In The

SUPREME COURT OF FLORIDA

No. 69,319

JOSEPHINE DORSE, etc., *et al.*,

Plaintiffs-Appellees,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*,

Defendants,

EAGLE-PICHER INDUSTRIES, INC.,

Defendant-Appellant.

On Certification from the
United States Court of Appeals
for the Eleventh Circuit

INITIAL BRIEF OF APPELLANT EAGLE-PICHER INDUSTRIES, INC.

Susan J. Cole
Florida Bar No. 270474
BLAIR & COLE
2801 Ponce de Leon Boulevard
Coral Gables, Florida 33134
(305) 444-2400

Joe G. Hollingsworth
Edward M. Fogarty
SPRIGGS, BODE & HOLLINGSWORTH
1015 15th Street, N.W.
Washington, D.C. 20005
(202) 898-5800

Attorneys for Appellant
Eagle-Picher Industries, Inc.

September 29, 1986

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS..................................	i
TABLE OF AUTHORITIES...............................	ii
STATEMENT OF THE CASE..............................	1
ISSUE PRESENTED FOR REVIEW.........................	7
May the defendant in a strict products liability case avoid liability by alleging and showing that (1) it manufactured and sold its product in accordance with mandatory specifications set forth in goverment contracts, and (2) it apprised the government of any hazards associated with the product that it knew of and of which the government was not aware?	
SUMMARY OF ARGUMENT................................	7
ARGUMENT...	12
I. Florida Law Already Recognizes the Basic Principles Underlying Application of the Government Contract Specification Defense................	12
II. Important Public Policy Considerations Support Application of the Government Contract Specifiction Defense in the Circumstances Presented Here.........	15
III. Application of the Government Contract Specification Defense in the Circumstances Presented Here Is Entirely Consistent With Florida Strict Products Liability Law........	22
CONCLUSION...	28

TABLE OF AUTHORITIES *

Cases:	Pages
Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982)	9,15,26
Brown v. Caterpillar Tractor Co., 741 F.2d 656 (3d Cir. 1984)	9
Burgess v. Colorado Serum Co., 772 F.2d 844 (11th Cir. 1985)	7,9
Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985)	5,9,19
Bynum v. General Motors Corp., 599 F. Supp. 155 (N.D. Miss. 1984), aff'd, 770 F.2d 556 (5th Cir. 1985)	14
Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S. 2d 400 (Sup. Ct. Bronx Cty. 1980)	10,19
Davis v. Henderlong Lumber Co., 221 F. Supp. 129 (N.D. Ind. 1963)	12-13
Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965)	10
Dorse v. Armstrong World Industries, Inc., No. 85-5334 (11th Cir. Sept. 9, 1986)	6,7
Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986)	9
*Edward M. Chadbourne, Inc. v. Vaughn, No. 66,413 (Fla. July 17, 1986)	21,22,23 24,28
Ference v. Booth & Flinn Co., 370 Pa. 400, 88 A.2d 413 (1952)	15
Fitzgibbon v. Western Dredging Co., 141 Iowa 328, 117 N.W. 878 (1908)	14

---

* Cases and other authorities principally relied upon herein are indicated by asterisks.

Cases (Continued): Pages

Foster v. Day & Zimmerman, Inc.,
502 F.2d 867 (8th Cir. 1974) 20

Garrison v. Rohm & Hass Co.,
492 F.2d 346 (6th Cir. 1974) 12

Green v. ICI America, Inc.,
362 F. Supp. 1263 (E.D. Tenn. 1973) 10

Hunt v. Blasius,
55 Ill. App. 2d 14, 370 N.E. 2d 617 (1977),
aff'd, 74 Ill.2d 203, 384 N.E.2d 368 (1978) 10,16

In re "Agent Orange" Product Liability Litigation,
597 F.Supp. 740 (E.D.N.Y. 1984) 5,7-8,9-10

*In Re Agent Orange Product Liability Litiation,
534 F. Supp. 1046 (E.D.N.Y. 1982) 3-4,8,10
18,19,25

*In re "Agent Orange" Product Liability Litigation,
506 F. Supp. 762 (E.D.N.Y.), rev'd on other
grounds, 635 F.2d 987 (2d. Cir. 1980)
cert. denied, 465 U.S. 1067, 104 S.Ct. 1417,
79 L.Ed.2d 743 (1984) 8,10,16

*In re Air Crash Disaster at Mannheim Germany,
769 F.2d 114 (3d Cir. 1985), cert. denied sub nom.
Eschler v. Boeing Co., 470 U.S. __, 106 S.Ct. 851,
84 L.Ed.2d 432 (1986) 7,15,17

*Koutsoubos v. Boeing Vertol,
755 F.2d 352 (3d Cir.), cert. denied,
54 U.S.L.W. 3323 (U.S. Oct. 7, 1985) 5,7,9,17

Littlehale v. E.I. du Pont de Nemours & Co.,
68 F. Supp. 791 (S.D.N.Y.),
aff'd, 380 F.2d 274 (2d Cir. 1967) 10

Matthews v. Lawnlite Co.,
88 So.2d 299 (Fla. 1956) 22

M.C. Winters, Inc. v. Eubank,
456 S.W. 2d 500 (Tex. Civ. App. 1970) 20

McCabe Powers Body Co. v. Sharp,
594 S.W. 2d 592 (Ky. 1980) 10

McKay v. Rockwell International Corp.,
704 F.2d 444 (9th Cir. 1983), cert. denied,
464 U.S. 1043 (1984) 9,17,25

Cases (Continued): Pages

McLaughlin v. Sikorsky Aircraft,
148 Cal. App. 3d 203, 195 Cal. Rptr. 764 (1983)..... 10

Myers v. United States,
323 F.2d 580 (9th Cir. 1963)........................ 9

Orion Insurance Co. Ltd. v. United Technologies
Corp., 502 F. Supp. 173 (E.D. Pa. 1980)............. 12,13

