

05-1760-CV

05-1509-CV, 05-1693-CV, 05-1694-CV, 05-1695-CV, 05-1696-CV,
05-1698-CV, 05-1700-CV, 05-1737-CV, 05-1771-CV, 05-1810-CV,
05-1813-CV, 05-1817-CV, 05-1820-CV, 05-2450-CV, 05-2451-CV

UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

DANIEL RAYMOND STEPHENSON, SUSAN STEPHENSON, DANIEL ANTHONY STEPHENSON,
AND EMILY ELIZABETH STEPHENSON,

Plaintiffs-Appellants

v.

DOW CHEMICAL COMPANY; MONSANTO COMPANY; HERCULES INC.; OCCIDENTAL
CHEMICAL CORPORATION; ULTRAMAR DIAMOND; MAXUS ENERGY CORP.; CHEMICAL
LAND HOLDINGS, INC.; T-H AGRICULTURE & NUTRITION CO.; THOMPSON HAYWARD
CHEMICAL CO.; HARCROS CHEMICALS, INC.; UNIROYAL, INC.; C.D.U. HOLDING, INC.;
AND UNIROYAL CHEMICAL CORP.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF PANEL'S SUMMARY JUDGMENT OPINION

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Preliminary Statement Pursuant to FRAP 35 and 40

Rehearing or rehearing *en banc* is requested because the panel's decision¹ conflicts not only with the decision of the United States Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) but also with several prior decisions of this Circuit, including *In Re: Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626, (2d Cir. 1990) ("Grispo"), *Lewis v. Babcock and Wilcox*, 985 F.2d 83 (2^d Cir. 1993), and *Densberger v. United Technologies Corporation*, 297 F.3d 66 (2^d Cir. 2002), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. The impact of the panel's decision involves a question of exceptional importance. By markedly expanding the government contractor defense, not only will victims of Agent Orange lose their rights but so might thousands of others exposed to asbestos and other cancer-causing toxins.

Although the panel technically affirmed the District Court's ruling, it rejected all of its key findings of fact. Once these factual findings were reversed,² *Boyle* and

¹ Hereinafter this will be designated as "Op." followed by a page number. The *Bauer* [05-1693-cv] opening and reply briefs will be designated "AB" and "RB." The *Isaacson* [05-1820-cv] opening and reply briefs will be designated "AI" and "RI." The *Stephenson* [05-1760-cv] opening and reply briefs will be designated "AS" and "RS." Appellants' Appendix will be designated "A."

² For instance, the District Court found that the government knew the defendants' manufacturing processes were producing 2,4,5-T with high levels of dioxin. The panel found that the government did *not* know what processes Defendants used to manufacture 2,4,5-T. *Compare* 304 F. Supp. 2d at 438, 443

