FILE NAME: Military Specifications (MS)

DATE: 1984

DOC#: MS010

DOCUMENT DESCRIPTION: Legal - Memo of the US in Opposition to Defendants' Motions for Summary Judgment, and in Support Plaintiffs' Motions for Summary Judgment

F.d. R. Civ. P. 26(b)(3). See, James Julian, Inc. v. Raytheon Company, 93 F.R.D. 138, 144 (D. Del. 1982) wherein Plaintiff's counsel had prepared a binder of documents sought to be produced by Defendants and the Court held:

> The threshold issue can be dispensed with quickly. The binder contains a small percentage of the extensive documents reviewed by plaintiff's counsel. In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product.

Even if the Court were to conclude that the documents sought by PCC were discoverable, PCC has failed to make the requisite showing of need under Fed. R. Civ. P. 26(b)(3). The documents which the Government retrieved and organized are available for review by the public with the assistance of archive employees. PCC had the same opportunity as did the Government. Moreover, on March 28, 1984 and on May 17, 1984, the Government made proposals to enter into a coordinated discovery effort wherein procedures were outlined for retrieval, review, and exchange of asbestos-related documents. PCC never responded to the proposal. Others have entered into agreements with the Government.

It would be inequitable to allow PCC to sit idle while relying on the efforts of others to retrieve, review and organize documents available to PCC.

Accordingly, the Special Master's Order No. 6 is AFFIRMED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED the 4th day of September, 1984.

WALTER T. McGOVERN
Chief United States District Judge

UNITED STATES DISTRICT COURT
IN THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUGH F. TEFFT, et ux., Plaintiffs, v. A.C. & S., Inc., et al., Defendants.	No. C84-154M MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT, ON THE GOVERNMENT CONTRACT DEFENSE

Pittsburgh Corning Corporation, Raymark Industries, Inc., and Fibreboard Corporation seek to avoid all liability in the captioned case and two accompanying cases by virtue of the "government contract defense." Motions for summary judgment have been filed by all defendants and by the plaintiff asbestos victims. The United States hereby urges the Court to deny defendants' motions and enter summary judgment in favor of the asbestos victims. There is no justification in law, policy or equity for granting those manufacturers the shelter of the government contract defense.

USA's MEMORANDUM REGARDING MOTIONS FOR SUMMARY JUDGMENT ON GOVERNMENT CONTRACT DEFENSE.....1

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I. FACTUAL BACKGROUND

Hugh Tefft worked as an insulation trainee at Puget Sound Naval Shipyard in 1954-55 and as an insulator and then insulation foreman from 1960 to the present. He now has asbestosis, but continues to work. The United States has awarded Mr. Tefft a lump sum payment under the Federal Employee Compensation Act (FECA), the worker's compensation scheme for federal employees.

William Raines has been employed at Puget Sound Naval Shipyard since 1960, largely as an electrician. He too has asbestosis but is still able to work. Mr. Raines will be eligible for payments under the Federal Employees Compensation Act as his illness progressee.

Albert Marry was employed as an insulator at Puget Sound Naval Shipyard during the years 1929-30, 1933-47 and 1948-65. Mr. Marry died in 1968 as a consequence of asbestos. This case is being pursued of behalf of his estate.

In this litigation Tefft, Raines and Albert Marry's estate seek damages from the manufacturers of the asbestos-containing products to which they were exposed at Puget Sound Naval Shipyerd. Pittsburgh Corning, Raymark and Fibrebeerd are attempting to avoid making any payment whatsoever to these workers by claiming that all fault lies with the government. Plaintiffs have not sued the United States, and could not do so because the Federal Employees Compensation Act, like most worker's compensation syatems, guarantees specified compensation for occupational injuries in exchange for waiver of the right to pursue tort claims against the employer. Nevertheless, the interests of the United States may be substantially

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affected by the ruling on the government contract defense in this case. Each year the United States negotiates contracts worth billions of dollars, many of which could be affected by an extension of the government contract defense to this type of situation. As the country's largest employer, the United States must be concerned with maintaining incentives for government contractors to provide equipment and materials which can be used safely by federal employees. The United States also has a direct interest in ensuring that the asbestos industry does not so distort the government contract defense--which is intended to assist the government by facilitating procurement--that it becomes a tool for transferring tort liability from the asbestos manufacturers to the purchasers of their products.

The United States believes that it would be a tragic misuse of the government contract defense to absolve Pittsburgh Corning, Raymark and Fibreboard of liability in these cases. Part II below demonstrates that the government contract defense cannot properly be applied in these cases. Part III demonstrates that even if the defense would apply were the five elements identified by this Court met, Pittsburgh Corning, Fibreboard and Raymark have each failed to establish the requisite elements.

II. THE GOVERNMENT CONTRACT DEFENSE DOES NOT APPLY TO THESE CASES

In September, 1982, this Court ruled that during the period when these claims arose the common law of the State of Washington recognized a "government contract defense" as an aspect of the

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"ordinary tort and agency law principles as applied to independent contractors." Order Granting Pittsburgh Corning's Motions to Amend, September 15, 1982, at 2. That decision rested heavily on two considerations. First, the Court concluded that the government contractor defense was a corollary to the fundamental tort law principle that liability should rest with the party exercising actual control. One consequence of this principle, the Court concluded, is that under Washington law an independent contractor acting under the detailed direction and control of his employer is not liable for his actions. Id. The Court viewed the government contract defense as an expression of this traditional relationship between control and liability and made clear that the defense would not apply in these asbestos cases unless it is established that the United States exercised such pervasive control over the manufacture of the insulation products at issue that the manufacturers became mere servants of the United States.

Second, the Court felt that public policy considerations favored recognition of the defense in certain circumstances, because this would serve to preserve tax revenues. The Court reasoned that the United States might have difficulty contracting for needed goods and services, or might be compelled to pay higher prices, if government contractors feared exposure to tort liability.

The United States firmly believes that neither of these rationales will support the application of the government contract defense to these asbestos cases. As shown below, (a) the United State did not compel the defendants to manufacture asbestos-

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containing insulation products or sell them for use by the United States; (b) defendants' insulation products were not designed to meet any unique governmental need and were sold to a wide commercial market; (c) the United States did not control the design, content, labeling or manufacturing process for defendants' insulation products; (d) the defendants were at least equal partners in the development of the specifications governing their products; (e) the government contract defense does not shield a manufacturer from liabiltiy for its own negligence; and (f) public policy considerations weigh heavily against application of the defense in these cases.

A. DEFENDANTS WERE NOT COMPELLED TO PRODUCE INSULATION PRODUCTS OR TO SELL THEM FOR USE BY THE UNITED STATES

Defendants do not allege that they were ever compelled, by law or otherwise, to produce the thermal insulation products at issue here or to sell them for use by the United States. These products were manufactured and sold solely as a function of the desire of the defendant corporations and their management to maximize profit.

B. DEFENDANTS' ASBESTOS-CONTAINING PRODUCTS WERE NOT DESIGNED TO MEET ANY UNIQUE GOVERNMENTAL OR MILITARY NEED

The government contract defense is most frequently recognized in the context of military procurement, where the government has requested a contractor to participate in the development of a weapon system or piece of complex equipment to meet a specific military need. The vast majority of the cases cited by the defendants

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arose in this military context. E.g., McKay v. Rockwell International Corp., 704 F.2d 444 (9th Cir. 1983) (ejection seat in Naval aircraft); Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3rd Cir. 1982) (bulldozer with rifle case and without protective canopy); Hubbs v. United Technologies, 574 F.2d 96 (E.D. Pa. 1983) (military helicopter); and Koutsoubos v. Boeing Vertol, 553 F. Supp. 340 (E.D. Pa. 1982) (military helicopter). Recognition of the defense in this context turns on factors limited to the military setting, e.g., consistent application of the Feres/Stencel doctrine, which bars manufacturers from recovering from the government for damages paid to injured members of the military, Feres v. United States, 340 U.S. 135 (1980); Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1966), and the need to avoid second-guessing by the judiciary of military decisions. See McKay v. Rockwell International, supra, at 449-450.

