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By Edward R. Hugo  
and Bina Ghanaat

**G**overnment Contractor defendants should file dispositive motions seeking to preclude strict products liability claims in cases alleging personal injury or wrongful death arising from work with or around complex Navy equipment.

## You Can't Buy Complex Navy Warship Equipment at Home Depot: An Argument for Expanding *McIndoe* to Preclude Strict Liability Claims Arising from Complex Navy Warship Equipment

In the seminal case of *McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1173 (9th Cir. 2016)<sup>1</sup>, the Ninth Circuit held that warships are not products and are excluded “from the realm of strict products liability” because they “were never ‘distributed commercially.’” *McIndoe*, 817 F.3d at 1173. The same logic applies to complex Navy warship equipment, such as the boilers.

**A Navy Warship Boiler Is Not a Common Product Because It Is Built to Mandatory and Precise Military Specifications, Is Not Distributed Commercially, and Public Policy Does Not Support Imposing Strict Liability on the Manufacturer of Such Equipment**

Pursuant to the Third Restatement of Torts, “a ‘product’ subject to strict liability” is “‘tangible personal properly distributed

commercially for use or consumption.’” *McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1173 (9th Cir. 2016) (quoting Restatement (Third) of Torts: Prods. Liab. § 19(a) (Am. Law Inst. 1998)) (emphasis added by *McIndoe*). The Restatement continues, “[O]nly when the complained-of injury was allegedly caused by a defect in something within this . . . definition of ‘product’ should the defendant manufacturer or seller be strictly liable for the harm caused.” *Id.* at 1173 (quoting Restatement (Third), § 19 reporter’s note, cmt. a). Conversely, “[i]njuries caused by other items are actionable only ‘under negligence, misrepresentation, or some other liability theory.’” *McIndoe*, 817 F.3d at 1173 (quoting Restatement (Third), § 19 reporter’s note, cmt. a). Pursuant to this definition, the *McIndoe* Court held that warships are not products and are excluded “from the realm

<sup>1</sup> *Edward R. Hugo argued the McIndoe case before the United States Court of Appeals, Ninth Circuit, on August 31, 2015.*

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of strict products liability” because they “were never ‘distributed commercially.’” *McIndoe*, 817 F.3d at 1173.

This result “makes sense” because “[t]he general aim of strict liability is to ‘plac[e] responsibility on the . . . party most able to prevent harm’ caused by dangerous products.” *Id.* at 1173-75 (quoting *All Alaskan Seafoods Inc. v. Raychem Corp.*, 197 F.3d 992, 994 (9th Cir. 1999).) That goal would not be advanced by imposing liability on the builder of a custom-ordered Navy warship boiler assembled to precise military specifications that expressly require the incorporation of asbestos-containing component parts.

The rationale of *McIndoe* applies to warship boilers because (1) Navy warship boilers are not distributed commercially; and (2) public policy militates against imposing strict liability against the builder of a cus-

tom-ordered Navy warship boiler assembled to precise military specifications.

Navy warship boilers do not enter the general stream of commerce and are not mass-produced. Instead, they are built to order pursuant to mandatory and precise Navy specifications. Stated differently, the role of the builder of a Navy warship boiler is more like a provider of a service (the assembly of an assortment of component parts chosen by the purchaser) than the manufacturer of a product. See 63 Am.Jur.2d Prod. Liab. § 617 (“The concept of strict tort liability does not apply to defective services, as opposed to defective products”). Cf. *McKee v. Miles Lab., Inc.*, 866 F.2d 219, 221 (6th Cir. 1989) (Kentucky law); *Dudley v. Business Exp., Inc.*, 882 F. Supp. 199, 210 (D.H.H. 1994) (New Hampshire law); *Coleman v. Charlesworth*, 157 Ill.2d 257, 262, 191 Ill. Dec. 480, 623 N.E.2d 1366 (Ill. 1993) (Illinois law); *Watts v. Rub-*

*ber Tree, Inc.*, 121 Or. App. 21, 23, 853 P.2d 1365 (Or.App.1993) (Oregon law). Accordingly, a Navy warship boiler is not a “product” within the meaning of strict product liability law.

