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The Supreme Court's Rejection of Government Indemnification to Agent Orange Manufacturers in Hercules, Inc. v. United States: Distinguishing the Forest from the Trees?

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THE SUPREME COURT'S REJECTION OF GOVERNMENT INDEMNIFICATION TO AGENT ORANGE MANUFACTURERS IN *HERCULES, INC. V. UNITED STATES*: DISTINGUISHING THE FOREST FROM THE TREES?

I. INTRODUCTION

In recent years, the Supreme Court clarified the scope of immunity afforded to contractors for damages resulting from the performance of a government contract.[1] However, the extent of the government's responsibility to indemnify third party claims resulting from a government contract has remained relatively obscure. Without clear direction, courts rejected government indemnification, relying upon a variety of detailed points of contract law which often concealed larger issues.[2] In an appellate court dissent, Judge Plager criticized this result, warning that "undue attention to trees . . . often hides the forest."[3] Recently, in *Hercules, Inc. v. United States*,[4] the Supreme Court addressed whether the United States Government has an obligation to reimburse manufacturers for expenses incurred from injuries caused by a product produced under a government contract.

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1. *See* Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (setting forth the government contractor defense which shields private contractors from product liability pursuant to a government contract).

2. *See* Hercules, Inc. v. United States, 116 S. Ct. 981, 992 (1996) (Breyer, J., dissenting) ("Unlike the majority, which compartmentalizes the companies' claims into several separate doctrinal categories . . . I believe the companies' submissions, fairly read, also set forth a much more general fact-based claim."); *see also* Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989).

3. Hercules, Inc. v. United States, 24 F.3d 188, 205 (Fed. Cir. 1994) (Plager, J., dissenting). According to Judge Plager, the "forest," or the fundamental issue which was being overlooked was "[whether when] the Government compels manufacture of a product by private companies, a product known to the Government to be potentially dangerous, and the use by the Government of the product causes the manufacturers to incur liability, [may] the Government claim immunity from the consequences of its conduct?" *Id.*

4. 116 S. Ct. 981 (1996).

Hercules, Inc. v. United States, consolidated with *Wm. T. Thompson Co. v. United States*, held that absent an express or implied-in-fact agreement to indemnify manufacturers, government contractors may not seek contribution from the United States for settling third party tort claims.[5] The Supreme Court relied upon precedent in finding the Tucker Act's[6] jurisdiction to hear claims based upon any express or implied contract extends only to contracts which are express or implied-in-fact; it does not confer jurisdiction to contracts which are determined to be implied-in-law.[7] The Court asserted that the circumstances surrounding the contract to produce the chemical Agent Orange did not give rise to an implied-in-fact agreement.[8] Furthermore, section 707 of the Defense Production Act (DPA) did not reveal an intent by Congress to indemnify manufacturers for liabilities flowing from compliance with an order issued under the Act.[9] Finally, the Court suggested that the government contractor defense would have shielded the petitioners from liability, although this was not explicitly stated in the majority opinion.[10]

This casenote examines the Court's decision in *Hercules* while considering the impact upon indemnification to government contractors. Specifically, Part II examines the scope of the Tucker Act and the limitations upon implied-in-law contracts.[11] Part III identifies the relevant statutes and case law which have formed the basis of immunity for government contractors.[12] Part IV describes the facts of the case, explains the reasoning of the lower federal courts and articulates the Supreme Court's decision in *Hercules*.[13] Part V analyzes the Court's rationale[14] and Part VI discusses the ramifications of the Court's decision.

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5. *See id.* at 985-86.
6. 28 U.S.C. § 1491 (1994).
7. *See Hercules*, 116 S. Ct. at 985.
8. *See id.* at 987.
9. *See id.* at 988-89.
10. *See id.* at 986.
11. *See infra* notes 15-25 and accompanying text.
12. *See infra* notes 26-88 and accompanying text.
13. *See infra* notes 89-156 and accompanying text.
14. *See infra* notes 157-193 and accompanying text.

II. THE SCOPE AND LIMITATIONS OF THE TUCKER ACT

Under the doctrine of sovereign immunity, the United States may not be sued without its consent.[15] Before the passage of the Tucker Act,[16] grievances against the federal government had to be submitted to Congress as private bills.[17] As the government expanded, the volume of private bills being submitted for review created a significant burden on congressional resources and prompted the passage of the Tucker Act.[18] The purpose of the Act is to serve as a waiver of sovereign immunity in certain contract situations. Specifically, the Tucker Act confers jurisdiction upon the Claims Court to hear claims which are based upon an "express or implied" contract with the United States.[19] An implied contract may either be implied-in-fact or implied-in-law. An implied-in-fact contract is not formed through express language; rather, it is suggested by the conduct and actions of the parties indicating an understanding or agreement that a contract exists.[20] On the other hand, an implied-in-law contract is not based upon an agreement between the parties. Instead, the contract is based upon a duty which is imposed by law according to principles of justice and equity in order to prevent unjust enrichment.[21] Although the explicit language of the Tucker Act does not prevent the court from adjudicating implied-in-law contract claims, in *Sutton v. United States*,[22] the Supreme Court determined that Claims Court

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15. *See* Larry J. Gusman, Note, *Rethinking* Boyle v. United Technologies Corp. *Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers?*, 39 AM. U. L. REV. 391, 392 (1990).

16. 28 U.S.C. § 1491 (1994).

17. *See* Jake T. Townsend, Comment, *Ambulance Chasers Beware:* Carley v. Wheeled Coach *and the Questionable Expansion of the Government Contractor Defense*, 78 MINN. L. REV. 1545, 1549-50 (1994).

18. *See id.* at 1550.

19. 28 U.S.C. § 1491(a)(1) (1994). The statute provides in relevant part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id.

20. *See* BLACK'S LAW DICTIONARY 323 (6th ed. 1990).

