Defending the Producers: Examining Product Liability Protection for Compelled Manufacturing Under the Defense Production Act

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IN MARCH 2020, the United States began to feel acutely the effects of a global outbreak of COVID-19, a potentially-deadly respiratory illness caused by the novel coronavirus SARS-CoV-2.[1] As illness and fatality totals steadily grew and hospitals faced the possibility of being overwhelmed by patients sick with COVID-19, state governments and the federal government took action to respond to the emerging pandemic.[2] On March 13, 2020, President Donald Trump declared the COVID-19 pandemic to be a national emergency pursuant to Section 501 (b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act").[3] While this emergency declaration permitted the federal government

[1] *See, e.g.*, Ella Torres, *A timeline of Cuomo's and Trump's responses to coronavirus outbreak*, ABC NEWS (April 3, 2020), available at https://abcnews.go.com/US/timeline-cuomos-trumps-responses-coronavirus-outbreak/story?id=69914641.

[2] *Id.*

[3] Donald J. Trump, *Letter from the President* (2020), available at https://www.whitehouse.gov/wp-content/uploads/2020/03/LetterFromThePresident.pdf.

to assist states, financially and otherwise, in their recovery efforts and federal agencies to coordinate the response to the crisis,[4] concerns loomed about shortages of needed medical equipment — particularly medical ventilators[5] and protective face masks.[6]

On March 18, 2020, President Trump issued an executive order invoking the Defense Production Act ("DPA"),[7] a Korean War-era law that provides the president with broad authority to direct production activity in the United States in order to further the "national defense."[8] On March 27, the president used his authority under the DPA to compel General Motors, an automaker, to produce ventilators amid a national shortage of these devices.[9] President Trump subsequently invoked the DPA to steer the production of medical devices and/or protective equipment for health care workers by companies more traditionally associated with the manufacture of these goods, including General Electric, Medtronic, and 3M.[10]

Perhaps anticipating the product liability issues that could arise in the context of this compelled production, Secretary of Health and Human Services Alex Azar issued a separate declaration under the Public Readiness and Emergency Preparedness ("PREP") Act[11] in the days preceding the president's invocation of the DPA. This declaration immunized manufacturers of a broadly defined set of "covered countermeasures"

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[4] Trisha Anderson et al., *INSIGHT: Coronavirus and the Stafford Act—What It Means for Contractors*, BLOOMBERG LAW (March 26, 2020), available at https://news.bloomberglaw.com/us-law-week/insight-coronavirus-and-the-stafford-act-what-it-means-for-contractors.

[5] Sarah Kliff et al., *There Aren't Enough Ventilators to Cope with the Coronavirus*, N.Y. TIMES (last updated Mar. 26, 2020), available at https://www.nytimes.com/2020/03/18/business/coronavirus-ventilator-shortage.html.

[6] Emily Feng and Amy Cheng, *COVID-19 Has Caused A Shortage of Face Masks, But They're Surprisingly Hard to Make*, NAT'L PUB. RADIO: GOATS & SODA (Mar. 16, 2020), available at https://www.npr.org/sections/goatsandsoda/2020/03/16/814929294/covid-19-has-caused-a-shortage-of-face-masks-but-theyre-surprisingly-hard-to-make.

[7] Defense Production Act of 1950, 50 U.S.C. §§ 4501-4568 (2018).

[8] *See* 50 U.S.C. § 4552 (14) (2018).

[9] John Wagner and Colby Itkowitz, *Trump orders GM to manufacture ventilators under the Defense Production Act*, WASH. POST (Mar. 27, 2020), available at https://www.washingtonpost.com/politics/trump-raises-prospect-of-ordering-gm-ford-to-manufacture-ventilators/2020/03/27/92f82db6-7043-11ea-aa80-c2470c6b2034_story.html.

[10] Yelena Dzhanova, *Trump Compelled these companies to make critical supplies, but most of them were already doing it*, CNBC (Apr. 3, 2020), available at https://www.cnbc.com/2020/04/03/coronavirus-trump-used-defense-production-act-on-these-companies-so-far.html.

