

MEMORANDUM

TO: File
FROM: AM
DATE: August 31, 1983
RE: King County Asbestos Cases
SUBJ: Continuation of milspec memo

Defendants have attached both Judge Maddock's August 2, 1983, order in the Kitsap cases allowing the defendants to amend their answers to alleged compliance with mandatory government specifications as a defense as well as the opinion of chief judge Walter McGovern in Tefft v. A C & S, Inc., No. C80-924M (W.D. Wash. 1982), in support of their opposition to plaintiffs' motion to strike the government specification defense. Defendants also point to the Agent Orange cases as being ^{supportive of their attempt to inject the military specifications def} NOISE ON TAPE -- can't hear anything ^{exception into the}

^{However} ~~In addition~~, [△] their reference to recent decisions relying on Agent Orange (a non-weapon, non-wartime procurement context), i.e., Brown v. Caterpillar Tractor, 696 F.2d 246 (1982), and Koutsoubos v. Boeing Vertal, 553 F. Supp. 340 (1982) are also distinguishable. Once again, the plaintiffs in these cases, Agent Orange, Brown, and Koutsoubos, were all military personnel: In Agent Orange, soldiers in Vietnam; in Brown, a U.S. Army reservist; and in Koutsoubos, a Navy crewman. Plaintiffs have argued that it

^{asbestos case is}

is the status of these military personnel that ~~is not~~ ^{underlines} ~~determines~~ the application of the military specifications defense, and renders it ~~more~~ ⁱⁿ appropriate ~~than~~ in the case of a civilian plaintiff, as in the asbestos cases.

Thus, the public policy rationale upon which chief judge McGovern relied in Tefft, ~~and~~ ^{when the dispensing of} ~~in part~~ the distinction between weapons and civilian products, ^{is not in fact relevant.} NOISE ON TAPE

Defendant Raymark goes on to argue that the justification for applying the government specification defense in the asbestos cases is even more compelling than in Agent Orange, because the government specifications for insulation products required the alleged injury-causing ingredient to be included in the final product, as opposed to dioxin, which is a by-product. First, as attached military specification Exhibit ____ will demonstrate, asbestos was not specified as the vital ingredient in all the thermal insulation; the product merely had to meet performance specifications. Second, even were the argument that asbestos was expressly required by the contracts accepted, as the attached specifications will further demonstrate, there was no government prohibition on warnings. Not only did the government ^{contracts preclude} ~~not~~ ~~not~~ warnings (and Washington law, of course, holds a manufacturer to a non-delegable duty to

*Insert #2 on this yellow side
Eye witness*

warn, c.f., Minert v. Harsco, 26 Wn. App. 867, 614 P.2d 686 (1980)), in fact various pertinent portions of the military specification read as follows:

Special assembly instructions and warnings. When special assembly instructions and warnings are required they shall be supplied by the shipper and shall be conspicuously indicated.

MIL/STD/129B (10 April 1957, GAF Milspec).

If defendants' argument about their non-liability owing to the requisite inclusion of asbestos in the products sold to the government, even absent any government prohibition as to warnings is accepted, it results in a legal absurdity. For example, if a business entity contracts for a machine with a sharp blade to cut work, as in a sawmill, and the manufacturer, following that contract specification to provide machinery with a sharp blade, produces such a machine and neglects to place warnings which are not barred by the contract on the machine, or, for example, a safety guard, and the worker using that machine with the sharp blade is injured by that blade, Washington courts would not release the manufacturer from liability where it had failed to give a warning or instructions on the proper use of the machine, even though the precise aspect of the machine, i.e., the blade, caused the injury and was specified by the

contract. In essence, the defendants are asking the court to find that in such a situation the manufacturer would not be liable. This result is opposed to Washington law and to the theories of justice underlying our Tort Reform and Product Liability bill. Defendants argue that the court should refuse to permit a supposed failure to warn exception to the government specification defense, fearing that the exception would vitiate the specification defense and the important public policies which support it. Given that the public policies which may support the government specification defense are not available and do not apply in the asbestos litigation, this argument also fails.

