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Xiii. Torts

and the statutory language of the 1954 Code.[91] The Fourth Circuit has balanced fairness and finality in providing relief from a situation which would otherwise have caused undue hardship. *Chertkof* clarifies the application of the mitigation provisions and demonstrates that the Fourth Circuit will not sacrifice fairness in a restrictive interpretation of the statutes' goals.

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XIII. TORTS

A. *Commercial Buyers Ineligible for Strict Liability Relief*

Prior to 1962, a plaintiff could bring a products liability action[1] only under negligence and breach of warranty theories.[2] If a plaintiff could not prove the necessary elements of negligence[3] or show that either an

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unless statute expressly contrary); Knowles Elec., Inc. v. United States, 365 F.2d 43, 48 (7th Cir. 1966) (purpose of mitigation provisions is to provide fair and workable formula under which taxpayer given relief from unjust results); Gooding v. United States, 326 F.2d 988, 993 (Ct. Cl. 1964) (mitigation provisions create mechanism of relief); Olin Mathieson Chem. Corp. v. United States, 265 F.2d 293, 297 (7th Cir. 1959) (same). In *Chertkof*, the Fourth Circuit has adopted the position that Congress intended the mitigation provisions to be remedial. *See* 676 F.2d at 990-92. The Fourth Circuit noted that in promulgating the mitigation statutes, Congress intended to be just. *Id.* at 991. The *Chertkof* court found that no policy reasons existed for not finding in favor of the taxpayers. *Id.*

[91] *See supra* text accompanying notes 67-74.

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[1] *See* 1 L. FRUMER & M. FRIEDMAN PRODUCTS LIABILITY § 3 (1982) (three possible grounds for products liability are negligence, contract, and strict liability); D. NOEL, PRODUCTS LIABILITY IN A NUTSHELL 1-4, 13-15, 67-72 (1974) (three bases of recovery in products liability are negligence, warranty, and strict liability); P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER 1-5, 41-53, 187-98 (1981) (four bases of recovery in products liability are negligence, express warranty, implied warranty, and strict liability).

[2] *See* Greenman v. Yuba Power Prod. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). In *Greenman*, the California Supreme Court first utilized strict liability theory to award damages in a products liability suit. *Id.* at 59-60, 377 P.2d at 900, 27 Cal. Rptr. at 700. *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) [hereinafter cited as *The Fall*]. The *Greenman* court allowed products liability redress to a plaintiff who did not stand in contractual privity with the manufacturer and who could not prove negligence. *Id.* at 803-04.

[3] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 142-48 (4th ed. 1971). A cause of action in negligence must allege four elements, duty, breach, proximate cause, and injury. *Id.* at 143-44. Actionable negligence is conduct which involves an unreasonably great risk of causing danger. *Id.* at 142-43. *See generally* Alexander v. Seaboard Air Lines R.R. Co., 346 F. Supp. 320 (W.D.N.C. 1971) (plaintiff must show that defendant breached duty of care); Fernandez v. Miami Jai-Alai, Inc., 386 So. 2d 4 (Fla. Dist. Ct. App. 1980) (commercial sporting arena has duty to guard against foreseeable injury to spectators); Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467 (Fla. 1978) (plaintiff in negligence action must show that defendant's tortious conduct caused injury); Pasadena State Bank v. Isaac, 149 Tex. 47, 228 S.W.2d 127 (1950) (plaintiff must show that defendant's breach caused appreciable injury); *see also*

express[4] or implied[5] warranty existed in the product, courts would not grant relief or award damages.[6] In 1962, the California Supreme Court allowed redress to a plaintiff who could not prove manufacturer negligence or breach of warranty.[7] In granting relief, the California Supreme Court was the first judicial body to state and apply a theory of "strict liability in tort."[8] Other courts soon accepted the doctrine of strict liability in tort and established strict liability as a third theory for recovery in products liability actions.[9]

Terry, *Negligence*, 29 HARV. L. REV. 40, 40-41 (1915) (complaint not alleging duty, breach, cause, and injury will not withstand test of demurrer).

[4] *See* U.C.C. § 2-313. Express warranties are formal affirmations of fact or promises made by a seller to a buyer that become part of the basis of the bargain between a seller and a buyer. *Id.* Express warranties are negotiated guarantees of product safety, reliability, or performance. *Id. See generally* 1 R. STEINHEIMER, DESK REFERENCE TO THE UNIFORM COMMERCIAL CODE 225-26 (1966); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-2, at 327-28 (2d ed. 1980).

[5] *See* U.C.C. §§ 2-314 to 316. The law of commercial transactions implies a warranty of merchantability into a contract for the sale of goods. U.C.C. § 2-314 (1). The law of commercial transactions also implies a warranty that the goods are fit for their intended purpose when the seller knows at the time of contracting that the buyer is relying upon the seller's judgment to furnish suitable goods. U.C.C. § 2-315. The parties to a contract can exclude or modify any implied warranties through negotiation and bargaining. U.C.C. § 2-316. *See generally* STEINHEIMER, *supra* note 4, at 226-31; WHITE & SUMMERS, *supra* note 4, § 9-6, at 343-49.

[6] *See, e.g.*, Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821, 825 (2d Cir. 1968) (extremely remote injury to ship not recoverable in tort action); L.S. Ayres & Co. v. Hicks, 220 Ind. 86, _____, 40 N.E.2d 334, 337 (1941) (no duty exists to rescue stranger); Cornpropst v. Sloan, 528 S.W.2d 188, 198 (Tenn. 1975) (intervening cause breaks chain of causation).

[7] Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). The trial court in *Greenman* ruled that the plaintiff's evidence did not establish an actionable claim in negligence. *Id.* at 58, 377 P.2d at 898, 27 Cal. Rptr. at 698. The *Greenman* jury denied the plaintiff relief on his breach of warranty cause after finding that the plaintiff failed to give notice to the manufacturer as required by California law. *Id.* at 58-59, 377 P.2d at 899, 27 Cal. Rptr. at 699.

[8] *Id.* at 60, 377 P.2d at 900, 27 Cal. Rptr. at 700. In *Greenman*, Justice Traynor argued that strict liability in tort is appropriate when a manufacturer places a product on the market with the knowledge that a consumer will use the product without prior inspection for defects. *Id.* at 60, 377 P.2d at 900, 27 Cal. Rptr. at 700 Justice Traynor further determined that the manufacturer's product must possess a defect which causes injury to the consumer. *Id.* at 60, 377 P.2d at 900, 27 Cal. Rptr. at 701. The plaintiff in *Greenman* suffered personal injury and not property damage. *Id.* at 60, 377 P.2d at 898-99, 27 Cal. Rptr. at 698-99. Justice Traynor intended for the *Greenman* theory of strict liability to apply only to personal injury cases. *Id.* at 60, 377 P.2d at 900, 27 Cal. Rptr. at 701. Later versions of strict liability have brought property damage and other physical injuries within the scope of strict liability. *See, e.g.*, Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329-30 (Alaska 1981) (component part damage due to defect in whole product recoverable under strict liability); Hoover & Son v. O.M. Franklin Serum Co., 444 S.W.2d 596, 598 (Tex. 1969) (loss of cattle caused by use of defective antibiotic animal serum recoverable under strict liability); City of LaCrosse v. Schubert, 72 Wis. 2d 38, _____, 240 N.W.2d 124, 127 (1976) (property damage and repair costs resulting from use of defective product recoverable under strict liability). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[9] *See* 1982 1 PROD. LIAB. REP. (CCH) ¶ 4015 (cases from states which have accepted strict liability in tort); 1982 1 PROD. LIAB. REP. (CCH) ¶ 4016 (chart of states which have ac-

Strict liability in tort arose from considerations of public policy and does not depend on either manufacturer or consumer intent.[10] Strict liability is a consumer protection device and exists to provide consumers with a simple and sure remedy against manufacturers of defective[11] and unreasonably dangerous[12] products.[13] The courts have adopted strict

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cepted strict liability in tort). As of May 1982, 47 of 50 states have accepted some form of strict liability in tort. *Id. See generally* Henderson, *Extending the Boundries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036 (1980); Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 681-82 (1980) [hereinafter cited as *Strict Liability Policies*]; *The Fall, supra* note 2, at 804; Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974) [hereinafter cited as *Section 402A Preemption*].

[10] Seely v. White Motor Co., 63 Cal. 2d 9, _____, 403 P.2d 145, 150-51, 45 Cal. Rptr. 17, 22-23 (1965) (intent of parties is irrelevant in strict products liability action); Greenman v. Yuba Power Prod. Inc., 59 Cal. 2d 57, 60, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 701 (1962) (strict liability does not stem from contractual intent); Brandenburger v. Toyota Motor Sales, Inc., 162 Mont. 506, _____, 513 P.2d 268, 273 (1973) (strict liability arose from requirements of public policy). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A, comment m (1965); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1140-43 (1960) [hereinafter cited as *The Assault*]; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826-27 (1973) [hereinafter cited as *Strict Liability Nature*].

[11] *See* Sears, Roebuck & Co. v. Haven Hills Farm, Inc., 395 So. 2d 991, 994 (Ala. 1981) (plaintiff must show product defect to prove prima facie case in strict products liability); Brady v. Melody Homes Mfr. 121 Ariz. 253, _____, 589 P.2d 896, 899 (Ariz. Ct. App. 1978) (showing of product design defect fulfills defective condition requirement of § 402A); Ford Motor Co. v. Hill, 381 So. 2d 249, 251 (Fla. Ct. App. 1979) (showing of either manufacturing or design defect fulfills defective condition of § 402A), *aff'd*, 404 So.2d 1049 (1981); Lewis v. Bucyrus-Erie, Inc., 622 S.W.2d 920, 927 (Mo. 1981) (plaintiff who cannot show product defect is ineligible for strict liability relief); International Harvester Co. v. Zavala, 623 S.W.2d 699, 707 (Tex. Civ. App. 1981) (showing of manufacturing defect fulfills defective condition requirement of § 402A). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965); Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101 (1977); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Products Liability Concepts*, 60 MARQ. L. REV. 297 (1977); *Strict Liability Nature, supra* note 10, at 832-33.

[12] *See* 1982 1 PROD. LIAB. REP. (CCH) ¶ 4065 (cases from jurisdictions which have required that products be unreasonably dangerous to vest their manufacturers with strict liability); 1982 1 PROD. LIAB. REP. (CCH) ¶ 4016 (states which have required the unreasonably dangerous requirement in their strict liability applications). As of May 1982, 40 of the 47 states which accept strict liability also require products to be unreasonably dangerous. *Id. But see* Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209, 214 (Alaska 1975) (Restatement § 402A unreasonably dangerous requirement is not adhered to in Alaska); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972) (unreasonably dangerous requirement places unreasonable burden on plaintiff); Azzarello v. Black Bros. Co., 480 Pa. 547, _____, 391 A.2d 1020, 1027 (1978) (strict liability plaintiff in Pennsylvania need not prove that product was unreasonably dangerous to receive relief). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965).

[13] *See* Kaiser Steel Corp. v. Westinghouse Elec. Corp., 55 Cal. App. 3d 737, 748, 127 Cal. Rptr. 838, 845 (1976) (strict liability applies only to consumer transactions). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A (1965); *Strict Liability Policies, supra* note 9, at 681-85; *Strict Liability Nature, supra* note 10, at 825-27.

liability on the ground that modern consumers cannot protect themselves adequately from defective products.[14] The courts which adopt strict liability also note that product manufacturers, through advertising, represent their products as safe to the public and thus should bear the costs of injuries that result from defective products.[15]

Strict liability does not displace, however, the traditional negligence and contractual theories of relief.[16] In particular, a majority of courts have held that the contractual warranty provisions of the Uniform Commercial Code (UCC) should serve as the basis for relief when a plaintiff's losses are purely economic.[17] Pure economic harm includes loss of profits,

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[14] *See* Kaiser Steel Corp. v. Westinghouse Elec. Corp., 55 Cal. App. 3d at 746-48, 127 Cal. Rptr. at 844-45 (strict liability exists to protect consumers who lack bargaining power and ability to discern product defects); Greenman v. Yuba Power Prod., Inc., 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (strict liability is needed because the law of commercial transactions does not properly protect consumers). *See generally Strict Liability Policies, supra* note 9 at 681-87; *The Fall, supra* note 2, at 800-05.

[15] Nalbandian v. Byron Jackson Pumps, Inc., 97 Ariz. 280, _____, 399 P.2d 681, 686-87 (1965) (Lockwood, J., concurring) (consumer vigilance has decreased because of advertising, marketing devices, and trademarks). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965) (by marketing product, seller assumes special responsibility toward any consumer who may sustain injury due to defect in product); *Strict Liability Policies, supra* note 9, at 681-87; *The Fall, supra* note 2, at 800-05.

[16] *See* Foster v. Ford Motor Co., 621 F.2d 715, 718 (5th Cir. 1980) (using Texas law governing commercial transactions and strict liability) (relief under implied warranty provisions of the Uniform Commercial Code (UCC) is broader than relief under strict liability); Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co., 246 Ark. 101, _____, 437 S.W.2d 459, 462-63 (1969) (removing privity requirement allows recovery of economic and commercial losses under contract theory when strict liability is inapplicable); Pierce v. Liberty Furniture Co., 141 Ga. App. 175, _____, 233 S.E.2d 33, 35-36 (1977) (UCC provides consumers with broader remedy than strict liability and does not require goods to be unreasonably dangerous). Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 81 (1977) (elimination of horizontal privity requirement in UCC implied warranty cases affords aggrieved party contractual relief that he could not receive under strict liability); Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 755 (1970). The trend toward removing the horizontal privity requirement of implied warranty actions has produced a products liability remedy under the UCC that affords a greater degree of protection in many instances to buyers than strict liability. *Id.* at 755-59. Horizontal privity implies a direct buyer-to-seller contractual relationship. *Id.* at 755. If horizontal privity is not an element of an implied warranty act, remote users of a product who were not the original purchasers of the product may receive implied warranty protection. *Id.* at 755-59, *Section 402A Preemption, supra* note 9, at 130-41. The doctrine of strict liability is not statutory law and thus cannot interfere with the allocation of commercial risks as provided by UCC statutory law. *Id.* at 123-26. Only the UCC should provide relief for plaintiffs who suffer economic or commercial loss. *Id.* at 130-41; *see also* Cline v. Prowler Indus. of Md., Inc., 418 A.2d 968, (Del. 1980) (strict liability is unconstitutional because it violates statutory law in UCC). *See generally Section 402A Preemption, supra* note 9, at 130-36; Note, *Strict Liability and Warranty in Consumer Protection: The Broader Protection of the U.C.C. in Cases Involving Economic Loss, Used Goods, and Non-dangerous Defective Goods*, 39 WASH. & LEE L. REV. 1347 (1982).