[11] *See* 42 U.S.C. § 247-6d (2018).

against tort liability relating to the use of these countermeasures and preempted any contrary state law. The secretary defined these countermeasures as including "any . . . device . . . used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product."[12] This declaration likely encompasses the entire use cycle of a covered countermeasure, including its manufacture, and thus would (with certain limitations for cases of willful misconduct) shield manufacturers from liability arising from the manufacture of covered countermeasures in response to the COVID-19 outbreak.[13]

Although the secretary's declaration under the PREP Act presents a useful liability shield for compelled manufacturing activity under the DPA in response to COVID-19, the current invocation of the DPA raises serious questions about the need for more permanent protection against product liability suits for DPA-compelled manufacturing going forward. The PREP Act is both limited in its applicability — applying only in cases of "a disease or other health condition or other threat to health [that] constitutes a public health emergency" or a credible risk of such disease[14] — and is subject to the secretary of Health and Human Services' discretion both in its invocation and its scope.[15] The DPA's codified liability protection,[16] meanwhile, has never been explicitly held to shield manufacturers from tort liability.[17]

In this article, we will argue that, contrary to some interpretations, the DPA's codified liability protection should be interpreted to shield compelled manufacturers against product liability claims. Instances of compelled production should be shielded from product liability claims under the doctrine of *Yearsley* immunity as well as the closely related "government contractor defense" provided certain conditions are met. We will first examine the origins of the DPA

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[12] Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198 (Mar. 17, 2020).

[13] *See, e.g.*, Lee F. Lasris, *COVID-19 Response: The PREP Act and Liability Immunity During the Coronavirus Outbreak*, LEWIS BRISBOIS BISGAARD & SMITH LLP: LEGAL ALERTS (Mar. 30, 2020), available at https://lewisbrisbois.com/newsroom/legal-alerts/covid-19-response-the-prep-act-and-liability-immunity-during-the-coronavirus.

[14] 42 U.S.C. § 247-6d (b) (1).

[15] 42 U.S.C. § 247-6d (b).

[16] 50 U.S.C. § 4557 (2018).

[17] *See* Kelly Belnick, *Emergency Laws Protect Cos. Enlisted in COVID-19 Fight*, LAW360 (Apr. 2, 2020), available at https://www.law360.com/articles/1259173/emergency-laws-protect-cos-enlisted-in-covid-19-fight.

and its use before the COVID-19 pandemic. We then will examine the language of the DPA's codified liability protections, as well as relevant case law analyzing these protections. After that, we will look to two judicially created doctrines, *Yearsley* immunity and the government contractor defense, as well as the specific application of contractor immunity in the context of disaster relief efforts. In closing, we will argue that each of these defenses — direct immunity under Section 707 of the DPA, in addition to immunity under *Yearsley* and its progeny as well as the government contractor defense — offers a potential avenue to avoid liability based on compelled production. Finally, we will offer suggested practice pointers for manufacturers to ensure that manufacturers do not foreclose the availability of these defenses to themselves and properly assert these defenses in any potential litigation.

I. Background

The federal government enacted the DPA in September 1950, spurred by the outbreak of the Korean War.[18] The purpose of the DPA, as set forth in Congress' declaration of policy, was to empower the president "to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of . . . national security . . . and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use . . . ."[19] The focus of the DPA remains on promoting national defense, although Congress expanded the definition of this term to encompass both traditional military aims and ones more closely implicating the United States' civilian population, specifically: "programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of [the Stafford Act] and critical infrastructure protection and restoration."[20] Executive Orders delegate the president's authority for implementing the DPA to pertinent cabinet secretaries, with the secretary of Health and Human Services responsible for the

[18] CONG. RESEARCH SERV., THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS 2 (updated Mar. 2, 2020), available at https://fas.org/sgp/crs/natsec/R43767.pdf [hereinafter CRS REPORT].

[19] Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798, § 2 (codified as amended at 50 U.S.C. § 4502 (2018)).

[20] 50 U.S.C. § 4552 (14) (2018).

administration of the DPA as it pertains to "health resources."[21] In his order invoking the DPA to battle COVID-19, President Trump reemphasized his delegation of his authority to execute the DPA to the secretary of Health and Human Services.[22]

Under the DPA, the executive branch has a wide-ranging set of powers vis-à-vis private sector manufacturers, including (1) the ability to prioritize the fulfillment of certain government contracts; (2) the ability to provide financial incentives, such as loans, to facilitate production; and (3) the ability to intercede in corporate decision-making, for instance by blocking certain mergers and acquisitions.[23] The first set of powers in this list, permitting the president both to prioritize private manufacturers' fulfillment of certain government contract orders over the fulfillment of non-government orders and also to direct the allocation of "materials, services, and facilities"[24] in service of the national defense, is most relevant to the present COVID-19 outbreak and is found in Section 101 (a) of Title I of the DPA.[25] To invoke these powers "to control the general distribution of any material in the civilian market," the president must find "(1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship."[26]

