing, including contracted plant research conducted by the Department of Agriculture with genetically altered organisms, has also created anxieties.

The greater hazards involved in the performance of many government contracts create a greater need for government indemnities and also provide the context for other legal and economic developments. Some of these developments, such as the "government contract defense"² and the "*Feres*"³ rule seem to relieve government contractors of liability, while other aspects of tort law place government contractors at considerable risk. For instance, many government contracts involve activities which may be regarded as unusually hazardous, giving rise to the application of strict liability. What is true of potentially extra-hazardous activities under government contract is also true for products manufactured under government contract, particularly when there are allegations of a design defect. Under the usual rules of product liability,⁴ manufacturers are strictly liable for design defects; the threat of strict liability poses a risk for contractors even though they may seek protection under the government contract defense.

Lastly, one additional element framing any discussion of government indemnification is the ongoing and much-discussed crisis in availability of insurance at reasonable rates. However, industry and popular perceptions relating to the insurance crisis are probably more important than the scope of the crisis itself; the industry concern over availability of insurance at affordable rates, and the popular perception that without such coverage injured members of the public will not be able to recover for their injuries, contributes to the perceived need to provide for indemnities in government contracts. Therefore, it is likely that with the emergence of greater hazards in government contracting activities, there will be greater pressure to secure contractual indemnities, because contractors will find it increasingly difficult to secure indemnification through litigation or to obtain coverage through insurance.

2. See *infra* text at note 9 (discussing government contract defense).

3. *Feres v. United States*, 340 U.S. 135 (1950) (holding that United States is not liable under Federal Tort Claims Act for injuries to members of armed forces on active duty resulting from negligence of others).

4. RESTATEMENT (SECOND) OF TORTS § 402(A) (1977).

I. RECENT DOCTRINAL CHANGES IN THE LAW OF GOVERNMENT LIABILITY THAT LIMIT THE RANGE OF FEDERAL OBLIGATIONS

When a third party may be injured, and when there would be few opportunities to succeed in litigation against the government, it is important for a government contractor to secure indemnification in advance. The liability of the government has always been narrowly limited by sovereign immunity.⁵ Thus, indemnity can be sought as a remedy only when the claim on which it is based arises within the limited area to which sovereign immunity does not apply. The United States has waived sovereign immunity in the Federal Tort Claims Act,⁶ the Federal Employees' Compensation Act,⁷ and in a small number of other laws that expressly provide for government liability or indemnification.⁸ The wider the area of sovereign immunity, the narrower the area in which a claim for indemnification can be made.

Under a variety of theories, the government's immunity from lawsuits has also been extended to government contractors. The most far-reaching of these theories is the government contract defense.⁹ There is also the "contract specification defense," which applies to private parties who order products to their own design specification. When a design defect causes injury, the injured third party can look to the principal who drew the specifications, rather than the contractor, under the rule of *respondeat superior*. However, when the *superior* who drew the

5. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821); *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846) (citing general proposition that sovereign independent state cannot be sued except by own consent).

6. Ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 2672-2680 and other scattered sections of the U.S.C. (1988)) (outlining administrative adjustment of claims and waiver of sovereign immunity).

7. 5 U.S.C. §§ 8101-8193 (1988).

8. See, e.g., 31 U.S.C. §§ 3721-3731 (1988); National Guard Claims Act, 32 U.S.C. § 715 (1982); Public Vessels Act, 46 U.S.C. §§ 781-790 (1982 & Supp. V 1987).

9. First developed in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), the government contract defense has been the subject of much recent legal literature. See, e.g., Souk, *Government Contracts and Tort Liability: Time for Reform*, 30 FED. B. NEWS & J. 74 (1983); Zollers, *Rethinking the Government Contract Defense*, 24 AM. BUS. L. J. 405 (1986); Note, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell International Corp.*, 3 BAYLOR L. REV. 181 (1985); Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. REV. 1025 (1982); Note, *The Essence of the Agent Orange Litigation: The Government Contract Defense*, 12 HOFSTRA L. REV. 983 (1984); Note, *The Government Contract Defense and Manufacturers of Military Equipment: McKay v. Rockwell International Corporation*, 21 HOUS. L. REV. 855 (1984); Comment, *An Interpretation of the Feres Doctrine After West v. United States and In re "Agent Orange" Product Liability Litigation*, 70 IOWA L. REV. 737 (1985); Note, *Government Contract Defense: Should Manufacturer Discretion Preclude Its Availability?*, 37 ME. L. REV. 187 (1985).

specifications is the government, recovery will usually be precluded by sovereign immunity. Briefly, the contractual specification defense maintains that the contractor will not be liable when it has acted in full compliance with government contract specifications. Unless the contractor has deviated from government specifications, the contractor will not be liable to third parties who have suffered injuries, and the contractor will have no reason to look for indemnification. The third party who has suffered injuries must bear the cost himself and cannot recover from the contractor unless he has brought an action against the government and the government has waived sovereign immunity.¹⁰

The court decisions that have provided the framework for the current discussion of the government contract defense, and thus indirectly for the discussion of contract indemnities are *Feres v. United States*,¹¹ *Stencel Aero Engineering Corp. v. United States*,¹² and *McKay v. Rockwell Int'l. Corp.*¹³ In *Feres*, plaintiffs brought suit under the Federal Tort Claims Act on behalf of a serviceman killed in a barracks' fire while on active duty; plaintiffs alleged the government was negligent in quartering him in a barracks which was known or should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch. The Court held that the United States is not liable under the Federal Tort Claims Act for injuries to members of the Armed Forces on active duty when the injuries result from the negligence of others in the Armed Forces.¹⁴

The Supreme Court's holding in *Feres* was extended in the *Stencel* case to create what has come to be known as the *Feres-Stencel* doctrine. In *Stencel*, a National Guard officer was injured while on active duty when the ejection system of his aircraft malfunctioned during a midair emergency. The ejection system had been manufactured by Stencel according to government contract specifications. The injured National Guard officer sued both the United States and Stencel, and Stencel cross-claimed against the United States.¹⁵ Chief Justice Burger, writing for the Court, held that plaintiff's claim against the United

10. For example, the government has waived sovereign immunity under the Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1988).

11. 340 U.S. 135 (1950).

12. 431 U.S. 666 (1977).

13. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

14. *Feres*, 340 U.S. at 141-42 (stating plaintiff failed to allege liability of private individual that is remotely analogous to one asserted against United States, and Court knows of no American law which would permit soldier to recover for negligence against superior officer or government).

15. *Stencel Aero Eng'g Corp.*, 431 U.S. at 668.

States was barred by the *Feres* rule because it was a claim for injuries sustained by a serviceman while on active duty.¹⁶ Stencel's cross-claim was barred on the grounds that such an action would not only circumvent the *Feres* rule, but would also disrupt military discipline by calling for judicial second-guessing of military orders.¹⁷ Justices Marshall and Brennan, dissenting, found no such disruption of military discipline would result from the third party action.¹⁸

The holding of *McKay v. Rockwell Int'l Corp.* seems to further extend the protection of government contractors with respect to design defects. Nevertheless, the full reach and authority of this Ninth Circuit decision has caused great concern among government contractors and in Congress, because while government immunity appears to be absolute, the decision suggests that contractors may be at risk for failure to follow government specifications, or for failure to ensure that the government heeds the contractor's design corrections.¹⁹ In two separate incidents, Navy pilots were killed after ejecting from a burning RA-5C aircraft. The cause of the injuries appeared to be the defective ejection equipment manufactured to government specifications. Rockwell had warned the Navy of errors in the specifications and of the resulting dangers, which were known to Rockwell but not to the government.²⁰

Applying the *Feres-Stencel* doctrine, the Court found no liability could be imposed against either the government or the contractor, because if military suppliers were held liable for defective designs,²¹ then this would compel the courts to review military decisions.²² The opinion did not discuss whether Rockwell was required to accept the government specifications. The case is frequently discussed in the context of *Lockheed Aircraft Corp. v. United States*,²³ a case in which the Supreme Court permitted an indemnity action against the United States where the United States did not dispute its responsibility for an air crash. In *Lockheed*, the Court held that the exclusive liability provi-

16. *Id.* at 673.

17. *Id.*

18. *Id.* at 674.

19. See *Indemnification of Government Contractors: Hearing on S. 1254 Before the Senate Judiciary Comm.*, 99th Cong., 1st Sess. 48 (1985) (statement of T. Richard Brown, Vice President, Law Department, Electronic and Defense Sector, TRW, Inc.) (noting concern of government contractors that contractors may be at risk for government's failure to follow contract specifications or design corrections because government immunity appears absolute).

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

21. See RESTATEMENT (SECOND) OF TORTS § 402A (1977) (establishing strict liability for seller of product which causes physical harm to consumer or user).

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

23. 460 U.S. 190 (1983).

sions of the Federal Employees' Compensation Act (FECA)²⁴ did not protect the government from third party indemnity actions.

Indemnity claims typically involve three parties: the government, the contractor, and a third party who has been injured or hurt as a consequence of the performance or misperformance of the government contract. While some rules of the law of torts, as applied to government contracts, may relieve both the government and the contractor from liability for the injury, the question of the appropriateness of allowing the burden of injury to fall on the third party victim has not always received the close attention it deserves. Thus, as the government expands its use of contractors for tasks that have the potential to cause mass injuries, the law surrounding contractual indemnification of government contractors would appear to be ripe for reform.

A. *Current Rules Generally Relating to Indemnities*

This Article addresses the *contractual* indemnification of government contractors, *i.e.* the statutory authorizations that enable government departments and agencies to include promises to indemnify contractors in some of their contracts. As a first step toward full development of these issues, this Article examines contractual indemnification in the general setting of tort law, where indemnities are remedies sought through litigation.

Some familiarity with the common law of indemnity is necessary to understanding the law of indemnification of government contractors. Indeed, this common law is not simply historical background, but is actually the law that applies in the majority of government indemnity cases that are currently litigated. Many of these cases involve actions under the Federal Tort Claims Act,²⁵ which is federal law and defines federal liabilities for tortious conduct by the government, its agents, or its employees. When the federal government contracts for the performance of a service, and the contractor performs the service in such a way as to injure a third party, the liability of the contractor to the third party is defined by the substantive law of torts of the state; the question of federal liability is determined under the Federal Tort Claims Act.²⁶ But whether the remedy of indemnity is applicable will be determined by the law of the state that determines the substantive liability in the

24. *Id.* at 193-99 (stating that FECA did not bar Lockheed's indemnity action against United States because FECA's bar only applies to government employees, relatives, or people claiming through or on behalf of such employees and relatives).

25. 28 U.S.C. §§ 2671-2680 (1988).

26. *Id.*

first instance.²⁷ Since there is no federal common law of indemnity, the common law of indemnity of any of the several states whose law may apply to the case will determine government liabilities.²⁸

B. *The Common Law of Indemnity*

Although the law of indemnity will have a different application in different states, in general the following rules apply. When two parties are liable for injuries to a third, indemnity refers to a full reimbursement to the one who has discharged the common law liability. Indemnity could be granted to a party who was held responsible solely by imputation of law because of a relationship to the actual tortfeasor. Thus, when an employee is directed to do an act not manifestly wrong and he is then held liable for such an act by a third party, he may seek indemnity from the employer who paid him to engage in the particular activity.²⁹ In theory, at least, if the injured party sues the employer and the employer responds in damages, the employer may then be entitled to obtain indemnity from his employee. It has been noted that such cases of indemnity are more theoretical than real, but actions by employers of independent contractors are not uncommon.³⁰ On the other hand, when the employer is the United States Government, and the employee or contractor is a substantial company that has failed in its obligations under the contract, a government indemnification claim against such a company will be brought. Prosser cites a number of other instances in which indemnity may be allowed under common law, but comments that it is difficult to predict exactly when indemnification will be imposed, because it is usually based on the equities of the parties' relationship and the conduct involved.³¹

Cases in which indemnification is sought as a remedy often involve situations in which the plaintiff has been injured or damaged by a number of tortfeasors standing in a variety of relationships to each other and to the victim. When the common law did not recognize theories of contributory negligence or comparative fault among tortfeasors, indem-

27. *Id.* § 2679.

28. *See Stencel Aero Eng'g*, 431 U.S. at 668 (basing indemnity claim on law of Missouri).

29. W. PROSSER & R. KEETON, *PROSSER AND KEETON ON TORTS* 341 (5th ed. 1984) (discussing indemnity as form requiring another to reimburse in full one who has discharged common law liability).

30. 3 F. HARPER, F. JAMES & G. GRAY, *THE LAW OF TORTS* § AH-S 10.2 (2d ed. 1986).

31. *See* W. PROSSER & R. KEETON, *supra* note 29, at 343-44 (stating indemnity is shifting of responsibility from shoulders of one person to another and duty to indemnify has been recognized in cases where equities supported it).

nity provided a remedy by seeking out a defendant who, in the view of the court, bore the major part of the responsibility and could properly be charged with the entire amount of the damages.³² As long as contribution among tortfeasors was barred, indemnity provided an all or nothing remedy. As the theory of contribution among tortfeasors became acceptable in a majority of jurisdictions and comparative negligence was adopted by statute in most states,³³ indemnity as a remedy lost a great deal of its significance. As a result, indemnity is currently applied far less frequently than in the past.³⁴ It is probably fair to say that indemnity as a remedy has retained its importance in the government contract field, but in few other areas of law.³⁵

The Restatement (Second) of Torts section 886B(1) states that "if two persons are liable in tort to a third person for the same harm, and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability."³⁶ The comments to the Restatement rule note that although the Restatement and other authorities regard restitution and unjust enrichment as the basis for indemnity, many of the

32. See Ferrini, *The Evolution From Indemnity to Contribution*, 59 CHI. B. REC. 254, 255 (1978) (briefly discussing use of indemnity prior to widespread acceptance of contribution). For cases using indemnity as a remedy, see, e.g., *Thomas v. Malco Refineries*, 214 F.2d 884 (10th Cir. 1954); *Gulf Mobile & Ohio R.R. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 98 N.E.2d 783 (App. Ct. 1951); *Humble Oil & Refinery Co. v. Martin*, 188 Tex. 175, 222 S.W.2d 995 (1949); *Joset v. Clarendon & Rosedale Packet Co.*, 122 Ark. 353, 183 S.W. 759 (1916).

33. See RESTATEMENT (SECOND) OF TORTS § 886A comment a (1977) (noting gradual acceptance of contribution beginning in late 19th century). The 1939 Uniform Contribution Among Tortfeasors Act adopted by the Conference of Commissioners on Uniform State Laws, the 1955 revisions to the Act, and the 1977 Comparative Fault Act have given impetus to the revision of state law over the past fifty years. See F. HARPER, F. JAMES & G. GRAY, *supra* note 30, §§ 10.2, 22.1 (discussing evolution of contribution and gradual adoption of comparative negligence statutes); Annotation, *Indemnity Between Joint Tortfeasors on the Basis of Relative Fault*, 53 A.L.R.3d 184 (1973) (summarizing developments in law regarding joint tortfeasors).

34. W. PROSSER & R. KEETON, *supra* note 27, at 344 (stating indemnity is shifting responsibility from one to another).

35. Treatises and course books on torts currently give very limited space to indemnity, and the most recent, the 1987 edition of THE LAW OF TORTS, by Harper, James, and Gray, treats indemnity as part of a general discussion of "Contribution and Indemnity." 3 F. HARPER, F. JAMES & G. GRAY, THE LAW OF TORTS § 10.2 (2d ed. 1986) (treating indemnity as part of general discussion of "Contribution and Indemnity").

36. See RESTATEMENT (SECOND) OF TORTS § 886B(2)(d)-(e) (1977) (enumerating instances in which indemnity is granted, including independent contractors being vicariously liable for conduct of indemnitor, instances of agents following direction of principal, and instances where indemnitor supplies defective chattel or performs defective work as result of which both are liable to third person); see also *id.* at comment (stating that "the basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be responsible to pay").

examples given in the Restatement itself indicate that courts do not necessarily look to restitution and unjust enrichment in particular cases, but rather decide on the basis of past decisions or on the basis of an ad hoc determination of the equities. Indeed, it seems that in many instances, courts rely on the remedy of indemnity as a last resort, when neither contribution nor joint liability is available, and when there appears to be a basic unfairness in having the defendant as the sole responsible party.³⁷ Implicit in the courts' determination to impose indemnity is the belief that the indemnitor is in the better position to prevent the injury,³⁸ and even more often, the belief that the indemnitor is better able to pass along the cost of liability and to otherwise distribute the economic burden than is the indemnitee.³⁹

With respect to government contracts, the common law of indemnity seeks to resolve a recurring issue of responsibility: When a government contract results in injury or damage to a third party, who should bear the risk of liability, the government or the contractor?⁴⁰ In addition to considerations of fairness and insurability,⁴¹ other factors significantly influence the need for contractual indemnification of government contractors. In particular, the government must ensure that there are willing bidders for contracts to supply dangerous though necessary products and services. In addition, both the government and the potential contractor have an interest in ensuring that the contractor is protected against liability for catastrophic injuries that may occur during the performance of, or as a result of, a government contract. Such injuries could expose a contractor to damages beyond the capacity of any contractor or insurer to pay and ultimately could destroy a major company and its needed productive capability.

II. CURRENT STATUTORY BASIS FOR INDEMNITIES FOR FEDERAL CONTRACTORS

There is no legislation in the United States that provides generally

37. Cf. W. PROSSER & R. KEETON, *supra* note 29, at 344 (discussing judicial indemnification orders based on discharge of common law liability where fairness, ability to prevent future injury, and financial equities determine indemnification).

38. See generally James, *Contribution, Indemnity and Subrogation*, 21 NACCA L.J. 36,369 (1958) (discussing efficient distribution of accident losses).

39. *Id.*

40. This question arises not only when courts decide claims, but also when Congress considers legislation that would authorize the granting of contractual indemnity under certain statutes or in particular circumstances.

41. See *supra* pp. 436-37 (discussing insurance availability crisis); *supra* text accompanying notes 37-39 (discussing fairness considerations in determining indemnification).

for indemnities for government contractors. However, there are specific statutes which provide for indemnities for limited categories of government contracts under certain predetermined conditions. This patchwork of legislation has developed in response to specific needs, and the very nature of these diverse pieces of legislation demonstrate that they were not developed in response to a general plan to provide for indemnities, but rather grew up in response to particular hazards created by government contracts. In some instances, contractual indemnities were authorized by legislation when there was a congressional judgment that indemnification was necessary to encourage contractors to undertake activities for the government which would expose them to greater risks than would ordinary commercial or industrial activities, which could be protected by private insurance.

The current debate over the extension of indemnities in government contracts must be viewed in light of the history of the field. Opponents of legislation which creates broad indemnity authorizations, frequently members of particular agencies and departments, are likely to rely on the past experience to show that broad authorizations for indemnities are not necessary. They will point out that the government has always been able to provide indemnities for specific purposes whenever a significant and well-defined need could be shown. The proponents of broad indemnity legislation are likely to point to existing narrow indemnity legislation to assert that the current patchy structure is inadequate to respond to current developments in a flexible fashion, and that it does not allow the government to provide indemnities in contracts for newly emerging areas that cannot be comfortably subsumed under current legislation. It has been suggested that when indemnities are not authorized, potential bidders in hazardous new fields are likely to withhold bids, rather than to undertake the lengthy and laborious process of persuading Congress to authorize indemnification for such new areas as projects involving gene-splicing and DNA research; projects involving the development of tests or immunizing agents for AIDS; or projects involving new methods for reducing the risk of removal of asbestos insulation from structures.

*A. Contracts for Research and Development for Military
Departments—10 U.S.C. § 2354*

A limited authority for contractual indemnity is contained in Chapter 139 of Title 10 of the United States Code. Section 2354 provides for indemnity for contractors involved in research and development contracts for a military department. The original law was passed in

1952,⁴² and applies only to contracts let by the Department of Defense (DOD) and the Armed Services.⁴³ Section 2354 restricts the availability of indemnities to "contracts for research and development or both."⁴⁴ Thus, the indemnity will be available for risks of the research and development of a new weapons system, but not for its regular production. Moreover, indemnity may be provided only for risks the contract defines as unusually hazardous,⁴⁵ and it is available only to the extent claims or losses are not covered by insurance.⁴⁶

B. National Defense Contracts Act—Public Law No. 85-804 and Executive Order 10,789

The statutory authorization of broadest application for contractual indemnities is the National Defense Contracts Act, Public Law No. 85-804,⁴⁷ which must be read together with Executive Order No. 10,789,⁴⁸ which was promulgated pursuant to adoption of the Act. The statutory language is as follows:

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense. . . .⁴⁹

The statute then limits the obligations that may be incurred on behalf of the government without approval by high-level officials within the contracting department, and it provides that no obligations in excess of

42. National Defense Contracts Act, ch. 882, § 5, 66 Stat. 726 (1952) (codified as amended at 10 U.S.C. § 2354 (1988)).

43. 10 U.S.C. § 2354 (1988). The National Defense Contracts Act, 50 U.S.C. § 1431 (1982), in contrast, covers contracts let by nonmilitary as well as military agencies and defines the availability of indemnity by activity and not by department. For further discussion of the Act, see *infra* Part IIIB.

44. 10 U.S.C. § 2354(a) (1988).

45. *Id.* § 2354(a)(1) (claims by third parties from risk that contract defines as unusually hazardous); *id.* § 2354(a)(2) (loss or damage to property of contractors from risk that contract defines as unusually hazardous).

46. *Id.* The provisions relating to contracts for research and development for a military department have been extended to cover contracts for research and investigation by the Secretary of the Department of Health and Human Services through the U.S. Public Health Service. See *infra* pp. 449-50.

47. 50 U.S.C. § 1431 (1988).

48. Exec. Order No. 10,789, 3 C.F.R. § 426-427 (1954-1958), *reprinted in* 50 U.S.C. § 1431 (1988).

49. 50 U.S.C. § 1431 (1988).

twenty-five million dollars may be incurred without providing an opportunity to the Armed Services Committees of the Senate and the House of Representatives to disapprove.⁵⁰ However, the 1983 decision of the Supreme Court in *INS v. Chadha*⁵¹ has invalidated such legislative veto provisions.

It is noteworthy that the legislation itself provides a single test, namely whether or not the contracts, contract modifications, and advance contract payments "facilitate the national defense."⁵² It is also significant that although the law is regarded as the broadest available authorization for contract indemnification, the terms "indemnification," "indemnity," or "contractual indemnity" do not appear in the legislation at all; the terms were supplied by Executive Order No. 10,789.⁵³

Executive Order No. 10,789 authorizes the Department of Defense to enter into contracts and contract modifications and to make advance payments "within the limits of the amounts appropriated and the contract authorization provided therefore" whenever, in the opinion of the Secretary of Defense or the chiefs of particular services or their representatives, "the national defense will be facilitated thereby."⁵⁴ The Executive Order then defines the authority to indemnify. First, it states that the dollar limitation to the amounts appropriated and the contract authorization provided "shall not apply to contractual provisions which provide that the United States will hold harmless and indemnify the contractor against any of the claims or losses set forth in subparagraph B."⁵⁵ This exception applies to claims or losses arising out of or resulting from risks that the contract defines as unusually hazardous or nuclear in nature.⁵⁶ Such a contractual provision is to be approved in advance by an official at or above the level of the Secretary of a military department and may require that the indemnified contractor provide financial protection of a type and in an amount determined to be appropriate under the circumstances by the approving official.⁵⁷ In mak-

50. *Id.*

51. 462 U.S. 919, 944-59 (1983) (holding one-house veto provision violates constitutional doctrine of separation of powers between branches of government and houses of Congress).

52. 50 U.S.C. § 1431 (1988).

53. *Supra* note 48.

54. *Id.* For discussion of the scope of the law, see Richardson, *The Use of the General and Residual Powers Under Pub. L. No. 85-804 in the Department of Defense*, 14 PUB. CONT. L.J. 128 (1983). The author was Attorney/Advisor, Office of the Assistant General Counsel, DOD.

