THE DISCRETIONARY FUNCTION EXEMPTION
RETURNS SOVEREIGN IMMUNITY TO THE
THRONE OF DOUGLAS COUNTY—ONCE AGAIN,
THE "KING CAN DO NO WRONG": JASA V.
DOUGLAS COUNTY

INTRODUCTION

Prior to 1946, an individual could not bring a tort action against
the United States.\(^1\) However, in 1946, Congress enacted the Federal
Tort Claims Act ("F.T.C.A.") in response to the growing influx of pri-
vate tort claims which citizens were bringing against the govern-
ment.\(^2\) The F.T.C.A. waives sovereign immunity and permits an

\(^1\) David Fishback & Gail Killefer, The Discretionary Function Exception to the
(1988-89). Prior to 1946, one had to obtain relief, for the torts of governmental employ-
ees, only by Congress' passage of a private bill. Osborne M. Reynolds, Jr., The Discre-
tionary Function Exception of the Federal Tort Claims Act: Time for Reconsideration, 42
Okla. L. Rev. 459, 459 (1989). Yet this means of relief was clumsy and the number of
claims to Congress steadily increased. Dalehite v. United States, 346 U.S. 15, 24-25
(1953). Nonetheless, there was no remedy for individuals harmed by the ordinary torts
of governmental employees. Dalehite, 346 U.S. at 25 n.10.

\(^2\) Dalehite, 346 U.S. at 24-5; Fishback & Killefer, 25 IDaho L. Rev. at 293; Reyn-

provides:
The United States shall be liable, respecting the provisions of this title relating

to tort claims, in the same manner and to the same extent as a private individ-
ual under like circumstances, but shall not be liable for interest prior to judg-
ment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place
where the act or omission complained of occurred provides, or has been con-
strued to provide, for damages only punitive in nature, the United States shall
be liable for actual or compensatory damages, measured by the pecuniary inju-
rines resulting from such death to the persons respectively, for whose benefit the
action was brought, in lieu thereof.

With respect to any claim under this chapter [28 U.S.C.S. §§ 2671 et seq.],
the United States shall be entitled to assert any defense based upon judicial or
legislative immunity which otherwise would have been available to the em-
ployee of the United States whose act or omission gave rise to the claim, as well
as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Val-
ley Authority shall be entitled to assert any defense which would
have been available to the employee based upon judicial or legislative immu-
nity, which otherwise would have been available to the employee of the Tenne-
ssee Valley Authority whose act or omission gave rise to the claim as well as any
other defenses to which the Tennessee Valley Authority is entitled under this
chapter [28 U.S.C.S. §§ 2671 et seq.].


Congress passed the Act under the belief that the government ought to be liable for
its' employees' torts, as other employers are. Reynolds, 42 Okla. L. Rev. at 459. In
addition, Congress hoped the FTCA would eliminate the burden of having to enact the
private claims legislation and would instead provide a more accessible means for claim-
individual to sue the government in Contract and Tort. Although the waiver of immunity as set out in section 2674 of Title 28 of the United States Code appears broad, Congress severely restricted its applicability in another section of the F.T.C.A. by exempting thirteen different classes of tort claims from liability. Among these restrictions is the discretionary function exemption ("exemption").


The provisions of this chapter and section 1346(b) of this title shall not apply to

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.


(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of the subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

The exemption insulates a government employee from liability if the employee is performing a "discretionary function." Congress adopted the exemption out of its fear that the F.T.C.A. and its waiver of sovereign immunity would interfere with governmental functions and decision-making. Congress was also concerned that the F.T.C.A. exceeded the bounds of the separation of powers doctrine.

Because neither the F.T.C.A. nor its legislative history provides precise definitions of what constitutes a "discretionary function," judicial interpretation by courts have largely determined the scope of the exemption. Various courts have employed conflicting approaches in their treatment of discretionary function claims. As a result, whether a government act involves discretion depends more upon which jurisdiction the claim arises rather than the particular facts of the case.

In Jasa v. Douglas County, the Nebraska Supreme Court addressed the discretionary function exemption contained in the Nebraska Political Subdivision Tort Claims Act, Nebraska's version of the F.T.C.A. The parents of Sean Jasa brought an action against Douglas County, Nebraska alleging that the county was negligent in its failure to take appropriate steps and to warn of the presence of bacterial meningitis at the West Omaha Day Care center. The court found that the county's duty in respect to making and enforcing disease regulations was sufficiently broad to make it a discretionary function. As a result, the court held the county immune from liability.

First, this Note will review the United States Supreme Court's and Nebraska Supreme Court's interpretations of what constitutes a discretionary function. Second, this Note will discuss how the Nebraska Supreme Court's decision in Jasa is inconsistent with state and federal case law. Next, this Note will explain how the Nebraska

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7. Fishback & Killefer, 25 IDAHO L. REV. at 293.
8. Id. Members of Congress were concerned that there were constitutional limits, especially with the separation of powers, on how much government activity the FTCA could cover in regards to tort actions alleging negligence in governmental decisions. Id.
11. Id. at 515.
14. Id. at 946, 510 N.W.2d at 283.
15. Id. at 962-63, 510 N.W.2d at 291.
16. Id. at 962-63, 510 N.W.2d at 291.
17. See infra notes 75-189 and accompanying text.
18. See infra notes 195-259 and accompanying text.
Supreme Court's holding in Jasa conflicts with its earlier rulings. This Note concludes that despite rhetoric to the contrary, in Nebraska, "the King can do no wrong."

FACTS AND HOLDING

On October 27, 1987, a pediatrician examined Amy Martin, a three-year old girl, after she became ill. The pediatrician again examined Amy on October 28 and informed her and her mother that she probably had contracted bacterial meningitis. Amy's mother contacted the West Omaha Day Care that same day to inform the day-care that her daughter had probably contracted meningitis while attending its facility.

Around November 2, 1987, the Douglas County Department of Health ("Douglas County") received a card report from the hospital where Amy was admitted for bacterial meningitis. Nebraska State Department of Health regulations did not require Douglas County to include bacterial meningitis on its "Disease Care Reports." Nonetheless, the county voluntarily included it and thus, health care professionals were required to report bacterial meningitis. On