*Rawls v. Ziegler,
207 So.2d 601 (Fla. 1958)........................... 4,8,14-15
22-23,28

Roland v. Jumper Creek Drainage District,
4 F.2d 719 (S.D. Fla. 1925)......................... 4,8,13-
14,28

Ryan v. Feeney & Sheehan Bldg. Co.,
239 N.Y. 43, 145 N.E. 321 (1924).................... 12

Sanner v. Ford Motor Co.,
144 N.J. Super. 1, 364 A.2d 846 (1978).............. 10,18-19

Spangler v. Kranco, Inc.,
481 F.2d 373 (4th Cir. 1973)........................ 12

Tillet v. J.I. Case Co.,
756 F.2d 591 (7th Cir. 1985)........................ 9,17

Tozer v. LTV Corp.,
792 F.2d 403 (4th Cir. 1986)........................ 9,17-18

Valley Forge Gardens, Inc. v. James D.
Morrissey, Inc., 395 Pa. 477, 123 A.2d
888 (1956).. 10,15

*West v. Caterpillar Tractor Co.,
336 So.2d 80 (Fla. 1976)............................ 22-23,
23-24,28

Yearsley v. W.A. Ross Construction Co.,
309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940)...... 13

Statute: | Pages

28 U.S.C. § 1291 6

Other Authorities:

Note, "Liability of a Manufacturer for Products Defectively Designed by the Government," 23 B.C. L. Rev. 1025 (1982) 20,21-22

Uniform Product Liability Law, 44 Fed. Reg. 62714 (Oct. 31, 1979) (U.S. Dept. of Commerce) 26

In The

SUPREME COURT OF FLORIDA

No. 69,319

JOSEPHINE DORSE, etc., et al.,

Plaintiffs-Appellees,

v.

ARMSTRONG WORLD INDUSTRIES, INC., et al.,

Defendants,

EAGLE-PICHER INDUSTRIES, INC.,

Defendant-Appellant.

On Certification from the
United States Court of Appeals
for the Eleventh Circuit

INITIAL BRIEF OF APPELLANT
EAGLE-PICHER INDUSTRIES, INC.

STATEMENT OF THE CASE

This matter arises out of a civil suit filed by Alfred and Josephine Dorse, husband and wife, on October 27, 1982, in the United States District Court for the Southern District of Florida, against 10 corporations, including appellant Eagle-Picher Industries, Inc. ("Eagle-Picher"), which formerly manufactured or distributed asbestos-containing insulation products for the United States Government.

(Record on Appeal [hereinafter cited as "R"], at vol. 1, pp. 1-13; vol. 2, pp. 261-83.)

By their complaint, plaintiffs alleged that Mr. Dorse had suffered personal injury as the result of exposure to defendants' asbestos-containing insulation products during the course of his employment in the construction and repair of United States naval vessels at the New York Naval Shipyard in Brooklyn, New York, between 1942 and 1946. (R. at vol. 1, pp. 7, 8, 167, 173-75; vol. 2, pp. 269-70.)

Subsequent to the filing of plaintiffs' complaint, Mr. Dorse died. (R. at vol. 2, pp. 255, 270.) Mrs. Dorse thereafter filed an amended complaint under Florida's wrongful death and survival statutes for injuries she suffered individually and as a representative of Mr. Dorse's estate. (R. at vol. 2, pp. 261-83.) Plaintiff's cause of action against all defendants, including Eagle-Picher, was predicated on products liability theories sounding in negligence, strict liability and breach of implied warranty. (R. at vol. 2, pp. 272-75.)

In answer to those claims, Eagle-Picher asserted the "government contract specification defense," an affirmative defense premised on the fact that Eagle-Picher manufactured and sold "Super 66" (an asbestos-containing high-temperature thermal insulation cement) to the United States Navy and the New York Naval Shipyard in Brooklyn, New York, pursuant to federal government procurement contracts and in strict compliance with government contract specifications which

expressly mandated the use of asbestos as a principal ingredient. (R. at vol. 1, p. 190.)

Eagle-Picher moved the district court for summary judgment, on the grounds that it had satisfied each element of the government contract specification defense: (i) The Government established and contractually enforced the subject specifications; (ii) Eagle-Picher manufactured Super 66 in strict compliance with those specifications; and (iii) the Government's knowledge of the hazards of occupational exposure to airborne asbestos dust was at all times equal to or greater than Eagle-Picher's knowledge. (R. at vol. 3, pp. 415-16.)

The district court denied Eagle-Picher's motion for summary judgment, stating that the Florida courts had not yet "explicitly recogniz[ed] and appl[ied] the government specification defense" in strict liability cases.[1] (R. at

---

[1] In denying Eagle-Picher's Motion for Summary Judgment, the district court acknowledged that:

> Jurisdictions which allow the government specification defense require that the defendant contractor must satisfy two elements under the defense: First, it must comply carefully and fully with the Government's specifications; second, it must apprise the Government of any hazards, unknown to the Government, associated with the product, of which the contractor is aware and which might affect the Government's decision to specify its use. In Re Agent Orange Product Liability Litigation, 534 F. Supp. 1046,

(Footnote Continued)

vol. 4, pp. 616.) The district court discounted Rawls v. Ziegler, 107 So.2d 601 (Fla. 1958) -- a decision in which this Court recognized and applied the defense -- because Rawls "involved a negligence claim as distinguished from the instant case involving strict products liability and the allegation of failure to warn." (R. at vol. 4, p. 617.) The court concluded that Rawls was therefore "not persuasive authority for the defendant's proposition that the Florida courts would likely adopt the government specification defense in the case at bar." (Id.)[2]

(Footnote Continued)
1057 (E.D.N.Y. 1982).

(R. at vol. 4, p. 617.)

The district court also ruled that there existed genuine issues of material fact (concerning the relative knowledge of Eagle-Picher and of the United States Government regarding the hazards associated with occupational exposure to asbestos) which rendered the entry of summary judgment inappropriate. (R. at vol. 4, p. 618.)