The insulation products at issue here were not designed or sold for any unique governmental or military use. To the contrary, these exact products were simultaneously marketed and sold to a variety of commercial and industrial users, who utilized the products in the same way they were used by the Navy. Sales to the United States for all purposes, both military and non-military, were often only a small fraction of total sales.

The only asbestos-containing thermal insulation product manufactured by Pittsburgh Corning was Unibestos, a pre-molded pipe-covering consisting of 95% asbestos. Pittsburgh Corning manufactured this product for almost 10 years, from July 1, 1962 until

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February 1, 1972. The dollar volume of Unibestos sales for each year during this period was:

Year	Unibestos Sales
1962	$ 560,339
1963	1,365,562
1964	1,418,941
1965	1,784,229
1966	2,471,026
1967	2,522,429
1968	3,067,446
1969	2,716,514
1970	2,933,457
1971	2,989,873
	$21,829,816

In total, Pittsburgh Corning sold over $21 million worth of Unibestos. However, total sales to the United States during this ten year period were only $738,470. Less than 4% of the Unibestos manufactured by Pittsburgh Corning was sold to the United States. Exhibit 1, at 2.

This Court's decision recognizing the government contract defense rested in part on the belief that Unibestos was only "incidentally sold to private concerns." Order Granting Pittsburgh Corning's Motions to Amend, Supra, at 10. It is now clear that more than 96% of the Unibestos manufactured by Pittsburgh Corning was sold to private industry, and it is the sales to the United States that were "incidental."

This is not surprising in view of the fact that Pittsburgh Corning aggressively marketed Unibestos as the ideal product for all or almost all high temperature industrial uses. In July, 1962, immediately after acquiring the Unibestos line, Pittsburgh Corning issued a promotional brochure stating at the onset in bold and highlighted type that

> Unibestos--the only industrial insulation made in the United States composed of unique long-fibered Amorite asbestos --is now manufactured by Pittsburgh Corning. Rugged and durable, Unibestos has proved itself an ideal high temperature insulation in the marine, refining, chemical, power and petrochemical fields. Exhibit 2, at 2.

In the remainder of the brochure Pittsburgh Corning states that "many industrial users of Unibestos have expressed satisfaction," Exhibit 2, at 7; that "Unibestos is proven best for petroleum refineries and petrochemical plants," Exhibit 2, at 8; that "Unibestos is proven best for pulp and paper mills," Exhibit 2, at 9; and that "Unibestos is proven best for the utilities industries" Exhibit 2, at 9; Pittsburgh Corning states that "Unibestos has supplied superior underground insulation for everything from schools, churches and colleges to hospitals, utilities and railroads as well as for processing lines for industrial plants." Exhibit 2, at 9. This brochure mentions only once that Unibestos may also be appropriate for governmental uses: "Unibestos has proved itself in the widest range of industrial, commercial, and government installations." Exhibit 2, at 8.

Pittsburgh Corning continued to promote widespread use of Unibestos until the product was discontinued in 1972. In 1964 Pittsburgh Corning described Unibestos as appropriate" for practically every high temperature insulation requirement. Exhibit 3, at 2. In 1965 and again in 1969 Pittsburgh Corning claimed that Unibestos "will do a better job anywhere the best insulation is needed for piping and equipment." Exhibit 4, at 2; Exhibit 5, at 2. Clearly Pittsburgh Corning cannot credibly claim that Unibestos met any need peculiar to the United States.

Pittsburgh Corning ignores its own sales figures and marketing practices from 1962 to 1972, and instead focuses on efforts more than 25 years earlier by another manufacturer (UNARCO) to ensure that its new product, eventually called Unibestos, would satisfy the then-applicable government specifications relating to pipe covering. The documents submitted by Pittsburgh Corning suggest that in 1935 UNARCO submitted several versions of its new product for Navy testing and in 1937 the product was approved for purchase. These documents do not establish that UNARCO designed its product to meet any need unique to the Navy or intended that its product would be sold exclusively, or even primarily, to the government. In view of UNARCO's actual practice of marketing and selling Unibestos primarily to private industry, a practice followed by Pittsburgh Corning after 1962, it seems clear that in submitting Unibestos for Navy testing UNARCO was simply seeking to assure that the product was eligible for government purchase, thus assuring a larger potential market. Approval by the Navy was also an attractive

selling point in marketing the new product to industrial users. Thus the materials submitted by Pittsburgh Corning certainly do not show, as claimed, that Unibestos was designed to meet any need special to the United States. They show only that UNARCO intended Unibestos to be the widely-used, general purpose high temperature insulation product which it soon became.

All insulation products at issue manufactured by Fibreboard and Raymark were similarly designed for wide industrial use and actually enjoyed large commercial sales. Neither Fibreboard nor Raymark has claimed that its products were designed specifically for sale to or use by the United States.

C. THE UNITED STATES DID NOT CONTROL THE DESIGN, CONTENT, LABELING, OR MANUFACTURING PROCESS FOR DEFENDANTS' PRODUCTS

The government contract defense can apply, by law and logic, only where a government specification mandated the aspect of the product which caused the injury. The Tort and Product Liability Reform Act, which codified the existing common law of Washington on this point, expressly provides that the defense is available only "[w]hen the injury-causing aspect of the product was, at the time of manufacture, in compliance with a specific mandatory government contract specification relating to design or warnings." RCW 7.72.050(2). In the instant cases plaintiffs' injuries were caused by the release of asbestos fiber from defendants' products. Whether and how much asbestos fiber is released into the air when insulation is removed from its packaging, cut to size, installed or

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removed is a function of many design and manufacturing factors, including (i) whether asbestos was used in the product; (ii) which type of asbestos was used (some types of asbestos are more likely to cause disease than others); (iii) the length of the fibers selected (also an important factor in the health impact); (iv) the percentage of asbestos in the product; (v) the other materials mixed with or surrounding the asbestos; and (vi) the process by which the various materials are bound together.

None of the specifications at issue in these cases imposed significant controls or limitation on the design decisions which together created the injury-causing aspect of defendants' insulation products. The federal government issues materials specifications in order to ensure that the materials purchased can be used as intended. This goal could sometimes be accomplished simply by designating a particular product by brand name. However, the government is also vitally interested in fostering competition among suppliers, in order to maintain or reduce the price of the product, and in generating new and better products. Consequently the United States ordinarily buys through reference to specifications which concisely list the technical features which must be satisfied by any item purchased under the specifications. In some situations, often dealing with the development of new equipment or weapons systems, the United States will use a "design" specification, dealing with how the product must be designed, and possibly manufactured. In purchasing the vast majority of the items needed to operate the government, however, the United States makes use of

"performance" specifications. This type of specification may contain some general design and content provisions, but focuses largely on the desired performance features. Performance specifications do not ordinarily make detailed provisions regarding the design of the product, its contents and chemical composition, on the manufacturing process. Manufacturers and distributors are free under this type of specification to choose the materials, design, and manufacturing process as long as the performance requirements of the specifications are satisfied. John Haas, who was the Assistant for Specifications within the Bureau of Ships (later Naval Sea Systems Command) from 1966 to 1981 and Chairman of the Specifications Control Board from 1968 to 1981, explained the Navy's preference for performance specifications as follows in a declaration attached as Exhibit 6:

> One of the fundamental distinctions in the preparation of military specifications is between those specifications which call for a specific material content ("design" or "content" specifications) and those calling only for performance characteristics ("performance" specifications).
>
> During my employment at NAVSEA and its predecessors, it was generally the policy and practice to write performance rather than design specifications, which encouraged manufacturers to develop new products and to improve existing ones in order to meet the Navy's needs. As a result, the Navy stimulated both cost competition and product development on the part of industry.