55. Exec. Order No. 10,789, § (I)(1A)(a), 3 C.F.R. § 426-427 (1954-1958), reprinted in 50 U.S.C. § 1431 (1988).

56. *Id.*

57. *Id.*

ing this determination, the official is to take into account the availability, cost, and terms of private insurance, self-insurance, other proof of financial responsibility, and workman's compensation insurance.⁵⁸ This approval and determination "shall be final."⁵⁹

The contractual indemnification is to apply to any losses not compensated by insurance, including 1) reasonable expenses of litigation and settlement; 2) third party claims, including claims by employees of the contractor, for death, personal injury, or property damage or loss; 3) the loss or damage to or the loss of use of property of the contractor; 4) the loss or damage to or loss of use of property of the government; and 5) claims arising from indemnification agreements between the contractor and subcontractors, and from indemnification arrangements between subcontractors at any tier, if such arrangements were entered into pursuant to regulations by the Secretaries of the contracting department and of the different Armed Services.⁶⁰ However, indemnification agreements between the United States and the contractor, or between the contractor and any subcontractors, may not cover claims or losses caused by willful misconduct or lack of good faith on the part of the contractors' or subcontractors' directors or officers, that are claims by the United States (other than claims arising through subrogation) against the contractor or subcontractor, nor may indemnification agreements cover losses affecting the property of such contractor or subcontractor.⁶¹

The United States may discharge its indemnity obligations by making payments directly to subcontractors or to third persons to whom a contractor or subcontractor may be liable.⁶² Contractual provisions for indemnification must provide for notice to the United States of any claim or action which may be covered by such contractual provision, and it must also provide for control or assistance by the United States in the settlement or defense of such claim or action, at the election of the government.⁶³

The purpose of the National Defense Contracts Act, as indicated in the legislative history, was to enact into permanent law "during periods

58. *Id.*

59. *Id.*

60. Exec. Order No. 10,789, § (I)(1A)(b)(1), 3 C.F.R. § 426-27 (1954-1958), reprinted in 50 U.S.C. § 1431 (1988).

61. Exec. Order No. 10,789, § (I)(1A)(b)(2), 3 C.F.R. § 426-27 (1954-1958), reprinted in 50 U.S.C. § 1431 (1988).

62. Exec. Order No. 10,789, § (I)(1A)(b)(3), 3 C.F.R. § 426-27 (1954-1958), reprinted in 50 U.S.C. § 1431 (1988).

63. Exec. Order No. 10,789, § (I)(1A)(c), 3 C.F.R. § 426-27 (1954-1958), reprinted in 50 U.S.C. § 1431 (1988).

of national emergency and for six months thereafter" the authority contained in the first War Powers Act of 1941, which had expired on June 30, 1958.⁶⁴ More particularly, it was to empower certain departments or agencies to amend or modify a government contract, without additional consideration, where necessary to prevent interruption of contract performance.⁶⁵ The aim was to advance the defense procurement program by facilitating contract adjustments where necessary.⁶⁶ Such adjustments would include contract modifications and advance payments, as well as indemnity provisions "for otherwise noninsurable risks."⁶⁷

The Senate report on the Act noted that one of the most significant developments under Title II of the War Powers Act was the use of that authority as a basis for indemnity provisions in certain contracts, and based on the broad language of that Act, the authority would be continued under the bill. The report stated that the need for indemnity claims in most cases is a direct outgrowth of military employment of nuclear power and the highly volatile fuels required in the missile program. Because of the magnitude of the risks involved, the report noted, commercial insurance policies were either unavailable or provided insufficient coverage. Testimony before a subcommittee of the House Judiciary Committee by representatives of the military departments indicated that contractors were therefore reluctant to enter into contracts involving the risk of a catastrophe without an indemnification provision.⁶⁸

The Senate report also noted that although military departments have specific statutory authority to indemnify contractors engaged in research and development, this authority does not extend to production contracts for dangerous products,⁶⁹ and just as in the Price-Anderson Act,⁷⁰ to the extent that commercial insurance is unavailable, the risk of loss should be borne by the United States.⁷¹ The extraordinary powers in the National Defense Contracts Act, including the power to indemnify, have never been tested in the courts.⁷²

64. S. REP. NO. 2281, 85th Cong., 2d Sess. 3-4, *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 4043 [hereinafter Senate Report].

65. *Id.*

66. *Id.*

67. *Id.* at 4049.

68. *Id.* at 4045.

69. See *supra* text accompanying note 44 (noting that 10 U.S.C. § 2354 applies only to contracts for research and development, not production).

70. 42 U.S.C. §§ 2210-2296 (1988), *amended by* Pub. L. No. 100-408, 102 Stat. 106 (1988). See *infra* Part IIID (discussing significance of Act and amendments).

71. Senate Report, *supra* note 64, at 4045.

72. The Executive Order also provides for broad authority relating to contract

C. *Department of Health and Human Services (HHS) Contracts for Research and Investigation — 42 U.S.C. Section 241*

Section 241 of Title 42 of the United States Code provides broad authorization for the Secretary of the Department of Health and Human Services (HHS) to conduct, promote, and undertake a wide range of research and investigation to advance various interests in public health.⁷³ The Secretary may, among other things, “enter into contracts, including contracts for research in accordance with and subject to the provisions of law applicable to contracts entered into by the military departments and Sections 2353 and 2354 of Title 10,” except that the Secretary of HHS, rather than the heads of the military departments, is responsible for approval and certification.⁷⁴ The inclusion by reference of the powers of the military departments to enter into contracts for research clearly includes the provisions relating to contractor indemnification.⁷⁵ However, HHS does not view this authorization as absolute and tends to treat it as similar to the authorization to indemnify that is extended under the Federal Acquisition Regulations (FAR),⁷⁶ which offers limited indemnification for certain types of contracts.⁷⁷ Medicare intermediary and carrier contracts are areas in which HHS has provided indemnification clauses,⁷⁸ but again the authority to do so is seen by the agency as illusory and potentially damaging to appropriations.⁷⁹ Aside from the Medicare contracts, there is lit-

modification and advance payments. Exec. Order No. 10,789, § (I)(2), 3 C.F.R. § 426-27 (1954-1958), *reprinted in* 50 U.S.C. § 1431 (1988). To carry out the purposes of the statute, pursuant to the Executive Order, these broad authorizations apply to the Department of the Treasury, the Department of the Interior, the Department of Agriculture, the Department of Commerce, the Department of Transportation, the Atomic Energy Commission, the General Service Administration, the National Aeronautics and Space Administration, the Tennessee Valley Authority, the Government Printing Office, and the Federal Emergency Management Agency. The head of each of the agencies named is authorized to issue regulations to carry out the functions and authority of the agency, and to the extent practicable, such regulations are to be uniform with the regulations prescribed or approved by the Secretary of Defense.

73. 42 U.S.C. § 241 (1988).

74. 42 U.S.C. § 241(a)(7) (1988).

75. 10 U.S.C. § 2354(a) (1988).

76. 48 C.F.R. § 52.228-7 (1988).

77. *Id.* (providing for government reimbursement to contractors for certain liabilities to third persons, including loss of or damage to property and death or bodily injury).

78. See 42 U.S.C. §§ 1395h(i), 1395u(e) (1988) (providing for no liability, except for gross negligence or fraud, for certifying or disbursing officers with regard to payments made under respective sections).

79. Letter from Darrel J. Grinstead, Associate General Counsel, HHS, to Marshall J. Breger, Chairman, Administrative Conference of the United States (Feb. 25, 1988) [hereinafter Grinstead Letter].

tle evidence that the indemnification authorization has been used by HHS,⁸⁰ or that many indemnification claims have been paid.

D. Indemnification Agreements Under the Price-Anderson Amendments Act for Public Contractors Involved in Nuclear Energy Operations

Indemnification for injuries and damages resulting from accidents that arise out of the operation of nuclear power plants represents the use of government indemnities in an area that may be considered typical of other areas in which government sponsored, modern technology creates a potential for major injuries. It may also be considered quite unusual and atypical in that nuclear power began as a secret military technology, and only later achieved its current position as a recognized source of energy operated by private industry.⁸¹

In the mid-1950's, when nuclear power was finally applied to peaceful uses, nuclear technology was not only a secret technology under exclusive United States control, but the government also controlled all nuclear materials that could be used for military purposes or for power production. Both the peaceful uses of nuclear energy and federal indemnification for such uses originated with the enactment of the Price-Anderson Act in 1957.⁸² It was clear from the very beginning, as the Supreme Court recognized in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,⁸³ that no utility company would enter the field of nuclear power production unless it had at first been assured of adequate insurance or indemnity coverage to prevent a financial wipe-out likely to result from the liabilities following a nuclear accident.⁸⁴ Whether the Price-Anderson Act was primarily designed to protect utility companies against unmanageable liabilities, or to create a sound system of recovery for victims of such accidents, is difficult to tell. During the past thirty years and following several amendments, Price-Anderson has met both purposes, although the atomic energy industry has had greater influence in shaping the provisions of the law than have public interest groups in protecting the interests of potential accident victims.

80. See *infra* text at notes 419-420 (discussing limitations of indemnification by HHS).

81. GRAD, TREATISE ON ENVIRONMENTAL LAW § 6.02[3][a] (1987).

82. Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. § 2210 (1988), further amended by Pub. L. No. 100-408, 102 Stat. 1066 (1988)).

83. 438 U.S. 59 (1977).

84. *Id.* at 64 (noting that potential liability "dwarfed" ability of industry and private insurance companies to absorb risks).

The original 1957 Price-Anderson Act established a system of insurance and indemnity for damages caused by "extraordinary nuclear occurrences."⁸⁵ Such occurrences include major catastrophic accidents.⁸⁶ The determination that such an event has occurred must be made by the Nuclear Regulatory Commission (NRC), and its determination is final and unreviewable.⁸⁷ The Act imposes requirements on persons who are NRC contractors or who have licenses for the distribution of special nuclear, special source, or by-product materials.⁸⁸ In addition, the NRC may not grant a license to operate a nuclear power plant unless the operator maintains "financial protections."⁸⁹ Financial protection may be in the form of private insurance, private contractual indemnities, self-insurance, or other proof of financial responsibility.⁹⁰

For nuclear power reactors, the financial protection must equal the maximum amount of liability insurance available from private sources, which in 1957 was sixty million dollars.⁹¹ In every instance in which the law required financial protection, the NRC also had to enter into an agreement with a licensee to indemnify the licensee and any other person who might be liable for damages growing out of a nuclear accident in excess of the required financial protection.⁹² The indemnity agreement lasts for the life of the license or permit.⁹³ Under the initial Act, the total liability, including the cost of investigating and settling claims and defending damage suits of all persons held liable for an extraordinary nuclear incident, was limited to \$500 million plus the amount of the financial protection required. However, the law imposed a total limit of \$560 million. As the law was originally enacted, if the damage from any one nuclear incident appeared likely to exceed this limit on liability, the NRC was to seek a court order allowing the funds available to be divided among persons who have suffered or who may

85. Pub. L. No. 85-256, 71 Stat. 576 (1957).

86. *Id.*

87. *Id.*

88. Pub. L. No. 85-256 § 4, 71 Stat. 576 (1957). This section of the Price-Anderson Act, which amended the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 (1954) by adding a new § 170 to the 1954 Act, is discussed in Comment, *Atomic Energy—Indemnity Legislation—Price-Anderson Amendments to Atomic Energy Act of 1954*, 56 MICH. L. REV. 752 (1958).

89. *Id.*

90. 42 U.S.C. § 2210(b) (1988).

91. *Id.* at § 2210(c). See also *Hearings Before the Joint Comm. on Atomic Energy on Governmental Indemnity and Reactor Safety*, 85th Cong., 1st Sess. 91 (1957) [hereinafter 1957 Hearings].

92. 42 U.S.C. § 2210(c) (1988); see 10 C.F.R. §§ 140.20, 140.52 (1988) (stating Commission will execute and issue indemnity agreements pursuant to regulation).

93. S. REP. NO. 296, 85th Cong., 1st Sess. 21 (1957).

suffer personal injury or whose property has been damaged.⁹⁴ The government indemnity was to become operative only if a nuclear incident resulted in liability in excess of the private insurance coverage required by law.⁹⁵

Although the risk of a nuclear accident was regarded as extremely low, there were serious doubts whether, in the event of such an accident, the \$500 million indemnity provided under the Act would be sufficient to cover the personal injury and property damage claims that would surely follow.⁹⁶ When Price-Anderson was first enacted, there was an expectation that injury and liability claims would be decided under state law and that the states would apply the rule of strict liability to such a hazardous activity.⁹⁷ The Price-Anderson Act did not itself provide that liability regardless of fault was intended, but a later amendment provided that persons injured as a result of major nuclear incidents will be compensated for their damages regardless of negligence or fault or the availability of technical legal defenses.⁹⁸ In situations other than extraordinary nuclear incidents, the states were free to follow their own law.⁹⁹ The provision for federal indemnities was a trade-off for the strict, though limited, liability provided under the Act.

From the beginning of the nuclear age, there was a need for government indemnification. The potential dimension of a nuclear accident made it impossible for owners or operators of nuclear power plants to obtain sufficient liability insurance to cover the entire risk. When the Price-Anderson Act was passed in 1957, the largest liability insurance policy written provided only twenty-five million dollars in coverage.¹⁰⁰

94. 42 U.S.C. § 2210(b) (1988).

95. *Id.* § 2210(c).

96. MURPHY, FINANCIAL PROTECTION AGAINST ATOMIC HAZARDS (Legislative Drafting Research Fund, Columbia University 1957). In addressing the question of the potential extent of damages from a catastrophic event, the author notes:

One such estimate, presented by the [Atomic Energy] Commission at the hearings on indemnity legislation in May, 1956, was that property damage in the event of a one hundred percent release of the fission products from an 800 MWH reactor could be between \$180 and \$900 million. Personal injuries would add materially to these figures.

Id. at 19.

97. See *Hearings Before the Joint Comm. on Atomic Energy on Governmental Indemnity for Prime Licensees and AEC Contractors Against Reactor Hazards*, 84th Cong., 2d Sess. 70-74 (1956) [hereinafter 1956 Atomic Energy Hearings] (testimony of William Mitchell, General Counsel, Atomic Energy Commission)(expressing confidence that court of any state where nuclear incident occurred would ultimately impose strict liability).

98. 42 U.S.C. § 2210(n) (1988).

99. *Id.*

100. Marrone, *Nuclear Liability Insurance—A Brief History Reflecting the Success of Nuclear Safety*, 12 NUCLEAR SAFETY 291 (1971).

Yet, while the extent of potential damages from a nuclear accident was unknown, it was speculated in legislative hearings that losses from an accident could reach hundreds of millions, or even billions, of dollars.¹⁰¹ These amounts were beyond the capacity of individual insurance companies to absorb. Contributing to the great uncertainty at that time, there was no actuarial experience on which to measure the degree of risk posed by nuclear power, because there were few members of the utility industry who had participated in nuclear developments.¹⁰² This restricted the availability of the usual rate-setting mechanisms and caused the nuclear power industry to look for alternatives to private insurance.¹⁰³

At the same time, the insurance industry opposed the idea that government indemnification should be provided in lieu of private insurance, indicating that it could use special pooling arrangements to write policies substantially in excess of its prior liability limits.¹⁰⁴ The mix of partial private insurance and partial government indemnity was a compromise between the different contending interests. Public protection required the availability of reliable sources to provide the unprecedented sums that might be needed to compensate victims of a nuclear incident, and the power industry required some limitation on its liability before entering the nuclear field. The device of government indemnification, coupled with an absolute limitation on liability, resolved the legislative dilemma of choosing an adequate level of protection, while maintaining limits on liability that would be acceptable to the insurance industry.

The Price-Anderson Act gave each industry most of what it had sought. It gave the nuclear energy industry a limitation on liability and an insurance requirement that would not be excessively costly, and it gave the insurance industry a portion of the indemnification business. The Act thereby averted a major government encroachment into the field of insurance and gave the government a method of avoiding costly administrative programs and a way to place some limits on its liability. The Act also provided the public an insured source of compensation in the event of an accident, in an amount which was then thought to be

101. *Hearings of the Joint Comm. on Atomic Energy*, 85th Cong., 2d Sess. 11 (1957).

102. McClure, *A Review of Nuclear Energy Insurance*, 55 *PROC. CASUALTY ACTUARIAL SOC'Y* 256 (1968).

103. 1956 Atomic Energy Hearings, *supra* note 97, at 110.

104. *See id.* at 123 (statement of Mr. Hubert W. Yount, Atomic Energy Reinsurance Pool and the American Mutual Alliance) (commenting on use of pooling arrangements).

adequate to cover any accident except a truly cataclysmic one.¹⁰⁵

Subsequent amendments to the Price-Anderson Act of 1957 involved the original parties to the 1957 compromise. The 1965 amendment sought to coordinate indemnity and insurance agreements, both to prevent gaps in coverage and to avoid overlapping coverage that would result in insurance liability in excess of the aggregate capacity of insurance pools.¹⁰⁶ The further amendment and extension of the Act in 1975 increased the total coverage for indemnity and liability insurance, and in addition to a number of technical amendments, adopted provisions that would eventually lead to a phasing out of government indemnities.¹⁰⁷ The impact of the 1977 amendment has been described as follows:

The major change is the adoption of a system of retrospective assessments payable by the licensees of electric power reactors or fuel reprocessing plants in the event of a nuclear incident causing damage above the primary level of financial protection. The amount of this so-called "deferred premium" is to be established by NRC rule within a range (prescribed in the statute) of \$2 million to \$5 million per operating reactor. The objective of this provision is the gradual substitution of private coverage for government indemnity and, in the case of electric power reactors, an eventual raising of the limit on liability substantially above \$560 million. It is estimated that, if the predicted growth rate in the number of power reactors is realized, the government indemnity will be phased out in the early 1980's. Thereafter, as the number of reactors increases, the limit on liability will automatically rise—on the assumed growth rate it is estimated that the limit will reach one billion dollars by 1990. There is no ceiling on the level to which the limit on liability may rise.¹⁰⁸

As amended in 1977, Price-Anderson provided for a three-tiered recovery system. In the event of a substantial nuclear accident, the available protection from private liability insurance would be called on first

105. L. ROCKETT, ISSUES OF FINANCIAL PROTECTION IN NUCLEAR ACTIVITIES 2-4 (Legislative Drafting Research Fund, Columbia University, 1973).

106. *Id.* at 2-5 to 2-9; Atomic Energy Act-Amendments, Pub. L. No. 89-210, 79 Stat. 855-57 (1965) (codified as amended at 42 U.S.C. § 2210 (1988)). For discussion of the amendment, see Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 HARV. L. REV. 644, 648-64 (1964); AEC Study of the Price-Anderson Indemnity Act: *Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, Selected Materials on Atomic Energy Indemnity Legislation*, 89th Cong., 1st Sess. 31-40 (1965); S. REP. NO. 1605, 89th Cong., 2d Sess. 26 (1966).

107. The 1975 amendments changed the statutory scheme to raise the total funds available to \$700 million from the \$560 million available under the previous version of the Act. Pub. L. No. 94-197, §§ 2-14, 89 Stat. 1111, 1111-15 (1975) (codified as amended at 42 U.S.C. § 2210 (1988)).

108. *Nuclear Power Plant Regulation*, THE NUCLEAR POWER CONTROVERSY 123-24 (A. Murphy ed. 1976). The plan was based on the so-called "NELIA-MAELU Proposal." See L. ROCKETT, *supra* note 105, at 5-14 to 5-18 (describing proposal).

to cover damages.¹⁰⁹ Next, under the retrospective rating plan, each major nuclear power plant would be assessed two million to five million dollars, based on its generating capacity.¹¹⁰ If this assessment were not adequate, the balance of up to the statutory maximum of \$560 million would come from the public indemnity.¹¹¹ Thus, as the number of nuclear power plants increases, the amounts available from retrospective rating assessments would diminish the need for federal indemnity and would, in due course, exceed the limit of coverage then established by statute.

The basic scheme of Price-Anderson and the provision for limited liability was upheld by the Supreme Court against due process and equal protection challenges in *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*¹¹² Fortunately, there have not been any "extraordinary nuclear occurrences" that would call Price-Anderson into operation. The only case that has even raised Price-Anderson issues was the Three Mile Island incident, which gave rise to litigation involving combined government claims by the Commonwealth of Pennsylvania and its municipalities for expenses incurred in responding to the accident.¹¹³

A new ten-year renewal of the Price-Anderson Act became due in 1987, and the work in Congress on the Price-Anderson Amendments Act began more than two years before its adoption. H.R. 1414 was referred to the Committee of Interior and Insular Affairs, the Committee on Science, Space and Technology, and the Committee on Energy and Commerce. All three House committees reported the bill with various amendments. The Committee of Interior and Insular Affairs was particularly concerned that the liability of commercial power plants be

109. 42 U.S.C. § 2210(b) (1988).

110. *Id.*

111. *Id.* § 2210(e).

112. 438 U.S. 59 (1977). Applying the presumption of constitutionality, the Court held that the \$560 million limit on liability was an economic regulation that was not arbitrary or irrational. The Court held that the record supported the need for the limit on liability to encourage private industry to participate in the development of nuclear energy. This encouragement, in the Court's view, bore a rational relationship to congressional concern for stimulating the involvement of private enterprise in the production of electric energy through atomic power. The Court also found that the Act provided a quid pro quo, namely a reasonable substitute for state common law tort remedies, by providing the assurance of compensation without proof of fault in return for the \$560 million limit on recoveries. *Id.* at 86-88, *rev'g* *Carolina Env'tl. Study Group v. Atomic Energy Comm'n*, 431 F. Supp. 203 (W.D.N.C. 1977).

113. *See In re TMI Litig. Governmental Entities Claim*, 544 F. Supp. 853 (M.D. Pa. 1982) (dismissing plaintiffs' claims). In dismissing the case, the district court indicated the Price-Anderson Act reflects both a policy to protect the public and to interfere as little as possible with state law. The court observed that neither federal nor state law makes provisions for recovery of response costs and concluded that absent injury to personal property, there cannot be a recovery for economic loss. *Id.* at 857.

provided for adequately through the maintenance of the two-tier protection system and through an increase in deferred premiums required under the second tier. Other areas of concern for the Committee included increasing the coverage for Department of Energy (DOE) contractors and strengthening congressional commitment to paying full damages for public liability claims exceeding the maximum aggregate liability established under the Act. The Committee also considered the question of indemnification of manufacturers and users of radio pharmaceuticals for medical purposes (nuclear pharmacies), but decided to leave intact the existing provisions that give the NRC discretion to monitor the need for indemnification.¹¹⁴

All but one of the amendments proposed by the Committee on Science, Space and Technology pertained to DOE contractors. Specifically, they would require the DOE to insure its demonstration reactors, ensuring that the DOE and NRC do not indemnify the same parties. The amendment established that the DOE may cover legal costs in administering and settling claims, and the NRC may do so only for university research reactors, making government indemnification the sole source of funds for payment of liability. Additionally, the amendments would extend the Secretary of Energy's authority to issue Price-Anderson coverage for twelve years to ensure protection of the public and DOE contractors during the period after the expiration of the ten-year life of the renewed legislation and before reenactment of subsequent renewal legislation.¹¹⁵

The third committee to report on the Price-Anderson Act, the Committee on Energy and Commerce, incorporated amendments that would protect DOE contractors by requiring the government to assume liability for accidents other than those caused by nuclear waste activities whenever a court determines that liability to the public is likely to exceed the liability limit.¹¹⁶ The Committee provided that a court may not approve the payment of legal costs unless such payments will not jeopardize compensation of victims. In addition, the Committee addressed the questions of consolidation of claims and the obligation of DOE waste transporters to carry a certain amount of commercial insurance.¹¹⁷

H.R. 1414 was passed in the House of Representatives on July 30, 1987, and was adopted with some amendments in April of 1988 by the

114. H.R. REP. NO. 104, 100th Cong., 1st Sess., pt. 1, at 19-21 (1987).

115. *Id.*, pt. 2, at 6.

116. *Id.*, pt. 3, at 17.

117. *Id.*, pt. 3, at 19.

Senate.¹¹⁸ There was significant difference between the House and Senate provisions for nuclear pharmacies, the liability of DOE employees, and the extension of NRC and DOE authority to enter into indemnity agreements. Due to these differences, Congress developed a compromise bill which resolved the conflict between the Senate and the House over the number of years during which the NRC and DOE could enter into indemnity agreements. The compromise bill substantially preserved the House committees' other amendments, and on August 5, 1988, the Senate agreed to adopt H.R. 1414.¹¹⁹ The compromise bill reauthorized the original Price-Anderson Act with some changes and ended the considerable controversy between the interest groups that had shaped the law since its beginning. On August 20, 1988, the President signed H.R. 1414 into law.

