No. ORIGINAL 116

In The

Supreme Court of the United States

October Term, 1989

ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, and WYOMING,

Plaintiffs,

-against-

W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, UNITED STATES GYPSUM COMPANY, USG CORPORATION, AMERICAN BILTRITE, INC., ARMSTRONG WORLD INDUSTRIES, INC., AZROCK INDUSTRIES, INC., BASIC INCORPORATED, CAREY-CANADA, INC., THE CELOTEX CORPORATION, CERTAINTEED CORPORATION, CROWN CORK & SEAL COMPANY, INC., EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, THE FLINTKOTE COMPANY, GAF CORPORATION, GEORGIA-PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., KEENE CORPORATION, KENTILE FLOORS, INC., OWENS-CORNING FIBERGLAS CORPORATION, OWENS-ILLINOIS, INC., PFIZER, INC., RAYMARK INDUSTRIES, INC., SPRAYED INSULATION, INC., and TURNER & NEWALL PLC,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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QUESTIONS PRESENTED

I. Whether this Court should exercise its original jurisdiction in a case brought by twenty-nine sovereign states which have acted to protect the public health from harm caused by the presence of asbestos in the States' buildings when no other adequate forum is available to grant comprehensive and uniform relief?

II. Whether this Court should exercise its original jurisdiction to grant comprehensive and uniform relief through equitable apportionment of the limited resources of the Asbestos Companies?

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Plaintiffs,

-against-

W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, UNITED STATES GYPSUM COMPANY, USG CORPORATION, AMERICAN BILTRITE, INC., ARMSTRONG WORLD INDUSTRIES, INC., AZROCK INDUSTRIES, INC., BASIC INCORPORATED, CAREY-CANADA, INC., THE CELOTEX CORPORATION, CERTAINTEED CORPORATION, CROWN CORK & SEAL COMPANY, INC., EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, THE FLINTKOTE COMPANY, GAF CORPORATION, GEORGIA-PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., KEENE CORPORATION, KENTILE FLOORS, INC., OWENS-CORNING FIBERGLAS CORPORATION, OWENS-ILLINOIS, INC., PFIZER, INC., RAYMARK INDUSTRIES, INC., SPRAYED INSULATION, INC., and TURNER & NEWALL PLC,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The states of Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota,

Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming, by their respective Attorneys General, hereby move this Court for leave to file the attached Complaint, pursuant to Article III, Section 2 of the United States Constitution and Section 1251, Paragraph (b)(3) of Title 28 of the United States Code for the reasons more fully set out in the attached Brief.

Respectfully submitted,

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January 29, 1990

No. ___ORIGINAL

In The

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ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, and WYOMING,

Plaintiffs,

-against-

W.R. GRACE & COMPANY, NATIONAL GYPSUM COMPANY, UNITED STATES GYPSUM COMPANY, USG CORPORATION, AMERICAN BILTRITE, INC., ARMSTRONG WORLD INDUSTRIES, INC., AZROCK INDUSTRIES, INC., BASIC INCORPORATED, CAREY-CANADA, INC., THE CELOTEX CORPORATION, CERTAINTEED CORPORATION, CROWN CORK & SEAL COMPANY, INC., EAGLE-PICHER INDUSTRIES, INC., FIBREBOARD CORPORATION, THE FLINTKOTE COMPANY, GAF CORPORATION, GEORGIA-PACIFIC CORPORATION, H.K. PORTER COMPANY, INC., KEENE CORPORATION, KENTILE FLOORS, INC., OWENS-CORNING FIBERGLAS CORPORATION, OWENS-ILLINOIS, INC., PFIZER, INC., RAYMARK INDUSTRIES, INC., SPRAYED INSULATION, INC., and TURNER & NEWALL PLC,

Defendants.

COMPLAINT

Twenty-nine states, by their respective Attorneys General, bring this original action seeking an equitable remedy to address the national crisis presented by the

presence of asbestos-containing materials in public buildings. For their complaint, the States aver:

I.
JURISDICTION

1. Jurisdiction exists by virtue of Article III, Section 2 of the United States Constitution and Section 1251, Paragraph (b)(3) of Title 28 of the United States Code.

II.
PARTIES

2. Plaintiffs are the following states: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming (hereinafter referred to as "the States"). The States own, operate, and maintain numerous public buildings and other facilities that are contaminated by asbestos-containing materials.

3. Defendants and their respective predecessors and successors in interest are the following: W.R. Grace & Company, a Connecticut citizen; National Gypsum Company, a Delaware citizen; United States Gypsum Company, a Delaware citizen; USG Corporation, a Delaware citizen; American Biltrite, Inc., a Delaware citizen; Armstrong World Industries, Inc., a Pennsylvania citizen; Azrock Industries, Inc., a Texas citizen; Basic Incorporated, a Delaware citizen; Carey-Canada, Inc., a foreign