19. See infra notes 260-75 and accompanying text.
20. See infra notes 277-82 and accompanying text.
21. Jasa v. Douglas County, 244 Neb. 944, 947, 510 N.W.2d 281, 284 (1994). At the time of her illness, Amy attended West Omaha Day Care. Id.
22. Jasa, 244 Neb. at 947, 510 N.W.2d at 284. Bacterial meningitis is also referred to as hemophilus influenza type B. Brief for Appellee at 5, Jasa v. Douglas County, 244 Neb. 944, 510 N.W.2d 281 (1994) (No. S-91-970). Medical textbooks state that it is an "infectious disease emergency" and one doctor ranks it as the most dangerous pediatric infectious disease. Brief for Appellee at 6-7, Jasa (No. S-91-970). Children under two who attend a day-care facility are at the highest risk for contracting bacterial meningitis. Id. If detected early, the dangerous and often life-threatening effects of the disease can be prevented through the administration of antibiotics. Id.
23. Jasa, 244 Neb. at 951-52, 510 N.W.2d at 286. Douglas County developed post care notification cards, called a "Disease Case Report," from which local hospitals reported specified diseases to the Department of Health in accordance with Neb. Rev. Stat. § 71-503 (Reissue 1990). Jasa, 244 Neb. at 951, 510 N.W.2d at 286; Brief for Appellee at 4, Jasa (No. S-91-970). The county department then uses its own postcard reporting form to record the reported incident. Jasa, 244 Neb. at 952, 510 N.W.2d at 286. John Weston, employee of the Omaha-Douglas County Department of Health, devised these forms in 1981. Id. at 951, 510 N.W.2d at 286. These cards lists bacterial meningitis, and many other reportable diseases, and requires detailed information on the nature of the disease and the patient. Id. at 952, 510 N.W.2d at 286. The purpose of these cards was to provide a way to collect information and data which help to develop effective health care policies and disease control measures. Id. The County also used the cards to fill out additional reports on forms provided by the National Center for Disease Control ("C.D.C."). Id. The County then furnished the state department with the national report. Id.
24. Id. at 953, 510 N.W.2d at 286. Douglas County developed post care notification cards, called a "Disease Case Report," from which local hospitals reported specified diseases to the Department of Health in accordance with Neb. Rev. Stat. § 71-503 (Reissue 1990). Jasa, 244 Neb. at 951, 510 N.W.2d at 286; Brief for Appellee at 4, Jasa (No. S-91-970). The county department then uses its own postcard reporting form to record the reported incident. Jasa, 244 Neb. at 952, 510 N.W.2d at 286. John Weston, employee of the Omaha-Douglas County Department of Health, devised these forms in 1981. Id. at 951, 510 N.W.2d at 286. These cards lists bacterial meningitis, and many other reportable diseases, and requires detailed information on the nature of the disease and the patient. Id. at 952, 510 N.W.2d at 286. The purpose of these cards was to provide a way to collect information and data which help to develop effective health care policies and disease control measures. Id. The County also used the cards to fill out additional reports on forms provided by the National Center for Disease Control ("C.D.C."). Id. The County then furnished the state department with the national report. Id.
25. Jasa, 244 Neb. at 951-52, 510 N.W.2d at 286; Brief for Appellee at 27, Jasa (No. S-91-970).
26. Jasa, 244 Neb. at 951-52, 510 N.W.2d at 286.
February 12, 1988, the county reported Amy's case of meningitis to the National Center For Disease Control through the use of its national center report form dated "4-77." This form did not inquire as to whether the infected individual attended a day care facility.

On October 26, 1987, thirteen month old Sean Jasa began attending West Omaha Day Care. Sean was a happy, normal, and healthy child. In late November, Sean's parents called his pediatrician's office after Sean exhibited a temperature. The pediatrician's partner stated that Sean could be contracting an ear infection and that the Jasas may keep him at home and wait for the infection to run its course. The Jasas elected to do so.

The next morning, Sean not only maintained a high temperature, but he also exhibited discoloration on his body. Because of this worsening condition, Sean's parents took him to the hospital where a doctor diagnosed him as having bacterial meningitis. A medical expert testified at trial that Sean's infection was directly related to that of Amy's. Because bacterial meningitis has no specific symptom which signals its presence, and the pediatrician received no notification that Amy, who attended the same day-care as Sean, had been diagnosed with the disease, Sean's pediatrician did not treat him for meningitis. As a result of this disease, Sean now suffers from seizures and brain damage, and has a loss of sight, hearing, and other bodily functions. If Sean's pediatrician would have received notification.

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27. Id. at 953, 510 N.W.2d at 286.
28. Id. In 1987, Douglas County was utilizing a C.D.C. form with a revision date of April, 1977. Id. Yet the C.D.C. had revised the April, 1977 form in July, 1981, again October, 1985, and finally October, 1986. Id. at 953, 510 N.W.2d at 286-87. The 1986 form asked for the first time whether the infected child was under six years of age and attended day-care. Id. at 953, 510 N.W.2d at 287. Douglas County had a policy to use the most current C.D.C. form and was to obtain them from the state department. Id. Yet the state department had no policy of disseminating the revised forms to the county. Id. As a result in 1987, Douglas County was utilizing an outdated eleven year-old C.D.C. form. Id.
29. Jasa, 244 Neb. at 945-49, 510 N.W.2d at 283-85.
30. Brief for Appellee at 6, Jasa (No. S-91-970).
31. Jasa, 244 Neb. at 949, 510 N.W.2d at 285.
32. Id. Sean had contracted ear infections in the past and thus, his pediatrician's partner believed that his high temperature was signaling another infection. Id.
33. Jasa, 244 Neb. at 949, 510 N.W.2d at 285.
34. Id. at 949-59, 510 N.W.2d at 285.
35. Id. at 950, 510 N.W.2d at 285.
36. Id. Dr. David Itkin, a pediatrician, testified at trial that Amy's bacterial meningitis colonized and spread to other day care attendees. Id. Colonization occurs when one who is exposed to an infectious organism, carries it to another without ever becoming ill. Id. West Omaha Day Care maintained a small population through which secondary cases of an infectious disease can colonize easier. Id.
37. Jasa, 244 Neb. at 950, 510 N.W.2d at 285.
38. Jasa, 244 Neb. at 964, 510 N.W.2d at 292 (White, J., dissenting). In addition, the doctors amputated Sean's left foot and several fingers. Id. Sean's projected nursing
tion that Sean was exposed to meningitis, the pediatrician would have treated him with an antibiotic which would have altered the course of the illness.\textsuperscript{39}

Sean, acting through his parents, brought an action against the Douglas County Department of Health ("Douglas County") under the Political Subdivision Tort Claims Act ("P.S.T.C.A.").\textsuperscript{40} In accordance with the P.S.T.C.A., the Jasas filed a claim with the Douglas County Board, which was denied.\textsuperscript{41} Subsequently, the Jasas filed an action in the District Court of Douglas County, Nebraska.\textsuperscript{42} The Jasas alleged that Douglas County undertook the duty to prevent the spread of bacterial meningitis.\textsuperscript{43} Furthermore, the Jasas alleged that Douglas County breached its duty because it failed to investigate and notify other enrollees at West Omaha Day Care of the children's potential exposure to Amy's bacterial meningitis.\textsuperscript{44} The district court entered judgment for the Jasas.\textsuperscript{45} Douglas County appealed on the basis that the district court failed to rule that the discretionary function exemption ("exemption") of the P.S.T.C.A. precluded the county's liability.\textsuperscript{46}

\begin{itemize}
\item The total amount recoverable under the Political Subdivisions Tort Claims Act for claims arising out of an occurrence after November 16, 1985, shall be limited to:
\begin{enumerate}
\item One million dollars for any person for any number of claims arising out of a single occurrence; and
\item Five million dollars for all claims arising out of a single occurrence.
\end{enumerate}
\end{itemize}
The Nebraska Supreme Court reversed the judgment of the district court and remanded the case, directing that it be dismissed. The court explained the nature of the exemption and those acts which the exemption protects from liability. The court discussed the two-part test developed by the United States Supreme Court in Berkovitz v. United States which courts use to determine if the challenged act falls within the confines of the exemption of the Federal Tort Claims Act. The court noted that the first part of the test requires the government employee to be permitted to exercise judgment in regards to the challenged act. Furthermore, the court recognized that if an employee's act meets the first part of the test then the second part of the test requires a court to determine whether the judgment is of the kind the exemption was designed to insulate.

Second, the court distinguished between discretionary and ministerial activities. The court explained that ministerial acts are those performed in a prescribed manner in accordance with some legal authority. The court noted that ministerial acts are not discretionary functions.

Third, the court examined the statutes which regulate Douglas County's actions in regard to infectious diseases. From that exami-
nation, the court found that “the duty of the county department to make and enforce regulations is painted in broad strokes.” 57 The court noted that the statutes which govern Douglas County do not dictate the manner in which the county is to conduct investigations, nor do they specify how the county should use the data collected from the report cards. 58 The court found that the county made diseases reportable in order to collect data to aid the study of infectious diseases and to promulgate regulations to help prevent the spread of such diseases. 59

Fourth, the court compared the facts of Sean’s illness to those presented in previous cases involving the exemption. 60 The court noted that no specific regulation or statute required Douglas County to ascertain whether Amy Martin had attended day-care. 61 Thus, the county was not required to contact the facility or parents of other en-

All attending physicians shall report to the official local health department or the [state] Department of Health promptly, upon the discovery thereof, the existence of any contagious or infectious diseases and such other disease, illness, or poisoning as the [state] Department of Health may from time to time specify.

