IN THE

SUPREME COURT OF FLORIDA

NO. 69,319

JOSEPHINE DORSE, ET AL,

Plaintiff-Appellee,

v.

ARMSTRONG WORLD INDUSTRIES, INC, ET AL

Defendants

EAGLE-PICHER INDUSTRIES, INC.,

Defendant-Appellant

On Certification from the
United States Court of Appeals
for the Eleventh Circuit

ANSWER BRIEF OF APPELLEE JOSEPHINE DORSE

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November 18, 1986

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STATEMENT OF THE CASE

Plaintiff-Appellee accepts the Statement of the Case presented by Appellant Eagle Picher Industries, Inc., but would add certain facts.

First, in its Initial Brief at 1, Eagle Picher states that plaintiffs brought suit "against 10 corporations, including Appellant Eagle Picher Industries, Inc. ("Eagle Picher") which formerly manufactured or distributed asbestos-containing insulation products for the United States Government." Every defendant sued, including Eagle Picher, manufactured and sold asbestos-containing insulation products, of course, primarily to private insulation companies. Never was asbestos insulation a military or "government" item. During World War II, asbestos was sold in large quantities to private and government shipyards for use in Naval and privately-owned ships. After the war, asbestos continued to be sold to shipyards.

Second, it should be pointed out that Eagle Picher vigorously opposed certification to this Court, arguing that federal common law governed this case and that such law would apply the defense to this case. Although Appellee contended that the determination of Judge King, who has long experience as a trial judge in both state and federal court in Florida, should be accorded deference, she expressed no opposition to certification believing that the unavailability of the government contract specification defense under Florida law is clear.

ISSUE PRESENTED FOR REVIEW

As articulated by the Court of Appeals, the issue presented for resolution by this Court is:

> May the defendant in a strict products liability case avoid liability by alleging and showing that (1) it manufactured and sold its product in accordance with mandatory specifications set forth in government contracts, and (2) it apprised the government of any hazards associated with the product that it knew of and of which the government was not aware?

Id. 798 F.2d at 1377.

SUMMARY OF ARGUMENT

Florida law contains no precedent whatsoever for use of the government contract specification defense urged by Appellant. The cases cited by Appellant have nothing to do with the defense and in fact confirm the strong duty to warn of a product's dangers imposed on manufacturers by Florida law.

Appellant contends, however, that even were there some basis in Florida precedent for the defense - which she expressly believes there is not - it could not be adopted in the circumstances of this case. The model case for adoption of the government contract specification defense is the case of a sophisticated military product, such as a supersonic reconnaissance aircraft ejection system, designed solely for military purchase and use which causes harm to a military user in the course of duty. Concerns such as separation of powers and avoidance of judicial scrutiny of essentially military decisions may properly enter into play in such cases. Asbestos litigation presents a different story. The products predated military purchase, were manufactured by and sold to

commercial buyers on a vast scale in identical form to the products shipped to the military, and were not used by servicemen but by civilian insulators. Many insulators worked on naval and private vessels in the same shipyard. Perhaps most compellingly, the defense is inapplicable on a simple intuitive level because no specification forbade or even regulated the use of warnings on containers of insulation products.

The many decisions cited by Appellant involve different settings, usually the paradigm military product/military user case. There are, conversely, several cases specifically rejecting the defense and none upholding it in the asbestos context.

Finally, the lack of other compensation alternatives and the overriding Florida duty to warn favor imposition of liability upon Eagle Picher. Such liability is fair, comports with any possible policy consideration under the government contract specification defense, and makes moral and intuitive sense.

I.

INTRODUCTION AND BACKGROUND

Alfred Dorse worked as a coppersmith in the New York Naval Shipyard at Brooklyn from 1942 through 1944 and for two months in 1946. As a result of exposure to asbestos-containing insulation products manufactured by Appellant Eagle Picher Industries, Inc. and other defendants, he contracted mesothelioma, an invariably fatal malignancy of the lining of the lung. Mr. Dorse died at the age of fifty-six.

The Dorses' suffering is a human vignette in a litany now all too familiar to the courts. Appellant and other asbestos companies manufactured and sold asbestos-containing insulation products from the early part of this century through the 1970's. Industry knowledge of the hazards posed by asbestos dust and the concomitant failure to place a simple warning thereof on boxes and sacks are well documented. Eagle Picher's conduct vis-a-vis the government as a purchaser is briefly detailed below. It is interesting to note Eagle Picher's acknowledgment that after the federal district court struck the government contract specification defense, Eagle Picher's "principal defense to plaintiff's claims, the parties and the court all recognized that no purpose would be served by a trial on the question of liability." Brief at 6, n.5.

It is Appellee's position that Florida law does not and should not recognize the "government contract specification defense" raised by Appellant. The policy concerns motivating some courts' adoption of this defense simply are not present in the case at bar, and Florida doctrine already accommodates those cases in which any such concerns exist. Before examining Florida law and the authority advanced by Eagle Picher, however, it is important to place this case in its proper factual perspective.

Asbestos-containing insulation products predate government specifications and were generally available and sold for governmental and non-governmental application. Manufacturers had a significant hand in formulating the government specifications.

While it has been difficult to reconstruct every detail of the drafting of the first governmental specifications for thermal insulation, from the discovery conducted thus far it is apparent that the insulation industry, including Eagle Picher, participated in - if not drafted outright - the first specifications for asbestos-containing insulation material.

During the first part of the century, when the United States Naval fleet experienced a tremendous period of growth, specifications were drafted for every type of product contained in or on a vessel. Since the Navy lacked the expertise to develop its own products, it simply looked to the products readily available on the commercial market. Specifications were drafted to conform to products already in existence. Thermal insulation products were no exception. As stated by Mr. Joseph H. Chilcote, a retired project engineer for the Department of the Navy, Bureau of Ships:

> Because time, resource and cost constraints made it impracticable for the Navy to develop the detailed expertise necessary to independently undertake its own product development, when my office was required by other Navy activities to procure a product or material, we invariably consulted with industry to determine product availability from pre-existing commercial sources. We regularly met with technical or sales representatives from various companies, including those from insulation manufacturers such as Raybestos-Manhattan, Inc., Johns-Manville and Keasbey-Mattison Corporation, who often initiated such contacts. Such companies sent representatives to Washington, D.C. to meet with us to discuss their products and product capabilities and to provide samples for suitability testing at our Engineering Experiment Station at Annapolis, Maryland. I relied on the specific and comprehensive knowledge so provided regarding their particular product lines because my responsibilities for broad ranging and diverse materials precluded me from acquiring such information quickly in any other manner. Moreover, we wanted to adapt our needs and our specifications wherever possible to products and materials already commercially available in order to facilitate acquisition and to save time and money

> otherwise required for development. This was invariably true with respect to thermal insulation materials where consultation with industry experts was regularly accomplished with a view toward fully utilizing available industry expertise and materials in fulfilling the needs of the Navy.
>
> . . .
>
> Following this process of consulting with industry and obtaining its comments and product samples for testing and comparison, we described the best commercially available products for desired applications and uses in terms of their performance characteristics. They were drafted to require specific material compositions only in those few instances where the product described in such specification was the only product available on the market which met the performance requirements. Specifications were drafted in this manner to permit the widest possible number of companies to qualify their products for government procurement and thus enhance cost competition.