21. *See id.*

22. 256 U.S. 575 (1921).

jurisdiction extends only to contracts which are express or implied-in-fact.[23] Therefore, the United States may not be sued based upon a contract which is determined to be implied-in-law. This judicially created restriction on the court's implied contract jurisdiction is based upon the standard that the waiver of sovereign immunity is to be narrowly construed in favor of the Government.[24] This decision has been reiterated in a number of Supreme Court opinions and has become a fairly established standard.[25]

III. THE DEVELOPMENT OF GOVERNMENT CONTRACTOR IMMUNITY

A. *The Government Contractor Defense*

While the Tucker Act serves as a waiver of sovereign immunity in contract claims, the Federal Tort Claims Act[26] (FTCA) serves as a waiver of sovereign immunity in tort claims. Although the FTCA provides a broad waiver of the federal government's sovereign immunity, there are several exceptions. One exception, which forms the foundation of the government contractor defense, provides that the FTCA does not apply to claims which are based upon the "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."[27] The statute also holds the government immune from any damage claim for inju-

23. *See id.* at 581.

24. *See* United States v. Sherwood, 312 U.S. 584, 590 (1941); Quality Furniture Rentals, Inc. v. United States, 1 Cl. Ct. 136, 139 (1983).

25. *See* United States v. Mitchell, 463 U.S. 206, 218 (1983); United States v. Minnesota Mut. Inv. Co., 271 U.S. 212, 217 (1926); Merritt v. United States, 267 U.S. 338, 341 (1925). *But see* United States v. Amdahl Corp., 786 F.2d 387, 393-95 (Fed. Cir. 1986) (allowing recovery for government contracts which are "quasi-contracts" or implied-in-law); Janowsky v. United States, 23 Cl. Ct. 706, 715-16 (1991).

26. 28 U.S.C. §§ 2671-2680 (1994); *see* A.L. Haizlip, *The Government Contractor Defense in Tort Liability: A Continuing Genesis*, 19 PUB. CONT. L.J. 116, 117-18 (1989).

27. 28 U.S.C. § 2680(a) (1994). The Supreme Court found that failure to warn of certain hazards is within the discretionary function exception. *See* Dalehite v. United States, 346 U.S. 15 (1953).

ries to military service personnel.[28] The primary purpose of the government contractor defense is to extend immunity from liability to contractors when a product is manufactured under a government contract.[29]

1. The *Feres-Stencel* Doctrine

The foundation of the government contractor defense was established in two Supreme Court decisions. First, in *Feres v. United States*,[30] the Supreme Court barred actions brought under the FTCA against the government for service-related injuries received by military personnel.[31] In *Feres*, a serviceman died in a barracks fire while on active duty in the armed forces. The executrix of the serviceman's estate claimed that the United States had been negligent in quartering the decedent in barracks which were known to be unsafe.[32] The Court acknowledged that the relationship between the government and members of the armed forces is "distinctively federal in character" and determined that Congress, in drafting the FTCA, did not intend to create a cause of action for injuries to "servicemen where the injuries arise out of or are . . . incident to service."[33]

Stencel Aero Engineering Corp. v. United States[34] extended the scope of immunity to include third party actions against the United States. A National Guard officer sued Stencel, a government contractor, and the United States for injuries incurred as a result of a defective ejection system.[35] Stencel then cross-claimed against the United States for providing incorrect design specifications and components.[36] The Supreme Court held that

28. *See* 28 U.S.C. § 2680(j) (1994).

29. *See* Emie Stewart, Comment, *The Government Made Me Do It!: Has* Boyle v. United Technologies *Extended the Government Contractor Defense Too Far?*, 57 J. AIR L. & COM. 981, 981 (1992).

30. 340 U.S. 135 (1950).

31. *See id.* at 146.

32. *See id.* at 136-37.

33. *Id.* at 143-44, 146.

34. 431 U.S. 666, 673-74 (1977).

35. *See id.* at 667-68.

36. *See id.* at 668.

the government is not liable under the FTCA to indemnify a manufacturer for damages.[37] Citing *Feres*, the Court found that the "relationship between the Government and its suppliers . . . is certainly no less 'distinctively federal in character' than the relationship between the Government and its soldiers."[38] Furthermore, allowing a claim would circumvent the limitation upon liability established in *Feres*.[39] A soldier would be able to sue a manufacturer, and the manufacturer in turn could sue the United States. Justice Burger, writing for the Court, observed that to allow recovery would be to "judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result."[40]

2. *Boyle v. United Technologies Corp.*[41]

Despite the *Feres-Stencel* doctrine, courts remained unclear about the scope of immunity for contractors. For example, in *McKay v. Rockwell International Corp.*,[42] the Ninth Circuit allowed immunity under the government contractor defense where a contractor developed detailed specifications and the specifications were approved by the government.[43] On the other hand, in *Shaw v. Grumman Aerospace Corp.*,[44] the Eleventh Circuit found a manufacturer immune under the government contractor defense only if the contractor "did not participate, or participated only minimally," in the design process or if the contractor warned the government of the risks in the design, offered an alternative, and was told to "proceed with the dangerous design" anyway.[45]

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37. *See id.* at 673.
38. *Id.* at 672.
39. *See id.* at 673.
40. *Id.* (quoting Laird v. Nelms, 406 U.S. 797, 802 (1972)).
41. 487 U.S. 500 (1988).
42. 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).
43. *See id.* at 451.
44. 778 F.2d 736 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988), *reh'g denied*, 487 U.S. 1250 (1988).
45. *Id.* at 745-46.

Boyle v. United Technologies Corp.[46] clarified the government contractor defense. In *Boyle*, a Marine was killed when the helicopter in which he was flying crashed during a training exercise.[47] Boyle's father brought suit against the helicopter manufacturer, alleging that the manufacturer had defectively repaired the helicopter's automatic flight control system.[48] The Supreme Court recognized that state law cannot be preempted absent a clear statutory provision or direct conflict between state and federal law.[49] A five-four majority identified a two-part test to determine when federal law may preempt state law in order to apply the government contractor defense. The first part requires the claim to involve "uniquely federal interests."[50] The Court reasoned that the imposition of liability on government contractors would directly affect the interests of the United States, as a contractor would either decline to manufacture goods according to government specifications or the contractor would raise its price.[51] The second part of the test requires that the application of state law conflict with or frustrate the objectives of federal legislation or a federal interest.[52] Justice Scalia, writing for the Court, asserted that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced."[53] *Boyle* clarified the necessary circumstances required to raise the government contractor defense. The Court announced that liability cannot be imposed upon a government military contractor when "the United States approved reasonably precise specifications," the product conformed to the specifications, and the manufacturer notified the government of any dangers in the use of the product of which the manufacturer was aware.[54] Thus, even without a clear statutory provision, the government contractor defense may preempt state tort law.