As discussed in detail in Part II below, the specifications pursuant to which the United States purchased pipe-covering from Pittsburgh Corning and Fibreboard (MIL-I-2781) and insulation blocks from Fibreboard (MIL-I-2819) were undoubtedly performance specifications,

in part because neither mentioned or required asbestos. Exhibit 8, at 3-4; Exhibit 9, at 5. Although the specifications covering the asbestos cloth sold by Raymark required 10% asbestos, these were nevertheless primarily performance specifications, for the manufacturer was left with broad discretion to choose the types of asbestos, the length of the asbestos fiber, the materials in which the asbestos is bound, and the manufacturing process, all of which affect the degree of the health hazard. The government contract defense cannot properly be applied in this type of situation, where the government exercised little or no real control over the design, content and manufacture of the product.

Nor can the defense shelter the manufacturers from plaintiffs' claims based on failure to warn. None of the specifications at issue here contained any provision, directly or through incorporation of any packaging provisions, which prohibit the attachment of a warning label. John Haas states in his accompanying declaration that to his knowledge "there was no provision in Section 5 [packaging] of any thermal insulation specification prohibiting suppliers from attaching warning labels." Exhibit 6, at 3. Similarly, Patrick V. Schott, an employee of the Defense Contract Administration Service who periodically visited Pittsburgh Corning's Port Allegheny Plant to inspect Unibestos shipments, testified that he could recall nothing in the applicable packaging instructions which would have prevented

Pittsburgh Corning from placing a warning label on its Unibestos packages. Exhibit 10, at 50.

D. The Manufacturers Were At Least Equal Partners In The Development of Product Specifications

The rationale underlying the government contract specification defense is that the manufacturer was compelled by the government to produce the item in question exactly as it was produced. Where the manufacturer has participated in the development of the specification, however, the element of compulsion is missing and the manufacturer may not rely on the defense. In O'Keefe v. Boeing Company, 335 F. Supp. 1104 (S.D. N.Y. 1971), for example, Boeing was sued for personal injury and wrongful death caused by the crash of a Boeing-manufactured Air Force B-52. Boeing argued that since the government had designed the aircraft, the company could not be held liable for any of plaintiffs' injuries. The court found that

> . . . ultimate responsibility for the design and use of the B-52 bomber rests and always has rested with the United States government. The court concludes, however, that this fact, in itself, neither exonerates the defendant, nor has it in any way altered the defendant's duty as a manufacturer in this case where there has been no showing that the defendant was totally oblivious of and/or aloof from the genesis of the design specifications in the first place. . . . [Footnotes and citations omitted.] 335 F. Supp. at 1124.

See also, Jenkins v. Wittaker Corp., 551 F.Supp. 110 (D. Hawaii 1982) (summary judgement for manufacturer not appropriate where there is evidence of involvement in the design of the product

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called for by the government contract).

The government contract defense is inapplicable here because the insulation manufacturers exercised considerable discretion and control over the terms of the military specifications applicable to their products.

The government has traditionally relied on product manufacturers for technical and product information to enable it to prepare specifications to cover the range of its needs. Specifications writers know the parameters of the Navy's performance needs and seek to develop specifications for products to meet those needs. They do not, however, have expertise in the range either of products available in the commercial market or of the performance characteristics of those products. It is essential, then, in the preparation of procurement specifications that the Navy ask for advice and assistance from industry in order to develop specifications with realistic requirements.

This general process has been true in the development of specifications for thermal insulation products since at least the early part of this century. The Navy has regularly relied on product manufacturers for technical and product information to enable it to prepare specifications to cover the range of its needs. John Alfers, who was employed by the Navy for 39 years in the field of military specifications, states in a declaration accompanying this memorandum, Exhibit 9, that

> Although my staff engineers attempted to keep current in the areas assigned

> to them, the industry engineers and representatives inevitably had much greater knowledge concerning the design, composition, manufacturing process, performance characteristics, existing commercial uses, and possible new uses of their own products. My staff necessarily relied heavily upon industry to provide them with all the information needed to draft useful specifications. In many cases, the great technical knowledge of the industry representatives gave them substantial influence over the final language and requirements of the specifications.

Exhibit 9, at 3-4. Similary, Joseph Chilcote, a project engineer in the Materials Standards Branch from 1942 to 1964, has stated that because it was impracticable for the Navy to develop the detailed expertise necessary independently to undertake its own product development, he and others in his office invariably conferred with industry to determine product availability from preexisting commercial sources. Exhibit 7, at 1. These practices comport with the purpose of the Defense Cataloguing and Standardization Act adopted in 1951, 10 U.S.C. § 2451, et seq., which was to develop a supplies catalogue and standardization program consonant with "the best practices of industry in order to obtain to the greatest extent practicable the cooperation and participation of industry in the program." The Navy regularly solicited comments from thermal insulation manufacturers on new specifications or proposed changes in existing specifications. Exhibit 11. Manufacturers regularly offered such comments. Exhibit 12.

Moreover, various trade associations to which the manufacturers belonged were consistently involved in reviewing, commenting on and redrafting new specifications or amendments to existing specifications. For example, Raybestos-Manhattan advised Joseph Chilcote by letter of March 29, 1963 that it would furnish comments on an interim specification revision to the Asbestos Textile Institute, and that the ATI would provide comments on behalf of the industry. Attachment C to Exhibit 7. In addition, Marion Washington Oliver, the vice-president of materials and environmental affairs for Raymark, has testified that the Asbestos Textile Institute and Raymark prepared specifications and modifications to specifications for asbestos cloth. Exhibit 13. Mr. Oliver, who was a member of the technical committee of the Asbestos Textile Institute between 1950 and 1967, testified that the technical committee wrote specifications which were later adopted by the government. According to Mr. Oliver, the committee drafted proposals for military specifications that were circulated to all the members of the committee. The committee then put the draft in final form and made the recommendation to the board of governors. Exhibit 13. Upon receiving the recommendations from the ATI, the government may have made some changes in terminiology but essentially accepted the technical committee's changes and modifications.

Similarly, the National Insulation Manufacturers Association (NIMA), of which Pittsburgh Corning and Fibreboard were members,

created a committee responsible solely for reviewing and preparing comments on proposed specifications. Exhibit 14, at 90. Before NIMA, the Magnesia Insulation Manufacturers Association (MIMA) provided substantial comments on proposed specifications. In commenting on proposed revision B to MIL-I-2781, for example, the MIMA comments indicated that the majority of manufacturers were in "major disagreement with certain provisions of the subject proposal," and changes were recommended by the manufacturers (including Fibreboard's predecessor, Pabco) to conform to existing materials or practices in the industry. Exhibit 15, at 1, and accompanying attachment.

Manufacturers also influenced the specification development process through direct dealings with government engineers. Harry P. Hoopes, who served in various capacities at Fibreboard Corporation, including insulation research director, has testified that he met with a writer of thermal insulation specifications to discuss a draft specification. It was his judgment that the specification writer knew about specifications, but was not knowledgeable about insulation. Hoopes provided needed technical advice. Exhibit 14, at 105-108.

