05-1760-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

In Re:
"Agent Orange"
Products Liability Litigation

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

Plaintiffs-Appellants,

v.

DOW CHEMICAL CO. and MONSANTO CO.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

FINAL BRIEF FOR PLAINTIFFS-APPELLANTS

Gerson H. Smoger, Esq.
SMOGER & ASSOCIATES
3175 Monterey Boulevard, Suite 3
Oakland, California 94602
510-531-4529

Mark R. Cuker, Esq.
WILLIAMS CUKER BEREZOFSKY
1617 JFK Boulevard, Suite 800
Philadelphia, Pennsylvania 19103
215-557-0099

Attorneys for Plaintiffs-Appellants

(Additional Counsel On the Reverse)

Michael Gordon, Esq.
GORDON & GORDON
80 Main Street
West Orange, New Jersey 07052
973-736-0094

Stuart Calwell, Esq.
THE CALWELL PRACTICE
Law & Arts Center West
500 Randolph Street
Charleston, West Virginia 25301
304-343-4323

Stephen B. Murray, Esq.
MURRAY LAW FIRM
Suite 2550, LL&E Tower
909 Poydras Street
New Orleans, Louisiana 70112
504-525-8100

Co-Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page No.:**

Cases: **Page No.:**

Cases: **Page No.:**

Cases: **Page No.:**

I. JURISDICTIONAL STATEMENT

Appellants appeal from final judgments entered by the United States District Court for the Eastern District of New York, in which the court denied remand and entered summary judgment in favor of Appellees; therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1291. The notice of appeal, filed March 30, 2005, was timely.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Could reasonable minds differ about whether manufacturers have satisfied the first prong of the government contractor defense when: 1) Appellees sold the government the same herbicides they were routinely selling commercially; 2) the specifications for the herbicides did not mention or consider the toxic contaminant, dioxin, which is at issue in this litigation; or 3) the high levels of the toxic contaminant, dioxin, which were sold to the government as an unwanted part of the product resulted from defective manufacturing processes that Appellees selected and controlled?

2) Could reasonable minds differ about whether manufacturers can satisfy the third prong of the government contractor defense, requiring warnings of hazards in the product when: 1) Appellants have shown that the

manufacturers had substantial knowledge about the toxicity of their product which they did not share with the government; 2) the actual government personnel involved in selecting Appellees' products and writing the contract specifications had no knowledge regarding the products' defects; or 3) Appellees seek to be relieved of their obligation to warn the government personnel actually involved in the contracting and specification process because of fragmentary and sporadic knowledge of government personnel working on unrelated projects;

3) Did the lower court err by limiting plaintiffs' discovery to the review of MDL litigation files more than 20 years old, and precluding them from taking meaningful discovery into substantial subsequent litigation involving the same issues and the same defendants, particularly when that litigation primarily concerned Appellees' knowledge of the toxicity of their herbicides and their dioxin contaminant?

III. STATEMENT OF FACTS

Daniel Stephenson served in Vietnam from 1965 to 1970, both on the ground and as a helicopter pilot. He was in regular contact with Agent Orange during that time. On February 19, 1998, he was first diagnosed with multiple myeloma, a rare bone marrow cancer associated with exposure to dioxin, an unwanted contaminant of

Agent Orange. Since then he has undergone numerous operations, including a bone marrow transplant.

Stephenson sued Defendants, The Dow Chemical Company and Monsanto, based upon theories of negligence and product liability, alleging that Defendants' dioxin contamination of their product and their negligence in not using the state of the art technology in their manufacturing process unnecessarily resulted in Stephenson's exposure to Defendants' herbicides which were highly contaminated with dioxin. This dioxin contamination was not mentioned in any government specifications. Stephenson Complaint, A13374-A13381. These allegations are supported by voluminous evidence, summarized in two briefs below, a 173 page brief, A7011-A7183, and a 147 page brief, A7795-A7941, which counters the vast majority of "facts" in the decision authored by the court below.

IV. STATEMENT OF THE CASE

Plaintiff Daniel Stephenson served in Vietnam as a helicopter pilot where he was exposed to herbicides manufactured by defendants. In 1998, he was diagnosed with multiple myeloma, a disease linked to dioxin exposure, and later he filed suit *pro se* in Federal Court in the Western District of Louisiana against Dow Chemical Company and Monsanto, two of the manufacturers of the herbicides used in Vietnam.

A13374-A13381. The case was transferred by the Multi-District Litigation Panel pursuant to MDL 381 to the Eastern District of New York.

In October 1999, Defendants moved to dismiss the claims of Daniel Stephenson and his wife under F.R.C.P.12(b)(6), asserting that they were barred by a 1984 class action settlement and subsequent final judgment purporting to resolve all Agent Orange claims of veterans stemming from Vietnam exposure. In December 1999, the District Court, per Judge Weinstein, granted Defendants' motion from the bench, finding that plaintiffs' claims were an impermissible collateral attack on the 1984 settlement.

Plaintiffs appealed the dismissal to this Court. At this point and through the remainder of the action the Stephensons' case was generally tracked along with the Isaacsons' case. The Stephensons, therefore, adopt the Statement of the Case as presented in the Isaacsons' case with the singular exception of all legal briefing related peculiarly to the issue of remand and removal of the Isaacsons' case, as the Stephensons' original filing was in Federal court in Louisiana. As such, the statement below will only discuss those issues peculiar to the Stephensons' case which do not apply to the Isaacsons' case.

After four years of winding through the Federal appellate court system, the Stephensons' case was transferred back to the District Court in September 2003. Shortly thereafter, in October 2003, the Stephensons filed a motion to file a

"Supplemental and Superceding Complaint," pursuant to Louisiana law, naming the additional manufacturers of herbicides as defendants who were not included in the complaint when it was originally filed *pro se* by the Stephensons. A13383-A13403,A13404-A13421. All manufacturers proposed to be added appear in the other lawsuits which are now before this Court. However, they objected to this amendment. A13422-A13439 ("Defendants' Memorandum of Law in Opposition"); A13446-A13448 ("Plaintiffs' Memorandum of Law in Reply").

On February 9, 2004, Judge Weinstein denied the motion to amend the Stephensons' complaint on the grounds that it would be "futile," since "no new theory would override any new defendant's government contractor defense." 2004 U.S. Dist. 1620 at *12. At the same time, Judge Weinstein granted summary judgment in favor of Defendants, staying the effect of the judgment explaining that:

> [a]t the hearing on this motion to dismiss, plaintiffs explained their failure to adequately respond by noting difficulties in obtaining evidence for their position. This problem is understandable since the events at issue occurred forty or more years ago. Plaintiffs have asked for an additional six months for discovery. *See* Part I, *supra*.
>
> To ensure due process, this decision is stayed until October 12, 2004. Discovery on the issues posed by the government contractor defense may continue to August 10, 2004. Plaintiffs may make a motion to reconsider by filing papers on or before September 10, 2004. If made, the motion will be heard on October 10, 2004.

In re "Agent Orange" Product Liability Litigation, 304 F. Supp. 2d 404, 441 (E.D.N.Y. 2004). The opinion in the Stephenson case does not explain why summary

judgment was granted to the two Defendants, Dow and Monsanto, in the Stephenson lawsuit. Rather, the decision only addresses the facts as they relate to Diamond, which had successfully fought Plaintiffs' motion to amend and was not a party to the Stephensons' lawsuit.

On February 25, 2004, Plaintiffs filed a "Motion For Entry of Final Order or, Alternatively, for Certification of Judgment as Final Appealable Order," A13511-A13514, on the grounds that Stephenson has a debilitating illness that is normally fatal and, in any case, given that the court denied Stephenson's motion to amend the complaint on the grounds that it was "futile," there seemed to be little purpose in going through the time and expense of discovery and re-briefing the issue when only two of the Defendants were parties to the Stephensons' suit. Defendants filed an opposition to that motion on March 12, 2004. A13516-A13524. At a conference on March 18, 2004, Judge Weinstein orally denied the motion, stating "I can't go forward with respect to this individual. I feel very sorry and please give him my best regards." A11685. No written order of denial was ever filed.

On March 2, 2005, the District Court reaffirmed its order granting summary judgment and dismissing Stephenson's case. A13785-A13786. Notice of appeal was filed timely on April 1, 2005. A13787-A13788.

V. SUMMARY OF ARGUMENT

This brief will demonstrate that the government had no responsibility for the defect in question, the unwanted contamination of Defendants' products with dioxin. First, the government purchased products that were routinely used throughout the United States and do not fall under the government contractor defense. Indeed, millions of gallons of herbicide were sold by Defendants commercially, all of which were similarly contaminated with dioxin. Secondly, the specifications cannot be considered to be "reasonably precise" as to the feature of Defendants' product claimed to be defective, as no specification even mentions the existence of dioxin in any product. Moreover, these specifications were not only "imprecise" as to dioxin-- they were irrelevant-- detectable levels of dioxin contamination in the final product only occurred as a result of the production processes which Defendants chose to use. No manufacturing process was ever specified by the government, which always left the method of production up to Defendants. Had Defendants followed the state of the art in manufacturing their product, they could have produced a product fully compliant with government specifications *and* no detectable dioxin. Instead, they made a contaminated product that was less expensive to produce. Because it was the defendants who made all of the design and manufacturing choices which culminated with the production of a highly toxic and defective product, *Boyle,* correctly applied, provides them no sanctuary for their own negligent acts.