The Price-Anderson Amendments Act of 1988, as H.R. 1414 is now called, raises the total funds available for victim compensation from \$700 million under the earlier law¹²⁰ to \$7.4 billion or more.¹²¹ As in earlier versions of the law, although the amount available for compensation was increased more than tenfold, it would still come from a combination of private insurance and "deferred premiums" payable by utility companies for each of their nuclear reactors following an accident at any one reactor in the nation.¹²² Similar to earlier law, the new Act also does not provide any contingent provisions in the event that the \$7.4 billion is insufficient to meet the liabilities. The new Act requires the President to submit a plan to Congress to provide for the payment of damages, but it does not provide for spending beyond the authorizations.¹²³

The new Act also retains the provision of the past law under which the government pays for damages, up to a certain limit, in any accident caused by a DOE contractor.¹²⁴ Although environmental, consumer, and taxpayer groups supported amendments to increase the nuclear industry's financial responsibility in the event of a major accident the Act, as finally adopted, retained the limit on industry liability and did

118. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988) (to be codified at 42 U.S.C. § 2210).

119. Davis, *House Votes to Amend Nuclear Insurance Law*, 45 CONG. Q. 1731 (Aug. 1987).

120. See *supra* text accompanying note 108 (discussing Price-Anderson Act's provision for insured's compensation in event of accident).

121. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988) (to be codified at 42 U.S.C. § 2210).

122. *Id.* at 1067.

123. *Id.* § 7, at 1071 (amendment to § 170(e) of Atomic Energy Act).

124. *Id.* § 4, at 1068-70 (amendment to § 170(d) of Atomic Energy Act).

not provide for increases in the deferred premium payments.¹²⁵ Efforts to amend the law to compel contractors to pick up a greater amount of damages were rejected, in spite of soundly supported objections.¹²⁶

As signed by the President, the Act provides that damages for nuclear accidents will first be paid out of the \$160 million that is available through private insurance and out of the maximum deferred premiums collected from all operating reactors.¹²⁷ Based on the existing 109 reactors, deferred premiums would start at \$7.027 billion, and damages beyond the sum of insurance and deferred premiums would constitute the limit on compensation in the absence of further congressional legislation. The law also provides for the adjustment of deferred premiums in the event more than one extraordinary nuclear incident happens in any one year, and it authorizes federal borrowing to be repaid from deferred premiums when, in any one year, damage claims exceed the amount collected in such deferred premiums.¹²⁸ Most importantly, the law extends for an additional fifteen years, until August 1, 2002, the NRC's authority to enter into indemnification agreements with operators of electric generating reactors, whether commercial or research in purpose.¹²⁹ The new Act expressly *requires* the DOE to indemnify its contractors.¹³⁰ Damages from a nuclear accident involving an indemnified DOE contractor will be paid from the general fund, up to the approximate amount available to discharge commercial liability, i.e. seven billion dollars; damages from nuclear waste accidents involving DOE contractors are to be paid from the Nuclear Waste Fund, established under the 1982 Nuclear Waste Policy Act, again up to the seven billion dollar mark.¹³¹ Damages beyond that amount, if any, will be paid from

125. *Id.* § 1, at 1066-67.

126. Davis, *supra* note 119, at 1731-32. The industry and industry supporters also prevailed with respect to the payment of legal costs in the event that damages from an accident exceeded the \$7.4 billion coverage. *Id.* See *supra* text accompanying notes 116-17 (summarizing proposed amendment to limit payment of legal costs). Legal costs include both the legal costs of the utility industry as well as legal costs of victims, and the fund previously was not protected from claims for the payment of legal costs despite assertions that payment of such costs might contribute significantly toward depletion of the fund. Davis, *supra* note 119, at 1731, 1733.

Proponents of the amendment had asserted that over the past 30 years, the government had spent \$124 billion on nuclear power contracts, while damage claims paid by the government added up to one-and-a-half million dollars, showing that the nuclear industry could well afford to pay a larger portion of damages. *Id.* at 1732.

127. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 2, 102 Stat. 1066, 1066 (1988) (to be codified at 42 U.S.C. § 2210).

128. *Id.* § 2, at 1066-67 (amendment to § 170(b) of Atomic Energy Act).

129. *Id.* § 4, at 1068 (amendment to § 170(d)(1)(A) of Atomic Energy Act).

130. *Id.* § 4, at 1068-69. Under earlier law, the DOE had discretion as to whether to indemnify its contractors.

131. *Id.* (amendment to § 170(d)(1)(B)(ii) of Atomic Energy Act).

the General Treasury if Congress does not act to appropriate other funds within one year of receiving a compensation plan from the President.¹³² The law sets \$100 million as the limit on compensation for federally covered nuclear waste accidents occurring outside of the United States.¹³³ In a provision which reflects the Three Mile Island experience, the Act provides that the cost of precautionary evacuations will be covered, if legally responsible state or local officials determine that such an evacuation is necessary and constitutes a public liability.¹³⁴

The Act also creates new procedures relating to compensation for damages. When damages are likely to go over the limit established by law, the NRC or DOE must survey the causes and extent of damage and report their findings to Congress, the public, and the nuclear industry, as well as to the courts.¹³⁵ If a court finds that the damages might exceed the limit, the President will be required to submit a plan to Congress within ninety days, including an estimate of the total damage expected and recommendations on the source of funds to pay for damages above the limit. The President's report to Congress would contain one or more plans to provide for prompt and full compensation and could recommend any additional legislative changes needed to implement such plans.¹³⁶ The Act also requires the President to appoint a commission to study means of fully compensating victims of a catastrophic nuclear accident in which damages exceed the amount of aggregate liability and to recommend changes in the laws and rules governing liability.¹³⁷

Section 10 of the amended law eliminates the twenty-year statute of limitations on suits filed by accident victims and provides that a claim is valid as long as it is brought within three years of discovery of the injury.¹³⁸ Section 11 provides for the consolidation of claims arising from "a nuclear incident," thus removing the "extraordinary nuclear occurrence" test of the previous law.¹³⁹

132. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 2, 102 Stat. 1066, 1067 (1988) (to be codified at 42 U.S.C. § 2210).

133. *Id.* § 6, at 1071 (amending § 170(e)(4) of Atomic Energy Act).

134. *Id.* § 5, at 1070 (amending § 11(w) of Atomic Energy Act).

135. *Id.* § 7, at 1071-73 (amending § 170(i) of Atomic Energy Act).

136. *Id.* § 7, at 1071-73.

137. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066, 1074 (1988) (to be codified at 42 U.S.C. § 2210) (amending 42 U.S.C. § 2210 (1988)).

138. *Id.* § 10 at 1075-76 (amending 42 U.S.C. § 2210(n)(1) (1988)).

139. *Id.* § 11, at 1076-77. *See* 42 U.S.C. § 2210(n)(2) (1988) (codifying extraordinary nuclear occurrence test). This provision allows consolidation of claims to apply retroactively. Under § 11, a court with jurisdiction may appoint a special case load

Section 11 provides that legal costs may be paid from the amount of financial protection extended by the government, but only upon the court's authorization. Claimants must demonstrate that they litigated in good faith, avoided unnecessary duplication of effort, did not make frivolous claims, and did not attempt to delay the prompt settlement or adjudication of claims.¹⁴⁰ Furthermore, if public liability claims and legal costs exceed the maximum amount of financial protection available, any licensee required to pay a deferred premium shall also be charged such an amount as is necessary to pay a pro rata share of such claims and costs, but not to exceed five percent of the deferred premiums.¹⁴¹

Section 14 provides that in any action with respect to a nuclear incident or precautionary evacuations, no court may award punitive damages against a person on behalf of whom the United States government is obligated to pay. As for NRC licensees, however, the law established under the Atomic Energy Act still does not prohibit a court from awarding punitive damages under state law.¹⁴²

The Price-Anderson Amendments Act of 1988 also provides for new civil and criminal penalties for violation of its terms. Section 17 establishes civil liability for all DOE contractors who violate any rules, regulations, or orders issued by the Secretary of Energy. The Secretary may assess the penalties after the violator has been given notice of the opportunity to elect in writing the mode of assessment.¹⁴³ Criminal penalties, under section 18, provide that persons indemnified by the DOE under section 170(d) of the Atomic Energy Act who knowingly and willfully violate applicable nuclear safety-related rules, regulations, or orders issued by the Secretary of Energy shall be subject to a fine of up to \$25,000, imprisonment of up to two years, or both. For a second conviction, the penalty increases to a fine of up to \$50,000, imprisonment of up to five years, or both.¹⁴⁴ Finally, the Act requires the DOE and NRC to report annually to Congress by April 1 on their activities under the Act.¹⁴⁵

management panel to consolidate and assign cases arising out of a nuclear incident.

140. *Id.* § 11 at 1076-77.

141. *Id.* § 11(d)(2), at 1077 (amending 42 U.S.C. § 2210(o) (1988)).

142. Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, § 14, 102 Stat. 1066, 1078 (1988) (to be codified at 42 U.S.C. § 2210).

143. *Id.* § 17, at 1081.

144. *Id.* § 16, at 1083. The Act also requires the DOE to have reported to Congress by February 1, 1988, on the criminal and civil liabilities of DOE contractors and other indemnified persons who intentionally cause or try to cause an accident at a DOE facility. *Id.*

145. *Id.* § 17, at 1078.

It is difficult to separate the indemnity provisions of the Price-Anderson Act from the rest of the compensation scheme and from other aspects of the relationship of insurance and indemnity in the operation of the nuclear power industry. It is also clear that the nuclear power industry, assured of federal indemnities since 1957, will not readily surrender that advantage, even though it is no longer the infant industry it was in 1957. While the reliance on retroactive premium payments by nuclear power licensees may well displace federal indemnities for licensees, in the case of DOE contractors (nuclear plant operators under contract with the government), indemnities are not only well-established but were raised tenfold in 1988 over their prior level.

E. Contract Settlement Act of 1944

The Contract Settlement Act of 1944 contains a broad indemnification provision "to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;" and, further, "to assure prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate financing until such final settlement" ¹⁴⁶ In a section entitled "Broad Powers and Duties of Contracting Agencies," the Act provides that such contracting agencies "in settling any termination claim, [may] agree to assume, or indemnify the war contractor against any claims by any person in connection with such termination claims or settlement." ¹⁴⁷ There is no evidence that this broad grant of powers to indemnify has ever been litigated.

F. Federal Aviation Act of 1958, As Amended

Another war risk-related indemnity provision is provided for under the Federal Aviation Act of 1958, as amended in 1977. ¹⁴⁸ The law originally provided authority for the insurance or reinsurance of any civil American aircraft against "war risks." ¹⁴⁹ As amended in 1977, the authorization changed from that of a long-term war risk insurance business to a more limited, short-term business of insuring for short periods against "any risk from the operation of an aircraft, when the Presi-

146. 41 U.S.C. § 101(b) (1988).

147. *Id.* § 120(a)(3).

148. 49 U.S.C. app. §§ 1531-1542 (1988).

149. *Id.* § 1531. The term "war risks" includes, "to such extent as the Secretary may determine, all or any part of those risks which are described in 'Free of Capture and Seizure' clauses, or analogous clauses." *Id.*

dent finds that insured operation is necessary to carry out the foreign policy of the U.S.”¹⁵⁰ Thus, the program is considered a backup device that shields United States foreign policy initiatives from the vagaries of the private insurance market. Although it has not been used recently, there is always a possibility that private insurance companies may be unwilling to insure air service to a foreign country in which there are security problems. While the Act’s provisions on aviation insurance are not couched in terms of indemnification, the Act does provide a governmental indemnity in its operation and in its intent, to advance the interest of the United States in certain aspects of foreign relations.

Under the original law, the Secretary of Transportation was authorized to provide insurance and reinsurance¹⁵¹ against loss or damage arising out of war risks with the approval of the President and, after consultation with the interested agencies of the government, whenever the Secretary determined that insurance adequate for the needs of national air commerce could not be obtained on reasonable terms from state-authorized companies.¹⁵² The government-issued insurance was to cover American or foreign flag aircraft whose operation was deemed by the Secretary to be in the interest of national defense or the national economy of the United States.¹⁵³ It would also cover air cargo transported on any such aircraft such as shipments by express or registered mail, and air cargo imported to or exported from the United States. The coverage would include air cargoes sold or purchased by citizens or residents of the United States under contracts of sale or purchase by the terms of which war risks (or the obligation to provide insurance against war risks) is assumed by or falls upon citizens or residents of the United States, including air cargo transported between the United States and any point in a territory or possession of the United States.¹⁵⁴ Personal effects and baggage of the crew of such aircraft and of persons employed or transported on such aircraft were also to be included in coverage.¹⁵⁵ The crews of such aircraft and persons employed or transported on such aircraft were to be insurable against loss of life, injury, or detention.¹⁵⁶ The insurable interest would also include statu-

150. *Id.* § 1532(a)(2) (added by Pub. L. No. 95-163, 91 Stat. 1278 (1977)).

151. For a general discussion of the principles and terminology of insurance law, see generally, R. KEETON & A. WIDISS, *INSURANCE LAW* (1988).

152. 49 U.S.C. app. § 1532(b) (1988). In addition, insurance or reinsurance issued under the Act was to be based as far as practicable on consideration of the risks involved. *Id.*

153. 49 U.S.C. app. § 1533(1) (1988).

154. *Id.* § 1533(2).

155. *Id.* § 1533(3).

156. *Id.* § 1533(4).

tory or contractual obligations or other liabilities of such aircraft or the owner or operator of such aircraft as customarily covered by private insurance.¹⁵⁷

Other departments or agencies of the United States, with the approval of the President, could procure insurance provided under the Act from the Secretary of Transportation. With the President's approval, the Secretary of Transportation could provide insurance, without premium, at the request of the Secretary of Defense and other agencies as prescribed by the President in consideration of the agreement by the Secretary of Defense or the head of any other agency insured in this manner to indemnify the Secretary of Transportation against all losses covered by such insurance.¹⁵⁸ In every instance in which the Secretary of Transportation may provide insurance, he may also provide reinsurance for any insurance company authorized to do business in any state of the United States, and he may reinsure with, cede, or retrocede to any such company any insurance or reinsurance provided by him in accordance with the Act, at rates comparable to private insurance rates.¹⁵⁹

The Federal Aviation Act, as amended, also authorizes the creation of a revolving insurance fund, consisting of monies appropriated to the fund to carry out the purposes of the law, as well as all monies received from premiums, salvage and other recoveries.¹⁶⁰ Such a fund is to be used to pay return premiums,¹⁶¹ losses, settlements, and judgments in all liabilities incurred by the United States under the Act.¹⁶² Surplus funds are to be paid over to the Treasury, and sums in the revolving fund may be invested in interest-bearing securities of the United States.¹⁶³ The law sets forth detailed administrative provisions, which in effect authorize the Secretary of Transportation to run an insurance business.¹⁶⁴ The Act allows actions to be brought against the United States, thereby waiving sovereign immunity, and it provides that the district courts will have jurisdiction over any claim or dispute under the Act.¹⁶⁵

157. *Id.* § 1533(5).

158. 49 U.S.C. app. § 1534(b) (1988).

159. *Id.* § 1535(b).

160. *Id.* § 1536(a).

161. *See* R. KEETON & A. WIDISS, *supra* note 151, at 607-08 (discussing return premiums).

162. 49 U.S.C. app. § 1536(a) (1988).

163. *Id.* § 1536(f).

164. *Id.* § 1539. The Act originally required annual and quarterly reports to Congress, but was amended in 1965 to do away with the requirement of quarterly reports. Pub. L. No. 89-348, § 1(6), 79 Stat. 1310, 1310 (1965).

165. 49 U.S.C. app. § 1540 (1988). In addition, the Act also provides for the join-

Although liabilities relating to the originally authorized war risk insurance may still continue, the authority of the Secretary of Transportation to run this insurance business was initially scheduled to expire on May 7, 1976.¹⁶⁶ It was extended in 1976, 1977, 1982, and 1987;¹⁶⁷ however, as noted earlier,¹⁶⁸ the nature of the insurance business authorized has changed. Instead of limiting the Secretary to insuring against "war risks," the Act now allows the Secretary to insure against "loss or damage arising out of *any risk* from the operation of an aircraft" whenever private insurance cannot be obtained on reasonable terms.¹⁶⁹ However, such insurance may be provided only for an initial sixty-day period, renewable for sixty-day terms upon a new presidential determination that the insurance is necessary for each period of extension.¹⁷⁰

The legislative history of the 1977 extension of the Act indicates that the expansion of the types of risks which the Secretary of Transportation may insure or reinsure was designed to address economic realities in the insurance market.¹⁷¹ During times of domestic and world stability, "war risk" policies are available on reasonable terms, but during an international crisis most of these policies terminate or become unobtainable.¹⁷²

In 1975, it was brought to Congress' attention that commercial underwriters were drafting exclusions in their "war risk" policies following certain hijacking incidents, as well as the 1975 evacuation of United States personnel from Saigon and various riots and civil disorders.¹⁷³ This created a potential gap in air carriers' insurance coverage. The Committee on Public Works and Transportation of the House of Representatives recommended that the Secretary of Transportation provide interim insurance—in addition to that for war risks—when insurance is not available elsewhere and when such coverage is required by reasons of foreign policy for the continuation of a particular air service.¹⁷⁴ The House report noted that the law contains safeguards to

der of all interested parties in an action before the district courts. *Id.*

166. Pub. L. No. 94-90, 89 Stat. 439 (1975) amended the expiration date from September 7, 1975, to May 7, 1976.

167. The 1987 amendment extended the Act through September 30, 1992. 49 U.S.C. app. § 1542 (1988).

168. *See supra* text accompanying note 150.

169. 49 U.S.C. app. § 1532(a)(1) (1988) (emphasis added).

170. *Id.* § 1532(c).

171. Federal Aviation Act of 1958, Insurance Risks, H.R. REP. NO. 301, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 3383.

172. *Id.*

173. *Id.*

174. *Id.*

ensure that the government does not end up providing insurance on a routine basis. Thus, the law now includes the following restrictions: 1) this is a discretionary program—no air carrier has an automatic right to insurance or a policy; 2) the Secretary of Transportation, before issuing a policy, must consult with such agencies as the President directs; 3) the President must approve the issuance of each policy; and 4) policies cannot be issued for periods exceeding 60 days.¹⁷⁵

The 1987 amendment to the law, which renewed authorization for the program until September 30, 1992,¹⁷⁶ retained the established test for DOT insurance: 1) the Secretary of Transportation must find that insurance cannot be acquired from domestic commercial insurance companies on reasonable terms and conditions, and 2) the President must determine that the nation's foreign policy or national security objectives would be threatened if air service to certain foreign destinations could not be continued because of the unavailability of commercial insurance.¹⁷⁷ The 1987 amendment also renewed authorization for the two types of insurance plans included in the 1982 reauthorization legislation: premium and nonpremium.¹⁷⁸ Premium insurance is issued by the Federal Aviation Administration (FAA), and the airline pays a premium for coverage; nonpremium insurance is issued to airlines operating under a government contract, such as Department of Defense Military Aircraft Command Contracts.¹⁷⁹ In the latter case, there is no premium, and the contracting government department agrees to indemnify the Department of Transportation for any claims which are paid.¹⁸⁰

There are currently no claims pending under the Federal Aviation Act, and there has not been a claim since 1975.¹⁸¹ Indeed, the program has not needed to issue insurance since the end of the Vietnam War, nor has it required appropriations in recent years.¹⁸² As of June 1, 1987, the fund had a balance of \$37.7 million, derived from premiums paid and interest earned on the funds.¹⁸³ Continued renewal of the program is likely, as evidenced by its eight-time reauthorization.¹⁸⁴

175. *Id.*

176. 49 U.S.C. app. § 1542 (1988).

177. S. REP. NO. 147, 100th Cong., 1st Sess. 2, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 830.

178. *Id.*

179. 49 U.S.C. app. § 1532(a)(1) (1988).

180. *Id.* § 1534.

181. S. REP. NO. 147, 100th Cong., 1st Sess. 3, reprinted in 1987 U.S. CODE CONG. & ADMIN NEWS 830.

182. *Id.* at 4.

183. *Id.* at 2.

184. *Id.* at 2.

G. *National Aeronautics and Space Act of 1958*

The National Aeronautics and Space Administration (NASA) obtained special authorization to indemnify users of its spacecraft in a 1979 amendment of the National Aeronautics and Space Act of 1958.¹⁸⁵ The amendment created a new section of the Act, section 308, and authorized NASA:

on such terms and to the extent it may deem appropriate to provide liability insurance for any user of a space vehicle to compensate all or a portion of claims by third parties for death, bodily injury, or loss of or damage to property resulting from activities carried on in connection with the launch, operations or recovery of the space vehicle.¹⁸⁶

Under this amendment, NASA may acquire such liability insurance using available appropriations, but to the maximum extent practicable, the users of spacecraft are to reimburse the agency in accordance with established reimbursement policies.¹⁸⁷ Furthermore, the NASA Administrator may, in any agreement with the user of a space vehicle, provide that the United States will indemnify the user against claims, including reasonable expenses of litigation and settlement costs, by "third parties for death, bodily injury, or loss of or damage to property resulting from activities carried on in connection with the launch, operation, or recovery of the space vehicle."¹⁸⁸

To the extent that claims are compensated by indemnities, they may be limited so as not to cover claims resulting from the actual negligence or willful misconduct of the user.¹⁸⁹ Indemnity agreements must also provide for notice to the United States of any claim or suit for covered risks, and for the "control of or assistance in defense by the United States, at its election, of that suit or claim."¹⁹⁰ Payments of claims for indemnity require a certification by the Administrator that the amount is just and reasonable.¹⁹¹ Such payments must be made from funds not otherwise obligated for research and development, or from funds appropriated for such payments.¹⁹² The legislative history of the amendment

185. Authorization Appropriations—National Aeronautics and Space Administration Authorization Act, Pub. L. No. 96-48, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 829, 830-32 (codified as amended at 42 U.S.C. § 2458b (1988)).

186. 42 U.S.C. § 2458b(a) (1988).

187. *Id.* Section 203(c) of the Act outlines the applicable reimbursement policies. See *infra* text accompanying note 191 for further explication of reimbursement policies.

188. *Id.* § 2458b(b).

189. *Id.* § 2458b(c)(1).

190. *Id.* § 2458b(c)(2).

191. 42 U.S.C. § 2458b(d) (1988).

192. *Id.* § 2458b(e).

indicates that "no authorized NASA program should be curtailed or terminated because of such indemnification payments."¹⁹³ The Senate Commerce, Science and Transportation Committee commented in some detail on the liability and indemnity provision of the amendment. The Senate Committee noted that subsection (a) of section 308 provides NASA substantive authority to indemnify. It authorizes the NASA Administrator to provide liability insurance to any user of a space vehicle to compensate them for claims by third parties for damage resulting from described activities. The Administrator is authorized to provide such insurance in its sole discretion on such terms and to the extent it may deem appropriate.¹⁹⁴ Thus, for example, the Administrator could require certain shuttle users to obtain liability insurance through NASA and to pay for an equitable share of third-party liability insurance. On the other hand, the Administrator could, in its discretion, exempt other shuttle users, for example, small self-contained payloads, from the requirement of obtaining insurance or paying for it.

The Senate Committee further noted that subsection (a) authorizes the Administrator, for example, to procure insurance for a number of shuttle flights in the future based on a projected schedule. In doing so, he is authorized to purchase such insurance with appropriated funds available to the Administration. In turn, he is required to seek reimbursement of the appropriation used, to the maximum extent practicable, from the users under the general shuttle reimbursement policies established pursuant to section 203(c) of the National Aeronautics and Space Act of 1958, as amended. This, the Committee noted, could be accomplished by charging users a fixed price for the insurance based upon an estimate of the cost of insurance, and a number of other relative factors. Any other reasonable method of charging users for such insurance could also be adopted, depending on NASA's experience and the insurance coverage available. The Committee did not anticipate that NASA would use its appropriated funds to protect the U.S. Government (including NASA when flying its payloads) from liability; however, the subsection is broad enough to permit that result, if the Administrator determines that to do so would be desirable and appropriate in any particular case, for example, depending on the mix of payloads to be flown on a given shuttle flight.¹⁹⁵

The Committee commented that subsection (b) grants NASA the

193. National Aeronautics and Space Administration Authorization Act, S. REP. NO. 207, 96th Cong., 1st Sess. 46, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 829.

194. S. REP. NO. 207, 96th Cong., 1st Sess. 46 (1979).

195. *Id.* at 46.

discretion to provide, in any agreement entered into by it and a user of a space vehicle (as defined in subsection 308(f)) for the indemnification of that user against claims by third parties (as defined in subsection 308(f)) for damage resulting from activities carried on in connection with the launch, operations, or recovery of the space vehicle, but only to the extent that such claims are not compensated by liability insurance of the user. It requires the Administrator to issue implementing regulations which take into account the availability, cost, and terms of liability insurance.¹⁹⁶ The Senate Committee asserted that the agreement to indemnify could be inserted in several different types of agreements with users of a space vehicle, including, but not limited to, agreements under which NASA provides shuttle launch services and other Government services, and agreements under which non-U.S. Government persons provide to NASA payload specialist services on board shuttle flights.