In addition, manufacturers have frequently brought new thermal insulation products to the Navy to seek a new market. Where existing specifications have not covered these products but the products have been tested and have had a demonstrated ability to perform in accordance with the Navy's needs, the

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Manufacturers supplying the United States with products that are also sold widely to commercial and industrial users will almost certainly carry substantial liability insurance regardless of whether a federal employee, or another individual exposed to a shipment sold to the government, could successfully assert a product liability claim. The cost of this insurance will be built into the price of the product, even if injured federal employees cannot benefit from the coverage. Further, certain government contracts in fact require that the contractor carry liability insurance. Thus recognition of the defense is unlikely to reduce the government's procurement costs or to induce additional sellers to offer their products to the United States. The only clear consequence of applying the government contract defense in most situations would be to provide a windfall to the contractor's insuror.

specification dealing with material or composition were as follows:

> 3.2 Materials. The pipe covering shall be composed of heat-resisting compounds suitable for temperature conditions and the purpose intended.
>
> 3.3 Composition. The composition of the pipe covering shall conform to that of the sample given qualification approval...

The remainder of the nine-page specification dealt with the shape and dimension of the pipe covering, the performance criteria to be met for each class and grade, and the testing procedures to be used to measure performance. There was no mention of asbestos.

Between July, 1962 and February, 1972, MIL-I-2781 was revised or amended on five occasions:

MIL-I-2781D (June 13, 1963)

Interim Amendment 1 (Ships) to MIL-I-2781D (December 10, 1964)

Interim Amendment 1 (DCSC) to MIL-I-2781D (January 11, 1965)

Interim Amendment 2 (Ships) to MIL-I-2781D (July 16, 1965)

Interim Amendment - 3 (Ships) to MIL-I-2781D (March 1, 1971)*/

However, the paragraph dealing with "Materials" (Section 3.2) remained unchanged.**/ Throughout this 10 year period MIL-I-2781 never mentioned asbestos.

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*/ Copies of these documents accompanied PCC's Motion for Summary Judgment. See Affidavit of John R. Allison, at 3, discussing PCC Exhibit 11.

**/ Section 3.3, dealing with "Composition," was deleted, apparently because other portions of the specification adequately insured that the product supplied had to be the same as the product tested.

III. NONE OF THE DEFENDANTS HAS SATISFIED THE REQUISITE ELEMENTS OF THE GOVERNMENT CONTRACT DEFENSE.

If despite the foregoing the Court concludes that the government contract defense is available in this context, each defendant can succeed on its motion for summary judgment only by demonstrating that (i) the specifications applicable to its insulation products at issue here were "design" rather than "performance" specifications; (ii) the product was supplied to the government pursuant to a contract; (iii) the Government established the specifications for the product; (iv) the product meet the government's specifications in all material respects; and (v) the defendant did not have, and fail 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. Order Granting Pittsburgh Corning's Motions To Amend, supra, at 12. As discussed in detail below, none of the defendants has established each of these elements.

A. Pittsburgh Corning Corporation

1. MIL-I-2781 Was A Performance Standard

When Pittsburgh Corning purchased the right to manufacture and sell Unibestos in July, 1962, the applicable pipe covering specification was MIL-I-2781C (see Exhibit 15), as supplemented by Amendment 1 (See Exhibit 16). The only sections of that

MIL-I-2781 was a classic performance specification. The expected performance charactistics were set out with great precision by grade (i.e., upper temperature limit), by class (whether the product was composed of a calcium silicate compound or of fiber), and, in some cases, by type (i.e., light or heavy density). Exhibit 15, at 5, Table III. Conversely, the specification made only broad and rudimentary references to the materials to be used ("fibrous" material; "heat-resisting compounds suitable for temperature conditions and the purpose intended") and to the design. Only a cursory review of MIL-I-2781 is required to determine that this specification set out no detailed design or content requirements.

Whether Pittsburgh Corning's pipe covering released asbestos fibers into the environment during use, and if so, the degree of the health hazard thus created, was largely a function of the following design factors: (i) whether asbestos was used in the product; (ii) the type of asbestos used--"asbestos" is a generic name referring to a general class of minerals, some of which are more dangerous than others; (iii) the length of the asbestos fibers (also an important health consideration); (iv) the percentage of asbestos in the product; (v) the other materials mixed with or surrounding the asbestos fibers; and (vi) the process by which the various materials were bound together. MIL-I-2781 did not address any of these design factors. Under this specification, Pittsburgh Corning had complete discretion to resolve these questions.

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Navy has developed a specification (or a new class or grade of an existing specification) to cover the new product. See Exhibit 14 at 121, where Mr. Hoopes states that the Navy wrote a specification during World War II to cover Fibreboard's product, a light density 85% magnesia insulation.

In sum, it is clear that in developing and revising thermal insulation specifications the United States neither desired nor attempted to override design decisions by the industry. Indeed, the United States strove to build on or incorporate in toto existing industry specifications wherever possible. Certainly the defendant manufacturers cannot establish that they were "totally oblivious of and/or aloof from the genesis of the design specification." O'Keefe v. Boeing Company, supra, at 1124.

E. THE GOVERNMENT CONTRACT DEFENSE DOES NOT SHEILD A MANUFACTURER FROM LIABILITY FOR ITS OWN NEGLIGENCE.

Regardless of whether the government contract defense is grounded conceptually on considerations unique to sales to the government or on general tort principles, the defense will not protect a manufacturer from his own negligence. If the contractor has particular knowledge or expertise concerning the design of the product, then he is no longer merely the servant of the purchasing party. Johnston v. United States, 568 F. Supp. 351 (D. Kansas, 1983).

Because the defendant asbestos manufacturers here are charged with the knowledge of experts concerning the design and manufacture of their own products, including the health implications thereof, Borel v. Fibreboard Paper Products, 493 F.2d 1076, 1089 (5th Cir. 1973), and because these manufacturers had actual knowledge unavailable to the United States concerning the manner in which their products were designed and produced (e.g. PCC's "special . . . production technique called fiberizing", Exhibit 2, at 2), the government contact defense is unavailable against plaintiffs claims based on negligence.

F. PUBLIC POLICY CONSIDERATIONS WEIGH HEAVILY AGAINST APPLICATION OF THE GOVERNMENT CONTRACT DEFENSE IN THESE CASES

At the time of its September, 1982, decision this Court believed that the government contract defense could be justified in part on the ground that recognition of the defense would facilitate government procurement. Having considered the significance of the government contract defense for the overall government procurement program, military and non-military, as well as the likely impact of the defense in litigation involving products purchased by the government, the United States respectfully asserts that public policy considerations argue strongly against application of the defense in these cases.

1. Potential Tort Liability Encourages Manufacturers To Provide Safe Products And Thus Protects The Health And Safety Of Federal Employees

One of the fundamental purposes of tort law, and specifically its product liability principles, is to encourage manufacterers to take every possible precaution to see that their products are reasonably safe. The United States has a direct interest in ensuring that materials and equipment sold to the government are safe, in part because these products are likely to have their greatest health impact on employees of the United States. The United States sees no justification for denying these workers the deterrent effect of ordinary tort law simply because they are employed by the federal government. Moreover, the operations of the government are adversely affected by any accident or illness which results in lost working time, hinders efficiency or lowers morale. The United States also has a clear financial interest in avoiding injury to its employees, for under the Federal Employees Compensation Act the government must reimburse its employees for certain medical costs and lost wages resulting from occupational illness or injury without any showing of fault. If the government contract defense is widely recognized, and safety consciousness among manufacturers selling to the government decreases, the United States not only could expect to incur a greater direct FECA burden, but would be less likely to recoup its FECA payments from sums recovered by the injured employee from the manufacturer.

2. Maintaining Potential Tort Liability For Manufacturers Pools The Risk Associated With Hazardous Products And Provides More Complete Relief For Tort Victims

Another obvious goal of the tort system is to provide relief to the victims of accident or injury. The government contract defense frustrates this goal, for the injured worker is left with no action against either his employer or the manufacturer, regardless of any culpability by either or both. This means that the burden is shared by the United States, through its FECA payments to the injured employee, and by the injured employee himself, who cannot recover for his pain and suffering. Only the manufacturer benefits from the defense.