Given the custom-built nature of Navy warship boilers, imposing strict liability against the manufacturer of such equipment would run afoul of public policy considerations. Imposing strict liability on a government contractor would not advance the goal of shifting liability to the “party most able to prevent harm” because the purchaser, i.e., the Navy, was the one who (1) controlled the design of its equipment pursuant to precise military specifications, including by requiring use of asbestos-containing component parts; and (2) controlled the working environment of the sailors that worked with or around the equipment. See *McIndoe*, 817 F.3d at 1174. The government contractor does not con-



trol the working environment of the sailors that work with or around the equipment. Rather, the United States Navy exercises complete control over the sailor's working environment and is the entity most able to prevent harm caused by the products that it specifies.

**Under California State Law, the Consumer Expectation Test Is Inapplicable to a Navy Warship Boiler**

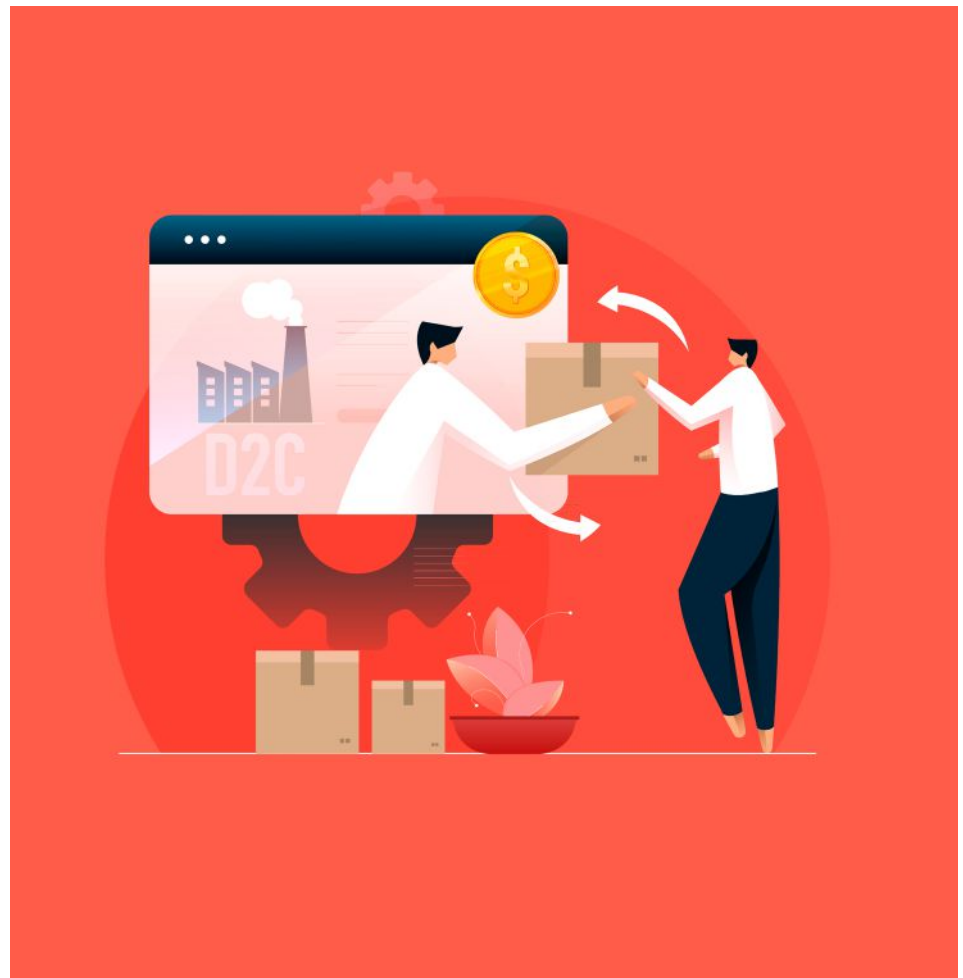
CACI No. 1203 defines Strict Liability under the Consumer Expectation Test as follows:

[Name of plaintiff] claims the [product]'s

**Navy warship boilers do not enter the general stream of commerce and are not mass-produced. Instead, they are built to order pursuant to mandatory and precise Navy specifications.**

design was defective because the [product] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [manufactured/distributed/sold] the [product];
2. That the [product] did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way;
3. That [name of plaintiff] was harmed; and
4. That the [product]'s failure to perform safely was a substantial



factor in causing [name of plaintiff]'s harm.

