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The Government Contractor Defense In The 4th Circ.

By **Erik Nadolink**


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Law360, New York (July 10, 2017, 12:23 PM EDT) -- With the recent Sawyer v. Foster Wheeler LLC[1] decision, the Fourth Circuit completed its journey toward recognizing the "government contractor defense" as an appropriate source of federal jurisdiction in products liability failure-to-warn cases. That journey began with the Hurley v. CBS Corp.[2] and Ripley v. Foster Wheeler LLC[3] decisions last year.

In Hurley, the court reversed the District of Maryland's ruling that defendants' notice of removal was untimely, and assumed without specifically deciding that "federal officer" removal jurisdiction pursuant to 28 U.S.C. § 1442(a)(2) was appropriate for failure-to-warn claims in product liability personal injury actions. Then late last year in Ripley, the court squarely addressed the issue. The Eastern District of Virginia remanded the case to state court, holding that the government contractor defense could not be used as basis for federal jurisdiction because the defense does not exist in failure-to-warn cases. The court again reversed, establishing for the first time in the Fourth Circuit both that the government contractor defense does apply in failure-to-warn cases, and also that the defense is an appropriate basis for 1442(a)(2) removal jurisdiction.

With these decisions in hand, the court then issued the recent Sawyer decision to lay out the specific standards for when defendants can rely upon the government contractor defense to remove products-based failure-to-warn cases to federal court. Sawyer is significant for several reasons.

The Fourth Circuit's Path

Each of these recent decisions involves asbestos personal injury claims against government contractors who supplied military equipment to the United States Navy for installation aboard Navy warships — from World War II through Vietnam. Plaintiffs in each of these cases claim exposure to asbestos-containing products in the course of installing, maintaining and/or repairing this shipboard equipment. Virtually all such claims in asbestos litigation are failure-to-warn claims, i.e., even though the Navy, through detailed specifications, required asbestos insulation to be used throughout the fleet, and defendants thus had little choice but to use asbestos-containing products, they should still have warned plaintiffs of asbestos hazards.

Courts in the Fourth Circuit are suitable venues for many of these cases because of the many historically important shipyards located in their states: Sparrows Point in Baltimore, Newport News and the Norfolk Naval Shipyard in Virginia, and the Charleston Navy Yard in South Carolina, just to name a few. Accordingly, it is of particular importance in the Fourth Circuit to determine the proper forum — state or federal — for litigating these cases. And yet while several other circuits had previously taken up the issue of how the government contractor defense applies in failure-to-warn cases (though not necessarily asbestos cases), the issue had not previously come before the Fourth Circuit until 2011 amendments to 28 U.S.C. 1447(d) provided a right of appeal from 1442(a)(2) remand decisions. Thus Hurley, Ripley and Sawyer became the court's first opportunities to address this important issue.

Section 1442(a)(2) provides a forum in federal court for defendants, sued in state court, for "any act under color of" the authority of a federal agency or officer. The government contractor defense, in

turn, is premised on the preemption of state tort law by the federal immunity afforded contractors conducting work pursuant to government specifications.

Almost three decades ago, in Boyle v. United Technologies[4], the U.S. Supreme Court recognized that the "uniquely federal interest" of "getting the Government's work done" requires that, under some circumstances, contractors be protected from tort liability associated with their performance of government procurement contracts. The Boyle court insightfully recognized that the same rationale behind maintaining sovereign immunity for "discretionary" action taken by federal agencies and employees was equally applicable to certain actions of government contractors performing obligations pursuant to such discretionary decisions taken by the military, even though the government contractors were, themselves, nongovernmental entities.

Thus when a government contractor builds a product pursuant to military specifications and is later sued because compliance with those specifications allegedly caused injury, the contractor is — like the federal government that promulgated the specifications — immune from liability for carrying out this fundamental discretionary function of governance. And the defendant with a plausible government contractor defense also necessarily "acted under" federal authority, and has the statutory right to litigate its defense in federal court.

