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California Comparative Fault Update

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Statutory Immunity of the United States Navy In Asbestos Cases Does Not Preclude Allocation of Fault Under Proposition 51

Court of Appeal Vindicates Burnham Brown Trial Arguments

In the recently published opinion of Collins v. Plant Insulation Company, 2010 DJDAR 8258, the Court of Appeal for the First Appellate District addressed the issue of whether fault may be allocated to the United States Navy pursuant to California Civil Code section 1431 et seq. ("Proposition 51") for injuries arising from asbestos exposures attributable to the Navy. The Appellate Court considered, and soundly rejected, arguments from Plaintiffs that under the doctrine of Sovereign Immunity, "the King can do no wrong," and thus the Navy was not only relieved from paying for its tortious conduct, but that the Navy owed no duty to military and civilian personnel. Rather, the Court affirmed the arguments advanced by Burnham Brown, counsel for Plant Insulation Company during trial, holding that although the Navy is immune from suit under 28 U.S.C. section 2671, et seq., (the Federal Tort Claims Act) "no authority suggests it owes no duty of care to its service personnel and civilian employees. Indeed, all authority is to the contrary." Collins *supra* at 8263. Accordingly, the Appellate Court concluded the Trial Court erred in excluding the Navy from the list of entities which the jury could apportion fault pursuant to Proposition 51.

During his lifetime, decedent Ulysses Collins brought suit against various defendants for personal injuries pertaining to alleged occupational asbestos exposure. Following Mr. Collins' death from mesothelioma, his surviving family brought suit. Collins worked as a welder at the Hunters Point Naval Shipyard from 1960 to 1973, as a boiler-maker welder at the Standard Oil Refinery from 1973 to 1976 and at Mare Island Naval Shipyard as a structural welder and pipe welder from 1976 to 1994. At each of these locations, Collins worked extensively with asbestos and asbestos-containing products.

At the close of evidence at trial, plaintiffs moved for a directed verdict regarding the Navy, arguing fault could not be allocated to the Navy because under the doctrine of Sovereign Immunity, the Navy was not a "tortfeasor" for the purposes of Proposition 51. Plant opposed the motion arguing that the Navy's immunity from suit did not absolve it from a duty of care as to its enlisted personnel and civilian employees. Thus, Plant contended the Navy is properly considered a party to whom fault can be allocated under Proposition 51. The Trial Court granted plaintiff's motion.

In a well-reasoned decision, the Appellate Court initiated its analysis by examining the purposes and scope of Proposition 51, as explained in the statutory text and precedent. The court observed "the statute 'neither states nor implies an exception for damages attributable to the fault of persons who are immune from liability . . . .'" Id. at 8259. Thus, "whether apportionment is proper with respect to an individual or entity immune from suit depends on the nature and character of the immunity." Id.

Exploring this concept, the court distinguished the Navy's immunity from suit from a legislative determination that one's conduct creates "no tortious responsibility," and is thus not a "tortfeasor" to which fault may be allocated under Proposition 51. The Court determined there is no basis for the argument that because the Navy is immune from suit, it cannot be a "tortfeasor" in an asbestos-exposure action. "Federal sovereign immunity is thus grounded not on the notion the government is infallible and can do no wrong, but on the jurisdictional theory it must consent to suit before it can be sued for its wrongful conduct." Id. at 8262. "We therefore agree… that fault may be allocated to the Navy under Proposition 51." Id.

In the last segment of its analysis, the court reviewed cases cited by the parties, most notably that cited by Plant, Taylor v. John Crane, Inc., 113 Cal.App.4th 1063 (2003). In Taylor, allocation of fault to the Navy was upheld by the reviewing court. When discussing Munoz v. City of Union, 148 Cal.App.4th 173 (2007), the case authority relied on by Plaintiffs, the Collins court emphasized that Munoz "considered only the immunities created by the California Government Code to shield California 'public entities' as defined and specified by the state statute. It did not consider, let alone analyze, the character of the Navy's immunity." Collins *supra* at 8263. Further, the Court noted that Munoz acknowledges Taylor and indeed quotes Taylor with approval. Id.

The Collins holding is significant for asbestos defendants in cases where the evidence is sufficient to support an allocation of fault to the Navy. Collins affirms the basic mandate of Proposition 51 that a defendant's liability for non-economic damages cannot exceed its proportionate share of fault "*as compared with all fault responsible for the plaintiff's injuries*, not merely that of 'defendants' present in the lawsuit." Id. at 8259 (quoting DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 603).

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