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Fourth Circuit upholds application of government-contractor defense in asbestos suit

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The US Court of Appeals for the Fourth Circuit recently applied the *Boyle* government-contractor defense to a failure-to-warn claim in an asbestos case. *Sawyer v. Foster Wheeler LLC,* 860 F.3d 249 (4th Cir. 2017). In doing so, the court wisely rejected a narrow interpretation of the defense favored by other federal circuit courts.

The defense derives its name from *Boyle v. United Technologies Corp.,* 487 U.S. 500, 501 (1988), which held that, in order to avoid indirectly penalizing the United States government for its discretionary decisions concerning the purchase of military equipment, contractors supplying that equipment would be immune from state product-liability claims where (1) the government approved reasonably precise specifications for the equipment; (2) the equipment conformed to those specifications; and (3) the contractor warned the government of any dangers known to the contractor about which the government was unaware.

Although *Boyle* addressed only design defect claims, all of the circuit courts to consider the issue have recognized that the defense also extends to failure-to-warn claims. *See, e.g., Ripley v. Foster Wheeler LLC,* 841 F.3d 207, 211 (4th Cir. 2016). The courts have expressed different views, however, about how the defense should be applied to such claims.

One line of cases follows the Sixth Circuit approach explained in *Tate v. Boeing Helicopters,* 55 F.3d 1150 (6th Cir. 1995). Under the *Tate* approach, state-law failure-to-warn claims are displaced where:

> (1) the United States exercised its direction and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not."

Id. at 1157.

The trend has been to apply the *Tate* approach to bar failure-to-warn claims where the government has generally approved or effectively controlled the contents of a manual or other written materials for the contractor's product, even if those written materials did *not expressly prohibit* the warnings the plaintiff claims should have given.

For example, in a later appeal following remand in *Tate*, the Sixth Circuit rejected plaintiffs' argument that the defense applied only where there was a direct conflict between a military specification and state law.

The court explained that the defense extended to "situations in which the government makes the informed decision *not* to include a specification or require a warning because, in the government's view, one would be unnecessary or problematic." *Tate v. Boeing Helicopters,* 140 F.3d 654, 660-61 (6th Cir. 1998) (emphasis added).

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However, some cases have adopted a rigid approach in which the emphasis is on whether a government specification expressly prohibited the contractor from giving the warnings the plaintiff claims should have been given. *See Dorse v. Eagle–Picher, Indust., Inc.,* 898 F.2d 1487, 1489 (11th Cir. 1990) (holding that *Boyle* defense did not apply where specifications did "not contain any prohibition against health warnings" for product); *In re Joint E. & S. Dist. N.Y. Asbestos Litig.,* 897 F.2d 626, 632 (2d Cir. 1990) (requiring a showing that the "[g]overnment controlled or limited the ability of contractors ... to warn those who would come into contact with its product"); *id.* at 630 (the government itself must have "'dictated' the content of the warnings meant to accompany the product") (citation omitted).

In *Sawyer,* defendant Foster Wheeler manufactured boilers for use aboard US Navy vessels under a contract with the Navy. The boilers contained asbestos that allegedly harmed the plaintiff.

The district court remanded the action to state court in part on the ground that Foster Wheeler lacked a colorable federal government-contractor defense.

The district court concluded that, even though the Navy had provided Foster Wheeler with detailed specifications governing warnings and written information that would accompany the boilers, "the fact that the Navy did not consider *additional* warnings to employees was fatal to Foster Wheeler's defense." *Sawyer,* 860 F.3d at 257.

The Fourth Circuit reversed. It followed the Sixth Circuit's analysis in *Tate* and held that, "the government need not prohibit the contractor from providing additional warnings; the defense applies so long as the government dictated or approved the warnings that the contractor actually applied." *Id.* at 256.

The Fourth Circuit echoed the holding from *Tate* that "'Government *discretion* is required, not dictation or prohibition of warnings.'" *Id.* (quoting *Tate,* 55 F.3d at 1157).

The Fourth Circuit's rejection of the rigid approach best reflects the realities of government contracting. It would be illogical for government specifications to be written in the negative — terms of what would be prohibited. The specifications are written in terms of affirmative requirements — in terms of what should be done.

The government's approval of equipment specifications should have no different effect than its approval of warnings. Both should give rise to the *Boyle* federal contractor defense.

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