Finally, any fair analysis must conclude that the companies who had manufactured the herbicides for close to two decades knew far more about their products than the government could hope to know. They certainly knew more than the government personnel who selected 2,4-D and 2,4,5-T for use in Vietnam and who negotiated the contracts, none of whom knew anything about dioxin.

Defendants never even claim to meet the active duty to warn that *Boyle* requires. Instead, they try to impute knowledge held by U.S. Government personnel who were not involved in the selection and procurement of herbicides. Even then, the knowledge of production processes in other government operations was woefully short of what was known to the Defendants. Moreover, the active warning responsibility of *Boyle* is rendered a nullity if a contractor is permitted to retrospectively impute knowledge of uninvolved government personnel to those employees who made the contract decisions.

VI. ARGUMENT

A. Standard of Review

The standard for review is *de novo*. F.R.C. P. 56(c) requires that there "is no genuine issue as to any material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), 106 S. Ct. 2505 (1986). Generally, review of *Boyle* is a fact-intensive inquiry not susceptible to summary judgment, particularly

given the fact that all inferences are to be viewed in the light most favorable to the plaintiffs. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Indeed, the contractor "must prove the first *Boyle* standard to such a degree that no reasonable juror could find otherwise, that the government's approval was a substantive exercise of its discretion to balance technical, military, social and safety trade-offs and, that the design feature in question was considered by a government officer." *Shurr v. A.R Siegler*, 70 F. Supp.2d 900, 915(E.D. Wis. 1999). Indeed, even in the case of the helicopter door that went the wrong way in *Boyle,* the Supreme Court still did not deny plaintiffs the right to trial by jury.

B. *Boyle* Established Narrow Limits to the Government Contractor Defense

The government contractor defense was established in the case of *Boyle v. United Technology*, 487 U.S. 500 (1987) in which the decedent was killed when a military helicopter crashed into the ocean. Pursuant to military specifications, the emergency escape hatch was designed to open out for rapid egress rather than in as with most helicopters. Water pressure prevented the decedent from opening the hatch outward once the helicopter was under water, and he drowned. 487 U.S. at 503. The decedent's estate sued under a state law design defect theory and won a jury verdict. On appeal, the United States Supreme Court remanded. The Court held that although the procurement of military equipment is an area of uniquely federal interest,

displacement of state law will only occur where ... a 'significant conflict' exists between an identifiable "federal policy or interest and the [operation] of state law." 487 U.S. at 507.

The Court focused on conflict with the "discretionary function" exception to the Federal Tort Claims Act. It held that "the selection of the appropriate *design* for military equipment . . . [is a discretionary function because it] often involves not merely engineering analysis but *judgment as to the balancing of many technical, military, and even social considerations,* including specifically the trade-off between greater safety and greater combat effectiveness". *Id*. at 511 (emphasis supplied). Consequently, a state law duty which would hold government contractors liable for design defects in military equipment when that defect *actually resulted from the discretion of the government* would present a "significant conflict" with federal policy. *Id*. at 512. Conversely, there would be no reason to displace state law when the products or product constituents are otherwise in the regular stream of commerce:

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is *precisely contrary* to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).

The Court further limited the military contractor defense:

> Even in this sort of situation, it would be unreasonable to say that there is *always* a "significant conflict" between the state law and a federal policy or interest.
>
> If, for example, a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward, it is impossible to say that the Government has a significant interest in that particular feature. That would be scarcely more reasonable than saying that a private individual who orders such a craft by model number cannot sue for the manufacturer's negligence because he got precisely what he ordered. *Id*. at 509. (emphasis supplied)
>
> The court continued:
>
> If, for example, the United States contracts for the purchase and installation of an air conditioning unit, specifying the cooling capacity, but not the *precise* manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature, would not be a duty identical to anything promised the Government, but neither would it be *contrary*. The contractor could comply with both its contractual obligations and the state prescribed duty of care. *No one suggests that state law would generally be preempted in this context*." *Id.* at 509. (emphasis supplied).

Based on these legal principles, the Court outlined three separate elements of the government contractor defense:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approves reasonably precise specifications (2) the equipment conforms 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 known to the United States. *Id*. at 512.

The first two of these conditions "assure that *the design feature in question* was considered by a Government officer, and not merely by the contractor itself." *Id*. (emphasis supplied) The third condition –warning– was required:

> 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. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.

Id. at 512-513. (emphasis supplied).

Significantly, because it was not clear that "no reasonable jury could, under the properly formulated defense" have found for the plaintiff, the Court remanded the issue for further proceedings, "since whether the facts establish the conditions for the defense is a question for the jury". *Id.* at 514. Thus, even under the clearly defined circumstances of *Boyle*, the Supreme Court found summary judgment inappropriate. Furthermore, they held that the government contractor defense as articulated by *Boyle* only applies to design defects and not to manufacturing defects.

C. The Interpretation of the Government Contractor Defense in Agent Orange (I) Is Substantially More Expansive Than the Supreme Court Allows in *Boyle* and Is No Longer the Law

In the original Agent Orange litigation (Agent Orange I), the government contractor defense as defined by Judges Pratt and Weinstein was significantly broader

than *Boyle.* Judge Pratt, delineated three requirements for the government contractor defense:

> 1) That the government established the specifications for Agent Orange; 2) That the "Agent Orange" manufactured by the defendants met the government's specifications in all material respects; and 3) That the government knew as much as or more than the defendant about the hazards to people that accompanied use of "Agent Orange".

In re: Agent Orange Product Liability Litigation, 565 F. Supp. 1263, 1274 (E.D. N.Y. 1983). Under this test, the government contractor defense could be invoked any time the government established the specifications, even if the product was an existing stock item or the specifications established by the government did not create any conflict with state tort law duty. *In re: Agent Orange Product Liability Litigation*, 534 F. Supp. 1046, 1056 (E.D. N.Y. 1983). Even applying this far broader defense, Judge Pratt denied defendants Dow, T.H. Agriculture and Uniroyal's motion for summary judgment based on the government contractor defense, because there were material issues of fact on the question of relative knowledge. *In re: Agent Orange Product Liability Litigation*, 565 F. Supp. 1263, 1275 (E.D. N.Y. 1983).

Given that the Supreme Court's test is much more restrictive than the test employed in the Agent Orange litigation, Judge Pratt would have certainly denied the motions applying *Boyle*. Instead of merely requiring that the government establish specifications, the Supreme Court required that those specifications be "reasonably precise." Instead of the government merely knowing as much or more than

Defendants about the hazards, *Boyle* requires that the supplier warn the United States about the dangers in the use of the equipment that were known to the supplier but not known to the United States. The manufacturer cannot merely assume knowledge by the government's contract representatives; "warning" signifies an active enquiry to remedy any gaps known to the manufacturer and unknown to government representatives dealing with the contractor.

In *Grispo v Eagle Picher Industries*, 897 F. 2d 626, 632 (2d. Cir 1990) this court recognized that the *Boyle* decision significantly narrowed the scope of the defense as it had been articulated in Agent Orange:

> [T]he scope of our holding in *Agent Orange* has been trimmed by *Boyle* such that *Agent Orange* no longer carries the weight [the defendant] places upon it. *Agent Orange*[1] grounded the military contractor defense upon broad separation-of-powers concerns counseling the insulation of military decision making from judicial oversight. ***Although these concerns certainly animated the Supreme Court's opinion in *Boyle,* *** *Boyle* ultimately cast the military contractor defense upon narrower grounds than we did in *Agent Orange.* In particular, *Boyle* predicated the military contractor defense upon the existence of a 'significant conflict' between federal contracting requirements and state tort duties. For the conflict to be 'significant,' the Government must control product content by approving 'reasonably precise specifications.' *** *Agent Orange neither honed in upon the need for a*

[1]In upholding the grant of summary judgment on the government contractor defense in the original Agent Orange opt out appeal, this court deplored the "inexplicable and unjustifiable failure of the opt outs' counsel to brief the issue". *In re: Agent Orange Product Liability Litigation*, 818 F. 2d 187, 190 (2d Cir. 1987). Given this lack of briefing, this court's opinion in *Agent Orange I* can hardly have precedential value.

> *'significant conflict' nor required that government specifications be 'reasonably precise.'*** *We think these differences underscore the more exacting standard a military contractor must satisfy after Boyle to establish the military contractor defense and thus* limit the value of the facts of *Agent Orange* as a benchmark in a failure-to-warn action for satisfaction of the military contractor defense after *Boyle.* Consequently, we cannot accept Eagle-Picher's argument that *Agent Orange* governs this case. 897 F 2d. at 635. (emphasis supplied)(citations omitted).