[2]Eagle-Picher subsequently moved the district court to reconsider its ruling that the government specification defense was inapplicable to strict-liability claims under Florida law. (R. at vol. 4, pp. 619-20.) Eagle-Picher argued that, in Rawls v. Ziegler, supra, this Court had ruled that an independent contractor who non-negligently follows the plans and specifications provided by his employer is immune from product-liability claims by third parties. Moreover, Eagle-Picher pointed out to the court that, under Roland v. Jumper Creek Drainage District, 4 F.2d 719 (S.D. Fla. 1925), an independent contractor is immune from third-party liability where he follows the plans and specifications provided by the state government. The district court denied Eagle-Picher's motion for reconsideration without opinion . (R. at vol. 4, p. 629.) Eagle-Picher did not seek reconsideration of the district court's determination that there exists a genuine issue of material fact with respect to the "relative knowledge" element of the defense.

Plaintiff then moved the district court to strike the government specification defense from Eagle-Picher's answer. (R. vol. 4, pp. 635-38.)[3] The district court granted plaintiff's motion, again stating that "there are no Florida cases which have explicitly recognized or applied the government specification defense" in a strict-liability context. (R. at vol. 4, p. 711.)[4]

---

[3]Eagle-Picher opposed that motion, arguing, inter alia, (i) that, although the Florida courts had not explicitly recognized the defense in the precise circumstances presented here, they would recognize the defense if presented with the issue; (ii) that material issues of fact existed which made the summary striking of the defense here inappropriate; and (iii) that the district court should also address the availability of the defense as a matter of federal common law. See Defendant Eagle-Picher Industries, Inc.'s Memorandum of Law in Opposition to Plaintiff's Motion to Strike Government Specification Defense, at 3-6, 6-8, 8-11 (filed Oct. 16, 1984). (R. at vol. 4, pp. 641-710.)

In support of its suggestion that the availability vel non of the defense should also be addressed as a matter of federal common law, Eagle-Picher cited In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 845-47 (E.D.N.Y. 1984). Since the conclusion of the proceedings in the district court, at least two federal courts of appeals have treated and upheld the validity of the defense as a matter of federal common law. See Bynum v. FMC Corp., 770 F.2d 556, 567-68 (5th Cir. 1985); Koutsoubos v. Boeing Vertol, 755 F.2d 352, 354-55 (3d Cir.), cert. denied, 54 U.S.L.W. 3323 (U.S. Oct. 7, 1985).

[4]Had the district court not stricken the defense from Eagle-Picher's answer, Eagle-Picher would have demonstrated conclusively that it has satisfied all elements of the government specification defense. First, Eagle-Picher manufactured Super 66 according to government specifications which dictated specific product content -- expressly requiring the use of asbestos -- and set rigorous performance, inspection and testing standards. (Supplemental Record [hereinafter cited as "Supp. R."] pp. 21-24, 87-89, 95-98.) Second, the Government tested and (Footnote Continued)

On February 26, 1985, the district court directed entry of final judgment in favor of plaintiff and against Eagle-Picher. (R. at vol. 4, pp. 714-15.)[5] Eagle-Picher thereupon appealed to the Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. § 1291.

On September 9, 1986, the court of appeals "determined that this case presents a controlling question of law which should be certified to the Florida Supreme Court." Dorse v. Armstrong World Industries, Inc., No. 85-5334 (11th Cir. Sept. 9, 1986) (Slip Opinion, at 5106-07).

(Footnote Continued)
approved Super 66, which complied at all times with the government specifications and all relevant standards. (Supp. R. at pp. 24-31, 87-90, 98-99.) Third, the Government was aware at least as early as 1939 of the hazards of exposure to asbestos-containing insulation products at the New York Naval Shipyard, where plaintiff's decedent was employed. (Supp. R. at pp. 35-46.) By contrast, Eagle-Picher had no such knowledge of these risks until many years later. (Supp. R. at pp. 46-52, 99-100.)

[5]With Eagle-Picher deprived of its principal defense to plaintiff's claims, the parties and the court all recognized that no purpose would be served by a trial on the question of liability. In the interest of avoiding wasteful expense and delay, and in the interest of judicial economy, the parties entered into -- and the district court approved -- a "Stipulation for Judgment" (R. at vol. 4, pp. 716-18), by which Eagle-Picher (i) stipulated to the entry of final judgment in favor of the plaintiff, subject to its continued objection to the district court's disallowance of the government contract specification defense; (ii) continued to assert its right to prove entitlement to the protection of that defense; and (iii) preserved its right to appeal from the district court's striking the defense. See Dorse v. Armstrong World Industries, Inc., No. 85-5334 (11th Cir. Sept. 9, 1986) (Slip Opinion, at 5108, 5110-11 & n.4).

ISSUE PRESENTED FOR REVIEW

As articulated by the court of appeals, the issue presented for resolution by this Court is the following:

> May the defendant in a strict products liability case avoid liability by alleging and showing that (1) it manufactured and sold its product in accordance with mandatory specifications set forth in government contracts, and (2) it apprised the government of any hazards associated with the product that it knew of and of which the government was not aware?

Id. (Slip Opinion, at 5111).

SUMMARY OF ARGUMENT

The government contract specification defense is an absolute defense to product-liability claims against government-contract manufacturers, where, as here:

1. The Government established and contractually enforced specifications pursuant to which the allegedly injurious product was manufactured and procured;

2. The product complied with the Government's specifications in all material respects; and

3. The Government possessed knowledge concerning hazards associated with the use of the product which was greater than or equal to that of the manufacturer.

