

# 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

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## UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT

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### 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

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### 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 decision<sup>1</sup> 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<sup>d</sup> Cir. 1993), and *Densberger v. United Technologies Corporation*, 297 F.3d 66 (2<sup>d</sup> 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,<sup>2</sup> *Boyle* and

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<sup>1</sup> 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."

<sup>2</sup> 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

*Grispo* required it to hold that summary judgment could not be granted on the first prong of the government contractor defense, while *Boyle* and *Densberger* mandated reversal on the third prong. Instead, the panel radically expanded the “government contractor defense,” extending *Lewis* beyond recognition and adding new grounds inconsistent with *Boyle*.

**1. The Panel’s Findings Regarding Prong 3 Contradict Defendants’ Material Fact 4 and Mandate Denial of Summary Judgment**

In *Boyle* at 511, the Supreme Court set forth a three pronged test which a government contractor must satisfy to benefit from the Defense. Defendants tracked *Boyle* in their “Material Facts as to Which There is No Genuine Issue to be Tried”:

- 1) “Defendants supplied “Agent Orange” to the United States pursuant to contract;”
- 2) “The United States approved reasonably precise specifications for ‘Agent Orange’” (*Boyle* prong 1);
- 3) “The ‘Agent Orange’ manufactured by Defendants conformed to those specifications” (*Boyle* prong 2); and
- 4) “The United States knew as much or more than Defendants about the dangers in the use of ‘Agent Orange’” (based on *Boyle* prong 3).<sup>3</sup>

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with Op. 47-48.

<sup>3</sup> See A135-136. Notwithstanding Defendants’ non-compliance with Rule 56.1, which the panel flags at Op. 14, FN. 7, Plaintiffs addressed the “Material Facts” as they were presented by the Defendants. AB8, RB5. These were the only “undisputed facts” listed in Defendants’ summary judgment motions in *Isaacson* and *Stephenson*. In their summary judgment motions filed one year later, the

Because the panel's discussion of the first prong stated that the government reordered the product with "knowledge" of a "defect," – i.e. its toxicity – it is necessary to discuss Prong 3 first. This is where the panel describes in detail the dangers known or unknown to the government. In its analysis of Prong 3, the panel expressly found that the evidence relating to Defendants' "Material Fact" 4 *did not* support summary judgment. In Op. 41-42, 50, 45, 45, FN 21, and FN22, respectively, the panel held as follows:

We doubt that the defendants can establish as a matter of law on the present record ... that they shared the knowledge of the dangers of which they were aware with the government and that the government had far more knowledge about the dangers of Agent Orange in its planned use. Each is intensely factual and hotly disputed. ...

We acknowledge that there may well have been some aspects of the dangers of Agent Orange resulting from the trace presence of dioxin that personnel of one or more of the defendants were aware of that members of the military may not have known ....

There is, indeed, ample evidence that the defendants were concerned about the health effects of dioxin, specifically chloracne and liver damage, of their workers." ... "also temporary nerve damage (Monsanto) and unspecified "systemic injury" (Dow)" ... "[v]ery conceivably [could] be a potent carcinogen.

Indeed, these findings directly contradicted the district court's ruling that the government's "knowledge and information was at all times greater than that of defendants." 304 F. Supp. 2d at 428-429.

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Defendants added a "Material Fact" related to product warnings. A8333-A8342.

This should have ended the summary judgment enquiry, as *Boyle* was intended to prevent contractors from withholding potential health risks:

The third requirement is imposed because ‘in its absence the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability.’ Op. 20, citing *Boyle* at 51.

*Instead*, the panel ruling was admittedly not grounded in *Boyle* at all. At Op. 44, the panel jettisons *Boyle*’s objective comparative knowledge determination, opting for what it purports to be a *pre-Boyle* subjective determination of whether the undisclosed information was “substantial enough to influence the military decision” regarding the purchase and use of Agent Orange.