Although the aforementioned language, as well as the DPA's wartime inception, would suggest that its use is limited to periods of dire national emergency or wartime mobilization, successive presidential administrations continuously have invoked the DPA in the military procurement realm.[27] According to a report by the Federal Emergency Management Agency, the Department of Defense has used the DPA's prioritization authority

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[21] Exec. Order No. 13,603, 3 C.F.R. 13603 (2012).
[22] Exec. Order No. 13,909, 3 C.F.R. 13909 (2020).
[23] CRS REPORT, *supra* note 18, at 2.
[24] 50 U.S.C. § 4511 (a) (2018).
[25] *Id.* § 4511.
[26] *Id.* § 4511 (b).
[27] James E. Baker, Opinion, *It's High Time We Fought This Virus the American Way*, N.Y. TIMES (Apr. 3, 2020), available at https://www.nytimes.com/2020/04/03/opinion/defense-protection-act-covid.html. Notably, all presidents since the DPA's passage have invoked it in some capacity, either "to prioritize federal contracts or to shore up vulnerabilities in domestic production that threaten the defense industrial base." Jane Chong, *How to Actually Use the Defense Production Act*, THE ATLANTIC (Apr. 6, 2020), available at https://www.theatlantic.com/ideas/archive/2020/04/how-actually-use-dpa-fight-covid-19/609469/.

"continuously and extensively" since 1950, placing approximately 300,000 prioritized orders per year.[28] Presidents of both parties also have used the DPA outside the military context, with former Presidents Bill Clinton and George W. Bush each invoking the DPA in early 2001 to ensure the transmission of electrical power and natural gas to the state of California in the midst of that state's energy crisis.[29] Former President Barack Obama used the DPA to force American tele-communications companies to disclose information on their use of foreign-manufactured components in an effort to root out potential cyberespionage,[30] while President Trump invoked the DPA in 2017 to promote the production of various materials deemed important to the "space industrial base."[31] The DPA's allocation authority, meanwhile, has gone unused since the end of the Cold War, although certain civilian aircraft remain allocated under it for purposes of the Civil Reserve Air Fleet.[32]

II. Potential Avenues for Liability Protection

The president's ability not only to prioritize the fulfillment of government contracts but also to compel the production of needed goods raises important liability questions, particularly in the context of manufacturers making products outside of their normal business lines in order to assist in combating a national emergency. These concerns can arise in the

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[28] DEP'T OF HOMELAND SEC., THE DEFENSE PRODUCTION ACT COMMITTEE REPORT TO CONGRESS 8 (June 24, 2019), available at https://www.fema.gov/media-library-data/1582898704576-dc44bbe61cce3cf763cc8a6b92617188/2018_DPAC_Report_to_Congress.pdf. "Rated orders" permit the federal government to prioritize its own contracts above competing contracts from other purchasers. *See* FED. EMERGENCY MGMT. AGENCY, *Information for Contractors About Priority-Rated Orders*, (Aug. 13, 2018) available at https://www.fema.gov/information-contractors-about-priority-rated-orders.

[29] Daniel H. Else, CONG. RESEARCH SERV., DEFENSE PRODUCTION ACT: PURPOSE AND SCOPE 2 (2009), available at https://fas.org/spg/sgp/crs/natsec/RS20587.pdf.

[30] Paul Wagenseil, *Feds Hunt Spyware in Foreign-Made Network Components, Report Says*, NBC NEWS (Nov. 30, 2011), available at http://www.nbcnews.com/id/45499713/ns/technology_and_science-security/t/feds-hunt-spyware-foreign-made-network-components-report-says/#.Xp2v8euSk2w.

[31] Donald J. Trump, *Letter from the President – Defense Production Act of 1950* (June 30, 2017), available at https://www.whitehouse.gov/briefings-statements/letter-president-defense-production-act-1950-2/.

[32] Baker, *supra* note 27. The Civil Reserve Air Fleet is composed of civilian airliners meant to provide auxiliary airlift capacity to the Department of Defense in times of emergency. *Civil Reserve Air Fleet*, U.S. AIR FORCE, (July 28, 2014), available at https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104583/civil-reserve-air-fleet/.

contractual realm — for example, a manufacturer that is forced to delay shipments to a commercial customer due to government orders taking precedence and thereby breaches its contract with the commercial customer. Alternately, these concerns may arise in tort — for instance, in the case of a manufacturer that is compelled to make products outside of its usual area of expertise and unintentionally does so in a defective manner. Statutory protections in the DPA resolve contractual concerns, but the tort questions remain in large part unsettled.