Thus, there are numerous policy and Washington common law and public interest reasons for not allowing the government specification defense to be applied in the asbestos litigation.

Given that the government specification defense
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those cases that arise after the _____, defendants cannot meet the elements of the defense as set forth by Judge Maddock in his August 2, 1983, Memorandum Opinion re defense of compliance with government contract specifications, In re Kitsap County Asbestos Cases of Schroeter,

Goldmark & Bender. Judge Maddock stated that the elements of the defense which have to be met are as follows:

1. The product was supplied to the government pursuant to contract;

2. The government established the specifications for the product;

3. The product met the government specifications in all material respect;

4. The defendant did not have, and failed to disclose, information unknown to the government about the hazards associated with the use of the product that might reasonably have affected the government's decision to specify its use; and

5. The specifications are not so obviously defective and dangerous that no reasonable person would follow them.

Judge Maddock then went on to say:

As to the question of the duty to warn as it relates to the government specifications defense, the mere fact of supplying a product pursuant to government specifications does not relieve the defendant of the duty to warn if the specifications are silent as to warnings. If the specifications do deal with warnings, then the applicability of the defense will depend upon the particular facts found to exist.

NOISE ON TAPE

However, as to the question of the duty to warn,

plaintiffs will demonstrate that there is no issue of material fact that can be produced by the defendants such as to enable them to meet their duty to warn. Hence, as a matter of law, as the defendants are not relieved of their duty to warn since the specifications are silent as to prohibiting the warnings, defendants should be unable to assert compliance with government specifications as a defense.

The government specifications defense is an affirmative defense for which the defendants bear the burden of proof. Their memoranda in support of their attempt to inject the government specification defense exception into the asbestos product liability actions have been notably silent as to the actual facts of warning, and the fact that the government would not and did not prevent manufacturers from warning.

Although defendants claim that there is sound authority for the proposition that there is no duty to supply warnings not required by government specifications, the case cited to support their assertion in fact does not. Littlehale v. E.I. DuPort DeNemours & Co., 268 F. Supp. 791 (S.D.N.Y. 1966), aff'd., 380 F.2d 274 (2d Cir. 1967), resulted in a summary judgment for defendant on the warning issue, as much because of the state of product liability law in 1966 where

the duty to warn by manufacturer differed from the duty to warn in Washington state as discussed above in Minert, as well as the court's findings on the orbit of foreseeable danger. ~~The scope of the reason~~ ^{The scope of} foreseeable danger was determined not only ^{in part by} the fact that the caps manufactured by defendant E.I. DuPont differed from the caps manufactured for general commercial sale ^{and were intended for use by different personnel than those the}. The fact that the court rested its decision on the unforeseeable nature of the accident as well as its unintended use of the caps is made clear by the district court's affirmation, where the court held that:

There was no duty to provide more detailed warnings . . . because the undisputed facts revealed that as a matter of law DuPont could not have foreseen that its detonators manufactured specifically for use by highly trained ordnance personnel to detonate 'composition C' would in fact be utilized thirteen years later by a civilian employee of the Navy to detonate a TNT grenade.

Thus, Littlehale provides little support for defendants' hypothesis, both because it is not in accord with Washington law but rather follows both maritime and various state substantive laws not precedential in Washington; and because its factual basis differs significantly from that of the asbestos cases, in which the very workers who used and were harmed by the manufacturers' products were the intended and foreseeable users. ^{bc not following product liability}

In fact courts have been concerned that defendants will attempt to insulate themselves from liability improperly if the government specification defense is spread too wide. The court in Brown v. Caterpillar Tractor, supra at 253, clearly foresaw the injustice of allowing the manufacturer to hide behind the government specification defense for its failure to use a safety device or a warning not mentioned specifically in a military specification contract. The court's concern augments Judge Pratt's discussion In re Agent Orange Product Liability Litigation, 534 F. Supp. 1046 (1982), as well. While Judge Pratt noted that "courts should not require suppliers of ordnance to question the military's needs for specifications for weapons during wartime," he also held, however, that a supplier has a duty to inform the military of known risks (pp. 1054-5). Given that Judge Pratt's concerns arise in the military context, his awareness that a manufacturer should not be insulated from liability for damages by the military specification defense applied under all circumstances parallels the court's concern in Brown v. Caterpillar Tractor, as well as the policies and goals of product liability law in the State of Washington. Asbestos plaintiffs, as civilian employees of the government, were not in the unique military

relationship, nor was the asbestos product in the unique contract circumstance of being a special product made or altered by the manufacturers according to government specifications, which has been present and predominated in all the cases cited above by defendants.