See Burgess v. Colorado Serum Co., 772 F.2d 844 (11th Cir. 1985) (applying Alabama law); In re Air Crash Disaster at Mannheim Germany, 769 F.2d 115 (3d Cir. 1985) (applying Pennsylvania law); Koutsoubos v. Boeing Vertol, 775 F.2d 352 (3d Cir. 1985) (applying federal common law); In re "Agent

Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984) ("Agent Orange III") (federal common law); In re "Agent Orange" Product Liability Litigation, 534 F. Supp. 1046 (E.D.N.Y. 1982), cert. denied, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984) ("Agent Orange II") (same); In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y.), rev'd on other grounds, 635 F.2d 987 (2d Cir. 1980), cert. denied, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984) ("Agent Orange I") (same).

Although it has never had occasion to address the availability of the government contract specification defense in the precise circumstances presented here, this Court has long recognized that,

> as to independent contractors, all authorities recognize that there is no liability if the contractor merely follows the plans, directions and specifications of his employer, since in that case the responsibility is assumed by the employer, at least where the plans are not so obviously dangerous that no reasonable man would follow them.

Rawls v. Ziegler, 107 So.2d 601, 605 (Fla. 1958). Accord, Roland v. Jumper Creek Drainage District, 4 F.2d 719, 721-22 (S.D. Fla. 1925). This is the basic principle from which the modern government contract specification defense is derived, and on the basis of which numerous jurisdictions have specifically adopted and applied that defense in circumstances similar to those presented here.

The overwhelming weight of authority[6] and compelling

---

[6] See, e.g., Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986) (manufacturer of defective airplane part relieved from liability, under any theory, where manufacturer fully complied with government specifications and did not fail to notify government of dangers unknown to government); Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986) (manufacturer of defective helicopter rotor system not liable where manufacturer modified the rotor design under direction of the Navy); Burgess v. Colorado Serum Co., Inc., 772 F.2d 844 (11th Cir. 1985) (manufacturer of brucellosis vaccine not liable to injured veterinarian where vaccine was produced pursuant to detailed government specifications); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985) (manufacture of cargo carrier in compliance with government specifications shields contractor from negligence, breach of warranty and strict liability claims); In re Air Crash Disaster at Mannheim Germany, 769 F.2d 115 (3d Cir. 1985), cert. denied sub. nom. Eschler v. Boeing Co., 470 U.S. __, 106 S.Ct. 851, 84 L.Ed.2d 432 (1986) (manufacturer relieved from liability where it followed government design specifications and no design modifications could be made without prior government review and testing); Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985) (manufacturer relieved from liability where commercial product was inspected and approved by the government); Koutsoubos v. Boeing Vertol, 755 F.2d 352 (3d Cir. 1985), aff'g 553 F. Supp. 340 (E.D. Pa. 1982), cert. denied, 54 U.S.L.W. 3323 (U.S. Oct. 7, 1985) (manufacturer of defectively designed helicopter absolved from liability in strict liability and negligence by virtue of compliance with government specifications); McKay v. Rockwell International Corp., 704 F.2d 444 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984) (strict liability claims for injuries sustained as a result of defectively designed aircraft ejection system defeated by manufacturer's compliance with government-approved specifications); Brown v. Caterpillar Tractor Co., 741 F.2d 656 (3d Cir. 1984) ("Brown II"); Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982) ("Brown I") (manufacture of bulldozer in accordance with government contract specifications provides a complete defense to personal injury claims based on failure to include safety device, whether phrased in negligence, strict liability, or breach of warranty); Myers v. United States, 323 F.2d 580 (9th Cir. 1963) (compliance with government specifications defeats tort action arising out of faulty road construction); In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984)

(Footnote Continued)

public policy considerations -- founded in the doctrine of separation of powers, the need for orderly and rational government procurement, and basic notions of fairness -- support the adoption and application of the government

---

(Footnote Continued)
("Agent Orange III"); In re "Agent Orange" Product Liability Litigation, 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982) ("Agent Orange II"); In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y.), rev'd on other grounds, 635 F.2d 987 (2d Cir. 1980) ("Agent Orange I") (suppliers of chemical defoliant not liable for injuries where manufacturers complied with government specifications and did not conceal knowledge of hazards from the government); Green v. ICI America, Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973) (contractor not liable for nuisance created by operation of plant in accordance with government specifications); Littlehale v. E.I. duPont de Nemours & Co., 268 F. Supp. 791, 803-04 n.17 (S.D.N.Y.), aff'd, 380 F.2d 274 (2d Cir. 1967) (compliance with military specifications, which did not require warnings, absolves manufacturer of liability for prematurely exploding detonator caps); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965) (suit for damages resulting from fumes from improperly placed dredge soil barred by contractor's compliance with government plans); McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764 (1983) (defense available to defeat strict liability claims); Hunt v. Blasius, 55 Ill. App. 2d 14, 370 N.E.2d 617 (1977), aff'd, 74 Ill.2d 203, 384 N.E.2d 368 (1978) (compliance with government specifications insulates contractor from liability for allegedly unsafe highway signposts); McCabe Powers Body Co. v. Sharp, 594 S.W.2d 592 (Ky. 1980) (manufacturer not liable for injuries caused by defective design and failure to warn where aerial boom was manufactured in compliance with government specifications); Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 846 (Law Div. 1976), aff'd, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), cert. denied, 75 N.J. 616, 384 A.2d 846 (1978) (adherence to military specifications shields manufacturer from liability for defectively designed jeeps); Casabianca v. Casabianca, 104 Misc.2d 348, 428 N.Y.S.2d 400 (Sup. Ct. Bronx Cty. 1980) (manufacturer not liable for defective dough-making machine supplied pursuant to military specifications); Valley Forge Gardens, Inc. v. James D. Morrissey, Inc., 385 Pa. 477, 123 A.2d 888 (1956) (contractor immune from liability where work was performed in accordance with government plans and specifications).

contract specification defense, as a matter of Florida law, in the instant litigation.

Finally, application of the government contract specification defense is warranted here not only in defense of negligence claims, but also as a bar to strict-liability claims such as those advanced by the plaintiff in this case. Notwithstanding the reservations expressed by the district court in its consideration of this case, application of the defense here is entirely consistent with, and would not in any respect frustrate, those public policies underlying Florida's strict products liability law.