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46. 487 U.S. 500 (1988).
47. *See id.* at 502.
48. *See id.* at 503.
49. *See id.* at 504.
50. *Id.*
51. *See id.* at 507.
52. *See id.* at 507-10.
53. *Id.* at 512.
54. *See id.*

B. *The Defense Production Act*[55]

Under the Defense Production Act (DPA), the President may compel a manufacturer to perform and give priority to contracts necessary to promote the national defense.[56] However, section 707 of the DPA contains a provision to hold a manufacturer harmless for any liabilities which may occur as a result of the manufacturer's compliance with the DPA order.[57] Specifically, the section provides that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance" with a government order.[58] Section 707 has rarely been litigated; the limited cases which have construed section 707 have only interpreted the section as excusing a contractor's breach of other nongovernment contracts in order to perform contracts under the DPA.[59]

Courts have found section 707 as revealing a clear intention to extend a defense to manufacturers who cannot perform under one contract because a DPA contract has been given priority.[60] However, before *Hercules*, no case law addressed whether the DPA's hold harmless provision may be construed to extend indemnity to manufacturers. Therefore, the full scope of section 707 serving to indemnify a government contractor for settlement of a third party tort claim remained unclear prior to the *Hercules* decision.

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55. 50 U.S.C. app. § 2061 (1994).

56. *See id.* § 2071. The statute provides in relevant part, "[t]he President is authorized to require that performance under contracts or orders . . . which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order . . . ." *Id.*

57. *See id.* § 2157 (originally enacted as the Defense Production Act of 1950, ch. 932, §707, 64 Stat. 818).

58. *Id.*

59. *See* Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d. 957, 997-98 (5th Cir. 1976); United States v. Texas Constr. Co, 224 F.2d 289, 293 (5th Cir. 1955).

60. *See, e.g., Eastern Air Lines, Inc.*, 532 F.2d. at 997.

C. *Government Contractor Immunity Under An Implied Warranty of Specifications*

Under an implied warranty of specifications, the United States warrants that following specifications supplied by the government will not expose a manufacturer to unforeseen consequences.[61] A claim for an implied warranty of specification requires proof that a valid warranty existed, that the warranty was breached, and that the damages were caused by the breach.[62] In *United States v. Spearin*,[63] the Supreme Court recognized a right of action for breach of implied contract warranties.[64] Spearin contracted to build a dock at a shipyard, a project which called for the relocation of a storm sewer.[65] The government furnished detailed plans and specifications which were later found to be defective.[66] Spearin did not complete the contract and then sued the government for the balance due and lost profits.[67] The Court held that "if [a] contractor is bound to build according to plans and specifications prepared by the [government], the contractor will not be responsible for the consequences of defects in the plans and specifications."[68] According to the Court, even if the contractor had inspected the site where the sewer was to be replaced, the ultimate responsibility still remained with the government.[69]

Although damages occurred during performance of the contract in *Spearin*, the Court of Claims in *Poorvu v. United States*[70] expanded an implied warranty of specifications to apply in situations beyond the time of performance.[71] In *Poorvu*,

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61. *See* Hercules, Inc. v. United States, 116 S. Ct. 981, 986 (1996) (citing United States v. Spearin, 248 U.S. 132, 136 (1918)).
62. *See* San Carlos Irrigation & Drainage Dist. v. United States, 877 F.2d 957 (Fed. Cir. 1989).
63. 248 U.S. 132 (1918).
64. *See id.* at 138.
65. *See id.* at 133.
66. *See id.* at 133-34.
67. *See id.* at 133.
68. *Id.* at 136.
69. *See id.* at 136-37.
70. 420 F.2d 993 (Ct. Cl. 1970).
71. *See id.* at 1000.

the government eliminated support pilings from the plans of a post office parking area in an effort to save money.[72] This was done despite objections by the contractor.[73] Five years later, as a result of pressure from the parking lot and the absence of support pilings, breaks occurred in the water line which caused severe settlement damage to the post office.[74] The court determined that it was irrelevant that the deficiency in the plans did not manifest itself until several years after construction of the post office, stating "[i]t would make little sense to impose the obligation of an implied warranty and then limit the life of the warranty to the period of construction."[75] Furthermore, the *Poorvu* court rejected an argument by the government that a *Spearin* warranty was not created because the contractor knew of the dangerous conditions, and therefore, he could not have relied upon the plans and specifications.[76]

In *Lopez v. A.C. & S., Inc.*,[77] the Federal Circuit rejected an argument based upon *Spearin* that an implied warranty by the government regarding the use of a product would not lead to third party claims against the contractor.[78] *Lopez* involved asbestos manufacturers who sought government indemnification for settlements with shipyard workers who had inhaled asbestos dust from products supplied under Navy contracts.[79] The court found it necessary to examine the circumstances surrounding the contract to determine whether an implied-in-fact warranty existed.[80] *Lopez* distinguished the construction contract in *Spearin* from a contract to supply a product, citing the "massive detail" that the government provides in a construction contract as evidence of an implied-in-fact warranty.[81] *Lopez* also distinguished *Ordnance Research, Inc. v. United States*,[82]

72. *See id.* at 996.
73. *See id.*
74. *See id.* at 997.
75. *Id.* at 1000.
76. *See id.*
77. 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989).
78. *See id.* at 716-17.
79. *See id.* at 713.
80. *See id.* at 715-16.
81. *Id.* at 715.
82. 609 F.2d 462 (Ct. Cl. 1979).