The Committee noted that the section specifically provides that the indemnification may, if the Administrator deems it appropriate, be limited to claims other than those resulting either from the actual negligence of the user or from willful misconduct of the user, or both.¹⁹⁷ Under this authority, the Administrator will be able to tailor the extent of the indemnification to the particular circumstances of a given flight, either totally indemnifying the user or indemnifying the user only with respect to damage or injury which did not result from the user's willful misconduct.

The Senate Committee report also stressed that indemnification would only be applicable to claims of a third party defined in subsection 308(a)(f)(9) as "any person who may institute a claim against a user for death, bodily injury or loss of or damage to property."¹⁹⁸ It is envisaged that a third party would not normally include persons who contract with NASA for launch services, since NASA expects to include in its launch agreements a provision under which the person procuring launch services agrees that he will not make a claim (and that he will hold NASA and other users harmless) for damage to his property or employees. The result would be that each person flying on a space vehicle would be required either to insure or self-insure his own property.

The indemnification authority, according to the Senate Committee, is applicable to damage resulting from activities carried on in connec-

196. *Id.*

197. *Id.* at 47.

198. *Id.*

tion with the launch, operations, or recovery of a space vehicle. The term "space vehicle" is defined in subsection 308(f)(1) to include spacecraft and other payloads that may be launched, with the term specifically including the space shuttle. The Administrator's implementing regulations would define technically and in detail the activities carried on that would be protected by indemnification and the extent and duration of such protection.

In commenting on subsection (c), the Committee noted that it provides that

certain described conditions must be contained in any agreement providing for indemnification under section 308. Specifically, it requires that (1) notice be given to the United States of any claim or suit against a user for damage; and (2) control of or assistance in the defense by the United States, at its election, of that suit or claim.¹⁹⁹

The Committee also noted that "[s]ubsection (d) provides that no indemnification payment made under subsection (b) may be made unless the Administrator or his designee certifies that the amount is just and reasonable."²⁰⁰

Finally, the Senate Committee maintained that subsection (e) provides that upon the Administrator's approval, indemnification payments under subsection (b) may be made either from any funds available for NASA's research and development activities not otherwise obligated or from funds appropriated specifically for such indemnification payments. A decision on whether to use existing appropriations or seek additional appropriations from Congress specifically to pay meritorious claims rests with the Administrator. The Committee stressed that it is the intent of the subsection that no authorized NASA program should be curtailed or terminated because of such indemnification payments.

H. Assumption of Liabilities Under the Expired Swine Flu Immunization Project

In 1976, Congress authorized the Public Health Service to make grants to the states for a swine flu immunization program as part of the general program of federal project grants for preventive health services.²⁰¹ The swine flu immunization program, which was to counter the threat of an epidemic that never happened, was to continue until

199. S. REP. NO. 207, 96th Cong., 1st Sess. 47 (1979).

200. *Id.*

201. National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (1976) (revised to delete Act and substitute provisions by Pub. L. No. 95-626, 92 Stat. 3551 (1978)).

August 1, 1977. It was to consist of the development of a safe and effective swine flu vaccine and the preparation and procurement of such a vaccine in sufficient quantities for the immunization of the population of the states.²⁰² The grants under the program were to assist state health authorities in meeting the costs of conducting programs to administer the vaccine and to help furnish state health authorities sufficient quantities of swine flu vaccine for the program.²⁰³ Appropriate quantities of swine flu vaccine were also to be furnished to federal health authorities.²⁰⁴ Funds were also to be used to provide training in the administration of the vaccine and for related research activities.²⁰⁵ The program was to include the development of procedures to assure that risks and benefits of the swine flu vaccine would be fully explained to individuals to whom the vaccine would be administered.²⁰⁶ An unusual provision of the law required that contracts for procurement by the United States of swine flu vaccine be subject to renegotiation to limit profits of government contractors to a reasonable level. The criteria to determine reasonable profit were to specify "that any insurance premium amount which is included in the price of such procurement contract and which is refunded to the manufacturer under any retrospective, experience-rating plan or similar rating plan shall in turn be refunded to the United States."²⁰⁷

As part of the law, Congress made a number of findings that indicate congressional awareness of the risks of the program and of the need for government indemnification. In order to secure participation in the program by agencies, organizations, and individuals who manufacture, distribute, and administer the swine flu vaccine,²⁰⁸ Congress found it necessary to protect participants in the program against liability, for other than their own negligence, "to persons alleging personal injury or death arising out of the administration of the vaccine."²⁰⁹ Thus, to provide such protection and to establish an orderly procedure for the handling of such claims, the Act provided claimants an exclusive remedy against the United States.²¹⁰ Moreover, in order to be prepared to meet the potential emergency of a swine flu epidemic, the Act stated that proce-

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Pub. L. No. 94-380, 90 Stat. 1113 (1976) (revised to delete Act and substitute provisions by Pub. L. No. 95-626, 92 Stat. 3551 (1978)).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

dures for the handling of claims must be provided "until Congress develops a permanent approach for handling claims arising under the programs of the Public Health Service Act."²¹¹

To accomplish the purposes of the Act, claims under the Act were to be brought directly against the United States under the Federal Tort Claims Act.²¹² The liability of the United States was to be based on any theory of liability that would govern an action under the law of the place where the act or omission occurred, "including negligence, strict liability in tort, and breach of warranty."²¹³ The Act also eased a number of procedural requirements in order to avoid problems arising from the tolling of statutes of limitation and other time limits.²¹⁴ Furthermore, the Act provided for the defense of government employees in civil actions by the Attorney General and for the removal of such actions from state courts to federal district court.²¹⁵ Finally, the Act provided that when the United States makes payment on a claim, either after judgment or after settlement, the United States has a right of subrogation against a participant in the program based on the participant's failure to carry out obligations and responsibilities assumed by it under its contract with the United States, or out of any negligent conduct in carrying out its obligations or responsibilities under the program.²¹⁶

The swine flu program is an instance in which the United States assumed full liabilities as a defendant, instead of acting as an indemnitor. The program is frequently cited as proof that the establishment of indemnities creates a deep pocket, resulting in the stimulation of claims that would not have been brought but for the deep pocket. The many cases brought and decided under the swine flu legislation reflect a recurring pattern of decisions in cases of contractor indemnities in which the basis of the liability is a federal law, such as the Federal Tort Claims Act, or a federal contract, but in which the theory of law applicable to the case is based on state law under applicable rules relating to choice of law.²¹⁷

211. Pub. L. No. 94-380, §317, 90 Stat. 1113, 1114 (1976).

212. *Id.* at 1115.

213. Pub. L. No. 94-380, §317, 90 Stat. 1113, 1125 (1976).

214. *Id.*

215. *Id.*

216. *Id.* at 117.

217. *See Daniels v. United States*, 704 F.2d 587 (11th Cir. 1983) (holding Swine Flu Act and Federal Tort Claims Act require courts to look at law of states in determining liability of federal government); *Hunt v. United States*, 636 F.2d 580 (D.C. Cir. 1980) (holding *Feres* doctrine did not bar military personnel from asserting claims under Swine Flu Act).

*I. Authorization of Indemnities for Certain Contracts of the
Department of Veterans' Affairs, Department of Medicine and
Surgery*

The Department of Medicine and Surgery in the Department of Veterans' Affairs has a wide array of functions and powers relating to medical research, prosthetic research, and medical manpower training, and it may enter into contracts to carry out these functions. With the approval of the Administrator, "any contract or research" authorized by statute, the performance of which "involves a risk of an unusually hazardous nature," may provide for indemnification for liabilities arising out of death, bodily injury, or loss of or damage to property.²¹⁸ However, only liabilities arising out of the direct performance of the contract are indemnifiable, and only to the extent that such risks are not covered under state or federal workers' injury compensation laws.²¹⁹

As is common in other indemnification authorizations, the contract that provides for indemnification must provide for notice to the United States of any claim or suit, and for control of or assistance in the defense by the United States, if it so elects.²²⁰ Payment of the indemnification may be made only if the Administrator certifies that the amount is just and reasonable.²²¹ Moreover, payment may be made only from funds that are: (1) obligated for the performance of the contract concerned, (2) payable for research or development or both and not otherwise obligated, or (3) funds appropriated for those payments.²²²

A contractor who is a party to an indemnification agreement must maintain financial protection to cover third party liability in the maximum amount available from private insurance sources. The Administrator may establish a lesser amount of financial protection, taking into consideration the costs and terms of private insurance.²²³ In administering the indemnification provisions, the Administrator may use the facilities and services of private insurers.²²⁴

218. 38 U.S.C. § 4101(c)(3)(A) (1988) (originally enacted as Veterans Omnibus Health Care Act of 1976, ch. 73, § 101, 90 Stat. 2842). Whether a risk is "unusually hazardous" is determined by the contract for performance. *Id.* § 4101(c)(3)(A)(i).

219. *Id.* § 4101(c)(3)(A).

220. *Id.* § 4101(c)(3)(B)(i)-(ii).

221. *Id.* § 4101(c)(3)(C).

222. *Id.* § 4101(c)(3)(D)(i)-(iii).

223. 38 U.S.C. § 4101(c)(3)(E) (1988).

224. *Id.* § 4101(c)(3)(F). The authority to indemnify contractors does not provide any rights to third persons that do not otherwise exist by law. *Id.* § 4101(c)(3)(G).

J. United States Information Agency

The United States Information Agency (USIA), in making contracts for the use of international short-wave radio stations and facilities, has the authority to agree on behalf of the United States to indemnify the owners and operators of such stations against loss or damage on account of injury to persons or property arising from the use of such stations.²²⁵ The Agency has authority to indemnify from such funds as may be appropriated for the purpose.²²⁶

K. Federal Council on the Arts and Humanities—Indemnities for Loss of or Damage to Artworks and Other Objects

Another indemnity provision of a more unusual character is contained in the legislation for the creation and activities of the Federal Council on the Arts and Humanities.²²⁷ The Federal Council on the Arts and Humanities was granted authority to make agreements to indemnify against loss of or damage to works of art, including tapestries, paintings, sculpture, folk art, graphics, and craft arts, as well as manuscripts, rare documents, books, and other printed or published materials, and other artifacts or objects.²²⁸ The coverage of indemnity also extends to photographs, motion pictures, and audio and video tapes. The objects to which the indemnity extends must be of educational, cultural, historical, or scientific value, and their exhibition must be certified by the Director of the USIA as being in the national interest. Indemnity agreements made pursuant to this provision are to cover eligible items while they are on exhibition in the United States or elsewhere, "preferably when part of an exchange of exhibitions."²²⁹

The law specifies the manner in which application for indemnity agreements may be made by any person, nonprofit agency, institution, or government.²³⁰ Upon approval of an application for indemnity by the Council, the indemnity agreement "shall constitute a contract between the Council and the applicant pledging the full faith and credit of the

225. 22 U.S.C. § 1461b (1988). The USIA, formerly called the International Communications Agency, was redesignated the United States Information Agency in Pub. L. No. 97-241, 96 Stat. 273 (1982).

226. This authority was most recently provided as part of the Department of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations Act of 1979. Pub. L. No. 95-431, 92 Stat. 1021 (1979). Similar authorizations were contained in prior appropriations acts starting in 1954.

227. Pub. L. No. 94-158, 89 Stat. 844 (1975) (codified at 20 U.S.C. §§ 971-977 (1988)).

228. 20 U.S.C. § 971 (1988).

229. *Id.* § 972(b)(1).

230. *Id.* § 973.

United States to pay any amount for which the Council becomes liable under such an agreement."²³¹ It also provides for deductible limits of indemnity. For example, when the estimated value of the covered item is more than \$2 million but less than \$10 million, coverage under the law extends only to loss or damage in excess of the first \$25,000 of loss covered.²³²

The indemnity provision also addresses the prompt adjustment of claims. In case of a claim of loss on a covered item, the Council is directed to certify the validity of the claim and the amount of the loss to the Speaker of the House of Representatives and the President Pro Tempore of the Senate.²³³ In addition, the Council must provide annual reports to Congress of claims actually paid and claims pending during the past fiscal year.²³⁴

L. Environmental Protection Agency—Authorization of Indemnification Under the Superfund Law

Section 119 of the Superfund law, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), as added by the Superfund Amendments and Reauthorization Act of 1986, provides authority for contractual indemnification of "response action contractors."²³⁵ A response action contractor (RAC) is a person hired or retained to provide services in response to any release or threatened release of a hazardous substance, pollutant, or contaminant from a facility regulated under Superfund. Under the amended Act, the RAC:

shall not be liable . . . to any person for injuries, costs, damages, expenses, or other liability (including but not limited to claims for indemnification, or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss) which results from such release, or threatened release.²³⁶

However, the immunity does not apply to releases caused by the RAC's negligent or grossly negligent conduct, or by the RAC's intentional misconduct.²³⁷ The indemnity is not to affect liabilities under existing state, local, or common law warranties, nor is it to affect the liability of

231. *Id.* § 973(c).

232. *Id.* § 974(d)(2).

233. 20 U.S.C. § 975(b) (1988).

234. *Id.* § 977.

235. Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9619 (1988) (commonly referred to as CERCLA § 119) (amending Comprehensive Environmental Response Compensation and Liability Act [hereinafter CERCLA], 42 U.S.C. §§ 9601-9657 (1982)).

236. 42 U.S.C. § 9619(a)(1) (1988) (commonly referred to as CERCLA § 119).

237. *Id.* § 9619(a)(2) (commonly referred to as CERCLA § 119(a)(2)).

any RAC to its employees under other provisions of law, including workers' compensation law. Section 119 of CERCLA expressly includes state and local government employees who perform such duties within the indemnification protection granted to RACs.²³⁸

Moreover, the section expressly provides that the indemnification is not available to any potentially responsible party (PRP) with respect to the costs or damages caused by any act or omission of an RAC.²³⁹ The section does not affect a plaintiff's burden of proof in establishing liability for releases under CERCLA.²⁴⁰ If an RAC meets the requirements of the law,²⁴¹ the President may agree to hold the RAC harmless and indemnify against any liability, including expenses of litigation and settlement, for negligence arising out of the RAC's performance in carrying out response action activities.²⁴² However, the RAC will not be indemnified if the liability was caused by the RAC's gross negligence, or by intentional misconduct.²⁴³

The amendment provides that the law is not to be subject to 31 U.S.C. sections 1301²⁴⁴ and 1341,²⁴⁵ 41 U.S.C. section 11²⁴⁶ or to the limitations on obligations to amounts appropriated as provided in 42 U.S.C. section 9662. Uses of funds for the indemnification of any RAC (except with respect to federally owned or operated facilities) are to be considered governmental response costs incurred pursuant to 42 U.S.C. section 9604.²⁴⁷ If sufficient funds are not available out of the Superfund for such indemnification payments, or if the legislation authorizing the fund has been repealed, the necessary funds are authorized to be appropriated.²⁴⁸

The amendment provides that an indemnification agreement may be entered into if the liability covered by the agreement exceeds or is not

238. *Id.* § 9619(a)(3)-(4) (commonly referred to as CERCLA § 119(a)(3)-(4)).

239. *Id.* § 9619(b)(1) (commonly referred to as CERCLA § 119(b)(1)).

240. *Id.* § 9619(b)(2) (commonly referred to as CERCLA § 119(b)(2)).

241. 42 U.S.C. § 9619 (1988) (commonly referred to as CERCLA § 119) (enumerating many requirements response action contractors must meet).

242. *Id.* § 119(c)(1) (commonly referred to as CERCLA § 119(c)(1)).

243. *Id.* § 9619(c)(1) (commonly referred to as CERCLA § 119(c)(1)).

244. Title 31 U.S.C. § 1301 is an appropriations amendment that limits appropriations for settlements of adverse actions.

245. Title 31 U.S.C. § 1341 limits expenditure of amounts not yet authorized by Congress.

246. Title 41 U.S.C. § 11 provides that no government contract can be made unless authorized or adequately appropriated by Congress.

247. 42 U.S.C. § 9619(c)(3) (1988) (commonly referred to as CERCLA § 119(c)(3)). Title 42 U.S.C. § 9604 gives the President authority to take actions necessary to respond to releases of hazardous substances into the environment and seek reimbursement for the cleanup from responsible parties.

248. *Id.* § 9619(c)(3) (commonly referred to as CERCLA § 119(c)(3)).

covered by insurance at a fair and reasonable price at the time the contractor enters into the response action contract, and if adequate insurance to cover such liability is not generally available at that time. The RAC must have made diligent efforts to obtain such coverage from nonfederal sources, and when a response action contract covers more than one facility, the RAC must agree to continue such diligent efforts each time it begins work at a new facility.²⁴⁹

Liability under indemnification agreements is limited to RAC liability that results from a release arising out of response activities. Such indemnification agreements are to include deductibles and are to provide for limits on the amount of indemnification.²⁵⁰ An RAC carrying out a written contract with a potentially responsible party may also obtain an indemnification agreement if the President determines that the amount the PRP is able to indemnify is inadequate to cover any reasonable potential liability which may stem from its negligence in performing the contract with the PRP.²⁵¹ In determining the adequacy of available indemnity, the President is to take into account the total net assets and resources of the PRPs with respect to the facility at the time of the determination. However, before an indemnification payment under an RAC-PRP agreement is made, the RAC must have exhausted "all administrative, judicial, and common law claims for indemnification against all potentially responsible parties participating in the clean-up of the facility"²⁵² The indemnification agreement, moreover, must require the RAC to pay any deductible established in such an agreement before it recovers any amount from the PRP or under the indemnification agreement.²⁵³ Persons who are retained or hired by an RAC are eligible for indemnification only if the hiring was specifically approved by the President, i.e., employees or subcontractors are included in an indemnification agreement only if such inclusion is expressly approved.²⁵⁴

249. 42 U.S.C. § 9619(c)(4)(A)-(C) (commonly referred to as CERCLA § 119(c)(4)(A)-(C)).

250. *Id.* § 9619(c)(5)(A)-(B) (commonly referred to as CERCLA § 119(c)(5)(A)-(B)).

251. *Id.* § 9619(c)(5)(C)(i) (commonly referred to as CERCLA § 119(c)(5)(C)(i)).

252. *Id.* § 9619(c)(5)(C)(ii) (commonly referred to as CERCLA § 119(c)(5)(C)(ii)).

253. *Id.* § 9619(c)(5)(C)(ii) (commonly referred to as CERCLA § 119(c)(5)(C)(ii)). The indemnification provision does not extend to owners or operators of facilities regulated under the Resource Conservation and Recovery Act (codified at 42 U.S.C. § 6901 (1988)).

254. 42 U.S.C. § 9619(c)(5)(E) (1988) (commonly referred to as CERCLA § 119(c)(5)(E)). For purposes of liability and cost recovery under 42 U.S.C. § 9607

The authorization for indemnification of RACs in section 119 has been clearly circumscribed to prevent a claim for indemnification by PRPs, namely owners, operators, transporters, and persons who arrange for disposal of hazardous substances as defined in section 107(a)(1), (4) of the Act.²⁵⁵ Section 119 also requires the Comptroller General to conduct a study on the application of the indemnity provision in fiscal year ending in 1989. Such a study is to include the number of indemnification agreements, the number of claims filed under such agreements, and a consideration of the need for the indemnification authorization. The findings were to be reported to Congress no later than September 30, 1989.²⁵⁶

M. Miscellaneous Statutory Indemnities

In addition to authorization for contractual indemnities, the government provides indemnities to persons in a variety of callings who may have been injured by government regulatory programs. For example, indemnities are provided for producers of cotton who suffer loss as a result of cotton insect eradication programs.²⁵⁷ The government also provides indemnities to dairy farmers whose milk was removed from commercial markets because of chemical residue contents.²⁵⁸ So too, manufacturers and dealers in pesticides are indemnified by the government for losses occurring through the cancellation or suspension of registration of the pesticide they produce or sell.²⁵⁹

(1988) (commonly referred to as CERCLA § 107), amounts expended for indemnification of any RAC are to be considered a cost of response incurred by the United States with respect to such release. 42 U.S.C. § 9619(c)(6) (1988) (commonly referred to as CERCLA § 119(c)(6)).

255. 42 U.S.C. § 9619(d) (1988) (referring to 42 U.S.C. § 9619(a)(1)-(4) (1988) (commonly referred to as CERCLA § 119(a)(1)-(4)); *see also id.* § 9619(f) (1988) (commonly referred to as CERCLA § 119(f)) (providing that RACs and subcontractors for program management, construction management, and other listed services are to be selected in accordance with Title IX of Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 541-544 (1988), which requires that aforesaid services be negotiated "on the basis of demonstrated competence . . . and at fair and reasonable prices," and that federal selection procedures are to apply to appropriate contracts negotiated by all federal governmental agencies involved in carrying out chapter). CERCLA authorizes the promulgation of regulations relating to indemnification. 42 U.S.C. § 9619(c)(7) (1988) (commonly referred to as CERCLA § 119(c)(7)).

256. 42 U.S.C. § 9619(c)(8) (1988) (commonly referred to as CERCLA § 119(c)(8)).

257. 7 U.S.C. § 1444a (1988).

258. 7 U.S.C. § 450j (1988).

259. 7 U.S.C. § 136m(a) (1988), *as amended* by Pub. L. No. 100-532 (substituting provisions which relate to general indemnification for provisions which relate to requirements for payment).

N. Recurring Provisions in Contractual Indemnity Legislation

It seems that the pattern for requirements for indemnification was established largely by the National Defense Contracts Act and the related Executive Order in 1958. Some of what is reflected in the Act and Executive Order was required even earlier in 10 U.S.C. section 2354, which governs indemnification in research and development contracts for military departments. As noted earlier,²⁶⁰ indemnification authorization in HHS contracts for research and investigation expressly tracks the provisions of 10 U.S.C. section 2354.

In general, indemnification covers all losses and liabilities not covered by the contractor's insurance. This includes expenses of litigation and settlement. There is generally no coverage for losses or claims caused by willful misconduct or lack of good faith on the part of the contractor. Some of the laws also protect against double recovery by excluding risks covered under state or federal workers' compensation or injury compensation laws. A number of the laws also require certification by the agency that the amount of the indemnity is "just and reasonable." However, this appears to be a somewhat superfluous requirement, because under other laws, if the conditions of indemnification are met, the amount of the indemnity is very likely to be just and reasonable whether or not so certified.

Some of the federal indemnification laws deviate from the general pattern, at least with regard to formal requirements for indemnification. Under the Price-Anderson Act, prior to its amendment in 1988, indemnity was strictly limited to major accidents encompassed in the term "extraordinary nuclear occurrence."²⁶¹ The law itself sets insurance requirements and makes clear that federal indemnity is applicable only above the private insurance coverage. There is one peculiar departure from the general pattern with respect to coverage for losses or claims caused by willful misconduct or lack of good faith. In the case of extraordinary nuclear occurrences, such as a major accident, the contractor's responsibility is not considered, but if the accident merely qualifies as a nuclear incident—i.e., a case of less horrendous consequences—then willful misconduct or lack of good faith excludes government indemnity.

Other special cases that do not follow the general pattern include the Contract Settlement Act of 1944,²⁶² which reflects an urgent desire to dispose of government obligations growing out of World War II, with-

260. See *supra* text accompanying notes 74-80.

261. See *supra* Part IID (discussing Price-Anderson Act).

262. See *supra* Part IIIE (addressing Contract Settlement Act).

out imposing any express conditions on the process. Other laws, such as those providing indemnifications in the field of international telecommunications and for obligations of the Council on Arts and Humanities, cover rather narrow areas, and the limited application of these laws apparently makes some of the broad restrictions and limitations in other laws less necessary or desirable. A slightly different pattern is found in the more recent 1986 Amendment of the Superfund law relating to indemnification resulting from cleanup operations at hazardous waste sites.²⁶³

While the application of the indemnity is substantial and broad, and largely follows the provision first set down in the National Defense Contracts Act, it may require the RAC to exhaust the possibility of collecting on its claims against other PRPs under the law. Unlike earlier laws, which denied coverage for losses and claims caused by willful misconduct or lack of good faith, the Superfund law denies recovery only to those contractors who have been grossly negligent or who have engaged in intentional misconduct.