A. DPA Section 707

The DPA and its implementing regulations each contain provisions that seem to address manufacturers' liability concerns in both the contractual and the tort contexts. The statutory liability protection is found in Section 707 of the DPA,[33] which provides in part: "No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this chapter . . . ." The DPA's implementing regulations similarly provide that "[a] person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action . . . ."[34] Despite neither Section 707 nor its implementing regulation containing language limiting their applicability to contract claims, courts have only held definitively that Section 707 protects against contract liability and have left its applicability to tort liability uncertain.

Notwithstanding Section 707's seemingly expansive limitation on producer liability for complying with orders under the DPA, the volume of case law involving it is rather low. As one court observed in the early 1980s, although the DPA had been in effect for more than three decades, it was able to find only two cases analyzing Section 707's applicability.[35] Both of these cases involved contract liability, rather than tort.[36] Nevertheless, an understanding of the court's application of Section 707 to one of these cases in particular, *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*,[37] is instructive in understanding both Section 707 itself as well as certain subsequent courts' hesitancy to apply Section 707 to tort claims.

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[33] Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798, § 707 (codified as amended at 50 U.S.C. § 4557 (2018)).
[34] 15 C.F.R. § 700.90 (2020).
[35] *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 845 (E.D.N.Y. 1984).
[36] *Id.*
[37] 532 F.2d 957 (5th Cir. 1976).

Eastern Air Lines occurred in the context of escalating U.S. involvement in the Vietnam War and involved breach of contract claims by the plaintiff, a civilian airline, against the defendant, a manufacturer of aircraft for both civilian and military use.[38] The plaintiff alleged that it had suffered damages as a result of delays in the defendant's delivery of new aircraft.[39] While the defendant did not contest that these delays had occurred, it argued that they were excusable given that it had been forced to satisfy the government's orders first as a result of, among other things, prioritization of these contracts under the DPA.[40] As such, one of the defendant's arguments was that Section 707 shielded it from liability arising out of the plaintiff's breach of contract claims.[41]

The court in *Eastern Air Lines* agreed with the defendant, explaining that Section 707 "is simply declaratory of the common law [doctrine of impossibility]"[42] and therefore provided a valid defense to breach of contract claims.[43] Further, the court held, Section 707 did not apply solely to formal orders placed under the DPA but rather applied in the context of any "informal but nonetheless concerted government priorities policy"[44] that was meant to ensure that government production needs received higher prioritization than their civilian analogues.

Subsequent courts accepted that *Eastern Air Lines* established Section 707 as a defense to contract claims by aggrieved contractual counterparties but were less receptive to the notion that Section 707 acted as a shield against tort liability. In another case set against the backdrop of military procurement during the Vietnam War, the court in *In re Agent Orange Product Liability Litigation* evaluated the merits of a settlement agreement between military veterans claiming injuries arising from the "Agent Orange" defoliant that had been used in the theater of combat during the war and the various manufacturers of Agent Orange.[45] As part of an inquiry into the plaintiffs' likelihood of success at trial, the court examined Section 707 as a possible defense to tort liability. [46] It opined that Section 707 likely did not extend to tort liability for two reasons: Section 707 corresponded to the president's prioritization authority under Section 101 and "should

[38] *Id.* at 961-962.
[39] *Id.* at 964.
[40] *Id.*
[41] *Id.* at 996-997.
[42] *Id.* at 997 (quoting United States v. Tex. Constr. Co., 224 F.2d 289, 293 (5th Cir. 1955)).
[43] *Id.*
[44] *Id.* at 998.
[45] *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. at 746-747.
[46] *Id.* at 843-845.

correspond to the risk imposed, viz., the possible need for the contractor to break its contracts with or the increased risk to employees or users posed by speeded-up production";[47] and second, Congress likely would not have implemented a change of this nature to tort law without explicitly stating so.[48] Notably, the court based its first argument on the notion that compelled production under Section 101 was unlikely to increase the risk of injury to users of, or others exposed to, a manufacturer's product, as well as its determination that any such risk was already accounted for through the so-called government contractor defense.[49] With respect to its second argument, the court contrasted Section 707 to a provision of one of the DPA's statutory predecessors, the First War Powers Act, which explicitly permitted the president to make certain indemnification payments to government contractors.[50]

The most crucial case examining the extent of the DPA's liability protection, *Hercules, Inc. v. United States*,[51] is as notable for what the Supreme Court explicitly declined to address as it is for the Court's ultimate holding. *Hercules* also took place in the context of Agent Orange claims and involved a manufacturer's efforts to seek indemnification from the U.S. government for costs incurred in the defense and settlement of the claims at issue in *In re Agent Orange Product Liability Litigation*.[52] *Hercules* presented an interesting procedural posture: the manufacturer was not seeking *immunity* from the underlying Agent Orange claims; rather, it was seeking to have the United States, post hoc, *indemnify* the manufacturer's decision to settle these claims.