which found an implied-in-fact warranty existed in a contract to supply bomb igniters because the government had provided very detailed specifications.[83] The *Ordnance* court stated "[w]hen the government issues design specifications of a detailed nature . . . it warrants the sufficiency and efficacy of those specifications to produce the desired product in a satisfactory manner."[84] The *Lopez* court, on the other hand, determined that the manufacturers themselves played a substantial role in developing the specifications and therefore, the circumstances surrounding the contract did not give rise to an implied-in-fact contract.[85] Thus, the claim was beyond the court's jurisdiction under the Tucker Act.[86]

Lopez also addressed government contractor immunity, recognizing the inconsistency which occurs when a manufacturer who is exposed to tort claims due to compliance with government specifications seeks indemnity from the government.[87] This inconsistency arises because under the government contractor defense, the manufacturer is immune from liability and, consequently, there should be no need for a claim for contribution or indemnity.[88]

IV. *HERCULES, INC. V. UNITED STATES*

A. *Facts and Procedural History*

Hercules, Inc. and Thompson Chemical Corp.[89] (Thompson) were among nine manufacturers who were required to produce Agent Orange under the authority of the DPA.[90] The military prescribed the formula for Agent Orange and provided further

83. *See id.* at 479.
84. *Id.*
85. *See Lopez*, 858 F.2d at 715-16.
86. *See id.* at 716.
87. *See id.* at 718.
88. *See id.*
89. In later litigation, Thompson Chemical Corp. is referred to as Wm. T. Thompson Co. *See, e.g.*, Wm. T. Thompson Co. v. United States, 26 Cl. Ct. 17 (1992).
90. *In re* Agent Orange Prod. Liab. Litig., 565 F.Supp. 1263, 1265, 1272 (E.D.N.Y. 1983); *see also* Hercules, Inc. v. United States, 24 F.3d 188, 191 (1994).

instructions, such as the marks which were to appear on the containers.[91] The manufacturers followed all of the guidelines established by the government. Agent Orange was used as a defoliant during the Vietnam War to destroy food supplies and eliminate enemy hiding places.[92]

After the war, thousands of Vietnam veterans filed lawsuits against the manufacturers of Agent Orange, including Hercules and Thompson.[93] The veterans claimed they suffered health problems from exposure to the chemical dioxin which was present in Agent Orange.[94] These health problems included skin and respiratory irritations as well as various forms of cancer.[95] The veterans also claimed that exposure to Agent Orange caused their children to be born with congenital birth defects.[96] The lawsuits were consolidated in a class action suit in the Eastern District of New York.[97] The district court judge accepted Hercules' and Thompson's claim of immunity from liability under the government contractor defense, because the government and military had much more knowledge of the hazards associated with dioxin than the chemical companies.[98] In addition, the Agent Orange produced by Hercules, Inc. was not found to contain any measurable dioxin.[99] The case was reassigned, however, before final summary judgment was entered.[100] Upon reassignment, Chief Judge Weinstein withdrew the decision and set the case for a jury trial to determine

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91. *See In re* Agent Orange Prod. Liab. Litig., 565 F. Supp. at 1274; *see also* Hercules, Inc. v. United States, 116 S. Ct. 981, 983 (1996).

92. *See* Hercules, Inc. v. United States, 24 F.3d 188, 191 (Fed. Cir. 1994). Twelve million gallons of Agent Orange were used to defoliate 4.5 million acres of land in Vietnam. *See* FRED A. WILCOX, WAITING FOR AN ARMY TO DIE: THE TRAGEDY OF AGENT ORANGE, at xii (1989).

93. *See In re* Agent Orange Prod. Liab. Litig., 506 F.Supp. 762 (E.D.N.Y. 1980).

94. *See Wilcox, supra* note 92, at xxi-xxii.

95. *See id.*

96. *See id.*

97. *See In re* Agent Orange Prod Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980).

98. *See In re* Agent Orange Prod. Liab. Litig., 565 F. Supp. 1263, 1278 (E.D.N.Y. 1983). The court determined that under the government contractor defense the defendant is required to prove that the government established specifications for Agent Orange; the Agent Orange manufactured by the defendants met the government specifications in all material respects; and that the government knew as much or more than the defendant about the hazards. *See id.* at 1274.

99. *See id.* at 1274.

100. *See In re* Agent Orange Prod. Liab. Litig., 580 F. Supp. 1242 (E.D.N.Y. 1984).

whether the manufacturers were entitled to raise the government contractor defense,[101] because at the time there was no consistent standard to determine whether immunity could be extended to private contractors.

Before the trial in May 1984, the chemical manufacturers settled the case for $180 million.[102] Based upon a market share, Hercules contributed $18.8 million and Thompson contributed $3.1 million toward the settlement price.[103] Litigation and attorney fees for Hercules and Thompson amounted to more than $9 million.[104] Recovery against the United States under tort theories of contribution and noncontractual indemnity failed.[105]

Hercules and Thompson filed separate actions against the government in the United States Court of Claims,[106] seeking to recover their share of the class action settlement and litigation costs.[107] The court granted summary judgment for the United States, stating that because Hercules and Thompson had been insulated by the government contractor defense, they were not entitled to indemnification.[108] The court was uncertain about whether an implied-in-fact warranty of specifications

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101. *See id.* at 1244; *see also* Hercules, Inc. v. United States, 116 S. Ct. 981, 983 (1996).

102. *See In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Summary judgment was later granted against the veterans who sued as individuals outside of the class action. The district court indicated that the veterans had not shown a credible link between exposure to Agent Orange and their injuries. Additionally, the court determined that the chemical manufacturers were immunized from liability by the government contractor defense. *See In re* Agent Orange Prod. Liab. Litig., 611 F.Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

103. *See* Wm. T. Thompson Co. v. United States, 26 Cl. Ct. 17, 21 (1992); Hercules, Inc. v. United States, 25 Cl. Ct. 616, 620 (1992).

104. *See Thompson*, 26 Cl. Ct. at 21; *Hercules*, 25 Cl. Ct. at 620.