Although Judge Weinstein dismissed this comment as "*obiter dictum",* 304 F. Supp. 2d 404, 439 (E.D.N.Y. 2004), that is not the case. The statement that the *Boyle* defense was narrower than *Agent Orange* was key to the denial of the summary judgment motion in *Grispo*: "[W]ere it not for the Supreme Court's subsequent explanation of the military contractor defense in *Boyle,* our holding in *Agent Orange* might support Eagle-Picher's argument for summary judgment." 897 F 2d at 634.[2]

Grispo is consistent with an extensive line of cases, which has construed the defense strictly to assure it is only applied when there is a significant conflict. Because the contractor defense has the potential to "displace large chunks of the states' traditional prerogative over tort law, the defense must be applied with caution." *Mitchell v. Lone Star Ammunition Inc*., 913 F 2d 242, 247 n.9 (5th Cir 1990).

---

[2] This court revisited the issue again in *In re "Agent Orange" Prod. Liab. Litig*., 996 F.2d 1425 (2d Cir 1996). In dismissing the veterans' claims on grounds that the class action judgment barred their claims, this court again observed that "the scope of the government contract defense has been somewhat limited by the Supreme Court's decision in *Boyle*" and that "the availability of the government contract defense might not be a foregone conclusion". *Id.* at 1436.

> *No immunity for negligence arises merely because the federal government is the customer. The government contractor defense is available only where the contractor could not both comply with its contract and satisfy its state-prescribed duty of care.* ...Where there is not adequate evidence that the government specifically considered and, after substantive and meaningful review, approved a given design feature proposed by the contractor, the contractor must answer allegations of negligence just as it would in any other case.

Shurr v. A.R. Siegler, 70 F. Supp. 2d 900, 915 (E.D. Wisc. 1999) (emphasis supplied).

The issue is one of responsibility. If the Government is responsible for the defect in question, the manufacturer is entitled to the defense. *Mitchell v. Lone Star*, *supra*., 913 F.2d at 248. Boyle's requirement of "reasonably precise specifications" mandates that the federal duties be *imposed* upon the contractor...Stripped to its essentials, the military contractor's defense under *Boyle* is to claim "The Government made me do it". *Grispo*, *supra*. at 630-632 (emphasis original).

D. Defendants Sold the Government the Type of Products That They Routinely Sold Commercially Throughout North America ("Off the Shelf" Products): Such Products Cannot Fulfill the "Reasonably Precise" Design Standard of Boyle

The policies supporting the government contractor defense do not apply to the sale of off-the-shelf herbicides. (See, e.g., Young at A5846-11-A5846-12; A5507-A5517, A5682-A5693; A5587-A5588; A5846-13-A5846-25; A5521-A5523; A5524-A5542; A6346-A6346-1.) *Boyle* intended to shield government contractors who designed unique equipment required to protect the members of our armed forces, not

to shield manufacturers from tort liability for over-the-counter products routinely placed into the stream of commerce. In fact, here, it was the defendants, not the government, who held the patents on the herbicides; it was the government that paid patent royalties to the defendants for their product, not the other way around. (See, e.g., A3843-A3844; A3846-A3847; A5908-A5909; A6198.) The government contractor defense requires an active design choice made by the government, not one that selects only a pre-designed product on the basis of quantity and availability.

The concerns raised in *Boyle* do not exist in respect to products readily available on the commercial market.

> The fact that the military may order such products does not make them "military equipment". The products have not been developed on the basis of involved judgments made by the military, but in response to the broader needs and desires of end users in the private sector. The contractors, furthermore, already will have factored the costs of ordinary tort liability into the price of their goods. That they will not enjoy immunity from tort liability with respect to the goods sold to one of their customers, the Government, is unlikely to effect their marketing behavior or their pricing.

In re Hawaii Federal Asbestos Cases, 960 F.2d 806, 811 (9th Cir 1992) (corrected per Defendants'-Appellees Stephenson Br. at 111). See also *Jackson v. Deft, Inc.*, 223 Cal. App. 3d 1305, 1319, 273 Cal. Rpt. 214, 222 (1990)(holding that where a product used by the military also has substantial use in the civilian market, the government contractor defense is a jury question).

In order to rebut the fact that the products which made up Agent Orange and the other Agents, 2,4-D and 2,4,5-T, were routinely sold on the domestic market, the District court stresses the history of the government's research into herbicides (even though the government completely shut down its group three years before it realized the need for herbicides in Vietnam). Yet, even if this were true, a case with a much stronger factual predicate was insufficient to grant summary judgment. In *Ammend v. Biopart, Inc.*, 322 F.Supp. 2d 848 (W.D. Mi. 2004), the plaintiffs were servicemen who sued as a result of injuries sustained from inoculations of the anthrax vaccine. It was undisputed that United States Army researchers at Ft. Detrick actually did design and patent the vaccine after which they licensed its manufacture. 322 F.Supp. 2d at 852. The defendant argued that the government's intimate involvement in the design and manufacture of the vaccine and continuous contact with the vaccine's producers satisfied the *Boyle* criteria. The court denied the motion[3] because whether the vaccine had become an "off the shelf product purchase pursuant to contracts devoid of specifications" was still a question of fact." *Ammend*. at 878.

Hazards usually become "known to the United States" because the government acquires substantial experience with highly sophisticated pieces of equipment which are custom designed for government use. They may be Apache Helicopters, Fighter

---

[3]Although styled as a motion to dismiss, the motion discussed materials outside the pleadings and was treated as a motion for summary judgment. 322 F.Supp. 2d at 854, n.1.

Aircraft, Submarines, or even custom mail sorters for the Postal Service. See *Russek v. Unisys Corp.*, 921 F.Supp. 1277 (D.NJ 1996) (involving a letter sorter 77 feet long and 12 feet high where the government was the only user of the product); *Lewis v. Babcock Industries*, 985 F.2d 83 (2d Cir. 1993) (involving a parachute cable for the F111-T jet fighter crew module first sold to the Air Force before 1980). By no stretch of the imagination may 2,4,5-T or 2,4-D be conceived as of unique products designed peculiarly for government use.

E. The "Reasonably Precise" Design Specification Requirement Cannot Be Met Because No Contract Even Mentioned Contamination of the Product by Dioxin

In the case at bar, the specifications for 2,4,5-T (which were not written until 1963) simply required 2,4,5-T and 2,4-D of a certain specific gravity and moisture content. (See Affidavit of Mark Cuker at A3935-A3952) They did not mention dioxin, contained NO detail which had any effect on the dioxin content, and did not control the method of manufacture. (See Affidavit of Dr. Ensley at A3241-A3243,A3953-A3966) There is NO evidence whatsoever that the Government and the contractor even discussed the dioxin issue until many years after the specification was written.

And, further, there are no facts which show that the federal officials contracting with the herbicide manufacturers exercised any discretionary judgment, made any trade-offs, or did any balancing to include dioxin in the product they were purchasing.

Strickland v. Royal Lubricant Company, Inc., 911 F.Supp. 1460 (M.D. Al. 1995) is directly on point. There, a plaintiff was injured when sprayed in the face by hydraulic fluid, which was manufactured for the military pursuant to a detailed twenty-five (25) page specification. The specification was precise as to many aspects of the fluid, e.g., base stock, additives, oxidation inhibitors, anti-wear agents, specific gravity, flammability, solid partial contamination, etc., but it was completely silent on the question of toxicity. The Court held that this silence raised a factual issue about whether the specifications were reasonably precise. Because "the defendant could have formulated a less toxic hydraulic fluid[4] that met the government's specifications and complied with the applicable state law," the defendant had not established the absence of the factual issue and denied summary judgment. *Id.* at 1468.

The case at bar is even stronger than *Strickland*. The six page specification for 2,4,5-T (MIL-51146) is completely silent on the subject of dioxin and the lower court never found that dioxin resulted in any way, shape or form from the specifications and conceded that dioxin emanated from the defendants' own manufacturing processes.

---

[4]Specifically, the plaintiff claimed the defendant should have used "a natural Tricresyl Phosphate rather than the synthetic Tricresyl Phasphate" to reduce toxicity. *Id*. at 1467.

304 F. Supp 2d at 427,429. See also *Barron v. Martin-Marietta Corp*., 868 F. Supp 1203, 1207 (N.D. Cal. 1994) (denying summary judgment where plaintiffs claimed injury from exposure to toxic fumes that leaked from missile canisters and it was not clear whether the specifications governed the defect which caused the toxic exposure.); *Snell v. Bell Helicopter Textron, Inc.,* 107 F.3d 744, 748 (9th Cir. 1996), (denying summary judgment, even though there was undisputed evidence that the government was significantly involved in and approved detailed specifications for the design of the entire helicopter, because the specification for the feature in question, the drive shaft, was so general that there was no evidence that the government exercised its discretion on that point). *Ritch v. A.M. General Corp.*,1996 U.S. Dist. Lexis 8361 at *11 (D. N.H.); (mere failure to consider the issue does not support the argument the government exercised discretion).

In coming to a contrary conclusion, the Fifth Circuit in *Miller v. Diamond Shamrock* 275 F 3d 414 (5th Cir 2001), curiously relied on by the MDL court, reached the wrong result because the proper record was not placed before it. *Miller* applied the right test: was the alleged defect due to a defect in government specifications? The *Miller* court, however, was not presented by Plaintiffs with any of the information necessary to answer the question correctly. The entire plaintiffs' record on appeal consisted of a single affidavit from Admiral Zumwalt! 275 F. 3d. at 422 n. 4. And this is more than was included in the *Winter* record, where the same Plaintiffs' counsel

didn't even place the Zumwalt affidavit into evidence. A7589,A7606-A7607, A7611-A7613,A7634,A7636.

