answering the narrow question before it, rather than foreclosing the possibility of a government contractor's defense for non-military contractors. The *Carley* court felt that the rationale underlying the *Boyle* opinion -- protection of the federal interest embodied in the discretionary function exception -- applied to military and non-military procurement contracts alike.

Having decided this, the court moved on to consider whether the non-military contractor in the *Carley* case satisfied the three-prong test of the government contractor's defense. The court observed that: (1) the ambulance was manufactured under contract for the U.S. General Services Administration by Wheeled Coach Inc.; (2) that the contract required Wheeled Coach to produce the ambulance in compliance with federal ambulance specifications: and (3) that the specifications incorporated the chassis manufacturer's guidelines for the maximum center of gravity for a completed ambulance.

Wheeled Coach alleged that it had complied with the government's specifications and submitted affidavits from its government sales manager and mechanical engineering supervisor to support the assertion. One of the affidavits reported the center of gravity on the finished ambulance was well within government specifications. Accordingly, the court found Wheeled Coach established as a matter of law that the government had approved reasonably precise specifications, satisfying the first prong of *Boyle*. Further, the court found that Wheeled Coach had established that the ambulance conformed to the government's specifications, satisfying the second prong of *Boyle*. Finally, as to the third prong, the court found that there was no evidence which proved that Wheeled Coach had warned the government about dangers in its ambulance design that were known to Wheeled Coach but not to the government. The court remarked that the record was devoid of communications between Wheeled Coach and the government pertaining to the risks of high centers of gravity. Nor was there any evidence indicating that the government knew that the height of the ambulance's center of gravity might give the vehicle a dangerous propensity to roll over. Accordingly, the court found that an issue of material fact existed as to whether Wheeled Coach had informed the government of dangers in the use of its ambulance which were known to Wheeled Coach but not known to the government. Therefore, the court remanded the case back to the district court for further findings on this issue.

Emory v. McDonnell Douglas Corporation

In *Emory*,[1] the appeal arose from the 1992 crash of an F/A-18 jet fighter at Patuxent River Naval Air Station (Pax River) in Maryland. Prior to the accident, the aircraft had been used to provide parts for the repair of other planes. However, in August 1992, the Navy reassembled the aircraft and performed an acceptance inspection. The crew discovered that the flight computer EFIS display was displaying

[1] Emory v. McDonnell Douglas Corp., 1998 WL 327264 (4th Cir. 1998). Decided June 22, 1998.

codes indicating a problem in the flight control system (FCS) related to the aircraft's rudders.

In October 1992, after approximately ten successful missions, the flight computer again indicated that there was a problem in the FCS. After resetting the FCS, the pilot determined that the plane was safe to fly. However, after takeoff, the problem reappeared. After resetting the FCS once again, the pilot proceeded to fly without incident for about forty-five to eighty minutes. Subsequently, the indicator reappeared and the pilot decided to discontinue the mission. The aircraft experienced uncommanded yaw on approach to the runway making the approach too dangerous, at which time, the pilot decided that a crash was imminent and that he must eject. The pilot safely ejected, however, the aircraft crashed into Rosemary Emory's truck, resulting in her death.

The appellant, Rosemary Emory's husband, sued McDonnell Douglas under strict liability and negligence theories. The district court granted summary judgment to McDonnell Douglas, holding the government contractor's defense barred both the design defect and the failure to warn claims. Emory appealed arguing that the government contractor's defense does not apply to failure to warn claims.

The *Emory* court noted that while it is true that the Court in *Boyle* adopted the government contractor's defense in the design defect context, many circuits have since held that the defense should apply to failure to warn claims.[1] The court found both the reasoning and decisions in these cases to be sound.