105. *See In re* Agent Orange Prod. Liab. Litig., 818 F.2d 204, 207 (2d Cir. 1987).

106. Congress changed the title of the Claims Court in 1992. The current title is the United States Court of Federal Claims. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506.

107. *See* Wm. T. Thompson Co. v. United States, 26 Cl. Ct. 17 (1992); Hercules, Inc. v. United States, 25 Cl. Ct. 616 (1992).

108. *See Thompson*, 26 Cl. Ct. at 28, 30-35; *Hercules*, 25 Cl. Ct. at 628-33.

could be found from the circumstances; however, the court rejected the claim, concluding there was no evidence that Agent Orange was the cause of the injuries.[109] Furthermore, the court reasoned that the contractors' voluntary settlement could not be viewed as damages which were reasonably foreseeable, as the government contractor defense would have barred the manufacturers' liability had the suit gone to trial.[110]

Hercules' and Thompson's claims based upon superior knowledge and duty to act in good faith were also rejected.[111] The superior knowledge doctrine allows government contractors to recover damages when the government has superior knowledge regarding problems in completing performance or production.[112] This doctrine had been applied when a contractor performs without knowledge or information which may have affected the cost or duration, when the government is aware that the contractor did not have the information, when the contract specifications misled the contractor, and when the government failed to provide the relevant information.[113] Under a theory of duty to act in good faith, Hercules asserted that the government breached this duty by failing to "provide identification of [Agent Orange's] active ingredients or give warnings concerning its proper use."[114] In denying the claims based upon superior knowledge and duty to act in good faith, the court observed that previous cases had involved damages for increased performance costs and not post performance expenditures associated with third-party tort litigation.[115]

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109. *See Thompson*, 26 Cl. Ct. at 24-28; *Hercules*, 25 Cl. Ct. at 625-28.

110. *See Thompson*, 26 Cl. Ct. at 33-34; *Hercules*, 25 Cl. Ct. at 631-32.

111. *See Thompson*, 26 Cl. Ct. at 24; *Hercules*, 25 Cl. Ct. at 623.

112. *See* American Ship Bldg. Co. v. United States, 654 F.2d 75, 77 (1981); Helene Curtis Indus., Inc. v. United States, 312 F.2d 774, 777 (1963) (holding that because the government was aware that a contractor reasonably assumed it could perform a contract without utilizing a grinding process, and because the government knew grinding was necessary and failed to inform the contractor, the government was liable for breach of contract).

113. *See American Ship Bldg. Co.*, 654 F.2d at 79; *Helene Curtis Indus., Inc.*, 312 F.2d at 777.

114. *Hercules*, 25 Cl. Ct. at 623.

115. *See Thompson*, 26 Cl. Ct. at 23-24; *Hercules* 25 Cl. Ct. at 622-24.

The court also denied a theory for contribution based upon a reverse warranty.[116] Under the reverse warranty theory, Hercules argued that the government breached an implied-in-fact obligation to exercise due care when handling Agent Orange to avoid potential health risks.[117] In rejecting this claim, the court noted "an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have so supposed at the date of sale by any inference from the circumstances."[118]

The court also dismissed Thompson's claim of implied contractual indemnification.[119] Thompson argued that section 707 of the DPA constituted an implied promise to indemnify for any liabilities incurred in performing under the DPA.[120] The court found that the purpose of section 707 was to serve as immunity for a government contractor who had breached another non-governmental contract as a result of compliance with a DPA order.[121] Section 707, however, did not create a promise of indemnification.[122]

B. *The U.S. Court of Appeals Decision*

A divided Court of Appeals for the Federal Circuit affirmed the decision of the claims court, finding that Hercules and Thompson could have invoked the government contractor defense and, therefore, the manufacturers assumed liability by settling the claims.[123] According to the court, if the class action litigation had been pursued to completion, rather than settled, the government contractor defense would have barred tort liability.[124] The claim under an implied warranty of specifications failed because the settlement constituted an interven-

116. *See Hercules*, 25 Cl. Ct. at 624.
117. *See id.*
118. *Id.* (quoting Lopez v. A.C. & S., Inc., 858 F.2d 712, 716 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989)).
119. *Thompson*, 26 Cl. Ct. at 28-29.
120. *See id.* at 28.
121. *See id.* at 29.
122. *See id.*
123. *See* Hercules, Inc. v. United States, 24 F.3d 188, 198-200 (Fed. Cir. 1994).
124. *See id.* at 200.

ing cause between the alleged breach and damages.[125] Furthermore, the court of appeals agreed that section 707 of the DPA served only as a defense for a contractor facing suits from non-government customers where the contractor had breached another contract in order to comply with a DPA order.[126] The court found no basis for determining section 707 created a right to indemnification.[127]

In a strong dissent, Circuit Judge Plager was not persuaded that Hercules and Thompson would have prevailed on the government contractor defense if they had proceeded to trial.[128] Judge Plager noted that the status of the government contractor defense was uncertain at the time of the Agent Orange settlement.[129] The fact that the initial summary judgment had been revoked was evidence that the manufacturers could not be certain that this defense would have barred them from liability.[130] Additionally, Judge Plager determined that the hold harmless provision in section 707 should be extended to require the government to indemnify contractors for all damages incurred as a result of compliance with a DPA contract, because the government had, in effect, seized control of the contractors' companies.[131]

The United States Supreme Court granted certiorari on the question of whether the government is required to reimburse a contractor for damages incurred as a result of third party tort claims.[132]

C. *The Supreme Court's Decision*

The Supreme Court affirmed the decision of the Federal Circuit holding that a government contractor may not receive indemnity for settlement of a third party tort claim; however, the Court concluded that the claim was more appropriately ad-

125. *See id.* at 197-98.
126. *See id.* at 203-04.
127. *See id.*
128. *See id.* at 206-08.
129. *See id.*
130. *See id.* at 205-06.
131. *See id.* at 209.
132. *See* Hercules, Inc. v. United States, 115 S. Ct. 1425 (1995).