[17] *See, e.g.*, Morrow v. New Moon Homes, Inc., 548 P.2d 279, 285-86 (Alaska 1976) (strict liability relief denied in case involving direct economic loss); Beauchamp v. Wilson, 21 Ariz. App. 14, _____, 515 P.2d 41, 44 (1973) (loss of bargain recovery denied under strict

loss of bargain, and other consequential damages caused by product failure or defectiveness.[18] Economic harm does not include physical harm to the plaintiff's property caused by the defective product.[19] Physical harm to the plaintiff's property is recoverable under strict liability in tort.[20] Most courts also refuse to allow strict liability relief when the parties to a products liability action are commercial entities[21] who have

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liability); Long Mfg., N.C., Inc. v. Grady Tractor Co., 140 Ga. App. 320, 322, 231 S.E.2d 105, 107-08 (1976) (tobacco farmer denied recovery for lost profits under strict liability); Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 203-04, 364 N.E.2d 100, 107 (1977) (recovery denied for economic losses sustained due to air conditioner breakdown); Richards v. Goerg Boat & Motors, Inc. 384 N.E.2d 1084, 1092-94 (Ind. Ct. App. 1979) (UCC provides only available remedy when injuries are strictly diminution in product's market value); Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981) (policies underlying strict liability do not support extension of strict liability to economic loss); Gibson v. Reliable Chevrolet, 608 S.W.2d 471, 474 (Mo. Ct. App. 1980) (strict liability relief denied to plaintiff whose automobile decreased in value due to a design defect); Hole v. General Motors Corp., 83 A.D.2d 715, 716-17, 442 N.Y.S.2d 638, 641 (1981) (strict liability relief denied to automobile owner who sustained economic loss due to frame defect); Nobility Homes of Texas, Inc. v. Shivers, 557 S.W.2d 77, 79 (Tex. 1977) (strict liability relief denied to owner of mobile home which decreased in value due to production error). *But see* Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, _____, 182 N.W.2d 800, 809-11 (1970) (strict liability relief allowed to purchaser of golf carts which lost value due to production defect); Santor v. A&M Karagheusian, Inc., 44 N.J. 52, _____, 207 A.2d 305, 312-13 (1965) (strict liability relief allowed to purchaser of carpeting which emitted strong odor and was unmerchantable). *See generally* Note, *Economic Losses and Strict Products Liability: A Record of Judicial Confusion Between Contract and Tort*, 54 NOTRE DAME LAW. 118 (1978).

[18] *See* Seely v. White Motor Co., 63 Cal. 2d 9, _____, 403 P.2d 145, 150-51, 45 Cal. Rptr. 17, 22-23 (1965) (economic loss not recoverable under strict liability includes diminution in value of truck due to design defect); Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 203-04, 364 N.E.2d 100, 107 (1977) (lost profits due to air conditioner failure not recoverable under strict liability); Ford Motor Co. v. Lonon, 217 Tenn. 400, _____, 398 S.W.2d 240, 248-49 (1966) (consequential damages from defective tractor not recoverable under strict liability). *See generally*, R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4.22 (1974 & Supp. 1980); Speidel, *Products Liability, Economic Loss and the UCC*, 40 TENN. L. REV. 309 (1973).

[19] *See* Seely v. White Motor Co., 63 Cal. 2d 9, _____, 403 P.2d 145, 150-51, 45 Cal. Rptr. 17, 22-23 (1965) (property damage to plaintiff's truck recoverable under strict liability in tort but plaintiff's lost profits not recoverable); Melody Home Mfg. Co. v. Morrison, 455 S.W.2d 825, 827 (Tex. Civ. App. 1970) (tangible property damage to mobile home recoverable under strict liability but diminution in value losses are not).

[20] Vandermark v. Ford Motor Co., 61 Cal. 2d 256, _____, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898 (1964) (damages to automobile caused by defective part recoverable under strict liability); Rosenau v. City of New Brunswick, 51 N.J. 130, _____, 238 A.2d 169, 175 (1968) (water damage to house caused by defective water meter recoverable under strict liability); Wulff v. Sprouse-Reitz Co., 262 Or. 293, _____, 498 P.2d 766, 771-74 (1972) (property damage caused by defective electric blanket which caught fire recoverable under strict liability). *See generally* HURSH & BAILEY, *supra* note 18, § 4.20 (1974 & Supp. 1980).

[21] *See* U.C.C. § 2-104(1). In the context of their transaction, the parties to a commercial transaction are "merchants" as defined by the Uniform Commercial Code. *Id.* Commercial parties are transacting parties who stand in contractual privity with one another, bargain the specifications of the item sold, possess relatively the same bargaining power, and negotiate the ancilliary aspects of their transaction. *Id.*; *see also* Southwest Forest Indus.,

entered into a contract.[22] Commercial entities can allocate risks associated with their contractual endeavors and can bargain away any implied warranties.[23] In commercial transactions, plaintiffs therefore must seek recovery of damages under the UCC.[24] In *Purvis v. Consolidated Energy Products Co.*,[25] the Fourth Circuit Court of Appeals determined that strict liability relief should not be available to a tobacco farmer who suffered severe crop damage by attempting to cure his tobacco in a defective curing barn on the grounds that the tobacco farmer entered into a commercial contract with the barn's manufacturer.[26]

In *Purvis*, South Carolina tobacco farmer Preston B. Purvis, after investigating a number of bulk curing barns, purchased six curing barns from the barns' manufacturer, Consolidated Energy Products Company (CEPCO).[27] Purvis was familiar with tobacco farming and curing and had operated his 600 acre farm for at least nineteen years.[28] Before purchas-

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Inc. v. Westinghouse Elect. Corp., 422 F.2d 1013, 1020 (9th Cir. 1970), *cert. denied*, 400 U.S. 902 (1970) (commercial parties possess knowledge of trade practices within the scope of transaction, possess equal bargaining power, and can negotiate sales contract freely). *See generally* WHITE & SUMMERS, *supra* note 4, § 9-6, 345-49.

[22] *See, e.g.*, Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 617 F.2d 936, 939-40 (2d Cir. 1980) (strict liability relief is inappropriate when extended to commercially transacting parties); Scandanavian Airlines Sys. v. United Aircraft Corp., 601 F.2d 425, 429 (9th Cir. 1979) (commercial buyers should seek their relief in the law of commercial transactions and not in strict liability); Idaho Power Co. v. Westinghouse Elect. Corp., 596 F.2d 924, 927-28 (9th Cir. 1979) (large corporate entities who contract as merchants should not receive strict liability relief); Posttape Assoc. v. Eastman Kodak Co., 537 F.2d 751, 755-56 (3d Cir. 1976) (strict liability does not apply to commercial transactions); Delta Airlines v. McDonnell Douglas Corp., 503 F.2d 239, 245 (5th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975) (policies underlying strict liability do not allow application to large corporate transactions); Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfr., 360 F. Supp. 25, 32 (S.D. Iowa 1973) (commercially transacting parties must seek legal redress in the warranty provisions of the UCC); K-Lines, Inc. v. Roberts Motor Co., 273 Or. 242, _____, 541 P.2d 1378, 1383-84 (1975) (strict liability relief is inappropriate in commercial transactions); K & C, Inc. v. Westinghouse Elec. Corp., 437 Pa. 303, _____, 263 A.2d 390, 393 (1970) (commercial buyers do not deserve strict liability protection).

[23] *See* U.C.C. § 2-316 (parties to commercial transactions can exclude or modify any express or implied warranties existing in goods sold); U.C.C. § 2-719(3) (limitations or exclusions on implied warranties are acceptable in commercial transactions but are prima facie unconscionable in consumer transactions). *See generally* STEINHEIMER, *supra* note 4, at 230-32.

[24] *See* Kaiser Steel Corp. v. Westinghouse Elec. Corp., 55 Cal. App. 3d 737, 748, 127 Cal. Rptr. 838, (1976) (strict liability relief is inappropriate when applied to commercial transactions); Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013, 1020 (9th Cir. 1970) (doctrine of strict liability does not apply between commercial parties who contract in commercial setting from positions of parity in bargaining power), *cert. denied*, 400 U.S. 902 (1970); *see also supra* text accompanying note 22.

[25] 674 F.2d 217 (4th Cir. 1982), *reh'g denied*, 674 F.2d 217 (4th Cir. 1982) (April 15, 1982).

[26] *Id.* at 222-23.

[27] *Id.* at 218.

[28] *Id.*

ing the barns, Purvis conferred for several hours with a CEPCO representative about purchase terms and express warranties.[29] CEPCO warranted that the barns were free from defects but restricted its liability to repair and replacement of defective parts.[30]

Purvis used the CEPCO barns and immediately experienced difficulty in obtaining satisfactory cures.[31] Although CEPCO attempted to aid Purvis by providing field consultation and curing instructions, Purvis' experience with the barns remained unsatisfactory for the remainder of the season.[32] After attempting to use the barns for a year, Purvis brought suit against CEPCO in federal district court[33] alleging fraud, breach of express and implied warranties, and strict products liability.[34] The district court deferred judgment on the defendant's motion for summary judgment and allowed the jury to hear evidence.[35] Upon CEPCO's renewed motions for summary judgment, the court directed verdicts for the defendant on the fraud and breach of warranty counts and submitted the case to the jury on the strict liability claim.[36]

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[29] *Id.*; *see* Brief of Appellant at 4, Purvis v. Consolidated Energy Prod. Co., 674 F.2d 217 (4th Cir. 1982). Appellant stressed in its brief the amount of negotiation, discussion, and investigation which the parties engaged in before contracting. *Id.* Appellee chose to avoid mentioning these events in its brief for strategic reasons. Brief of Appellee at 3-4, Purvis v. Consolidated Energy Prod. Co., 674 F.2d 217 (4th Cir. 1982).

[30] 674 F.2d at 218. Purvis freely accepted the restricted warranty from CEPCO. *Id.*

[31] *Id.* In describing the causes behind Purvis' inability to obtain successful cures of his tobacco, the appellant's and appellee's versions of the facts diverge. *Id.* at 218 n.2. Appellant suggested that Purvis used a method of loading the tobacco into the barns that was inconsistent with the manufacturer's instructions. Brief of Appellant, *supra* note 29, at 5. Purvis argued that he followed the manufacturer's instructions. Brief of Appellee, *supra* note 29, at 2. Both parties agree that Purvis' tobacco was useless and unmerchantable after the attempted curing. Brief of Appellant, *supra* note 29, at 6; Brief of Appellee, *supra* note 29, at 3.

[32] 674 F.2d at 218.

[33] Brief of Appellant, *supra* note 29, at 2. Purvis commenced his action against CEPCO in the United States District Court for the District of South Carolina. 674 F.2d at 217; Brief of Appellant, *supra* note 29, at 2.

[34] 674 F.2d at 219.

[35] *Id.* The district court deferred judgment on CEPCO's motion for summary judgment to allow the jury to determine if a genuine issue of material fact existed between the plaintiff's and defendant's version of the facts. Brief for Appellant, *supra* note 29, at 3; *see* FED. R. CIV. P. 56. If no genuine issue of material fact exists, a court will render judgment in favor of a party moving for summary judgment if the moving party is entitled to judgment as a matter of law. *Id. See generally* Lemley, *Summary Judgment Under Rule 56 of the Federal Rules of Civil Procedure—Its Use and Abuse*, 11 ARK. L. REV. 138 (1957); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).

[36] 674 F.2d at 219. The jury determined that the facts did not support any indication of fraud on CEPCO's part. *Id.* The jury also found that Purvis was ineligible for warranty relief under the South Carolina commercial code because of a lack of notice as required under South Carolina's version of the UCC. Brief for Appellant at 3; *see* S.C. CODE § 36-2-607(3) (1976) (notice requirement).

The jury awarded Purvis $57,722.94 on his strict liability claim and CEPCO appealed the adverse judgment to the Fourth Circuit.[37]

The Fourth Circuit in *Purvis* reversed the decision of the district court[38] and determined that Purvis did not qualify for strict liability protection.[39] The *Purvis* court found that strict liability was applicable only to consumer transactions[40] and held that Purvis' contracting with CEPCO was a commercial transaction.[41] The *Purvis* court also found that strict liability attaches to only "unreasonably dangerous"[42] products[43] and determined that the CEPCO curing barns were not unreasonably dangerous.[44]

In denying Purvis strict liability relief, the Fourth Circuit held that strict liability protects only consumers who are powerless to protect themselves from injuries caused by defective products.[45] The *Purvis* court observed that consumers do not examine products routinely before use,[46] do not appreciate all warranty limitations existing in the products,[47] and fully expect the products to be safe.[48] The Fourth Circuit determined that commercial buyers, on the other hand, can protect themselves by negotiating the allocation of risks with the seller for a more favorable price and thus do not deserve strict liability protection.[49]

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[37] 674 F.2d at 219. On appeal to the Fourth Circuit, CEPCO argued that Purvis should not receive strict liability relief on the grounds that the sale of the curing barns was a commercial transaction. Brief for Appellant, *supra* note 29, at 9-13. CEPCO further argued the curing barns were not unreasonably dangerous as required by the South Carolina strict liability statute. Brief for Appellant, *supra* note 29, at 25-30; *see infra* text accompanying notes 68-72. (Fourth Circuit determines that barns were not unreasonably dangerous). Purvis did not appeal the directed verdicts against him on the fraud and breach of warranty claims. 674 F.2d at 219. Purvis offered no explanation for the decision not to appeal the directed verdicts against him. Brief for Appellee, *supra* note 29, at 6-15.

[38] 674 F.2d at 218.

[39] *Id.* at 223.

[40] *Id.* at 220, 223; *see infra* text accompanying notes 53-58.

[41] 674 F.2d at 223; *see infra* text accompanying notes 59-60.

[42] 674 F.2d at 222-23; *see* RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965) (unreasonably dangerous product is dangerous beyond ordinary consumer's contemplation). *See generally* HURSH & BAILEY, *supra* note 18, § 4:14; *Strict Liability Nature*, *supra* note 10, at 832-34.

