

Won for Foster Wheeler in an asbestos failure to warn case involving the government contractor defense. The Fourth Circuit reversed and remanded to the district court following our arguments that evidence set forth by Foster Wheeler was sufficient to demonstrate a colorable defense establishing federal jurisdiction.

2017

WTO attorneys won reversal and remand for Foster Wheeler from the U.S. Court of Appeals for the Fourth Circuit. At issue was application of the “government contractor defense” (for federal immunity) in an asbestos failure to warn case in which the plaintiff claimed our client was liable for the illness and death of a former Bethlehem Steel shipyard worker.



WTO attorneys Rick Nadolink and Kate Mercer-Lawson

This is a significant opinion for several reasons. In addition to reversing and remanding the lower court decision against our

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client, the opinion follows up and expands upon the Fourth Circuit's decision in *Ripley v. Foster Wheeler*, 841 F.3d 207 (4th Cir. 2016) (also argued by WTO) from last year, in which the Court established the existence of the government contractor defense in failure to warn cases but declined to articulate specific standards for its application.

In *Sawyer*, the Court has now adopted the appropriate standard for determining when a government contractor is immunized from liability. Namely, suppliers of military equipment are protected when "the government exercised its discretion and approved certain warnings."

This is the standard previously adopted in several other federal circuits and the asbestos MDL. It 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 would be virtually impossible to satisfy considering the lack of witnesses and scarcity of documentation regarding contracts and related correspondence for military equipment procured for Navy warships that went into service a half century ago or more.

Accordingly, the Court went on to hold that affidavits from a former Foster Wheeler employee were adequate to demonstrate the government's exercise of discretion over product warnings and establish a colorable federal immunity defense. The employee was familiar with the procurement process and stated that the Navy "exercised intense direction and control over all written documentation to be delivered" with its equipment.

The Court further held that plaintiffs cannot narrow the issues to defeat removal to federal court. The plaintiffs had both products (strict liability) and simple negligence claims but attempted to focus solely on the purported negligence of the defendant's representatives in the shipyard to defeat

removal in this case. The Court made clear that a colorable defense as to any claim asserted by plaintiffs (regardless of whether it is the one they want to argue about now) is sufficient for removal.