The manufacturer rested its claims on two arguments: the government's contract to purchase Agent Orange contained an implied warranty against third-party liability claims; and government compulsion under the DPA carried with it an implied-in-fact agreement by the government to indemnify the manufacturer against subsequent claimed losses by third parties.[53] In rejecting both of these arguments, the Supreme Court drew heavily on statutory authority forbidding entities responsible for government procurement from providing the "open-ended indemnity for third-party liability" it characterized the manufacturer as seeking.[54] Further

[47] *Id.* at 845.
[48] *Id.*
[49] *Id.* The government contractor defense is discussed in detail at Part II.B, *infra*.
[50] *Id.*
[51] 516 U.S. 417 (1996).
[52] *Id.* at 422.
[53] *Id.* at 424-425.
[54] *Id.* at 427.

demonstrating that its holding was focused squarely on the manufacturer's attempt to impose post hoc indemnification on the government, the Court explained that, had the government wanted to indemnify the manufacturer against any subsequent claims, statutory mechanisms existed for it to do so. The Court stated: "These statutes, set out in meticulous detail and each supported by a panoply of implementing regulations, would be entirely unnecessary if an implied agreement to indemnify could arise from the circumstances of contracting. We will not interpret the DPA contracts so as to render these statutes and regulations superfluous."[55]

Notably, the Supreme Court, although affirming the lower court's ultimate holding, expressly refused to do so on the basis of the lower court's determination that Section 707 was applicable only to contractual liability claims.[56] The Court instead held only that Section 707 could not be used to impose indemnification on the federal government, explaining: "The statute plainly provides immunity, not indemnity. By expressly providing a defense to liability, Congress does not implicitly agree that, if liability is imposed notwithstanding that defense, the Government will reimburse the unlucky defendant."[57] The Court also explicitly declined the government's invitation to interpret Section 707 "as only barring liability to customers whose orders are delayed or displaced on account of the priority accorded Government orders under § 101 of the DPA," holding that, given the nature of the claims before it, it needed only to rule on Section 707's applicability in the indemnification context.[58]

B. *Yearsley* and the Government Contractor Defense

Judicially created doctrines insulating government contractors from liability provide additional avenues for liability protection in the context of DPA-compelled production.[59] The doctrine of *Yearsley* immunity, named for the case that gave rise to it, and a closely related doctrine that has

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[55] *Id.* at 428-429.
[56] *Id.* at 422.
[57] *Id.* at 429-430.
[58] *Id.* at 430 n.14.
[59] An open question is whether the immunity provided by these doctrines is immunity from liability alone or whether it immunizes government contractors from suit entirely., "[T]he more recent trend is . . . as an affirmative defense to liability." *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *Covering the Contractors: The Current State of the Government Contractor Defense*, 5 (Feb. 2017), available at https://www.arnoldporter.com/-/media/files/perspectives/publications/2017/02/covering-the-contractors.pdf. While the type of immunity provided by these doctrines presents an important question, it is beyond the scope of this article.

come to be known as the government contractor defense offer examples of this species of protection.[60] In a very general sense, both of these doctrines provide ways for contractors building products or otherwise doing work at the federal government's behest to avoid liability for damages caused by their work for the government.

Yearsley immunity shields contractors performing work for the federal government from lawsuits arising out of this work provided that the contractor validly was authorized to perform the work in question. In *Yearsley*, the defendant company had contracted with the U.S. government pursuant to an act of Congress to construct dikes in the Missouri River.[61] In the process of constructing these dikes, the company washed away a portion of the petitioners' land, leading the petitioners to seek compensation for the value of this land.[62] Petitioners alleged that the destruction of their land was a taking as defined under the Fifth Amendment to the U.S. Constitution, and they were accordingly entitled to just compensation.[63]

In holding that the contractor could not be held liable for the damage caused to the petitioners' land, the Supreme Court set forth two criteria that, if met, would immunize a government contractor against liability: the contractor's authority to act on behalf of the federal government must have been validly conferred; and the contractor must have been acting within the bounds of this authority.[64] In the Court's words: "[I]f what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will . . . . Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred."[65] Provided that these conditions were met, the contractor would be deemed immune, with its immunity derivative of the federal government's own sovereign immunity.[66]