NEB. REV. STAT. § 71-503 (Reissue 1990). Section 71-503.01 provides in pertinent part:

Whenever any statute of the state ... requires medical practitioners or other persons to report cases of communicable diseases. ... The appropriate board, health department, agency or official may: (3) make such investigation as deemed necessary.

NEB. REV. STAT. § 71-503.01 (Reissue 1986). Section 71-505 provides in pertinent part:

It shall be the duty of the [state] Department of Health ... to secure and maintain in all parts of the state an official record and notification of reportable diseases, illnesses ... and in all other effective ways to prevent the origin and spread of disease and promote the general public health.

NEB. REV. STAT. § 71-505 (Reissue 1986). Section 71-1631 (Reissue 1990) provides in pertinent part:

The board of health of each county ... shall have the power herein set forth ... (7) enact rules and regulations ... and enforce the same for the protection of public health and the prevention of communicable diseases within its jurisdiction, subject to the review and approval of such rules and regulations by the State Board of Health ... (10) investigate the existence of any contagious or infectious disease and adopt measures ... to arrest the progress of the same.

NEB. REV. STAT. § 71-1631 (Reissue 1990).

57. Jasa, 244 Neb. at 962, 510 N.W.2d at 291.
58. Id.
59. Id.
60. Id. at 962-63, 510 N.W.2d at 291-92. The court compared Jasa’s situation to that presented by Wickersham v. State, 218 Neb. 175, 354 N.W.2d 134 (1984) (holding that the State should not have been granted summary judgment); Lemke v. Metropolitan Util. Dist., 243 Neb. 633, 502 N.W.2d 80 (1992) (holding that the political subdivision’s actions did not fall within the exemption) [both factual situations differed from that of Jasa]; Security Inv. Co. v. State, 231 Neb. 596, 437 N.W.2d 439 (1989) (sustaining the State’s demurrer) and Allen v. Lancaster County, 218 Neb. 163, 352 N.W.2d 883 (1984) (sustaining the State’s demurrer) [both factual situations are similar to that of Jasa].
61. Jasa, 244 Neb. at 963, 510 N.W.2d at 292.
rollees.\textsuperscript{62} Therefore, the court held that the county's determination as to how it should perform its duty and allocate its resources in relation to a reported disease was a judgment based upon public policy considerations and was protected by the exemption.\textsuperscript{63}

Judge C. Thomas White dissented from the court's decision.\textsuperscript{64} Judge White made three arguments.\textsuperscript{65} First, Judge White stated that once the county was notified of a case of bacterial meningitis, it had a nondiscretionary duty to respond with due care.\textsuperscript{66} Justice White noted that due care required the county to determine whether Amy had been in day-care and if so, to provide notice to the exposed children's parents.\textsuperscript{67}

Second, Judge White argued that the court's distinction between ministerial and discretionary acts was not clear.\textsuperscript{68} He argued that all acts contain a decision-making element; thus, an act will not fall within the exemption solely because the actor exercised judgment.\textsuperscript{69} Judge White noted that the county's response to Amy's reported case of bacterial meningitis involved decision-making but that such decisions were ministerial and thus required execution with reasonable care.\textsuperscript{70} Judge White stated that because the county undertook the duty to collect data on bacterial meningitis, its response was nondiscretionary.\textsuperscript{71}

Third, Judge White explained that the exemption shields policy judgments from liability but not failures to act.\textsuperscript{72} Judge White noted that the county had not proven that its inaction in regards to Amy's reported case of meningitis was a policy decision.\textsuperscript{73} Thus, Judge White concluded that the county's inaction was not protected by the exemption.\textsuperscript{74}

\begin{itemize}
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id. (White, J., dissenting). Judge Lanphier joined the dissent. Id. at 967, 510 N.W.2d at 254 (White, J., dissenting).
\item \textsuperscript{65} See infra notes 66-74 and accompanying text.
\item \textsuperscript{66} Jasa, 244 Neb. at 964, 510 N.W.2d at 292 (White, J., dissenting).
\item \textsuperscript{67} Jasa, 244 Neb. at 964, 510 N.W.2d at 292 (White, J., dissenting).
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id. at 965, 510 N.W.2d at 293 (White, J., dissenting).
\item \textsuperscript{71} Id. at 966, 510 N.W.2d at 294 (White, J., dissenting).
\item \textsuperscript{72} Id. at 967, 510 N.W.2d at 294 (White, J., dissenting).
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Id.
\end{itemize}
BACKGROUND

INTERPRETATIONS OF DISCRETIONARY FUNCTIONS

An interpretation of the discretionary function exemption ("exemption") involves a consideration of both state and federal law.\(^7\) States grappling with their own exemptions contained in their own state statutes reference decisions from federal courts interpreting the Federal Tort Claims Act ("F.T.C.A.") and use the legal theories supplied by such decisions.\(^7\) In Nebraska, the exemption of the Nebraska Political Subdivision Tort Claims Act ("P.S.T.C.A.") is almost identical to those contained in both the Nebraska State Tort Claims Act ("S.T.C.A.") and the F.T.C.A.\(^7\) Thus, court interpretations of the S.T.C.A. and F.T.C.A. exemptions aid in interpreting the P.S.T.C.A.\(^7\)

The discretionary function exemption signifies the boundary between government employees' acts which are immune from tort liability and those that are subject to it.\(^7\) The F.T.C.A., S.T.C.A. and P.S.T.C.A. do not define precisely what is a "discretionary function."\(^8\) Furthermore, federal legislative history does not address the situations to which Congress intended the exemption to apply.\(^8\) The courts, through judicial interpretation, have largely determined the exemption's scope.\(^9\)

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76. Id.


78. See Allen v. Lancaster County, 218 Neb. 163, 167, 352 N.W.2d 885, 886 (1984) (stating that "the discretionary function exemption from tort claims acts generally is best described in one of the early cases interpreting the Federal Tort Claims Act").


81. Barry R. Goldman, Can the King do no Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act, 26 Ga. L. Rev. 837, 842 (1992). The legislative history provides that § 2680 does not preclude claims for "negligence in the operation of vehicles" and "that alleged abuse[s] of discretionary authority" are protected from tort liability. Id.

82. Goldman, 26 Ga. L. Rev. at 842.
The Early Definitions

In *Dalehite v. United States*, the United States Supreme Court first interpreted the discretionary function exemption. The federal government had produced and distributed ammonium nitrate fertilizer which contained an ingredient traditionally used in explosives. The Supreme Court addressed whether the federal government was liable for the explosion of the fertilizer which injured and killed hundreds of people.

In reaching its conclusion, the Court examined the legislative history and legal principles which formed the basis of the F.T.C.A. and the exemption. The Court recognized that the legislative purpose behind the F.T.C.A. was to make the government liable "in the same manner and to the same extent as a private individual under like circumstances." The Court noted that although it was bound to give the F.T.C.A. a construction which would accomplish such a purpose, it also had to give "due regard for the statutory exceptions to that policy." The Court stated that "due regard" includes exempting from liability not only administrative and executive decisions made in the development of plans and specifications, but also acts of subordinates performed in accordance with official directions.

The Court developed a planning versus operational test to determine whether the challenged act fell within the scope of the exemption. Under this test, if the alleged tortious act occurred at the planning level, the government was protected by the exemption. However, if the act occurred at the operational level, the exemption would no longer apply and the government would face potential liability.

Applying these principles, the Court held that the exemption barred every claim against the government in its creation and imple-
mentation of the fertilizer export program. The Court stated that the challenged acts were made at the planning level rather than the operational, thereby immunizing the government from liability.