First, the California state law consumer expectation test does not apply to a Navy warship boiler because such equipment is highly complicated and not within the understanding of ordinary lay consumers. For instance, in *Jones v. John Crane, Inc.*, 132 Cal.App.4th 990 (2005), the Court considered the applicability of California's consumer expectation test to a common gasket. The Appellate Court appropriately started its analysis by reviewing the test outlined by the Supreme Court:

In *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567 [34 Cal. Rptr.2d 607, 882 P.2d 298], the Supreme Court held that the consumer expectations test is properly applied in "cases in which the everyday experience of the product's users permits a conclusion that

the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design." In contrast, the test should not be used "when the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit," since "in many instances it is simply impossible to eliminate the balancing or weighing of competing considerations in determining whether a product is defectively designed or not." (Id. at pp. 562-563.) "The crucial question in each individual case is whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." (Id. at pp. 568-569.)

Jones, 132 Cal.App.4th at 1002-03.

In applying the Soule test, the Jones Court found that “[a]ccording to defendant’s own explanation, there is nothing complicated or obscure about the design and operation of the products, nor are there any esoteric circumstances surrounding the manner in which Jones was exposed to the asbestos fibers.” Jones, 132 Cal.App.4th at 1003-04. Accordingly, the consumer expectation test was found applicable to a common gasket.

Similarly, in *Saller v. Crown Cork & Seal Company*, 187 Cal.App.4th 1220 (2010), the Appellate Court considered the applicability of California’s consumer expectation test to common insulation, “an apparently innocuous product” and concluded:

Here, we agree that the consumer expectations test applied to the use of asbestos at Standard Oil and that Saller’s testimony concerning his expectations about its safety in its ordinary use at Standard Oil were sufficient to require a jury instruction on the issue. The use of asbestos insulation is a product that is within the understanding of ordinary lay consumers.

*Id.* at 1236.

Because a Navy warship boiler is a complicated piece of machinery designed to the Navy’s own specifications, the California consumer expectation test is inapplicable. Even plaintiffs’ Naval experts will concede that “[t]he [whole steam] system itself is highly complicated, and as a result of years and years of engineering by the Navy.”<sup>2</sup> Furthermore, unlike the “apparently innocuous product” in *Saller*, 187 Cal.App.4th at 1236, a Navy warship boiler

is obviously dangerous.<sup>3</sup> For instance, the temperature inside a Navy boiler would be about 2,500 or 2,700 degrees Fahrenheit, and if there were a steam leak on the boiler it would not be visible and if an unsuspecting sailor stuck their hand out to test a leak, their fingers would be cut off.<sup>4</sup>

Given the custom-built nature of Navy warship boilers, imposing strict liability against the manufacturer of such equipment would run afoul of public policy considerations.

<sup>2</sup> *Q (Plaintiff’s counsel) put up a diagram that showed the whole steam system. Do you remember that earlier?*

*A Yes.*

*Q Would you describe that as a simple system?*

*A No, I would not. I mean, you mean the diagram or the system itself?*

*Q The whole system itself.*

*A The system itself is highly complicated, and as a result of years and years of engineering by the Navy.*

<sup>3</sup> *Q How hot is the inside temperature for 600-pound [name of manufacturer] boiler?*

*A In the furnace, it would range about 2,500, 2,700 degrees Fahrenheit.*

*Q That is pretty hot, right?*

*A Yes.*

*Q So if there is a steam leak on a boiler, it’s not something you can see, right?*

*A That’s correct. If it’s super-heated steam, in particular, and super-heated steam is steam once it’s turned to steam they keep heating it so it gets more energy into it. That is what I mean by super-heated steam. But in the case of super-heated steam, you are not going to see it, you may hear it, but you not going to see it.*

*Q If you are walking with your hand out to test a leak, it’s going to cut your fingers right off the hand?*

*A They teach sailors to use brooms to -- if they hear a steam leak to use a broom to test it and not their hands. You are correct, it would cut off the hand if they were foolish enough to put their hand into it.*

*Q They teach them that at school, right?*

*A They teach them that at school and petty officers also teach the firemen and fire apprentices that report to them the very same thing.*

*Q The boilers does not have a warning sign, that says, watch out for steam leaks, does it?*

*A Not to my knowledge.*

*Q The boiler is really loud.*

*A It can be, yes.*

*Q It’s basically, although it is a big thing, it’s in a relatively confined compartment, correct?*