The *Emory* court reasoned that the government contractor's defense was applicable in this case because the Navy had extensive knowledge of the hazards associated with the F/A-18 aircraft and that they had played a significant role in its design and production. The factors the court considered important in making its decision were:

- the Navy required McDonnell Douglas to submit detailed drawings of the aircraft's FCS as well as FCS failure analysis reports;
- the Navy conducted extensive tests on eleven F/A-18 aircraft, including the FCS's;

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[1] Id. at 2; see Tate v. Boeing Helicopters (Tate II), 140 F.3d 654 (6th Cir. 1998); Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744, 759-50 (9th Cir. 1997); Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 1003-04 (7th Cir. 1996), *cert. denied*, --- U.S. ---, 117 S. CT.. 1246 (1997); Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 583, 586 (9th Cir. 1996); In re Air Disaster at Ramstein Air Base, Germany on 8/29/90, 81 F.3d 570 (5th Cir.), *modified on other grounds* (*per curiam*), Perez v. Lockheed Corp., 88 F.3d 340 (5th Cir.), *and cert. denied*, Chase v. Lockheed Corp., ---U.S.---, 117 S. CT.. 583 (1996); Tate v. Boeing Helicopters (Tate I), 55 F.3d 1150, 1156-58 (6th Cir. 1995); In re Joint E. & S. Dist. N.Y. Asbestos Litigation, 897 F.2d 626, 629-30 (2d Cir. 1990).

- the Navy had "substantial participation" in the aircraft's design and development; and
- the Navy had specific knowledge of possible FCS failures.[1]

The court held that, as the district court had already determined, nothing in the case law suggests that a military contractor is responsible for directly warning the individual military personnel who fly the planes under military command.[2] Finally, the court held that the settled grounds of state products liability law thus suffices to protect the precise federal interest identified by the Supreme Court in *Boyle*—"the government's ability to make discretionary decisions about military defense."[3]

Recent U.S. District Court Decision

Arness v. Boeing North American, Inc.

In *Arness*,[4] the action stemmed from the alleged release and disposal of trichloroethylene ("TCE") by Boeing at the Rocketdyne Facilities, Santa Susanna Field Laboratory, California. Since 1948, the defendants had been manufacturing and testing rocket engines for the United States government.[5] The plaintiffs alleged that during the course of manufacturing and testing rocket engines at Rocketdyne, Boeing and the other defendants allowed TCE and other toxins to contaminate the soil and groundwater. Boeing asserted that they had performed the testing and manufacturing pursuant to their rocket engine contracts with the United States government "at the direction of federal officers pursuant to detailed and comprehensive procedures dictated by [the] officers [from NASA and the Department of Defense]."[6]

In the context of deciding whether to grant or deny the plaintiffs' motion to remand the case to state court, the court noted that "[a]lthough *Boyle* involved a design defect, the test may apply equally to government contracts performed according to government specifications, because the defense is intended to implement and protect the discretionary function exception under the Federal Tort Claims Act, 28 U.S.C. 2680(a)."[7]

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1 Emory, *supra* note 27, at 3-4.

2 Id. at 5.

3 Id. at 6.

4 Arness v. Boeing North American, Inc., 997 F.Supp. 1268; 1998 U.S. Dist. LEXIS 3239 (C.D.Cal. 1998). Decided January 26, 1998.

5 Arness, *supra*, at 3, n.1

6 Id. at 4-5 (emphasis added).

7 Id. at 11-12 (quoting Snell v. Bell Helicopter, *supra*, 107 F.3d at 744, 749 & n.3).

The *Arness* court reaffirmed the application of the government contractor's defense in cases where the government requires that the contractor use a specific product or component simply because this invokes the "government's need to exercise discretion regarding the military."[1]

Conclusion

Accordingly, a review of recent decisions involving the government contractor's defense indicates that, while the defense is a significant and sometimes insurmountable hurdle for the plaintiff's bar, some courts are taking a much closer look at the requirements, especially with regard to allegations involving failure to warn. Obviously, the foregoing summary analysis of recent case law is just that. Aviation airframe and component manufacturers should seek the advice of aviation law counsel in making any significant decisions that might involve the government contractor's defense.

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[1] Id. at 12.