Thus, the Washington goals of holding manufacturers liable to warn should control, especially where the military rationales are unavailing, and the warnings were not in any way prevented by the government. Under these circumstances, defendants as a matter of law cannot assert the military specification defense.

Defendant Raymark refers to the deposition of John Haas, 9/15/80, 9/16/80, 11/5/80 at pp. 235-40 and 12/10/81 at p. 164, to buttress their somewhat vague statement that the relevant government regulations did deal with warnings. (ALI: be careful there, same plaintiff language undealt with.) At best, a fair reading of the statements of John Haas would be that certain sections of the standard packaging specifications would indicate at times that certain writings might include warning labels although (note p. 240, his example of a warning label that went right on a bottle of corrosive acid included the fact that the label on the outside of the package might indicate that it should say

"don't drop," or "this end up") such that if a label were required, such a requirement would appear in section 5 of the packaging specification. However, this proves nothing as to the manufacturer's duty and ability to place a warning on a package to caution workers who otherwise would be working with an unreasonably hazardous product. Even less supportive of defendants' theory is John Haas' statement, cited by them at p. 164 of his 12/10/81 deposition. Haas states that: "Warnings could also be in section 3, which is a requirement to put a label or something on the thing that conceivably could be in section 3." In essence, this is a requirement that where warnings or special instructions are required by the nature of the product, they be placed there by the manufacturer.

This correlates exactly with section 7.8, which reads, as noted above, that when special assembly instructions and warnings are required, they should be supplied by the shipper. Nothing presented by the defendants indicates that they were prevented from putting warning labels on the packages. In fact, the 11/18/82 deposition of Bockstahler indicates that exactly the opposite situation controlled. When asked by plaintiff's attorney if "you didn't have to go to the Navy to get their permission to put



get the case cite.

Is it ~~In re Kings County~~ Asbestos Co.

If so - what's the #? Can they feel exp.

that warning label [when Eagle-Picher began to place warning labels on their products in 1964] on there, did you?" the answer was, "The Navy many times specified things on packages." Question: "Well, please try to answer my question . . . you have got a document . . . that shows where you wrote the Navy and asked their permission to put that label on the side of the package?" Answer: "No, I don't." Question: "The truth of the matter is, you didn't have to write the Navy about a caution label on the side of the package, isn't that true?" Answer: "That is correct." As defendants never had to request permission from the Navy when they began putting warning labels on their product, and as the packaging specifications never forbade such warnings, the only reasonable inference is that defendant manufacturers could have at any time placed warning labels on the packages because the military specifications were silent as to this fact. Under Washington law, under their non-delegable duty to warn, they should have done so; since they were not forbidden by the government specification defense is, as a matter of law, no defense against their liability.

As it is defendants' affirmative burden of proof to come forward with evidence that somehow the government forbade their placing of warning labels on the product and,

as defendants have failed in this burden of proof and must fail as a matter of law, the government specification defense should be stricken.

On all of the elements of the defense, in fact, the only point at which defendants might conceivably be able to apply the defense, Robert L. Bockstahler notes in his affidavit that "One-Cote" was first submitted to the Navy for approval without asbestos. In a letter of November 21, 1955, the Navy informed Eagle-Picher that One-Cote could not be approved under the existing finishing cement specification MIL-C-2908. In 1960 Eagle-Picher added asbestos to One-Cote and the Navy approved it. The inference being, that absent asbestos the cement would not conform to specifications and asbestos was added to the product especially for the government. This is only an inference; but, even if accepted, it stretches the imagination to believe that the military specification defense, which might agree with the factual patterns of one product of one defendant should thereby be so extended as to shield all the manufacturers of asbestos products from liability when they shipped their products to government shipyards to be used by civilian employees.