If the defense is not applied, the individual can be compensated and the risk spread to other users of the product and throughout the insurance system. The manufacturer of the product is in by far the best position to learn of the risks associated with his product, to insure against these risks, and, if necessary, to adjust prices to reflect these insurance costs. The government contract defense creates an unpredictable and unjustifed exception to this mechanism for spreading the risks of injury and death, denying relief solely on the ground that the worker was injured by a product sold to the federal government. Certainly there can be no basis for denying tort compensation to Puget Sound Naval Shipyard workers while insulators exposed to the same products at private shipyards (e.g. Todd Shipyard), and suffering the same disabilities, are not confronted with this defense.

3. Recognition Of The Government Contract Defense Is Unlikely To Facilitate Government Procurement

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Pittsburgh Corning used this discretion to produce a very distinctive product, composed almost entirely (95%) of asbestos. Moreover, Pittsburgh Corning selected an unusual type of asbestos (amosite) found almost exclusively in South Africa. Exhibit 2, at 3. Throughout its promotional material Pittsburgh Corning repeatedly emphasized that "Unibestos...is the only industrial insulation made in the United States composed of unique long-fibered Amosite asbestos." Exhibit 2, at 2. Unibestos had an "exclusive composition" offering "unique natural advantages" over other available thermal insulation pipe covering. Exhibit 2, at 2. Further, Pittsburgh Corning stated in its promotional material that its manufacturing process was "special" to Pittsburgh Corning:

> The Amosite asbestos is processed by a special Pittsburgh Corning production technique call fiberizing, designed to exploit the full natural advantages of the long-fibered material. In this process, the Amosite is carefully screened, air blown, and brushed to "open up" the long, fine asbestos fibers into an interlaced fibrous mass which entraps millions of insulating air spaces. UNIBESTOS is produced by carefully forming this exclusive base material into sections of precise thicknesses, then applying a smooth, chemically-inert refractory coating.

Based on these factors Pittsburgh Cornning promoted Unibestos as "unique among insulations in its make-up and manufacture." Exhibit 2, at 2.

Clearly Pittsburgh Corning cannot now claim that MIL-I-2781 imposed a single, uniform set of design or manufacturing requirements. Neither can Pittsburgh Corning argue that MIL-I-2781

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expressly required asbestos, for this is obviously not the case. In the final analysis Pittsburgh Corning is left with, and makes, only one argument: that the performance requirements set out in those portions of MIL-I-2781 under which Unibestos was purchased could be met only if asbestos was included in the product. Pittsburgh Corning apparently would have the Court concluded from this that MIL-I-2781 is a design specification.

This argument falls far short, for several reasons. First, an asbestos-free product could almost certainly have been developed to meet the performance characteristics set out in the two relevant subsections of MIL-I-2781, had the industry been willing to do so. Attached as Exhibit 28 is a detailed historical study by Stephen L. Berger of the patents issued for asbestos-containing thermal insulation products. Mr. Berger concludes that the technology necessary to manufacture substitutes for existing products existed throughout the period at issue here. Indeed, Mr. Berger finds that such products had already been patented by several manufacturers of asbestos-containing insulation products by 1962.*/

Second, Pittsburgh Corning creates the impression that the Navy's demand for the performance characteristics contained in MIL-I-2781 was inflexible. In fact, however, all materials specifications necessarily reflect trade-offs among a variety of factors, none of which can be considered an absolute.

*/ On September 11, 1984, Mr. Berger described these findings under oath in a deposition noticed in this litigation. The transcript of this deposition is not yet available to the United States.

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John Alfers, who was responsible for portions of the Asbestos Elimination and Substitution Program, describes these trade-offs and their significance in the asbestos context as follows:

> In drafting materials specifications, the project engineer invariably balances various interests and strikes compromises abetween achieving the ideal performance and durability on the one hand, and, for example, cost, feasibility, commercial availability and known safety constraints on the other hand. I am certain that had the manufacturers and suppliers of asbestos-cotanining products alerted my office earlier to the health hazards associated with asbestos, my staff would have sacrificed a certain degree of performance, if necessary and compatible with the Navy's minimal performance needs, in order to reduce or eliminate the asbestos content of the products and thus facilitate procurement of safer products. Exhibit 9.

In fact, this is exactly what was eventually done as part of the asbestos elimination program. On March 1, 1971, prior to the availability of asbestos-free substitutes, the United States eliminated Grade II, Class c and Grade III, Class f of MIL-I-2781, the only provisions under which Unibestos was purchased. The Navy then made use of products which could be obtained under other portions of MIL-I-2781 having less demanding performance criteria. Thus the Navy choose to switch to existing low-asbestos products rather than insist on the particular performance characteristics of Unibestos. Clearly Unibestos was not essential to the survival of the fleet and would have been deleted from the specification earlier had the United States been warned of the health hazards.

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Even if those sections of MIL-I-2781 under which Unibestos was purchased could have been satisfied only through the use of asbestos, this remains a performance specification for two reasons. First, the manifold design decisions discussed above, other than whether to use asbestos, would have remained within Pittsburgh Corning's unfettered discretion. Second, even if the performance criteria within portions of MIL-I-2781 could not then have been satisfied by any product unless it was designed as Unibestos was designed, the only criterion within the specification was one of performance. As noted, one of the goals of the specification system is to increase competition among suppliers and thus decrease costs. By insisting on a classic performance specification, the United States created an incentive, and left open the possibility, for another manufacturer to meet the performance requirements in a different way, i.e., to produce a competing product. Thus MIL-I-2781 remained a true performance specification at all times relevant here even if only one product was purchased thereunder. That no other manufacturer in fact developed a competing product, perhaps asbestos-free, until compelled to do so by the Navy is a dramatic testament to the to the collusiveness of the asbestos industry.

2. Most of the Unibestos Used At PSNS Was Obtained From Sources Other Than PCC and Was Not Governed By A Contract Between The United States and PCC

This Court has provided that in order to benefit from the government contract defense a manufacturer must show that

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"the product was supplied to the Government puruant to a contract." Order Granting PCC's Motions To Amend, supra, at 12. This requirement was articulate by Judge Pratt in the Agent Orange litigation as follows:

> Since the defense applies to a product only when it was supplied by a defendant pursuant to a government contract, in order to succeed the defendant must establish that it did have one or more contracts with the government to supply "Agent Orange". Moreover, the defense will extend to, and protect the defendant against liability for, only those particular shipments that were made under the contract with the government.

In Re Agent Orange Product Liability Litigation, 534 F. Supp. 1046, 1056 (E.D.N.Y., 1982) (emphasis added). In order to completely defeat plaintiffs' claims, Pittsburgh Corning must establish that each of the shipments of its Unibestos to which Hugh Tefft, William Raines and Albert Marry were exposed was sold to the United States pursuant to a contract directly "with the United States". Id. This is not a mere technical requirement, for it is only by contract that the United States could exercise the type of control over a manufacturer's product design which lies at the heart of the government contract defense.

Pittsburgh Corning clearly has not satisfied this requirement. Although its exhibits are voluminous on other subjects, Pittsburgh Corning has submitted only one document showing a sale of Unibestos directly to the United States for delivery to or use at Puget Sound Naval Shipyard. Exhibit C to the affidavit of Robert E. Buckley is a PCC invoice dated May 18, 1970 showing the sale and shipment

of $624.10 worth of Unibestos to PSNS. This document is entirely irrelevant to Dorothy Marry v. A.C. and S., Inc., No. C84-168M, since Albert Marry left PSNS in 1965 and died in 1968. Nor does this single $620 invoice carry much persuasive weigh in Tefft and Raines, for the plaintiffs' claims arise primarily from exposure prior to 1970, and the invoice involves only a very small shipment of pipe covering (300 pieces). Pittsburgh Corning submits no evidence of a direct sale to the United States for use at PSNS at any other point during the 10 years Unibestos was manufactured by Pittsburgh Corning. Moreover, neither the papers submitted by Pittsburgh Corning's counsel nor the supporting affidavits actually claim that Pittsburgh Corning made other direct sales to the United States for use at Puget Sound Naval Shipyard during the relevant periods. Pittsburgh Corning's motion for summary judgment must be denied on these grounds alone.