This case is very much akin to the air conditioning unit in *Boyle.* Here, the specifications were clearly not "reasonably precise," because, being silent on the existence of dioxin in the herbicide, they imposed no contractual duty contrary to "the state prescribed duty of care" *Boyle* at 509. (See Affidavit of Ralph Nash, A6989-A7000,A10347-A10355; and Affidavits of Dr. Ensley, A3241-A3243,A3953-A3966). As Dr. Ensley explains, the "reasonably precise" specifications relied on by the Fifth Circuit –MIL 51147 and 51148 -- do not, as the Fifth Circuit was led to believe, define "*all* facets of their respective chemical's composition." 275 F 3d at 419. He further opines that the dioxin composition of the product is not controlled by these specifications at all, but by the amount of heat used in the production process, which was left entirely to the discretion of the contractor. Had the Fifth Circuit been provided with this information, it could never have concluded, as a matter of law, that "the alleged defect resulted not from a deviation from the required military specifications, but from defendants' strict adherence to them." Id. at 421.

Defendants further argue that the fact that "dioxin" was nowhere to be found in the specifications does not matter, because the government approved the specifications. However, the contract specifications only discussed the final product the government was to receive. Defendants cannot prevail by arguing the government

approved of the specifications unless they can show that the design feature in question was actively considered by a government officer. The trier of fact must "determine whether the government has *exercised or delegated discretion to the contractor* over the product design." *Trevino v. General Dynamics Corp*., 865 F.2d 1474, 1480 (5th Cir. 1989)(emphasis supplied):

> The government exercises its discretion over the design when it actually chooses a design feature. The government delegates the design discretion *when it buys a product designed by a private manufacturer*; when it contracts for the design of a product or a feature of a product, leaving the critical design decisions to the private contractor; *or when it contracts out the design of a concept generated by the government, requiring only that the final design satisfy minimal or general standards established by the government. If the government delegates the design discretion to the contractor, the exercise of that discretion does not revert to the government by the mere retention of the right of "final approval"* . *Id.* (emphasis supplied)

The *Trevino* court went on to say:

> If the government approved imprecise or general guidelines, the discretion over important design choices would be left to the government contractor. *Id*. at 1481.

In short, approval is shown only where the "government provided the precise specifications and the precise manner of construction" or where there is a "continuous back and forth" between the contractor and the government, with the government "making final decisions as to specifications". *Shurr, supra*, at 913. In the case of Agent Orange, this was not done.

Finally, regardless of who prepared the specifications, the defense is only available when the specifications are precisely contrary to a state law duty. There have been numerous law suits against these same Defendants for exposure to dioxin in their 2,4,5,-T commercial herbicides. These have been based upon the very same state law tort theories of liability as have been presented here. (See e.g. *DePetrillo v. Dow Chem. Co.*, 1999 R.I. LEXIS 99, 729 A.2d 677 (R.I. 1999); *Arkansas ex rel. Bryant v. Dow Chem. Co.*, 981 F. Supp.1170 (E.D.Ark. 1997); *Rice v. Dow Chem Co.,* 124 Wn.2d 205, 875 P.2d 1213 (Wash. 1994); *Peteet v. Dow Chemical Co.,* 868 F.2d 1428 (5th Cir. 1989); *Keister v. Dow Chem.Co.,* 723 F. Supp. 117 (E.D.Ark. 1989); *MacDonald v. Monsanto, Co.,* 27 F.3d 1021 (5th Cir. 1994), and *Peterson v. Monsanto Co.,* 157 Ill.App.3d 508, 510 N.E.2d 458 (Il1.App. 1987).) Members of our military should not be treated differently than civilians when suing for illnesses stemming from exposure to the very same toxic contaminant, dioxin.

F. Defendants Controlled Their Method of Manufacture and Chose Methods Which were below the Standard of Care When They Could Have Produced Their Product Without Detectable Dioxin; the Intent of *Boyle* Was to Give Protection for Government Design Decisions, Not Manufacturing Defects.

Defendants knew at the time they were contracting with the government that the German manufacturer Boehringer had developed a state of the art, low temperature manufacturing process to control the production of dioxin in its herbicides. (See, e.g.,

A7740-A7746; A5518-A5520;A5543-A5560;A5612-A5633) Nevertheless, without informing the government, the defendants chose not to produce the safest possible product for government use. Instead, they used higher temperatures which they knew would generate high levels of dioxin in their products.

If defendants had chosen to use the low temperature, state of the art procedures in order to manufacture herbicides as Boehringer did, there would have been no conflict with the federal interests in question. (See Affidavit of Dr. Harry Ensley at A3953-A3966). Because the federal government did not specify how the herbicides should be manufactured in general, what temperatures should be used in particular, whether dioxin should exist in the product, or how much of it there should be, there simply is no conflict at all, much less a "significant conflict" between state tort law duties and the manufacturers' contractual duties.

There is no question that the Defendants were free to decrease their processing temperatures so as to "formulate a less toxic" 2,4,5-T. As testified to by Dr. Ensley, the Defendants had the ability to produce their 2,4,5-T so that no detectable amount of dioxin would have been found in the products they manufactured, but for economic reasons they chose not to produce their product at the lower temperatures and costlier hold times employed by Boehringer. Where, as here, defects result from the manufacturing process and not the government specifications themselves, they are not subject to the government contractor defense. *Boyle*, 487 U.S. at 509.

As this court stated in *Grispo*, the Government is not responsible unless the precise specifications it approved control the "feature in question." Where the specifications focus on product content and design, "and leave other safety-related decisions, such as the method of product manufacture...to the contractor's sole discretion" state law manufacturing requirements are not displaced. *Grispo, supra,* at 631. *"Boyle* displaces state law only where the Government, making a discretionary, safety-related military procurement decision contrary to the requirements of state law, incorporates this decision into a military contractor's contractual obligations, thereby limiting the contractor's ability to accommodate safety in a different fashion." *Id.* at 632. Here, although the government ordered 2,4,5-T, it never limited the Defendants' ability to "accommodate safety in a different fashion" by altering their processes to minimize dioxin creation while making 2,4,5-T.

Indeed, the majority of courts have held that the defense cannot apply to any manufacturing defect at all. (See, e.g. *Zinck v. ITT Corporation,* 690 F. Supp. 1331, 1337 (S.D. N.Y. 1988)) Yet, even those courts which will apply the defense to a manufacturing defect will not do so unless the Government has responsibility for the process that created the defect. *Snell, supra*. at 749; *Mitchell v. Lone Star*, *supra.* at 248. Here, the lower court itself found that "the government did not specify the details of the manufacturing process to be utilized by defendants". 304 F.Supp. 2d at 429.

Nor did the government ever require any particular manufacturing process in its contract specifications. Indeed, the presence of some government input into the inspection process does not make the government responsible for defects which occur as a result of that process. *Mitchell v. Lone Star*, *supra.* at 247; *Roll v. Tracor, Inc.*, 102 F.Supp. 2d 1200, 1202 (D.N.V. 2000).

Yet based on a legal pretense of so-called implicit approval, the court below concluded without any factual references whatsoever:

> In the instant case, the government was aware of the manufacturing process that would be used, and that it could result in dioxin's presence in Agent Orange. It thus threw its cloak of contractors' defense immunity over Agent Orange producers even though it and they knew of the dioxin in Agent Orange. *Id.*

The District Court is the only court to ever hold that the government's mere *awareness* of manufacturing defects, without more, triggers the defense:

> If the government explicitly *or implicitly* approves the design and method of production and is aware of the resulting defects, *Boyle* would apply as in any design defect case. 304 F. Supp. 2d at 438. (emphasis added)

The government did not know any of the manufacturing processes being used and none of the contracting officers, specifiers, or inspectors knew that dioxin would be in the product. (pp. 52-56, *infra.*) Even if they did, there is no such thing as "implicit" approval and there has not been a single document presented demonstrating

that the government approved of or was even asked to approve of the Defendants' manufacturing processes.

Moreover, even if this statement were factually correct, it would be legally unfounded. In *Grispo*, the government knowingly accepted asbestos products without warnings, even though the government knew asbestos could cause lung disease. 897 F2d at 631. This provided no shelter to contractors who could have provided warnings with the asbestos and failed to do so. Indeed, the *Grispo* contractor argued that the Government's deliberate decision not to warn its own workers should also have cloaked the contractor with that immunity as well. *Id.* This court rejected that argument, because the government "never controlled or limited the ability of contractors...themselves to warn." *Id.* at 632. By ruling that the government's acceptance of goods with a manufacturing defect not caused by government specifications triggers the defense, the MDL court immunized the contractors for their own negligence, a result totally contrary to *Boyle* and the cases interpreting it.