Declaration of Joseph H. Chilcote at 1-3 (July 9, 1981) (Appellee's Supp. R. 1-3).

A review of the deposition of Glen J. Christner, a former salesman for Eagle-Picher, reveals essentially the same situation as that described by Mr. Chilcote. Mr. Christner stated that Eagle 66 insulating cement was available commercially prior to 1931 and that, before 1931, the cement contained asbestos. (Deposition of Glen J. Christner at 7-8, February 1, 1983) (hereinafter referred to as Christner Depo.) (Appellee's Supp. R. 60-92). Indeed, Eagle-Picher was not compelled to sell its asbestos-containing insulation products to the United States Navy, but rather aggressively sought out the Navy as a new customer. Mr. Christner stated that the government did not manufacture or design any type of insulation products: "That's not their business but they had requirements for these products and performance was the main thing that they wanted." Christner Depo. at 18-19.

(Appellee's Supp. R. 76-77). The Navy based its specifications for thermal insulation products on its own expertise with products that were otherwise commercially available:

> Question: So their experience on what they require was based on what they had from prior experience, from prior products, other products?
>
> Answer: From prior experience, I would assume, with other products.

Christner Depo. at 18. (Appellee's Supp. R. 76).

In order to develop the United States Navy as a customer, Eagle Picher dispatched Mr. Christner with a sample of its Eagle 66 insulating cement to the Governmental Testing Station at Annapolis, Maryland. Two cements were already purchased by the government. These cements were manufactured by the Weber Company and Johns-Manville. The original specification had been drafted around these two insulating cements. In 1932, when Mr. Christner initially offered Eagle 66 for Navy testing, the product failed the government's test for performance standards. Mr. Walter P. Sinclair, the governmental official in charge of the testing, suggested that Eagle-Picher reformulate its cement, and then resubmit the cement for a second testing. In his deposition, Mr. Christner denied that Mr. Sinclair suggested the addition of asbestos:

> Question: Did Mr. Sinclair suggest an addition of asbestos?
>
> Answer: No, he didn't suggest anything, he says go back and try again. And we had our own testing laboratories in Joplin and I personally witnessed the Navy experimental test so I knew just what portions of the test we

> were delinquent or inefficient in. And when we in our own laboratories at the factory had a product we thought would meet all these, why, then we resubmitted it to the experimental station for approval.

Christner Depo. at 17. (Appellee's Supp. R. 75).

Eagle Picher, then, of its own will added more asbestos to its product in order to meet the performance standards already established by the Navy's use of Johns-Manville cement and Weber 48 cement. Mr. Christner testified that he did not know whether or not another ingredient would have enabled Eagle 66 to meet the government's approval. The Navy's primary interest, however, was not product content, but performance:

> Question: What was the purpose for the testing of products or for specifications generally, do you know?
>
> Answer: Performance, that of course to the Navy and any other consumer, performance is the important thing. As long as they're not made of something that's injurious to the equipment its used on, why, performance is what they want.

Christner Depo. at 34. (Appellee's Supp. R. 92).

This scenario was confirmed by discovery of other industry members. For instance, the Asbestos Textile Institute drafted the specifications for asbestos textile cloth. Submitted to the trial court were the minutes of the technical meeting which was held on September 11, 1947. (Appellee's Supp. R. 5-6). Mr. Jesse M. Weaver, Chairman of the Committee, stated in the minutes:

> The preliminary draft of the Proposed Federal Specifications, which was sent to all member companies, was discussed in full

> detail and recommendations for changes therein were agreed upon and incorporated. A copy of the draft as revised and approved at this meeting is attached. Any additional changes or suggestions should be forwarded as soon as possible to Mr. Weaver so that a final revised draft can be prepared and a joint meeting of the Technical Committee and the War Department arranged.

Appellee's Supp. R. 6.

Another document also demonstrates that government specifications were written by industry. In a letter dated June 26, 1951, from J. A. Bettes, Jr. of Raybestos-Manhattan to the office of the Quartermaster General, Mr. Bettes wrote that the enclosed specification "was written after careful consideration with various members of the industry, and in the writer's opinion accurately reflects the physical values of the various cloths specified." (Appellee's Supp. R. 7). The Raybestos-Manhattan official further stated in his letter that "[t]he specification above recommended is not only the recommendations (sic) of our company, but also represents the consensus of opinion of the members present at the last meeting of A.T.A." Id.

Further evidence that the industry participated in the drafting of specifications is provided by the deposition of John Haas, Chairman of the Ships Specifications Control Board of the United States Navy. Mr. Haas gave the following testimony during his deposition:

> Question: Since 1950, is it your understanding that in part the D.O.D. intended that the military, the Navy specifically, find out what products existed for a particular need in the process of drafting a specification?
>
> Answer: That's correct.

Question: And this was done so that specifications could be drafted to conform to those products; is that also correct?

Answer: That's correct.

Question: This would be true for thermal insulation products as well as other products requested by the Navy?

Answer: Right.

Question: And this has always been the case as far as you know?

Answer: To the best of my knowledge.

. . . .

Question: In general, sir, the Navy relied upon the suppliers to determine what products were actually available to fit their particular need; is that also a fair statement? . . .

Answer: In general, yes . . .

. . . .

Question: Mr. Haas, do you know of any prohibition among Navy regulations rule or which would prohibit a supplier of a thermal insulation product from drafting the specification pertaining to that product?

Answer: I don't know of any.

Question: It is your understanding, is it not, that suppliers could request revisions of military specifications dealing with thermal insulation products?

Answer: Yes. Done all the time.

St. Jacque v. Johns-Manville Products Corp., No. C-137-465 (Cal. Super. Ct., Los Angeles Cty.) (Deposition of John Haas at 191, 198-99, 205) (Appellee's Supp. R. 16-18).