Further, the record now before the Court establishes, and Pittsburgh Corning admits, that much of the Unibestos used by the United States was purchased from independent local insulation distributors, such as E.J. Bartells in the Seattle area. (See the Affidavit of Robert E. Buckley submitted by PCC, at 4 and 6.) This is confirmed by John Norris, a E.J. Bartells employee, who states that PSNS purchased Unibestos from Bartells during the period 1962-72 Exhibit 18 at 2. That PSNS would purchase Unibestos locally, rather than from Pittsburgh Corning, is consistant with the shipyard's overall purchasing for insulation materials.

Alfred E. Lede, who was a Purchasing Agent at the shipyard from 1942 to 1944 and 1946 to 1951, states by affidavit that

> when thermal insulation products were purchased at least 50% of the products were purchased from local source in the Seattle area, such as Brown Company or E.J. Bartells. In these cases our purchases were made directly from these local commercial outlets rather than from the manufacturers. Many of these purchases were made orally over the telephone.

Exhibit 19, at 1-2.

In sum, it seems indisputable that much, and possibly most, Unibestos used at PSNS was not obtained pursuant to a contract directly from Pittsburgh Corning, but from independent distributors. Because such sales did not involve contracts between the United States and Pittsburgh Corning, the government contract defense does not apply to these sales. On this basis Pittsburgh Corning's motion for summary should be denied, and plaintiffs' motion granted, as to all claims except those arising out of the May, 1970 shipment.

3. Pittsburgh Corning Exercised Significant Influence and Control Over the Form and Import of MIL-I-2781

Because MIL-I-2781 existed prior to the time Pittsburgh Corning purchased the Unibestos line, the appropriate inquiry must be whether during 1962 to 1972, Pittsburgh Corning exercised a significant degree of control over the implementation of these portions of the specification applying to Unibestos. Because Unibestos was the only product being purchased under

Grade II, class c, and Grade III, class f, Pittsburgh Corning was a dominant actor in all decisions affecting this part of the specification. This is dramatically illustrated by Pittsburgh Corning's successful effort to delay the amendment of MIL-I-2781 to delete high-asbestos content insulation, principally Unibestos. When Navy engineers advised PCC of an intention to halt the purchase of Unibestos because of suspected health hazards, Pittsburgh Corning argued that the government engineers were incorrect, that Unibestos was not more dangerous than low-asbestos content products, and that the specifications should not be amended until more was known about the health hazards. As a result, the Navy decided to forago any decision until extensive experiments could be conducted. It was not until the results of this test proved the special hazards associated with Unibestos that PCC halted its battle against the amendment and the authority to purchase Unibestos was deleted.

4. The United States Does Not Contest That Any Unibestos Used at PSNS Complied With MIL-I-2781

The Navy's specification requirements may be waived under certain conditions. Further, because the Navy can inspect only a small sample of any shipment before acceptance, and in many situations relies totally on the manufacturer's "certificate of compliance", material purchased pursuant to a specification may inadvertently be accepted and used even though not complying with

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the specification. In general, however, thermal insulation and most other material may be purchased and accepted only if it complies with the applicable specification. Consequently the United States does not contest this element of the government contract defense.

5. Pittsburgh Corning Had Greater Knowledge of The Health Hazards Associated With The Use of Unibestos Than Did The United States

Pittsburgh Corning's argument on the final element of the government contract defense greatly overstates the government's knowledge while understating Pittsburgh Corning's own knowledge. This is accomplished by failing to focus on the only time period of significance here, distorting the meaning of several crucial developments in the medical knowledge, misinterpreting the Shuman decision, and ignoring evidence that Pittsburgh Corning was informed of the hazards of asbestos exposure even before it began producing Unibestos.

a. The Relevant Period: Because Pittsburgh Corning manufactured Unibestos only between July 1, 1962 and February 1, 1972, this is the only period within which relative knowledge need be evaluated. During the 1960's the "state-of-the-art" in medical knowledge concerning asbestos was evolving, sometimes from month to month, and consequently the government contract defense can be meanfully litigated only by focusing on the exact dates at issue. The particular focal points here must be the dates on which Pittsburgh Corning and the United States entered into contracts

concerning the purchase of that Unibestos to which the plaintiffs were exposed.

Pittsburgh Corning has established only one contract (in May, 1970) between the United States and Pittsbrugh Corning regarding the purchase of Unibestos for PSNS. It has been argued above that the government contract defense can be applied only to this contract. If the Court adopts this position, then the only significant date for the "relevant knowledge" inquiry regarding PCC is May, 1970. Because Albert Marry clearly was not exposed to the May, 1970 shipment of Unibestos, no "relative knowledge" inquiry need be made in the Dorothy Marry Rose case. Even if successful as to Tafft and Raines, PCC would be sheltered only from liability arising from this 1970 shipment.

If this Court were to permit Pittsburgh Corning to assert the defense as to each sale of Unibestos for use at PSNS, the crucial date for relative knowledge purpose would presumably be the date of sale. But here too the defense must fail, because Pittsburgh Corning has not to provided any specific information on sales to or for PSNS. Consequently Pittsburgh Corning's factual predicate is so inadequate that the relative knowledge element cannot be meanfully evaluated and PCC's motion for summary judgment must be denied.

b. Studies, Surveys, and Safety Practices at Naval Shipyards: Pittsburgh Corning emphasizes that there is "a clear and obvious difference" in the type of asbestos exposure experienced by

factory workers in the manufacturing setting (i.e., where asbestos products are made) and the exposure experianced by insulators and other shipyard workers dealing with the finished asbestos-containing products. The United States believes that this is a valid and crucial distinction. However, the remainder of Pittsburgh Corning's relative knowledge argument is simplistic, self-serving and inaccurate. Without recognizing or discussing the medical and scientific complexities, Pittsburgh Corning simply asserts that because the United States operated shipyards in which asbestos was used and knew that asbestos could be dangerous under certain conditions, the United States knew that the use of Unibestos was dangerous under the conditions prevailing at PSNS during the relevant period. Conversely, Pittsburgh Corning denies that it had "any knowledge of asbestos hazards in any environment prior to 1961" PCC's Memorandum In Support, August 24, 1984, at 14 (emphasis added). Pittsburgh Corning has submitted no expert testimony in support of this position.

The evolution of medical knowledge concerning the various asbestos-related diseases (asbestosis, mesothelioma, and lung cancer) and of the hazards associated with each type of exposure (e.g., factory workers; insulators; bystander exposure; exposure to relatives) is far too difficult and complex to present at length in a memorandum on summary judgment. In briefest summary, it is the position of the United States that although it was generally known within the medical and scientific community before

1930 that asbestos could be hazardous under certain conditions involving intense and prolonged exposure, it was not until the mid-1960's that the United States learned that, despite the safety precautions then mandatory at the shipyards, exposure to asbestos-containing products could cause significant adverse health consequences among insulators. Accompanying this memorandum as Exhibit 20 are portions of the September 6, 1984, deposition testimony of Dr. Joseph Aisner, who is a Professor of Medicine and Oncology at the University of Maryland, with special expertise in asbestos-related diseases of the lung. Dr. Aisner has testified, and would testify at trial, that there was no basis in the medical literature until at least 1965 on which the United States had reason to know that asbestos-containing products constituted a health hazard under shipyard conditions. Exhibit 20, at 73, 193.