citizen; The Celotex Corporation, a Delaware citizen; Certainteed Corporation, a Delaware citizen; Crown Cork & Seal Company, Inc., a Pennsylvania citizen; Eagle-Picher Industries, Inc., an Ohio citizen; Fibreboard Corporation, a Delaware citizen; The Flintkote Company, a Delaware citizen; GAF Corporation, a Delaware citizen; Georgia-Pacific Corporation, a Georgia citizen; H.K. Porter Company, Inc., a Delaware citizen; Keene Corporation, a New York citizen; Kentile Floors, Inc., a New York citizen; Owens-Corning Fiberglas Corporation, a Delaware citizen; Owens-Illinois, Inc., a Delaware citizen; Pfizer, Inc., a Delaware citizen; Raymark Industries, Inc. a Connecticut citizen; Sprayed Insulation, Inc., a New Jersey citizen; and Turner & Newall PLC, a foreign citizen (hereinafter referred to as "the Asbestos Companies"). The Asbestos Companies have been, or are now, engaged in the manufacture, distribution, and marketing of hazardous asbestos-containing products that were installed in buildings and facilities owned or maintained by the States.

4. The States bring this action against all of the Asbestos Companies named herein regardless of their citizenship. In the alternative, this action is brought by each of the States against only non-citizen Asbestos Companies as set out in Exhibit A hereto.

III.

THE ASBESTOS CRISIS

5. Asbestos fibers are known to be a human carcinogen. Inhalation of asbestos fibers can lead to mesothelioma, lung cancer, asbestosis, and other diseases that are serious, incurable, and often fatal.

6. The Asbestos Companies knew, or should have known, of the link between asbestos exposure and disease. Despite this knowledge, the Asbestos Companies manufactured, distributed, and marketed asbestos-containing building products that were installed in the States' buildings and facilities.

7. The Asbestos Companies had a duty to provide to the States products that were safe for their intended uses or, in the alternative, to warn the States of any dangers posed by their products.

8. The Asbestos Companies breached their duty because the products installed in the States' buildings and facilities were not safe for their intended uses, and at no time did the Asbestos Companies warn the States of the dangers posed by their products.

9. There is no safe level of exposure to asbestos fibers. All asbestos-containing products eventually deteriorate and release their hazardous fibers. Accordingly, an imminent danger exists to the health and welfare not only of occupants of the States' buildings, but also of the public who visits those buildings.

10. As sovereigns and proprietors, the States must act and have acted to protect the public health and to preserve the value and utility of state-owned properties by abating the hazards created by the manufacture, distribution, and marketing of the asbestos-containing building products of the Asbestos Companies.

11. Abatement of the asbestos-containing products in the States' buildings has and will require a great expenditure of the States' funds.

IV.

THE STATES CLAIM EQUITABLE RELIEF PURSUANT TO THE PUBLIC ASSISTANCE DOCTRINE

12. The States incorporate here the averments set forth above.

13. The Asbestos Companies had, and continue to have, a duty to abate the hazards created by their manufacture, distribution, or marketing of the hazardous asbestos-containing materials.

14. The Asbestos Companies have breached their duty, and the States have undertaken to perform the duty of the Asbestos Companies to abate the hazards created by the manufacture, distribution, and marketing of asbestos-containing building materials.

15. The States have acted to abate the asbestos hazards for which the Asbestos Companies are responsible without requesting that the Asbestos Companies perform the abatement because such a request would be futile.

16. Immediate action by the States to abate the asbestos hazards is, and will continue to be, necessary to protect the public health and safety and to preserve the utility and value of the States' properties.

17. The States have acted unofficiously and with intent to charge the Asbestos Companies for the expenses incurred.

18. The States have no adequate remedy at law.

WHEREFORE, the States pray that:

A. This Court declare that the Asbestos Companies are liable to the States for the costs of asbestos abatement

undertaken to remedy the hazards caused by the failure of the Asbestos Companies to perform their duty;

B. This Court, by a Special Master(s), fashion such relief as is equitable and appropriate to effectuate restitution to the States;

C. This Court grant such other, further, or different relief as may be deemed just and proper.

Respectfully submitted,

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*COUNSEL OF RECORD FOR PLAINTIFFS

January 29, 1990

EXHIBIT A

1. ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, and WYOMING bring this suit against all named Defendants.

2. CONNECTICUT brings this suit against all named Defendants except Raymark Industries, Inc. and W.R. Grace & Company.

3. DELAWARE brings this suit against all named Defendants except National Gypsum Company, United States Gypsum Company, USG Corporation, American Biltrite, Inc., Basic Incorporated, The Celotex Corporation, Certainteed Corporation, Fibreboard Corporation, The Flintkote Company, GAF Corporation, Owens-Corning Fiberglas Corporation, Owens-Illinois, Inc., H.K. Porter Company, Inc., and Pfizer, Inc.

4. NEW YORK brings this suit against all named Defendants except Keene Corporation and Kentile Floors, Inc.

5. OHIO brings this suit against all named Defendants except Eagle-Picher Industries, Inc.

6. TEXAS brings this suit against all named Defendants except Azrock Industries, Inc.

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Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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JURISDICTION

The States invoke the original jurisdiction of the Court pursuant to Article III, Section 2 of the United

States Constitution and Section 1251, Paragraph (b)(3) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article III, Section 2 of the United States Constitution.