Following the Court's decision in Dalehite, courts tried to narrow the application of the exemption because they believed the Court's interpretation was overly broad. Despite this concern, the Court reaffirmed Dalehite in United States v. S.A. Empresa De Viacao Aerea Rio Grandense ("Varig Airlines"). In Varig Airlines, the Court admitted that its reading of the F.T.C.A. had not been consistent. Nonetheless, the Court stated that "we do not accept the supposition that Dalehite no longer represents a valid interpretation of the discretionary function exception."

The facts of Varig Airlines involved the alleged negligence of the Federal Aviation Administration ("F.A.A.") in issuing an approval certificate to an aircraft. A fire commenced in the aircraft's lavatory and engulfed the cabin in smoke, killing most of the passengers. The F.A.A. certificate signified its approval of the aircraft's safety standards following a "spot check" of the work of the manufacturer. The Court addressed whether the exemption insulated the F.A.A.'s certification process.

The Court outlined two factors to consider when determining whether a government employee's acts are protected by the exemption. In regards to the first factor, the Court stated that it is the nature of the conduct, not the actor's status, that determines whether

94. Dalehite, 346 U.S. at 39-42. The Court also deemed it unnecessary to define the scope of discretion. Id. at 35. Rather, the Court stated that "where there is room for policy judgment and decision there is discretion." Id. at 36. This broad encompassing statement forced lower courts to either dismiss every claim in which a government employee exercised choice, or use the planning versus operational level test in order to hold employees liable. Meredith & Pressman, 18 U. BALT. L. REV. at 517. This broad interpretation of the exemption served to erode the FTCA. Osborne M. Reynolds Jr., The Discretionary Function Exception of the Federal Tort Claims Act: Time for Reconsideration, 42 OKLA. L. REV. 459, 470 (1989).

95. Dalehite, 346 U.S. at 42.

96. Meredith & Pressman, 18 U. BALT. L. REV. at 520; see, e.g., Downs v. United States, 522 F.2d 990, 995-98 (6th Cir. 1975) (stating that the mere exercise of discretion will not protect the government from liability for the torts of its employees; the activity must involve the formulation of governmental policy).


98. Id. at 811-12.

99. Id.

100. Id. at 798.

101. Id. at 799-800.

102. Id. at 800.

103. Id. at 814.

104. Id. at 813-14; Meredith & Pressman, 18 U. BALT. L. REV. at 521.
the exemption applies.\textsuperscript{105} The Court noted that the basic inquiry is whether the challenged act is that which Congress intended the exemption to shield from liability.\textsuperscript{106} The employee's rank is irrelevant.\textsuperscript{107}

The second factor the Court considered was whether the government agent, in the performance of the challenged act, regulated the activities of private individuals.\textsuperscript{108} The Court explained that the legislative history continuously referred to the conduct of regulatory agencies as protected by the exemption.\textsuperscript{109} The Court reasoned that such emphasis indicated that Congress, through its enactment of the exemption, intended to "prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy."\textsuperscript{110}

The Court held that the exemption barred the respondent's claims against the government.\textsuperscript{111} The Court stated that the F.A.A.'s implementation and application of the "spot-check" program was discretionary because it was of the nature and quality protected by the exemption.\textsuperscript{112} The Court noted that judicial intervention into this program would involve "second-guessing" the judgment of the F.A.A., the precise intervention Congress intended the exemption to prevent.\textsuperscript{113}

The Development of the Berkovitz Two-Part Test

After Varig Airlines, the scope of the exemption remained unclear.\textsuperscript{114} In Berkovitz v. United States,\textsuperscript{115} the United States Supreme Court tried to provide yet another clarification of the exemption.\textsuperscript{116} Kevin Berkovitz, through his parents, alleged that the National Institutes of Health's Division of Biologic Standards and the Bureau of Biologics of the Food and Drug Administration were negligent in licensing Lederle Laboratories to produce a polio vaccine.\textsuperscript{117} Berkovitz

\begin{thebibliography}{117}
\bibitem{105} Varig Airlines, 467 U.S. at 813.
\bibitem{106} Id.
\bibitem{107} Id.; Goldman, 26 Ga. L. Rev. at 844. After Varig Airlines, actions of low-level agents at the operational level were also protected by the exemption. Goldman, 26 Ga. L. Rev. at 844.
\bibitem{108} Varig Airlines, 467 U.S. at 813-14.
\bibitem{109} Id. at 814.
\bibitem{110} Id.
\bibitem{111} Id. at 821.
\bibitem{112} Id. at 819.
\bibitem{113} Id. at 820.
\bibitem{114} Meredith & Pressman, 18 U. Balt. L. Rev. at 522.
\bibitem{115} 486 U.S. 531 (1988).
\bibitem{116} See Berkovitz v. United States, 486 U.S. 531 (1988); Goldman, 26 Ga. L. Rev. at 845.
\bibitem{117} Berkovitz, 486 U.S. at 533.
\end{thebibliography}
claimed that he had contracted polio because the agencies were negligent in approving a release of a lot of vaccine to the public.118

The Supreme Court developed a two-part test for courts to utilize in determining whether to apply the exemption.119 First, a court must determine whether the challenged action is a matter of choice for the government employee.120 Second, if a court determines that the challenged act involved permissible choice, the court must decide whether the judgment was "of the kind that the discretionary function exception was designed to shield."121 This test has become the prevailing standard in the application of the exemption.122

In regards to the first part of the test, a court must review the delegation of authority granted to the employee and determine whether such authority permitted discretion.123 The Court concluded that when a statute, regulation, or policy dictates a course of action for an agent to follow, the exemption will not apply.124 Courts must examine relevant statutes, policies, and procedures to determine if they merely provide guidance or dictate a particular action.125 If such legal authorities prescribe some type of action, the government employee or agency is not permitted to exercise discretion.126 In addition, if the employee's challenged act is not the result of any judgment or choice, then the act does not involve any discretion for the exemption to protect from liability.127

In regards to the second part of the test, a court must determine whether the exercise of judgment served the purposes of the exemption.128 The Court stated that in developing the exemption, Congress wanted to prevent the courts from second-guessing administrative and legislative decisions based on public policy.129 Thus, the Court noted that the exemption only protects employees' acts based on considerations of economic, social, or political public policies.130 A policy judgment involves the balancing of competing interests and may re-

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118. Id.
119. Id. at 536-37; See George v. United States, 735 F. Supp. 1524 (M.D. Ala. 1990) (applying the "Berkovitz test").
120. Berkovitz, 486 U.S. at 536.
121. Id.; See Bagby & Gittings, 30 Am. Bus. L. J. at 246.
126. Berkovitz, 486 U.S. at 536.
127. Id.
128. Id.; See Bagby & Gittings, 30 Am. Bus. L. J. at 246.
130. Id. at 537.
quire an assessment of the feasibility of the proposed action.¹³¹ The exemption will not apply to a mere failure to act unless the employee proves that there was a conscious balancing of policy factors before the employee chose not to act.¹³²

The Court noted that statutory and regulatory provisions required the federal agencies to receive data from the manufacturer, examine it, and determine that it meets safety standards before the agency issued a license.¹³³ Using this analysis, the Court held that the federal agencies' acts did not involve a permissible exercise of discretion.¹³⁴

In United States v. Gaubert,¹³⁵ the Court clarified and expanded the analysis used in determining what is a discretionary function.¹³⁶ A shareholder of an insolvent savings and loan association brought an action alleging that the Federal Home Loan Bank Board ("F.H.L.B.B.") and its division in Dallas were negligent in their supervisory activities.¹³⁷