*A I think that is a good characterization.*

*Q The boiler does not have a warning about ear protection, does it?*

*A It does not.*

<sup>4</sup> *Id.*



Not only is a Navy warship boiler a highly complicated and dangerous piece of equipment, but it is also not subject to use or any expectations by an “ordinary consumer.” For over 40 years, the California Supreme Court has explicitly limited the applicability of the consumer expectation test to cases where ordinary knowledge as to the product’s characteristics “permit an inference that the product did not perform as safely as it should.” *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 566 (1994); *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413 (1978). The *Soule* case focused on an ordinary consumer’s expectations regarding a common commercially produced automobile, which is significantly less complex than a warship boiler built to precise Navy specifications.

An ordinary consumer of automobiles cannot reasonably expect that a car’s frame, suspension, or interior will be designed to

remain intact in any and all accidents. Nor would ordinary experience and understanding inform such a consumer how safely an automobile’s design should perform under the esoteric circumstances of the collision at issue here. Indeed, both parties assumed that quite complicated design considerations were at issue, and that expert testimony was necessary to illuminate these matters. Therefore, injection of ordinary consumer expectations into the design defect equation was improper.

*Id.* at 570.

Subsequent cases have found the consumer expectation test inapplicable to machinery such as cotton pickers (*Bates v. John Deere Co.*, 148 Cal.App.3d 40 (1983)) and front-end loaders (*Lunghi v. Clark Equipment Co.*, 153 Cal.App.3d 485 (1984)), which actually have commercial consumers and are far less complicated than a Navy warship boiler and do not call “for a care-

ful assessment of feasibility, practicality, risk and benefit.” *Soule*, 8 Cal.4th at 562-63.

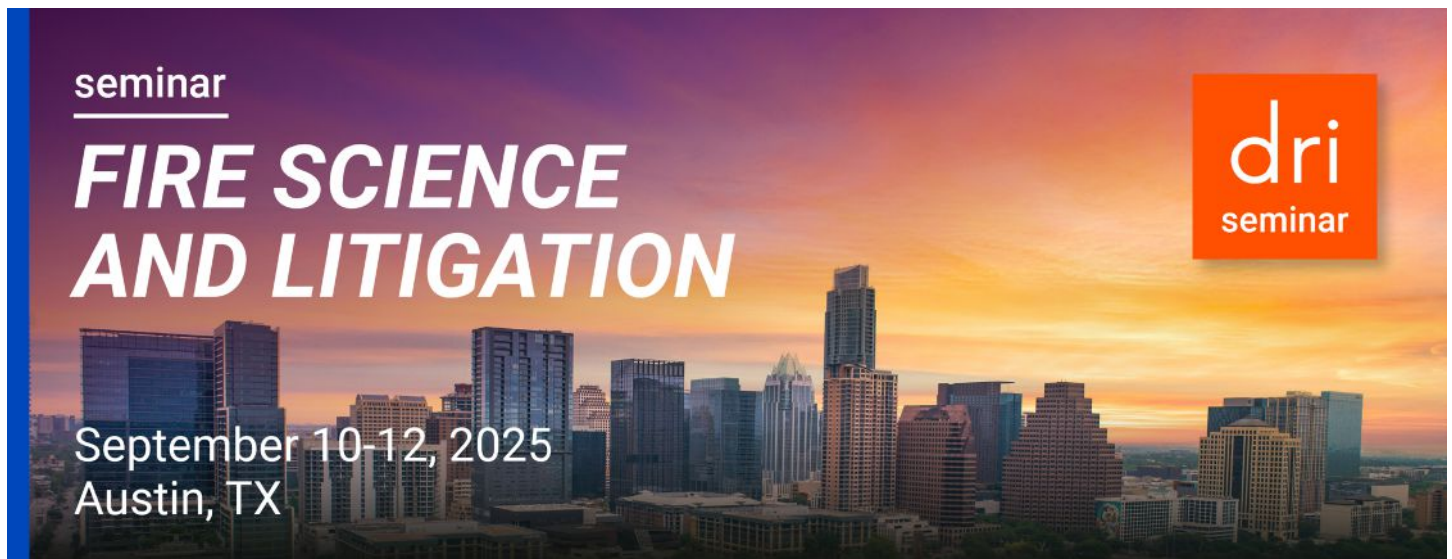
Not only is a Navy warship boiler a complicated and dangerous piece of machinery that is not commercially distributed, but there is also no “ordinary lay consumer” of such equipment. These boilers are custom-built to precise Navy specifications and are not available for purchase by ordinary consumers. Ordinary consumers do not use, and therefore have no expectations regarding, Navy warship boilers.