Pittsburgh Corning's claim that the United States "withheld its knowledge about shipyard asbestos hazards from the general public, including PCC", PCC Memorandum In Support, August 24, at 14, is belied by Pittsburgh Corning's own exhibits. The collection of Navy and Public Health Service studies, articles, surveys and reports submitted by Pittsburgh Corning demonstrate that the government was struggling throughout this period to gather information and find solutions to a multitude of health problems at government shipyards--and this struggle continues. Indeed, the Navy virtually created the field of industrial hygiene in the 1940's to protect shipyard workers. Had members of the asbestos industry pursued the health and safety issues surrounding asbestos with

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anything near equal vigor, plaintiffs have might well never have contracted asbestosis.

c. The Shuman Decision: The Shuman decision cited by Pittsburgh Corning dealt with a mesothelioma victim working in a bystander trade in a private shipyard in the 1940's and 1950's. Liability required a showing of negligence based on the government's vessel-owner under the Longshoreman's Act. The instant cases deal with asbestosis in a naval shipyard and the only period of concern to Pittsburgh Corning is 1962-1972. The issue is not negligence, but relative knowledge. Consequently Shuman is wholly inapposite to this litigation. Shuman v. United States, No. 78-1407 (D. Mass. July 27, 1984).

Moreover, that portion of the Shuman decision relied on by Pittsburgh Corning here is consistent with the government's position here. On page six of the Findings, Rulings, and Order For Judgement, Judge Skinner concludes that: "Upper echelon Navy officials knew at least as early as the 1940's, probably earlier, that asbestos dust posed a significant health hazard." As discussed above, it is the government's position that it was indeed widely known by at least the 1940's that asbestos could be hazardous under certain conditions. However, it was not known at that time, and the Navy did not know until the mid-1960's, that the use of asbestos-containing insulation products was dangerous to shipyard workers.

d. Pittsburgh Corning's Knowledge: A manufacturer of asbestos-containing products is held to the knowledge and skill of

an expert, meaning that "at a minimum, he must keep abreast of scientific knowledge, discoveries and advances and is presumed to know what is imparted thereby." Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076, 1089-90 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). In addition, such a manufacturer has a duty to test and inspect its product, i.e., to research and experiment commensurate with the dangers involved. Id. In light of the fact that even the general scientific and medical community had recognized a link between asbestosis and workers in asbestos-product manufacturing industries for several decades before PCC began manufacturing Unibestos, these results impose a heavy burden on PCC to have been abreast of, and even lead, the frontiers of knowledge of health risks of exposure to asbestos.

A complete discussion of the facts concerning PCC's actual knowledge between 1962 and 1972 concerning the hazards of exposure to asbestos, and in some cases failure to act upon or disclose such knowledge, could fill hundreds of pages. For illustrative purposes, the United States points to the following:

In May, 1962, Clyde Ruddick, the manager of safety and plant protection for PPG Company, wrote to Carl Baumler, Vice President, Pittsburgh-Corning Corporation furnishing him with copies of a number of articles about the toxic properties of asbestos and the disease asbestosis. Ruddick pointed out that one of the authorities quoted in the articles, Dr. Carey P. McCord, was "an authority and is retained by our company." Ruddick also reminded Baumler that PPG was a member of the Industrial Hygiene Foundation and said

"its services and advice are at your call. Exhibit 21.

PCC was a member of the National Insulation Manufacturers Association ("NIMA") as early as 1963 and Robert E. Buckley of PCC served as Director of NIMA.

In June 1963, the Air Hygiene and Manufacturing Committee of the ATI was advised that Dr. Irving J. Selikoff, at the next meeting at the American Medical Association in about 30 days, would read a paper on a study he had made of about 1500 workers showing a very large incidence of lung cancer over normal expectancy. It was thought that the Selikoff study would "be damaging to the industry." Exhibit 22.

At the April 14, 1964, meeting of the Board of Directors of NIMA, it was reported that Johns-Manville Sales Corporation was printing on containers of asbestos products the following warning:

> Caution: This product contains asbestos fibers. Inhalation of asbestos in excessive quantities over long periods of time may be harmful. If dust is created when this product is handled, avoid breathing the dust. If adequate ventilation control is not possible wear respirators approved by the U.S. Bureau of Mines for pneumocoriosis [sic] producing dust.

Exhibit 23, at 4.

In October, 1964, Pittsburgh Corning Corporation became aware of an article in a New York paper entitled "A Rare Carcinoma Believed On The Rise--A Study of Asbestos Workers Shows A High Incidence." The article began, "occupational exposure to asbestos may be making an extremely rare form of cancer much more common . . . The cancer is called mesothelioma. Exhibit 24.

The Board of Governors of the ATI (Asbestos Textile Industry) met in Feburay 1965. The group discussed "the unfavorable publicity" which had resulted from a conference on "biological effect of asbestos" held in October under the auspices of the New York Academy of Sciences. Exhibit 24.

B. FIBREBOARD CORPORATION

1. The Specifications Applicable to Fibreboard's Products Were All Performance Specifications

Fibreboard manufactured asbestos-containing insulation products from the 1920's until 1971. The earliest specifications applicable to Fibreboard's products were Navy Department Specification 32P3, promulgated in 1928, and Federal Specification HH-M-61, promulgated in 1934. Specification 32P3, entitled "Pipe-Covering, Diatomaceous Earth, Molded," required qualifying products to contain a minimum of 4% asbestos. Through later incorporation by reference of HH-M-61, covering 85% magnesia products, products qualifying under 32P3 were required to have an asbestos content of at least 10%. These requirements of minimum asbestos content were deleted from the Navy specifications during World War II - 32P8, for pipe covering, in 1942 and 32I3, for block, in 1943. The new provisions regarding product content referred to "heat resisting compounds suitable for the temperature conditions and for the purpose intended." In the early 1950's, the Navy's specifications were superseded by military specifications applicable to the Army, the Navy and the Air Force. Thus, MIL-I-2781 covered thermal insulation in pipe covering form, and MIL-I-2819 was promulgated to cover

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and since it is clear that much of Fibreboard's products were in fact sold by local distributors, Fibreboard has failed to establish this element of the government contract specification defense.

3. Fibreboard Participated in the Development of the Specifications Applicable to its Products

The United States has shown in Part II above that the members of the asbestos industry, including Fibreboard, had significant influence, and in some cases control, over the development of the specifications governing their products. See Exhibits 11, 12 and 14.

4. Fibreboard Had Greater Knowledge Than The United States Concerning the Health Hazards Associated With the Use of Its Products

The United States adhers to and adopts the plaintiffs' statement concerning the Fibreboard's knowledge of the health hazards associated with asbestos exposure.

C. RAYMARK INDUSTRIES, INC.

Both plaintiffs and Raymark seek summary judgment on only the first three elements of the defense as it relates to Raymark. The government addresses the "performance v. design" and "contract" issues below but does not contract compliance with specifications.

1. The Specifications Applicable To Raymark's Asbestos-Containing Cloth Were Performance Specifications

Raymark's only argument on this element is that the applicable specifications mandated that insulating cloth contain a stated amount of asbestos. Yet this alone cannot make these specification

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"design" specifications, for all other aspects of the product remained within the discretion of the manufacturer. As discussed in detail above, the government contract defense does not properly apply where the manufacturer retains this type of design discretion.

2. Asbestos-Containing Cloth Manufactured By Raymark Was Not Supplied To Puget Sound Navy Shipyard Pursuant to A Contract

Raymark submits the affidavit of John Hawkins, a Raymark employee, who states that Raybestos made sales to the United States in response to specific, numbered contracts. The United States does not dispute that Raymark, on occasion, may have sold an asbestos-containing product to the United States pursuant to a contract. The United States aeserts, however, there is no evidence that any of the asbestos cloth manufactured by Raymark to which plaintiffs were exposed at Puget Sound Naval Shipyard was purchased pursuant to a contract with Raymark.