G. By Any Objective Standard Defendants, Who Manufactured 2,4,5-T and 2,4-D Commercially for Well over a Decade Before the Government Began Using These Products in Vietnam, Knew More about the Hazards of Their Product than the Government

On the third prong of the *Boyle* test, Plaintiffs have presented ample evidence to demonstrate that the manufacturers knew significantly more than the government

about the dangers of the products they were selling. (See Affidavit of Janet Weiss, M.D., A3967-A3980).

By the time Dow sold various Agents to the U.S. government, it had nearly three decades of knowledge regarding serious health problems related to the production of chlorophenol herbicides. This knowledge came both from health problems in its own workforce, as well as knowledge regarding health problems in the workforces of its manufacturing competitors. Dow had intimate knowledge of chloracne going back to the 1940s, was well aware of the potential for 2,4,5-T and its contaminant dioxin to cause systemic injury, including liver damage, had its own toxicologist on staff, Dr. V.K. Rowe, conducted its own animal experiments on 2,4,5-T and dioxin, and had a major incident at its factory, resulting in numerous employees being injured after which for a period of time the union refused to allow its employees to go back to work. A3631-1-A3631-2,A3473-A3509, A3527-A3529, A3530, 3570-A3571, A3589-A3590, A3624-A3626, A3628-1, A3629, A3631, A3632-A3634, A3643, A3663-A3674, A3689-A3701, A3709-A3731, A3732-A3733,A5543; *see also* A6879-A6895 (Early Dow History of The Chloracne Problem - Biochem's Contribution, 03/16/1965); A5707-A5710 (Dow Internal Memo re Chloracne Research Program - History of Chloracne Incidences at Dow, 04/25/1967); and A6900-A6922 (Chloracne Presentation Materials).

Indeed, chloracne had been a continuous problem for Dow since the 1930's. (See A6879-A6895 and A6900-A6922) As a subsequent internal Dow memo by Alex Widiger acknowledged, there had been a history of chloracne at Dow ever since Dow began production of chlorophenol. As early as the late 1930's, Dow had information showing that there were contaminant byproducts of the chlorophenol manufacturing processes which were very toxic. A5707-A5710.

Dow's understanding was enhanced, when it, as well as other manufacturing defendants, were made aware of information regarding the toxic contamination of 2,4,5-T at the Boehringer facility in Germany in the 1950's. A6879-A6895; A3582; A3591-A3593; A5559-A5560; A7742. Between 1952 and 1954, 37 cases of serious chloracne had appeared at two Boehringer plants. The problem became so serious that production was halted and the plants were closed. A5518-A5520. When rabbits were placed on each of the floors with the doors and windows closed, they all died within five days. Autopsies showed pronounced liver changes and liver necrosis. Boehringer then wrote to other known manufacturers of 2,4,5-T, telling them of their efforts to deal with the problem, including constant testing of all production runs that were three times slower, all in an effort to protect the health of its workers and its customers. A5543-A5552; A5553-A5556; A5559-A5560.

A year later, when Dow had a major epidemic of chloracne, Dow called a meeting in Midland of all major manufacturers to finally develop a strategy for dioxin

contamination in their herbicide production. A3645-A3646, A3647-A3652, A3660-A3661, A5671-A5677, A6879-A6895. Rowe and others at Dow expressed deep concern that the manufacturers had to solve the problem before the government found out. Rowe at A6374-A6375. Not a single government representative was invited to attend. It was expressly limited "to the medical and toxicological people" working for the manufacturers. A7654 (February 25, 1965 letter from G.L. Lynn). Nor did Dow or any other Defendant convey the information disseminated at the meeting to any government representative. *See* A5660. The reason Dow did not reveal this information to the government appears in June 1965 correspondence from Rowe to Ross Mullholland of Dow Chemical of Canada:

> As you well know, we had a serious situation in our operating plants because of contamination of 2,4,5-[trichlorophenol] with impurities, the most active of which is 2,3,7,8-tetrachlorodibenzodioxin ["dioxin"]. This material is exceptionally toxic; it has a tremendous potential for producing chloracne and systemic injury. If it is present in the trichlorophenol, it will be carried through into the T acid and hence into ~~the~~ formulations which are to be sold to the public. One of the things which we want to avoid is the occurrence of any acne in consumers. I am particularly concerned here with persons who are using the material on a daily, repeated basis....<u>If this should occur, the whole 2,4,5-T industry will be hard hit and I would expect restrictive legislation, either barring the material or putting very rigid controls upon it. This is the main reason why we are so concerned that we clean up our own house from within, rather than having someone from without do it for us.</u> ...
>
> We are not in any way attempting to hide our problem under a heap of sand, <u>but we certainly do not want to have any situations arise which will cause the regulatory agencies to become restrictive. Our primary objective is to avoid this</u>.

> I trust that you will be very judicious in your use of this information. It could be quite embarrassing if it were misinterpreted or misused.

A5679-A5680 (emphasis supplied).

A month later, a confidential file memorandum from Hercules' J.P.Frawley summarized a conversation that he had with Dow's Earl Farnham in which Mr. Farnham confirmed Dow's desire to keep the hazards of dioxin from going public

> On July 9, 1965, Mr. Earl Farnham of Dow Chemical Company telephoned me stating that he was calling at the request of Mr. Donald Baldwin, Vice-President of Dow to inquire how serious I considered the chloracne problem in relation to consumer use of 2,4,5-T.....He then stated that Dow was extremely frightened that this situation might explode. *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 on the manufacture of pesticides which might result. I advised Mr. Farnham that we shared his fear but are not aware of his allegation that the competitors' products were hazardous. He asked if Hercules had established an internal specification. I stated that he should discuss this with someone in our management.

A5681 (emphasis added).

While Elmer P. Wheeler of Monsanto would later refer to Dr. Rowe as the "gentleman who 'opened up the can of worms' on the 2,4,5-T situation, A7655 (March 30, 1965, correspondence from Monsanto's Medical Director R. Emmet Kelley) notes as follows:

> I talked with the Hercules representative who attended the Dow meeting on the 2,4,5-T problem.... *Hercules also seems to believe that the Public*

> *Health Service would be very happy to get into the act*, whether or not the chloracne exists in the ultimate user. I must agree with them about this and it would seem almost mandatory that we see if we can first firm up our analytical methods and then devise ways to minimize the presence of the known chloracne agent. There is also another very good reason for us to do this. Regardless of what we think of the rabbit test, *this dioxane [sic] compound must be a potent contaminant. Very conceivably, it can be a potent carcinogen.* We, therefore, will never know how close we are to having another epidemic at Nitro and we certainly don't want to go through that again. A5678 (emphasis supplied).

In fact, despite having more knowledge than anyone about the contamination in chlorophenol production and the hazards of chloracne, Rowe testified in 1984 that he had no recollection of notifying any government agent involved with the selection or use of the herbicides in Vietnam about dioxin before 1969. Rowe at A6372. At a later deposition, he acknowledged that he did not write to the government and couldn't confirm that he ever formally informed the government between 1965 and some time after the November 1969 release of the Hazleton Bionetics studies concerning contaminants in trichlorophenol. A6785. Richard Hickman, Manager of Government Sales for Dow since 1963, knew dioxin was in 2,4,5-T and knew dioxin was a poison, but never advised anyone in the Department of Defense involved with purchasing or selecting 2,4,5-T that Agent Orange contained that poison. Hickman at A6188-A6190. In fact, Dow did not publish anything even about its ability to analyze for dioxins until 1973, although Dow had this information a decade earlier and communicated it to the other manufacturers in 1965. Crummett at A5678, A6055-1,

A6056-A6056-6, A6057-A6059, A7654, A6059-1-A6059-11 (article entitled "Determination of Chlorinated Dibenzo-p-dioxins and Dibenzofurans in Various Materials").

Dr. Julius Johnson, a member of the Dow Board of Directors, acknowledged that any public disclosure of what Dow knew about dioxin after November 1969 would have been the first time that Dow had made any such public disclosure about its dioxin knowledge. A7674-1-A7674-4.

He further stated that the disclosure to the United States government should have been made at least as early as 1964:

> Senator Hart: Then in June of 1964 you were concerned about the chloracne, and in your testimony you say I think that you notified a number of people. . . . why not the FDA and the U.S. Department of Agriculture?
>
> Dr. Johnson: At that time, Senator Hart, we considered our obligation discharged by removing the dioxin from our product, by notifying health authorities in the State ... In retrospect it would have been much preferred had we notified the U.S. Department of Agriculture, the agency that has statutory authority for the registration…The period of time between 1966 and now could have been shortened by sharing appropriate information, and I admit we could have assisted by volunteering earlier. But there seems to be some reverse togetherness and there seems to be great concern that communication between governmental agencies and industry is suspect and would be misused.

Dr. Julius Johnson testimony before the Subcomittee of Energy, Natural Resources and the Environment, April 7 and 15, 1970, at A7664, A7671.