Under its expansion of the exemption, the Court noted that a regulation which permits a government employee to exercise discretion creates a presumption that the challenged act involves the same public policy considerations which led to the development of the regulation itself.¹³⁸ Thus, once a court determines that the challenged conduct of an employee was a matter of choice, if the employee was acting under a regulation, the plaintiff would then have the burden to rebut the presumption that the exemption applies.¹³⁹

The Court eroded the planning versus operational level test used in previous federal decisions.¹⁴⁰ The Court stated that its use of the term "operational" in Dalehite merely described the level at which the government act occurred.¹⁴¹ The Court explained that a discretionary act is that which involves choice; nothing in the definition of discretionary restricts it to only planning or policy making functions.¹⁴²

¹³² Id. at 255. Some courts also require a clear link between the employee’s discretion and the challenged act or omission which harmed the individual. Id. at 256.
¹³³ Berkovicz, 486 U.S. at 540-41.
¹³⁴ Id. at 548.
¹³⁷ Gaubert, 499 U.S. at 319.
¹³⁸ Gaubert, 499 U.S. at 324.
¹³⁹ Brown & Anjier, 53 LA. L. Rev. at 1492; But see Prescott v. United States, 973 F.2d. 696, 702 n.4 (9th Cir. 1992) (stating that "Gaubert, of course, did not deal with the burden of proof question").
¹⁴⁰ Brown & Anjier, 53 LA. L. Rev. at 1493.
¹⁴¹ Gaubert, 499 U.S. at 326.
¹⁴² Id.
The Court stated that "[i]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exemption applies in a given case." Accordingly, the Court stated that actions at the operational level may also be protected by the exemption. The Court noted that there were no regulations governing the F.H.L.B.B.'s conduct. Applying this analysis, the Court held that the F.H.L.B.B.'s acts were discretionary.

Nebraska's Interpretations of what Constitutes a Discretionary Function under the S.T.C.A. and P.S.T.C.A.

An Overview: Policy Decisions Versus Ministerial Acts in Nebraska

In the application of the Berkovitz two-part test used to determine whether the exemption applies, the Nebraska Supreme Court has distinguished between policy decisions and ministerial acts. The supreme court has held that the exemption applies to only basic policy decisions and not to ministerial acts implementing those policy judgments. A discretionary act is that which entails an element of either judgment or choice regarding policy. In courts' determinations of whether a challenged act involves policy concerns, they are to consider the nature of the conduct rather than the status of the actor.

The court has defined a ministerial act as "one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated." The court has also stated that a ministerial act is one performed in a prescribed manner in accordance with a legal authority and not upon one's own judgment. Decisions made in developing plans, schedules of operation, or specifications are discretionary and shielded from liability under the exemption.

143. Id. (quoting Varig Airlines, 467 U.S. at 813).
144. Id. at 326.
145. Id. at 329-30.
146. Id. at 334.
148. See infra notes 149-54 and accompanying text.
150. Id.
151. Allen, 218 Neb. at 169, 352 N.W.2d at 887 (quoting State v. Kuhlmen, 167 Neb. 674, 682-83, 94 N.W.2d 373, 380 (1959)).
152. Wickersham, 218 Neb. at 180, 354 N.W.2d at 138.
153. Id.
cisions made to implement such plans or policies are ministerial and are not protected.  

Nebraska Decisions Interpreting the Discretionary Function Exemption

In *Wickersham v. State*, the Nebraska Supreme Court interpreted the exemption of the S.T.C.A. when a rancher brought an action against the State of Nebraska. He alleged the State was negligent in testing his cattle for diseases and for failing to notify him that his herd was exposed to brucellosis, a contagious disease. Wickersham purchased seventeen head of cattle from a Peddicord herd on January 30, 1980. In accordance with federal guidelines, a field investigator from the State tested the original herd of Peddicord and discovered they were infected with brucellosis. On February 25, 1980, the field investigator informed the State Department of Agriculture of all Peddicord cattle owners, including Wickersham, who purchased heads of cattle from the infected herd. However, the State Department of Agriculture did not notify Wickersham of the disease until May 2, 1980. By that time, Wickersham had placed the Peddicord with the rest of his herd.

In its analysis of the exemption, the court distinguished between policy decisions, which are protected by the exemption, and ministerial activities, which are not. The court noted that the exemption protects the discretion of government employees when they are decid-

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154. *Id.*
157. *Id.* at 176, 354 N.W.2d at 136.
158. *Id.* at 177, 354 N.W.2d at 137.
159. *Id.* at 176, 354 N.W.2d at 136. The United State’s Department of Agriculture developed regulations called the Uniform Methods and Rules for Brucellosis Eradication to guide state officials. *Id.* Such regulations provide, “when the quarantine is released on the brucellosis affected herd, the owners of the potentially exposed herds... shall be notified.” *Id.*

In addition, Nebraska Revised Statutes § 54-701 (Reissue 1978) provides in pertinent part that, “[t]he Department of Agriculture shall be vested with the power and charged with the duties of protecting the health of livestock in Nebraska... Provided, that as far as practicable the regulations approved by the United States Department of Agriculture shall be adopted.” NEB. REV. STAT. § 54-701 (Reissue 1978).

The court in *Wickersham* noted the duty to notify was either imposed by the federal regulations or self-imposed by the State but in either case, its response was not discretionary. *Wickersham*, 218 Neb. at 181, 354 N.W.2d at 139.

160. *Wickersham*, 218 Neb. at 178, 354 N.W.2d at 137.
161. *Id.*
162. *Id.* After being notified on May 2, the State tested Wickersham’s herd and determined that they were so badly infected that the herd must be liquidated. *Id.* An expert testified that the Peddicord herd infected Wickersham’s cattle. *Id.*
ing on the best course of action to take.\textsuperscript{164} The court explained that state regulations required the field investigator to immediately notify herd owners of their cattle's exposure to brucellosis.\textsuperscript{165} Thus, the court noted that the State's response upon discovering a case of brucellosis may not be discretionary.\textsuperscript{166}

The court stated that when one who is under no duty to act does act, the individual then must act with reasonable care.\textsuperscript{167} The court noted that once the State inspected and tested the infected Peddicord cattle, it was obligated to use due care in its subsequent response.\textsuperscript{168} The court held that the State's summary judgment was precluded because there was a substantial issue of fact as to whether the State's actions fell within the exemption.\textsuperscript{169}

In \textit{Blitzkie v. State},\textsuperscript{170} the court addressed whether the exemption of the S.T.C.A. insulated the State from liability stemming from its failure to give public notice of an outbreak of pseudorabies which killed a farmer's hogs.\textsuperscript{171} In reaching its decision, the court explained that the exemption protected discretionary conduct at all levels, not only that at the policy or planning level.\textsuperscript{172} The court noted that the statute which governed the Department of Agriculture's conduct allowed the department to use the most practical and efficient means for the control of diseases among animals.\textsuperscript{173} Therefore, the court held

