

# The Government Contracting Officer's Authority

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The Contracting Officer (CO) has enormous Power. He probably is what Justice Scalia was describing when he said a Government Procurement Officer with power to use government discretion in the design and procurement process of the United States Government.

By government Law The Federal Acquisition Regulations and a variant used by DOD.

## THE CO

The Contracting Officer (CO) is designated in writing for each contract.

The Contracting Officer(CO) is the only person per contract empowered issue or approve final specifications.

The Contracting Officer(CO) is the only person per contract empowered to change Specifications

The Contracting Officer(CO) is the only person per contract empowered to change contract provisions

The Contracting Officer(CO) is the only person per contract empowered to issue waivers or deviations.

The Contracting Officer(CO) is the only person per contract empowered react to any DOD issued by the manufacturer per contract proviso.

The Contracting Officer (CO) has a cadre of The Contracting Officer Technical representatives (COTR) that may view verification and other tests.

## THE COTR

COTR can disapprove test results or verification

COTR may recommend acceptance of specifications

COTR may recommend the issuance of waivers or deviations.

## **SPLIT: MISUSE**

The only different defense specific for a strict products liability case is that of Misuse of the product. There is Assumption of the Risk defense as well. The Assumption of Risk is the same as for negligence cases.

**MISUSE** is a simple theory in inception: if a consumer uses the product in a manner not intended by the manufacturer then the manufacturer had a defense. Murphy's Law came into play and the misuse was later revised to become **UNFORESEEABLE**

**MISUSE**. Today in most jurisdiction the test for misuse is that the manufacturer can not be held responsible for consumer misuse of the product that an expert in the field could not have reasonably foreseen.

This puts the manufacturer to a great burden, since he has to predict the actions of every variety of person who might become a user. Is that asking too much? Most jurisdictions hold that operation of a product under the influence is a misuse. Driving or flying under the influence may be negligence per se. Flying under the influence is a violation of F.A.R.s.

## Engineering trade offs and ramifications of such an admission

In the real world of sophisticated and technical Products liability cases such as design cases involving aircraft it is a regular occurrence for the defense to suggest that even though a potential hazard was recognized that an engineering trade off was made by the designer and this hazard was incorporated by necessity.

This is a double edged sword when analyzed from the risk - utility viewpoint. If the defective design could have been made safer at the time of design without excessive cost and without jeopardizing the products usefulness and other safety aspects then conscious choice created a defective product. An Engineering trade off is of course an informed and intentional act of conduct by the company. Whenever, such a trade off is made, there is a the possibility that what seemed a normal engineering decision to the manufacturer will appear as wanton, intentional disregard and egregious conduct to a jury.

Acceptable risk and Acceptable loss are concepts familiar to the Systems Safety Engineer and design engineers. These may be basis for liability to a jury.

It is appropriate at this juncture to digress a little from the law and slip over into safety engineering and design philosophy. Almost all sophisticated designs are subjected to systems safety analysis as part of the early design process. This is good engineering and is not the result of legal liability lawsuits. DESIGNING a product with safety in mind is good business, and it has always been cheaper for a company to design it correctly initially rather than be forced to retrofit a safety fix. What systems safety does are arm design engineers with notice of potential hazards and defects.

Thus the final design, may incorporate hazards by design, and such a choice was willful, intentional and necessary.

## Negligence scrutinizes Conduct or lack thereof

All Negligence cases are reviewing the standard of conduct of the defendant and searching for a breach of a duty of that conduct that result in harm to the plaintiff. Negligence can come about as either acting negligently or failing to act in a reasonable and prudent manner.

When a duty of care is owed, the negligent failure to act, or the negligent act of doing nothing, is as much negligence in the law as is perpetrating an act negligently. This is seen in the real world in failure to warn cases, failure to inspect cases, and failure to change or modify cases. In these actions the jury is deciding on the core issue of conduct that breaches a duty.

Pure **STRICT PRODUCT LIABILITY IN TORT** has not been a review of conduct, rather it is a review of the product for defectiveness. In **SPLIT** it matters little if the manufacturer acted in a reasonable and prudent manner in designing, manufacturing or marketing a defective product.

The issue is solely whether a defective product, in marketing, manufacture or design, unchanged or unmodified caused the damage complained of by plaintiff. The test for defect is delineated by the case laws of the various forums or their statutes as created by their state government.

## Statistical Maintenance reports

**Service Difficulty Reports, Malfunction and Defect Reports** and USAF (military) **HOW MAL reports** are gotten from a computer in Oklahoma City F.A.A. or the services systems desks or program office. These reports show maintenance problems with aircraft and components thereof. These reports to the F.A.A. are a part of a voluntary reporting system and the best part is that it is from all maintenance sources, not just the manufacturer. Most forward looking manufacturers routinely subscribe to this service. As it is a Government record these can be obtained at request. They can be obtained " BLUE RIBBON: certified.