For all of these reasons, as set forth more fully hereinbelow, this Court should now rule expressly that a government contractor/defendant in a strict products liability case may avoid liability by alleging (as Eagle-Picher has alleged) and showing (as Eagle-Picher is prepared to show) that (1) it manufactured and sold its product in accordance with mandatory specifications set forth in government contracts, and (2) it apprised the government of any hazards associated with the product that it knew of and of which the government was not aware.

ARGUMENT

I. Florida Law Already Recognizes the Basic Principles Underlying Application of the Government Contract Specification Defense.

The government contract specification defense derives from the established tort principle, recognized by the courts at least since 1924,[7] that an independent contractor is not liable to third parties injured as the result of his activities "if he has merely carried out carefully the plans, specifications and directions given him, since in that case the responsibility is assumed by the employer, at least where the plans are not so obviously defective and dangerous that no reasonable man would follow them." W. Prosser, Law of Torts § 104, at 681 (4th ed. 1971).[8]

---

[7] See Ryan v. Feeney & Sheehan Bldg. Co., 239 N.Y. 43, 44, 145 N.E. 321, 321-22 (1924) ("A builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow, unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury.").

[8] See e.g., Garrison v. Rohm & Hass Co., 492 F.2d 346, 351-53 (6th Cir. 1974) (dismissing various claims, including strict liability claim of failure to warn, for injuries resulting form dolly manufactured pursuant to specifications prepared by plaintiff's employer); Spangler v. Kranco, Inc., 481 F.2d 373, 375 (4th Cir. 1973) (dismissing claims for injuries resulting from a crane manufactured in accordance with specifications provided by defendant's customer); Orion Insurance Co., Ltd. v. United Technologies Corp., 502 F. Supp. 173, 176 (E.D. Pa. 1980) (dismissing strict liability claim against a manufacturer of a helicopter component, based upon defective design and manufacture, on the ground that the manufacturer had produced the component in compliance with specifications issued by a third party); Davis v. Henderlong Lumber Co., 221 F. Supp. 129, 134 (N.D.
(Footnote Continued)

The United States Supreme Court first recognized the government contract specification defense in Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940), holding that a federal contractor was not liable for injuries to private property resulting from erosion caused by the contractor's construction of dikes in accordance with government plans. The same principle has been applied in a wide variety of cases to defeat claims sounding both in negligence and in strict liability for injuries resulting from a manufacturer's compliance with specifications issued by its customer.

In 1925, some 15 years before the United States Supreme Court's decision in Yearsley, the United States District Court for the Southern District of Florida itself recognized and adopted the principles upon which the government contract specification defense is based. In Roland v. Jumper Creek Drainage District, supra, the court held that a contractor was not liable for injuries to private property resulting from an overflow caused by the construction of canals and ditches in accordance with plans and specifications approved and provided by the state drainage district:

> "[T]he ditch being constructed by the state acting through its local agencies in the exercise of its power of eminent domain, the contractor and laborers who

---

(Footnote Continued)
Ind. 1963) (dismissing claims against prime and subcontractor for plaintiff's exposure to toxic laboratory fumes on ground that laboratory had been constructed in compliance with plans furnished by plaintiff's employer).

> do the work of actual excavation are not liable for damages which naturally result to said lands from carrying the scheme or plan of drainage into execution. In other words, if the contractor or laborer makes the ditch substantially in accordance with the plan furnished him, taking reasonable care . . . he is not charged with responsibility for injurious effects which naturally follow the [state government] authorized improvement."

4 F.2d at 722 (quoting Fitzgibbon v. Western Dredging Co. 141 Iowa 328, 117 N.W. 878 (1908)) (emphasis added).[9]

Thirty-three years later, in Rawls v. Ziegler supra, this Court, too, held that an independent contractor who had non-negligently followed the plans and specifications of his employer had a complete defense to product liability claims:

> [A]s to independent contractors, all authorities recognize that there is no liability if the contractor merely follows the plans, directions and specifications of his employer, since in

---

[9]The import of Roland was recently underscored by the United States District Court for the Northern District of Mississippi, which adopted and applied the modern government contract specification to defeat strict-liability claims such as those asserted here:

> Public contractors have long been accorded immunity from tort under state law when the injury complained of does not result from performing the work in a tortious manner, see, e.g., Roland v. Jumper Creek Drainage District, 4 F.2d 719, 721-22 (D.C. Fla. 1925) (non-liability of contractor hired by state for damage resulting from construction according to plans of state).

Bynum v. General Motors Corp., 599 F. Supp. 155, 156 (N.D. Miss. 1984) (recognizing defense as a matter of Mississippi law), aff'd, 770 F.2d 556 (5th Cir. 1985) (recognizing defense as a matter of federal common law).

> that case the responsibility is assumed by the employer, at least where the plans are not so obviously dangerous that no reasonable man would follow them. See the Restatement, Torts, § 404, comment a., p. 1093; Prosser on Torts, § 84, p. 697.

107 So.2d at 605. That virtually universally accepted principle is precisely the precedental basis upon which most courts have adopted and applied the modern government contract specification defense, in circumstances similar to those presented here, as a bar to product-liability claims by injured third parties such as Mr. and Mrs. Dorse.[10]

II. Important Public Policy Considerations Support Application of the Government Contract Specification Defense in the Circumstances Presented Here.

