

9th Circuit Affirms Ruling Limiting Strict Liability Jury Instruction in Asbestos Case

SAN FRANCISCO — The 9th Circuit U.S. Court of Appeals has affirmed a lower court order that denied an asbestos plaintiff's efforts to instruct the jury on strict liability and punitive damage claims.

In the March 11 order, the 9th Circuit opined that the plaintiff had failed to present evidence to overcome the court's ruling in *McIndoe*, in which the court concluded that a U.S. Naval warship is not a "product" that is distributed commercially.

Plaintiff Rosa Dennis asserted the claims on behalf of Patrick Dennis. The plaintiff asked the court to instruct the jury on claims for strict liability and punitive damages, but the District Court denied those efforts, relying on *McIndoe v. Huntington Ingalls Inc.* (817 F.3d 1170, 9th Cir. 2016).

The plaintiff appealed.

In addressing the dispute, the 9th Circuit wrote that in *McIndoe*, it looked to whether the builders of U.S. Naval warships could be held strictly liable for defects in materials originally installed on the ships they built.

"We held that, under the Restatement (Third) of Torts: Products Liability § 19 (1998), a warship is not a 'product' that is 'distributed commercially for use or consumption,'" the 9th Circuit wrote. "Naval warships are custom built to specifications provided by the United States and sold exclusively to the United States. They are not 'distributed commercially.'"

That reasoning applies to the case at hand, the 9th Circuit found, saying that the evidence has established that the U.S. Navy underwent "customary request for proposal process when procuring Foster Wheeler's boilers for use in naval warships."

"That process involved the Navy providing detailed specifications for each boiler, 'including requirements such as chemical composition, dimensions, required testing and performance demonstrations, required labeling, packaging, and shipping requirements, and similar content,'" the court wrote. "Foster Wheeler followed the Navy's specifications when building the boilers. Naval specifications 'required the use of asbestos for the gaskets, the packing, and the insulating block[s].'"

The plaintiff did not offer any evidence to the contrary, the 9th Circuit said. As such, there is no triable factual issue over whether the boilers entered the general stream of commerce like a commercially distributed or mass-produced property would.

"Instead," the court concluded, "the only evidence was that the boilers were custom-built property, which, like the naval warship in *McIndoe*, are excluded from the realm of strict products liability. Therefore, the district court did not err in rejecting Appellant's strict liability jury instruction. Affirming the district court's decision to exclude the strict liability jury instruction means we need not consider Appellant's arguments concerning the rejected punitive damages instruction."

Dennis, et al. v. Foster Wheeler Energy Corp., et al., No. 23-4283 (9th Cir.).

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