Industry's final chapter in the history of governmental

sales was written in the late 1960's and early 1970's. It is particularly grotesque in the light of manufacturers' present claims that the use of asbestos was strictly mandated and compliance with specifications was compelled. When the government sought to remove asbestos from the products it purchased, industry attempt to thwart such a program of asbestos substitution. In a letter dated May 28, 1969, M.Q. Scowcroft of Raybestos-Manhattan wrote to E.A. Schuman of Johns-Manville, stating that "we feel it expedient to submit a letter prior to June 15th in order to contribute to discouraging a development program on substitutes for asbestos in shipboard insulation." (Appellee's Supp. R. 19).

The paradigm case for application of the government contract specification defense is where the defendant manufactures a military product, to be used only by the armed forces and for sale only to the military, in strict compliance with specifications developed by the government which bear on the defect alleged by plaintiff. This is not such a case. Asbestos insulation was made and sold by Appellant long before any government purchases. Identical products were sold for widespread civilian use. Decedent, like all asbestos plaintiffs, was not a member of the military. Specifications originated not with the government but with industry. Finally, even if the government had developed specifications, and even if the same product had not been sold for civilian use and had been used only by military personnel, the defense would be fundamentally irrelevant here, because <u>there was no specification bearing on the alleged defect: the absence of a</u>

warning. Plaintiff's central contention, and the central contention in all asbestos litigation, is that Appellant and other manufacturers failed to warn of the danger of breathing asbestos dust and to urge the use of respirators or other protective devices. Since no governmental specification involved warnings or labels, the defense is obviously unavailing because it is irrelevant.

Eagle Picher and other insulation manufacturers have never adduced any specifications forbidding warnings on their products. That the government never prohibited the placement of warnings on the packages of insulation products it purchased from Appellant is further established by the deposition testimony of Mr. Adam Martin. Mr. Martin is a packaging specialist employed by the United States Government, and, as such, he has authority over Military Standard 129 which relates to the labeling of products received by the United States military. He stated in his deposition:

> Question: Is there any prohibition contained in Military Standard 129 with respect to preventing manufacturers from including instructions on the packages?
>
> Answer: No, not that I am aware of. 129 would not -- again, it is a classification of defects. As an inspector, I would say no., There is nothing in the document prohibiting instructions.

Martin deposition at page 929. (Appellee's Supp. R. 58).

Particularly telling is the freedom with which Eagle Picher finally began, in 1964 to include warnings on thermal insulation products sold to the government.

Eagle Picher and other asbestos manufacturers have never adduced any specification forbidding warnings on their products.

The decision to include such warnings on product packaging was apparently made without prior government approval, leading to the inference that no prohibitions existed. Consider the following trial testimony of Mr. Robert Bockstahler, an Eagle Picher official:

> Mr. Motley: You didn't have to go to the Navy to get their permission to put that w3arning label on there, did you?
>
> Mr. Bockstahler: The Navy many times specified things on packages.
>
> Mr. Motley: Well, please try to answer my question. . . . you have not a document. . . that shows where you wrote the Navy and asked their permission to put that label on the side of the package?
>
> Mr Bockstahler: No, I don't
>
> Mr. Motley: 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?
>
> Mr. Bockstahler: That is correct.

Wester v. Southern Textile Corp., No. 508-108 (Wisc. Cir. Ct. -- Milwaukee Cty., Nov. 18, 1982) (Cross-examination of Mr. Robert Bockstahler by Mr. Ronald Motley at p.33) (R. 505).

Appellant's defense is plainly inapposite in the present case. As discussed below, those courts which have considered the defense in the asbestos litigation context have uniformly rejected it. Moreover, Florida law already supplies the necessary doctrinal basis for exonerating a defendant in those few cases truly warranting the defense's application. There is no basis in Florida law for its application otherwise, nor need there be.

II.

FLORIDA LAW DOES NOT RECOGNIZE THE GOVERNMENT CONTRACT SPECIFICATION DEFENSE

Unable to discern sufficient precedent in Florida law, the Eleventh Circuit certified the following question to this Court:

> May the defendant in a strict products liability case avoid liability by alleging and showing that (1) it manufactured and sold its product in accordance with mandatory specifications set forth in government contracts, and (2) it apprised the government of any hazards associated with the product that it knew of and of which the government was not aware?

Appellant relies on four Florida cases for the proposition that Florida recognizes the government contract specification defense. thereTis, of course, no holding at all that such a defense exists in Florida, but Appellant terms the defense "not only consistent with, but effectively already incorporated into, the law and the public policy of the State of Florida." Brief at 28. The four cases cited are discussed in turn.

The oldest case cited is Roland v. Jumper Creek Drainage Dist., 4 F.2d 719 (S.D. Fla. 1925). In Roland plaintiffs claimed negligence in the performance of a public contract to dig a canal. The court found that the work was done pursuant to plans and specifications of a governmental body and denied recovery. Crucially, the court found that the work was conducted completely in accordance with specifications and that plaintiffs had not shown the absence of a specification covering the particular act of negligence charged. 4 F.2d at 721. It is reasonable to assume that had such evidence existed liability would have obtained.

In any event, Roland certainly is not Florida law. It was

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decided in 1925, long before the Erie doctrine commanded application of state law, and indeed no Florida authority is cited (the opinion relies entirely on a Iowa case from 1908). Roland also has never subsequently been cited by any Florida court, state or federal. The case is irrelevant to an appraisal of Florida law and provides no conceptual support for Eagle Picher's position anyway.

Eagle Picher relies most heavily on Rawls v. Ziegler, 107 So.2d 601 (Fla. 1958). Plaintiff in Rawls was injured in an automobile crash when her car was sideswiped by a truck. She sued the truck driver, the seller of the truck, and an independent contractor which had mounted the dump body on the chassis. This Court restated, with little discussion, the general hornbook rule that an independent contractor is not normally liable for harm if the contractor merely follows the employer's specifications. The contractor was thus absolved, but several points distinguish Rawls from the instant case.

First, Rawls concerned only the routine situation of an independent contractor performing work according to specifications, and involved none of the policy factors determining a manufac-

turer's responsibility under products liability law.[1] Second, the contractor followed unique specifications for one job. In contrast, Appellant herein sold its products on a vast scale to private and government purchasers in identical form and according to broad specifications.

Third, and perhaps most important, there was no allegation in Rawls of a failure to warn. Significantly, this Court noted plaintiff's allegation that the contractor should have recommended to the seller that the truck frame be "fishplated," but found no evidence that fishplating would have prevented injury. 107 So.2d at 605. A plausible reading of Rawls is thus that the contractor may be liable for failure to warn others, or at least the employer, of safety hazards. In any event, Rawls simply provides no authority whatever for the assertion that a manufacturer who complies with broad performance specifications has an absolute defense to failure-to-warn claims when the specifications are silent as to warnings.