Raymark relies on the deposition of John Haas, an employee of the United States who had responsibility for the development of specifications. Mr. Haas' deposition is irrelevant to the issue of whether the product was supplied pursuant to a contract. His testimony clearly relates only to the development and use of specifications.

Similarly, the photocopies submitted by Raymark are inadequate to prove that asbestos cloth was supplied to Puget Sound Naval Shipyard pursuant to a contract. Raymark's Exhibit A consists of five documents dealing with asbestos tape (not asbestos cloth,

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which is in issue here) for shipment to GSA facilities in Fort Worth, Texas. Three orders indicate asbestos cloth was to be shipped either to the GSA Supply Distribution Facility in Auburn, Washington or Forth Worth, Texas. There is no evidence that these orders were delivered to GSA nor is there any evidence that these products were ultimately delivered to Puget Sound Naval Shipyard.

Raymark also submits orders for sewing thread and packing and gasket material, under MIL-A-24058, allegedly sold to the Naval Supply Center. Even assuming these contracts were entered into, they are insufficient as a matter of law to prove sale of asbestos cloth.

In short, there is no evidence that asbestos cloth was supplied to Puget Sound Naval Shipyard pursuant to a contract between the United States and Raymark. As discussed in detail above, PSNS routinely purchased insulation products from local wholesalers and suppliers. Exhibits 18 and 19. Conversely, Raymark routinely sold its products to distributors for reasale locally. Exhibit 28, at 109. Against this background, Raymark cannot succeed on the government contract defense without specifically proving that the Raymark cloth to which plaintiffs were exposed was sold pursuant to a contract between the United States and Raymark.

IV. CONCLUSION

None of the defendants has established all of the elements of the government contract defense and consequently their motions

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for summary judgment must be denied. Because the specifications at issue are performance rather than design specifications, because the products at issue were not supplied pursuant to a contract between the United States and the manufacturer, and because the manufacturers were equal, and sometimes controlling, partners in the development of the specifications, this Court should enter summary judgment in favor of the plaintiffs on the government contract defense.

DATED September 19, 1984

Respectfully submitted,

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thermal insulation manufactured in blocks. These specifications contained no requirement for minimum asbestos content.

Fibreboard manufactured Prasco block and pipe covering products from the mid 1920's to 1957. The first specification applicable to these products was 32P3. Fibreboard's Prasco products were ready for manufacture and commercial distribution prior to the existence of the specification. Exhibit 29. Indeed, Fibreboard's Prasco pipe covering and block products were included by the Navy in a series of tests of the products of various manufacturers for the purpose of "evolv[ing] satisfactory specifications for high temperature pipe covering." Exhibit 30.

Fibreboard manufactured 85% magnesia block and pipe covering products from 1928 to 1966. Fibreboard identifies Federal Specification HH-M-61 as the first specification pursuant to which these products were produced for sale to the government. HH-M-61 was promulgated in 1934 and required a minimum asbestos content of 10%. HH-M-61 was superseded in 1956 by HH-I-554 which deleted the requirement of asbestos content and substituted therefor reinforcement with "mineral fiber." Fiberboard's 85% magnesia products were also qualified for sale to the government pursuant to MIL-I-2781 and MIL-I-2819, promulgated in 1951.

Fibreboard manufactured its Caltemp and Super Caltemp block and pipe covering products, a combination of calcium silicate and asbestos, from 1951 to 1971. These products were first submitted to the Navy for testing in 1949 and approved in 1951. Fibreboard identifies 32I3 as the specification pursuant to which the company

initially sought product approval. The Caltemp and Super Caltemp products qualified for sale under MIL-I-2781 and MIL-I-2819 in 1953.

Each of the specifications pursuant to which these Fibreboard products were purchased was a performance specification. The most important of these was MIL-I-2781, which has been discussed at length above in connection with Pittsburgh Corning. MIL-I-2819 is similarly a straight-forward performance specification, for it "sets forth an objective or a standard to be achieved, ... the successful bidder . . . selecting the means" of achieving the objective. J.L. Simmons Company v. United States, 412 F.2d 1360, 1362 (Ct. Cl. 1969). This specification describes temperature ranges and conditions under which the asbestos-containing blocks must perform, and sets physical characteristics relating to strength, durability and water absorption to which the product must conform. Choices relating to produce composition and methods of manufacture are left to the discretion of the manufacturer.*/

It is abundantly clear that the manufacturers have traditionally viewed both MIL-I-2781 and MIL-I-2819 as performance specifications. Both Harry Hoopes, a former Fibreboard employee, and Robert Buckley, former vice president of Pittsburgh Corning Corporation, have so testified. Exhibits 14 and 25, respectively. In addition, A.P. Mueller, Research Manager of the Phillip Carey Corporation, in correspondence with the head of the Navy's Qualified Products List Section, Naval Ship Engineering Center, in 1968 called MIL-I-2781 and MILI-2819 "essentially performance standards." Exhibit 26.

Although Fibreboard may argue that only by containing asbestos could its products meet the performance standards, the specifications are nonetheless performance and not design specifications. As the court recognized in Southland Mower v. Consumer Produce Safety Commission, 619 F.2d 499 (5th Cir. 1980), "[M]anufacturers remain free to develop new forms of technology that will meet the. . . criterion. [Yet pending such developments] a performance requirement may be quite design restrictive in its practical import." Id. at 515. That Fibreboard felt free to develop a new technology under the two specifications is apparent. In 1971 Fibreboard submitted its asbestos-free products for qualification under MIL-I-2781 and MIL-I-2819. In its letter notifying the Navy of the proposed change in its Caltemp products, Fibreboard stated that the only change was the elimination of asbestos fiber and the substitution of an unidentified fiber "of a proprietary nature." Exhibit 27. Thus it is clear that neither the Navy nor Fibreboard believed the specification required the use of asbestos.

2. FIBREBOARD HAS FAILED TO ESTABLISH THAT ANY FIBREBOARD PRODUCTS USED AT PSNS WERE SUPPLIED PURSUANT TO CONTRACT BETWEEN FIBREBOARD AND THE UNITED STATES

Fibreboard must establish that it had a contract with the United States relating to the products which caused plaintiffs' injuries. In re "Agent Orange" Product Liability Litigation, 534 F. Supp. 1046, 1056 (E.D. N.Y. 1982). Fibreboard's evidence on this subject consists of certain correspondence with the Navy referring to specific contract numbers. Fibreboard fails to point out, however, that the contracts are for shipments of products to locations other than Puget Sound Naval Shipyard. Fibreboard has produced not one document which refers to a contract to supply products to PSNS.

Similarly, the Fibreboard internal sales records or reports which accompany the Budlong affidavit do not reflect direct contracts with the Navy for use at PSNS. All of the sales reports reflect periodic sales to "U.S. Government - Bremerton" or to "U.S. Government/Oth[er] - Bremerton." Despite the conclusory assertions contained in the affidavit of Edmond Torbonn, there is nothing on the face of the reports to show that these sales were made to or for Puget Sound Naval Shipyard. Nor may such a conclusion automatically be drawn, for the Naval Supply Center in Bremerton purchases material and supplies for a number of government facilities in the Northwest in addition to the shipyard. Moreover, these sales reports do not indicate whether the sale was to the government, or to some "other" entity.

Because Fibreboard cannot establish that it had a contract with the United States to supply the insulation products to which plaintiffs' were exposed at Puget Sound Naval Shipyard

*/ Some versions of specifications preceding MIL-I-2781 and MIL-I-2819 did contain minimum asbestos content requirements. See, e.g., 32P3, indirectly incorporating HH-M-61 "technical requirements." Such references were deleted from the military specifications in World War II, and materials thereafter were generally required to be "suitable for the temperature conditions and the purpose intended."

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