dressed by the jurisdictional limitations under the Tucker Act.[133] The lower courts had assumed the existence of an implied contract, but found Hercules and Thompson could not recover damages because they were not able to prove causation between the breach and the damages.[134] The Supreme Court's majority opinion did not reach the "no causation" holding, because it found that the evidence did not suggest an implied-in-fact contract which would permit jurisdiction under the Tucker Act.[135] Chief Justice Rehnquist, writing for the majority, held that the *Spearin* doctrine, which releases a contractor from consequences of defects in plans and specifications during performance, does not extend to create a warranty for third party claims against a contractor.[136] Therefore, the United States was not responsible to reimburse the manufacturers.[137] The Court reasoned that the government would not have contemplated a warranty that would extend to third party claims, stating "the Government would avoid such an obligation, because reimbursement through contract would provide a contractor with what is denied to it through tort law."[138]

Additionally, the Court did not agree with Thompson's argument that an implied-in-fact agreement to indemnify a contractor existed, because the government "required Thompson to produce [Agent Orange] under the authority of the DPA . . . imposed detailed specifications, [and] had superior knowledge of the hazards."[139] Chief Justice Rehnquist cited the Anti-Deficiency Act (ADA), which "bars a federal employee or agency from entering into a contract for future payment of money . . . in excess of an existing appropriation."[140] Absent an express provision in an appropriation for reimbursement, the ADA would not allow indemnification on grounds that it would

133. *See* Hercules, Inc. v. United States, 116 S. Ct. 981, 985 (1996).
134. *See id.* at 984-85.
135. *Id.* at 985-89.
136. See *id.* at 986.
137. *See id.* at 986.
138. *Id.* (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666 (1977)).
139. *Id.* at 987.
140. *Id.* (citing 31 U.S.C. § 1341(a)(1) (1994)). The statute provides in relevant part, "[a]n officer or employee of the United State Government . . . may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1) (1994).

amount to an obligation of funds not yet appropriated.[141] The majority reasoned that the contracting government officer would have had knowledge of the ADA and the existence of statutes which allow government agents to expressly provide an indemnity agreement to contractors under certain conditions.[142] If an implied agreement to indemnify could arise merely from the circumstances of contracting, the statutes would have been "entirely unnecessary."[143] According to the Court, this logic prevents the inference that the contract included an implied-in-fact indemnity agreement.[144] In response to Thompson's argument that the ADA only applies to express contracts, the majority cited *Sutton v. United States*, which stated "[t]he limitation upon the authority to impose contract obligations upon the United States is as applicable to contracts by implication as it is to those expressly made."[145]

The majority agreed with the lower courts in finding section 707 of the DPA does not include an intent to hold manufacturers harmless for any liabilities which result from compliance with an order issued under the DPA.[146] The Court declined to interpret the full scope of section 707, stating the statute "clearly functions only as an immunity, and provides no hint of a further agreement to indemnify."[147]

Finally, the Court dismissed an argument based upon "simple fairness," explaining that the Court does not have jurisdiction over claims "based merely on equitable considerations."[148] The simple fairness argument was also weakened by *Feres v. United States*,[149] which held that the injured veterans could not recover damages from the government themselves.[150] During oral arguments, Justice Scalia responded to a statement by the

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141. *See* California-Pacific Util. Co. v. United States, 194 Ct. Cl. 703, 715 (1971).

142. *See Hercules*, 116 S. Ct. at 988; *see also* 10 U.S.C. § 2354 (1994) (allowing indemnity provisions in military contracts for research and development).

143. *Hercules*, 116 S. Ct. at 988.

144. *See id.*

145. *Id.* at 988 (quoting Sutton v. United States, 256 U.S. 575, 580 (1921)).

146. *See id.* at 988-89.

147. *Id.* at 989 n.14.

148. *Id.* at 989 (quoting United States v. Minnesota Mut. Inv. Co., 271 U.S. 212, 217-18 (1926)).

149. 340 U.S. 135 (1950).

150. *See id.* at 146.

attorney representing the chemical companies that the case was about simple fairness, rationalizing, "[s]hould we be outraged that the companies cannot pass on their liability [to the government], when the injured parties themselves cannot recover [from the government]?"[151]

D. *The Supreme Court's Dissent*

Justice Breyer, joined by Justice O'Connor, was unconvinced that Hercules and Thompson were unable to prove the existence of an implied-in-fact warranty.[152] The dissent argued that the majority was incorrect in "compartmentalizing" the companies' claims into categories and rejecting each separately rather than examining the general circumstances which may have given rise to an implied-in-fact contract.[153] The dissent did not specifically rule upon whether the facts revealed the existence of an implied-in-fact contract,[154] instead the dissent criticized the rationale of the majority.

According to the dissent, the majority's implication that a contracting officer would not have agreed to an implied promise of indemnity was ill-founded in light of the language of the 1964 statutes and regulations which was "nonspecific [and] ambiguous on the procedures required for indemnification."[155] Similarly, the dissent found nothing to prevent a *Spearin* claim from extending beyond the time of performance to third party claims against the contractor, as asserted by the defendants.[156]

Furthermore, the dissent rejected the court of appeals' finding that a settlement was unforeseeable and therefore severed the causation between the implied promise and the harm.[157] The

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151. Brian D. Shannon, *Analysis—Court to Decide Whether Government Contractors Who Settled Agent Orange Litigation May Pursue Implied Warranty or Indemnification Claims Against U.S.*, West's Legal News 9417, Dec. 4, 1995, at 27, *available in* 1995 WL 877107 (quoting Oral Argument, Official U.S. Supreme Court Transcript, Oct. 30, 1995, at 4, *available in* 1995 WL 64597).

152. *See Hercules*, 116 S. Ct. at 990-91 (Breyer, J., dissenting).

153. *See id.* at 991-92.

154. *See id.* at 994.

155. *Id.* at 992.

156. *See id.* at 993.