[43] 674 F.2d at 210; *see infra* text accompanying notes 69-71.

[44] 674 F.2d at 223; *see infra* text accompanying note 72.

[45] 674 F.2d at 219. The *Purvis* court relied on Judge Traynor's strict liability rationale contained in *Greenman v. Yuba Power Products* in holding that strict liability is appropriate because of consumer inability to discern product defects. *Id.*; *see Greenman*, 59 Cal.2d at _____, 377 P.2d at 900, 27 Cal. Rptr. at 700 (strict liability is necessary to protect consumers against latent product defects); *see also supra* notes 7-8 (explanation of *Greenman* holding).

[46] 674 F.2d at 219-20.

[47] 674 F.2d at 220.

[48] *Id.*

[49] *Id.* at 221-22. A commercial buyer bargains specifications and warranties with the

To determine whether Purvis acted as a consumer or a commercial party in his purchase of the CEPCO barns, the *Purvis* court relied upon the opinion of the California Court of Appeals in *Kaiser Steel Corp. v. Westinghouse Electric Corp.*[50] The Fourth Circuit decided to follow *Kaiser Steel* after taking notice of the lack of South Carolina strict liability precedent.[51] *Kaiser Steel*, the Fourth Circuit determined, was the leading case on point dealing with the applicability of strict liability to commercial transactions.[52]

The *Kaiser Steel* court developed a four-part test for distinguishing between consumer and commercial entities for purposes of strict liability application.[53] Under the *Kaiser Steel* test, parties who deal in a commercial setting,[54] contract from positions of relatively equal economic strength,[55] bargain the specifications of the product,[56] and negotiate the risk of loss from defects in the product[57] are commercial entities and are ineligible for strict liability relief.[58] Although the Fourth Circuit did not find that all four elements of the *Kaiser Steel* test were present in *Purvis*,[59] the Fourth Circuit determined that Purvis qualified as a commercial entity and refused to award strict liability relief.[60]

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manufacturer, can discern production defects in the product and thereby mitigate injury, does not rely entirely upon the manufacturer's marketing claims, and can seek relief under the warranty provisions of the UCC. *Id.*

[50] 55 Cal. App. 3d 737, 127 Cal. Rptr. 838 (1976). The California Court of Appeals in *Kaiser Steel* held that the contractual law of warranty and not the tort-based doctrine of strict liability should provide legal remedy to aggrieved commercial buyers. *Id.* at 748, 127 Cal. Rptr. at 845. The *Kaiser Steel* court found that strict liability relief was unnecessary due to the existence of privity between the parties. *Id.* at 748, 127 Cal. Rptr. at 845. The *Kaiser Steel* court also found that the application of strict liability to commercial transaction products liability would not induce the seller to design and produce safe products since, in such transactions, the buyer and seller normally negotiate specifications. *Id.* at 748, 127 Cal. Rptr. at 845; *Henderson, supra* note 9, at 1041-44. In situations in which the buyer and seller negotiate product specifications, application of strict liability relief may reduce overall product safety. *Henderson, supra* note 9, at 1038.

[51] 674 F.2d at 218. Since 1974, when the South Carolina state legislature enacted § 402A into law, the South Carolina Supreme Court has heard only twelve cases dealing with strict liability in tort. *Products Liability—Annual Survey of South Carolina Law*, 31 S.C. L. REV. 107-17 (1979). None of the twelve cases dealt with the application of strict liability to commercial transactions. *Id.*

[52] 674 F.2d at 220.

[53] 55 Cal. App. 3d at 748, 127 Cal. Rptr. at 845; *see infra* text accompanying notes 54-57. (*Kaiser Steel* four-part test).

[54] 55 Cal. App. 3d at 748, 127 Cal. Rptr. at 845. Parties who deal in a commercial setting can seek relief under the warranty provisions of the UCC because of privity of contract existing in their transaction. *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*; *see* U.C.C. § 2-719. Parties to a commercial transaction can modify or limit the effect of any implied warranties by negotiation. 55 Cal. App. 3d at 748, 127 Cal. Rptr. at 845.

[58] 55 Cal. App. 3d at 748, 127 Cal. Rptr. at 845.

[59] 674 F.2d at 223; *see infra* text accompanying notes 90-93 (Purvis only met two parts of *Kaiser Steel* four-part test).

[60] 674 F.2d at 223; *see id.* n.11. The *Purvis* court did not deem the parity in economic

As an alternative ground for denying strict liability relief, the Fourth Circuit found that Purvis qualified as a commercial entity by knowingly and voluntarily accepting a commercial risk.[61] In suggesting a second method for distinguishing between consumer and commercial parties, the *Purvis* court declared that the nature of the risk and not the nature of the parties determines the applicability of strict liability relief.[62] The Fourth Circuit found that Purvis knew of the risks associated with the use of the CEPCO barns[63] and freely chose to cure his tobacco in the barns in spite of the known risks.[64] The *Purvis* court used the "nature of the risk"[65] analysis in denying Purvis strict liability relief but expressly declared that reliance upon the *Kaiser Steel* test dictated the outcome in *Purvis*.[66]

Finally, the Fourth Circuit found that the CEPCO barns in question were not unreasonably dangerous.[67] The Fourth Circuit determined that South Carolina law requires products to be unreasonably dangerous to invoke strict liability.[68] The *Purvis* court held that a product is unreasonably dangerous when an ordinary consumer could not with ordinary knowledge discern the danger inherent in the product.[69] The *Purvis* court found that the CEPCO barns were defective and inefficient at curing tobacco[70] but determined that the barns did not possess any inherent dangers.[71]

The Fourth Circuit held that since Purvis assumed commercial risks

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strength and specification-bargaining aspects of the *Kaiser Steel* test important in determining whether the policies underlying strict liability attach to a product. *Id.* The *Purvis* court considered that the commercial setting and negotiation elements of the test embodied the essence of the *Kaiser Steel* limitation on strict liability. *Id.* at 223. *See also infra* text accompanying notes 90-94.

[61] 674 F.2d at 223.

[62] *Id.* at 222.

[63] *Id.* at 218-19; *see* Brief of Appellant, *supra* note 29, at 4. Purvis knew that use of the CEPCO barns, by curing larger quantities of tobacco faster, could reduce the quality of his tobacco cures. Brief of Appellant, *supra* note 29, at 4-5.

[64] 674 F.2d at 218, 223; Brief of Appellant, *supra* note 29, at 4-5. *But see* 674 F.2d at 224 (Hall, J., dissenting). The dissent argued that the majority in *Purvis* erred by concluding that Purvis possessed bargaining power parity with CEPCO. *Id.* The dissent also suggested that Purvis could not possibly examine all of the aspects involved in purchasing and using the CEPCO barns. *Id.*

[65] *See id.* at 222; *infra* text accompanying notes 109-115 (explaining nature of the risk analysis).

[66] 674 F.2d at 223.

[67] *Id.* at 222-23.

[68] *Id.* at 219; *see* Kennedy v. Custom Ice Equip. Co., 271 S.C. 171, 176, 246 S.E.2d 176, 178 (1978) (strict liability application requires unreasonably dangerous finding); Young v. Tide Craft, Inc., 270 S.C. 453, 471, 242 S.E.2d 671, 679 (1978) (product must be unreasonably dangerous to vest manufacturer with strict liability); S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976) (South Carolina enactment of § 402A includes unreasonably dangerous requirement).

[69] 674 F.2d at 222-23; *see* RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965) (article must be unreasonably dangerous beyond contemplation of ordinary consumer).

[70] 674 F.2d at 223.

[71] *Id.*

in contracting with CEPCO,[72] Purvis should have sought any appropriate relief under the implied warranty provisions of the UCC.[73] The Fourth Circuit found that Purvis freely accepted CEPCO's limited warranty[74] and determined that the contractual provisions containing the limited warranty acted to bar strict products liability.[75] Furthermore, the *Purvis* court held that when a loss results from mere product ineffectiveness, the law of contracts and commercial transactions fixes responsibility for the loss.[76] The *Purvis* court, however, did not declare that strict liability relief never could be available to commercial plaintiffs.[77] The Fourth Circuit stated that strict liability relief may be appropriate when commercial buyers purchase products as consumers and thereafter sustain injury from use of the product since in this situation the nature of the buyers' risk would not be commercial.[78]

The dissenting opinion in *Purvis* disagreed with the majority's determination that the CEPCO barns were merely inefficient and not

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[72] *Id.*; *see supra* note 49. (definition of commercial party).

[73] 674 F.2d at 222-23; *see supra* note 5 (implied warranty provisions of the UCC).

[74] 674 F.2d at 218; *see supra* text accompanying notes 29-30. (CEPCO limited warranty on curing barns).

[75] 674 F.2d at 223. In holding that the CEPCO limited warranty acted to bar strict products liability, the *Purvis* court implicitly found that the CEPCO warranty provisions were not unconscionable. *See id.*; U.C.C. § 2-302(1). Courts may strike unconscionable clauses and modifications of implied warranties from a contract and enforce the contract as if the unconscionable clause never existed. *Id.* Parties to a contract may modify or limit damages subject to unconscionability constraints. *Id.* § 2-719; *see also* Ford Motor Co. v. Tritt, 244 Ark. 883, _____, 430 S.W.2d 778, 781 (1968) (express disclaimer of all implied warranties in automobile sales contract held unconscionable); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69, 95 (1960) (written disclaimer held unconscionable); Jefferson Credit Corp. v. Marcano, 60 Misc. 2d 138, 142, 302 N.Y.S.2d 390, 394-95 (N.Y. Civ. Ct. 1969) (automotive warranty limitation held unconscionable). *See generally* WHITE & SUMMERS, *supra* note 4, §§ 4-2 to 4-9, at 149-173 (1980); Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 516-28 (1967).

[76] 674 F.2d at 223; *see* Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242, 1248-50 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981) (doctrine of strict liability is not applicable to defect in product which only decreases product efficiency); Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660, 666-67 (5th Cir. 1971) (law of commercial transactions governs legal redress available to plaintiff whose cattle fail to gain weight when fed defendant's feed); Brown v. Western Farmers Ass'n, 268 Or. 470, 475-76, 521 P.2d 537, 542 (1974) (courts should not extend doctrine of strict liability to cover losses caused by product ineffectiveness).

[77] 674 F.2d at 222.

[78] *Id.* The Fourth Circuit determined that, in the context of some product purchases, commercial parties function essentially as consumers and rely upon the manufacturer's duty to produce safe products. *Id.* In such cases, commercial buyers deserve the same strict liability protections as consumers. *Id.*; *see* Signal Oil & Gas Co. v. Universal Oil Prods., 572 S.W.2d 320, 325-27 (Tex. 1978) (commercial plaintiff who purchases consumer good without formal negotiation with manufacturer is eligible for strict liability relief); *see also* RESTATEMENT (SECOND) OF TORTS § 402A, comment d (1965) (strict liability extends to any ultimate user or consumer).

unreasonably dangerous.[79] The dissent argued that the majority erred in setting aside the jury's strict liability award without holding that the jury's unreasonably dangerous finding was clearly erroneous.[80] Additionally, the dissent disagreed with the majority's use of and reliance upon the *Kaiser Steel* test.[81] The dissent argued that the *Kaiser Steel* limitation on strict liability applies only to large corporate enterprises and does not extend to small commercial operations such as farming.[82]

While the *Kaiser Steel* test is the leading case on identification of commercial entities for purposes of strict liability application,[83] few courts outside of California have accepted the *Kaiser Steel* test.[84] Until the Fourth Circuit's *Purvis* opinion, the only federal appellate courts which had adopted the *Kaiser Steel* test were the Ninth[85] and Second[86] Circuits. Other courts have formulated tests analogous to the *Kaiser Steel* test and have determined that strict liability protection does not extend to commercial parties.[87] Courts applying Pennsylvania law have

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[79] 674 F.2d at 224; *see infra* text accompanying notes 79-80.

[80] 674 F.2d at 224; *see* FED. R. CIV. P. 52(a) (appellate court shall not set aside jury findings of fact unless such facts are clearly erroneous); *see also* United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948) (explaining clearly erroneous rule). A finding of fact is clearly erroneous when, although evidence exists to support the finding, the appellate court determines with a definite and firm conviction that the finding is incorrect. *Id.* at 395.

[81] 674 F.2d at 224; *see infra* text accompanying notes 83, 90-91.

[82] 674 F.2d at 224. The *Purvis* dissent relied on the Ninth Circuit's holding in S.A. Empresa v. Boeing Co., 641 F.2d 746, 753-54 (9th Cir. 1981), to support the proposition that the *Kaiser Steel* limitation on strict liability should apply only to large corporate enterprises. 674 F.2d at 224. In addition, the *Purvis* dissent disagreed with the majority's determination that farming constitutes a "commercial activity" for purposes of strict liability application. 674 F.2d at 224. The dissent argued that the classification of farming as a commercial activity was unduly harsh to Purvis. *Id.*

[83] *See* 55 Cal. App. 3d at 748, 127 Cal. Rptr. at 845. The *Kaiser Steel* test involves a four-part process to determine availability of strict liability relief. *Id.*; *supra* text accompanying notes 54-58. (explanation of *Kaiser Steel* test). The *Kaiser Steel* test is easy to apply and does not require any detailed factual information. 55 Cal. App. 3d at 748, 127 Cal. Rptr. at 845; *see also infra* note 84 (jurisdictions which have accepted *Kaiser Steel* test).

[84] *See* S.A. Empresa v. Boeing Co., 641 F.2d 746, 753-54 (9th Cir. 1981) (accepting *Kaiser Steel* test); Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 617 F.2d 936, 939-40 (2d Cir. 1980) (accepting *Kaiser Steel* test); Rocky Mountain Helicopters Inc. v. Bell Helicopter Co., 491 F. Supp. 611, 614-15 (N.D. Tex. 1979) (accepting *Kaiser Steel* test).

[85] *See* S.A. Empresa v. Boeing Co., 641 F.2d 746, 753-54 (9th Cir. 1981) (accepting *Kaiser Steel* test) (using California law); Scandanavian Airlines Sys. v. United Aircraft Corp., 601 F.2d 425, 428-29 (9th Cir. 1979) (accepting *Kaiser Steel* test) (using California law); Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924, 927-28 (9th Cir. 1979) (accepting *Kaiser Steel* test) (using Idaho law).