\begin{itemize}
  \item \textsuperscript{164} Id.
  \item \textsuperscript{165} Id. at 181, 354 N.W.2d at 139.
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} Id. In support of this proposition, the court referenced a United States Supreme Court opinion in \textit{Indian Towing Co. v. United States}. Indian Towing Co. v. United States, 350 U.S. 61, 62 (1955); Wickersham, 218 Neb. at 181, 354 N.W.2d at 139. \textit{Indian Towing} addressed the duty of the United States Coast Guard to properly maintain a light of a lighthouse which the Coast Guard provided. \textit{Indian Towing Co.}, 350 U.S. at 62. Yet \textit{Indian Towing Co.} did not present the United States Supreme Court with the opportunity to interpret the exemption. Meredith & Pressman, 18 U. Balt. L. Rev. at 519. Instead, the Supreme Court addressed the Government's contention that the FTCA did not apply because it excludes liability when the Government performs activities which private individuals do not engage in. \textit{Indian Towing Co.}, 350 U.S. at 64. After refuting this argument, the Court held that once the Coast Guard undertook the duty to provide a lighthouse, it had a duty to use due care in maintaining it. \textit{Indian Towing Co.}, 350 U.S. at 67-9.
  \item \textsuperscript{168} Wickersham, 218 Neb. at 181, 354 N.W.2d at 139.
  \item \textsuperscript{169} Id. at 182, 354 N.W.2d at 139.
  \item \textsuperscript{170} 241 Neb. 759, 491 N.W.2d at 429 (1992).
  \item \textsuperscript{171} Id. at 764, 491 N.W.2d at 46 (quoting United States v. Gaubert, 499 U.S. 315 (1991)).
  \item \textsuperscript{172} Id. In support of this proposition, the court referenced a United States Supreme Court opinion in \textit{Indian Towing Co. v. United States}. Indian Towing Co. v. United States, 350 U.S. 61, 62 (1955); Wickersham, 218 Neb. at 181, 354 N.W.2d at 139. \textit{Indian Towing} addressed the duty of the United States Coast Guard to properly maintain a light of a lighthouse which the Coast Guard provided. \textit{Indian Towing Co.}, 350 U.S. at 62. Yet \textit{Indian Towing Co.} did not present the United States Supreme Court with the opportunity to interpret the exemption. Meredith & Pressman, 18 U. Balt. L. Rev. at 519. Instead, the Supreme Court addressed the Government's contention that the FTCA did not apply because it excludes liability when the Government performs activities which private individuals do not engage in. \textit{Indian Towing Co.}, 350 U.S. at 64. After refuting this argument, the Court held that once the Coast Guard undertook the duty to provide a lighthouse, it had a duty to use due care in maintaining it. \textit{Indian Towing Co.}, 350 U.S. at 67-9.
  \item \textsuperscript{167} \textit{Indian Towing Co.}, 350 U.S. at 67-9.
  \item \textsuperscript{169} 241 Neb. 759, 491 N.W.2d at 429 (1992).
  \item \textsuperscript{171} 241 Neb. 759, 491 N.W.2d at 42, 44 (1992).
  \item \textsuperscript{172} Id. at 764, 491 N.W.2d at 46 (quoting United States v. Gaubert, 499 U.S. 315 (1991)).
  \item \textsuperscript{173} Id.
\end{itemize}

The Department of Agriculture shall be vested with the power and charged with the duties of protecting the health of livestock in Nebraska, of determining and employing the most efficient and practical means for the prevention,
that the department’s failure to give public notice was a discretionary function because the statute itself required the department to exercise discretion.\textsuperscript{174}

In \textit{Lemke v. Metropolitan Util. Dist.},\textsuperscript{175} the court applied the P.S.T.C.A. exemption to a claim based on Metropolitan Utilities District’s (“M.U.D.”) failure to warn its customers of a defective gas connector manufactured by another company.\textsuperscript{176} Lorraine Lemke was injured from an explosive fire as a result of the connector leaking gas.\textsuperscript{177} The United States Consumer Product Safety Commission sent the American Gas Company (“A.G.A.”), an industry trade organization, a letter with a warning about the connectors’ potential dangers.\textsuperscript{178} The A.G.A. sent this letter and a “Safety Bulletin” to its members, including M.U.D.\textsuperscript{179} The A.G.A. also included a notice of the warning in its directory.\textsuperscript{180} M.U.D. received the A.G.A. directory, but placed it in its library and did not disseminate the information to its service personnel.\textsuperscript{181}

In its analysis, the court noted that other circuit court opinions have held that the exemption does not protect decisions of the government not to warn against a danger known to the government but unknown to the public.\textsuperscript{182} The court stated that when a governmental entity has notice of a dangerous condition caused by the entity or under its control and the condition is not apparent to those who will potentially be injured from it, the entity has a nondiscretionary obligation to warn of the danger or employ other means to prevent the probable injury.\textsuperscript{183} The court noted that in such situations a failure to warn or employ protective measures is not within the exemption.\textsuperscript{184}
The court explained that although there was no evidence demonstrating that M.U.D. installed Lemkes' connector, M.U.D. had notice of the dangerous hazard involved with it. The court noted that when M.U.D. did not disseminate this information to its customers, M.U.D. exerted control over the situation. The court also stated that M.U.D.'s failure to warn was a "decision by default" because nothing indicated that M.U.D. consciously chose to not warn its customers. In other words, the failure to warn was not a decision based on a legitimate policy judgment. Therefore, the court held that M.U.D.'s actions were not protected by the exemption under the P.S.T.C.A.

ANALYSIS

In Jasa v. Douglas County, the Nebraska Supreme Court held that the discretionary function exemption ("exemption") contained in Nebraska's Political Subdivision Tort Claims Act ("P.S.T.C.A.") shielded the Douglas County Department of Health ("Douglas County") from liability regarding Douglas county's response to Amy Martin's reported case of bacterial meningitis. In his dissent, Judge C. Thomas White articulated three reasons why the exemption did not apply. Based on both federal and Nebraska case law interpreting the exemption, Judge White's reasoning that the county's actions were nondiscretionary is more persuasive than the court's.

Douglas County's Actions did not Satisfy the First Part of the Berkovitz Test

In Berkovitz v. United States, the United States Supreme Court developed a two-part test for determining whether the exemption protects certain government actions from liability. The first part of the test requires a court to ascertain if the challenged act involved a matter of choice for the governmental employee. Under

185. Id. at 647-48, 502 N.W.2d at 89-90.
186. Id. at 648, 502 N.W.2d at 89.
187. Id. at 648, 502 N.W.2d at 90.
188. Id. at 648, 502 N.W.2d at 89-90.
189. Id.
190. 244 Neb. 944, 510 N.W.2d 281 (1994).
192. See supra notes 64-74 and accompanying text.
193. See infra notes 194-275 and accompanying text (analyzing why the exemption did not apply to the county's actions).
the first part, if a statute, regulation, or policy mandates a course of action, then there is no permissible choice and the exemption does not apply. 197

In *Jasa*, the Nebraska Supreme Court stated that there was no statute or regulation which required Douglas County to ascertain whether Amy Martin attended day-care and if so, to contact parents of other enrollees who attended the day-care with Amy. 198 Thus, the court concluded that the county's actions involved choice and were within the confines of the exemption. 199

The court's analysis was incomplete. 200 Under the first part of the test, an employee is not permitted choice if a statute, regulation, or policy mandates a particular action. 201 In *Jasa*, the court only considered whether there was a statute or regulation which prescribed a course of action for the county to follow. 202 The court did not address whether a policy existed that required the county to determine whether a child diagnosed with meningitis was enrolled in day-care and if so, to contact the other enrollees' parents. 203 To the contrary, there existed a policy which required the county to inquire whether an infected child attended day-care and if so to contact the facility. 204

The county's policy was to use the most current Center for Disease Control ("C.D.C.") form when filling out its report after a physician reported a contagious disease to the county. 205 The C.D.C.'s current form, most recently revised in October, 1986, inquires whether the infected child was under six years of age and attended