Indeed, the government was never told that Dow had attempted to change their process specifications from the massively contaminated 2,4,5-T shipments that they were sending to the government in the early 1960s to a goal beginning in 1965 of a maximum contamination of 1ppm. This fact alone was sufficient for Judge Pratt to deny the defendants' summary judgment in 1983. (See *In re Joint Eastern & Southern District New York Asbestos Litig*., 897 F. 2d 626 (2d Cir. 1990). Judge Pratt wrote:

> If there is a real difference in the level of knowledge between Dow and the government it focuses on Dow's discovery in 1964 that dioxin was the chloracnegen in TCP[5], its development of a test to determine dioxin levels, and its development of techniques (partially through purchase from C.H. Boehringer Sohn Company) to reduce dioxin levels during the manufacturing process. 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. Related questions of fact are the actual dioxin levels in Dow's product and the actual hazards involved at different levels of dioxin…The fact remains that we do not know whether Dow's self-imposed 1ppm standard was a safe level for dioxin contamination of the 2,4,5-T…Thus, Dow's adoption of the 1ppm standard raises an issue of fact that precludes summary judgment.

---

[5] Actually, Dow had known this fact since the 1950's without reporting it to the government. As Dr. Julius Johnson testified before the Subcomittee of Energy, Natural Resources and the Environment, April 7 and 15, 1970, at 379: "In 1950 the Germans ran into difficulty with chloracne and they isolated the dioxin. This was in the process of manufacture of 2,4,5 trichlorophenol. We were aware of it." A7663.

In re: "Agent Orange" Product Liability Litigation, 565 F.Supp.1263,1270,1276 (E.D.N.Y. 1983).

Indeed, Monsanto's chief medical person, Dr. Emmett Kelly, stated that it was his belief that "one ppm of TDD [dioxin] could cause chloracne problems." A7675. This conclusion was based by Dr. Kelly on Monsanto's vast experience regarding the hazards of 2,4,5-T production and dioxin contamination.

Monsanto, like Dow, had a major incident involving serious injuries to its workforce in its 2,4,5-T manufacturing building. This occurred in 1949, (See A7676-A7680), after which Monsanto had considerable difficulty even getting its employees to go back to work in its 2,4,5-T manufacturing building. A7681. Internal Monsanto correspondence indicates: "The incidence of chloracne has been almost universal among personnel engaged in the manufacture of 2,4,5-trichlorophenol (TCP) and 2,4,5-trichlorophenoxyacetic acid (2,4,5-T). . . . [C]ases of varying severity have occurred consistently among operators primarily employed around the 2,4,5-T". A7685. Indeed, Monsanto dealt extensively with the toxic results of this massive dioxin exposure to its workers, handling numerous claims for worker's compensation.

Monsanto also thoroughly understood that the dioxin contaminant could cause systemic injuries. By 1953 Monsanto's plant physician had determined that a contaminant in the 2,4,5-T process caused damage to the peripheral nerve system. (Dr. Suskind at A3512-A3516). They, like the other manufacturers, were aware of

potential liver toxicity of these products. A7708-A7712,A7676-A7680. For this reason, Monsanto in 1961 had commissioned a closely guarded toxicological assessment of 2,4,5-T, performed by Younger Laboratories on rabbits near its St. Louis headquarters. A7713-A7718. This assessment found that: "Toxic symptoms included increasing weakness, tremors, salivation, diarrhea, and dyspnea. At autopsy there was liver discoloration together with renal and pulmonary hyperemia by macroscopic examination. The compound was classed as highly to extremely toxic" A7717. None of this was communicated to any government representative involved in the selection or purchase of 2,4,5-T.

In *Bogges vs. Monsanto*, Dr. Emmet Kelly of Monsanto testified as follows:

Q: So by March of 1965 you suspected that this dioxin was a very toxic substance; isn't that true?

A: That's true.

Yet, not only did Monsanto personnel hide the truth of the toxicity of these chemicals and the dioxin contamination of 2,4,5-T from the government, they also hid this knowledge from others in the company who should have been told this information. For instance, William J. McCarville, the Director of Sales in the Marketing Department form 1964 to 1968, was in charge of sales of 2,4,5-T and solicitations for bids would have come to his desk. Although he dealt with the government's specification and was the Monsanto person most familiar with

government procurement of the various Agents, he was never informed by anyone at Monsanto that dioxin was found in 2,4,5-T. In fact, even though he was assigned by Monsanto to regularly deal with the government in the purchase of 2,4,5-T, he didn't know until 1970 that TCDD was found in 2,4,5-T and he had only heard apocryphal stories about a problem in 1949. *See* A6608, A6616-A6618. Testimony of McCarville in *Adkins v. Monsanto*. It is incongruous for Monsanto to argue that the government contract representatives had to know about dioxin being in 2,4,5-T, as well as its toxicity, when Monsanto kept that information hidden from its own salesman.

Diamond had years of chloracne and liver problems in its workforce, including a major industrial incident, and was aware of both the dangerous nature of dioxin contamination of its product and the serious health effects caused to its worker population, (*see, e.g.,* A3707-A3708) and to its customers. In 1955, an internal investigation of the plant revealed that "the skin disease is serious" with an understanding that exposure resulted in the chloracnegen having hormonal effect on cell growth. A3566-A3568 (June 29, 1955 memo from Dr. York). Diamond was acutely aware of liver toxicity affecting its 2,4,5-T production workers, including several diagnoses of porphyria. A3608-A3609,A3614,A3614-1-A3614-3,A3615-A3616, A3617-A3621. And it is clear from the complaints of Diamond's customers that Diamond was aware of toxicity in the end product it was selling. A3603. In fact, Diamond's 2,4,5-T was at times so contaminated that Dow would not even accept

delivery of it, though neither Dow nor Diamond gave the government any notice of this fact. A5737-9.

Thompson also had a major incident which involved large numbers of its workforce suffering from chloracne and other dioxin related conditions. *See* A3702-A3703 (Letter dated February 15, 1967). Yet, long before this, Thompson, like the other defendants was aware of the toxicity of the 2,4,5-T products. A7719.

Hercules understood from toxicological investigation that effects could be seen as low as 100 ppb in rabbits, or at 1/10th of the Dow detection limit with effects including severe liver damage. A3644-1-A3644-2 (March 26 letter from C.L. Dunn) and A3676-A3688. Indeed, Hercules' Industrial Hygienist Emil Christofano was aware of the hepatotoxic nature of dioxin, however he never published on the subject after inquiring of Rowe and being told:

> In regard to publication…I think this requires a considerable amount of thought and premeditation with regard to possible consequences. *I feel that it would be a mistake to kick this in the public eye* until such time as we have answers to obvious questions. (Emphasis added)

See A3734. Hercules was also aware of health problems affecting end-users of 2,4,5-T products. A3706 (letter from JM Egan marked "confidential!").

These companies all were thus intimately familiar with the systemic nature of the injuries that these chemicals caused, particularly to the liver and as a suspected carcinogen. For these reasons, the companies referred to the 2,3,7,8-TCDD

contaminant of 2,4,5-T as “one of the most toxic materials known,” A5906 and “the most toxic compound they have ever experienced.” A3643. See also A3450-A3466, A3627-A3628, A3644-A3645, A5678, and A5679-A5680.

Furthermore, unlike the government, the chemical companies developed the internal ability to perform toxicological evaluations. Hercules conducted tests on its product, looking specifically for liver problems. Cristofano at A10662-2. By contrast, there is no evidence that those government individuals responsible for determining the specifications for Agent Orange were aware of the presence of dioxin in Agent Orange, how dioxin formation could be controlled, or its toxicity.

Because none of the Defendants communicated this information to anyone involved in selection of the herbicides for use in Vietnam or the drafting of the specifications until Dow did so in March of 1970, there is no evidence that any government officer involved in the defoliant contracts was aware that dioxin was present in the 2,4,5-T being sold to the government, much less that it was believed to be toxic. It is clear that the key government personnel did not know that dioxin was created as a part of the 2,4,5-T manufacturing process. Military scientists at the Chemical Warfare Laboratories at Edgewood Arsenal knew very little about either “dioxin” or 2,4,5-T. Far from knowing that “small quantities of dioxin” had caused “occupational injury to the workers,” scientists at Edgewood in the early 1960's had little knowledge of health problems at Dow or any other manufacturing facility of

2,4,5-T. Delmore at A6073-A6074 (first learned of dioxin in 1980 or 1981); *id.* at A6075 (never heard of chloracne); and *id.* at A6076-A6078-3 (never heard of industrial incidents); Frank L. Bauer, Director of Medical Division, at A5945-A5946; Francis W. Morthland, Deputy, Life Sciences Division of the Army Research Office, at A6353; A6359-A6361 (did not hear of dioxin or industrial accidents before 1970's); Brunildo A. Herrero, Chief of Experimental Pathology, at A6181-A6182 (first heard of dioxin in the 1970's); *id.* at A6185 (never heard of industrial accidents involving 2,4,5-T); *id.* at A6183 (knew nothing about manufacturing process); *id.* at A6184 (knew nothing about the rabbit ear test); and *id.* at A6185-A6186 (knew nothing about chloracne); John S. Leary, Jr., Chief Staff Officer for Pharmacology and Rodenticides, at A6282 (did not know chloracne could be caused by 2,4,5-T); William H. Summerson, Chief Scientist, US Army Chemical Corps Research and Development Command, at A6433,A6436 (never heard of dioxin until very recently before his deposition in the 1980's); John F. Callahan, Sr., Section Chief for Mechanics of Skin Penetration, at A5986 (first learned of dioxin in 1971); Seymour Silver, Technical Director for Scientific Activities, at A6392, A6393-A6394 (can't say when he first learned of dioxin); (unaware of industrial accidents); James Gardner, Deputy Director of Defense, Research and Engineering, at A6135 (unaware of industrial accidents); *id.* and A6142-A6143 (unaware of dioxin).

