744.19 PRODUCTS LIABILITY[1]--MILITARY CONTRACTOR DEFENSE.

NOTE WELL: This instruction may be given in a product liability action when the defendant claims as a bar to liability the affirmative "military contractor" defense.[2] As a matter of policy, the "military contractor" defense exists to insulate the military procurement process from the injurious effects of state products liability claims.[3]

The *(state number)* issue reads:

"Was the defendant acting as a military contractor when *it* supplied [*state name of product or equipment*] to the plaintiff?"

Under certain circumstances, a defendant in a suit brought by a party who claims injury due to the inadequate design or formulation of a product or equipment[4] may avoid liability if the defendant qualifies as a military contractor.[5]

On this issue the burden of proof is on the defendant.[6] This means that the defendant must prove, by the greater weight of the evidence, five things[7]:

First, that the [*state name of product or equipment*] alleged to be the proximate cause of the plaintiff's [injury] [death] was military equipment.[8] "Military equipment" is equipment owned by a branch of the United States Armed Forces.[9]

Second, that the defendant was the manufacturer of the [*state name of product or equipment*].[10] A "manufacturer" is one who designs, assembles, fabricates, produces, constructs or otherwise prepares a product, or component part of a product, prior to its sale.[11]

Third, that the United States Government approved reasonably precise specifications for the *[state name of product or equipment]*.[12] Approval must consist of more than a mere "rubber stamp."[13] This means that [the Government

must have actively participated in the design of the [*state name of product or equipment*]] [the Government provided the design of the [*state name of product or equipment*] to the defendant].[14] Simple approval of a design submitted to the Government by the manufacturer, without other proof of Government participation in the design, is not sufficient.[15]

Fourth, that the [*state name of product or equipment*] conformed to the Government specifications.[16] To "conform" means to satisfy the design requirements or specifications stipulated or approved by the Government.

Fifth, that if the defendant knew of the danger[s] in the use of the *[state name of product or equipment]* that proximately caused the plaintiff's [injury] [death], and the Government was not aware of such danger[s], the defendant must have warned the Government about such dangers.[17]

Finally, as to this *(state number)* issue on which the defendant has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was acting as a military contractor when it furnished [*state name of product or equipment*] to the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the defendant. If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the plaintiff.

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1. N.C.G.S. § 99B-1(3) (describing a "Product liability action" as one that "includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product.").

2. *See Stilwell v. Gen. Ry. Services,* 167 N.C. App. 291, 295-96, 605 S.E.2d 500, 503 (2004) (citing *Boyle v. United Technologies Corp.,* 487 U.S. 500, 512, 101 L. Ed. 2d. 442, 458 (1988)), *discretionary rev. denied,* 359 N.C. 326, 611 S.E.2d 852 (2005).

3. *See, e.g., Tozer v. LTZ Corp.,* 792 F.2d 403, 405-07 (4th Cir. 1986) ("Permitting recovery for design defects under any theory of liability risks altering the nature of the procurement process . . . . [I]n the absence of the defense, there would be a decrease in contractor participation in design, an increase in the cost of military . . . equipment, and diminished efforts in contractor research and development.").

The "military contractor" defense mandates pre-emption of state law by federal common law. When the elements of the "military contractor" defense are established, "state law . . . present[s] a 'significant conflict' with federal policy and must be displaced." *Boyle*, 487 U.S. at 512, 101 L. Ed. 2d. at 458.

4. *See* N.C.G.S. § 99B-6. Note that the statute does not use the term "equipment." However, the term "product" in the statute seems to include the term "equipment" as employed in the "military contractor" defense.

5. *Stilwell*, 167 N.C. App. at 295-96, 605 S.E.2d at 503 ("This defense was formally recognized in *Boyle . . .* where the Supreme Court . . . held that: '[l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed 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 to the United States.'" (quoting *Boyle,* 487 U.S at 512, 101 L.Ed.2d at 458)). "Stripped to its essentials, the military contractor's defense under Boyle is to claim, 'The Government made me do it.'" *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626, 632 (2nd Cir. 1990).

6. To prevail, the contractor "bears the burden of proving each element of the military contractor defense." *Beaver Valley Power Co. v. National Engineering & Contracting Co.*, 883 F.2d 1210, 1217, n.7 (3rd Cir. 1989).