197. Berkowitz, 486 U.S. at 536.
198. *Jasa*, 244 Neb. at 963, 510 N.W.2d at 292. State statutes imposed upon the county a duty to "make and enforce regulations to prevent the introduction and spread of . . . infectious . . . diseases." NEB. REV. STAT. § 71-501 (Reissue 1990). Under definitions provided by the Nebraska Supreme Court, such actions were ministerial. See infra notes 152-54 and accompanying text (defining a ministerial action as that not dependent upon one's own judgment and explaining that, under its reporting system, the County was directed to take particular actions). The County developed its reporting system in accordance with these statutes which required the county to take certain actions. *Jasa*, 244 Neb. at 962, 510 N.W.2d at 291. Thus, because the County's response after receiving a report of a disease was required in a manner not dependent upon one's judgment, such response is a ministerial act. Allen v. Lancaster County, 218 Neb. 163, 169, 352 N.W.2d 883, 887 (1984). The exemption does not shield this response from liability. *Allen*, 218 Neb. at 166, 352 N.W.2d at 884.
199. *Jasa*, 244 Neb. at 963, 510 N.W.2d at 292.
200. See infra notes 201-03 and accompanying text (illustrating that the court stated neither a statute nor a regulation required the county to ask certain questions, yet the first prong also includes an examination of policy).
201. Berkowitz, 456 U.S. at 536.
202. *Jasa*, 244 Neb. at 963, 510 N.W.2d at 292.
203. See id.
204. See infra notes 205-09 and accompanying text (explaining that the county had a policy to use the most current C.D.C. forms which required the county to determine the age of the infected child and if the child attended day-care).
205. *Jasa*, 244 Neb. at 953, 510 N.W.2d at 287.
day-care. However, the county did not follow its policy and use the 1986 form but instead used an April, 1977 form which had been revised three times after 1977. Had it used its most recent form, the county would have had to determine whether Amy, who had bacterial meningitis, was under six years of age and attended day-care.

Furthermore, Douglas County itself admitted to having a policy which required it to contact the day-care facility if it was notified of a case of bacterial meningitis in a day-care attendee. If the county would have followed its own policy and used current C.D.C. forms, it would have discovered that Amy attended day-care. After realizing Amy attended West Omaha Day Care, the county then would have contacted the day-care to make recommendations to prevent the spread of Amy's meningitis. Because there was a policy for the county to follow after it received a reported case of meningitis, any actions taken by the county did not involve choice protected by the exemption; therefore, Douglas County's response to Amy's case of bacterial meningitis did not meet the first part of the Berkovitz test.

**Douglas County's Actions Did Not Satisfy the Second Part of the Berkovitz Test**

When applying the exemption to a challenged act, if the act does not satisfy the first part of the Berkovitz test because the employee was not permitted to exercise choice, then the act is not protected by the exemption and the analysis ends. However, even if the act meets the first part, the second part of the test requires a court to determine whether the judgment involved in the challenged act is that which Congress intended the exemption to protect. If so, then the exemption applies and the government is immune from liability. Congress desired to prevent courts from second-guessing government decisions based on considerations of public policy.

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206. *Id.*
207. *Id.*; see *supra* note 28 and accompanying text.
208. *Jasa*, 244 Neb. at 953, 510 N.W.2d at 287.
209. *Id.* at 952, 510 N.W.2d at 286.
210. *Id.* at 947-53, 510 N.W.2d at 283-87 (stating that Amy Martin attended West Omaha Day Care at the time of her illness and that the 1986 Center for Disease Control form asked if the infected child was less than six years of age and attended day-care).
211. *Id.* at 947-52, 510 N.W.2d at 283-86.
212. See *infra* notes 205, 209 and accompanying text; *Berkovitz*, 486 U.S. at 536 (stating that when a policy prescribes a course of action which one is to follow, the exemption does not apply).
216. *Id.* at 536-37.
In analyzing the second part of the Berkovitz test, federal courts have concluded that a government failure to warn of a danger which is known to the government but unknown to the public is not protected by the exemption.\textsuperscript{217} The courts in \textit{Summers v. United States},\textsuperscript{218} Boyd \textit{v. United States},\textsuperscript{219} George \textit{v. United States},\textsuperscript{220} and Andrulonis \textit{v. United States},\textsuperscript{221} have held that a failure to warn is an omission which does not involve any kind of considerations of public policy.\textsuperscript{222}

Similarly in \textit{Jasa}, Douglas County failed to warn of a danger known to the county but unknown to the public.\textsuperscript{223} Douglas County knew that bacterial meningitis was a dangerous disease.\textsuperscript{224} The county also knew that children who were under the age of four and children who attended day-care were both at risk for contracting meningitis.\textsuperscript{225} The county had access to reported cases of bacterial meningitis through its reporting system.\textsuperscript{226} Thus, after receiving a report that Amy Martin contracted bacterial meningitis, the county had knowledge of a danger.\textsuperscript{227} Furthermore, this danger was unknown to the public.\textsuperscript{228}

The county's failure to warn other enrollees at West Omaha Day Care of Amy's dangerous and infectious disease was simply not based

\begin{footnotes}
\footnote{217. See Andrulonis \textit{v. United States}, 924 F.2d 1210, 1219 (2nd Cir. 1991) (stating that withholding a warning of dangers of using a rabies viral strain did not involve a policy analysis and thus, is not within the scope of the exemption), recons., 952 F.2d 652 (2d Cir. 1991), cert. denied 112 S. Ct. 2992 (1992); Summers \textit{v. United States}, 894 F.2d 325, 327-28 (10th Cir. 1990) (stating that a failure to warn was not within the exemption because the government did not balance competing policy considerations), \textit{amend. and superseded}, 905 F.2d 1212 (9th Cir. 1990); Boyd \textit{v. United States}, 881 F.2d 895, 898 (10th Cir. 1989) (stating that a failure to warn does not involve any policy judgments protected by the exemption); George \textit{v. United States}, 735 F. Supp. 1524, 1533-34 (M.D. Ala. 1990) (stating that the government's failure to warn of an alligator in a public swimming area does not invoke the protection of the exemption because if Congress wanted to shield such actions from liability, the Act would have no purpose).

218. 894 F.2d 325 (10th Cir. 1990), \textit{amend. and superseded}, 905 F.2d 1212 (9th Cir. 1990).

219. 881 F.2d 895 (10th Cir. 1989).


222. See \textit{Summers} 894 F.2d at 327-28; \textit{Boyd} 881 F.2d at 898; \textit{George} 735 F. Supp. at 1533-34; \textit{Andrulonis}, 924 F.2d at 1219.

223. \textit{See infra} notes 224-28 and accompanying text.


225. Brief for Appellee at 11, \textit{Jasa} (No. S-91-970). Douglas County also had notice that approximately fifty percent of children the same age of Amy Martin attended day-care. \textit{Id}.

226. \textit{Jasa}, 244 Neb. at 951-52, 510 N.W.2d at 285-86.

227. \textit{See supra} notes 224-25 and accompanying text.

228. \textit{Jasa}, 244 Neb. 964, 510 N.W.2d at 292 (White, J., dissenting).}

on considerations of public policy. Accordingly, the county's actions did not meet the second part of the Berkovitz test.

_Douglas County Undertook Action and was Obligated to use Due Care as a Result of Its Action_

Douglas County designed the postcard reporting form in 1981. The postcard reporting form provided a means of collecting information on infectious diseases in order to develop an effective public health policy. However, under Nebraska Revised Statute section 71-501, the county voluntarily included bacterial meningitis on the postcard form. As a result, bacterial meningitis became a disease that the county required physicians to report. The purpose of the reporting requirement was to prevent the "introduction and spread of contagious, infectious and malignant disease[s]." Thus, the county voluntarily made a policy decision to prevent the spread of bacterial meningitis.