[86] *See* Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 617 F.2d 936, 939-40 (2d Cir. 1980) (accepting *Kaiser Steel* test) (using New York law).

[87] *E.g.* Delta Air Lines Inc. v. McDonnell Douglas Corp., 503 F.2d 239, 245 (5th Cir. 1974), *cert. denied*, 421 U.S. 965 (parties eligible for implied warranty protection are exempt from strict liability relief) (using Georgia law); Ebasco Serv., Inc. v. Pennsylvania Power & Light Co., 460 F. Supp. 163, 223-26 (E.D. Pa. 1978) (strict liability does not apply to parties in

recognized that strict liability relief is appropriate only to buyers who lack the ability or power to bargain with their sellers.[88] Courts applying Iowa law refuse to award strict liability relief to buyers who purchase goods in traditionally commercial settings.[89]

In applying the *Kaiser Steel* test, the Fourth Circuit correctly found that Purvis dealt in a commercial setting[90] and negotiated risks of loss with CEPCO,[91] but did not determine whether Purvis dealt with CEPCO from a position of relatively equal economic strength[92] or bargained the specifications of the curing barns.[93] The Fourth Circuit did not consider the parity in economic strength and specification-bargaining elements of the *Kaiser Steel* test significant in determining that Purvis was a commercial entity.[94] Although the *Purvis* court, in effect, disregarded one half of the *Kaiser Steel* test, the *Purvis* court claimed to follow *Kaiser Steel* in denying Purvis strict liability relief.[95]

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a commercial setting) (using Pennsylvania law); Midland Forge, Inc. v. Letts Indus., Inc., 395 F. Supp. 506, 514-15 (N.D. Iowa 1975) (losses incurred in commercial ventures not recoverable under strict liability) (using Iowa law); Noel Transfer & Package Delivery Serv., Inc. v. General Motors Corp., 341 F. Supp. 968, 970-71 (D. Minn. 1972) (economic losses suffered by commercial parties not recoverable under strict liability) (using Minnesota law).

[88] *See, e.g.*, Posttape Assoc. v. Eastman Kodak Co., 537 F.2d 751, 756 (3d Cir. 1976) (commercial parties who modify or limit implied warranties in a product are not eligible for strict liability relief) (using Pennsylvania law); Employers Liability Assurance Corp. v. Greenville Business Men's Ass'n, 423 Pa. 288, _____, 224 A.2d 620, 623-24 (1966) (buyers who bargain away or limit implied warranties are ineligible for strict liability protection).

[89] *See, e.g.*, Midland Forge, Inc. v. Letts Indus., Inc., 395 F. Supp. 506, 514-15 (N.D. Iowa 1975) (losses incurred in commercial venture not recoverable under strict liability); Iowa Elec. Light & Power Co. v. Allis-Chalmers Mfg. Co., 360 F. Supp. 25, 32 (S.D. Iowa 1973) (strict liability inapplicable between parties who function properly in commercial setting).

[90] *See* 674 F.2d at 218. Purvis contracted directly with a representative of CEPCO and negotiated a sales contract. *Id.*

[91] *See id.* Purvis negotiated the sales contract with CEPCO and accepted the limited warranty that CEPCO inserted into the contract. *Id.*

[92] *See id.* at 218-19. Purvis did not possess the economic strength of CEPCO. *Id.* Purvis owned a medium-sized tobacco farm in rural South Carolina. *Id.* CEPCO was a division of the Condec Corporation, whose gross revenues in 1981 were $275,000,000. STANDARD AND POOR'S REGISTER OF CORPORATIONS 564 (1982).

[93] *See* 674 F.2d at 218. The CEPCO barns were prefabricated and were not built to order. *Id.*

[94] 674 F.2d at 223 n.11. The *Purvis* court deemed the parity in economic strength and specification-bargaining considerations insignificant elements of the *Kaiser Steel* test. *Id.* The *Purvis* court found that bargaining power disparity is important only in instances in which a seller can impose an adhesion contract. *Id.* Additionally, the *Purvis* court determined that product specification-bargaining has no bearing on the question of whether the policies underlying strict liability attach to a given product. *Id.*; *see Greenman*, 59 Cal. 2d at 60, 377 P.2d at 900, 27 Cal. Rptr. at 700 (policies underlying strict liability); *supra* note 8 (explanation of *Greenman* holding).

[95] 674 F.2d at 223. The Fourth Circuit's declaration that the *Purvis* holding followed from *Kaiser Steel* in light of the Fourth Circuit's treatment of the *Kaiser Steel* test is highly suspect. *See supra* text accompanying notes 59-60, 90-93. Apparently, the *Purvis*

In addition, the Fourth Circuit's reliance upon the *Kaiser Steel* analysis is questionable in light of the facts in *Purvis* and prior applications of the *Kaiser Steel* test.[96] Purvis' farming operation was not a large corporate enterprise[97] and courts that have applied the *Kaiser Steel* test have agreed that the *Kaiser Steel* limitation on strict liability applies only to large corporate enterprises.[98] By applying the *Kaiser Steel* test to a case involving a non-corporate buyer, the Fourth Circuit extended the *Kaiser Steel* limitation to a previously unaffected class.[99] Also, since South Carolina had enacted Restatement of Torts section 402A into statutory law,[100] the Fourth Circuit had an obligation to decide *Purvis* with deference toward the section 402A version of strict liability.[101] *Kaiser Steel* is a California case and California does not accept section 402A or the unreasonably dangerous requirement embodied in section 402A.[102] In following *Kaiser Steel*, the Fourth Circuit relied on a legal analysis unrelated to South Carolina law or precedent.[103] For the above reasons, the value of *Kaiser Steel* as precedent in the Fourth Circuit is uncertain.[104]

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court believed that it could follow *Kaiser Steel* without applying the full four-part *Kaiser Steel* test. *See supra* note 94 (*Purvis* court treatment of *Kaiser Steel* test).

[96] *See supra* notes 84-86 (cases accepting *Kaiser Steel* analysis); *infra* text accompanying notes 97-98.

[97] 674 F.2d at 218. Purvis' farming operation was a sole proprietorship that encompassed tobacco growing and curing on a 600 acre farm. *Id.*

[98] *See supra* notes 84-86 (cases accepting *Kaiser Steel* analysis).

[99] *See id.* No court yet has applied the *Kaiser Steel* limitation on strict liability to either a sole proprietorship or farming operation. *Id.*

[100] 674 F.2d at 219; *see* S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976). South Carolina has enacted § 402A and the official comments to § 402A into statutory law. S.C. CODE § 15-73-30 (1976). Section 402A of the Restatement of Torts provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[101] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (federal courts sitting in diversity have obligation to apply substantive law of forum state). *See generally* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Friendly, *In Praise of* Erie—*and the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

[102] *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 135, 501 P.2d 1153, 1163, 104 Cal. Rptr. 433, 443 (1972) (unreasonably dangerous criterion is not element of California strict liability).

[103] *See supra* notes 68, 100 (unreasonably dangerous criterion is an element of South Carolina strict liability).

[104] *See supra* text accompanying notes 96-103. At best, the *Kaiser Steel* analysis will retain precedential value until the state supreme courts within the jurisdiction of the Fourth Circuit render opinions on the availability of strict liability relief to commercial parties. *Id.*

Although the facts in *Purvis* did not allow for a determination that Purvis was a commercial entity under a strict application of all four parts of the *Kaiser Steel* test,[105] the facts did allow for a determination that Purvis was a commercial entity under the Fourth Circuit's nature of the risk analysis.[106] The Fourth Circuit's nature of the risk analysis is, in essence, a distillation of the *Kaiser Steel* test[107] that embodies general strict liability policy.[108] The nature of the risk analysis is an amalgamation of the two parts of the *Kaiser Steel* test that the *Purvis* court found significant.[109] In applying the *Kaiser Steel* test, the Fourth Circuit found that Purvis dealt in a commercial setting[110] and negotiated risk of loss with CEPCO,[111] and determined, based upon these findings, that Purvis had accepted a commercial risk.[112] Furthermore, the Fourth Circuit's nature of the risk analysis is consistent with the policy considerations underlying strict liability by providing strict liability relief to consumers and denying strict liability relief to parties who knowingly accept commercial risks.[113]

In addition to denying Purvis strict liability relief because Purvis accepted a commercial risk, the Fourth Circuit found another ground for denying Purvis strict liability relief by determining that the CEPCO barns in question were not unreasonably dangerous.[114] In order for the CEPCO bars to have been unreasonably dangerous as defined by comment i to section 402A of the Restatement,[115] the barns must have been

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[105] *See* 674 F.2d at 220; *supra* text accompanying notes 59, 90-95. The Fourth Circuit found that Purvis met only two parts of the *Kasier Steel* four part test. 674 F.2d at 223 n.11.

[106] *See infra* text accompanying notes 110-112 (Purvis accepted commercial risks).

[107] 674 F.2d at 222-223; *see infra* text accompanying notes 109-12.

[108] *See Greenman*, 59 Cal. 2d at 60-61, 377 P.2d at 900-01, 27 Cal. Rptr. at 700-01 (policies underlying strict liability); *supra* note 8 (explanation of *Greenman* holding).

[109] 674 F.2d at 223 n.11. The *Purvis* court determined that the commercial setting and negotiation of risk elements of the *Kaiser Steel* test contained the essence of the *Kaiser Steel* test; *see infra* text accompanying notes 110-12.

[110] 674 F.2d at 218; *see supra* note 90 (commercial setting element).

[111] 674 F.2d at 218; *see supra* note 91 (negotiation of risk element).

[112] 674 F.2d at 223; *see supra* note 49 (explanation of commercial risk).

[113] *See supra* text accompanying notes 10-15 (analysis of policy considerations underlying strict liability); *supra* text accompanying notes 45-49 (reasons for allowing strict liability relief to consumers and for denying strict liability relief to commercial parties).

[114] 674 F.2d at 223. If the CEPCO barns in question were not unreasonably dangerous, Purvis could not receive strict liability relief under § 402A regardless of whether the Fourth Circuit considered his transaction with CEPCO a consumer or commercial transaction. *See supra* note 100 (South Carolina strict liability statute); *supra* note 68 (unreasonably dangerous criterion is element of South Carolina strict liability).

[115] *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965). Comment i, in part, provides that a product must be dangerous to an extent beyond that which would be contemplated by the ordinary purchasing consumer in order to be unreasonably dangerous. *Id.* Comment i suggests that goods in their normal marketable form are usually not unreasonably dangerous. *Id.* The presence of a design defect or latent contamination in an otherwise normal product can render a product unreasonably dangerous because a consumer would not ordinarily contemplate such dangers. *Id.*

dangerous beyond any of Purvis' contemplations.[116] Therefore, if Purvis knew of the risk that the CEPCO barns might destroy his tobacco, the barns were not unreasonably dangerous.[117] The facts in *Purvis* do not indicate that Purvis knew that use of the CEPCO barns posed such a risk to his tobacco.[118] Purvis knew that the CEPCO barns might diminish the value of his tobacco by proving to be inefficient at curing, but did not know that the barns might destroy the tobacco.[119] The Fourth Circuit correctly noted, however, that the risks of ordinary product malfunction and ineffectiveness are never beyond the contemplation of the buyer.[120]

In determining that the loss of Purvis' tobacco was due to curing barn ineffectiveness, the Fourth Circuit blurred the distinction between product ineffectiveness and product dangerousness.[121] A majority of courts which accept section 402A allow strict liability for property damage when such damage is calamitous or total.[122] Under such circumstances, most courts deem the injury-causing product unreasonably dangerous and allow relief under 402A.[123] Most courts which accept section 402A do not, however, allow strict liability recovery for property injury when the injury to the item involves only partial damage or diminution in value.[124] In such cases, most courts consider the injury-causing

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[116] 674 F.2d at 222.

[117] *See supra* note 115. If Purvis knew of the substantial likelihood that the CEPCO barns would destroy his tobacco, the barns would not be dangerous to an extent beyond his contemplation. *Id.* Furthermore, if Purvis knew that the barns probably would destroy his tobacco, CEPCO could argue that Purvis assumed the risk of crop damage. *See* RESTATEMENT (SECOND) OF TORTS § 496A (1965) (assumption of the risk defense is available to defendants in strict liability actions).

[118] *See* 674 F.2d at 218-19. The facts suggest that Purvis was an informed purchaser and knew of the merits and drawbacks of the CEPCO barns, but do not suggest that Purvis knew of any serious dangers in using the barns. *Id. See also* Brief of Appellant, *supra* note 29, at 4.

[119] *See* 674 F.2d at 222-23 Purvis accepted the risk, as does any purchaser, of product ineffectiveness. *Id.* Although the facts are silent on the degree of Purvis' knowledge, Purvis undoubtedly would not have used the CEPCO barns if he suspected that the barns would destroy his tobacco. *Id.*

[120] *Id.*

[121] *See id.* at 222-23; *infra* text accompanying notes 122-125.

[122] *See, e.g.*, Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1174-75 (3d Cir. 1981) (damages to tractor caused by defective part which caused fire recoverable under strict liability); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, ———, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898 (1964) (damages to automobile caused by defective part recoverable under strict liability); Rosenau v. City of New Brunswick, 51 N.J. 130, 140-41, 238 A.2d 169, 175 (1968) (water damage to house caused by defective water meter recoverable under strict liability); Wulff v. Sprouse-Reitz Co., 262 Or. 293, 498 P.2d 766, 771-72 (1972) (property damage caused by defective electric blanket which caught fire recoverable under strict liability).

[123] *See supra* note 122. Generally, courts which accept § 402A consider a product unreasonably dangerous if the product inflicts sudden or severe damage upon the user's property. *Id. See generally* HURSH & BAILEY, *supra* note 18, § 4.20 (1974 & 1980 Supp.).