O. Policy Considerations in the Provision of Indemnities

Authorization for contractual indemnification has not been developed in accordance with an overall plan or pattern, but has responded to particular needs and exigencies of the government and the industries affected. The availability of contractual indemnification is a benefit the government bestows on a limited number of groups and callings. Indemnities have been used quite regularly to induce defense contractors to engage in production or services for the government that may subject the contractor to claims and potential liabilities not shared by other manufacturers and providers. Ordinary services, such as transportation services rendered by commercial airlines, were selected for indemnification when, in the national interest, airlines had to assume unusual risks, such as war risks, in flying their routes.²⁶⁴ In many instances, the indemnification of a dangerous activity carried out under contract is justified not because the contractor is under any obligation to assume the risky contract, but because Congress has declared that undertaking the risky activity advances national interests. Thus, indemnification for the risks of nuclear power production was legislatively justified on the grounds that the country needed the additional power for its economic development, growth, and welfare.²⁶⁵ In the case of the

263. See *supra* Part IIL (discussing indemnification under Superfund law).

264. See *supra* Part IIF (discussing Federal Aviation Act of 1958, as amended).

265. See *supra* text accompanying notes 97-102 (discussing rationale for indemnifi-

national space program, indemnification of contracts involving substantial hazards was justifiable both in terms of national security and economic development.²⁶⁶ Indemnification of shortwave radio facilities and stations,²⁶⁷ and of persons and organizations that lend valuable art works and other objects for exhibition here and abroad,²⁶⁸ can be seen as an effort to improve the international relations of the United States and to contribute to international amity.

The purpose of government indemnities in the public health area, such as indemnities for experimental treatments and other activities carried out in veteran's hospitals,²⁶⁹ is to limit the liability of contractual participants in the rendition of public health services that Congress supports as being in the public interest but which carry risks and liabilities to the public that might otherwise dissuade participants. The swine flu program, which was not by its terms an indemnity program, interestingly provided an alternative to the provision of indemnities:²⁷⁰ when a project is considered of such overwhelming national interest that it should be undertaken regardless of liabilities, direct government responsibility is an alternative to indemnity.

III. PROCEDURAL ASPECTS OF ENTERING INTO CONTRACTUAL INDEMNITIES

Laws that authorize the inclusion of indemnities in government contracts are not self-executing. All of them state the conditions that must be met before contractual indemnification will be granted, and they also designate the official who must determine that the conditions have been met. These conditions usually involve unusual risks, or risks that cannot be covered by commercially available insurance.

Another element for consideration is that government procurement of products and services is subject to a variety of detailed regulations that not only aim at providing the government with the best products and services at the least cost, but that also serve many other policy purposes—preference for small and minority-owned businesses; preferences for reclaimed rather than virgin materials; exclusions of bidders who have violated environmental laws; compliance with affirmative ac-

cation under Price-Anderson Act).

266. See *supra* Part IIG (discussing National Aeronautics and Space Act of 1958).

267. See *supra* Part IIJ (discussing indemnification by USIA).

268. See *supra* Part IIK (discussing indemnification by Federal Council on the Arts and Humanities).

269. See *supra* Part III (discussing indemnification by Department of Veterans' Affairs); Part IIH (discussing indemnification under swine flu program).

270. See *supra* Part IIH (discussing expired Swine Flu Immunization Project).

tion requirements for handicapped workers and disabled veterans; and many others. Thus, the procurement of services and products has long been the subject of detailed procurement codes and regulations in which the provisions relating to the inclusion of contractual indemnities are also used to advance certain policies.

The mass of procurement regulations have undergone significant re-arrangement. On September 19, 1983, the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration issued a joint document establishing a new Federal Acquisition Regulation (FAR),²⁷¹ codified in Chapter 1, Title 48, of the *Code of Federal Regulations* (CFR), leaving chapters 2 through 4 of Title 48 for individual agency implementations and supplementations of the FAR. Thus, the FAR in Chapter 1 and Chapters 2-4 of Title 48 of the CFR comprise the Federal Acquisition Regulations System that went into effect on April 1, 1984.²⁷²

The new FAR system replaced both the earlier Federal Procurement Regulations System (FPRS) for civilian contracts²⁷³ and the Defense Acquisition Regulations (DAR) for defense contracts.²⁷⁴ These earlier regulations remain a part of the CFR, however, because both the DAR and FPR provisions continue to apply to contracts which preceded April 1, 1984, the effective date of the FAR.²⁷⁵

In general, the indemnity provisions in the FAR and in the contract clauses that provide for contractual indemnity follow both the terms of the statutory authorization for indemnification and the statutory language. They offer very few elaborations. The language of the regulations, moreover, is not subject to judicial review in the usual sense, because the grant or denial of a contractual indemnity is not subject to judicial review. The interpretation of the language by the public official administering the indemnity is final, subject only to a corrective revision of the authorizing legislation by Congress.²⁷⁶

271. 48 Fed. Reg. 42,103 (1983) (codified as Federal Acquisition Regulations System, 48 C.F.R. pt. 1 (1990)).

272. 50 Fed. Reg. 26,987 (1985) (codified as Federal Procurement Regulations and Defense Acquisition Regulations, 32 C.F.R. pts. 1-39 and 41 C.F.R. pts. 1-49 (1990), respectively).

273. 41 C.F.R. Subtitle A, Chapters 1-49 (1990).

274. 32 C.F.R. Chapter 1 (chapters 1-39) (1990).

275. 50 Fed. Reg. 26,987, 26,988 (1985) (codified at 41 C.F.R. Subtitle A, Chapters 1-49 and 32 C.F.R. Chapters 1-39).

276. 48 C.F.R. § 1.301 (1990).

A. *Indemnity Regulations Under the National Defense Contracts Act—Public Law No. 85-804*

The National Defense Contracts Act,²⁷⁷ contains the most broadly applicable regulation on contractual indemnities. The Act covers a long list of military and civilian government departments and agencies that have significant national defense functions and stipulates that indemnity clauses may only be included in such agencies' contracts when this would advance the national defense.²⁷⁸ The authority to enter into such contracts can only be granted by the Secretary or Administrator of the agency concerned.²⁷⁹ Indemnification agreements authorized by an agency head are not limited to amounts appropriated or to contract authorization.²⁸⁰

1. *Indemnification Requests*

Contractors requesting indemnification contracts under the National Defense Contracts Act must supply certain information to the contracting officer. First, the contractor must identify and define the unusually hazardous or nuclear risk and state how the contractor would be exposed to such risk.²⁸¹ Second, since the indemnification applies only to the extent that the claim is not compensated for by insurance, the contractor must furnish a statement disclosing all insurance coverage applicable to the stated risk.²⁸² The contractor must also disclose the controlling factor for determining the amount of coverage and the availability, cost, and terms of additional insurance.²⁸³ If the contractor is part of a parent corporation, it must supply the contracting officer with the precise legal relationship between the companies and reveal whether the parent company has insurance coverage that bears on the risks for which the contractor seeks indemnification.²⁸⁴ Third, if the

277. See *supra* Part IIB (discussing National Defense Contracts Act).

278. 48 C.F.R. § 50.101 (1988) (including Government Printing Office; Federal Emergency Management Agency; Tennessee Valley Authority; National Aeronautics and Space Administration; General Services Administration; Departments of Defense, Army, Navy, and Air Force, Treasury, Interior, Agriculture, Commerce, and Transportation; and Department of Energy).

279. *Id.* § 50.201.

280. *Id.* § 50.203.

281. *Id.* § 50.403-1(a)(2).

282. *Id.* § 50.403-1(a)(3) (requiring disclosure of names of insurance companies, description of types of insurance, dollar limits per occurrence, deductibles if any, any exclusions from coverage, and any applicable workers' compensation insurance coverage).

283. 48 C.F.R. § 50.403-1(a)(4) (1990).

284. *Id.* § 50.403-1(a)(6).

contractor has entered into other government contracts that provide for indemnification against similar risks, the contractor must report this information with a description of any limitations contained in those contracts.²⁸⁵

2. Agency Action

The contracting officer is authorized to review the indemnification request and to determine whether all of the conditions have been met.²⁸⁶ Any recommendation for approval to the agency head must include a definition (to which all parties have agreed) of the unusually hazardous or nuclear risks and the following statements by the contracting officer: 1) that the contract would facilitate the national defense; 2) that the defined risk could expose the contractor to liabilities in excess of insurance coverage; 3) that the contractor is complying with all applicable safety requirements; and 4) whether the indemnification would be extended to subcontractors.²⁸⁷

In deciding whether to approve the request for an indemnification clause, "an agency head shall consider such factors as self-insurance, to extend indemnification to subcontractors, other proof of financial responsibility, workers' compensation insurance, and the availability of private insurance."²⁸⁸ Approval of the recommendations is issued in a Memorandum of Decision.²⁸⁹ Only then can the contracting officer enter into agreement with the contractor using the same procedures as those required for entering agreements with other contractors.²⁹⁰

The contract clause for indemnification under the Act provides that the government will indemnify the contractor against claims by third persons for death, personal injury, or loss of, damage to, or loss of use of property, and the government will also indemnify the contractor for any loss of, damage to, or loss of use of the contractor's property.²⁹¹ The clause provides that the indemnification is limited to claims arising out of the risks defined in the contract that are not compensated for by insurance or otherwise.²⁹² If the claim results from willful misconduct or lack of good faith on the part of the contractor, the contractor will

285. *Id.* § 50.403-1(a)(5).

286. *Id.* § 50.403-2.

287. *Id.* § 50.403-2.

288. 48 C.F.R. § 50.401 (1990).

289. *Id.* § 50.403-2(a)(7)(b).

290. *Id.* § 50.403-2 (setting forth requirements for an action on indemnification requests).

291. *Id.* § 52.250-1(b).

292. *Id.* § 52.250-1(c).

not be indemnified, other than through subrogation, for its own property loss or for any government claims against the contractor.²⁹³

3. *Claiming Indemnification*

The regulations require contractors to promptly notify the contracting officer of any claim that may be expected to involve indemnification.²⁹⁴ This includes supplying all pertinent papers the contractor receives and evidence of any claim of loss and how it may be covered under the contract.²⁹⁵ The contractor is required, by contract, to comply with any government directions regarding the settlement or defense of the claim.²⁹⁶ The indemnification clause provides that the government may direct, control, or assist in the defense or settlement of any claims or actions.²⁹⁷

Agencies are required to maintain complete records of all indemnity actions taken pursuant to the Act, and they must also report to Congress annually on actions taken on requests for relief under the Act, including indemnification.²⁹⁸ The agency is required to retain for each request for relief processed: 1) the contractor's request; 2) the Memorandum of Decision; 3) a copy of the contract; and 4) all relevant memoranda, correspondence, affidavits, and other pertinent documents.²⁹⁹ The annual reports required under the Act show that no claims for indemnification were made in the last five years, and appropriate personnel in DOD and DOJ cannot recall any such claims in the past.³⁰⁰

4. *Agency Regulations*

Agencies authorized to execute indemnity agreements under the National Defense Contracts Act include NASA, DOD, and DOE.³⁰¹ NASA has adopted its own procedures for entering into indemnifica-

293. 48 C.F.R. § 52.250-1(d) (1990).

294. *Id.* § 52.250-1(g)(1).

295. *Id.* § 52.250-1(g)(2).

296. *Id.* § 52.250-1(g)(4).

297. *Id.* § 52.250-1(h).

298. 48 C.F.R. § 50.104 (1990).

299. *Id.* § 50.105.

300. Telephone conversations with William Coleman, OMB Office of Procurement Policy, (May 12, 1987; Sept. 14, 1987); James Pesnell, NASA Senior Procurement Officer, (May 21, 1987); Jeffrey Levitky, attorney, DOJ, (Aug. 26, 1987; Sept. 14, 1987); Peter Brien, DOD Contracts Office, Cost, Price and Finance, (Sept. 17, 1987); Jeffrey Robbins, attorney, HHS Office of the General Counsel, (May 18, 1987; Aug. 25, 1987).

301. 48 C.F.R. § 50.101(b) (1990) (noting general authority of Act).

tion agreements with government contractors.³⁰² For example, in addition to the FAR procedures for requesting indemnification, NASA requires a contractor to include copies of all relevant third party comprehensive liability policies and product liability policies or the equivalent.³⁰³

NASA provides the contracting officer with a standard definition of "unusually hazardous risks" to be used in the government contracts (unless the Administrator approves a different definition to be used in a particular contract).³⁰⁴ NASA also provides a contract clause to be used in place of the clause provided by the FAR. This clause differs in that under NASA's indemnification clause the government shall only be liable for loss in excess of the contractor's insurance or \$500 million, whichever is the larger amount.³⁰⁵ The contract clause used by the FAR does not impose any limits on appropriation.³⁰⁶

The Defense Department's use of indemnification under the National Defense Contracts Act is limited to situations in which the contractor cannot be indemnified under 10 U.S.C. section 2354, which governs military contracts for research and development, but meets all requirements prescribed by the FAR.³⁰⁷ The authority granted by the Act may be used to provide indemnification in contracts involving unusually hazardous risks in research and development work, as well as for work that cannot be so classified.³⁰⁸ The Department of Energy (DOE) is authorized to execute agreements under the Act only for functions transferred to that Department from another authorized agency.³⁰⁹

B. Department of Energy—Indemnity Regulations Under Atomic Energy Act

Section 170(d) of the Atomic Energy Act of 1954 authorizes the Department of Energy "to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident."³¹⁰

302. *Id.* § 1850.403.

303. *Id.*

304. *Id.* § 1852.250-72 (setting forth authorized risk to which indemnification applies to unusually hazardous space activities).

305. *Id.* § 1852.250-70(d)(1)(iii).

306. 48 C.F.R. § 50.203 (1990).

307. *Id.* § 235.070.

308. *Id.* § 250.403-70.

309. *Id.* § 50.101.

310. 42 U.S.C. § 2014(j) (1988); 48 C.F.R. § 950.7003 (1990).

The Department of Energy has established the Department of Energy Acquisition Regulations (DEAR).³¹¹ The heads of the contracting activities are authorized to enter into indemnity contracts whenever it has been determined that the contractor is under the risk of public liability for the occurrence of a substantial nuclear incident in the course of performance of the contract work or for a substantial nuclear occurrence caused by a product delivered under contract.³¹² The determination is based on a detailed study to determine the maximum conceivable damage that could result from a nuclear incident arising out of the contractor's activities.³¹³ If the maximum conceivable damage is \$60 million or more, the head of the contracting activity may approve the use of an indemnity clause.³¹⁴ If the potential damage amounts to between \$1 million and \$60 million, the request for indemnity must be approved by the agency head. If the amount is less than \$1 million, then the contractor does not qualify for indemnity under the Atomic Energy Act of 1954.³¹⁵

The Act also authorizes the indemnification of all subcontractors, vendors, and suppliers under the prime contract.³¹⁶ This includes contracts for operation of a production or utilization facility on its completion, architect-engineer services, component parts for a production or utilization facility, construction at a production or utilization facility where the work does not entail a substantial risk, and equipment or services which would be part of or contribute to the construction or operation of a production or utilization facility.³¹⁷

1. *Indemnification under the Atomic Energy Act*

The following regulatory analysis does not reflect any changes occurring after the 1988 amendment to the Price-Anderson Act, which was discussed earlier.³¹⁸ The DOE will indemnify against claims for public liability and the reasonable cost of investigating and settling claims and defending suits if the incident is not covered by any other indemnity agreement entered into by the DOE or NRC. The DOE's liability

311. 49 Fed. Reg. 11,936 (1984) (codified at 48 C.F.R. §§ 901.101-901.570 (1990)).

312. 48 C.F.R. § 950.7004 (1990).

313. *Id.* § 950.7005.

314. *Id.*

315. *Id.*

316. *Id.* § 950.7008.

317. 48 C.F.R. § 750.7007 (1990).

318. *See supra* Part IID (discussing Price-Anderson Act).

under all contracts entered into under section 170 of the Act³¹⁹ shall not exceed \$500 million in the aggregate (the statutory maximum) for each nuclear incident occurring within the United States or \$100 million in the aggregate for each nuclear incident occurring outside of the United States, regardless of the number of persons indemnified under the contract.³²⁰

Different indemnification clauses are provided for different kinds of DOE contracts, such as for general contract work, including the construction or operation of a nuclear power plant.³²¹ Another clause provides indemnity for product liability,³²² and a third clause provides indemnity for architect-engineers or suppliers.³²³ Although the clauses follow the same general structure, only contracts for construction and operation require the contractor to waive the defenses listed in the Atomic Energy Act in the event of an extraordinary nuclear incident,³²⁴ and there are significant differences in coverage and amount of indemnity.³²⁵ In the case of the general contract indemnity, coverage for claims involving willful misconduct will depend upon how an incident is characterized—as a “nuclear incident” or as an “*extraordinary nuclear incident*.”³²⁶

2. Claiming Indemnification

The contractor must give the DOE notice of any claim made against the contractor or any other person included in the contract and furnish the DOE with any pertinent papers received by the contractor or filed with respect to such claims or actions.³²⁷ The DOE has the right to require prior approval for the payment of any claim and to appear through the Attorney General on behalf of the contractor or other persons indemnified.³²⁸ The DOE may take charge of the settlement or defense of the action through the Attorney General.³²⁹

319. 42 U.S.C. § 2210(e)(1)-(4) (1982 & Supp. V 1987).

320. 48 C.F.R. § 952.250-70(c)(1) (1988).

321. *Id.* § 952.250-70.

322. *Id.* § 952.250-71.

323. *Id.* § 952.250-72.

324. 42 U.S.C. § 2210(n) (1988). Potential defenses may be based on: the conduct of the claimant or the fault of persons indemnified, charitable or governmental immunity, or the applicable statute of limitations. *Id.*

325. *See* 48 C.F.R. § 952.250-70 (1990) (stating exceptions to indemnification requirements that are not present in 48 C.F.R. § 952.250-71 (1988)); *cf. id.* § 952.250-71 (providing indemnification for product liability).

326. *Id.* § 952.250-70(a)(3) (emphasis added).

327. *Id.* § 952.250-70(f).

328. *Id.* § 952.250-70(f)(1).

329. *Id.* § 952.250-70(f)(2).

The agency head may authorize the head of the contracting activity to offer the contractor a general authority indemnity agreement when statutory indemnity under the Atomic Energy Act does not cover the contract.³³⁰ Alternatively, the head of the contracting agency is authorized to offer the contractor nuclear liability insurance.³³¹ DOE contractors covered by the Atomic Energy Act are generally not required or permitted to carry insurance against public liability for nuclear accidents unless they do not qualify for indemnity.³³² In that case, the insurance must also be approved by the Office of Industrial Relations and cannot exceed \$1 million in coverage.³³³

If the DOE is extending indemnification under its general authority, the amount of protection is subject to the availability of appropriated funds.³³⁴ Normally, the amount is equivalent to the amount of insurance the contractor would carry in its other commercial operations for similar risks.³³⁵ If the contractor has been extended both statutory indemnity and general authority indemnity, the general authority indemnity will not apply to the extent that the statutory indemnity applies.³³⁶

C. NASA—Contractual Indemnity Regulations

NASA treats contractual indemnities as part of its regulation of Extraordinary Contractual Actions.³³⁷ NASA has decided not to use the "residual powers" authorized by the National Defense Contracts Act and by FAR Subpart 50.4, and not to include in its contracts the clause authorized under Public Law No. 85-804.³³⁸ NASA thus uses its own indemnification regulations and its own contract clause.

Contractor requests for the exercise of the indemnification authority are to be forwarded to the Assistant Administrator for Procurement, who must then review it and forward the contractor request "through channels to the administrator for approval."³³⁹ If the Administrator approves, he signs a Memorandum of Decision. The information that

330. 48 C.F.R. § 950.7011(a) (1990).

331. *Id.* § 950.7011(d).

332. *Id.*

333. *Id.* § 950.7010(a).

334. *Id.* § 950.7011(b) (noting policy of DOE to restrict indemnity agreements against public liability for nuclear incident to statutory requirements provided under Atomic Energy Act of 1954).

335. 48 C.F.R. § 950.7011(e) (1990) (stating general authority to indemnify where indemnified risk is nonnuclear).

336. *Id.* § 950.7011(g).

337. *Id.* § 1850.

338. *See id.* § 52.250.1 (setting forth indemnification against hazardous or nuclear risks under National Defense Contracts Act).

339. *Id.* § 1856.402.

must be submitted is the same as that required by the FAR. In addition, the information must include a copy of relevant third party comprehensive liability policies and product liability policies.³⁴⁰ The contract clause for NASA contracts cross-references to a number of the FAR and Public Law No. 85-804 clauses,³⁴¹ but requires the inclusion of a special clause on Space Activity-Unusually Hazardous Risk.³⁴²

The contracting officer must submit a report directly to the Contract Adjustment Board when an indemnification provision is included in any NASA prime contract pursuant to the authority of the Administrator's Memorandum Decision, including two copies of the Memorandum Decision and two copies of any clause which deviates from the indemnification clauses prescribed and complies with the Requirement of Public Law No. 85-804 and Executive Order No. 10,789 (i.e. requirements similar to FAR requirements).³⁴³ The Contract Adjustment Board must retain these submissions.³⁴⁴

D. EPA Regulations Governing Indemnification of Superfund Response Action Contractors Under Section 119 of the Superfund Law

To carry out the mandate of Section 119 of the Superfund law as added by the Superfund Amendments and Reauthorization Act of 1986 (SARA),³⁴⁵ the EPA has adopted an interim guidance document.³⁴⁶ The document is addressed to Regional Administrators and Directors of Toxics and Waste Management Divisions and provides detailed guidance for their indemnification response action contractors working for the EPA and for other federal agencies.³⁴⁷

The interim guidance provides for indemnification of RACs working at Superfund sites for states, potentially responsible parties, and the EPA, including RACs working for the United States Army Corps of Engineers. In its background information, the interim guidance notes: Prior to the reauthorization of CERCLA, EPA provided indemnifica-

340. 48 C.F.R. § 1850.403-1(a) (1990).

341. *Id.* § 1852.250-72.

342. *Id.* § 1850.403-3.

343. *See id.* § 1850.403-70 (outlining reporting requirements that contracting officer must submit to Contract Adjustment Board).

344. *Id.* § 1850.403-70(b).

345. Pub. L. No. 99-499, 100 Stat. 1729, 42 U.S.C. §§ 11001-11050 (1988).

346. EPA INTERIM GUIDANCE ON INDEMNIFICATION OF SUPERFUND RESPONSE ACTION CONTRACTORS UNDER § 119 OF SARA (1987) [hereinafter EPA INTERIM GUIDANCE].

347. *See* Exec. Order No. 12,580, 3 C.F.R. § 193 (1987), *reprinted in* 42 U.S.C. § 9615 (1988) (providing authority to indemnify RACs working for other agencies).

tion to RACs working for EPA through contract authority implementing CERCLA. EPA took this step in order to retain qualified contractors, given the absence of pollution liability insurance coverage. Under this old indemnification agreement, the federal government indemnified RACs above an initial \$1 million for third party liabilities and defense expenses. The indemnification agreement was void in case of gross negligence or willful misconduct.³⁴⁸

Noting that section 119 of SARA responds to many of the concerns of the RAC community, the interim guidance document states that the section establishes a standard of negligence for actions brought against RACs under federal law.³⁴⁹ However, if an action is brought under state law, a strict liability standard could apply.³⁵⁰ The guidance document reiterates the provision of limited indemnification against pollution liability arising from RAC negligence on a discretionary basis.³⁵¹ The interim guidance document then recites the limits and deductibles under statutory indemnification provisions and asserts that RAC indemnification provides an adequate substitute for insurance.³⁵² The interim guidance document asserts that "discretionary indemnification is an interim vehicle that will keep the Superfund program operative until the insurance industry returns to the RAC liability insurance market; and discretionary indemnification does not create a federally intrusive insurance program that interferes with private sector efforts to develop RAC liability insurance coverage."³⁵³

The interim guidance document also states that the purpose of an EPA task force is the establishment of an RAC indemnification program, the development of final indemnification guidelines and regulations, the establishment of a forum for public comment on RAC indemnification, and the promotion of private sector provision of RAC pollution liability insurance by providing technical assistance to the insurance industry.³⁵⁴

Authorization to provide indemnification under the EPA interim guidance will be made by the EPA Office of Solid Waste and Emergency Response (OSWER) with the concurrence of the Office of the Comptroller (OC). Indemnification authorization is made upon receipt of a recommendation from the EPA task force, and the OC will pro-

348. EPA INTERIM GUIDANCE, *supra* note 346, at 2.

349. *Id.* at 3.

350. *Id.* at 3 n.4.

351. *Id.* at 4.

352. *Id.* at 4.