The Nebraska Supreme Court, along with the United States Supreme Court and other federal courts, have interpreted the exemption in cases with substantially similar facts. In _Indian Towing Co. v. United States_, _Wickersham v. State_, _George v. United_
States,242 and Denham v. United States,243 a governmental entity voluntarily undertook a duty which it was not required to perform.244 The courts held that when a government entity voluntarily assumes to perform a duty, this decision is discretionary and protected under the exemption.245 However, these courts have also held that once this critical discretionary decision is made, subsequent actions which government employees perform in order to carry out this duty are nondiscretionary.246 Such actions, which are not protected under the exemption, must be performed with reasonable care.247

In Wickersham v. State,248 the Nebraska Supreme Court stated that "when one under no obligation to act does undertake action, one must act with reasonable care."249 However, in Jasa, the supreme court did not follow this principle.250 Douglas County was under no obligation or duty to include bacterial meningitis on its postcard reporting forms.251 In fact, the development of these forms was discretionary because the statute only required the county to make and enforce a "regulation" to prevent the spread of contagious diseases.252 Nonetheless, the county admitted that it had voluntarily included bacterial meningitis on the form.253 Thus, under Wickersham, the county was obligated to use reasonable care in its response to reported cases of bacterial meningitis.254

In Jasa, the court did not even address the county's initial voluntary decision to develop and implement the postcard reporting forms

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243. 834 F.2d 518 (5th Cir. 1987).
244. Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955); Denham, 834 F.2d at 520; Wickersham v. State, 218 Neb. 175, 181, 354 N.W.2d 134, 139 (1984); George, 735 F. Supp. at 1533.
245. See Indian Towing Co., 350 U.S. at 69 (stating that the Coast Guard was not under the duty to provide a lighthouse service); Denham, 834 F.2d at 520-21 (stating that the discretionary decision was to create a designated swimming area); Wickersham, 218 Neb. at 181, 354 N.W.2d at 139 (illustrating that the State had no obligation to act); George, 735 F. Supp. at 1533 (stating that the Forest Service's decision to create a recreational area was discretionary).
246. Indian Towing Co., 350 U.S. at 69; Denham, 834 F.2d at 520-21; Wickersham, 218 Neb. at 181, 354 N.W.2d at 139; George, 735 F. Supp. at 1533.
247. Indian Towing Co., 350 U.S. at 69; Denham, 834 F.2d at 520-21; Wickersham, 218 Neb. at 181, 354 N.W.2d at 139; George, 735 F. Supp. at 1533.
249. Wickersham, 218 Neb. at 181, 354 N.W.2d at 139 (citing Indian Towing Co., 350 U.S. at 69).
250. See infra notes 251-59 and accompanying text.
251. Jasa, 244 Neb. at 951-52, 510 N.W.2d at 286.
252. See note 56.
253. See note 26 and accompanying text.
254. See supra notes 249-53 and accompanying text (explaining that once the government voluntarily provides a service or assumes a duty, actions in response to the duty must be performed with reasonable care).
and to include bacterial meningitis on them. The court recognized that the statute authorizing the county to make regulations pertaining to infectious diseases is "painted in broad strokes." However, as soon as the county voluntarily decided to place "bacterial meningitis" on its postcard reporting forms, which it distributed to health care providers, it then undertook the duty to prevent the spread of bacterial meningitis in the county. Actions performed in response to this duty are nondiscretionary and must be performed with reasonable care. Such actions included the county's duty to respond to the report it received on November 2, 1987, indicating that Amy Martin had been treated for bacterial meningitis.

**Douglas County had Notice of a Danger Under Its Control and Therefore had a Nondiscretionary Duty to Warn**

The Nebraska Supreme Court has held that when a government agency is notified of a dangerous condition which is under the agency's control and the danger is not apparent to those who will most likely be injured by it, the government has a nondiscretionary duty to warn of the danger or to take other preventive measures. In *Lemke v. Metropolitan Util. Dist.*, the supreme court stated that Metropolitan Util. District ("M.U.D.") had a duty to warn its customers of a defective gas connector which may have been installed in their customers' homes. The court explained that although M.U.D. itself may have not installed the gas connectors, it exerted control over the connectors' potential dangers when it received but did not disseminate information regarding the defective connectors. The court concluded that M.U.D.'s actions after receiving the information were nondiscretionary and not protected by the exemption.

In *Jasa*, the court stated that although Douglas County received a reported case of bacterial meningitis, the county had discretion as to
The county had notice of the dangerous and potentially life threatening effects of Amy Martin's bacterial meningitis. Similar to M.U.D.'s actions in *Lemke*, the county exerted control when it received information of Amy's meningitis but did not disseminate the information to those who could be potentially injured by the meningitis, other day-care enrollees at West Omaha Day Care. In addition, Amy's disease was not readily apparent to other children who attended West Omaha Day Care, especially Sean Jasa who did not attend the day-care at the same time as Amy. Thus, after receiving the report of Amy's disease, Douglas County had a nondiscretionary duty to warn or take other preventive measures. As a result, the exemption should not have insulated Douglas County from liability.

The court distinguished *Lemke* by holding that in *Lemke*, it was M.U.D. "that brought the injury-causing agent (the odorized gas) to its customers" whereas Douglas County did not bring the injury-causing agent (the Hemophilus bacterium) to West Omaha Day Care. However, in *Lemke*, there was no evidence that M.U.D. brought the "injury-causing agent" to the Lemkes. On the contrary, the connector, which M.U.D. did not manufacture or assume liability for, was defective and allowed the escape of gas which subsequently injured the Lemkes. The court held M.U.D. liable because it had information about the defective connectors which it did not disseminate to its customers. Therefore, the court in *Jasa* should have followed its holding in *Lemke* because, in both cases, neither governmental agency brought the injury-causing agent to those who could be injured by the dangerous condition.

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265. *Jasa*, 244 Neb. at 963, 510 N.W.2d at 292.
266. Brief for Appellee at 11, 22, *Jasa* (No. S-91-970). Despite knowing that HIB was a dangerous disease, the county did not report Amy Martin's contraction of HIB to the state until February 12, 1988. *Jasa*, 244 Neb. at 953, 510 N.W.2d at 286. This was more than three months after the county received the card on Amy Martin. *Id.*
267. See supra notes 24-8 and accompanying text.
268. *Jasa*, 244 Neb. at 950, 510 N.W.2d at 285.
269. See supra note 260 and accompanying text.
270. See supra note 264 and accompanying text (arguing that the duty to take preventive measures is nondiscretionary and therefore, the exemption does not apply).
271. *Id.*
273. *Id.* at 638-40, 502 N.W.2d at 84-6.
274. *Id.* at 648, 502 N.W.2d at 89-90.
275. See supra notes 272-74 and accompanying text.
CONCLUSION

As noted in Jasa v. Douglas County, bacterial meningitis is a dangerous disease which threatens the health and well-being of all citizens. The Douglas County Department of Health ("Douglas County") is charged with protecting the health of the citizens of the county by lessening the risk of such diseases. However, under the unsettling facts presented in Jasa, Douglas County chose to not warn its citizens of a reported case of meningitis. This was a result of Douglas County's failure to make one phone call to inquire whether a child with a reported case of bacterial meningitis, Amy Martin, attended day-care. As a result of the county's inaction, Sean Jasa's life was permanently altered. In addition, as a result of the Nebraska Supreme Court's decision in Jasa, Sean's parents were deprived of a jury award to help them compensate the costs of Sean's injury.

The supreme court shielded Douglas County from liability regarding the county's response to Amy's reported case of bacterial meningitis under the discretionary function exemption ("exemption") contained in Nebraska's Political Subdivision Tort Claims Act ("P.S.T.C.A."). The court's treatment of the discretionary function exemption erodes the purpose of the P.S.T.C.A. and the State Tort Claims Act. Under the court's ruling, governmental entities will be excused from their negligent acts unless there is some statute or regulation which prescribes, word for word, the action the governmental entity is to follow. If the government employee is permitted even the slightest choice, this choice will be deemed "discretionary." Despite years of struggling to hold the government liable, it is once again true that Douglas County, the King, "can do no wrong."

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276. 244 Neb. 944, 510 N.W.2d 281 (1994).
277. See supra notes 22, 38 and accompanying text.
278. See supra note 56 and accompanying text.
279. See supra notes 27-8 and accompanying text.
280. See supra note 208 and accompanying text.
281. See supra note 38 and accompanying text.
282. See supra note 47 and accompanying text.