At the heart of the modern government contract specification defense is the realization that the imposition of

---

[10]Indeed, Rawls constitutes far more compelling state-court precedent for application of the government contract specification defense under Florida law than, for example, that which existed in Pennsylvania prior to the decision of the Court of Appeals for the Third Circuit in Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982). In Brown, the court ruled that the manufacture of a bulldozer in accordance with government contract specifications provided a complete defense, under Pennsylvania law, to personal injury claims, whether such claims were couched in terms of negligence, strict liability, or breach of warranty. It did so despite the fact that neither of the state court decisions upon which it relied -- Ference v. Booth & Flinn Co., 370 Pa. 400, 88 A.2d 413 (1952), and Valley Forge Gardens, Inc. v. James D. Morrissey, Inc., 385 Pa. 477, 123 A.2d 888 (1956) -- had involved product liability claims. See also In re Air Crash Disaster at Mannheim Germany, supra, 769 F.2d at 120-25.

liability upon a government-contract supplier serves no societal purpose where, as here, the government itself is the decision-maker with respect to product content and manufacture:

> [T]ort liability principles properly seek to impose liability on the wrongdoer whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government.

Agent Orange I, supra, 506 F. Supp. at 793. This, of course, is essentially the same realization reflected by the Rawls and Roland decisions in Florida. When the purchaser is a governmental entity, and the transaction involved is formalized government procurement, additional policy considerations come to the fore. As an Illinois appellate court succinctly explained in Hunt v. Blasius, supra:

> A government contract must of necessity be different in nature from private undertakings. Nearly all government purchases and contracts are taken by open bidding; necessity exists to obtain the widest possible field of bidders in order to preserve tax revenues. Should bidders feel apprehensive that they might be sued for following specifications, either of two untoward results could ensue: (1) There would be no bids, or (2) bids would be inflated to take care of any potential liability. Public policy dictates that bidders who comply strictly with governmental specifications should be shielded from liability in any respect in which the product complies.

55 Ill. App.3d at 20, 370 N.E.2d at 621-22 (emphasis added).

Additional, constitutionally based policy considerations came into play where, as here, the procuring governmental agency is a branch of the United States military:

> [H]olding military contractors liable [for injuries caused by dangerous products designed by the military] would "thrust the judiciary into the making of military decisions. Although judges must decide cases from fields of endeavor of which they know little, their otherwise omnicompetence confronts its limits in military matters. At this point, it must be acknowledged, separation of powers becomes a proper concern."

Koutsoubos v. Boeing Vertol, supra, 755 F.2d at 354 (quoting McKay v. Rockwell International Corp., 704 F.2d 444, 449 (9th Cir. 1983)). See also In re Air Crash Disaster at Mannheim Germany, supra, 769 F.2d at 121; Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985). In the instant case, it has been alleged that the United States Navy (and other military agencies), fully apprised that exposure to asbestos presented a serious and immediate threat to the health and safety of shipyard workers such as Mr. Dorse, nonetheless determined that it was imperative that asbestos-containing insulation products be used in the construction and repair of this Nation's naval fleet. (Supp. R. at 22-23, 249-67.) As the Court of Appeals for the Fourth Circuit has recently explained of such decisions by the military:

> It should be axiomatic that "considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are

> uniquely questions for the military and are exempt from review by civilian courts."

Tozer v. LTV Corp., 792 F.2d 403, 406 (4th Cir. 1986) (quoting Agent Orange II, supra, 534 F. Supp. at 1054 n.1).

A related concern of compelling importance is the obvious public interest in assuring ready access by the military to materials which are perceived by the military to be necessary to the national defense. The government contract specification defense, by immunizing the supplier from liability so long as he fully discloses any material information he possesses concerning the hazards of the product specifications, serves and advances that interest. Conversely, that compelling national interest is ill-served if a manufacturer, faced with uncertain liability as a consequence of supplying the requested product, must second-guess the military's specifications. Thus, as one New Jersey state court has observed:

> The procurement of military equipment by the government is made pursuant to its war powers and its inherent right and obligation to maintain an adequate defense posture. In carrying out its responsibilities the government must be given wide latitude in its decisionmaking process.
>
> To impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army . . . would seriously impair the government's ability to formulate policy and make judgments pursuant to its war powers. The government is the agency charged with the responsibility of deciding the nature and type of military equipment

> that best suits its needs, not a manufacturer . . . .

Sanner v. Ford Motor Co. 144 N.J. Super. 1, 9, 364 A.2d 43, 47 (Law Div. 1976), aff'd, 154 N.J. Super. 407, 381 A.2d 846 (1978). Accord, Bynum v. FMC Corp. 770 F.2d 556, 569-71 (5th Cir. 1985); Agent Orange II supra, 534 F. Supp. at 1054 n.1; Casabianca v. Casabianca, 104 Misc.2d 348, 350, 428 N.Y.S.2d 400, 402 (Sup. Ct. Bronx Cty. 1980).

In Casabianca, a dough-mixing machine manufactured for the Army in the 1940's, in compliance with government specifications, came later to be owned by the proprietor of a pizza parlor in the Bronx. Some time in the late 1970's, the infant son of the pizza-parlor operator was severely injured when his hand was caught in the machine's mixing blades. The child sued the machine's manufacturer, alleging negligence, breach of warranty and strict products liability. The manufacturer sought summary judgment on the basis of the government contract specification defense. The court dismissed all claims against the manufacturer, ruling that,

> as a matter of public policy no such liability may be imposed. It is not disputed that the defendant Teledyne manufactured the machine in accordance with such specifications. A supplier to the military in time of war has a right to rely upon such specifications and is not obligated to withhold from the United States armed forces material believed by the latter to be necessary because the manufacturer considers the design to be imprudent or even dangerous.

104 Misc.2d at 350, 428 N.Y.S.2d at 402.

Finally, underlying all of the policy interests which support application of the government contract specification defense in the circumstances presented here is a fundamental recognition of the fact that "imposing enormous liability on a manufacturer who had been found to produce a product on the government's terms would be unfair." *See* Note, "Liability of a Manufacturer for Products Defectively Designed by the Government," 23 *B.C. L. Rev.* 1025, 1072 (1982). The defense -- which represents a carefully developed judicial accommodation of the important public policies outlined above with those which underlie strict liability principles in the context of government (and especially military) procurement -- is designed "to accommodate [these] concerns of basic fairness." *Id.* at 1073.