353. EPA INTERIM GUIDANCE, *supra* note 346, at 3.

354. *Id.* at 4.

vide concurrence or nonconcurrence with recommendations to indemnify within seven calendar days of receipt of a recommendation.³⁵⁵ In carrying out the requirements of section 119, the EPA plans eventually to promulgate guidelines for determining whether insurance is "generally available" or is "fairly and reasonably priced."³⁵⁶

For the purpose of this interim guidance, the EPA has determined, based on information currently available, that Superfund RACs are unable to obtain reasonably priced pollution liability insurance. Therefore, RACs are eligible to receive indemnification under section 119 beginning from the date of enactment of SARA. However, the EPA will require that RACs seeking federal indemnification meet certain requirements.³⁵⁷

The interim guidance lists the evidence the RAC must submit to the EPA demonstrating efforts to receive liability insurance and the kind of documentation that is necessary in the event the RAC obtains such coverage.³⁵⁸ The EPA may require the RAC to submit information to the EPA or to the state contracting officer that demonstrates additional efforts made to obtain such liability insurance when no insurance has been obtained. Other documentation that must be presented includes reports of liability insurance coverage offered to but not accepted by the RAC and a status report concerning the alternative pollution liability risk transfer mechanisms which the RAC has pursued, other than commercial pollution liability insurance, such as risk retention groups, purchasing groups, and association captives.³⁵⁹

The interim guidance provides that pre-SARA indemnification terms will apply to work performed at a site after the enactment date of SARA if response action at the site is initiated prior to the date of enactment. New indemnification agreements are provided for RACs currently working under a contract with the EPA for work they will initiate at a new site after the date of enactment.³⁶⁰

Separate provisions are made for indemnification of RACs working for states. In general, the provisions parallel the provisions applicable to RACs who work for the EPA, in that the EPA may indemnify RACs performing response action activities for a state at a state-led Superfund site after the date of SARA's enactment;³⁶¹ indemnification

355. *Id.* at 5.

356. *Id.* at 5.

357. *Id.* at 6.

358. EPA INTERIM GUIDANCE, *supra* note 346, at 6.

359. *Id.* at 6.

360. *Id.*

361. *Id.*

will not be available for site work performed prior to the effective date of SARA.³⁶² An RAC must meet all of the requirements relating to efforts to obtain liability insurance coverage, and it must meet the requirements of section 119(c)(4), which applies to indemnification in the absence of appropriate insurance availability. Such an RAC would also be subject to the limits, deductibles, and other restrictions as provided in section 119(c)(5). The interim guidance provides for the processing of indemnification requests through the EPA task force until final guidance and regulations are issued. Other temporary provisions on the routing of indemnification requests are also included.³⁶³

There is also a provision for indemnification of RACs working for other federal agencies. President Reagan authorized other federal agencies to use section 119 on January 23, 1987, by Executive order.³⁶⁴ The same provisions applicable to RACs working for the EPA apply, except that other federal agencies using section 119 authority must provide their own source of funds to pay indemnification costs.³⁶⁵

The interim guidance notes that section 119(c)(2) of CERCLA authorizes the EPA, in limited circumstances, to indemnify those RACs which perform response action activities for potentially responsible parties that are subject to a consent order or decree at Superfund sites after SARA's date of enactment. The interim guidance requires that all the conditions regarding efforts to obtain private insurance be met, in addition to other interim guideline requirements; that the PRPs be unable to provide adequate indemnification, and as a result be unable to obtain the services of a qualified RAC; that the RAC response action be part of new site work initiated at a Superfund site after SARA's date of enactment; and that such response action be related specifically to the cleanup of the site.³⁶⁶ Such indemnification will not be offered for work performed for PRPs prior to SARA's date of enactment, nor for any response activity not specifically related to a remedy at a Superfund site.³⁶⁷

The interim guidance also notes that section 119(c)(5)(C) of SARA

362. *Id.* at 7.

363. EPA INTERIM GUIDANCE, *supra* note 346, at 8.

364. Exec. Order No. 12,580, 3 C.F.R. §193 (1987), *reprinted in* 42 U.S.C. § 9615 (1990).

365. EPA INTERIM GUIDANCE, *supra* note 346, at 9. RACs, working as contractors for the Corps of Engineers at a Superfund site pursuant to an interagency agreement with the EPA where the site is listed on the National Priority List, are considered to be working for the EPA rather than for some "other federal agency," and will be offered the same indemnification as if they were working for the EPA itself. *Id.*

366. *Id.*

367. *Id.* at 10.

requires that before the EPA enters into an indemnification agreement with an RAC performing work under a contract with PRPs at a Superfund site, the EPA must determine the amount by which the PRP is able to indemnify the RAC.³⁶⁸ After taking net assets and resources of the PRP into account, the EPA may provide the indemnification if it determines that the PRP's indemnification amount is inadequate for the RAC. The EPA must consider the combined capabilities of all the PRPs at a site to determine whether, as a group, they are capable of providing adequate coverage.³⁶⁹ The guidance document states that, in general, the agency expects to use this provision only in cases in which PRPs are small firms with few assets. Where PRPs are large corporations with substantial assets, or where the group as a whole has substantial assets, regions should not make requests for federal indemnification.³⁷⁰ Consequently, the EPA does not expect requests for federal indemnification to become an integral part of settlement negotiations.³⁷¹ The EPA promises to provide additional guidance in the future relating to the determination of net assets and resources before ability to provide adequate indemnification may be ascertained.³⁷² Until such time as such guidance is forthcoming, the determination is to be made by the EPA task force.³⁷³

The interim guidance document asserts that EPA indemnification of an RAC working for a PRP is a measure of last resort.³⁷⁴ In all cases in which the EPA does provide such indemnification, the model EPA indemnification agreement is to be used in the consent decree or order in specifying the terms and conditions.³⁷⁵ When EPA enters into an indemnification agreement with an RAC working for PRPs, the RAC must retain financial responsibility for a deductible amount if commercial insurance is unavailable or unreasonably priced. The RAC must also exhaust all administrative, judicial, and common law claims for indemnification against all PRPs participating in the cleanup before the EPA can pay a claim.³⁷⁶ The EPA may also provide indemnification in cases in which an RAC has received partial indemnification from a PRP which the EPA deems insufficient and in mixed funding cases (i.e., cases in which remedial costs are met in part from the Superfund

368. *Id.*

369. *Id.*

370. EPA INTERIM GUIDANCE, *supra* note 346, at 10.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. EPA INTERIM GUIDANCE, *supra* note 346, at 11.

376. *Id.* at 10.

and in part by PRPs). Where an RAC has worked for PRPs, requests for EPA indemnification must be submitted to both the indemnification task force and to the regional Superfund coordinator and the regional counsel's site representative. The EPA task force then evaluates the amount to which the PRP is able to indemnify the RAC and an amount to which the EPA will indemnify the RAC in excess of the PRP indemnification, subject to the limits, deductibles and limitations required by section 119(c)(5).³⁷⁷

The interim guidance provides recommended arrangements for RACs working for PRPs without indemnification. Such RACs may receive no indemnification at all or may receive indemnification only from PRPs. For RACs working with no indemnification, PRPs should show that the RAC is qualified, has sufficient financial capability to complete the work, and demonstrates financial responsibility for potential third party liability costs. Demonstration of financial responsibility may consist of a purchase of performance bonds, letters of credit, insurance, terms, the maintenance of a trust fund, or by other means. The consent decree should provide the appropriate specifications.³⁷⁸

For RACs receiving indemnification from PRPs only, where the EPA deems such indemnification to be adequate, the RACs should be qualified to perform the work adequately. The PRP indemnification in such instances is sufficient demonstration of financial responsibility, and no further demonstration of financial responsibility will be required. The consent decree should specify the circumstances as well as the terms and conditions of indemnification.³⁷⁹

The interim guidance document determines that the EPA will not indemnify the owner or operator of a facility regulated under the Resource Conservation and Recovery Act (RCRA).³⁸⁰ This will be the case whether the specific prohibition of section 119(c)(5)(D) applies or whether the publicly owned treatment works (POTW) is not subject to RCRA because it operates without a permit by rule. Although such POTWs are not expressly excluded under section 119, the EPA has determined that it will not extend such indemnification because the intent of the provision is to prohibit the EPA from offering indemnification to off-site treaters or disposers of Superfund hazardous waste.³⁸¹

In summary, the interim guidance recites that indemnification is not to be provided for acts of gross negligence or willful misconduct and

377. *Id.*

378. *Id.* at 11.

379. *Id.* at 12.

380. EPA INTERIM GUIDANCE, *supra* note 346, at 12.

381. *Id.*

that the section 119 indemnity provision does not preempt the rights of states to enforce a standard of strict liability.³⁸² The interim guidance document concludes, “[f]ederal indemnification is meant to be an interim vehicle which will keep the Superfund program operative until the insurance industry returns to the market. It is not intended to create a federally intrusive program that will interfere with private sector efforts to develop RAC liability insurance coverage.”³⁸³

The interim guidance contains a series of attachments consisting of model EPA indemnification agreements for use by the EPA, states, and PRPs when RACs seek indemnification from the EPA.³⁸⁴ The introduction to the model agreements notes that any deviation from the model language must be approved by the EPA indemnification task force.³⁸⁵

E. Department of Veterans' Affairs—Regulations Governing Indemnification of Contractors in Medical Research or Development Contracts

For contracts authorized by 38 U.S.C. section 4101, indemnification may be provided for physical injury and property damage from risks defined as unusually hazardous in the contract.³⁸⁶ Such contracts must provide for prompt notification of claims, and at the government's election for government control or assistance in the defense or settlement of the claim.³⁸⁷ Contractors are required to maintain the maximum amount of private liability insurance available to cover the risk, unless the Administration establishes a lesser amount. Government indemnity is then applicable in excess of the private coverage. The request for approval of indemnification must be made to the contracting officer, and it then goes to the Director, Office of Procurement and Supply, for final transmittal to the Director.

382. *Id.*

383. *Id.*

384. *Id.* at 2.

385. EPA INTERIM GUIDANCE, *supra* note 346, at 2. For additional information, see GENERAL ACCOUNTING OFFICE, CONTRACTORS ARE BEING TOO LIBERALLY INDEMNIFIED BY THE GOVERNMENT 2 (1989) (providing detailed EPA briefing document on indemnification under Superfund program).

386. See *supra* text accompanying note 218.

387. See 48 C.F.R. § 828.702 (1990) (outlining provisions relating to extent of indemnification).

IV. CURRENT AGENCY EXPERIENCE WITH CONTRACTOR INDEMNIFICATION

A. *The Frequency and Use of Indemnity Clauses in Federal Contracts*

While indemnity clauses in government contracts have been authorized for a variety of situations involving "unusually hazardous" circumstances, very few contractors secure the inclusion of indemnity clauses in their government contracts. The DOD, which may indemnify contractors under Public Law No. 85-804 and under 10 U.S.C. section 2354 for research and development contracts, has used this authority very sparingly. The Deputy Undersecretary of Defense for Acquisition Management, testifying before a congressional committee, stated that indemnification provisions are used in:

exceptional circumstances involving unusually hazardous or nuclear risks. Items that fall under the definition of 'unusually hazardous' are generally those associated with nuclear powered vessels, nuclear armed guided missiles, experimental work with nuclear energy, handling of explosives, or performance in hazardous areas. In addition, indemnification clauses are inserted in all transportation contracts entered into by the military airlift command for transportation services to be performed by air carriers that own or control aircraft which have been allocated by the Department of Transportation to a civil reserve air fleet . . .

The use of indemnification provisions is very unusual. Provisions to indemnify contractors against liabilities because of death or injury or property damage arising out of nuclear radiation, use of high energy propellants, or other risks not covered by the contractor's insurance program have indeed been used very sparingly in the last five years:

<i>Calendar Year</i>	<i>Contracts [Providing for Indemnification]</i>
1980	65
1981	77
1982	93
1983	53
1984	50

To put these numbers in perspective, the Department of Defense executed over 14.8 million contract actions in fiscal year 1984. Indemnification provisions were used in less than 1/1000 of 1% of those contract actions.³⁸⁸

In this, as in other congressional testimony, the Department of Defense

388. *Indemnification of Government Contractors: Hearing Before the Senate Judiciary Comm., 99th Cong., 1st Sess. 31 (1985)* (statement of Mary Ann Gilleece, Deputy Under Secretary of Defense for Acquisition Management, U.S. Department of Defense) [hereinafter Gilleece testimony].

has indicated that "although indemnification provisions are used rarely, they are essential to procuring the nation's defense systems."³⁸⁹ Indemnification ensures that some of the nation's critical defense programs are executed in spite of extraordinary risks. "When we operate at the leading edge of technology we cannot expect the contractor to assume all the risk particularly when hazardous or nuclear risks are involved. We believe our indemnification procedures are a necessity and they are working well."³⁹⁰

The Department of Defense has reiterated and maintained its position that its authorities under Public Law No. 85-804 and 10 U.S.C. section 2354 are adequate and that the DOD is opposed to expanding the government's financial liability by additional indemnification legislation.³⁹¹ The Deputy Undersecretary of Defense has indicated that no actual indemnification had taken place to her knowledge under any of the indemnification agreements entered into.³⁹²

A substantial number of DOD contracts that contain indemnity clauses relate to the construction of nuclear vessels. The application of indemnities in the case of nuclear vessels is significant because military uses of nuclear energy, including nuclear vessels, are not covered by the indemnity provisions of the Price-Anderson Act.³⁹³

Indemnity clauses are regularly used by the NASA for contracts that may involve "unusually hazardous" risks. As defined by NASA, an unusually hazardous risk is a risk which exceeds the level of insurance available to the contractor.³⁹⁴ NASA's primary authority to include indemnity clauses in its contracts relates to users of space vehicles.³⁹⁵ Thus, the authority for indemnification is rather narrow in its application.

NASA did not authorize indemnity provisions in its contracts until January 19, 1983, when its Administrator, in a Memorandum Decision

389. *Id.*

390. *Oversight Hearing on Indemnification of Government Contractors Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 98th Cong., 1st Sess. 40-45 (1983) (statement of Mary Ann Gillece, Deputy Undersecretary for Acquisition Management, U.S. Department of Defense) (indicating that in 1978, there were 75 indemnities authorized and in 1979, 127).

391. *Id.* at 32.

392. *Id.* at 34 (statement of Mary Ann Gillece, Deputy Undersecretary for Acquisition Management, U.S. Department of Defense) (stating that she is unaware of any actual indemnification under any indemnification agreement).

393. *See* 42 U.S.C. § 2210(a) (1988) (discussing application of indemnities to nuclear vessels and noting that military uses of nuclear energy are not covered by Price-Anderson Act).

394. *Space Activity—Unusually Hazardous Risk*, 48 C.F.R. § 1852.250-72 (1990).

395. 42 U.S.C. § 2458b (1990).

under Public Law No. 85-804, authorized that certain NASA contractors be indemnified against designated risks.³⁹⁶ The authorization gave NASA contracting officers the authority to include provisions for the indemnification of the contractors and their subcontractors against defined losses.

The Administrator, in the introduction to his Decision, provided a rationale for contractor indemnification. He recited that in July 1982, the space shuttle completed its design development and evaluation phase and was declared operational for the transportation of payload into and out of space for governmental and commercial purposes.³⁹⁷ As a consequence, the Space Transportation System (STS) would conduct launch, in-orbit, and landing activities on a repetitive basis and with increasing frequency. This necessitated a re-examination of the risks in repetitive space activities and the availability of adequate insurance at reasonable premiums to manufacturers and operators of the system.³⁹⁸ While asserting the safety of space activities, the Administrator stated that "there exists the remote and low statistical probability that a malfunction of either hardware, software or operator error could occur resulting in an accident."³⁹⁹ This low probability, though remote, cannot be totally removed and if such liability arose, it could be substantially in excess of the insurance coverage NASA contractors may reasonably be expected to acquire and maintain.

The authorization for indemnity was limited to prime contracts for the following purposes:

- a) provision of space transportation and cargo flight elements or components thereof;
- b) provision of space transportation systems and cargo ground support equipment or components thereof;
- c) provision of space transportation and cargo ground control facilities and services for their operation;
- d) repair, modification overhaul support and services and other support and services directly relating to the space transportation system, its cargo, and other elements used in NASA's space activities.⁴⁰⁰

The indemnity is limited to claims or losses arising out of the use or performance of the products or services described in NASA's space activities, when used in such activities at a United States government in-

396. NASA Administrator James Beggs' Memorandum on Indemnification of Contractors and NASA Guidance Implementing the New Indemnification Policy (1983) (LEXIS, BNA Library, Fd cont file) [hereinafter NASA Memorandum].

397. *Id.* at 2.

398. *Id.*

399. *Id.*

400. *Id.*

stallation in connection with a shuttle launch or NASA space activities.⁴⁰¹ The risks for which indemnification is authorized are the risks of personal injury or death, the loss of or damage to property, or the loss of the use of property.⁴⁰² These risks are described as unusually hazardous risks only in the sense that the potential liabilities could be in excess of the insurance coverage that a NASA prime contractor would reasonably be expected to purchase and maintain. The Administrator's opinion takes pains to state that in no other sense may the activities of STS be considered as unusually hazardous.⁴⁰³ The authorization for indemnity is given only upon condition that the contractor maintain financial protection in an amount and kind approved by the Administrator. Each prime contractor must submit proof of such financial protection.⁴⁰⁴

The opinion notes that the actual or potential cost, if any, of the action authorized is impossible to estimate. "Such an occurrence may never occur; in the event of a major incident, millions of dollars of damage could occur."⁴⁰⁵ It was reported in 1987 that the appropriate indemnity clause had been included in about forty contracts since the adoption of the Memorandum Decision.⁴⁰⁶

Answering questions on the nature and extent of injuries and damages covered by the NASA indemnity, and on the manner in which determinations would be made of the adequacy of private insurance, Neil S. Hosenball, General Counsel of NASA, responded:

In the process of the submission of requests by contractors, we have requested each of them to provide their insurance program to us and also to furnish us with the premiums that were paid in the prior renewal term. And, yes, it calls for a judgment. The example that I gave you earlier of one contractor who has indicated that his insurance in the prior renewal period was \$234,000 related to the space shuttle, is now being increased to \$3 million. We have to make a judgment as to whether there is a substantial risk of exposure, both from a legal as well as a technical standpoint. The contractors are concerned about a catastrophic situation, as well as from the point of view of potential lawsuits. Whether there would be recovery or not remains to be seen. For example, if a shuttle with three commercial payloads were on board, happened to land in a populated area, you would not only lose the three payloads but there would be damage on the ground, as well. If you just look at the payload situation itself, you could have upward of \$200 million right there, just in the payload cost. On top of that, you would have

401. NASA Memorandum, *supra* note 396, at 2.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.* at 3.

406. Telephone interview with James Pesnell, NASA Senior Procurement Officer, and David Sudduth (May 21, 1987).

loss of revenue and consequential damage claims, in addition to which some of our commercial carriers have been selling off transponders. Those transponders could go for as much as \$10 million, so the worth of that satellite could be, rather than \$50 million, two-hundred-and-some-odd million dollars. So, you have a potential of lawsuits that could well exceed insurance limits. Now, we have made a judgment that the risk to the Government if the Government were to indemnify, is very, very small. That is a judgment we have to make—both that the incident would occur, and second, that there would be the type of recovery I have indicated.

However, contractors say: Well, that is fine for the Government to take that position. If the Government does suffer a loss, why, the Government would still continue. However, if we suffered the loss, we could very well be out of business.

And so they have that concern. I think it is a legitimate concern for a business to take. It is for that reason that we have proceeded with the indemnification.⁴⁰⁷

Note that this response was given several years before the Challenger shuttle disaster.

It has been noted by industry commentators that the test established by NASA for the availability of indemnities essentially relies on the Administrator's discretion and judgment.⁴⁰⁸ NASA provides indemnities for "unusually hazardous" risks, i.e. it provides government indemnity above the level of insurance available to the contractor. The amount of insurance available is not a fixed amount but depends on a judgment as to how much insurance is available to the contractor, which in turn may depend on insurer's judgment of the particular risks involved.⁴⁰⁹ Although NASA maintains that its measure of unusually hazardous risk, as defined by insurance availability, is more accurate than the standard applied under the DOD's authority under Public Law No. 85-804, both standards actually require the exercise of the Administrator's judgment. It is clear from the Memorandum Decision adopted by NASA that the definition of "unusually hazardous risk" defined as indemnity above the level of insurance available saves the agency from reclassifying a project as hazardous, since it has taken the position that it is not engaged in any hazardous activity in its STS projects.⁴¹⁰

A limited indemnity program was instituted by the Federal Aeronautics Administration (FAA) in 1981, which provided for contracts to

407. *Oversight Hearing on Indemnification of Government Contractors Before the Subcomm. on Administrative Practice and Procedure, of the Senate Judiciary Comm.*, 98th Cong. 1st Sess., pt. 2, 8 (1983) (testimony of Neil S. Hosenball, General Counsel, NASA) [hereinafter Hosenball testimony].

408. See *supra* text accompanying note 407 (excerpting congressional testimony of Neil S. Hosenball, General Counsel, NASA).

409. NASA Memorandum, *supra* note 396, at 2.

410. *Id.* at 2.

reprogram computers used by air traffic controllers. The FAA Memorandum Decision for this program, which includes the authorization for indemnities, recognizes the potential for major liability arising out of aviation accidents and also recognizes that the contract would not be undertaken unless indemnity were provided.⁴¹¹ There was no special legislation to authorize indemnities for the particular project, but the Memorandum Decision includes a finding that the project to reprogram computers for civil aviation would advance national defense functions and was therefore appropriately authorized under Public Law No. 85-804 and Executive Order No. 10,789, and under the provisions for military research and development under 10 U.S.C. section 2354.⁴¹²

Indemnification provisions under the Federal Aviation Act of 1958 as amended and the War Risk Insurance Provisions that preceded the current Federal Aviation Act provisions do provide for indemnities, but as has been previously noted,⁴¹³ the indemnification provision has found little application in the past few years. In addition, the revolving fund which supplies the means for indemnities has not been used since the Vietnam War and remains undiminished.⁴¹⁴

The major indemnification scheme under the Price-Anderson Act⁴¹⁵ has been enhanced and reauthorized for the fourth time, but fortunately no indemnities of any kind have thus far been paid for damages caused by an extraordinary nuclear incident. The one effort to use the Act to obtain indemnification for the costs of planned evacuation at the time of the Three Mile Island incident was turned down by the court as not covered by the Act.⁴¹⁶

Although the EPA is authorized by recent amendment of the Superfund law to indemnify response action contractors, i.e. contractors that contract to undertake response and remedial cleanup activities under the Superfund law,⁴¹⁷ the EPA has clearly distinguished RAC liabilities from private liabilities of generators, transporters and disposers of hazardous wastes, i.e. the potentially responsible parties.⁴¹⁸

411. 46 Fed. Reg. 62,596, 62,597 (1981).

412. *Id.* at 62,597.

413. *See supra* text accompanying notes 181-83 (noting limited application of indemnity program under Federal Aviation Act).

414. *See supra* text accompanying note 182 (noting program has not needed to issue insurance since end of Vietnam War).

415. *See supra* Part IID (discussing Price-Anderson Act amendments).

416. *See supra* note 113 (citing *In re TMI Litig.* Governmental Entities Claim, 544 F. Supp. 853 (M.D. Pa. 1982) and noting in district court dismissal of case that 1987 amendment of Act authorizes indemnification for planned evacuation expenses).

417. *See supra* text accompanying note 252 (quoting liability of RACs under Superfund law).

418. 42 U.S.C. § 9607 (1988).

The Department of Health and Human Services is reported to have used indemnity provisions in earlier contracts involving clinical experiments on human subjects. Information from HHS officials indicates that no indemnification clauses have been included in HHS contracts for the last several years.⁴¹⁹ There appears to be a general resistance to the inclusion of indemnity clauses in HHS contracts, which are viewed as affording a new opportunity for litigation directed at the government's deep pocket. To some extent this reaction appears to have resulted from, or to have been strengthened by, the Department's swine flu litigation experience.⁴²⁰

In addition to indemnity clauses in contracts by authorized agencies, there have been instances in which agencies have granted indemnification without authorization. The Office of Federal Procurement Policy (OFPP), in a statement relating to its activities concerning product liability and indemnification of government contractors, commented on the work of an Interagency Task Force on Indemnification, which reported in 1982. The task force was made up of representatives of the Offices of General Counsel of DOD, DOE, DOJ, NASA, NRC, the Federal Emergency Management Agency (FEMA), the National Science Foundation (NSF), the General Accounting Office (GAO), and the Department of Commerce, along with OFPP representatives. It noted:

Several agencies reported contracting situations under which they had agreed, without specific authority, to indemnify contractors engaged in certain activities. Those activities included contract airline evaluation flights from Southeast Asia under the agency for international development (AID), acquisition of utility services for federal installations (GSA), and testing of devices and compounds using human subjects (HHS). In addition there were a few instances reported where contractors refused to compete for contracts without being indemnified. Representatives of the private sector reported their experience with increased liability insurance premiums; the infinite nature of their tort liability exposure under many long-term government programs (including space activities); the effect of the doctrine of strict liability which is being applied in varying degrees in state courts; and what they perceive as the unfairness of the government's immunity from suit in certain product liability situations.⁴²¹

No evidence was found of the number of contracts involved in each of

419. Telephone interview with Jeffrey Robbin, Staff Attorney, General Counsel's Office, HHS (May 18, 1987; Aug. 25, 1987).