157. *See id.* at 991.

dissent concluded that without the benefit of hindsight, the settlement was foreseeable as a "reasonable litigation strategy" to avoid added litigation costs and the threat of significant additional liability.[158]

V. ANALYZING *HERCULES, INC. V. UNITED STATES*

A. *Contract Circumstances Suggest DPA's Hold Harmless Provision Allows Indemnification*

The *Hercules* majority correctly asserted that section 707 should not be interpreted to include indemnification.[159] Although nothing in the language would prevent a broad extension, arguably Congress intended only to provide immunity for DPA contractors and did not intend to impose liability upon the government when it drafted the DPA. Nevertheless, the dissent found it was unnecessary to address the actual intent of Congress.[160] Instead, the dissent framed the issue upon the "risks [that] contracting officers at the time might have thought the Government was assuming" based upon the language in section 707.[161] Furthermore, the dissent argued that the effect of the language of the hold harmless provision must be viewed in light of the surrounding circumstances.[162] The stated objective of the DPA to relieve manufacturers of involuntarily created liability could have reasonably led a contracting officer at the time, and under the particular circumstances, to believe that a warranty existed to hold a manufacturer harmless for future third-party tort claims.[163]

The Court also determined that the ADA would prevent contracting officers from making implied warranties, reasoning that

158. *See id.*
159. *See id.* at 988-89.
160. *See id.* at 993 (Breyer, J., dissenting).
161. *Id.*
162. *See id.*
163. *See id.*

if an express warranty is illegal, then an implied warranty must also be illegal.[164] The court was reluctant to adopt this reasoning in *Lopez v. A.C. & S., Inc.*,[165] arguing that a standing appropriation exists to pay court judgments in these types of situations.[166] The *Lopez* court also expressed doubt regarding an interpretation that implied warranties are illegal, because the rationale would severely limit all *Spearin* warranties, including those implied-in-fact.[167] Furthermore, this interpretation effectively insulates the government from any warranty and disregards the intent of the contracting parties.[168]

B. Spearin *Does Not Limit Implied Warranty of Specifications*

1. Precedent Does Not Suggest *Spearin* Should be Limited

The *Hercules* majority assumes that Congress would not have intended to extend the *Spearin* doctrine to include third-party tort claims beyond the performance of the contract.[169] This assumption ignores the fact that recovery under an implied warranty of specifications has been granted when a claim is brought by a third-party during the performance of a contract, such as in *Michigan Wisconsin Pipeline Co. v. Williams-McWilliams Co.*[170] Furthermore, courts have allowed recovery when a claim is brought by the manufacturer after performance, such as in *Poorvu v. United States*.[171] In *Hercules*, the Court offered no rationale to deny recovery for claims which are brought after performance *and* involve a third-party action.

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164. *See id.* at 987-88.
165. 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989).
166. *See id.* at 716.
167. *See id.*
168. *See* Hercules, Inc. v. United States, 116 S. Ct. 981, 987-88 (1996).
169. *See id.* at 986.
170. 551 F.2d 945 (5th Cir. 1977) (allowing recovery against government for damages owed by a contractor to a third party).
171. 420 F.2d 993 (Cl. Ct. 1970) (allowing recovery after time of contract performance).

2. Government Contractor Defense is Misapplied

The *Hercules* majority also misapplies the government contractor defense. First, the majority cited *Stencel* as evidence that a contracting government official would not have made an implied warranty to indemnify for defects, reasoning that the official would have been aware that the manufacturer was granted immunity under the government contractor defense.[172] Although the Court acknowledged that *Stencel* postdated the signing of the contracts, Chief Justice Rehnquist found it convincing that *Stencel* had been supported by several earlier decisions which suggested immunity for government manufacturers.[173] The majority disregards the fact that very few circuits recognized this immunity at the time the contracts were signed.[174] Additionally, the courts which recognized this immunity held the defense was a matter of state law, which was subject to change in several states.[175] The Supreme Court previously had held that the government contractor defense should not create immunity rights unless expressly created by Congress,[176] and Congress repeatedly had refused to immunize government contractors.[177] In fact, the scope of the government contractor defense was not clear until *Boyle* was decided by the Court in 1988.[178] It is submitted that a government contracting officer would not have been expected to rely upon an unclear and unresolved doctrine as a substitute for an implied warranty of specifications.[179]

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172. *See Hercules*, 116 S. Ct. at 986 n.6.

173. *See id.*

174. *See id. See also, e.g.*, United Air Lines, Inc. v. Wiener, 335 F.2d 379, 404 (9th Cir. 1964).

175. *See Hercules*, 116 S. Ct. at 991; *United Air Lines*, 335 F.2d at 404.

176. *See* Brady v. Roosevelt S.S. Co., 317 U.S. 575, 583-84 (1943) ("[I]f this authority to carry out the project . . . was within the constitutional power of Congress, there is no liability on the part of the contractor. . . . ") (quoting Yearsley v. Ross Construction Co., 309 U.S. 18, 20-21 (1940)).

177. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 515 & n.1 (1988) (Brennan, J., dissenting) (citing H.R. 2378, 100th Cong., 1st Sess. (1987); H.R. 4765, 99th Cong., 2d Sess. (1986); S. 2441, 99th Cong., 2d Sess. (1986); H.R. 5883, 98th Cong., 2d Sess. (1984); H.R. 1504, 97th Cong., 1st Sess. (1981); H.R. 5351, 96th Cong., 1st Sess. (1979)).

178. *See Hercules*, 116 S. Ct. at 991 (Breyer, J., dissenting).

179. *See* Hercules, Inc. v. United States, 24 F.3d 188, 207-08 (Fed. Cir. 1994) (Plager, J., dissenting).