Yet, even under this entirely new standard, there is abundant evidence that the Defendants themselves thought that it would be highly material to the government’s decision-making process. As Defendant Hercules wrote in summarizing a secret meeting with Defendant Dow, AS32, A5681:

They are aware that their competitors are marketing 2,4,5-T acid which contains alarming amounts of acnegen and if the government learns of this the whole industry will suffer. They are particularly fearful of a congressional investigation and excessive restrictive legislation ...

At the same time, without telling the government, Dow developed a “test to determine dioxin levels” and started to implement some “techniques to reduce dioxin levels during the manufacturing process” that it had long known about. In *Re: Agent Orange*, 565 F. Supp. 1263, 1268-1270. As a result, contrary to the panel’s

interpretation of pre-*Boyle* law, Judge Pratt denied summary judgment on the very basis the panel granted it: “One question of fact is whether this knowledge, if disclosed to the government, might have made a difference in the government’s decision- making process.” *Id.*

The panel’s conclusion that full and complete disclosure wouldn’t have made a difference cites no testimonial support. By contrast, Wayne Vandeventer, an Air Force officer responsible for contract specifications for Agent Orange, testified that he would have wanted to have known about dioxin and expected the chemical companies to have told him about its existence in 2,4,5-T. SR20, A6454-2. When first informed of the presence of the toxic contaminant dioxin *in 1970*, Dr. Robert Darrow, one of those responsible for recommending 2,4,5-T, stated that he and other relevant government personnel were “surprised when we got the information” and that “the feeling was there that it should have been disclosed before.” A6064-6065. Nor does the panel explain why, in direct response to this revelation, 2,4,5-T use was suspended in April 1970. RS84.

The panel attempts to justify the vast amount of information not disclosed to the government about the “systemic problems” and the potential of dioxin being a “potent carcinogen” by concluding that these are “not enough to convince a reasonable factfinder that ... the defendants knew that trace amounts of dioxin in Agent Orange might prove to be a carcinogen for those not involved in manufacturer

or direct handling.”<sup>4</sup> Op. 47 FN. 22. This attempt to justify the Defendants’ intentional secrecy goes beyond the scope of *Boyle* and ignores the district court’s ruling that foreseeability would neither be a part of the summary judgment determination nor even a subject upon which the Plaintiffs would be allowed to conduct discovery. (*See* p.15, *infra.*) On January 26, 2004, the district court stated:

The Court: As I understand it, I am not going to address causation either on the motion to remand or on the motion for summary judgment .. I do not wish to get into the issue of causality on this motion. If I have to get into the issue of causality, **I will then have to reopen this whole matter and give the plaintiffs an opportunity to get involved in causation and in risk and in foreseeability by defendants and by the government.** A11607, A11624 (emphasis added)

For the panel to rely on such causation grounds now -- when the lower court did not even entertain them --denies the veterans fundamental due process.

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<sup>4</sup> Factually, this analysis suffers in several ways. First, many service personnel did directly and regularly handle Agent Orange during the course of its widespread spraying in Vietnam. Secondly, even if defendants did not know for *certain* that dioxin caused cancer, they *did* know that dioxin’s toxicity was positively scary: “one of the most toxic materials known,” and “the most toxic chemical they have ever experienced.” AS 34, 41. It is preposterous to rule, as a matter of law, that the government contractor defense did not require them to tell this to the government. Further, requiring positive knowledge of known human carcinogenicity will give any manufacturer of a known toxin a “free pass “for decades. As a rule, human cancer has a latency from exposure of twenty to forty years, a fact which the district court long understood. 597 F. Supp. 740 , 795 (1984). Because 2,4,5-T was not widely used until the late 1940's, AB14-AB15, carcinogenicity would not have begun to be demonstrable until after Agent Orange use was discontinued. It took until 1994 for the National Academy of Sciences, Institute of Medicine to conclude that Agent Orange caused cancer in Vietnam veterans. RB21-23.