Eagle Picher also cites West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976). In West, of course, this Court adopted

[1]At one point Eagle Picher apparently attempts to mischaracterize Rawls as a products liability case. Appellant claims, Brief at 15, n.10, that Rawls provides much stronger precedent for adoption of the government contract specification defense under Florida law then that which existed in Pennsylvania for the Court of Appeals for the Third Circuit in Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982). According to Eagle Picher, the Brown court embraced the defense despite the fact that neither of the Pennsylvania decisions upon which it relied involved product liability claims. The claim at issue in Rawls, however, was likewise not a products claim but an allegation of independent contractor negligence in mounting the body of a truck.

strict products liability; Eagle Picher points out that "[t]he ordinary rules of causation and the defenses applicable to negligence are available," under West's adoption of the doctrine. Brief at 23, n.14, quoting West, 336 So.2d at 90 (emphasis Appellant's). West says nothing about any defense based on purchaser specifications, and the passage quoted above is found in a discussion of the defense of contributory negligence. Plaintiff submits that the following salutary language from West is more relevant to the present case:

> The obligation of the manufacturer must become what in justice it ought to be - an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The cost of injuries or damages, either to persons or property, resulting from the defective products, should be borne by the makers of the products who put them into the channels of trade, rather than by the injured or damaged persons who are ordinarily powerless to protect themselves.

Id. at 92.

Finally, Eagle Picher cites Edward M. Chadbourne, Inc. v. Vaughn, 491 So.2d 551 (Fla. 1986). Chadbourne involved a car wreck caused by defects in highway pavement. Defendant had manufactured the paving materials and repaved the road and had turned over all inspection and maintenance responsibility to the county almost two years before the accident. Three weeks prior to the wreck the county had inspected the road and noted the defect.

After first holding that the road was not a product for purposes of strict products liability, this Court stated that the contractor could not have proximately caused the accident because inspection and repair responsibility did not rest with it and because the defect had been noted by the responsible party. Id. at

554. Chadbourne thus turns on causation and has nothing to do, factually or conceptually, with any contract specification defense.

Contrary to Appellant's broad-brushed assertions, there is no basis in Florida law for adoption of the government contract specification defense. Not a single decision cited by Appellant even involves the policy concerns usually present in cases involving the defense and invoked by Appellant in its brief, let alone announces the theory as an absolute defense. Even accepting any limited conceptual precedent afforded by independent contractor negligence cases for erection of the defense in the defective products context, none of the cited cases involves any failure to warn allegations. Nothing in Florida law supports the defense in the situation at bar. The corresponding complete absence of policy justification for the defense in this situation is discussed below.

III.

APPELLANT'S AUTHORITY FROM OTHER JURISDICTIONS DOES NOT SUPPORT APPLICATION OF THE DEFENSE HEREIN

A. Cases Decided Under Federal Common Law are Inapposite.

Eagle Picher cites several cases decided under federal common law which apply the government contract specification defense in one form or another. These cases all are based on policy motivations existing in the specialized context in which they were decided and have no relevance to this case.

McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983),

cert. denied, 464 U.S. 1043 (1984), is cited three times by Appellant and is the seminal modern case in the development of the defense. Two Navy pilots were killed in separate incidents when they were forced to eject from their supersonic reconnaissance RA-5C aircraft manufactured by defendant. The district court found that defects in the ejection system caused their deaths. On appeal defendant claimed that the "government contractor defense" insulated it from liability. The Ninth Circuit agreed, finding four justifications:

1. Preservation of Feres-Stencel Immunity

Under Feres v. United States, 340 U.S. 135 (1950), the government is immune from tort liability to servicemen who sustain injuries incident to active duty; Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977) enlarges this immunity to bar indemnification suits by third parties for damages paid by them to servicemen injured during service. The Ninth Circuit reasoned that allowing plaintiffs' recovery against Rockwell would subvert the Feres-Stencel immunity since defense contractors would pass on the tort costs of their products through contractual cost overrun provisions reflecting liability insurance costs or through higher prices for later products. 704 F.2d at 449.

2. Separation of Powers

While labeling this factor as "separation of powers," 704 F.2d at 449, the Ninth Circuit did not articulate political or constitutional reasons for this concern. Rather, the Court felt that the judiciary is simply incapable of making essentially mili-

tary decisions. Trials on military product defects would also, it was feared, "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." McKay, 704 F.2d at 449, quoting Stencel, supra, 431 U.S. at 673.

3. Exigencies of National Defense

The Ninth Circuit considered that national defense would often compel the government to "push technology toward its limits and thereby . . . incur risks beyond those that would be acceptable for ordinary consumers goods. A supplier is frequently unable to negotiate with the United States to eliminate those risks." 704 F.2d at 450. For example, the RA-5C aircraft in McKay was a supersonic carrier-based plane used extensively in Vietnam. Id. at 446.

4. "Fixing the Locus of Responsibility"

The court stated that the defense "provides incentives for suppliers to work closely with and to consult the military authorities in the development and testing of equipment. The defense therefore encourages fixing the locus of responsibility for military equipment design with more precision than is possible under a system where the government contractor rule is not allowed." Id at 450. The Eleventh Circuit has termed this last rationale "somewhat inscrutable." Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985).

In a vigorous dissent, Judge Alarcon criticized the majority's reasoning on several grounds. McKay, 704 F.2d at 456-462.

Moreover, the McKay opinion has been criticized by several courts, most notably the Eleventh Circuit in Shaw, supra. Even taking the rationales of McKay as controlling, however, it is obvious that the defense has no application to a claim by a coppersmith who was exposed to commercial asbestos insulation products as they were installed on ships in a Navy yard.

First, there can be no concern that Feres-Stencel immunity will be breached, since Feres-Stencel doesn't come into play anyway. As Mr. Dorse was not a serviceman, the doctrine is irrelevant. Even if this immunity existed, it would, of course, be academic since asbestos products are no longer sold to the government or to anyone and Eagle Picher would have no way of passing liability costs on to the government. For commercial products generally, such as asbestos, which were or are sold to the military as well as to private purchasers, the concern about liability costs being passed on to the government is attenuated since manufacturers' liability costs can easily be recovered in the private market.

The Eleventh Circuit regards this first justification as "weak support" for the defense and embraces instead Judge Alarcon's dissent in McKay. Shaw, 778 F.2d at 741-42. In any event, this reason for the defense does not obtain in the drastically different context presented in this case.