[124] *See, e.g.*, Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324,

product inefficient and deny relief under section 402A on the grounds that the injury involved only economic loss.[125] The facts in *Purvis*, however, are unique and only two other courts have considered the availability of strict liability relief to cases involving crop damage caused by defective farming equipment.[126] In one case, the Montana Supreme Court allowed strict liability relief to a farmer whose crops suffered damage due to a faulty irrigation system.[127] In the other case, the Texas Court of Civil Appeals denied strict liability relief to a farmer whose crops suffered damage due to a defective irrigation system on the ground that crop loss was economic loss.[128] In the Texas case, however, the crop losses were not total and the defective irrigation system caused only a fifty per cent drop in crop yield.[129] By classifying the total property loss in *Purvis* as a product of curing barn ineffectiveness, the Fourth Circuit appears to have misconstrued the unreasonably dangerous requirement of section 402A.[130]

In *Purvis*, the Fourth Circuit claimed to follow *Kaiser Steel* but relied upon the nature of the risk analysis in denying Purvis strict liability relief.[131] The Fourth Circuit's determination that Purvis qualified as a commercial entity is correct under the nature of risk analysis.[132] Purvis knew of the risks involved in using the CEPCO barns and was aware of the chance that his tobacco might not cure well in the modern prefabricated barns.[133] Purvis did not qualify, however, as a commercial

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329-30 (Alaska 1981) (diminution in value damages to electric generator not recoverable under strict liability); Beauchamp v. Wilson, 21 Ariz. App. 14, _____, 515 P.2d 41, 44 (1973) (loss of bargain recovery denied under strict liability); Chrysler Corp. v. Taylor, 141 Ga. App. 671, 672, 234 S.E.2d 123, 124-25 (1977) (loss of bargain damages to automobile not recoverable under strict liability); Wuench v. Ford Motor Co., 104 Ill. App. 3d 317, 321, 432 N.E.2d 969, 971-72 (1982) (partial damage to automobile caused by defective part not recoverable under strict liability); Hole v. General Motors Corp., 83 A.D.2d 715, 716-17, 442 N.Y.S.2d 638, 641 (1981) (strict liability relief denied to automobile owner whose car sustained damage due to frame defect).

[125] *See supra* note 124. Generally, courts which accept § 402A do not consider a product unreasonably dangerous if the product inflicts only economic loss damage upon an item of the user's property. *See generally* HURSH & BAILEY, *supra* note 18, § 4.22 (1974 & Supp. 1980).

[126] Whitaker v. Farmhand, Inc., 173 Mont. 345, _____, 567 P.2d 916, 922 (1977) (strict liability relief allowed in case involving crop damage); Lockwood Corp. v. Spencer, 613 S.W.2d 369, 370 (Tex. Civ. App. 1981) (strict liability relief denied in case involving crop damage).

[127] *Whitaker*, 173 Mont. at _____, 567 P.2d at 922.

[128] *Spencer*, 613 S.W.2d at 370-71.

[129] *Id.*

[130] *See supra* text accompanying notes 121-125.

[131] *See supra* text accompanying notes 65-66 (*Purvis* court's use of nature of risk analysis); *supra* text accompanying notes 90-95 (*Purvis* court's treatment of *Kaiser Steel* test).

[132] *See supra* text accompanying notes 110-113 (*Purvis* court's application of nature of the risk analysis).

[133] *See* 674 F.2d at 222-23 (Purvis accepted risk of curing barn ineffectiveness); *supra*

entity under the *Kaiser Steel* test.[134] The *Purvis* court found only two elements of the *Kaiser Steel* four-part test significant and utilized these two elements in formulating the nature of the risk analysis.[135]

Although the Fourth Circuit's use of the nature of the risk analysis in *Purvis* yielded a correct result,[136] the nature of the risk analysis could yield incorrect results in future cases.[137] The nature of the risk analysis is highly subjective and allows courts much discretion in determining what constitutes a commercial risk.[138] For example, a court might apply the nature of the risk analysis and determine that a consumer who purchases goods with the slightest degree of pre-sale negotiation accepts a commercial risk and is ineligible for strict liability relief.[139] If courts apply the nature of the risk analysis with such a preference toward finding commercial risks, courts may create an incentive for consumers to purchase goods blindly without any pre-sale inquiry into product safety.[140] The nature of the risk test will be useful to courts only when the courts have clear guidelines to distinguish commercial risks from consumer risks.

After the Fourth Circuit's decision in *Purvis*, Purvis probably cannot get relief in the federal court system.[141] The Fourth Circuit denied Purvis' petition for rehearing and rehearing en banc[142] and likely will not grant Purvis an additional rehearing.[143] In addition, South Carolina does not have a certification statute[144] that allows for federal courts sitting in

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text accompanying note 119 (Purvis knew that CEPCO barns could diminish the value of his tobacco).

[134] *See* 674 F.2d at 223; *supra* text accompanying notes 90-95 (*Purvis* court's treatment of *Kaiser Steel* test).

[135] *See supra* text accompanying notes 105-112 (*Purvis* court's formulation of nature of the risk analysis).

[136] *See* 674 F.2d at 223; *supra* text accompanying notes 90-91, 119-120 (nature of the risk analysis shows that Purvis accepted commercial risks).

[137] *See* 674 F.2d at 222-23. In *Purvis*, the Fourth Circuit did not explain in detail the nature of the risk test. *Id.* Additionally, the *Purvis* court did not distinguish clearly between consumer and commercial risks. *Id.* at 221-23; *see also infra* text accompanying notes 138-140.

[138] *See* 674 F.2d at 223.

[139] *See id.* Since the Fourth circuit did not define what kinds of pre-sale negotiations incur commercial risks, the nature of the risk analysis is a nebulous test for determining when a buyer acts as a commercial entity. *Id.*

[140] *See id.* If consumers believe that any pre-sale negotiation with a product seller will exempt them from strict liability protection, consumers may make a conscious effort to avoid asking any questions pertaining to product safety or reliability in an effort to retain the option of strict liability relief. *See generally* Keeton, *Assumption of the Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961).

[141] *See* 674 F.2d at 217. The Fourth Circuit denied Purvis' motion for rehearing on April 15, 1982. *Id.*

[142] *Id.*

[143] *See* R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 470-74 (1981) (appellate courts almost always summarily deny petitions for additional rehearings).

[144] 674 F.2d at 219.

diversity to transfer questions of state law to the South Carolina Supreme Court.[145] Purvis, therefore, has no grounds to argue that the Fourth Circuit misapplied the South Carolina strict liability law until the South Carolina Supreme Court renders an opinion on the availability of strict liability protection to commercially transacting parties.

After *Purvis*, purchasers who accept commercial risks in the Fourth Circuit will have to find their relief in products liability actions within the law of express and implied warranty.[146] Courts that apply the *Purvis* reasoning will utilize the nature of the risk analysis[147] in determining if a plaintiff is eligible for strict liability relief.[148] Generally, courts that follow *Purvis* will deny a buyer strict liability relief if the buyer contracts in a commercial setting with a seller and negotiates the risk of loss from product defects.[149] *Purvis* does not, however, determine that strict liability protection is never available to commercial plaintiffs.[150] Commercial parties who rely on products as consumers and do not accept commercial risks deserve strict liability protection.[151]

JOHN RANDALL MINCHEW

B. *Federal Tort Claims Act: Administrative Claim as a Prerequisite to Actions Under the Federal Drivers Act*

The Federal Tort Claims Act[1] (the Act) permits recovery against the United States for tortious conduct committed by government agents.[2]

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[145] *Id.*

[146] *See supra* text accompanying notes 72-76 (express and implied warranties).

[147] *See* 674 F.2d at 222-23; *supra* text accompanying notes 61-64, 107-13 (nature of the risk analysis).

[148] *See supra* text accompanying notes 62, 107-13 (strict liability relief eligibility).

[149] *See* 674 F.2d at 220; *Kaiser Steel*, 55 Cal. App. 3d at 748, 127 Cal. Rptr. at 845; *supra* text accompanying notes 109-22 (*Purvis* application of *Kaiser Steel* test).

[150] *See* 674 F.2d at 222; *supra* note 78 (consumer purchasers).

[151] *See supra* text accompanying notes 77-78 (commercial purchasers).

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[1] Federal Tort Claims Act, ch. 753, tit. iv, 60 Stat. 843 (1946) (codified in scattered sections of 28 U.S.C.). The Federal Tort Claims Act confers exclusive jurisdiction on United States district courts to hear all claims against the United States for injury caused by any government employee under circumstances in which a private individual would be liable. 28 U.S.C. § 1346(b) (1976). The Act's broad waiver of immunity is subject to a number of qualifications set forth in 28 U.S.C. §§ 2671-2680 (1976).

Beginning in 1923, Congress considered legislation establishing a federal tort claims act. *See* McCabe, *Observations on the Federal Tort Claims Act*, 3 FORUM 66, 68 (1968). In 1928, President Coolidge vetoed a bill which both houses of Congress had passed. *Id.* In 1939-41, Congress initiated a new effort to pass a tort claims act with the introduction of twelve tort claims bills, resulting in passage of the present Act in August 1946. *Id.*; *see generally Symposium on the Federal Tort Claims Act*, 24 FED. B.J. 136 (1964).

[2] *See* L. JAYSON, PERSONAL INJURY: HANDLING FEDERAL TORT CLAIMS § 1 (1979).

The Act imposes liability on the United States in the same manner and to the same extent as a private individual.[3] In 1961, Congress enacted the Federal Drivers Act as an amendment to the Federal Tort Claims Act.[4] The amendment provides that the exclusive civil remedy for tort claims resulting from the negligent operation of a motor vehicle by an

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Before the enactment of the Federal Tort Claims Act, relief was available against the government for personal injury or property damage through passage of a private relief bill in Congress. *See generally* Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROBS. 311, 321-26 (1942); Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1688-93 (1966).

In the absence of a specific waiver, courts historically applied the common-law doctrine of sovereign immunity to prohibit suits against government entities, particularly the federal government. *See, e.g.*, Larson v. Domestic & Foreign Corp., 337 U.S. 682, 688 (1949) (no jurisdiction to sue government absent consent); United States v. Clarke, 33 U.S. (8 Pet.) 151, 154 (1834) (no common-law right to sue United States); Cohens v. Virginia, 19 U.S. (6 Wheat) 82, 86 (1821) (sovereign state not subject to lawsuit except by own consent). Although based on the rationale "the King can do no wrong," the doctrine of sovereign immunity survived the American rejection of the English monarchy in the eighteenth century. 2 W. BLACKSTONE, COMMENTARIES 254 (1809); 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 458-59 (3d ed. 1927). The maxim evolved from the principle that no court superseded the King's authority. Parker, *The King Does No Wrong—Liability for Misadministrations*, 5 VAND. L. REV. 167, 168 (1952). In Kawananakoa v. Polyblank, 205 U.S. 349 (1907), Justice Holmes stated a sovereign is exempt from suit on the grounds that plaintiffs have "no legal right against the authority that makes the law on which the right depends." *Id.* at 353. Modern doctrine is simply that the federal government is immune from suit without its permission. 2 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 29.2-.3, at 1609-10 (1956).

[3] 28 U.S.C. § 2674 (1976); *see* Big Head v. United States, 166 F. Supp. 510, 512 (D. Mont. 1958) (United States liable as private person under like circumstances); *supra* note 1 (discussing Federal Tort Claims Act).

[4] Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. §§ 2679(b)-2679(e) (1976)). The effective date of the Federal Drivers Act was March 21, 1962.

In 1960, Congress considered a bill granting personal immunity to government drivers. S. REP. NO. 736, 87th Cong., 1st Sess. 1, 16, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2784, 2797. Though Congress passed the measure, President Eisenhower objected to a section in the bill which would condition the bill's effect upon the plaintiff's consent to removal of a state court action to federal court. *Id.* at 16, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS at 2797. The President believed that this provision made the bill ineffective and inconsistent since any plaintiff refusing to give his consent could prevent conversion of an action into one under the Act and therefore thwart the purposes of the original bill. H.R. DOC. NO. 415, 86th Cong., 2d Sess., 106 CONG. REC. 12455 (1960). In the next session, Congress passed a similar bill without the section requiring plaintiff's consent. 107 CONG. REC. 18499-500 (1961); *see* McCord, *Fault Without Liability; Immunity of Federal Employees*, 1966 U. ILL. L.F. 849, 851-52 (1966).

Prior to enactment of the Federal Drivers Act, Congress considered several proposals attempting to grant immunity to government drivers. Some of these bills sought to indemnify the driver after payment of judgments or claims. *See* H.R. 4492, 84th Cong., 1st Sess. 1-3 (1955). Additional bills proposed that the government pay for liability insurance for its employees. *See* H.R. 10577, 84th Cong., 2d Sess. 4 (1956). Congress ultimately utilized the Act to provide relief to government drivers. S. REP. NO. 736, 87th Cong., 1st Sess. 1, 2, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2784, 2786; *see* Comment, *Administrative Claims and the Substitution of the United States as Defendant under the Federal Drivers Act: The Catch 22 of the Federal Tort Claims Act?*, 29 EMORY L.J. 755, 763-64 (1980).

employee of the federal government acting in the line of duty is an action against the United States.[5] The Federal Drivers Act also provides immunity for the negligent government driver,[6] thus precluding an injured individual's option of bringing suit against the driver personally[7] or the United States under the principle of *respondeat superior*.[8] The Act sets forth a procedure to dispose of actions brought against a government driver in his individual capacity.[9]

In 1966, Congress made substantial changes to the Federal Tort

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[5] 28 U.S.C. § 2679(b) (1976). Subsection (b) provides that under the remedy by suit against the United States as provided 28 U.S.C. § 1346(b) (1976), resulting from the operation by a government employee of any motor vehicle while acting within the scope of his employment is exclusive of any other civil actions. *Id.*

[6] *Id.*

[7] Prior to passage of the Federal Drivers Act, an injured plaintiff could sue the negligent driver in his personal capacity. *See, e.g.*, United States v. First Sec. Bank, 208 F.2d 424, 428 (10th Cir. 1953) (individual liable for tort injuries caused by negligence); Burks v. United States, 116 F. Supp. 337, 339 (S.D. Tex. 1953) (government employee liable for tort to third person).