Defendants cite as an example of control the fact that

Naval inspectors at times supervised the product performance lab tests. Once again, although this activity by the government indicates their participation in setting and testing performance specifications, it bears no relevance to the element of control vis-a-vis the placing of warning labels on the products (nor does it bring defendants' situation within the ambit of the control doctrine, as enunciated by Washington courts supra).

Although Bockstahler's affidavit goes into detail as to relevant knowledge and conformance with specification and the joint participation of military and industrial representatives in the setting of the specifications, all these issues do not mitigate the fact that, as a matter of law, defendants are unable to meet the final element enunciated by Judge Maddock in his test for the applicability of the government specification defense.

In addition, it might be noted that one of the focal points of defendants' argument bears only on the negligence claim, and does not relate to strict liability vis-a-vis the military specifications defense. For example, their statement of Washington law and traditional tort principles that an independent contractor or builder is justified in relying on the plans and specifications unless they are so apparent-

ly defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous, (cites _____). This corresponds to element 5 of Judge Maddock's decision, that the specifications are not so obviously defective and dangerous that no reasonable person would follow them. In a product liability action such as these are, inter alia, it is the expectation of the consumer which governs, rather than the reasonableness of the actions of defendant manufacturers. (ALI: This theory may be too weak to follow through on -- check later.) Eagle-Picher, in their memorandum in support of motion for leave to amend the answer In re Kitsap County Asbestos Cases attempts to claim that the specification defense is consistent with the derived support from government contract law. Eagle-Picher claims that when the government issues specifications, it "impliedly warrants" the specifications for their accuracy, for their feasibility, and for their safety. Once again, defendant Eagle-Picher is in the anomalous situation of advocating the use of the military specification defense for policy reasons to benefit the government, when the government is fiercely contesting the application of that principle, i.e., in this situation, the denial that government specifications are an implied warranty, as

evidenced by Keene v. _____. Their citation of Ordnance Research Inc. v. United States, 609 F.2d 462 (C.T.C.L. 1979), is, for example, irrelevant for the language that "specifications having major safety defects are fully as much in breach of the implied warranty as defects in the feasibility, practicability, or commercial possibility of performance as specified" (at 479) has no cogency against the fact that the specifications did not prevent the manufacturers from placing warnings on the products. (ALI: Could defencants argue that government's failure to place warning labels was in fact the violation of the implied warranty?)

Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824 (D. Conn. 1965), also fails to aid the defendants for the multiple reasons that it is (1) an independent contractor, not a product liability, case; (2) it derives from a Federal Tort Claims Act case and a discussion of governmental immunity for discretionary actions; and (3) defendant played no part in the decision to dredge the channel or the means of dredging or funnelling fumes.

In summary, then, defendants' statement that the government specification defense follows Washington common law is untrue. Its appearance in the product liability

reform bill as an exception indicates that it is meant to be just that -- an exception to the general rules and the application of it given that it is established on policy grounds and for concerns with government power requires a weighing of the policies for and against the application of product liability in these cases. Because the asbestos situation differs so markedly from every other situation in which the government specification defense has been allowed by other jurisdictions in the product liability realm, plaintiffs ask the Washington courts to clarify the muddled status of product liability law and the unfortunate application of badly reasoned decisions to the injured plaintiffs in Washington state. The asbestos products were manufactured identically to the government as well as to private purchasers. Manufacturers were exposed to or forced to do no more or less for the manufacture of their asbestos products for the government than they did for any other buyer, and thus the rationales for applying the product liability exception do not apply here.

Plaintiffs who number potentially in the thousands were domestic civilian employees, unlike the soldiers of almost all the other cases cited by defendants, and thus the specific concerns and unique relationships between a soldier

and his or her government is not present here. Even if these policy reasons for applying the government defense are somehow accepted, defendants will not be able to meet the elements of the test as a matter of law proposed by Judge Maddock because the government contract specifications nowhere prohibited defendants from warning of the dangers and the inherent hazards of the asbestos products that they were shipping all over the country, which ultimately resulted in the domestic catastrophe of occupational health that we see today.