In 1962, ARPA sent a five man team to Vietnam to review and evaluate the nascent herbicide program. The team was headed by Gen. Delmore and included Dr. Minarik, Dr. Shaw, Levi Burcham and Donald Whittam. A6143-1. The team concurred that the program should continue with 2,4,5-T as a selected herbicide. A6143-1-A6143-12. None of the five people on this evaluation team knew anything about dioxin or chloracne. Minarik, *supra*; Shaw, *supra*; Delmore, *supra*; Whittam at A6501; Burcham at A5973. Neither did their superior, Dr. Harold Brown, who oversaw ARPA. Nor did his assistant James Gardner or Robert Heaston who worked on the herbicide program at ARPA. Brown. at A5966-A5977; Gardner at A6135, A6138-A6139, A6142-A6145; Heaston at A6165-A6168.

Most importantly, none of the persons involved in selecting and approving the Agents used in Vietnam knew that dioxin was present in any of the Agents. Hercules' counsel Krohley's affidavit, which was filed by Defendants in support of their summary judgment motion, notes that the original recommendation of 2,4,5-T for use in Vietnam came from Dr. J.W. Brown. Krohley Affidavit at A4176. While Brown apparently died before he could be deposed, there is no evidence that he knew anything about dioxin or chloracne. The person approving his recommendation was Dr. Minarik, Director of the Crops Division at Ft. Detrick, and neither he nor his assistant, Dr. Darrow, knew anything about dioxin or chloracne. Minarik at A6347,A6348-1; Darrow at A6061-6064; Irish at A6239-A6242.

Indeed, it is clear that those involved in the selection of the various Agents believed they were using commercial herbicides which were not toxic to humans or animals. McNamara at A6312,A6316; Brown at A5964,A5965,A5966,A5969; *see also* A6786,A6788,A6798-A6799,A6800-A6818 (ARPA, "Memorandum for the Record," November 6, 1962 (The criteria used for selection of chemicals includes "non-toxicity to humans and livestock" and "off the shelf availability.") A3381. Because the Defendants were producing 50 million pounds of these chemicals annually for agricultural uses, A4276. Colonel Brown and the rest of the Army relied on the manufacturer's commercial experience with these herbicides:

> The basic ingredients of the purple, pink (or white) and green coded materials have been used in large quantities for several years in the United States and their use will undoubtedly continue. During this time, many people have been exposed to them in their manufacture and use. Under these conditions harmful effects to humans have had ample opportunities to be expressed. .... One can surely conclude, therefore, that for their intended use, these products are not directly harmful to humans or to animals.

A12582.

In 1963, after 2,4-D and 2,4,5-T were recommended for more extensive use in Vietnam, the government held meetings to consider whether these compounds met the "non-toxic" requirement. Dow was asked to provide toxicological background. The words "dioxin" or "chloracne" do not even appear in any minutes of the 1963 meetings. Far from being informed about toxic contaminants, on May 9, 1963, the

President's Science Advisory Committee ratified the verdict of the Edgewood Arsenal meeting, again heavily relying on the commercial record. That government decision demonstrates how broad the gulf was between the knowledge of the chemical companies and that of the government:

> Since 1947 more than three-hundred million pounds have been produced and used to control vegetation on more than four-hundred million acres of land in the United States. Rates of application range from one-sixteenth to one-hundred-sixty pounds per acre.[6] The annual production is estimated to exceed fifty million pounds and fifty million acres are treated annually…Major manufacturers have certified that none of the workmen in their factories have shown any ill effects. Commercial spray operators report no adverse effects except for a very few allergic skin reactions. These companies report very few claims for damage to livestock and none of these have been proven.

A4774.

In conclusion, even if it is not now *absolutely* clear that Defendants, the manufacturers of 2,4,5-T and its toxic contaminant dioxin, knew more about their product's hazards than the government, there is more than sufficient evidence to present a triable issue of fact on that issue to a jury. See *Grispo*, *supra.* at 639 (where "there is abundant evidence that both Eagle Picher and the government had knowledge of the dangers of asbestos, the true extent of the knowledge, when it was acquired and when it was communicated, should be resolved at trial.") (Miner, J., concurring)

---

[6] Agent Orange was sprayed at 3 gallons, or about thirty pounds, per acre, well within the range of civilian agricultural use.

In Agent Orange I, even Judge Weinstein stated that the issue of relative knowledge "almost certainly would have been" submitted to a jury had the case not settled. 597 F. Supp. at 797. After the 1984 settlement, Judge Weinstein retracted that position and granted summary judgment against those who opted out of the settlement. Still, there is no question that since the Defendants never warned the Government directly, the Defendants' evidence on the relative knowledge issue is highly circumstantial, rooted in innuendo and supposition. As such, other courts addressing this issue have concluded it is not appropriate for summary judgment:

> The determination of how much knowledge both the (contractor) and the government had about the hazards of dioxin and Agent Orange, *is fact-intensive, and not suitable for summary judgment*. *William T. Thompson Company v. United States*, 26 Cl. Ct. 17, 24 (1992); *Hercules, Inc. v. United States*, 25 Cl. Ct. 616, 622 (1992). (Emphasis supplied)

H. *Boyle* Requires an Active Duty to Warn Those Involved in theSpecification and Contracting Process of the Hazards Known by the Manufacturer of a Product; Because Those Involved in the Specification and Contracting Process Knew Nothing about the Hazards of the Product Nor its Dioxin Content, the Third Prong of *Boyle* Cannot Be Met

One reason the government looked to the chemical companies as experts on 2,4,5-T, and asked the companies on several occasions about their experience with its toxicity is because in the 1960's, the Government had no central repository of toxicology information. Indeed, the President's Science Advisory Council issued a

report in 1966 lamenting the fact that toxicology information held by Government agencies was not readily shared:

> Each information service has tended to guard its own existence while none meet the unfilled information needs of the biomedical community. Each existing service, with rare exceptions, has developed as a separate entity unrelated to others, and is unconcerned and often incompatible with them. Many sources of toxicological information are untapped. Handling of Toxicological Information, A report of the President's Science Advisory Council, June 1966, at A3448.

By way of contrast, the same report noted that the chemical companies were in a superior research position to the Government:

> [Chemical] firms spend a substantial fraction of their research budgets on organized information services... These information services, which provide a sophisticated, professionally oriented information service to the firm's employees, supplement the traditional library services by such research and development-oriented services as complicated chemical search questions, critical evaluation and review of the literature, and attempts to cover unpublished information. *Id.*

In this case, no defendant claims that it relied on the government's knowledge of the dioxin problem. Nor do they claim awareness of that knowledge other than the Public Health Service investigation of Diamond and Monsanto after workers became ill during production. Most of the "government knowledge" defendants now allege was unknown to them until after the Agent Orange litigation was begun and they mounted a vast investigation of the files of other Government agencies. Rather than rely after the fact on a complicated web of circumstantial evidence to justify their intentional silence, Defendants should be required to meet their burden by showing,

either through affidavit, document or deposition testimony, that they: a) directly warned the government decision-makers involved in specifying and contracting with them of the hazards of the dioxin contaminant; or b) refrained from doing so only because they had knowledge that these decision- makers already knew the risks. While such an affidavit would still have to clearly state when and how the defendants informed the government decision-makers of the risk, *Sundstrom v. McDonnell Douglas Corp.*, 816 F.Supp. 577, 586 (N.D. CA. 1992), defendants never presented such an affidavit. They deliberately chose not to make any direct warnings to their customers, whether military or civilian.

By ruling that those who decided to use a product, create its specifications or negotiate the contract did not need to know the risks of the product they were ordering, the lower court undermined the purpose of the warning test in *Boyle,* which is meant to induce the contractor to disclose all the known risks to the government decision-makers so that they will be well-informed when they exercise their discretion in selecting a design. In *Boyle,* the Supreme Court adopted the warning requirement:

> 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. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting of information highly relevant to the discretionary decision.

Boyle, 487 U.S. 500, 512-13.

Thus, the warning requirement is an active one. It cannot be fulfilled by merely hoping that some distant member of the government incidentally came upon the knowledge in question. The Court of Appeals in *Trevino v. General Dynamics Corp* explained why this policy of informing the actual government decision-makers is necessary to the warning element in *Boyle*:

> This element clearly contemplates that the government's approval of the design will involve informed decisions and considered choices. . . . The (Supreme) Court's inclusion of a warning element must indicate that approval requires some level of evaluation and review; otherwise, the government contractor might argue one day that it should have the benefit of the defense, despite its failure to give a warning because the government has rubber stamped the design, because the information withheld would have been of no use to the government and was not desired by the government, and because the provision of the information would not have affected the Government's "approval" of the design.