[8] The Federal Tort Claims Act imposes liability on the federal government on the basis of conventional *respondeat superior* principles. *See, e.g.*, Williams v. United States, 350 U.S. 857, 857 (1955) (per curiam) (case controlled by doctrine of *respondeat superior*); United States v. Holcombe, 277 F.2d 143, 146 (4th Cir. 1960) (policy of Act is to fix government liability under *respondeat superior*). *Respondeat superior* means that a master is liable in certain cases for the wrongful acts of his servant. Burger Chef Sys., Inc. v. Govro, 407 F.2d 921, 925 (8th Cir. 1969). Under the doctrine, the master is responsible for negligence on the servant's part towards whom those the master owes a duty to use care, provided failure by the servant to use such care occurred within the course of employment. Shell Petroleum Corp. v. Magnolia Pipe Line Co., 35 S.W.2d 829, 833 (Tex. Civ. App. 1935). Prior to the Federal Drivers Act, government employees risked personal liability in the course of official duty, and employees felt financially compelled to carry their own liability insurance. Note, *The Constitutionality and Basic Fairness of the Government Drivers Law*, 54 MINN. L. REV. 645, 651-52 (1970). Congress granted government drivers personal immunity from accidents occurring within the scope of federal employment to alleviate the federal employees' financial burden. S. REP. NO. 736, 87th Cong., 1st Sess. 1-3, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2784, 2789-90.

[9] *See* 28 U.S.C. §§ 2679(c)-2679(e) (1976). The Federal Drivers Act requires the Attorney General to defend suits brought in any court against federal employee for negligence while the employee acted within the scope of his employment. 28 U.S.C. § 2679(c) (1976). To insure that the Attorney General can appear and defend the suit, the Federal Drivers Act requires government drivers to deliver papers served upon them to the driver's superior who must furnish copies of the process to the Attorney General. *Id.* In an action initially commenced in state court, the party may not join the federal government until removal of the action to federal district court. *See* 28 U.S.C. § 1441 (1976). To accomplish removal and joinder, the Attorney General first must present a certificate issued by the appropriate agency, admitting that the driver was operating the vehicle within the scope of federal employment. 28 U.S.C. § 2679(d) (1976). Following removal, but prior to trial on the merits, any party may move to remand. *Id.* If the court finds that the government driver was not acting within the scope of his employment, the court remands the case to state court. *Id.* In the alternative, if the court determines that the government driver was acting within the scope of his employment, the Federal Drivers Act grants the employee personal immunity and deems the suit a tort action against the federal government under the Federal Tort Claims Act. *Id.*

Claims Act to provide increased authority to federal agencies to facilitate administrative settlement of tort claims.[10] The purpose of Congress in enacting the 1966 amendments was to reduce the number of suits filed under the Act[11] and to allow the government agency whose employee caused the injury to consider and settle the claim.[12] The Act requires presentation of a written claim to the appropriate federal agency as a prerequisite to commencement of a civil action against the government.[13] Failure by a plaintiff to submit a written claim within two years after the claim accrues will bar a tort action against the United States.[14]

The exclusive remedy provided by the Federal Drivers Act combined with the Act's strict administrative claims procedure may result in a harsh outcome for plaintiffs who are unaware that a negligent driver was a federal employee in the line of duty.[15] An injured plaintiff typically

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[10] Pub. L. No. 89-506, 80 Stat. 306 (1976) (codified in 28 U.S.C. §§ 2401, 2671-2680 (1976)). Since the amendments to the Federal Tort Claims Act provided for administrative settlement, the procedures set forth in the amendments were not to become effective until the enactment date in July 1966. S. REP. No. 1327, 89th Cong., 2d Sess. 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2515, 2519. This interim period allowed federal agencies to instruct employees on the new responsibilities. *Id.*

[11] Prior to passage of the 1966 amendments, claimants filed between 1500 and 2000 new tort cases against the government each year. S. REP. No. 1327, 89th Cong., 2d Sess. 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2515, 2518.

[12] S. REP. No. 1327, 89th Cong., 2d Sess. 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2517. *See generally Improvements of Procedures in Claims Settlement and Government Litigation: Hearing on H.R. 13650 Before the House Subcomm. No. 2 of the Comm. on the Judiciary*, 89th Cong., 2d Sess. 13, 15 (1966).

[13] 28 U.S.C. § 2675(a) (1976). For purposes of the Federal Tort Claims Act the plaintiff must file an administrative claim with the federal agency whose activities give rise to the claim. 28 C.F.R. § 14.2(b)(1) (1981). If the government denies the claim or offers an amount that is unsatisfactory, a claimant may bring an action in federal district court. 28 U.S.C. § 2675(b) (1976). The amount requested, however, may not exceed the amount of the administrative claim. *Id.* § 2675(b). Courts make an exception if newly discovered evidence or a demonstration of intervening facts relating to the administrative claim justifies an increased amount. *See* Morgan v. United States, 123 F. Supp. 794, 796 (S.D.N.Y. 1954) (amount restricted to claim when no newly discoverable evidence).

[14] 28 U.S.C. § 2401(b) (1976). Having required the filing of an administrative claim prior to bringing suit against the government, Congress additionally amended § 2401(b) of Title 28 to include the filing of an administrative claim within two years rather than requiring the claimant to bring suit. S. REP. No. 1327, 89th Cong., 2d Sess. 6, 8, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2515, 2522.

In computing the two-year limitation period, courts exclude the day of the accident and include the last day of the two-year period. Prince v. United States, 185 F. Supp. 269, 272 (E.D. Wis. 1960). Mailing an administrative claim addressed to the appropriate agency, however, does not meet the statutory requirement that the plaintiff present the claim to the appropriate federal agency. *See* Steele v. United States, 390 F. Supp. 1109, 1112 (S.D. Cal. 1975) (mailing not sufficient to toll Act's statute of limitations). The requirement in § 2675(a) of presentation of a claim is at a minimum the equivalent of a filing. Avril v. United States, 461 F.2d 1090, 1091 (9th Cir. 1972).

[15] *See, e.g.*, Fuller v. Daniel, 438 F. Supp. 928, 930 (N.D. Ala. 1977) (court notes unfairness of result in dismissing plaintiff's action originally commenced in state court without knowledge driver was federal employee); Montalvo v. Graham, 390 F. Supp. 533, 534 (E.D.

brings an action against a negligent driver individually, without realizing the need to file an administrative claim.[16] The defendant raises the issue of personal immunity and the court substitutes the United States as proper defendant.[17] The court then dismisses the plaintiff's suit for failure to present the requisite claim.[18] A more serious result occurs when the negligent driver raises the personal immunity defense after the tolling of the Act's two-year statute of limitations.[19] In *United States v. Wilkinson*,[20] the Fourth Circuit considered whether a plaintiff's lack of awareness that the federal employee driving the automobile was in the line of duty at the time of the accident excuses the plaintiff's failure to file an administrative claim within two years.[21]

On October 3, 1978 in Norfolk, Virginia, an automobile operated by Richard Gray struck Tilden Wilkinson.[22] At the time of the accident, Gray, a first-class boatswain's mate, was on Naval duty, serving with the *U.S.S. Miller* in Boston, Massachusetts.[23] Gray drove from Boston to Norfolk in a car leased to the *U.S.S. Miller* in order to pick up and deliver parts and mail for the ship.[24] The accident occurred while Gray was returning to his hotel after delivering the ship's mail.[25] Following the accident, Wilkinson retained Howard I. Legum as counsel to represent him in his claim against Gray.[26] Legum obtained a copy of the accident report which showed that Gray was in the Navy and stationed in Boston.[27]

Wis. 1975) (claimant's failure to file administrative claim within two years resulted in dismissal on basis of statute of limitations); Smith v. United States, 328 F. Supp. 1224, 1226 (W.D. Tenn. 1971) (plaintiff does not satisfy requirement of filing administrative claim by commencing action in state court); Driggers v. United States, 309 F. Supp. 1377, 1379 (D.S.C. 1970) (requirement of filing administrative claim is prerequisite to suit under Act). *See generally* Comment, *supra* note 4.

[16] *See, e.g.*, Wollman v. Gross, 637 F.2d 544, 547 (8th Cir. 1980) (action brought in state court against federal employee due to plaintiff's lack of knowledge of significance of driver's employment by government). *See generally* Comment, *The Federal Tort Claims Act and Administrative Claims*, 20 BAYLOR L. REV. 336 (1968).

[17] *See supra* text accompanying note 9 (discussing Federal Drivers Act procedures).

[18] *See* Pitard, *Procedural Aspects of the Federal Tort Claims Act*, 21 LOY. L. REV. 899, 900 n.8 (1975). If the plaintiff files suit before filing the administrative claim, the courts normally dismiss the action without prejudice, reserving to the plaintiff the right to refile. *Id.*

[19] *See supra* note 15 (citing decisions dismissing plaintiff's actions).

[20] 677 F.2d 998 (4th Cir. 1982).

[21] *Id.*

[22] *Id.* at 998-99.

[23] *Id.* at 999.

[24] *Id.*

[25] *Id.*

[25] *Id.*

[26] *Id.* Gray promptly contacted both the commanding officer of the *U.S.S. Miller* and the car rental company, informing them of the accident and the circumstances. *Id.* at 1000.

[27] *Id.* at 999. The first interrogatory that Wilkinson's counsel directed to Gray requested him to state his duty station, the name of his ship, and its address. Joint Appendix at 7, Wilkinson v. United States, 677 F.2d 998 (4th Cir. 1982). Gray's counsel answered the interrogatory from Wilkinson's attorney in October 1978. *Id.* at 999.

Nevertheless, neither Legum nor Wilkinson discovered that Gray was acting in the line of Naval duty at the time of the accident.[28]

Wilkinson filed suit against Gray in state court on September 17, 1980, almost two years after the accident.[29] On October 10, 1980, Gray, by his insurance counsel, filed a responsive pleading asserting Gray was within the scope of his Naval duty at the time of the accident.[30] Relying on the personal immunity grant of the Federal Drivers Act, Gray moved for dismissal.[31] Wilkinson's attorney subsequently filed an administrative claim with the Navy on October 20, 1980, seventeen days after the statute of limitations expired.[32] The claims attorney for the Navy determined that Gray was within the scope of his government duty at the time of the accident and requested representation by the United States Attorney.[33] The United States Attorney successfully petitioned the state court for removal of the case to federal district court and subsequently filed a motion for substitution of the United States as proper party defendant.[34] The government moved for dismissal based upon Wilkinson's failure to file an administrative claim prior to bringing suit against the United States.[35] The district court found that Gray was operating the rented automobile within the course of his federal employment.[36] Following substitution of the United States as defendant, the

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[28] 677 F.2d at 999. Following the accident, Legum contacted the attorney retained by the car rental company's insurance carrier. *Id.* Legum failed to explore the possibility that the accident occurred while Gray was acting within the scope of his employment. *Id.*

[29] *Id.* Wilkinson served process on the Commissioner of Motor Vehicles in accordance with the Virginia long-arm statute. VA. CODE ANN. §§ 8.01-308 & 310 (1980). The certificate shows that Wilkinson served the Commissioner on September 22, 1980. Joint Appendix at 4, Wilkinson v. United States, 677 F.2d 998 (4th Cir. 1982). Gray had twenty-one days to respond. VA. SUP. CT. C.P.R. 3:5.

[30] 677 F.2d at 999.

[31] *Id.* at 1000; *see* 28 U.S.C. § 2679(b) (1976). *See generally supra* notes accompanying text 5-9 (discussing provisions of Federal Drivers Act).

[32] 677 F.2d at 1001 n.5; *see also supra* note 14 (discussing computation of time period for statute of limitations purposes).

[33] 677 F.2d at 1003; *see supra* note 9 (United States Attorney required to defend suit). The claims attorney for the Navy investigated the circumstances surrounding the accident for almost four months before determining that Gray was within the scope of federal employment. 677 F.2d at 1003.

[34] 677 F.2d at 1001. On April 6, 1981, the United States Attorney removed the action from state court to the United States District Court for the Eastern District of Virginia at Norfolk. Joint Appendix at 29-31, Wilkinson v. United States, 677 F.2d 998 (4th Cir. 1982). On April 30, 1981, the United States Attorney filed a motion to substitute the federal government as the proper defendant and filed a motion to dismiss the action. Joint Appendix at 32, Wilkinson v. United States, 677 F.2d 998 (4th Cir. 1982).

[35] 677 F.2d at 999.

[36] Wilkinson v. Gray, 523 F. Supp. 372, 374-75 (E.D. Va. 1981). The law of the state in which the negligent or wrongful conduct occurs determines whether a federal employee's acts are within the scope of his employment. Williams v. United States, 350 U.S. 857, 857 (1955) (per curiam); *see* Laird v. Nelms, 406 U.S. 797, 801 (1972) (*respondeat superior* determines government's liability under Act); *see also* Bissel v. McElligott, 369 F.2d 115, 117 (8th

district court ruled that the filing of an administrative claim was a prerequisite to federal jurisdiction and that the statute of limitations had expired before Wilkinson filed an administrative claim.[37]

On appeal, the Fourth Circuit upheld the district court's dismissal of the tort claim.[38] The majority agreed with the lower court's finding that Gray was acting within the scope of his duty at the time his car struck Wilkinson.[39] In accordance with the Federal Drivers Act, the Fourth Cir-

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Cir. 1966) (words "line of duty" in statute invoke state law of *respondeat superior* to tort claims arising out of wrongful acts of military personnel); Kimball v. United States, 262 F. Supp. 509, 511-12 (D.N.J. 1967) (use of term "line of duty" does not expand area of government's liability for acts of employees beyond traditional *respondeat superior* concepts); Farmer v. United States, 261 F. Supp. 750, 751 (S.D. Iowa 1966) (determination of whether particular act is within scope of employment is made under applicable law of state where accident occurred); *infra* note 39 (discussing Virginia test for determining whether act within scope of employment).

[37] 523 F. Supp. at 376.

[38] 677 F.2d at 1002.

[39] *Id.* at 999-1000. In *Wilkinson*, the commanding officer of the *U.S.S. Miller* supplied Gray with the rented vehicle and directed him to travel to Norfolk. *Id.* at 999. At the time of the accident, Wilkinson was returning from delivering the ship's mail with the intention of eating dinner and going to his hotel room. *Id.* at 999-1000. The Fourth Circuit correctly found that eating dinner and staying in a hotel room were entirely incidental to the performance of Gray's duties for the United States. *Id.* at 1000. Gray received a daily allowance and subsistence reimbursement for mileage, food, and lodging. *Id.* at 999. The Fourth Circuit's analysis recognizes that Wilkinson's federal employment brought about his journey and created the exposure to a potential accident. *Id.* Wilkinson thus acted within the scope of his employment at the time of the accident. *Id.* The test in Virginia for determining whether an employee commits the act within the scope of employment is "whether the act was done by virtue of the employment and in the furtherance of the master's business." Broaddus v. Standard Drug Co., 211 Va. 645, 652-53, 179 S.E.2d 497, 503-504 (1971). *See* note 1 *supra* (local law determines liability of United States). In *Broaddus*, the Supreme Court of Virginia found that generally an act is within the scope of employment when the act falls under two circumstances. *Id.* at 652-53, 179 S.E.2d at 503-504. First, the servant's act is something fairly and naturally incident to the business. *Id.* at 653, 179 S.E.2d at 504. Second, the act occurs while the servant is doing the master's business with an intent to further the master's interests, and does not arise from some external, independent, or personal motive on the part of the servant to do an act upon his own account. *Id.* at 653, 179 S.E.2d at 503-504.