7. *See Stilwell*, 167 N.C. App. at 295-97, 605 S.E.2d at 503-04.

8. *See id.* (discussing argument that a caboose was an item of military equipment, "as it was owned by the U.S. Army for use . . . even though it was being used [for] a normal commercial [purpose] on the date of the incident."). *Stilwell* notes that "most of the cases since Boyle have involved unique military equipment," but that "there has been a split in the federal circuits over whether the defense is available to all [government] contractors." *Id*. *Boyle* itself refers to the "government contractor defense," although the product at issue was the escape hatch on a military helicopter. *Boyle*, 487 U.S. at 510, 101 L. Ed. 2d at 456. *Stillwell* "reser[ved] any position on this issue." 167 N.C. App. at 297, 605 S.E.2d at 504.

9. *See Stillwell*, 167 N.C. App. at 296, 605 S.E.2d at 504.

10. *See id.*

11. N.C.G.S. § 99B-1. A manufacturer also includes a "seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part."

12. *Stilwell*, 167 N.C. App. at 295, 605 S.E.2d at 503. This element assures that "the government, and not the contractor, is exercising discretion in selecting the design." *Stout v. Borg-Warner Corp*., 933 F.2d 331, 334 (5th Cir. 1991); *see also Tate v. Boeing Helicopters*, 55 F.3d 1150, 1154 (6th Cir. 1995) (To determine if this condition is satisfied, courts often will examine whether "the government and the contractor engage[d] in a continuous back and forth review process regarding the design in question"); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1481 (5th Cir. 1989), cert. denied, 493 U.S. 935, 107 L. Ed. 2d 317 (1989) ("The requirement that the specification be precise means that the discretion over significant details and all critical design choices will be exercised by the government. If the government approved imprecise or general guidelines, then discretion over important design choices would be left to the government contractor.").

13. *Tozer,* 792 F.2d at 407-08 ("The defense will be permitted to a participating contractor so long as government approval of design 'consists of more than a mere rubber stamp.'"); *see also Tate*, 55 F.3d at 1153 ("When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion.").

14. *See Schoenborn v. Boeing*, 769 F.2d 115, 122 (3rd Cir. 1985) (If there is genuine governmental participation in the design, "the defense is available.").

15. *See id.; Tate*, 55 F.3d at 1153. However, some courts have held "that even though the military had not developed or approved the specifications for the component at issue, 'the length and breadth of the [military's] experience with the [component]—and its decision to continue using it—amply establish government approval of the alleged design defects.'" *Ramey v. Martin-Baker Aircraft Co.,* 874 F.2d 946, 950 (4th Cir. 1989).

16. *Stilwell*, 167 N.C. App. at 295, 605 S.E.2d at 503; *see also Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 420 (5th Cir. 2001) ("[a]cceptance and use of an item following its production can establish that the item conformed to its specifications"); *Ramey*, 874 F.2d at 951 (finding that when "[n]othing in the record suggests to us that the Navy found the seat not to conform to specifications . . . [I]t is not [the] province [of the court] . . . to make such a finding in the Navy's behalf.").

By implication, if the product was defectively manufactured in that it did not conform to the design specifications approved by the government, then a design-defect claim would not be immunized by the defense. *See generally* 53 A.L.R.5TH 535 THE GOVERNMENT CONTRACTOR DEFENSE TO STATE PRODUCTS-LIABILITY CLAIMS § 7 (2005) (noting the defense is intended to protect manufacturers only where it is the government, and not the manufacturer, that is responsible for the defect in question).

17. *Id.* This requirement "eliminate[s] any incentive the military contractor defense might create" for contractors to withhold knowledge of risks, since without the requirement conveying knowledge of risks might disrupt the contract but withholding that knowledge would produce no liability. *Stout*, 933 F.2d at 334. However, "a government contractor is only responsible for warning the government of dangers about which it has actual knowledge," *Trevino*, 865 F.2d at 1487, and the "defense does not require a contractor to warn the government of defects about which it only *should have* known," *Kerstetter v. Pacific Sci. Co.*, 210 F.3d 431, 436 (5th Cir. 2000); *see also Boyle*, 487 U.S. at 513, 101 L. Ed. 2d. at 458. (holding that contractors should not be held liable for failure to "identify[y] all design defects.");