The panel's decision frustrates the policy behind the third prong of *Boyle* which was intended to insure that the manufacturer would not “**withhold knowledge of risks.**” 487 U.S. at 512. (emphasis supplied) This requires “a substantial showing that the manufacturer informed the government of known risks in the use of its product.” *Carley v. Wheeled Coach*, 991 F.2d 1117, 1127 (3<sup>rd</sup> Cir. 1993). As the panel states at FN18, “[t]he government’s discretionary determination must be a fully informed one.” The panel’s decision creates a perverse incentive for manufacturers to withhold risks<sup>5</sup> by permitting them to argue afterwards that the concealed facts weren’t material.

It is also the polar opposite of this court’s ruling in *Densberger, supra*, which found that a reasonable jury could conclude that the manufacturer’s additional warning of dangers, even if *already known* to the government, could cause the government to treat the product differently. (“It is possible that if the army had been warned of the danger of which it already knew, it might have warned the pilots, and would have done so even if, absent a warning, it *had* failed to caution them.” *Id.* at 73. (italics original) By contrast, the *Agent Orange* panel ruled that no reasonable jury could conclude that the failure to warn of dangers, even when *unknown* to the

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<sup>5</sup> The panel’s concerns about the costs to the government are misplaced. The fact that this information was hidden from the government has cost the government many hundreds of millions in order to compensate Vietnam veterans who were exposed to Agent Orange. *See, e.g.,* RB12.

government, would make a difference in whether and how the government would use a product. Obviously, if a reasonable jury could find warning of dangers *already known* could make a difference, it would be even more reasonable to find that warning of dangers *not already known* could make a difference. These two cases cannot stand together.

## **2. The Panel’s Decision Stretches the First Prong of Boyle, Requiring “Reasonably Precise Specifications,” Beyond Recognition**

In *Boyle* at 512, the Supreme Court explained why Prong 1 requires the approval of “reasonably precise specifications”:

“The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – *i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.”

As noted at Op. 21, Plaintiffs maintained that the features at issue were not considered by the Government because: 1) the contracts included no specifications regarding the toxic impurity dioxin; and 2) the defect was caused by the defendants’ chosen manufacturing methods. AB8, AS7. Plaintiffs were supported by the unchallenged affidavits of two experts, Dr. Harry Ensley, a chemical expert on the manufacture of 2,4,5-T (A3241-3243, A3953-A3966, AI47-48) , and Ralph Nash, a nationally renowned authority on government contracts (A6989-A7000, A10347-A10355, AI46-47). The panel at Op. 31 *agreed entirely* with Plaintiffs:

The defendants do not contest that the government’s **contractual specifications**

for Agent Orange are **silent regarding the method of manufacturing** or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced.. ...

Indeed, **they admit that they were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.**

Unlike the lower court, the panel concluded at p.33

[There is a] **triable issue of fact** as to whether the defendants could have complied with their contractual obligations to the government while using what the plaintiffs contend was a process that would have resulted in a defoliating agent substantially less dangerous to military personnel. (Emphasis added)

Again, this should have ended the enquiry. Defendants failed to establish the necessary “significant conflict” between contract specifications and state law duties regarding design required by *Boyle*.<sup>6</sup> 487 US at 508-509. AS25.

Instead, the panel disregarded both its quotation of *Boyle* at Op. 20 (“assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.”) and at 23 (government must have “made a discretionary determination about the material it obtained that related to the defective design feature at issue.”). It held that because the government’s unsophisticated testing of the

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<sup>6</sup> Plaintiffs, supported by the affidavit of Dr. Ensley, contended that the defendants should have manufactured their 2,4,5-T with lower temperatures and longer hold times, which would have resulted in a far safer product. AS22, AS25, RS11, RS57-58, A3953-3966. Plaintiffs describe this as a manufacturing defect. AB43-56. At 29, FN 15 the panel redefines this as a “design defect.” However it is described, the evidence is clear that it was never considered by the government. (In this light, the panel’s statement at 17, FN 9 that “the plaintiffs’ briefs make no arguments regarding the district court’s findings as to their ... manufacturing defect claims” is both curious and inaccurate. *See* AB43-56, AS27-28.)