420. *Id.*

421. *Oversight Hearing on Indemnification of Government Contractors Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 98th Cong., 1st Sess., pt. 2, 4 (1983) (statement of the Office of Federal Procurement Policy concerning product liability problems encountered by government contractors).

these situations, nor is there any available evidence of the amount of indemnification paid in these miscellaneous instances.

B. *The Cost of Indemnification in Government Contracts*

Indemnity clauses in government contracts place the United States at great risk of contingent liabilities. In the case of nuclear accidents, for instance, the contingent liability under current law is in excess of seven billion dollars. The potential for contingent liabilities in NASA contracts are in the hundreds of millions of dollars, if not more. While the percentage of all Department of Defense contracts entered into in which indemnities are included is diminishing, there are nevertheless an average of about seventy-five contracts a year entered into by the DOD in which indemnities are provided.

In its 1987 annual report to Congress as required under the National Defense Contracts Act,⁴²² the DOD made clear that there had been no indemnity claims for the past three years, and there is no evidence that there were any others before that time.⁴²³ While the reports for 1982, 1983, 1984, 1985, and 1986 each show "contingent liabilities" for each branch of the Department of Defense Armed Services, these contingencies are listed as cost-free, because none of them had occurred during the calendar year.⁴²⁴ The reports for each year note that the potential cost of the liabilities cannot be estimated since the liability to the Government, if any, will depend upon the occurrence of an incident as described in the indemnification clause. The summary table for the 1987 report indicates such contingent liabilities in three contracts of the Army, thirty-three contracts of the Navy, and sixteen contracts of the Air Force.⁴²⁵

The record of the past several years in DOD contracts is borne out by the earlier experience reflected in the legislative history of the 1977 re-adoption of the National Defense Contracts Act. In supporting the re-adoption of the Act, one congressional committee noted that no indemnity payments had been made in the period from the initial enactment of the law until its proposed re-adoption.⁴²⁶ In addition, no evi-

422. 50 U.S.C. § 1436 (1982).

423. 133 CONG. REC. H150 (daily ed. Mar. 23, 1987).

424. See *supra* text accompanying note 388 (discussing indemnification claims for years 1982-1986); see also *id.* (discussing indemnification contracts for 1986).

425. 133 CONG. REC. H1510 (daily ed. Mar. 23, 1987).

426. H. REP. NO. 2232, 85th Cong., 2d Sess. 10-15 (1958) (statements to Congressman Emanuel Cellar, House of Representatives Committee on the Judiciary, by Hugh L. Eryden, Director of the Bureau of the Budget, United States Atomic Energy Commission; Sinclair Weeks, Secretary of Commerce; Joseph Campbell, Comptroller General of the United States; and D. Otis Reasley, Secretary, Department of the Inte-

dence has been found that any indemnities have been paid upon the occurrence of a particular covered event under other, smaller indemnity programs for the FAA, HHS, and other agencies. The revolving fund under the Federal Aviation Act, which earlier provided war risk insurance, appears to be intact because no indemnity payments have been made. The only substantial government liability expenditures appear to be expenditures incidental to the swine flu program, which was not an indemnity program at all, but a program in which the United States made itself a substitute defendant for the manufacturers and participants in the administration of the swine flu immunization.⁴²⁷

There is virtually no evidence that the government has had to make good on any of its contingent liabilities under contractual indemnity provisions in the past thirty years since the original passage of the National Defense Contracts Act in 1958 and the Price-Anderson Act in 1957. Government agencies and departments may be reluctant to discuss indemnities, but even if this reluctance has led to an underestimation of contractual indemnities paid by the government, such an underestimation or possible partial reporting is possible only if indemnities paid were not very substantial.

The information here drawn upon does not include data on the 1986 space shuttle disaster. The space shuttle explosion and the near disaster at Three Mile Island indicate that in spite of the low cost of contractual indemnities thus far, the contingent liabilities assumed by the government are real and may become pressing realities without advance notice.

C. *The Impact of the Anti-Deficiency Act*

The cost of indemnities in government contracts has long been a matter of some concern. Until May 1982, indemnity clauses exposed the government to open-ended liabilities. However, following a decision by the General Accounting Office (GAO) on May 3, 1982,⁴²⁸ indemnity clauses in government contracts must specify that the indemnity is available only to the extent of available authorization, pursuant to the Federal Anti-Deficiency Act.

The Anti-Deficiency Act prohibits the incurrence of any obligation for the future payment of money in advance of or in excess of an ap-

rior reporting that no indemnity payments had been made from the initial enactment of the National Defense Contracts Act until its re-adoption in 1958).

427. See *supra* Part IIH (discussing Swine Flu Immunization Project).

428. Comp. Gen. Op. B-201072 (May 3, 1982) (unpublished).

propriation adequate to cover it.⁴²⁹ In the May 1982 GAO decision, the Comptroller General held that a clause for use in cost reimbursement contracts entitled "Insurance-Liability to Third Persons" in the Federal Procurement Regulations (now replaced by the FAR) violated the Anti-Deficiency Act.⁴³⁰ The decision, made in response to a request from HHS, noted that the clause provides virtually complete indemnity to contractors for any liability incurred in the performance of such contracts, in unlimited amounts and without restrictions.⁴³¹ In the initial decision, the Comptroller General suggested a modification of the clause to provide that the indemnity be limited to amounts available in agency appropriations at the time the liability arises, and that nothing in the contract be construed to bind Congress to appropriate additional funds to cover any deficiency.⁴³² The opinion was promptly challenged by the Public Contract Law Section (PCLS) of the American Bar Association (ABA), urging reconsideration.

Although the Comptroller General generally does not render decisions in response to requests from nongovernmental entities that are not parties to the dispute in question, the Comptroller General recognized, in this instance, that the PCLS reflects the views of government contractors who would be directly affected by the decision if all federal agencies were to implement it.⁴³³ The ABA intervenors asserted that the May 1982 decision upset a forty-year practice based on a 1943 decision of the Comptroller General. The ABA claimed the opinion would have a destabilizing effect, that there was no Anti-Deficiency Act violation, and that the decision conflicted with earlier decisions by the Comptroller General.⁴³⁴ Following an elaborate process of distinguishing earlier cases and differentiating the 1943 opinion, the Comptroller General concluded that its initial decision had been correct. The clause is clearly in violation of the Anti-Deficiency Act, the Comptroller held, because under the clause, the maximum liability is not determinable, and it is not possible to set aside sufficient funds to meet the government's obligation if and when it arises.⁴³⁵ The Comptroller further considered:

429. 31 U.S.C. § 1341 (1988).

430. See Matter of: Assumption by Government of Contractor Liability to Third Persons—Reconsideration, 62 Comp. Gen. 361, 362 (1983) (discussing 1982 initial decision).

431. *Id.* at 361-62.

432. *Id.* at 366-67.

433. *Id.*

434. *Id.*

435. 62 Comp. Gen. 366-67 (1983).

Who can set a maximum price, at the time the indemnity obligation is incurred, on a human life or predict the amount of a court award for serious injury or other dire consequences arising from the performance of a contract? We find that the clause, *on its face* commits the Government to pay at some future time an indefinite sum of money should certain events happen. There is no possible way to know at the time the contract is signed whether there are sufficient funds in the appropriation to cover the liability if or when it arises because no one knows in advance how much the liability may be.⁴³⁶

In reconsidering the initial decision, the Comptroller General also rejected the modification recommended by the GAO in the May 1982 decision, agreeing with the PCLS' statement that the modification is a "naked promise because an appropriation may be exhausted at the time a loss occurs."⁴³⁷ The Comptroller General observed that the effect of the indemnity may well vary under the proposed modification depending on whether the accident indemnified occurred at the beginning of the fiscal year, when appropriations were still available, or at the end of the fiscal year when few appropriations would be left over. Furthermore, even if adequate funds are available, the need to meet the obligation of the indemnity may well exhaust a particular department's resources for the rest of the fiscal year, which would also be undesirable.⁴³⁸

As the Comptroller General's opinion itself recognizes, the reach of the initial decision relating to the application of the Anti-Deficiency Act is not very broad. The opinion notes that many indemnity contracts are "protected by the statutory umbrella," which include contracts under the National Defense Contracts Act and other laws as to which Congress has enacted a statutory exception to the Anti-Deficiency Act in the exercise of its legislative powers.⁴³⁹ As noted earlier, expressly excepted legislation includes the Price-Anderson Act.⁴⁴⁰

In the course of congressional hearings on proposed indemnity legislation, industry witnesses generally call attention to the restrictive impact of the Anti-Deficiency Act ruling, though it does not appear that the ruling has made any significant difference in the government contracts of the many agencies that include indemnity provisions in their contracts pursuant to the National Defense Contracts Act. Past experi-

436. *Id.* at 366 (emphasis in original).

437. *Id.* at 367.

438. *Id.* at 367.

439. *Id.* at 365. The opinion points out that the GAO has "never objected to an indemnity where the maximum amount of liability is fixed or readily ascertainable, and where the agency had sufficient funds in its appropriation which could be obligated or administratively reserved to cover the maximum liability." *Id.* at 365.

440. 42 U.S.C. § 2210(j) (1988).

ence with the extension of authority to grant indemnities to the FAA indicates that the National Defense Contracts Act and the related Executive Order are capable of some expanded interpretation, so that the impact of the Anti-Deficiency Act may not be as significant as some of the government contractors assert.

V. CURRENT AGENCY VIEWS ON INDEMNITIES IN GOVERNMENT CONTRACTS

An effort to arrive at a shared agency approach to indemnification of government contractors is contained in the 1982 report of the OFPP Interagency Task Force on Indemnification, entitled "Indemnification of Government Contractors Against Third Party Liability Claims." The Task Force consisted of ten members, nine of them representatives of the Offices of General Counsel of executive agencies and departments, DOD, DOE, DOJ, NASA, NRC, FEMA, NSF, Commerce, a representative from the General Accounting Office, and representatives of OFPP. The report contains the caveat that it reflects the personal analysis and findings of each member; it does not necessarily reflect the view of their respective agencies. In spite of this caveat, there was a dissent from the report by the Department of Justice representative. The following is a summary of the Task Force conclusions:

1. There is a reasonable justification for amending E.O. 10789, as amended, to authorize all Executive Agencies who may exercise functions in connection with the national defense to agree to indemnify against third-party liability claims under the authority of Public Law 85-804 and subject to the other conditions in E.O. 10789, as amended.
2. E.O. 10789 also should be amended to permit an eligible agency to agree to indemnify a contractor if the particular contract gives rise to the possibility of 'catastrophic losses' which should be defined as 'losses which the particular contractor cannot reasonably protect against through private insurance or self-insurance by the payment of a reasonable premium or the establishment of or reliance on a reasonable self-insurance reserve.'
3. The head of an Executive Agency has the authority to broadly construe the clause appearing in paragraph 1 of E.O. 10789, as amended, which authorizes the agency to agree to indemnify a contractor whenever in his judgment 'the national defense will be facilitated thereby.'
4. The Task Force is not now prepared to recommend that there is a convincing justification to provide through legislation for the indemnification of all Government contractors. Furthermore, the Task Force believes that if the Executive Order is amended as proposed, indemnification will be made available to most contractors who need the protection of indemnification. Some members of the Task Force believe that legislation should be drafted to reverse the precedent of *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) and, moreover, to require the Government to indemnify a contractor where the con-

tractor is held liable under the doctrine of strict liability as a result of Government imposed specifications or drawings. However, a majority of the Task Force believed that a recommendation proposing such a sweeping change in its United States law should be supported by an in-depth study. Moreover, such a study would no doubt duplicate the work underlying H.R. 1504, 97th Cong., 1st Sess. a bill 'to provide indemnity for suppliers of products to the Government in certain cases in which such suppliers become liable for loss with respect to those products, and for other purposes' and similar bills which the Congress has had under consideration recently. Finally, we believe such a study should be undertaken by a team representing the various interests affected and not solely representatives of Government agencies.⁴⁴¹

The Task Force report points out that the Task Force was stimulated by the 1972 report of the Commission on Government Procurement, which had recommended that legislation be enacted to provide for government indemnification of contractors for liability damage arising from a catastrophic accident occurring in connection with a government program.⁴⁴² It had recommended that such indemnification should be above the limit of available insurance.⁴⁴³

In congressional testimony, one of the co-chairmen of the Task Force related that the Task Force had sent out a memorandum to thirty-five executive agencies to inquire whether they felt a need to indemnify their contractors. Nineteen responses were received indicating that some agencies had been required to provide indemnities in order to accomplish their mission, even though these agencies did not have express statutory authority to indemnify. The Task Force could not point to any written record of evidence that potential contractors had refused to bid on a government contract because the agency refused to undertake to indemnify them. It was asserted, however, that there was some indirect evidence that this may have occurred in the past.⁴⁴⁴

The Task Force recommendations essentially would amount to a slight expansion of authority under Public Law No. 85-804 and Executive Order No. 10,789. The Task Force would also expand coverage for catastrophic losses, but it did not recommend legislation to indemnify all government contractors.⁴⁴⁵

In spite of the very modest expansion of government indemnification recommended by the Task Force, the Department of Justice representative dissented, and it appears that the DOJ point of view reflected the

441. OFPP INTERAGENCY TASK FORCE ON INDEMNIFICATION, *Indemnification of Government Contractors Against Third Party Liability Claims* 2 (Jan. 28, 1982).

442. REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 100 (1972).

443. *Id.*

444. OFPP INTERAGENCY TASK FORCE ON INDEMNIFICATION, *supra* note 441.

445. *Id.*

view of the Reagan Administration. Testifying before a congressional committee in opposition to H.R. 1623 on November 6, 1985, Richard Willard, Acting Assistant Attorney General, Civil Division, Department of Justice, indicated that the existence of indemnification would tend to subject the government to larger judgments because of the deep pocket aspects of the government's involvement.⁴⁴⁶ He asserted in other testimony that indemnification is not the way to deal with the tort law changes that have occurred in the area of strict product liability,⁴⁴⁷ and that the government is not equipped to evaluate insurance needs involved in every contract, which would be made necessary by the provision for indemnification above the amount of reasonable insurance.⁴⁴⁸ Mr. Willard stated that the Justice Department prefers tort reform to indemnification and that such tort reform should consist of limiting unreasonable awards and punitive and noneconomic damages, such as damages for pain and suffering.

The tort reforms to which Assistant Attorney General Willard referred are incorporated in the so-called "Administration Liability Reform Package" introduced in the House of Representatives on May 7, 1986. The package consisted of a proposed "Product Liability Reform Act of 1986," "Government Contractor Liability Reform Act of 1986," and the "Federal Tort Claims Reform Act of 1986." In the course of introducing this package of legislation, Representative Fish noted that the three-part legislative package is the out-growth of findings and recommendations made by the Administration's interagency Tort Policy Working Group chaired by Assistant Attorney General Willard.⁴⁴⁹ The tort law reforms to which Mr. Willard referred in his testimony as the preferred alternative to government contractor indemnification were included in the report of the Tort Policy Working Group.⁴⁵⁰ The specific

446. *Fair Allocation of Government Fault Act, H.R. 1623: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm.*, 99th Cong., 1st Sess. 21, 22 (1985) (testimony and prepared statement of Richard K. Willard, acting Attorney General, Civil Division, Dep't of Justice).

447. *Indemnification of Government Contractors: Hearings Before the Senate Judiciary Comm.*, 96th Cong., 1st Sess. 18-28 (1979) (offering similar testimony by Richard K. Willard, acting Assistant Attorney General, Civil Division, U.S. Dep't of Justice in opposition to S. 1254 which attempted to provide for indemnification of government contracts in certain cases).

448. *Hearings on H.R. 4083 and 4199 Before the Subcomm. on Administrative Law and Governmental Relations of House Judiciary Comm.*, 98th Cong., 2d Sess. 44, 50 (1984) (testimony and statement of Richard K. Willard, Assistant Attorney General, Civil Division, Dep't of Justice).

449. 132 CONG. REC. H2468-69 (daily ed. May 7, 1986) (statement of Rep. Fish).

450. U.S. DEPT OF JUSTICE TASK FORCE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (Feb. 1986).

recommendations of the Tort Policy Working Group were to return to a fault-based standard of liability; to base causation findings on credible scientific and medical evidence; to eliminate joint and several liability in cases where defendants have not acted in concert; to limit noneconomic damages, such as damages for pain and suffering, mental anguish, or punitive damages to a maximum dollar amount; to provide for structured verdicts, i.e. for periodic instead of lump-sum payments of damages for future medical care and lost income; to reduce awards of damages by the amount of recoveries from collateral sources; and to limit attorneys' contingency fees to reasonable amounts on a sliding scale. The Administration's general policy reflected in the Liability Reform Package was to improve insurance availability at reasonable premium rates, thereby deemphasizing the need for government indemnity of contracts.

The Justice Department has also taken the position that there is no major problem with the existing rules of indemnification or with the existing limits on indemnification, because government contracts are being actively pursued.⁴⁵¹ Whether the absence of government indemnification and the presence of excessive risks discourages suppliers from bidding for government contracts is difficult to prove or disprove. The evidence is not overwhelming either way, but testifying before another congressional committee, one industry representative asserted that he knew of at least one situation in which his company, TRW, Inc.,⁴⁵² backed out of competing on an FAA contract because of the lack of an indemnity clause. In addition, a witness appearing for the American Bar Association noted that at least one major chemical manufacturer has dropped out of government contracting because of the unavailability of insurance.⁴⁵³

The Department of Defense has long taken the position that current indemnification authorization under the National Defense Contracts Act is adequate and that contractors should cover their own risks except for unusually hazardous or nuclear risks. As noted earlier,⁴⁵⁴ the

451. *Contractor Liability and Indemnification Act, S. 1839: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 99th Cong., 1st Sess., pt. 3, at 7 (1985)* (testimony of J. Paul McGrath, Assistant Attorney General, Civil Division, Dep't of Justice).

452. *Fair Allocation of Government Fault Act, H.R. 1623: Hearings Before the Subcomm. on Administrative Law and Government Relations of the Senate Judiciary Comm. Judiciary, 99th Cong., 1st Sess. 51-53 (1985)* (testimony of T. Richard Brown, Vice President, TRW, Inc.).

453. *Id.* at 73 (testimony of Karen H. Williams, Chairman, Legislative Liason Comm., Section of Public Contract Law, ABA).

454. See *supra* text accompanying notes 388-393.

DOD has included indemnification clauses in some fifty to eighty contracts out of its many millions of contracts each year.

NASA has supported a moderate expansion of the use of indemnities in its contracts. In congressional committee hearings, it was noted that NASA issued regulations authorizing indemnity clauses in NASA contracts because the Agency was paying unreasonable premiums for liability insurance, since contractors are reimbursed for the premium payments as part of the cost of the contract. NASA had indicated that the Agency would be unable to attract private contractors without such indemnity clauses because premiums had substantially increased.⁴⁵⁵

One subcontractor, working for both the Air Force and NASA, continued working for the Air Force because it received indemnity coverage and discontinued work for NASA due to lack of such coverage. Under the current NASA policy, it is the responsibility of space shuttle contractors and subcontractors to ask NASA for indemnity coverage. Approximately ten contractors had done so from the start of the program until March 8, 1983. Not all contractors ask for coverage, because some consider their insurance coverage adequate. NASA has indicated that it is reluctant to label its projects as potentially involving catastrophic loss, as required for indemnification under Public Law No. 85-804, but prefers to indemnify for unusually hazardous projects, which may involve loss above the level of reasonably available insurance coverage.⁴⁵⁶

NASA notes that the vast majority of its contracts are cost-plus contracts under which there is a direct pass-through of insurance premium costs to the government. Contractors cannot apply for the inclusion of an indemnity clause in their contracts until after the contract has been awarded. As a result, indemnification is not used as a consideration in awarding contracts to bidders. It appears that by mid-1987, NASA had approved approximately forty indemnification clauses in its contracts. There have been no requests for indemnification pursuant to these agreements, and even the Challenger disaster has not resulted in any requests for indemnification up to this point.⁴⁵⁷

The current policy of the Department of Health and Human Services

455. See Hosenball testimony, *supra* note 407 and accompanying text (discussing need for indemnity clauses).

456. *Oversight Hearings on Indemnification of Government Contractors: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 98th Cong., 1st Sess. 13-15 (1983) (statement of Neil S. Hosenball, General Counsel, NASA).

457. Telephone interviews with James Pesnell, Senior Procurement Officer, NASA, and David Sudduth (May 21, 1987).

is to exclude indemnity clauses from its contracts. HHS does not view the grant of indemnification authority as explicit.⁴⁵⁸ In addition, HHS believes that indemnification clauses violate the Anti-Deficiency Act; consequently, HHS would only agree to indemnity clauses that specify a maximum dollar amount or define the time period of the appropriation. Furthermore, the experience with the swine flu program has led to a conviction that the government's deep pocket must be protected, and that if contractors or groups of contractors insist on special indemnity clauses they can "get them from the Hill," i.e. through special legislative authorizations. HHS would, in most instances, opt for special legislative approval.

None of the departments and agencies of the federal government appear to feel any strong need for the expansion of indemnities in government contracts, or for broad legislation that would extend indemnities to government contractors across-the-board. Testimony before congressional committees and telephone conversations with members of agencies and departments convey the impression that they are reasonably satisfied with the present state of the law and the present state of practice. In general, there is no feeling that current practices and limits on indemnities discourage potential contractors from bidding. In the few instances where increased insurance costs have changed the willingness of contractors to undertake risky tasks, most notably NASA's experience with respect to space shuttle contracts, the movement in the direction of greater use of contractual indemnities has come as much from the government as from contractor pressure. NASA seemed to have provided authority for indemnity clauses in its contracts when it appeared that rising insurance costs were having an undesirable effect on cost reimbursement contracts.⁴⁵⁹ Having accepted the use of indemnification clauses in its contracts, NASA has granted such clauses to ten contractors in forty contracts. Having changed the regulations in this respect,⁴⁶⁰ NASA seems to be content to leave current law and regulations unchanged.

The Department of Defense also seems to find no reason to change the statutory law or regulations. There is no indication that the DOD considers its practices in limiting the grant of indemnification clauses as a discouragement to potential bidders, and it is clear that the DOD

458. See *supra* note 78 and accompanying text (noting Medicare intermediary and carrier contracts are areas where HHS has provided indemnification clauses pursuant to 42 U.S.C. § 1395h(j) and 42 U.S.C. § 1395u(e) (1988)).

459. See *infra* text accompanying note 460 (reporting that appropriate indemnity clause has been included in about 10 contracts since adoption of regulations).

460. *Id.*

takes the position that if current law and regulations discourage bidders, it is up to industry to make that case.

Likewise, the Department of Health and Human Services takes the position that current authorizations for contractual indemnities are adequate. However, there is recent evidence that HHS' policy to turn down contractors' requests for indemnification clauses has adversely affected the mission of the National Institutes of Health in several areas. Impact has been felt in the areas of Acquired Immune Deficiency Syndrome (AIDS) research, in research on prophylactics in connection with AIDS, and in certain areas of contraceptive and carcinogen research. In the case of contraceptives, two research contracts have been terminated because the contractors were unable to obtain liability insurance.⁴⁶¹ Another area affected by HHS' refusal to grant indemnity clauses is the agency's asbestos removal program. Contractors have asked for, but have not received, indemnity clause contracts for this work. Since these contractors often cannot obtain adequate insurance protection, many smaller companies have gone into asbestos removal because they are more willing to risk bankruptcy at some later date.⁴⁶²

While acknowledging that there are some emerging areas where indemnification may be required, HHS would prefer to leave that problem to legislative resolution, on a case-by-case basis, rather than by way of across-the-board indemnification laws or broader regulatory authority. If proposed research contracts involving clinical investigation using human subjects or clinical investigations relating to AIDS and its prevention, remedial measures, immunization, or cure were to increase the pressures for contractual indemnification, HHS is likely to deflect to Congress these pressures to provide authority for specific indemnification but limited contractual undertakings.

