



## CALIFORNIA APPEALS COURT BREAKS WITH NINTH CIRCUIT, ACCEPTS GOVERNMENT-CONTRACTOR DEFENSE IN ASBESTOS LIABILITY SUIT

by Thomas J. LoSavio

The “government contractor defense” is available in asbestos lawsuits brought against manufacturers and suppliers of military hardware and equipment. The defense protects the federal government’s exercise of discretion and judgment in its contract specifications and designs. In *Kase v. Metalclad Insulation Corp.*, 6 Cal. App.5th 623 (Cal. Ct. App. 2016), the California Court of Appeal, First Appellate District, considered whether the defense is available to a broker that arranged for asbestos-containing insulation to be shipped to a Naval Shipyard in 1968, where workers packed it around submarine piping.

The broker provided the insulation under detailed performance and testing specifications of the Navy, although those specifications did not explicitly call for the use of asbestos. The Court of Appeal determined that Metalclad could raise the defense because the Navy had knowledge of the dangers of asbestos, provided the broker with reasonably precise specifications, and had conducted extensive study and testing. Significantly, the state court broke with the US Court of Appeals for the Ninth Circuit over whether the defense is available in situations where the product at issue is commercially available.

The US Supreme Court set out the government-contractor defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). It held that the government itself need not design the allegedly defective product. The government may select a design, and so long as the government thoroughly reviews the proposed designs and makes a considered judgment, the defense can apply. The Court explained the defense will not apply, for example, if the government procures a stock helicopter designated solely by the manufacturer’s model number and which has the complained-of defect. In such a case, the manufacturer could meet both its contractual obligation to the government and its alleged design duty under state law. There would be no significant conflict between federal interests and state law, rendering the defense unavailable under those circumstances.

Unibestos is asbestos-containing insulation that had been available for decades. After multiple studies to determine its suitability for military use, the Navy used Unibestos on its vessels, and the product was subsequently ordered under Navy specifications, which specifically called for asbestos in insulation. In August 1968, Metalclad brokered a delivery of Unibestos from Pittsburgh Corning to the Navy. The Navy’s contract with Metalclad called for various inspections and tests of the insulation. Each lot of the supplied Unibestos had to measure up to the specifications.

During the 1970s, plaintiff Gary Kase worked on various Navy ships with those who were cutting, installing, removing, and disturbing Unibestos. Kase and his wife sued Metalclad and others, asserting claims based on his asbestos exposure. After answering the complaint, Metalclad moved for summary judgment or summary adjudication on two grounds: (1) the government-contractor defense precluded the design-defect claims; and (2) no triable issue on causation existed regarding the failure-to-warn claims (*i.e.*, an asbestos warning by Metalclad would have been impossible and futile).

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On Kase's design-defect claims, the trial court ruled that the US government approved precise specifications for the Metalclad-supplied Unibestos; the Metalclad-supplied Unibestos conformed to the government's specifications; and Metalclad had no duty to warn the government because the government was well aware of the potential hazards of asbestos. Further, Pittsburgh Corning provided warnings on the packaging. On his failure-to-warn claims, the trial court ruled that Metalclad presented uncontroverted evidence that a warning was provided on the boxes of Unibestos supplied by Pittsburgh Corning, but that warning did not prevent Kase from exposure. A warning given by Metalclad would not have affected how the Navy used the Unibestos nor prevented Mr. Kase's alleged exposure. As a matter of law, any failure to warn by Metalclad was not a substantial factor in causing Mr. Kase's alleged exposure.

The Supreme Court in *Boyle* adopted a three-prong test: (1) the US approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the US about the equipment use dangers known to the supplier but not the government. The first two requirements insure the suit is within the area where the policy of the "discretionary function" would be frustrated and that that design feature was considered by a government officer and not merely by the contractor itself.

In urging reversal of the summary judgment on his design-defect claims, Kase focused primarily on the first requirement—that the US approved reasonably precise specifications (*i.e.*, asbestos in the insulation Metalclad supplied to the naval shipyard). Kase pointed out that while the Navy studied and rigorously tested Unibestos, it did not design or manufacturer the insulation. According to Kase, Unibestos was a common commercial product, no different from the off-the-shelf stock helicopter referred to in *Boyle*. He contended there was a triable issue whether the insulation was military equipment, the procurement of which was a discretionary function. Kase relied on *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992), which held the defense inapplicable to goods readily available, in substantially similar form, to commercial users and concluded the defense was not available to the insulation manufacturers.

The California Court of Appeal opined that the US Supreme Court in *Boyle* did not limit the defense to exclude the procurement of products also sold commercially. Rather, where a purchase does not involve reasonably precise specifications bearing on the challenged design feature, the government has not made a considered evaluation of and affirmative judgment call about the design. That could not be said, however, about the Navy's procurement of the asbestos insulation at issue in *Kase*.

Kase pointed out that the Navy's purchase order issued to Metalclad did not expressly call for asbestos in the requisitioned insulation, but rather, referenced certain specifications. The court however concluded that under the available evidence, Metalclad needed to provide an asbestos-containing insulation to comply with the specifications. Kase also argued that a triable issue existed on the third requirement: the defendant warned the US about the dangers in using the product known to the supplier, but not to the US. The court found, however, that no warning was needed when the US already knew of the danger. The court summarized the evidence regarding the Navy's extensive knowledge of the health risks of asbestos products.

The court then considered Kase's failure-to-warn claims. It found the causation evidence uncontroverted. The court concluded there was no evidence to support Kase's argument that Metalclad could have directed Pittsburgh Corning to place an asbestos warning on the boxes of Unibestos, or that Pittsburgh Corning would have complied with such a request.

The government-contractor defense is limited in its applicability but, where it applies, it provides a complete defense. In *Kase*, the California Court of Appeal took a broader approach regarding the applicability of the defense to commercially available products than did the Ninth Circuit when it considered the issue. The California Supreme Court may have to clarify whether *Kase* or the Ninth Circuit's *In re Hawaii Federal Asbestos Cases* will be the standard in state court cases.