Second, there can be no fear that in this case the judiciary would inappropriately be making military decisions. State and federal courts have rendered hundreds of decisions on all aspects

of asbestos litigation, and jurors regularly evaluate manufacturers' conduct. While it may be "the rare juror - or judge - who has been in the cockpit of a Navy RF-8G of the deck of a carrier on a low level, high speed fly-by maneuver," Tozer v. LTV Corp, 792 F.2d 403, 406 (4th Cir. 1986), jurors are all too familiar with asbestos insulation. There clearly should be no concern in the kind of case presented here that military decision-making will be improperly scrutinized.

Third, the McKay rationale that military technology must sometimes create "risks beyond those that would be acceptable for ordinary consumer goods" is inapplicable to the case of products manufactured identically for widespread commercial use as well as for military sales (asbestos insulation, of course, was sold privately long before sales to government were made). Decisions about the level of safety acceptable in a sophisticated Rockwell fighter jet just aren't similar to decisions about a pail of Eagle Picher Super 66 cement.

It is thus clear that the concerns motivating the McKay court simply don't apply outside the discrete context - a sophisticated military product solely produced for and used by the military - in which it was decided. While Appellant leans heavily on McKay, it fails to acknowledge that the Ninth Circuit explicitly confined the defense to cases in which the United States would enjoy Feres-Stencel immunity, 704 F.2d at 451, and most importantly, to cases not involving "an ordinary consumer product purchased by the armed forces - a can of beans, for example. . . ." 704 F.2d at

451. Asbestos insulation is precisely that type of product.

The other federal common law cases advanced by Eagle Picher are similarly unavailing. In Tozer, supra, the Fourth Circuit stated that it was "difficult to imagine a more purely military matter than that at issue in this case - the design of a sophisticated reconnaissance craft that was flying, on the day of Tozer's death, some 50 to 75 feet above the surface of the water at a speed of 500-550 nautical miles per hour." 792 F.2d at 405-06. The holding applying the defense hinged on the reluctance to judicially scrutinize fundamentally military decisions and worries about increased military product costs - neither of which concerns are present herein. The Fourth Circuit also took the status of the decedent into account:

> Pilots of the Navy and Air Force, whose service and sacrifice make possible the security of this country, are not the military doubles of civilian motorists. Their lives are led in the company of peril. . . .
>
> [They] recognize when they join the armed forces that they may be exposed to grave risks of danger, such as having to bail out of a disabled aircraft. This is part of the job. The Nation sometimes demands their very lives. This is an immutable feature of their calling. To regard them as ordinary consumers would demean and dishonor the high station in public esteem to which, because of their exposure to danger, they are justly entitled."

792 F.2d at 407, quoting McKay, supra, 704 F.2d at 453. Whatever

this Court's appraisal of such a view,[2] the defense thus plainly should not apply to Mr. Dorse, a civilian shipyard coppersmith for two years, and the tens of thousands of civilians like him who happened to work on government ships.

In Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985) the Fifth Circuit applied federal common law in a suit brought by a National Guardsman for injuries inflicted by a defective cargo carrier. Adoption of the defense turned solely on "notions of the limits of the judicial function and. . .separation of powers concerns. . . ." Id. at 574. Significantly, the court distinguished Hansen v. Johns-Manville Corp., 734 F.2d 1036 (5th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 1749 (1985). In Hansen, as here, a shipyard widow sued insulation manufacturers for causing decedent's mesothelioma and defendants raised the government contract specification defense. Finding no indication that the Texas courts would apply the defense in those circumstances the Fifth Circuit rejected it. In Bynum, the Fifth Circuit also noted that "plaintiff in Hansen was not a member of the armed services.

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[2]Lieutenant Commander Tozer as his plane crashed into the ocean, and his widow and children in the years, after might have agreed more with the reply of Judge Alarcon:

> Military personnel are honored and esteemed because they are willing to fight for their country and risk their lives doing so. They are not so respected because they are sometimes forced by their calling to use unsatisfactory or unsafe equipment. It is the Military's, Rockwell's and this Court's duty to insure that our servicemen are provided with safe and reliable equipment.

704 F.2d at 102.

Thus, the federal interest in military discipline was not implicated." 770 F.2d at 573.

Koutsoubos v. Boeing Vertol, 755 F.2d 352 (3d Cir. 1985), cert. denied, 54 U.S.L.W. 3323 (Oct. 7, 1985), merely restates the McKay requirements. Eagle Picher does not discuss Shaw v. Grumman Aerospace Corp., supra, in which the Eleventh Circuit took a far more restrictive view of the defense in the same context of a sophisticated military product used by a serviceman. Shaw recognized the defense exclusively on separation of powers grounds, and held:

> The decision to which, under this holding, the judiciary properly defers is a "military decision" not only in the sense that it is one made by the military, but also in the sense that it involves an assessment of the risks of the product to servicemen in activities, as Feres puts it, "incident to service." Under the facts of this case, we do not reach the very different problem of civilian plaintiffs injured as a result of a military decision to use potentially dangerous products.

Id. at 744 (emphasis in original).

Cases decided under federal common law are simply irrelevant to the situation presented by this case. None of the policies behind federal common law adoption of the government contract specification defense obtain.

B. State Law Cases Likewise Do Not Aid Appellant

Eagle Picher cites several state law decisions adopting the defense to one extent or another. Important authority, however, is omitted by Eagle Picher, and a fair appraisal of the cited rulings lends no weight to Appellant's contentions.

Appellant relies most heavily on Sanner v. Ford Motor Co.,

144 N.J. Super. 1, 364 A.2d 846 (Law Div. 1976) aff'd, 154 N.J.Super. 407, 381 A.2d 805 (App.Div. 1977), certif. denied, 75 N.J. 616, 384 A.2d 846 (1978), in which defendant, which manufactured a jeep to government specifications, was held not liable to a plaintiff injured because the jeep lacked seat belts. The trial court reasoned:

> [t]o impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army. . . would seriously impair the government's ability to formulate policy and make judgments pursuant to its war powers. The government is the agency charged with the responsibility of deciding the nature and type of military equipment that best suits its needs, not a manufacturer. . . .

144 N.J.Super. at 9, 364 A.2d at 47.

The Supreme Court of New Jersey, however, distinguished Sanner in Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 451 A.2d 179 (1982). In Michalko, the defendant rebuilt a machine in accordance with the owner's specifications, but was nevertheless held liable for failure to incorporate safety devices which were not excluded by the specifications and for failure to warn of the machine's dangers, though warnings were neither excluded nor required by the owner. The Supreme Court noted that Sanner rested on the "conscious, intentional determination by the United States Government that the installation of seat belts would be incompatible with the intended use of the vehicle." Sanner, 154 N.J.Super. at 410, 381 A.2d at 805. The Michalko court then stated:

> Thus, we do not read the Sanner decision as standing for the proposition that a manufacturer is relieved of liability when it produces a machine according to the design specifications of the buyer.