Courts recognize that when employment involves an overnight trip, employees are acting within the scope of employment while proceeding to lodging away from home. Johnston v. United States, 310 F. Supp. 1, 5 (N.D. Ga. 1970). In *Johnston*, a national guard officer on active training duty caused an accident while proceeding from work to a public restaurant. *Id.* at 2. The court found that the officer's daily food and housing allowance from the government indicated the officer was in a duty status at the time of the accident. *Id.* at 4. Noting the government furnished the officer with the vehicle, the court reasoned that the government voluntarily gave the officer discretion to eat where he chose. *Id.* In finding the officer's actions within the scope of government employment, the court concluded that the government maintained authority to control the officer's movements to a greater extent if the government so desired. *Id.* at 4-5.

In *Wilkinson*, plaintiff's counsel urged the Fourth Circuit to follow *Strohkorb v. United States*, 268 F. Supp. 526 (E.D. Va. 1967), *aff'd*, 393 F.2d 137 (4th Cir. 1968) (per curiam). Brief for Appellant at 10-11, Wilkinson v. United States, 677 F.2d 998 (4th Cir. 1982). In

cuit ruled that Wilkinson's exclusive tort remedy was an action against the United States pursuant to the Federal Tort Claims Act.[40] The Fourth Circuit also found that the administrative procedures of the Act were applicable to a suit brought pursuant to the Federal Drivers Act.[41] The majority upheld the district court's finding that the filing of a written claim within two years was a prerequisite to jurisdiction against the United States under the Act.[42]

The Fourth Circuit also dismissed the assertion that the government intentionally waited until the statute of limitations expired to raise the

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Strohkorb, the court found that a serviceman returning to the naval base after eating his evening meal at home, although officer of the day, was not within the scope of his employment at the time of an automobile accident about five miles from the base. 268 F. Supp. at 527-28. Significantly, however, the officer in *Strohkorb* went home to eat for his own convenience. *Id.* at 528. The Fourth Circuit's refusal in *Wilkinson* to follow *Strohkorb* correctly recognizes that Wilkinson was acting within the scope of government employment in proceeding to overnight lodging authorized by his superior. 677 F.2d at 1000. *See generally* Note, *Federal Tort Claims Act: Scope of Employment: Liability for Servicemen in Transit Between Duty Stations—A Quagmire Revisited*, 26 JAG. J. 107 (1971).

[40] 677 F.2d at 999; *see supra* text accompanying notes 5-8 (Federal Drivers Act grants personal immunity to government driver).

[41] 677 F.2d at 1000; *see* Meeker v. United States, 435 F.2d 1219, 1222-23 (8th Cir. 1970) (requirement of filing administrative claim cannot be circumvented by filing action in state court against government employee); Driggers v. United States, 309 F. Supp. 1377, 1378-79 (D.S.C. 1970) (plaintiff's letter to government employee with copy to facility where government driver worked did not satisfy administrative claim requirement).

[42] 677 F.2d at 1000 (citing Wollman v. Gross, 637 F.2d 544, 547 (8th Cir. 1980)), *cert. denied*, 454 U.S. 893 (1982)). The Fourth Circuit relied on *Wollman* for the proposition that failure to file an administrative claim prior to bringing suit against the United States requires dismissal. 677 F.2d at 1000. In *Wollman*, the plaintiff's injury arose out of an automobile accident in June 1976. 637 F.2d at 546. Gross, a federal employee with the Agriculture Stabilization and Conservation Service, worked out of his office and often used his personal car for business purposes. *Id.* The accident occurred as Gross returned home from an assignment. *Id.* Gross and Wollman were neighbors and neither realized that Gross was within the scope of his employment at the time of the accident. *Id.* Gross did not report the accident to his office, and his personal insurance company began dealing with the plaintiff. *Id.* In January 1979, more than two years after the accident, Wollman filed suit in state court. *Id* In February 1979, the United States replaced Gross as proper party defendant and removed the case to federal court. *Id.* In March 1979, the United States filed a motion to dismiss for lack of jurisdiction due to the plaintiff's failure to file an administrative claim. *Id.* Gross then sent an administrative claim to the United States Department of Agriculture dated July 16, 1979 and filed a motion to remand to state court. *Id.* The Eighth Circuit noted the harshness of the result, but strictly applied the administrative claims requirement in dismissing the action. *Id.* at 549-50; *see also* Bailey v. United States, 642 F.2d 344, 347 (9th Cir. 1981) (court dismissed case in which attorney mailed claim within two-year limitations period but claim never received by government agency); Dunaville v. Carnago, 485 F. Supp. 545, 548-49 (S.D. Ohio 1980) (suit dismissed because of plaintiff's failure to file administrative claim within time period even though plaintiff unaware of federal employee status of driver); Malicote v. McDowell, 479 F. Supp. 63, 64 (E.D. Tenn. 1979) (action commenced in state court dismissed for failure to file administrative claim); Montalvo v. Graham, 390 F. Supp. 533, 534 (E.D. Wis. 1975) (claimant's failure to file administrative claim within two years resulted in dismissal on basis of statute of limitations).

scope of employment issue.[43] The court noted that Wilkinson's attorney negotiated exclusively with Gray's insurance counsel during the intervening two years following the accident.[44] Gray's insurance counsel represented him in all aspects of the state court proceedings and filed the original motion to dismiss.[45] The court noted that the United States Attorney's first contact with the case occurred with the filing of the government's petition for removal on April 6, 1981.[46] The Fourth Circuit concluded that the government counsel had no knowledge of any of the prior proceedings until after the two-year limitation period expired.[47]

The majority also rejected the plaintiff's argument that the terms of the Federal Tort Claims Act do not require expressly the filing of an administrative claim within two years of the date of injury.[48] The dissent in *Wilkinson* contended that Congress only required the filing of a claim within two years after the date of accrual of the plaintiff's cause of action.[49] To determine the date of accrual under the Federal Drivers Act, the dissent urged the majority to adopt the rule announced by the Supreme Court in *United States v. Kubrick*.[50] The *Kubrick* Court held

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[43] 677 F.2d at 1000 (citing Kelly v. United States, 568 F.2d 259, 262 (2d Cir.), *cert. denied*, 439 U.S. 830 (1978)). In *Kelly*, the plaintiff brought the action in state court within the two-year limitation period. 563 F.2d at 260-61. After the statute of limitations expired, the government removed the case to district court and moved for dismissal on the basis of failure to file an administrative claim. *Id.* at 261. The district court denied the government's motion, ruling that the government lulled the plaintiff into a false sense of security. *Id.* at 262. The district court reasoned that the government waited until the limitations period ran before moving for substitution of the United States as proper party defendant. *Id.* On appeal, the Second Circuit affirmed on substantially different grounds. *Id.* at 268-69; *see infra* notes 62-64 (discussing modification of lower court's ruling by Second Circuit).

[44] 677 F.2d at 1000.

[45] *Id.* The motion to dismiss in the state court was filed on October 10, 1980. *Id.*

[46] *Id.* at 1001.

[47] *Id.* The Fourth Circuit in *Wilkinson* correctly ruled that the government did not wait intentionally until the Act's two-year statute of limitations period ended before asserting the scope of employment defense. *Id.* at 1000. The Fourth Circuit's holding recognizes that the government counsel had no contact with the case until after the limitations period expired. *Id.* Following the filing of the petition for removal, the government filed a motion for substitution of the United States as proper defendant and a motion for dismissal on April 30, 1981. *Id.* at 1001.

[48] 677 F.2d at 1001.

[49] *Id.* at 1001-1002; *see* 28 U.S.C. § 2401(b) (1976). The Fourth Circuit majority noted that Wilkinson failed to raise the issue of delayed accrual in either his brief or in oral arguments. *Id.* at 1002. Despite this ruling, the majority addressed the issue in response to the dissent's argument. *Id.*

[50] 677 F.2d at 1003 (discussing United States v. Kubrick, 444 U.S. 111 (1978)). In *Kubrick*, the government doctors treated the plaintiff with neomycin at a Veteran's Administration hospital for an infection of the right femur. 444 U.S. at 113-14. Irrigation of the infected area with neomycin led to a ringing sensation in the plaintiff's ears and loss of hearing six weeks later. *Id.* An ear specialist, who had secured Kubrick's records from the Veteran's Administration, advised Kubrick that the neomycin treatment might be responsible for the hearing loss. *Id.* at 114. The plaintiff did not file a claim against the government until later when another physician advised him that neomycin was the cause of the injury.

that in a medical malpractice suit, the plaintiff's cause of action accrues at the time the plaintiff discovers the critical facts concerning the existence and the cause of the injury rather than on the date of the actual injury.[51] Applying the *Kubrick* analysis to the facts in *Wilkinson*, the dissent argued that an essential element of an action under the Federal Tort Claims Act is the plaintiff's knowledge that a federal employee acting within the scope of his employment caused the injury.[52] The dissent criticized the majority's holding that the claim accrued at the time of the accident as contrary to the language of the statute and inconsistent with the Supreme Court's opinion in *Kubrick*.[53]

The Fourth Circuit in *Wilkinson* held that the *Kubrick* reasoning did not apply to a claim brought under the Federal Drivers Act.[54] The court noted that in a malpractice case, the plaintiff's injury often does not manifest itself until after the date of the injury.[55] The Fourth Circuit

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Id. at 114-15. The Court held that Kubrick's cause of action accrued when the plaintiff learned of the possibility that the neomycin caused his injury, not when he learned that the doctor causing the injury was legally responsible. *Id.* at 122. The Court, however, reversed an additional extension of the rule by the Third Circuit, and held that accrual cannot be deferred until a plaintiff learns of a defendant's negligence or legal fault. *Id.* at 121-22. In reaching its decision in *Kubrick*, the Supreme Court held that federal law establishes when a claim accrues. *Id.* at 117. The Court explained that the Act's statute of limitations provisions was a condition of the waiver of the United States sovereign immunity and courts should not extend the time period beyond the scope of congressional intent. *Id.* at 118.

[51] 677 F.2d at 1002. The *Kubrick* Court found that the cause of action accrues at the time the plaintiff knows that he has been hurt and knows who inflicted the injury. 444 U.S. at 122. The doctrine announced by the Court in *Kubrick* originated from the rule of "blameless ignorance." Urie v. Thompson, 337 U.S. 163 (1949). In *Urie*, the Supreme Court held that a cause of action accrues under the Federal Employer's Liability Act after notice of invasion of the plaintiff's legal rights. *Id.* at 170. The Court reasoned that Congress did not intend for the statute of limitations to bar an action when blameless ignorance prevented discovery of the injury and its cause. *Id.* In 1962, the Fifth Circuit, borrowing the blameless ignorance notion from *Urie*, adopted a similar rule for medical malpractice suits brought against the government under the Federal Tort Claims Act. Quinton v. United States, 304 F.2d 234, 239 (5th Cir. 1962). In *Quinton*, the court held that a claim accrues when the claimant discovers or in the exercise of reasonable diligence should discover the acts constituting the alleged malpractice. *Id.* at 240.

[52] 677 F.2d at 1002.

[53] *Id.* In *Wilkinson*, the dissent noted that the *Kubrick* Court accepted the government's construction of § 2401(b) that a malpractice claim does not accrue until the plaintiff knows both the existence and the cause of his injury. *Id.* at 1004. The *Wilkinson* dissent argued that although Wilkinson knew of the existence of the injury on the night he was in the accident, he did not know that Gray was acting within the scope of federal government employment until later. *Id.* at 1003. The dissent argued that Wilkinson's claim accrued within the meaning of § 2401(b) when Wilkinson or his attorney knew or in the exercise of reasonable diligence should have known that a governmental employee acting within the scope of his employment caused Wilkinson's injury. *Id.* at 1004.

[54] *Id.* at 1002.

[55] *Id.* The general rule of tort law is that a claim accrues at the time of the plaintiff's injury. RESTATEMENT (SECOND) OF TORTS § 899, comment c at 441 (1977). To alleviate the harsh result in medical malpractice claims, however, courts have modified the general rule to

stated that delaying the accrual date until the plaintiff discovers the existence and the cause of the injury is proper in a medical malpractice context.[56] In an automobile injury suit, however, the *Wilkinson* majority reasoned that knowledge of an injury and the identity of the person causing the injury are immediately apparent.[57] The court explained that Wilkinson was aware of sufficient facts to put him on notice that Gray was operating the vehicle within the course of government employment.[58] The court noted that Gray's responsibility for the plaintiff's injury was immediately apparent.[59] The Fourth Circuit found that Wilkinson was merely unaware that the Federal Driver's Act limited Wilkinson's remedy solely to recovery against the United States.[60]

The Fourth Circuit's decision in *Wilkinson* stands in direct conflict with the Second Circuit's decision in *Kelly v. United States*.[61] In *Kelly*, the Second Circuit held that the filing of an administrative claim is not a prerequisite to suit following substitution of the United States as the proper defendant pursuant to the Federal Drivers Act.[62] The *Kelly* court found that the 1966 amendment to the Act did not apply to actions brought in state courts against negligent drivers acting within the scope

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delay accrual of the claim until the plaintiff discovers, or in the exercise of reasonable diligence should discover, both the injury and its cause. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971). *See generally* Gotlieb & Young, *Medical Malpractice and Limitations Under the Federal Tort Claims Act*, 13 DEF. L.J. 257 (1964); Sacks, *Statutes of Limitations and Undiscovered Malpractice*, 16 CLEV.-MAR. L. REV. 65 (1967).

[56] 677 F.2d at 1002; *see supra* text accompanying notes 50-51 (discussing *Kubrick*).