Nearly fifty years later in *Boyle v. United Technologies Corp.*,[67] the Supreme Court articulated what has come to be known as the "government contractor defense,"

[60] Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18 (1940).
[61] *Id.* at 19.
[62] *Id.* at 19-20.
[63] *Id.* at 20.
[64] *Id.* at 20-21.
[65] *Id.*
[66] *Id.* at 21 (citing The Paquete Habana, 189 U.S. 453, 465 (1903) ("[W]hen the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued.")).
[67] 487 U.S. 500 (1988).

which addresses specifically the issue of product liability claims arising out of government procurement contracts. In *Boyle*, a Marine Corps helicopter pilot died after the helicopter he was piloting crashed into a body of water and he was unable to escape, eventually causing him to drown.[68] The pilot's father brought state law design defect claims against the company responsible for manufacturing the helicopter, alleging that it had constructed the helicopter with a defective, outward-opening escape hatch, which was made useless when exposed to water pressure.[69] The manufacturer's immunity claims were based in part on the notion that it produced the helicopters according to exact specifications mandated by the federal government rather than specifications that it could itself control.[70]

In a 5-4 decision, the Supreme Court agreed with the manufacturer, finding that the performance of federal procurement contracts presented a "uniquely federal" interest such that this interest preempted the plaintiff's state law tort claims.[71] The Court analogized the contractor's liability to that of a federal employee, explaining that "[t]he present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government's work done."[72] The Court went on to explain that "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price."[73]

Rather than finding all products manufactured in accordance with government procurement contracts to be immune from state tort claims under the government contractor defense, the Court explained that such immunity would apply only when certain conditions were met. There first would need to exist "a significant conflict . . . between an identifiable 'federal policy or interest and the [operation] of state law.'"[74] In finding that such a conflict existed in *Boyle*, the Court looked to the portion of the Federal Tort Claims Act ("FTCA")[75] that exempted "discretionary functions" performed by government employees from suit, explaining that the design of military hardware required numerous discretionary

[68] *Id.* at 502.
[69] *Id.* at 503.
[70] *See id.*
[71] *Id.* at 504.
[72] *Id.* at 505.
[73] *Id.* at 507.
[74] *Id.* (citations omitted).
[75] 28 U.S.C. § 2680 (a) (2018).

determinations and that it would be improper to contradict the policy articulated in the FTCA by allowing plaintiffs to "second-guess" what were essentially government decisions by holding private contractors liable.[76] The remaining condition was a requirement that three specific criteria be met: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[77] As suggested in the Court's holding and emphasized by several subsequent courts, the government's participation in the determination or approval of specifications for the challenged product must be active.[78] In the words of the U.S. Court of Appeals for the Second Circuit, summarizing *Boyle* and related cases: "Where the government merely rubber stamps a design . . . or where the [g]overnment merely orders a product from stock without a significant interest in the alleged design defect, the government has not made a discretionary decision in need of protection, and the defense is therefore inapplicable."[79]

Notably, given that *Boyle* occurred in the context of military hardware, some courts, chiefly those in the Ninth Circuit, have held that the government contractor defense applies solely to military procurement rather than to government contract manufacturing more generally.[80] Multiple circuits, meanwhile, have held the opposite and found that the government contractor defense applies to all government procurement activity, military or otherwise.[81] Other circuits, including the Second Circuit, have not explicitly held that the government contractor defense applies outside of military procurement but have signaled receptivity to the notion of applying the defense to all government contract manufacturing.[82]

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[76] *Boyle*, 487 U.S. at 511-512.

[77] *Id.* at 512.

[78] *Id.*

[79] *In re* Agent Orange Prod. Liab. Litig., 517 F.3d 76, 90 (2d Cir. 2008) (citations omitted).

[80] *See, e.g.*, *In re* Haw. Fed. Asbestos Cases, 960 F.2d 806, 811-812 (9th Cir. 1992).

[81] *See, e.g.*, Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329 (11th Cir. 2003); Carley v. Wheeled Coach, 991 F.2d 1117 (3rd Cir. 1993).