Under the defense, a supplier has two obligations: First, it must comply carefully and fully with the government's contract specifications;[11] second, it must apprise the government of any hazards, unknown to the government, associated with the product of which the supplier is aware and which might affect the government's decision to procure

---

[11] Thus, the defense does not insulate a manufacturer from liability where it has failed to comply with the specifications (*i.e.*, where it has defectively manufactured the product). *See e.g.*, *Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867 (8th Cir. 1974); *M.C. Winters, Inc. v. Eubank*, 456 S.W.2d 500 (Tex. Civ. App. 1970).

the product.[12] Once that is done, fairness and important policy considerations require that responsibility for the decision to use the product rests with the government, and not with the supplier.[13]

---

[12]Where, as in this case, mandatory government specifications are involved, the manufacturer's obligation in this regard is to share with the government whatever information it has (and the government does not have) concerning health risks which would affect the government's decision to use the product. Once the manufacturer has done that, the decision whether to specify the product, to change the specification or to require further warnings is the responsibility of the government, not the manufacturer. The manufacturer's duty to warn the government of such hazards is thus one part of the "relative knowledge" element of the defense. As Chief Judge Weinstein explained in Agent Orange III, supra:

> [I]f the government was aware of the hazard, no harm results from the lack of warning [by defendants] and the element of proximate cause is, therefore, missing.

597 F. Supp. at 850. This Court itself has recently made the same point, recognizing that:

> It would be contrary to public policy as well as good common sense to hold a person, whether characterized as a manufacturer or a contractor, strictly liable when the defect is patent or known to the owner.

Edward M. Chadbourne, Inc. v. Vaughn, No. 66,413 (Fla. July 17, 1986) (Slip Opinion, at 4).

[13]As the previously cited commentary concluded:

> In a suit for injuries caused by a defectively designed military or nonmilitary product, a manufacturer should be able to invoke a defense similar to the contract specification defense. The defense should be

(Footnote Continued)

III. Application of the Government Contract Specification Defense in the Circumstances Presented Here Is Entirely Consistent With Florida Strict Products Liability Law.

Although the decision of the district court in this case (R. at vol. 4, p. 711-12) contains no discussion whatsoever of the merits of Eagle-Picher's assertion of the government contract specification defense, Judge King's order did suggest that he was concerned about the impact of the defense upon Florida's strict products liability law.[14] Rejecting Eagle-Picher's reliance upon Rawls v. Ziegler,

---

(Footnote Continued)

> available to the manufacturer whether it is sued under a theory of negligence, breach of warranty, or strict liability. Thus, where a manufacturer has fully complied with government specifications which contain a defect in design, it would be liable only when the design was obviously defective and dangerous . . . . If the defect was discovered by or was obvious to the government . . . the manufacturer normally should not be liable . . . .

Note, supra, 23 B.C. L. Rev. at 1086 (emphasis added). Accord, Edward M. Chadbourne v. Vaughn, supra note 12 (Slip Opinion, at 4).

[14] This Court first recognized the doctrine of products liability in Matthews v. Lawnlite Co., 88 So.2d 299 (Fla. 1956), two years before its decision in Rawls v. Zeigler.

It adopted a rule of strict products liability in West v. Caterpillar Tractor Co., 336 So.2d 80, 86-87 (Fla. 1976). In doing so, it cautioned that "strict liability should be applied only when a product the manufacturer places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." 336 So.2d at 86. And it expressly ruled

(Footnote Continued)

supra, "as providing the conceptual basis for the Florida courts['] probable adoption of the defense," Judge King stated:

> The Rawls case involved a negligence claim as distinguished from the instant case involving strict products liability and the allegation of a failure to warn. The Court, thus, [does] not find . . . Rawls persuasive authority for the defendant's proposition that the Florida courts would likely adopt the government specification defense in the case at bar.

(R. at vol. 4, p. 711.) Eagle-Picher submits that the district court's concern in this regard was unfounded -- for, as this Court itself has effectively recognized, application of the government contract specification defense is entirely consistent with the policies embodied in Florida's strict products liability law. As noted above (note 14 supra), when this Court adopted the rule of strict products liability set forth in Section 402A of the Restatement (Second) of Torts, in 1976, it expressly incorporated into Florida's law of strict liability "[t]he ordinary rules of causation and the defenses applicable

---

(Footnote Continued)
that:

> The ordinary rules of causation and the defenses applicable to negligence are available under our adoption of the Restatement rule [of strict products liability].

Id. at 90 (quoted in Edward M. Chadbourne, Inc. v. Vaughn, supra, note 12 (Slip Opinion, at 4) (emphasis added).

to negligence" claims. West v. Caterpillar Tractor Co., supra, 336 So.2d at 90. It recently reaffirmed that limitation on Florida's strict liability principles in Edward M. Chadbourne, Inc. v. Vaughn, supra note 12.

The fact of the matter is that the district court's decision in the instant case flies in the face of the principles articulated by this Court in Chadbourne. Judge King's ruling here would hold a government contractor/ manufacturer strictly liable even though the government, the designer and owner of the product, not only knew of the potentially dangerous character of the product, but actually and expressly mandated, for its own reasons, that the potentially dangerous component of the product, asbestos, be used as the product's principal ingredient. Such a ruling, in the words of this Court, is "contrary to public policy as well as good common sense." Edward M. Chadbourne, Inc. v. Vaughn, supra note 12 (Slip Opinion, at 4).

This Court's analysis of these public policy factors is consistent with the many cases in which the government contract specification defense has been held equally available as an absolute defense to strict liability claims as it is to negligence claims. In Agent Orange I, for example, Judge Pratt explained that the imposition of liability upon a government-contract supplier serves absolutely no societal purpose where, as here, the government (and not the contractor) controls the design and content of the product:

> [T]ort liability principles properly seek to impose liability on the wrongdoers whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government. The imposition of tort liability on a wrongdoer can have a strong prophylactic effect; tortfeasors held liable for damages that flow from their wrongdoing have a strong incentive to prevent the occurrence of future harm. . . . <u>Before any societal benefit can be derived from the deterrent effects of tort liability, however, the party in a position to correct the tortious act or omission must be held accountable for the damages caused and thus motivated to prevent future torts</u>.