[57] 677 F.2d at 1002.

[58] *Id.*

[59] *Id.*

[60] *Id.* The *Wilkinson* court found that Wilkinson merely was unaware that the Federal Drivers Act granted Gray personal immunity. *Id.*; *see also* Miller v. United States, 418 F. Supp. 373, 377 (D. Minn. 1976) (claim against federal government not dependent upon admission that employee defendant acted within scope of federal employment).

[61] Kelly v. United States, 568 F.2d 259 (2d Cir.), *cert. denied*, 439 U.S. 830 (1978). In *Kelly*, an automobile driven by an employee of the Department of Agriculture struck the plaintiff in November 1972. *Id.* at 260-61. In May 1973, plaintiff brought suit in state court, unaware that the accident occurred within the scope of the defendant's federal employment. *Id.* at 261. The government removed the case to district court in February 1975, after the two-year limitation period expired. *Id.* In May 1975, the government moved for substitution of the United States as proper defendant and to have the action dismissed, based upon the plaintiff's failure to file the requisite administrative claim. *Id.* at 261.

[62] *Id.* at 268. In *Wilkinson*, the majority addressed the *Kelly* decision, but misapplied the *Kelly* rationale in distinguishing its holding. 677 F.2d at 1000. The Fourth Circuit cited *Kelly* for the proposition that the government may not lull a plaintiff into a false sense of security and then raise the scope of employment defense following expiration of the statute of limitations. *Id.* In *Kelly*, the district court held that the government's conduct justified dispensing with the administrative claim requirement. 568 F.2d at 262 (discussing district court's unpublished opinion). The Second Circuit, however, significantly modified the lower court's analysis on appeal. *Id.* The Second Circuit found that the filing of an administrative claim is not a prerequisite to suit following substitution of the United States as proper party defendant pursuant to the Federal Tort Claims Act. *Id.* at 268-69.

of federal employment.[63] The court found significant the absence of an explicit reference in the legislative history to suits commenced in state court and subsequently removed to federal court by the Attorney General's certificates.[64] The *Kelly* court also noted that the amendment only requires the filing of an administrative claim before instituting an action against the United States.[65] Relying on this reasoning, the Second Circuit held that the administrative claims requirement does not apply to actions commenced in state court and subsequently removed to federal court under the Federal Drivers Act.[66]

The Second Circuit's rationale in *Kelly* provides an alternative approach to the harsh result of the Fourth Circuit's ruling in *Wilkinson*.[67] The *Kelly* decision, however, is the only decision holding that the filing of an administrative claim is not a prerequisite to suit following substitution of the United States as the proper defendant pursuant to the Federal Drivers Act.[68] Significantly, in promulgating the 1966 amend-

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[63] *Id.* at 264. In *Kelly*, the Second Circuit argued that Congress enacted the 1966 amendments to the Act to relieve the great volume of tort cases to allow for the settlement of claims against the United States without the necessity of filing suit. *See supra* text accompanying notes 10-14 (discussing 1966 Amendments to Federal Tort Claims Act).

[64] 568 F.2d at 264. The *Kelly* court reasoned that § 2679(b)-(e) implied that an action against a federal employee constitutes an action against the United States. *Id.* The Second Circuit in *Kelly* therefore concluded the statute does not mandate dismissal once the court substitutes the United States as proper defendant and removes the action to federal district court. *Id.*

[65] *Id.*; *see* 28 U.S.C. § 2675(a) (1976) (plaintiff shall not institute action against United States unless plaintiff first presents administrative claim).

[66] 568 F.2d at 266-67; *see* Harris v. Burris Chem., Inc., 490 F. Supp. 968 (N.D. Ga. 1980). In *Harris*, plaintiff brought suit in state court against a federal employee driver. *Id.* The government moved for removal and substitution of the United States as defendant. *Id.* In rejecting the government's motion to dismiss, the *Harris* court held that when the plaintiff, prior to filing suit, knows or had reason to know that the other driver was a federal employee acting within the scope of his employment, the administrative claims requirement applies. *Id.* at 971. However, when the plaintiff brings suit in state court because the plaintiff did not know and had no reason to know that the defendant was a federal employee acting within the scope of his employment, no administrative claim is necessary. *Id.* at 971; *see also* United States v. LaPatourel, 571 F.2d 405, 410-11 (8th Cir. 1978) (cause of action did not accrue until court's declaration that federal judges were federal employees under Act); Henderson v. United States, 429 F.2d 588, 590 n.2 (10th Cir. 1970) (timely action commenced in state court tolls Federal Tort Claims Act statute of limitations).

[67] 677 F.2d at 1001.

[68] 568 F.2d at 264. Before Congress amended the Federal Tort Claims Act in 1966 to require the filing of an administrative claim as a prerequisite to suit, courts narrowly construed provisions of the Federal Drivers Act as an exclusive remedy against the United States. Comment, *Federal Tort Claims Act: Interpretation of Two Year Period of Limitations*, 34 TENN. L. REV. 421, 422-23 (1967). Courts strictly applied the federal statute of limitations to bar suits commenced originally in state court, notwithstanding the fact that the suit was timely under the applicable state statute of limitations. *See, e.g.*, Whealton v. United States, 271 F. Supp. 770, 771-72 (E.D. Va. 1967); Hock v. Carter, 242 F. Supp. 863, 865 (S.D.N.Y. 1965).

In *Whealton*, the court considered a suit for property damages timely brought under

ments implementing the administrative claims procedure, Congress also provided that in the case of third-party complaints, cross-claims, or counterclaims, the presentation and denial of an administrative claim is not a prerequisite to suit.[69] Failure to provide the same exception for cases removed from state court under the Federal Drivers Act supports the presumption that Congress specifically chose not to make such an exception.[70] The Second Circuit's decision in *Kelly* effectively engrafts an additional exception under the Act to the administrative claims procedure.[71] In contrast, other courts consistently have held that the exhaustion of administrative remedies is a prerequisite to suit following substitution of the United States as defendant pursuant to the Federal Drivers Act.[72]

The Fourth Circuit's holding in *Wilkinson* represents the soundest approach given the administrative claim requirement of the Federal Tort Claims Act.[73] The *Kelly* decision's broad language applies to all cases brought initially in state court against an individual and subsequently removed to federal court, followed by substitution of the United

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the Virginia five-year statute of limitations. 271 F. Supp. at 771. Upon removal, the district court dismissed the case for failure to bring the action within the two years allowed by the Federal Tort Claims Act. *Id.* at 773-74.

In *Hoch*, plaintiff commenced a timely suit in the state court individually against the driver of a United States mail truck. 242 F. Supp. at 865. Suit was not brought within the two-year statute of limitations of the Federal Tort Claims Act. *Id.* Following removal of the action from state court, the district court dismissed the suit. *Id.* at 866.

Similarly, in Kizer v. Sherwood, 311 F. Supp. 809 (M.D. Pa. 1970), plaintiff brought suit against an individual mail carrier in state court. *Id.* at 810. Following a default judgment but prior to the award of damages, the government obtained removal. *Id.* at 810-11. After substitution of the United States as proper party defendant, the court granted dismissal on the grounds that the plaintiff failed to bring suit with the two-year limitations period. *Id.* at 811-12.

[69] 28 U.S.C. § 2675(a) (1976).

[70] *Id.* In reaching its decision, the *Kelly* court disregarded the maxim of statutory interpretation which states that the mention of one thing in a statute implies the exclusion of another. Illinois Cent. R. Co. v. Franklin County, 387 Ill. 301, 313, 56 N.E.2d 775, 781 (1944). The rule is one of statutory construction, not of substantive law. *Id.* Courts apply the maxim as an aid in discovering the legislative intent when the intent is not otherwise apparent. *See* United States v. Barnes, 222 U.S. 513, 518-19 (1912); *see also* Comment, *supra* note 4, at 786.

Implicit in the application of the *Kelly* court's analysis is the court's recognition that when Congress grants a waiver of sovereign immunity, Congress may define the conditions of such a waiver. *See supra* note 2 (discussion of sovereign immunity); *see also* United States v. Sherwood, 312 U.S. 584, 586 (1941) (United States may not be sued without its specific consent); Minnesota v. United States, 305 U.S. 382, 387 (1939) (courts must strictly construe Congressional waiver of sovereign immunity).

[71] *See* Wollman v. Gross, 637 F.2d 544, 549 (8th Cir. 1980) (waiver of administrative claims requirement would rewrite statute of limitations).

[72] *See* Steele v. United States, 599 F.2d 823, 825 (7th Cir. 1979) (plaintiff does not meet administrative claim requirement by commencing action in state court); Montalvo v. Graham, 390 F. Supp. 533, 534 (E.D. Wis. 1975) (plaintiff's action dismissed for failure to file claim within two years).

[73] *See supra* notes accompanying text 10-14 (discussing 1966 amendments to Federal Tort Claims Act).

States as proper party defendant.[74] Such a rule permits a plaintiff who is aware of the defendant's federal employment to avoid filing an administrative claim by first bringing suit in state court.[75] The *Kelly* decision fails to give full effect to Congress' stated purpose of increasing the administrative adjustment of claims.[76] The Fourth Circuit's approach in *Wilkinson* is consistent with the language of the Act and the express congressional intent.[77]

The Fourth Circuit's narrow resolution of the issue in *Wilkinson* is significant because the court refused to apply the *Kubrick* rationale to claims brought under the Federal Drivers Act.[78] Inherent in the *Kubrick* decision is the Supreme Court's recognition that a plaintiff's knowledge of the injury and the injury's cause is not always apparent in an action resulting from medical negligence.[79] To extend the *Kubrick* rationale to the facts in *Wilkinson*, however, as the *Wilkinson* dissent suggests, would delay the running of the statute of limitations until the government conceded that an employee acted within the line of duty.[80] The *Wilkinson* decision demonstrates the Fourth Circuit's realization that the *Kubrick* rule is inappropriate in an automobile injury suit.[81] In the

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[74] 568 F.2d at 264.

[75] *See supra* note 9 (discussing removal of suit originally brought in state court to district court).

[76] H.R. No. 1532, 89th Cong., 2d Sess. 3 *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2515, 2518. The congressional goal in enacting the 1966 amendments of relieving the federal courts from the voluminous number of suits filed against the government suggests that initially an administrative agency should consider every case unless an exception is provided. *Id.* at 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS at 2518.

[77] 677 F.2d at 1002. The *Wilkinson* court's finding also supports the principle behind statutes of limitations. *See supra* notes accompanying text 10-14 (discussing 1966 amendments to Federal Tort Claims Act). Statutes of limitations embody sound public policy by requiring parties to settle their business matters within reasonable periods. H. WOOD, LIMITATIONS OF ACTION 8 (4th ed. 1916). Statutes of limitations provisions promote the peace and welfare of society by not allowing affairs to remain uncertain. H. BUSWELL, STATUTE OF LIMITATIONS AND ADVERSE POSSESSION 7 (1889). The primary argument in favor of statutes of limitations is that of fairness to the defendant. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950). Statutes of limitations are characteristically statutes of repose based upon the proposition that persons who fail to exercise their rights may lose the right after a specified period of time. *Id.* Statutes of limitations also promote justice by preventing surprise through the revival of claims delayed until evidence is lost, memories have faded, and witnesses have disappeared. *Id.*

[78] 677 F.2d at 1001.

[79] *See supra* notes accompanying text 50-51 (discussing *Kubrick*).

[80] *See* Katzner v. United States, 342 F. Supp. 1088, 1090 (E.D. Wis. 1972) (rejecting argument that claim accrues when claim is filed administratively rather than when accident took place); *see also supra* note 50 (*Kubrick* court rejected argument that claim accrues when plaintiff learns of defendants legal fault).

[81] 677 F.2d at 1002. Courts consistently have held that the statute of limitations accrues for personal injury from the negligent operation of a motor vehicle by a government employee at the time of the accident. *See, e.g.*, Ianni v. United States, 457 F.2d 804, 805 (6th Cir. 1972) (claim arose at time mail truck struck plaintiff); Bialowas v. United States, 443 F.2d 1047, 1049 (3d Cir. 1971) (claim arose at time of accident); United States v. Westfall, 197

case of an automobile accident, the cause of the accident and identity of a negligent driver usually are immediately known.[82] The Act's limitation period reflects Congress' determination that two years is adequate time for plaintiffs to discover whether the negligent driver was a federal employee within the scope of employment.[83]

The Fourth Circuit acknowledged the harsh result worked upon the plaintiff by the *Wilkinson* decision.[84] The court's ruling effectively eliminated any possibility of recovery for Wilkinson on his tort claim against the United States.[85] The Fourth Circuit recognized, however, that acceptance of the alternative arguments in essence would rewrite the two-year statute of limitations.[86] The *Wilkinson* court correctly concluded that any change in the law is the prerogative of the Congress and not within the authority of the courts.[87]

The Fourth Circuit in *Wilkinson* avoided circumventing the statutory administrative claims requirement but consequently barred a tort victim's potentially meritorious claim.[88] The court followed the weight of authority, which strictly applies the administrative claim procedure to actions brought under the Federal Drivers Act.[89] The *Wilkinson* decision points to the necessity of plaintiff's lawyers determining whether a negligent driver employed by the government was acting within the scope of his employment at the time of the accident.[90]

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F.2d 765, 766-67 (9th Cir. 1952) (injury giving rise to action occurred at time of accident); *see supra* note 55 (claims generally accrue at time of injury).

[82] 677 F.2d at 1002.

[83] 28 U.S.C. § 2401(b) (1976).

[84] 677 F.2d at 1001.

[85] *Id.*

[86] *Id.* at 1001 n.7.

[87] *Id.* at 1001. Courts consistently recognize that the judiciary cannot extend the statute of limitations period provided by the Congress. *See, e.g.*, Wollman v. Gross, 637 F.2d 544, 549 (8th Cir. 1980) (any change in law is prerogative of Congress and not courts); Miller v. United States, 418 F. Supp. 373, 378 (D. Minn. 1976) (courts have no power to extend statutory period). *See generally* Smith, *Urging Judicial Restraint*, 68 A.B.A.J. 59 (January, 1982).

[88] *See generally supra* text accompanying notes 39 to 42.

[89] *See generally supra* text accompanying notes 68 to 72.

[90] *See generally supra* text accompanying notes 15 to 19.