Navy sailors’ expectations are ultimately irrelevant because they are required to follow the Navy’s orders even at their own peril. They understand that they could die during their Navy service<sup>5</sup> and that they have to follow orders, without question.<sup>6</sup> Accordingly, they would have gone aboard a ship that said “asbestos,” “warning may cause cancer,” if they were ordered to do so, rendering any warning moot.<sup>7</sup>

<sup>5</sup> *Deposition Testimony of (Plaintiff) from March 27, 2020 (volume 3)*  
283:24 Q. And you also understood that you could die in  
283:25 that process, that the hatch could close behind you if  
284:01 that fire was uncontrollable and that you could die?  
284:02 A. Yes.

<sup>6</sup> *Deposition Testimony of (Plaintiff) from March 26, 2020 (volume 2)*  
137:07 Q. Is it correct that one of the things you learned  
137:08 in recruit training is that orders are not optional, and  
137:09 that you were obligated to follow orders from a senior  
137:10 enlisted personnel or officer?  
137:11 A. Yes.  
137:12 Q. Were you allowed to question or refuse orders?  
137:13 A. No.  
206:11 Is it fair to say, sir, while you were in the  
206:12 Navy, you had to follow Navy rules and regulations  
206:13 24 hours a day, seven days a week?  
206:14 A. Pretty much, yeah.  
206:15 Q. I mean, even on leave, you had to follow some of  
206:16 the regulations or you’d get in trouble.  
206:17 Right?  
206:18 A. That’s correct.

*Deposition Testimony of (Plaintiff) from March 27, 2020 (volume 3)*  
287:23 Q. And if the ship had “asbestos” on the side of it,  
287:24 “warning may cause cancer,” if your chief petty officer  
287:25 ordered you to go aboard and go down and do repair and  
288:01 maintenance, that was something you were obligated to do.  
288:02 Fair enough?  
288:03 A. Yes.



### Conclusion

Although the Ninth Circuit has yet to issue a published decision applying *McIndoe* to complex Navy warship equipment, it recently affirmed a trial court's decision to decline to instruct the jury on strict products liability in a case involving Navy war-

ship boilers.<sup>8</sup> Accordingly, Government Contractor defendants should file dispositive motions seeking to preclude strict products liability claims in cases alleging personal injury or wrongful death arising from work with or around complex Navy equipment.



<sup>7</sup> *Deposition Testimony of (Plaintiff) from March 26, 2020 (volume 2)*

163:14 Q. Well, when you did work in the Navy, did you

163:15 follow any of the procedures?

163:16 A. Yes.

163:17 Q. Okay.

163:18 And the Navy was responsible for teaching you the

163:19 procedures they wanted followed?

163:20 A. Yes.

206:11 Is it fair to say, sir, while you were in the

206:12 Navy, you had to follow Navy rules and regulations

206:13 24 hours a day, seven days a week?

206:14 A. Pretty much, yeah.

206:15 Q. I mean, even on leave, you had to follow some of

206:16 the regulations or you'd get in trouble.

206:17 Right?

206:18 A. That's correct.

<sup>8</sup> *The Ninth Circuit recently issued an unpublished disposition affirming a trial court's decision to exclude a strict liability jury instruction in a case involving Navy warship boilers. Rosa Dennis, individually and as successor-in-interest to Patrick W. Dennis (Deceased) v. Foster Wheeler Energy Corporation; Foster Wheeler LLC, et al., No. 23-4283 (9th Cir. Mar. 11, 2025). The Ninth Circuit explained that the evidence at trial was that "the Navy underwent its customary request for proposal process when procuring Foster Wheeler's boilers for use in naval warships," and "[t]hat 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.'" Id. at \*3. Furthermore, "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].'" Id. Finally, "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." Id. at \*4 (citing *McIndoe* at 1173). Edward R. Hugo argued the case before the United States Court of Appeals, Ninth Circuit, on March 4, 2025.*