451 A.2d at 184.

While the court observed in a footnote that a governmental entity was involved in Sanner, the distinguishing significance of this fact was confined to situations where deliberate specifications concerning safety features had been made and contractor liability would seriously thwart government policy formulation. The holding in Michalko is precisely on point in this case.

Eagle Picher also quotes from Hunt v. Blasius, 55 Ill.App.2d 14, 370 N.E.2d 617 (1977), aff'd, 74 Ill.2d 203, 384 N.E.2d 368 (1978) to the effect that "[p]ublic policy dictates that bidders who comply strictly with governmental specifications should be shielded from liability in any respect in which the product complies." 55 Ill.App.3d at 20, 370 N.E.2d at 621-22; Brief at 16. (emphasis Appellee's). Under Hunt, of course, Eagle Picher would still be liable to Appellee because there was no government specification at all concerning warnings. Moreover, the Supreme Court of Illinois recently held that the defense is inapplicable as a matter of law in the same circumstances as those herein. In Hammond v. North American Asbestos Corp., 97 Ill.2d 195, 454 N.E.2d 210 (1983), plaintiff's husband contracted asbestosis as a result of employment in an insulation factory. He sued the suppliers of raw asbestos, who argued that they had sold identical products to a barter corporation for ultimate delivery to and use by the government and had made them according to government specifications. Affirming the trial court's exclusion of the defense, the Illinois Supreme Court held:

> At trial, defendant argued the government specifications precluded placing a warning on the bags.
>
> This position is without merit. The specification it relies on for this defense read in pertinent part: "The bags shall not carry a security classification or any marking, other than the contract number, indicating National Stockpile ownership." In response to plaintiff's motion in limine, the trial judge ruled the specification did not preclude defendant from placing a warning on the bags and therefore as a matter of law this was not a defense to plaintiff's action. The court did allow defendant to present evidence that it complied with the government contract specifications. This ruling was proper. Defendant's own witness, when asked whether the specification precluded placing a warning on the bags, answered "it might have." Furthermore, defendant never placed warnings on bags sold to nongovernment purchasers, including UNARCO. Under these circumstances, defendant cannot rely on this defense as a matter of law.

454 N.E.2d at 217. Hammond's import for this case is clear.

Appellant also relies on Brown v. Caterpillar Tractor Co., 696 F.2d 246 (3d Cir. 1982), ("Brown I") opinion after remand, 741 F.2d 656 (1984). In Brown I, the Third Circuit adopted the government contractor defense as the law of Pennsylvania. Brown was an Army Reservist injured by a bulldozer which lacked canopy protection. Evidence indicated that the bulldozer was built to Army specifications and that "the Army was aware of the availability of protective structures and rejected them because of transportation, visibility and maintenance problems." 741 F.2d at 659. Caterpillar had, in fact, offered to "retrofit" the bulldozer with a protective device. Id. Under these circumstances, the Third Circuit in Brown I held the defense available to all of plaintiff's claims. Eagle Picher neglects, however, to discuss the result in Brown II.

In its second opinion, the Third Circuit reviewed a judgment

for Caterpillar on a jury verdict. The trial court had instructed the jury that if it found the Army knew of the danger of operating the bulldozer without a protective device, then Caterpillar could not be liable to plaintiff on a failure to warn theory. The appeals court held this instruction erroneous and prejudicial and remanded for another new trial, because under Pennsylvania law the duty to warn is owed to the ultimate user regardless of another's knowledge of a hazard. Thus, even where the Army specifically rejected safety protection - which is certainly not the situation in the present case - the contractor still owed the users a duty to warn. This was so even where the product was exclusively a military one and the user was a member of the military injured on duty.

In Burgess v. Colorado Serum Co., 772 F.2d 844 (11th Cir. 1985), the defense was adopted under Alabama law. No discussion of Alabama precedent is contained in the opinion. This case is readily distinguished: the brucellosis vaccine was made exclusively for government use and the exact language on the label was specified by the government. 772 F.2d at 845. As noted previously, no government specification forbade or prescribed the content of asbestos package labels.

Casabianca v. Casabianca, 104 Misc.2d 348, 428 N.Y.S.2d 400 (Sup.Ct. Bronx Cty. 1980), also cited by Eagle Picher, was a trial court ruling in a suit by an infant plaintiff against her father and Teledyne, Inc., which had manufactured an oven for use in Army field kitchens during World War II. The oven had ended up

unchanged in the father's Bronx pizza shop. Teledyne obtained dismissal on the ground that it had complied with Army specifications. Again, the product was a uniquely military one. The judge in Casabianca relied on two cases: Sanner, supra and Hunt, supra. As detailed above, both of these lower court cases have since been sharply distinguished by Supreme Court rulings in their respective states.

Finally, Appellant cites In re Air Crash Disaster at Mannheim, Germany, 769 F.2d 115 (3d Cir. 1985), cert. denied sub nom. Eschler v. Boeing Co., 470 U.S. ____, 106 S.Ct. 851 (1986), and Tillett v. J.I. Case Co., 756 F.2d 591 (7th Cir. 1985). Both cases involved adoption of the McKay rationales as state law (of Pennsylvania and Wisconsin, respectively),[3] and were suits by heirs of servicemen killed, while on duty, by defective products manufactured exclusively for military use (a helicopter and a front end loader). It suffices to say that they are inapposite for the same reasons McKay is. It should also be pointed out that the discussion of the "government contract defense" in Tillett is expressly dictum. 756 F.2d at 596.

Interestingly, Appellant does not discuss Johnston v. United

[3]Mannheim specifically applied the test formulated in In re Agent Orange Product Liability Litigations, 534 F.Supp. 1046 (E.D. N.Y. 1982), as "interpreted by McKay and Koutsoubos," supra, 769 F.2d at 122. The Agent Orange formulation is for "military equipment cases" and is similar to McKay's. It provides a defense if: (1) the government established the specifications for the product; (2) the manufacturer complied with the specifications; and (3) the government knew as much or more than the contractor about the hazards of the product as designed. See 769 F.2d at 121; 534 F.Supp. at 1055.

States, 568 F.Supp. 351 (D.Kan. 1983), a case decided under Kansas law. There plaintiffs sued for cancer caused by radiation emitted from instruments which they were repairing and which had been produced under wartime government contracts. In discussing the "government contract defense," Judge Kelly was succinct:

> When the product in question is a new and technically complex one used only by the military - such as the ejection seat in McKay - the rationale has some force, but when the product is a simple adaptation or copy of one already sold in private commerce - as here - it does not: The McKay court recognized that the doctrine ought not apply to "an ordinary consumer product purchased by the armed forces - a can of beans, for example . . . ."