VI. FEDERAL INDEMNITY LEGISLATION PROPOSED

In the last eight years or so, a number of bills involving indemnification were introduced in Congress, and hearings were held on a few of them. None of them, however, were reported out of committee, and there was no discussion of indemnity issues of any kind on the floor of the House or Senate. Three types of bills were introduced, and the bills within each type followed or duplicated each other very closely.

The first type of newly proposed indemnity legislation is an effort to codify and perhaps to expand slightly the government contract de-

461. Grinstead Letter, *supra* note 79.

462. Telephone interview with Jeffrey Robbin, *supra* note 419.

fense.⁴⁶³ H.R. 5351, introduced in the 96th Congress, was intended

to establish just standards of ultimate liability for suppliers of products to the United States Government by providing indemnity for those suppliers in certain instances in which the United States Government is logically responsible for the harm creating the supplier's liability but cannot be required to provide indemnity because of sovereign immunity.⁴⁶⁴

The bill provided that the government shall be liable as indemnitor for any loss experienced by a contractor because of the "characteristic" of a product supplied to the United States Government, if that characteristic was required by government specifications. The purpose of the bill is rendered even more apparent by the fact that on the same day the bill was introduced, Congressman Gudger, who introduced H.R. 5351, also introduced H.R. 5358, a bill to provide relief from the holding of the Supreme Court in *Stencel Aero Engineering Corporation*.⁴⁶⁵

A more advanced version of the same approach to government indemnification of contractors is represented by H.R. 4083,⁴⁶⁶ introduced by Congressman Sam B. Hall, Jr., in 1983. The bill authorizes the indemnification of a contractor for product liability claims, as well as for liabilities that were incurred by the contractor for damages resulting from harm caused or contributed to by the misuse or modification of a product by the United States Government. No indemnity would be available if the liability arose solely on account of the negligence of the supplier, or if the supplier knew or should have known of the defect in the characteristic of the product. However, indemnity would be available: if the supplier informed the government of the defect and the government required the characteristic to be retained pursuant to the contract after it was informed of the defect; if the product was designed or manufactured in accordance with commercial standards or is generally available to persons other than the government; or if the supplier either designed or participated in designing the specification pursuant to which the contract was performed.

Procedurally, the bill allows the contractor to bring an action for indemnification or to join the United States as a third party in any civil action brought against it for damages in a product liability claim. The

463. See *supra* text accompanying note 9 (discussing government contract defense). See Government Contractors' Product Liability Act of 1979, H.R. 5351, 96th Cong., 1st Sess. (1979) (representing effort to expand government contract defense).

464. H.R. 5351, 96th Cong., 1st Sess. (1979).

465. See *supra* text accompanying notes 15-18 (discussing *Stencel Aero Eng'g Corp.*, 431 U.S. 666 (1977)).

466. Government Contractors' Product Liability Act of 1983, H.R. 4083, 98th Cong., 1st Sess. (1983).

bill also allows the United States to intervene in civil actions brought against a supplier for product liability, and provides that the right to indemnification under the bill would be established by a preponderance of the evidence. The bill requires that the Attorney General be notified of any product liability action brought against the supplier for which indemnification will be sought.

The bill establishes comparative responsibility as a basis for the determination of the amount of indemnification to be provided. It also establishes comparative responsibility in cases of misuse or modification of a product. The bill defines misuse or modification of a product to include the use of a product in disregard of warnings or instructions, or in a manner different from the reasonable practice of users of the product.

No indemnification would be available for claims arising outside the United States or arising under the admiralty or maritime jurisdiction of the United States. The bill would require that indemnification be reduced by any amount of insurance paid to the supplier on account of the losses indemnified. The bill would apply with respect to claims for damages "arising after" the date of enactment.

Another approach to contractor indemnity legislation reflects an effort to assure a fair allocation of responsibilities between the government and the contractor in cases that give rise to liability. H.R. 1623, introduced in 1985,⁴⁶⁷ provides for "equitable reduction of liability."⁴⁶⁸ When a civil action is brought by an officer or employee of the United States or by his or her legal representative against a contractor for harm or injury for which such officer or employee is entitled to receive workers' compensation or other benefits from the United States pursuant to Title 10, Title 37, Title 38, or Chapter 81 of Title 8, of the United States Code, the court, upon application of any party, is to make findings of fact as to the proportion that the fault of the United States bears to the total fault of all persons in causing the harm for which suit is brought. The amount for which the United States is entitled by law to be reimbursed through subrogation for benefits provided under the various compensation plans is to be reduced by the proportion of fault of the United States in causing the harm. The contractor who wishes to claim the benefit of this provision must give written notice to the Attorney General within ninety days after the filing of the civil action. In determining the proportion of fault of the United States,

467. H.R. 1623, 99th Cong., 1st Sess. (1985). The bill was introduced by Representative Kindness for himself and several other members of the House.

468. *Id.*

the court must consider a number of factors relating to the contract specifications for which the United States is responsible, and to the degree of care exercised by the United States in the use, application, and maintenance of products or services after delivery by the contractor.

The bill further provides that the United States shall hold harmless and indemnify any contractor against any liability arising out of or resulting from goods or services supplied pursuant to a contract, to the extent that such liability exceeds the amount against which the contractor is protected through commercial insurance or qualified self-insurance which he is required to maintain in order to be entitled to the indemnity. The indemnity covers liability for all damages arising from personal injury, illness, or death from damage to or loss of use of property. The indemnification provided is not to apply to liabilities arising out of or resulting from the use of goods or services that are also sold by the contractor to nongovernmental purchasers for uses substantially similar to the uses or applications of the goods and services by the United States. The bill provides for rulemaking by the administrator of a federal procurement agency, after opportunity for a hearing, to provide guidelines relating to limitations affecting goods supplied to nongovernmental purchasers for nongovernmental uses, and relating to the amount of commercial insurance and qualified self-insurance required.

Liabilities and risks for which indemnification is provided under the Price-Anderson Act are exempted from coverage. The bill also provides funding sources for the payment of indemnities.

The third type of recently proposed indemnity legislation is exemplified by S. 1839, introduced in 1983 by Senator Grassley.⁴⁶⁹ Similar to earlier mentioned bills that require apportionment of liability between the government and the contractor, this bill also requires the apportionment of workers' compensation benefits in cases of civil action brought by an employee of the United States against any contractor, where the employee has received workers' compensation benefits.

However, the bill requires the United States to include in any contract the provision that the United States will hold harmless and indemnify liability claims against the contractor. The required indemnification is to apply only to claims for losses or injuries resulting from risks that the contract has defined as: 1) unusually hazardous or nuclear in nature, or 2) giving rise to the possibility of liability against which the contractor cannot reasonably protect through private insurance or self-insurance. The bill provided that no such provision shall be included in any contract for the procurement for goods and services

469. S. 1839, 98th Cong., 1st Sess. (1983).

that are sold by the contractor to a nongovernmental purchaser for uses or applications identical in nature and scope to the uses of the goods and services by the United States. The determination of these conditions should first be made by the agency, i.e. by the head of the agency or his designee, and may require that each contractor so indemnified provide and maintain financial protection of the type and in such amount as the department head or his designee may determine. Indemnities are to cover personal injuries and property loss or damage, and the costs of litigation and settlement insofar as not compensated by insurance or otherwise.

The proposal contains the usual provisions against indemnification for willful misconduct or lack of good faith on the part of the contractor, for notice to the United States of any claim or action, and for the control or assistance by the United States, at its election, in the litigation or settlement of a claim.

In 1984, Representative Kindness introduced H.R. 5883,⁴⁷⁰ which in most respects and with few formal changes follows the 1983 bill, S. 1839. In 1985, Senator Grassley introduced S. 1254,⁴⁷¹ the bill he had introduced in 1983 without change. Hearings on S. 1254 were held on June 11, 1985, before the Senate Committee on the Judiciary. Witnesses from the administration included Richard K. Willard, Acting Assistant Attorney General, Civil Division, United States Department of Justice, and Mary Ann Gilleece, Deputy Undersecretary for Acquisition Management, Department of Defense. Their testimony reflected the Administration's position that no new legislation was necessary.⁴⁷²

Industry witnesses fully supported the proposed legislation, reiterating their concern that the present state of the law frequently results in contractor liability for faulty government specifications.⁴⁷³ The purported problems created for industry by *Stencel Aero Engineering*

470. H.R. 5883, 98th Cong., 2d Sess. (1984).

471. S. 1254, 99th Cong., 1st Sess. (1985).

472. See *supra* text accompanying notes 446-457 (discussing DOJ and Reagan Administration's views on need for indemnification legislation).

473. Industry witnesses included Jeffrey J. Weinsten, President, Winfield Manufacturing Co., on behalf of the American Apparel Manufacturers' Association; T. Richard Brown, Vice President, Law Department, Electronic and Defense Sector, TRW, Inc., and Fred Souk, Counsel; James J. Perino, Director, Insurance and Risk Management, Rockwell International Corp., on behalf of the Contractor Liability and Indemnification Alliance; and Robert C. Gusman, Chairman, Indemnification Project Group, Aerospace Industries Association. In addition, there was testimony from Karen Hastie Williams, Chairman, Legislative Liaison Committee, Section of Public Contract Law, American Bar Association, and O.S. Hiestand, Jr., Vice Chairman, Committee on Insurance and Indemnification, American Bar Association.

*Corp. v. United States*⁴⁷⁴ and *Lockheed Aircraft Corp. v. United States*⁴⁷⁵ including concern over exposure to catastrophic loss, were repeatedly referred to throughout the hearings. One comment noted that the issue had been raised long ago, in the 1972 report of the Commission on Government Procurement.⁴⁷⁶ Yet, in spite of repeated support for the recommendation of a national policy to shield contractors from catastrophic liability, nothing had happened to implement such a policy.

Witnesses from the American Bar Association also supported S. 1254, pointing to the longstanding support by the ABA of federal legislation to alleviate the unique problem of government contractors who face extraordinary liabilities as a result of their government contract work. The ABA witnesses asserted that current statutory authority for indemnification does not work well. In particular, they pointed out that the standards in current legislation, such as "unusually hazardous," are vague and difficult to apply, and that the decision to indemnify is largely discretionary. Agencies are under no requirement to explain why a request for indemnification is denied, and contracting officers who implement the law are not well versed in the concepts of indemnification, third party liability, casualty insurance, and the business practices of the insurance industry. The application of current law is therefore frequently inconsistent and unpredictable, because it requires the parties to reach agreement on issues that are highly conjectural or speculative, including identification of risk, estimates of future costs, and availability of insurance, as well as estimates on the utility or useful life of products not yet built.

The House also held hearings in 1985 on H.R. 1623. The array of government and industry witnesses and the positions they expressed were similar to the witnesses and opinions expressed at the Senate hearings that year. However, there were also two public interest witnesses, Joseph Goffman, Staff Attorney for Public Citizen's Congress Watch, and Linda Lipsen, Legislative Regulatory Counsel, Consumers Union. Their position was that H.R. 1623 would relieve contractors of liability and would encourage contractor negligence by protecting contractors against the full reach of their responsibility. Acknowledging the need for indemnification in cases of major disasters, where victim compensation may be necessary, and in ultrahazardous activities, where

474. 431 U.S. 666 (1977). See *supra* text accompanying notes 15-18 (discussing *Stencel Aero Eng'g Corp.*, 431 U.S. 666 (1977)).

475. 460 U.S. 190 (1983).

476. See *supra* text accompanying note 443 (recommending that indemnification be above limit of available insurance).

adequate insurance is unavailable, the witnesses suggested that the agency's authority to indemnify contractors should be expanded on a contract-to-contract basis, rather than across-the-board by general indemnification legislation.⁴⁷⁷

Hearings were held in 1983 on S. 1839⁴⁷⁸ and in 1984 on H.R. 4083 and H.R. 4199.⁴⁷⁹ In 1983, the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee also held an oversight hearing on the indemnification of government contractors.⁴⁸⁰ The hearing records demonstrate that since 1983, the positions of the administration, of major defense contractors, and of general public interest representatives have remained unchanged.

VII. AVAILABLE CHOICES

It is the position of the current administration that no further legislation authorizing contractual indemnities is necessary or called for. The no-action option has been the practical choice since the passage of the National Defense Contract Act in 1958. To call it a no-action choice may be somewhat misleading because it merely means that no action will be taken that tries to address the issue of government indemnification broadly, but that narrow and particular legislation will be initiated to respond to specific needs. This Article provides instances of limited government authority for the grant of contractual indemnities when needed by specific agencies to enable contractors to undertake tasks that involve greater-than-ordinary risks. The no-action alternative has proven persuasive in the recent past, because there is very little evidence that the absence of indemnification has discouraged many potential bidders from undertaking government contract work. In the few instances in which contractors could not be persuaded to take government work without indemnities, such as in the cases of NASA's space shuttle, the public health service swine flu program, or IBM's reluctance to reprogram the flight controllers' programs, appropriate, nar-

477. See generally *Fair Allocation of Government Fault Act*, 1986 H.R. 1623: *Hearings Before the Subcomm. on Administrative Law and Government of the House Judiciary Comm.*, 99th Cong., 1st Sess. 6 (1985).

478. See generally *Indemnification of Government Contractors: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 98th Cong., 1st Sess., pts. 1-3 (1983).

479. *Hearings on H.R. 4083 and H.R. 4199 Before the Subcomm. on Administrative Law and Government Relations of the House Judiciary Comm.*, 98th Cong., 2d Sess. (1984).

480. See generally *Indemnification of Government Contractors: Hearings Before the Subcomm. on Administrative Practice of the Senate Judiciary Comm.*, 98th Cong., 1st Sess. (1983).

rowly defined authority was provided to deal with a specific issue.

The no-action option may also be persuasive because, thus far, it has been practically cost-free. The government, under current authorizations for contractual indemnities, has undertaken vast contingent liabilities, and thus far has not been held accountable to make good on any of the indemnities it has provided. While the government, as a frequent deep pocket defendant, pays out millions of dollars in noncontractual indemnities under the Federal Tort Claims Act and under other laws which provide an opportunity for the application of common law indemnities,⁴⁸¹ there is no record of government payments of indemnity obligations incurred contractually.

In the response to the so-called insurance availability crisis of the mid-1980's, which replicated the insurance availability crisis of the mid-1970's,⁴⁸² there has been a major effort to undertake a program of "tort reform," as well as through federal task forces and other programs. Tort reform in this instance means legal changes to limit the size of personal injury verdicts, to reduce or do away with damages for pain and suffering and for punitive damages, to limit joint and several liability, and to insist on the fault principle and on clearer evidence of causation, so as to reduce the number and size of plaintiffs' verdicts. The purpose of this effort is to make liability insurance available at more affordable rates, which the administration believes will make insurance available to government contractors, thereby lessening the need for government indemnities.

However, the option of taking no legislative action yields to some demands for change—for instance, the recommendations of the OFPP Interagency Task Force on Indemnification, although they did not recommend any legislative changes, saw "a reasonable justification" for amending Executive Order No. 10,789 to authorize *all* executive agencies who may exercise national defense functions to agree to indemnify against third party liability.⁴⁸³ What always remains a possibility and has been used before, as in the case of the FAA authorization to construe the National Defense Contract Act, is to give the Executive Order expanded meaning to meet the conditions for which indemnification may be granted, i.e. that the indemnification will "facilitate" the "na-

481. In 1982, the government defended 10,561 tort suits seeking \$154 billion in damages. See Gilleece testimony, *supra* note 388 (discussing DOD use and cost of indemnification provisions).

482. See *Fair Allocation of Government Fault Act, H.R. 1623: Hearings Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 14-15 (1985) (statement of Rep. Glickman).

483. See *supra* text accompanying note 441 (quoting Task Force Report).

tional defense."⁴⁸⁴

Without expanding contractual indemnification substantively through new legislation, certain steps could be taken administratively to provide a better basis in the future for determining whether broader indemnification is necessary. Current law and regulations do not contain any requirement that the administration report to Congress or anyone else that it has paid out on any of its obligations to indemnify. Based on telephone conversations with attorneys who are responsible for contractual indemnification in different agencies⁴⁸⁵ and on indications contained in miscellaneous reports,⁴⁸⁶ it is clear that the United States has not paid out on any of its indemnifications, and if it has done so, it has done so only occasionally and in relatively modest amounts. It would be helpful to determine clearly and without any lingering doubt how often and in what amounts the government has been called upon to make good on its contractual indemnifications. A simple reporting requirement by an agency like the General Accounting Office would provide the necessary information on a regular basis.

Although government agencies believe that current law provides adequate guidance in determining whether or not a particular government contractor ought to be granted an indemnity clause, contractors and knowledgeable legal analysts have raised the issue of undue vagueness in such language as "extraordinary risk," "unusually hazardous," activities and similar terms that describe conditions under which indemnities may be granted. In some instances, indemnities are available beyond the threshold of reasonably available private insurance, while in others, insurance availability defines the degree of risk, as in the case of NASA indemnities.⁴⁸⁷ The American Bar Association has asserted that determinations of risk and insurability are extremely difficult to make, that contract offices are not always equipped to deal with them, and that, consequently, decisions relating to indemnities involve great uncertainty and may be made quite inconsistently.

484. See Hosenball testimony, *supra* note 407 (testimony of Neil S. Hosenball, General Counsel, NASA, discussing contractors' concerns regarding indemnification).

485. Telephone interviews with William Coleman, Office of Procurement Policy, OMB (May 12, 1987; Sept. 14, 1987); James Pesnell, Senior Procurement Officer, NASA (May 21, 1987); Jeffrey Levitky, attorney, DOJ (Aug. 26, 1987; Sept. 14, 1987); Peter Brien, Contracts Office, DOD (Cost, Price and Finance) (Sept. 17, 1987); Jeffrey Robbins, attorney, Office of the General Counsel, HHS (May 18, 1987; Aug. 25, 1987).

486. The author also examined last five years' cases on indemnification.

487. NASA defines unusually hazardous risks as risks that give rise to potential liabilities in excess of the insurance coverage that a NASA prime contractor would reasonably be expected to purchase and maintain. 48 C.F.R. § 1852.250.72 (1990). See *supra* text accompanying note 394 (stating definition).

Except in cases where procurement involves urgent necessities and short deadlines, the determination of issues of risk and insurance availability could be delegated to an agency or office that has the requisite expertise to make such decisions or to assist the appropriate agencies in making such decisions as the need for the award of indemnification clauses arises. The purpose here is not administrative over-elaboration, and it may well be inappropriate to provide for proceedings of any formality that may then in turn provide opportunities for further administrative, or even judicial review. The major purpose of such a development would merely be to provide the technical capability to make decisions that must be made quite routinely in granting government indemnification.

A further step in the development of contractual indemnities would limit government indemnities to agencies involved in high-risk activities. Current law has greatly advanced in limiting government indemnities to certain agencies involved in activities carrying high risks. Agencies involved in defense contract work, as under the National Defense Contract Act; the activities engaged in by the Department of Energy and the Nuclear Regulatory Commission, as covered by the Price-Anderson amendments; and the activities of NASA in its space shuttle work all meet the general description of high-risk activities undertaken by agencies authorized to carry out such activities. In other situations, however, when agencies such as the FAA or HHS or the EPA, whose normal activities may not be regarded as involving special risks, become involved in high-risk activities as a result of technological developments, they may need the power to grant indemnity clauses to government contractors in order to deal with newly emerging problems. In the past, agencies have had to seek special authority for this purpose, and this has either happened administratively, by the expansion of existing authority, or by the broad reading of past authority, or it has been done by special legislative authorization, as in the case of the assumption of the risk by the government in the case of the swine flu program.

Risk assessment, a highly technical task, is not within the capability of all administrative departments and agencies. The DOE and NRC, as well as the EPA and the United States Public Health Service of HHS may have risk assessment problems, and the technical capability to resolve them, as part of their ordinary tasks; other agencies may not. It may be possible to look into agency capabilities and to determine whether risk assessment tasks in the context of contractor indemnification can be placed on them, or whether some other structures, possibly interagency structures, should be utilized to do what needs to be done

with newly emerging technological risks in the government contract area.

There clearly is a need to address the problem of mass injuries and major losses resulting from catastrophic accidents in government programs. The issue was first addressed in 1972 in the *Report of the Commission on Government Procurement*. For its example, the report referred to the Texas City disaster on April 16 and 17, 1947. The government, following World War II, decided to market ammonium nitrate as a fertilizer. Two ships carrying ammonium nitrate under a government contract exploded at the docks in Texas City. The Commission reports on the incident as follows:

The explosion destroyed virtually the entire dock area of Texas City, killing some 570 persons and injuring 3,500. Approximately 1,000 homes, industrial plants, and other buildings either suffered major damage or were totally destroyed. The total claims were originally estimated at \$200 million. After denying relief to the plaintiffs [in *Dalehite v. United States*, 346 U.S. 15 (1953)] Congress enacted the Texas City Disaster Relief Act in 1955, eight years after the disaster. Under a 1959 amendment, it was estimated that an additional \$4 million would be needed for payment although appraisals of the actual damages ranged from \$300 million to billions of dollars. The army paid \$17.1 million in settlement of claims on the limited settlement authority of the Relief Act, with the last payment being made in September 1962, fifteen years after the disaster.⁴⁸⁸

Noting the inadequacy of private means to deal with such catastrophic accidents, the Commission summarized the available government indemnity authorizations, under Public Law No. 85-804, the Price-Anderson Act, and other indemnity authorizations and concluded that both private means and existing statutory authority were generally inadequate to deal with disasters of the Texas City kind. Current legislation is not only inadequate to provide the means to cope with such a disaster, but except for the Price-Anderson Act, does not contain the procedural means to deal with the multiplicity of claims effectively, or to deal promptly with the need to compensate and relieve mass injuries. The 1972 report made two relevant recommendations:

Recommendation 4. Enact legislation to assure prompt and adequate compensation for victims of catastrophic accidents occurring in connection with Government programs.

Recommendation 5. Enact legislation to provide Government indemnification, above the limit of available insurance, of contractors for liability for damage arising from a catastrophic accident occurring in connection with a Government program.⁴⁸⁹

488. REPORT ON THE COMMISSION OF GOVERNMENT PROCUREMENT 99-103 (1972).

489. *Id.*

The issue of victim compensation and the need for adequate government programs in this field were addressed in a 1963 study by the Legislative Drafting Research Fund of Columbia University. It contained recommendations for interim emergency compensation and for ultimate compensation by way of direct actions against the government. It also suggested an alternative indemnification remedy.⁴⁹⁰ A recent comment on the problem of compensation for catastrophic accidents noted that in spite of the awareness of the problem, there had been no government action of any kind since the Texas City disaster forty years ago.⁴⁹¹

Current law provides indemnities that are generally limited as to the nature of the risk to be indemnified, and while they have no express upper limit, except in the case of the Price-Anderson indemnification for extraordinary nuclear incidents, they all have a co-insurance clause, because in general the indemnity does not apply until after the amount of available private liability insurance has been exhausted. An indemnity law of general applicability, unlimited as to the amount of coverage or the nature of the risk, would make the federal government the insurer for all government contractor activities. This is not a realistic choice for indemnity legislation. The broadest existing law is probably the indemnification provision under the Price-Anderson Act, which is limited both as to amount and the nature of the risk covered by the indemnity. The other broad indemnity authorization, the National Defense Contracts Act, together with Executive Order No. 10,789, provides broad authorizations that are nonspecific with respect to the nature of the risks covered, but do in effect authorize agencies to impose a limit on the amount of indemnity to be provided.

There has never been a study of the cost of contractual indemnification. What this Article shows is that although contractual indemnification involves administrative costs for the management of the grant of contractual indemnities, there have been few costs in meeting indemnity obligations by the government, because there is no evidence of litigation to recover such indemnities, nor is there even any evidence of claims for such indemnities.

On the other hand, the government is a perpetual defendant in common law actions for indemnities for claims asserted under the Federal Tort Claims Act. There has been no analysis of the amount of such recoveries and of the character of the indemnity claims on which recov-

490. ROSENTHAL, KORN & LUBMAN, CATASTROPHIC ACCIDENTS IN GOVERNMENT PROGRAMS (Legislative Drafting Research Fund of Columbia University, 1963) (independent study for National Security Industrial Association).

491. Dembling, *Catastrophic Accidents: Indemnification of Contractors Against Third Party Liability*, 10 J. SPACE L. 1 (1982).

eries were based. Such a study could be used as a basis for the consideration of contractual indemnification in lieu of indemnification recovered by way of litigation under the Federal Tort Claims Act and other laws. It is possible that contractual indemnification of the many claims which are now made by way of tort litigation may be less expensive in terms of litigation costs than the current system, which limits contractual indemnification but in which the government is held as indemnitor in many law suits.