[82] *See, e.g.*, Bennett v. MIS Corp., 607 F.3d 1076, 1090 (6th Cir. 2010) ("It is at least plausible that the government contractor defense could apply outside the military procurement contract context because the Supreme Court noted that the origins of the defense, at least in part, were based upon a case that immunized a private contractor from liability arising out of its performance of a public works project."); *In re* World Trade Center Disaster Site Litig., 521 F.3d 169, 197 (2nd Cir. 2008) ("The Supreme Court likewise suggested that the

Applying both *Yearsley* and *Boyle*, the Second Circuit in *In re World Trade Center Disaster Site Litigation*[83] expanded the applicability of the government contractor defense into the disaster recovery context.[84] The plaintiffs in *In re World Trade Center* were various individuals involved in the cleanup efforts following the September 11, 2001, terrorist attacks on the World Trade Center in New York City.[85] These plaintiffs sued the City of New York, the Port Authority of New York and New Jersey, and others, alleging that they had been exposed to toxic fumes and other hazardous conditions during the cleanup efforts and that the defendants had failed to monitor these conditions properly, provide the plaintiffs with adequate safety equipment, or otherwise warn the plaintiffs of these hazards.[86] The defendants argued that their actions were part of the federal government's coordinated post-9/11 recovery plan and that they should be entitled to derivative immunity based on their compliance with federal decision-making.[87]

The *In re World Trade Center* defendants argued that the ultimate source of their derivative immunity was a section of the Stafford Act with language markedly similar to the "discretionary function" language of the FTCA on which the *Boyle* court had relied.[88] Codified at 42 U.S.C. § 5148, the Stafford Act's immunity provision provides that "[t]he Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter."[89] In setting up a framework for the government contractor defense pursuant to Section 5148, the court first evaluated whether the federal agencies responsible for administering the World Trade Center cleanup[90] were acting in a discretionary manner and would thus be entitled to immunity under

[government contractor] defense is not limited to military contractors.").

[83] 521 F.3d 169.

[84] *Id.* at 197 ("Without deciding its applicability in other contexts, we think that the rationale for the government contractor defense would extend to the disaster relief context due to the unique federal interest in coordinating federal disaster assistance and streamlining the management of large-scale disaster recovery projects, as evidenced by the Stafford Act.").

[85] *Id.* at 173.

[86] *Id.*

[87] *Id.* at 176.

[88] *Id.* at 198.

[89] 42 U.S.C. § 5148 (2018).

[90] The Army Corps of Engineers, the Occupational Safety and Health Administration, and the Environmental Protection Agency. *See In re World Trade Center Disaster Site Litig.*, 521 F.3d at 195 n.29.

the Stafford Act.[91] The court looked in part to the Supreme Court's explanation of the FTCA's "discretionary function" exception in *United States v. Gaubert*,[92] in which the Supreme Court had held first that "[t]he [discretionary function] exception covers only acts that are discretionary in nature" and would be inapplicable if, for instance, a statute or regulation laid out a required course of action, and second, that "the exception protects only governmental actions and decisions based on considerations of public policy."[93] Then, the Court evaluated whether the same principles that gave rise to derivative immunity in *Yearsley* and *Boyle* applied in the context of the case before it, finding ultimately that they did: "If a federal agency orders a private contractor or City agency to implement decisions made by the federal agency, in its discretion, we think that 'the interests of the United States will be directly affected' if the contractor or City agency does not follow those orders for fear of liability."[94]

Finally, in *Campbell-Ewald Co. v. Gomez*,[95] the Supreme Court reaffirmed the parameters of *Yearsley* immunity. In *Campbell-Ewald*, a marketing firm sought to immunize itself from claims that it had violated the Telephone Consumer Protection Act by improperly sending text messages to non-consenting recipients as part of a recruiting campaign for the U.S. Navy.[96] Specifically, the marketing firm sought to avail itself of immunity derivative of the Navy's own sovereign immunity, notwithstanding the fact that the Navy had directed the marketing firm only to send text messages to recipients who had opted in to receiving such messages.[97] The Court rejected the marketing firm's attempts to establish *Yearsley* immunity for itself, succinctly explaining that "[w]hen a contractor violates both federal law and the Government's explicit instructions, as here alleged, no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation."[98]

C. Application of these Defenses to the COVID-19 Response

A manufacturer compelled to produce unfamiliar products under the DPA should be aware of each possible defense to liability and

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[91] *In re World Trade Center Disaster Site Litig.*, 521 F.3d at 195.
[92] *Id.* (citing United States v. Gaubert, 499 U.S. 315, 322 (1991)).
[93] *Gaubert*, 499 U.S. at 322-323.
[94] *In re World Trade Center Disaster Site Litig.*, 521 F.3d at 197.
[95] 136 S. Ct. 663 (2016).
[96] *Id.* at 668.
[97] *Id.* at 672.
[98] *Id.*

prepared to invoke each in the event that they are faced with product liability claims arising out of this production. As it pertains to Section 707 of the DPA, manufacturers should note, pursuant to *Hercules*, that the statute does not permit the imposition of mandatory indemnification on the federal government. Thus, any manufacturer seeking to shield itself under Section 707 must not agree to settle any claims against it and expect the federal government to repay these amounts afterward.