568 F.Supp. at 357, quoting McKay, supra, 704 F.2d at 451. The court denied summary judgment on the defense and would have done so "even on defendants' version of the facts" because "the policies that might have justified the defense in other cases do not justify it here." Id. at 356.[4]

[4]The court also denied defendants' motions for summary judgment on the "contract specification defense" as well as the "government contract defense" discussed in the text. The court stated that the former applies to products manufactured to the specifications of another unless the contractor would realize the "grave chance that his product would be dangerously unsafe." 568 F.Supp. at 354, citing Restatement (Second) of Torts §404 Comment a. (1965). The "government contract defense" applies only where the contract is with the government and allows the contractor to share in the governments' immunity. Id at 356. The court noted that both defenses obtain only where the injury-causing defect is mandated by the contract. Id at 356. As discussed elsewhere, Eagle Picher has never adduced any specification forbidding or regulating warnings on its insulation products, and so neither defense shields it from liability. Appellee also contends that Eagle Picher knew its product was dangerous, so as to take Appellant out of the "contract specification defense."

Eagle Picher apparently seeks dismissal on the basis of an amalgam of the defenses.

It is clear, then that neither federal common law nor state law cases provide support for Appellant's position. Conspicuously missing from Appellant's brief, however, are several cases which directly reject the defense in the same circumstances in which Eagle Picher now advances it.

IV.

THE DEFENSE HAS CONSISTENTLY BEEN REJECTED IN THE CIRCUMSTANCES PRESENTED BY THIS CASE

A. Several Cases Hold the Defense Inapplicable in the Instant Situation

In this subsection Appellee will outline the cases which hold, uniformly, that Eagle Picher's defense is ineffective against a failure to warn claim and in the context of asbestos litigation. Hammond, supra, and Hansen, supra, in which the Illinois Supreme Court and the Fifth Circuit rejected it in asbestos litigation, have already been discussed.

Hammond was followed by Nobriga v. Raybestos-Manhattan, Inc., 683 P.2d 389 (Hawaii 1984). As in this case, Eagle Picher appealed an order striking the government contract specification defense from its answer. The Supreme Court of Hawaii affirmed, holding that since asbestos was inherently dangerous the defense could not apply.

In In re All Maine Asbestos Litigation, 575 F.Supp. 1375 (D. Me. 1983), the Court exhaustively reviewed the prior holdings and stated that "[t]here has been no asbestos case in which the defendant manufacturers have successfully established compliance with government specifications as an absolute defense on the merits."

Id. at 1379. The court denied plaintiffs' motions to strike the defense based on uncertainties about the facts and about Maine law. The case is interesting because the government joined with plaintiffs in opposing the government contract defense - seriously undermining any claim that manufacturers' liability would subvert governmental immunity, raise defense costs or entail unwarranted judicial intrusion into military decision-making. See 575 F.Supp. at 1379. Also significant is the fact that Eagle Picher and other manufacturers fought a protracted battle in this litigation to hold the government liable on cross-claims for indemnification and contribution, again rendering Eagle Picher's separation of powers and governmental immunity arguments transparent. In re All Maine Asbestos Litigation, 772 F.2d 1023 (1st Cir. 1985), affirming 581 F.Supp. 963 (D. Me. 1983), cert. denied ____ U.S. ____, 106 S.Ct. 1994 (1986). The claims failed either on jurisdictional grounds or under Maine law.

In In re Related Asbestos Cases, 543 F.Supp. 1142 (N.D. Cal. 1982) the court denied plaintiffs' motions to strike the defense, but expressed doubt that the defense would apply if "the defendants did not specifically manufacture asbestos products in accordance with government specifications but merely supplied the Navy with the same products with which they filled orders for non-military uses." Id. at 1152. Such is, of course, the evidence in the present case.

Most recently, the California Court of Appeals held that the government contract specification defense is not an absolute

defense even to punitive damages claims. Like Mr. Dorse, plaintiff in Gard v. Raymark Industries, Inc., 229 Cal.Rptr. 861 (Cal.App. 1986) worked in a shipyard for a brief time and in proximity to insulators. Defendant raised the government contract specification defense but on appeal abandoned it except as to punitive damages claims. Even as against such claims, however, the defense could not preclude liability as a matter of law. Id. at 873-74.

Finally, several unreported decisions have rejected the defense in asbestos litigation. These opinions are attached to Appellee's brief in the Eleventh Circuit transferred as part of the Record to this Court.

In Chapin v. Johns-Manville Corp., No. S79-0272N (S.D. Miss. January 27, 1982) defendant manufacturers moved to strike evidence of exposure to asbestos used on vessels constructed for the Navy on the grounds of compliance with government specifications. The court found that none of the products manufactured by the defendants was specifically produced for the Navy, but rather, for general commercial use. Thus defendants were not relieved of liability. The court also concluded that the manufacturer's failure to warn of the foreseeable risk of harm of exposure to asbestos would render the product defective at the time it left the plant and therefore strict liability would attach:

> In the instant case if the Defendants fail to warn of foreseeable risks, or fail to give adequate warning of foreseeable risk the product they manufactured would be defective at the time it left the Defendant's control and strict liability would thereby attach to the product as being unreasonably dangerous notwithstanding the fact that the product complied with military specifications for use on vessels constructed for the United States Navy and the United States Coast Guard.

Chapin, at 4.

Similarly, in Plas v. Raymark, No. C78-946 (N.D. Ohio April 22, 1983) the defense was stricken because materials sold to government were the same as materials sold generally to the private sector, and because defendants invented the product sold to the government and worked on specifications with the government.

In Ward v. Johns-Manville Corp., No. H-76-54 (D.Conn. June 20, 1979), the court granted plaintiffs' motion to strike the defense based on an analysis of the Connecticut tort doctrine of supervening cause. The court concluded that the injuries caused to plaintiffs were precisely within the scope of the risk created by the manufacturers in selling their asbestos products, and therefore the defendants' compliance with specifications would not relieve them of liability.

In Cox v. Celotex Corp., No. W-82-CA-258 (W.D. Tex. June 4, 1984), a Texas federal district court denied Eagle Picher's motion for summary judgment based on government specification defense. Significantly, the court "question[ed] whether the type of specifications showed by the summary judgment proof is sufficient to justify the defense, particularly because no specifications dealt with warnings, and because Eagle Picher was not a contractor in the usual sense of the word, but was merely selling a product to the government, which product had to meet the government's requirements." Id. at 2.