Applying the Doctrine to Failure-to-Warn Claims

The government contractor defense, and removal jurisdiction based on the same, is thus long established in design defect cases. But how does this doctrine apply, if at all, to the failure-to-warn claims that make up the bulk of contemporary asbestos cases (and countless other products-liability personal injury suits)? Defendants argue that it should apply just like it does in design defect cases; if the government exercised its "discretion" by promulgating specifications — for things like equipment technical manuals and placards for operating instructions — and then reviewed and approved the written materials supplied by its vendors — then the contractor is immunized from liability for its alleged failure to include more or different warnings than those approved by the government.

Plaintiffs have argued for the opposite proposition, that failure-to-warn claims are fundamentally different from design defect claims. They argue that absent a specific directive from the government prohibiting a defendant from providing a particular warning in its manual or instructions, the defense in inapplicable. Of course, it is virtually impossible to prove that a defendant specifically sought to include a particular warning in a technical manual for a piece of equipment supplied for installation aboard a Navy vessel a half-century ago or more, and that the Navy explicitly vetoed that proposed warning. Thus the difference between the defendant and plaintiff interpretations of the defense is, as a practical matter, the difference between a potentially viable government contractor defense, and none at all.

Joining — and Advancing — a Burgeoning Majority

Federal appellate and district courts around the nation have articulated different formulations of the standard, but over the years a majority rule eventually began to surface. The Fifth, Sixth, Seventh and Ninth Circuits, along with the asbestos multidistrict litigation sitting in the Eastern District of Pennsylvania, adopted a standard close to that championed by defendants, holding that the government contractor immunity applies in failure-to-warn cases when:

> (1) the government exercised its discretion and approved certain warnings; (2) the contractor provided the warnings required by the government; [and] (3) the contractor warned the government about the dangers in the equipment's use that were known to the contractor but not the government."[5]

In Sawyer, the Fourth Circuit joined this burgeoning majority. Sawyer rejects plaintiffs' arguments that defendants must prove the government explicitly prohibited warnings or otherwise took an active hand in making a specific decision not to provide a warning — a standard that in many cases would be virtually impossible to satisfy. Here the defendant presented sworn testimony from a former employee and a retired Navy captain, both of whom were familiar with the procurement process and the Navy's sophisticated hazard communications practices. They stated that the Navy "exercised intense direction and control over all written documentation to be delivered" with its

equipment. The court held such testimony was sufficient to demonstrate the government's exercise of discretion over product warnings and establish a colorable federal immunity defense.

The court further held that plaintiffs cannot artificially narrow the issues to defeat removal. The Sawyer plaintiffs had both products (strict liability) and simple negligence claims but attempted to focus solely on the purported negligence claims in hopes of defeating removal. In other words, the plaintiffs' complaint alleged that the defendant's product lacked appropriate warnings. They also claimed that the defendant's representative was on-site at the shipyard during portions of the assembly of the equipment, and that he was personally negligent for not warning the plaintiff about asbestos. The Sawyer plaintiffs' remand motion ignored their own warnings claims with respect to the product (which was subject to detailed Navy specifications, review and approval), and focused exclusively on the alleged simple negligence of the individual (who they argued was not subject to Navy discretion). The court made it clear that a colorable defense as to any claim asserted by plaintiffs (regardless of whether it is the one they discuss in their remand motion) is sufficient for removal.

In sum, in Sawyer the Fourth Circuit furthered the emergence of a rational national standard for application of the government contractor defense in failure-to-warn cases, and provided clear guidance regarding when such cases may be removed to federal court pursuant to 1442(a)(2) federal officer jurisdiction.

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[1] --- F.3d ---, No. 16-1530, 2017 WL 2680581 (4th Cir. June 22, 2017).

[2] 648 Fed.Appx. 299 (4th Cir. 2016).

[3] 841 F.3d 207 (4th Cir. 2016).

[4] 487 U.S. 500 (1988).

[5] Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 1003-04 (7th Cir. 1996).