The majority also misapplies the government contractor defense in holding that a contractor could not obtain through contract what is denied through tort law.[180] This directly conflicts with the ruling in *Hatzlachh Supply Co. v. United States*,[181] where the Supreme Court stated

> we fail to see how the *Stencel* holding . . . supports the conclusion that if the [FTCA] bars a tort remedy, neither is there a contractual remedy. The absence of Government tort liability [does not] bar contractual remedies on implied-in-fact contracts, even in those cases also having elements of a tort.[182]

C. *Existence of Claims Court Jurisdiction Under Tucker Act*

1. Plain Language of Tucker Act Does Not Reveal a Limitation on Implied-in-Law Contracts

The plain language of the Tucker Act confers jurisdiction to contracts which are "express or implied."[183] In a number of decisions, the Court ignored the literal language of the Tucker Act and imposed its own interpretation limiting jurisdiction of implied contracts to those implied-in-fact.[184] The *Hercules* majority cited *Sutton v. United States*[185] and several other cases to support this position;[186] however, none of these cases offer justification or rationale for this rule.[187] *Sutton* identified *United States v. North American Transportation & Trading Co.*[188] as a foundation for this standard, but *North American* never states nor considers this rule.[189] Therefore, neither the

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180. *See Hercules*, 116 S. Ct. at 986.
181. 444 U.S. 460 (1980) (per curiam).
182. *Id.* at 465.
183. 28 U.S.C. § 1491(a) (1994).
184. *See* United States v. Mitchell, 463 U.S. 206, 218 (1983); United States v. Minnesota Mut. Inv. Co., 271 U.S. 212, 217 (1926); Merritt v. United States, 267 U.S. 338, 341 (1925); Sutton v. United States, 256 U.S. 575, 581 (1921).
185. 256 U.S. 575 (1921).
186. *See* Hercules, Inc. v. United States, 116 S. Ct. 981, 985 (1996).
187. *See* United States v. Mitchell, 463 U.S. 206, 218 (1983); United States v. Minnesota Mut. Inv. Co., 271 U.S. 212, 217 (1926); Merritt v. United States, 267 U.S. 338, 341 (1925); Sutton v. United States, 256 U.S. 575, 581 (1921).
188. 253 U.S. 330 (1920).
189. *See id.*

plain language of the Tucker Act nor case law reveals a justification for the limitation upon implied-in-law contracts.[190]

2. Circumstances of Agent Orange Contract Suggest an Implied-in-Fact Contract

The majority's determination that jurisdiction did not exist under the Tucker Act is based upon a very narrow interpretation of the circumstances of the contract which create an implied warranty of specifications. Chief Justice Rehnquist cited *Lopez* as authority that "a Spearin warranty within a . . . contract must be implied in fact."[191] However, the Court failed to address the substance of the *Lopez* decision, which found that absent circumstances justifying an inference that a warranty could have been supposed at the date of contracting, such a warranty could not be implied-in-fact.[192] *Lopez* suggests that an examination of all circumstances surrounding the contract is necessary to determine whether a contract is implied-in-fact.[193] The *Lopez* court indicated that detailed specifications provided by the government which state "just how to do the job" are indicia of an implied-in-fact warranty.[194] Furthermore, the court noted that in the *Lopez* situation, the government "might reasonably suppose [the asbestos manufacturers] knew enough about asbestos and its perils not to need to learn more about it from the government."[195] In *Hercules*, there is no evidence that the chemical manufacturers had any prior information regarding the production of Agent Orange and its dangers.

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190. This occurrence has been criticized by two authors who have suggested that an explicit amendment should be added to the Tucker Act granting jurisdiction for contracts which are implied-in-law. *See* Willard L. Boyd & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605, 620-21 (1991). One argument for this amendment reveals that in certain situations, courts have "ignored the distinction between implied in fact contracts and implied in law contracts in order to find an implied in fact contract and allow recovery." Michael C. Walch, Note, *Dealing with a Not-So-Benevolent Uncle: Implied Contracts with Federal Agencies*, 37 STAN. L. REV. 1367, 1375 (1985).

191. *Hercules*, 116 S. Ct. at 985.

192. *See* Lopez v. A.C. & S., Inc., 858 F.2d 712, 716 (Fed. Cir. 1988).

193. *See id.* at 715-16.

194. *Id.* at 716; *see also* G.A.F. Corp. v. United States, 932 F.2d 947, 950 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992).

195. *Id.* at 717.

Therefore, in light of *Lopez*, the fact that the government compelled the manufacturing of Agent Orange under the authority of the DPA, had superior knowledge regarding the dangers of Agent Orange, and provided detailed specifications regarding its production, suggest adequate "additional circumstances" to create an implied-in-fact contract in *Hercules*.

VI. CONCLUSION

In *Hercules*, the Supreme Court incorrectly denied indemnification to government contractors by failing to examine the particular circumstances surrounding the contract. The result of this narrow focus suggests the Court has adopted a stricter attitude regarding liability of the United States, even when the government in effect seizes control of a company. The decision to reject indemnification to government contractors should have little or no effect upon other manufacturers under similar circumstances. The government contractor defense now clearly conveys immunity to manufacturers performing under a military contract[196] and, therefore, it is unlikely that a *Hercules* type situation should arise again. Nevertheless, it has been argued under *Boyle*, that the government contractor defense is ambiguous with regard to whether immunity should be extended to manufacturers of nonmilitary products.[197] Therefore, there is still a question of whether *Hercules* will insulate the government from indemnity for a contractor who performs under a nonmilitary contract.

An examination of public policy and the basis for rejecting indemnification reveals the majority's reasoning is necessary to protect the federal government from extensive liability. Allowing indemnification may encourage manufacturers to settle claims and then seek reimbursement from the United States. Nevertheless, it is undoubtedly unjust for the government to benefit at the expense of others. Justice Breyer expressed his "fear that the practical effect of disposing of the companies' claim . . . will make it more difficult . . . for courts to interpret Government

196. *See* Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

197. *See* Stewart, *supra* note 29, at 1013; Townsend, *supra* note 17, at 1546 (1994).

contracts with an eye towards fair allocation of risks that the parties likely intended."[198] As this casenote suggests, *Hercules* assumed a very narrow interpretation of circumstances surrounding the contract to deny indemnification to government contractors. In doing so, the Court has missed the forest for the trees.

KaCey Reed

198. *Hercules*, 116 S. Ct. at 994 (Breyer, J., dissenting).