865 F.2d 1474, 1481 (5th Cir. 1989).

Obviously, this level of evaluation and review can only take place if the persons exercising discretion to choose the design are the government employees with the relevant knowledge of the hazards. The duty to actually inform the government decision-makers makes sense, because, unlike the government, manufacturers are considered to be experts in their field, and the government is justified in looking to experts for information. *Gonzales v. Digital Equipment Corp.,* 8 F. Supp. 2d. 194, 198 (E.D.N.Y. 1998).

Finally, the imputed knowledge standard also flies in the face of the reasoning of this Court's decision in *Densberger v. United Technologies Corp*., 297 F.3d 66 (2d. Cir. 2002). That court stated that a trier of fact could conclude that a contractor acted unreasonably in failing to warn the government about risks, *even if those risks were already known to the government*, as long as the contractor was unaware that the government had the information.

Defendants' argument was also rejected by the Third Circuit in *Carley v. Wheeled Coach*, 991 F.2d 1117 (3rd Cir. 1993) which ruled that the knowledge prong of *Boyle* could only be satisfied if the knowledge was in the hands of the person or agency making the decision. *Carley* reversed a lower court holding that the knowledge which other branches of the government acquired by performing crash-worthiness tests relieved the government contractor of its duty to warn the GSA, the contracting agency, of dangers that were known to the contractor, but not to the GSA. The court concluded that summary judgment on the government contractor defense was not appropriate "absent a substantial showing that the *manufacturer* informed the government [i.e. the GSA] of known risks in the use of its product". *Id.* at 1127 (emphasis supplied).

I. Defendants Attempt to Overcome the Gross Disparity in Knowledge by Imputing the Knowledge of Others in Distant Departments to the Actual Contracting and Specifying Officers; However, this Sporadic and Incomplete Knowledge Cannot Immunize Defendants for Their Failure to Warn Those They Were Dealing with of Their Product's Hazards

In *Agent Orange I*, Judge Weinstein held that knowledge could not be imputed from one government official to another unless the agent with knowledge had a legal duty to transmit the information to the one without it. 597 F.Supp. at 796. In this opinion, Judge Weinstein identified five "agencies" which heretofore were allegedly aware of dioxin: the Public Health Service; The President's Science Advisory Council; the Army Chemical Corp. Chemical Warfare Laboratories; The Weldon Springs Project run by a private contractor, Thomson Sterns Roger, under the auspices of the Army Corp. of Engineers; and Bionetics Laboratory. Yet, the court made no findings that any of these agencies had a duty to transmit their knowledge to the people who selected, procured, and contracted with the Defendants for 2,4,5-T. Indeed, the PHS and Bionetics people did not even know the government was spraying 2,4,5-T in Vietnam; the PSAC was never formally charged with evaluating the defoliation program and did not get involved in any procurement or contracting decisions; the Army Chemical Warfare people evaluated dioxin in isolation and not as a contaminant of 2,4,5-T during the 1950's and were completely separate from the Crops Division at Ft. Detrick; and the three Weldon Springs engineers in Denver

didn't even disclose their knowledge to their own superiors in the Army Corps of Engineers, much less to the officials in charge of the crops division who selected Agent Orange. A7117,A7163,A7859-A7868, A7873-A7876, A7903-A7914.

Thus, the court ignored the contracting officials' ignorance of information that was rudimentary to the chemical companies, and, instead, strained to impute knowledge to them by concentrating on others with whom they had little or no contact. When *Boyle* spoke of hazards "not known to the United States," 487 U.S. at 512, the only sensible construction of "United States" can be "those agents of the United States who are exercising their discretion over the design." Otherwise, the *Boyle* comparative knowledge standard would really be applying a "should have known" standard to government decision-makers when *Boyle* only permits the government contractor defense if the Defendant had actually informed the pertinent government officials or knew they had actual knowledge of the hazards in question. *Trevino*, 865 F.2d at 1487. To impute the full knowledge of the entire United States government, which probably has access to every fact known to humankind, to these government purchasing officers would eviscerate the warning requirement. The result would be to perversely reward a contractor who discloses the risks to any government entity *but* the one involved with the selection of the design and contracting for the product.

Defendants' far-flung imputed knowledge construct places an impossible duty on the government when *Boyle* plainly places the duty on the contractor. *Boyle* does not require the government officer to assemble the pieces of a jigsaw puzzle or even "connect the dots" in order to learn the risks of the product contracted for.

For instance, in *Mason v. Texaco, Inc.*, 741 F.Supp. 1472 (D. Kan. 1990), the court refused to impute knowledge to the Coast Guard of the carcinogencity of benzene simply because the Coast Guard's manager of industrial hygiene was a member of the American Conference of Governmental Industrial Hygienists. The mere fact that the Coast Guard's industrial hygienist had access to these documents did not impute him with knowledge without specific evidence that he had actually reviewed the ACGIH reports. *Id*. at p. 1485.

Similarly in government contract litigation between the government and contractors, it has long been the rule that one federal agency should not be charged with knowledge of what another is doing simply because they are both components of the same federal government. *Bateson-Stolte, Inc. v. United States*, 172 F. Supp. 454, 457 (1959); 305 F.2d 386 (CT CL. 1962) ("in a business so vast as that engaged in by the United States Government, within its multitudinous departments, bureaus and independent agencies, with various and sundry projects scattered all over the world, it is impossible for one department to know what another department is going to do.")

In *United States v. Weinstein*, 1998 U.S. Dist. Lexis 61 (E.D. NY) the defendant was prosecuted for mail fraud, because he deliberately misrepresented the quality of Chem suits purchased by the Coast Guard on an emergency basis due to the exigencies of the Persian Gulf War. The defendant failed to disclose that the Chem suits had been rejected by earlier inspections performed by the Department of Defense. The defendant argued that there was no fraud, because the Coast Guard could and should have known what the Defense Department did. Even though the Coast Guard was part of the Department of Defense, the court rejected this argument, stating that "one federal agency should not be charged with knowledge of what another is doing simply because both are components of the same federal government". *Id*. at *18. *Weinstein* cannot be reconciled with defendants "imputed knowledge" theory. If the defendants are right, a member of the Coast Guard who suffered a catastrophic injury in the Gulf War because the Chem suit was defective would have no claim against the seller if someone in a different branch of the Defense Department knew of the defects.

J. This Court Should Reverse the Trial Court's Denial of Plaintiffs' Motion to Amend

The lower court denied Plaintiffs' Motion to Amend on the same day that it granted summary judgment. 220 FRD 22. In doing so, the court conceded that even though the motion came years after the complaint was filed, the fact that almost all

of that time was spent on appeal "would normally constitute a satisfactory excuse." 220 FRD at 25. The court's statement that leave to amend should be denied, because it would require too much time and effort for the new defendants to "acquaint themselves with this litigation" is untenable. *Id*. at 26. All of the same defendants were sued in the Isaacson case and a number of other "Agent Orange" cases pending in the lower court.

Finally, the court's statement that "no new theory would override any new defendant's government contractor defense" and that an amendment would be "futile," (*Id.*) contradicts its statement, made in the same case on the very same day, that "to ensure due process" it was staying its decision granting summary judgment to permit discovery and a motion for reconsideration. 304 F. Supp 2d at 442. Due process could not have been assured if the court had already determined that, no matter what discovery might reveal, the amendment could not survive the government contractor defense.

Accordingly, the court's denial of the motion of amend was an abuse of discretion and should be reversed.

VII. CONCLUSION

Summary judgment should be reversed. Plaintiffs' motion to file a Superceding Complaint should be granted. Discovery as described in the brief of the Isaacson Plaintiffs should be granted.

Respectfully Submitted,

SMOGER & ASSOCIATES, P.C.

/s/ Gerson H. Smoger
GERSON H. SMOGER, ESQ.
SMOGER & ASSOCIATES, P.C.
3175 Monterey Blvd., Suite 3
Oakland, CA 94602
(510) 531-4529
FAX (510) 531-4377

MARK R. CUKER, ESQ.
WILLIAMS CUKER BEREZOFSKY
1617 J.F.K. Boulevard, Suite 800
Philadelphia, PA 19103
(215) 557-0099
FAX (215) 557-0673

ATTORNEYS FOR APPELLANTS

VIII. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) because: this brief contains 13,391 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Wordperfect in 14-point Times New Roman.

SMOGER & ASSOCIATES, P.C.

By: /s/ Gerson H. Smoger
GERSON H. SMOGER, ESQ.
SMOGER & ASSOCIATES, P.C.
3175 Monterey Blvd., Suite 3
Oakland, CA 94602
(510) 531-4529
FAX (510) 531-4377

Dated: June 23, 2006

CERTIFICATIONS PURSUANT TO LOCAL RULE 32(a)(1)

I, Stephen Peabody, hereby certify that: a converted PDF version of the foregoing brief was created and compared to the paper original and found to be a true and complete copy thereof. Said PDF version of the foregoing brief was also scanned for viruses using Symantec AntiVirus Full Version 10.0.0.359. No viruses were detected. Said PDF version was also submitted to the Court and opposing counsel via e-mail attachment.

_____

Stephen Peabody