As the Supreme Court explained in *Hercules*, Section 707 provides immunity — although whether this immunity applies only in contract or to tort claims as well remains an open question. A manufacturer seeking to invoke Section 707 in the tort context should argue first that the statute's language contains no explicit limitations that would confine its protection to the contractual realm. It would be prudent to counter the factors that led the district court, in evaluating the settlement in *In re Agent Orange*, to opine that Section 707 was inapplicable to tort claims. The court in that case first posited that compelled production would be unlikely to increase the risk of injury and, in any event, that the government contractor defense would provide a liability shield in such an instance. Here, by contrast, the sort of compelled production at issue in cases like the present scenario does pose an increased likelihood of injury, because it involves manufacturers making products outside of their normal business lines in response to an unprecedented national emergency. Further, while the government contractor defense should shield manufacturers in the present scenario, the applicability of this defense to manufacturers' compelled DPA production is by no means as clear-cut as in *Boyle*'s military procurement realm. Finally, with respect to the Court's second assertion that Congress would have been more explicit if it intended Section 707 to limit tort liability for DPA-compelled production, it should be noted that the *In re Agent Orange* court couched that discussion in the context of *indemnification* rather than immunity. As *Hercules* demonstrated, the imposition of indemnity on the federal government is an exceedingly difficult hurdle and likely would require congressional assent. Immunity, however, presents an entirely different question and analysis.

Yearsley immunity, as well as the related concept of derivative immunity based on Stafford Act disaster relief efforts as articulated in *In re World Trade Center*, also offer potential avenues for compelled manufacturers to seek shelter from product liability claims.

Similar to *In re World Trade Center*, the COVID-19 pandemic is a declared national emergency under the Stafford Act, with the Department of Health and Human Services serving as the lead agency coordinating the federal response.[99] Given the delegation of the president's DPA authority to various Cabinet secretaries, the invocation of the DPA to direct production activity in response to a national emergency arguably is a discretionary agency function as referenced by 42 U.S.C. § 5148. If manufacturers hesitate to follow agency directives to produce certain goods under the DPA out of fear of liability, it would directly affect the United States' interests in disaster recovery — the exact scenario posited by the Second Circuit in *In re World Trade Center*. Keeping in mind the limitations of *Yearsley* and *Campbell-Ewald*, however, a manufacturer should ensure that its DPA-compelled manufacturing activity is conducted within the parameters of applicable federal directives.

Finally, the government contractor defense as articulated in *Boyle* may offer a third avenue for liability protection in cases of compelled production, depending on the federal government's involvement in approving the designs used in the products requisitioned pursuant to the DPA. In the case of COVID-19, the ventilators and other products ordered pursuant to the DPA are being sold directly to the federal government, thus satisfying the procurement-based application of this defense.[100] Accordingly, a manufacturer compelled under the DPA to produce goods for sale to the federal government should seek to involve the government actively in the design and/or approval of the products at issue. The manufacturer must also ensure that it warns the government of any known hazards in the product or products requisitioned. Finally, in the event that litigation threatens, the manufacturer and/or the manufacturer's counsel should be aware of courts' views in the relevant jurisdiction(s) with respect to *Boyle*'s applicability outside of military procurement.

III. Conclusion

While no manufacturer actively wishes to provide a defective product to market, the possibility of product liability claims is an ever-present one, perhaps even more so in the context of government-compelled production of goods outside of a manufacturer's usual

[99] *See* Trump, *supra* note 3, at 2.

[100] Tanya Snyder and Gavin Bade, *GM, Philips sign DPA contract for ventilators*, POLITICO (last updated Apr. 8, 2020), available at https://www.politico.com/news/2020/04/08/general-motors-ventilators-coronavirus-174724.

repertoire. Given the PREP Act's limited, discretionary nature and the president's expansive powers under the DPA, manufacturers faced with future compelled production under the DPA should keep in mind Section 707, *Yearsley* immunity, and the government contractor defense as potential avenues to immunize themselves against product liability claims arising out of DPA production.