The irrelevance of the defense to asbestos cases was explained most plainly by the court in In re Kitsap Cty. Asbestos

Cases of Schroeter, Goldmark & Bender, No. 81-2-00490-1 (Sup.Ct. of Wash. for Kitsap Cty., August 2, 1983) (attached as Exhibit "A" to Appellant's Brief in the Eleventh Circuit transferred to this Court as part of the Record in this case).

> 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 duty specifications are silent as to warnings."

Id. at 5.[5]

Thus, every court to have considered the defense has rejected its applicability as a mater of law; several courts have stricken the defense. Eagle Picher cites no cases to the contrary.[6] The precedent is clear: the defense is irrelevant to this case.

B. Three Additional Policies Militate in Favor of Rejection.

The uniform rejection by the courts of the government contract specifications defense in asbestos cases reflects the obvious: none of the justifications behind its adoption elsewhere are present in asbestos litigation, and it intuitively makes no

[5]In addition, at least four courts have denied manufacturer's requests for a Phase I trial limited to the government specification defense, but have declined to rule on the existence of the defense. McCrae v. Pittsburgh Corning Corp., 97 F.R.D. 490 (E.D. Pa. 1983); In Re General Dynamics Asbestos Cases, CML No. 1 (D.Conn. April 22, 1983); In Re Massachusetts Asbestos Cases Nos. 1 and 2, (D.Mass. September 13, 1983); In Re All Maine Asbestos Litigation, 575 F.Supp. 1375 (D.Me. 1983).

[6]Only one case of any type is listed by Eagle Picher as dismissing a failure to warn claim - Garrison v. Rohm & Haas Co., 492 F.2d 346 (6th Cir. 1974), Brief at 12, n.8. Contrary to Appellant's assertion, the failure to warn claim was dismissed on its merits, not on any contract specifications defense. Id. at 352.

sense where there was no specification concerning warnings. If any doubt remains, there are additional affirmative reasons for imposing liability on Eagle Picher.

First, of course, such a result is fair and comports with the aims of products liability law. See West, supra, 336 So.2d at 92. This result not only compensates Mrs. Dorse for Mr. Dorse's death but also assigns responsibility on the culpable party, Eagle Picher.[7]

Second, if the defense is accepted it will deprive Mrs. Dorse and the thousands of widows and workers like her of any remedy. There is no hope of recovery against the United States: it has recently been held that a Federal Tort Claims Act suit against the government for failure to warn shipyard workers about the hazards of asbestos insulation is barred by the discretionary function exception to the Act, 28 U.S.C. §2680(a). Shuman v. United States, 765 F.2d 283 (1st Cir. 1985). Whether the government in

[7]While this Brief will not discuss the evidence as to the historical knowledge generally of Eagle Picher of asbestos hazards (this evidence is outlined in Appellee's Brief in the Eleventh Circuit transferred in the Record to this Court), evidence not available to Appellee at trial and not discussed in the Eleventh Circuit now places such knowledge, specifically in regard to Super 66 cement (the compound Mr. Dorse was exposed to), at least as early as 1932, well before both the date originally claimed by Appellee and the date that Appellant claims the government knew of shipyard hazards. Attached as Exhibit "A" is a copy of a report to Eagle Picher's home office Safety Engineer by a surgeon in the Bureau of Mines of an inspection of the Eagle Picher Rock Wool plant at Joplin. At p.3, the report states that "it is now know definitely that asbestos dust is one of the most dangerous dusts to which man is exposed." At page 4 the report predicts that "the dust encountered by these men is more dangerous and will produce lung involvement in a very much shorter period of time than the dust which is encountered in the Picher mines."

fact had sufficient knowledge to demand warnings, and the wisdom of such a holding aside, plaintiffs cannot currently sue the government and are relegated to an action against the party which fortunately is the truly liable entity: the manufacturer.

Third, many cases recognize that even in the paradigm government contract specification defense case of the sophisticated military product and a military victim, the harshness of the defense is eased somewhat by the Veterans' Benefits Act, which provides "a generous military compensation scheme" and a "swift, efficient remedy." Stencel, supra, 431 U.S. at 672-73; See also, e.g., McKay, supra, 704 F.2d at 452; Tozer, supra, 792 F.2d at 407. This "generous scheme," of course, is unavailable to Mrs. Dorse and the multitudes of other shipyard plaintiffs. Tort recovery is their only compensation, and it should not be denied them.

C. Liability Fulfills the Strong Duty Under Florida Law to Warn of Product Dangers.

That manufacturers have a strict duty to warn of the dangers of their products is a strong tenet of Florida law. The stringency of a manufacturer's duty to warn of the characteristics of "inherently dangerous" products was spelled out in Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958);

> Implicit in the duty to warn is the duty to warn with a degree of intensity that would cause a reasonable man to exercise for his own safety the caution commensurate with the potential danger.

Id. at 609. See also Harless v. Boyle-Midway Div., American Home Products, 594 F.2d 1051 (5th Cir. 1979).

The Wait court defined an "inherently dangerous" product as

one "burdened with a latent danger which derives from the very nature of the article itself." 103 So.2d at 607. This definition certainly includes a material such as asbestos. See, e.g. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973) cert. denied, 419 U.S. 869 (1974).

So strong is the Florida policy requiring effective warnings that summary judgment is almost never proper on a failure to warn claim. Lake v. Konstantinu, 189 So.2d 171, 175 (Fla.2d DCA 1966) ("[The warnings issue] above all others must certainly be submitted to a jury"). See also MacMurdo v. Upjohn Co., 444 So.2d 449 (Fla.4th DCA 1983); Giddens v. Denman Rubber Mfg. Co., 440 So.2d 1320 (Fla.5th DCA 1983); Edwards v. California Chemical Co., 245 So.2d 259 (Fla.4th DCA 1971). See also Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (Fla.1st DCA 1984), pet. for rev. denied, 467 So.2d 999 (1985) (punitive damages for failure to warn of asbestos hazards upheld).

Appellee contends that even if warnings specifications existed, the strong duty imposed by Florida law to warn of hazards would defeat the specifications defense; here, in any case, no such specifications existed.

CONCLUSION

There is no basis in Florida law for adoption of the government contract specification defense in the situation presented by this case. Moreover, none of the policies which may justify its acceptance in a small group of military cases exist in asbestos litigation, and this fact is reflected in the uniform rejection of

the defense by courts in asbestos cases. Additional independent policy reasons also weigh in favor of imposition of manufacturer liability.

WHEREFORE, PREMISES CONSIDERED, Appellee expressly prays that this Court answer the question certified to it by the United States Court of Appeals for the Eleventh Circuit in the negative.

Respectfully submitted,

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