506 F. Supp. at 793-94 (emphasis added). <u>See also</u> <u>Agent Orange II</u>, <u>supra</u>, 534 F. Supp. at 1054 n.1. The Court of Appeals for the Ninth Circuit made essentially the same point in the <u>McKay</u> case:

> [T]he government, the sole purchaser of most military equipment, has both the ability to recognize safety problems in military equipment and to negotiate with suppliers to remedy those problems. It constantly balances the safety of the article against the imperatives of national defense. Strict liability would no doubt increase defense costs but would do little not already being done to increase the use of safety features in military equipment.

704 F.2d at 452. There is, in short, absolutely no question but that

> state and federal courts [which the court characterized as "the weight of common law authority"] have recently held that the government contractor defense applies to strict liability claims . . . [and] have concluded that the justifications for the defense in the negligence context apply with equal

> force in the context of a strict liability claim.

Brown v. Caterpillar Tractor Co., supra, 696 F.2d at 252.[15]

In fact, virtually every court to have addressed the issue in recent years has ruled that the government contract specification defense is an absolute defense to all product liability claims, including claims based on strict liability principles. And the virtual unanimity among the courts in this regard should not be surprising -- for, if the defense is to mean anything at all, it must be available in the strict-liability context. If a government-contract manufacturer has been negligent, either in (i) failing to comply fully and carefully with the terms of the government's

---

[15] In this regard, it is instructive -- and significant -- that Section 108 of the Uniform Product Liability Law, published by the United States Department of Commerce in 1979 (44 Fed. Reg. 62714 (Oct. 31, 1979)), expressly recognizes the government contract specification defense as an absolute defense to product liability claims -- including strict product liability claims:

> (C) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, this shall be an absolute defense. . . .

Although the Uniform Law does not have the force of law, courts have emphasized its utility in limiting the scope of product liability in appropriate circumstances, as here. See, e.g., Brown v. Caterpillar Tractor Co., supra, 696 F.2d at 252 n.13.

specifications or (ii) in failing to alert the government to a defect or potential danger in the specifications of which the Government is unaware, then the government contract specification defense would not be available to the contractor/manufacturer. It is only where the contractor/manufacturer (i) has complied fully with the government's specifications and thus produced the product as the Government wanted it produced and (ii) has not withheld information unknown to the government concerning latent defects or dangers that it would be -- and should be -- protected from liability. Clearly, it is principally, if not exclusively, in the context of strict products liability claims that such protection is needed. It is therefore a meaningless gesture to say, as the district court has said here, that the defense is available in negligence actions but not in strict-liability cases.

As explained at the outset of this brief (see pages 7-8 supra), and as reflected in the Eleventh Circuit's statement of the issue presented to this Court (see page 7 supra), the defense which Eagle-Picher asks this Court expressly to recognize here requires the defendant to demonstrate to the court's satisfaction that:

1. The Government established and contractually enforced specifications pursuant which the allegedly injurious product was manufactured and procured;

2. The product complied with the Government's specifications in all material respects; and

3. The Government possessed knowledge concerning hazards associated with the use of the product which was greater than or equal to that of the manufacturer.

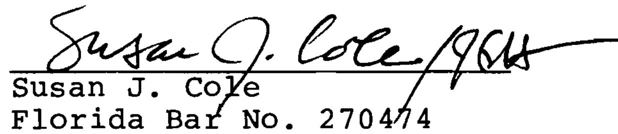
That defense is not only consistent with, but effectively already incorporated into, the law and the public policy of the State of Florida. See Edward M. Chadbourne, Inc. v. Vaughn, supra (Slip Opinion, at 2-4); West v. Caterpillar Tractor Co, supra, 336 So.2d at 90-92; Rawls v. Zeigler, supra, 107 So.2d at 605; Roland v. Jumper Creek Drainage District, supra, 4 F.2d at 721-22. This Court should now formally and expressly recognize and adopt the government contract specification defense, in this case, as a matter of Florida law.

CONCLUSION

For all of the foregoing reasons, and for such other reasons as may be adduced at oral argument in this proceeding, Eagle-Picher respectfully submits that this Court should now expressly rule that a government-contract manufacturer/ defendant in a strict products liability case may avoid liability by alleging and showing that (1) it manufactured and sold its product in accordance with mandatory specifications set forth in government contracts, and (2) it apprised

the government of any hazards associated with the product that it knew of and of which the government was not aware.

Respectfully submitted,



Susan J. Cole
Florida Bar No. 270474

BLAIRE & COLE
2801 Ponce de Leon Boulevard
Coral Gables, Florida 33134
(305) 444-2400

Joe G. Hollingsworth

Edward M. Fogarty

SPRIGGS, BODE & HOLLINGSWORTH
1015 Fifteenth Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 898-5800

Attorneys for Defendant-Appellant
Eagle-Picher Industries, Inc.

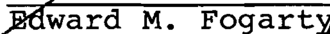
Dated: September 29, 1986

CERTIFICATE OF SERVICE

I, Edward M. Fogarty, hereby certify that, on this 29th day of September, 1986, copies of the foregoing Initial Brief of Appellant Eagle-Picher Industries, Inc. were mailed, first-class postage pre-paid, to the following counsel for plaintiffs-appellees:

Frederick M. Baron, Esquire
Jane N. Saginaw, Esquire
Charles S. Siegel, Esquire
BARON & BUDD
8333 Douglas Avenue, 10th Floor
Dallas, Texas 75255

Louis S. Robles, Esquire
75 SW 8th Street
Miami, Florida 33130



Edward M. Fogarty

September 29, 1986