> The judicial Power shall extend to all Cases, in Law and Equity, . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects . . . .
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

Section 1251, Paragraph (b)(3) of Title 28 of the United States Code.

> The Supreme Court shall have original but not exclusive jurisdiction of . . . [a]ll actions or proceedings by a State against the citizens of another State or against aliens.

STATEMENT OF THE CASE

The States bring this action in their capacity as *parens patriae* to protect the public health and as owners of public buildings contaminated by asbestos-containing products. The States seek equitable relief designed to reimburse them for the costs incurred in abating the asbestos contamination present in state-owned buildings

and facilities. In their Complaint, the States claim that the named Asbestos Companies knew, or should have known, of the link between exposure to asbestos fibers and disease at the time of the manufacture, distribution, and marketing of their asbestos-containing products to the States. The States also allege that the Asbestos Companies failed to warn the States of the health hazards associated with asbestos exposure and thereby breached their duty to provide safe products to the public. Further, as alleged, the Asbestos Companies have failed to abate the health hazards created by the presence of their products, and the States are now required to act at great expense to remedy the asbestos contamination found in public buildings. The States seek restitution for the costs of asbestos abatement activities from the Asbestos Companies pursuant to the Public Assistance Doctrine, articulated in the *Restatement of Restitution* § 115 (1937).

SUMMARY OF ARGUMENT

This Court has original jurisdiction of the States' action pursuant to Article III, Section 2 of the United States Constitution and Section 1251, Paragraph (b)(3) of Title 28 of the United States Code as an action brought by a state against citizens of another state. This suit brought by the States warrants the exercise of the Court's original jurisdiction as it raises issues of serious magnitude and because no other adequate forum exists where all of the Asbestos Companies may be sued and their resources equitably apportioned after a finding of liability. Additionally, this Court should exercise jurisdiction whether there is minimal or complete diversity of citizenship

among the parties. Last, the States bring this action for equitable relief pursuant to the Public Assistance Doctrine which is appropriate and especially suitable to an asbestos property damage cost recovery action.

ARGUMENT

I.

INTRODUCTION: THE NATIONAL ASBESTOS PROBLEM

Knowledge of the history of the nation's asbestos problem is vital to an understanding of the States' cause of action. Asbestos,[1] because of its incombustibility, high tensile strength, and thermal and electrical insulating properties, has been used in approximately 3,000 commercial applications throughout this country. Asbestos had hundreds of uses in building construction and is found in most places where heat resistance is important. Asbestos-containing thermal system insulations include pipe coverings, boiler blankets, joint connections, and mechanical insulation. Many floor tiles, ceiling tiles, wall and ceiling plasters, paints, and grouts also contain asbestos fibers. In addition, between 1946 and 1972 the Asbestos Companies marketed spray-on asbestos for use in many public buildings as fireproofing and as acoustical and decorative plasters. *See* Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3601(a)(4) (1982).

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[1] Asbestos is a generic term applied to a wide variety of naturally occurring mineral silicates that separate into fibers.

This useful mineral, however, is a human carcinogen. Occupational health hazards associated with inhaling asbestos fibers were first documented in the early 1900's. *See* Reitze, Nicholson, Holaday, and Selikoff, *Application of Sprayed Inorganic Fiber Containing Asbestos: Occupational Health Hazards,* 33 American Industrial Hygiene Association Journal 178 (1972).[2] Numerous medical studies conducted on asbestos factory and mill workers and asbestos insulators from 1906 through 1964 indicated a correlation between asbestos exposure and asbestosis, lung cancer, and mesothelioma (a rare form of cancer linked only to asbestos exposure). *See* Committee on Education and Labor, United States House of Representatives, 97th Cong., 1st Sess., *The Attorney General's Asbestos Liability Report to the Congress: Pursuant to Section 8(b) of the Asbestos School Hazard Detection and Control Act of 1980* (Comm. Print 1981) at 19-33 [hereinafter *AG Report*].[3] Although many of these studies were funded by the asbestos industry, the Asbestos Companies did not warn of the dangers discovered. *Id.* at 34-36; *see generally Borel v. Fibreboard Paper Products Corp.,* 493 F.2d 1076, 1103-1106 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974) (discussion of the industry-wide failure to warn). Often the published findings of these studies were edited and distorted in order to obfuscate the detrimental health effects of exposure to asbestos. *See* B. Castleman, *Asbestos: Medical and Legal Aspects* 46-106 (2d ed. 1986). In fact, many lawsuits

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[2] "Occupational" exposures as used here refer to exposures encountered in asbestos factories and mills.

[3] Fifteen (15) copies of this document have been lodged with the Clerk of this Court.

to date have alleged an industry-wide conspiracy to suppress the medical and scientific evidence linking asbestos exposure to disease. *See AG Report, supra* p. 14, at 34-47 (discussion of the industry awareness of asbestos health hazards).

Furthermore, the ever-increasing population at risk includes not only those engaged in the manufacture and installation of asbestos products, but also building occupants and maintenance personnel. *See* U.S. Environmental Protection Agency, *EPA Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* (1988) [hereinafter *EPA Study*].[4] The source of the health hazard in buildings is the friability (the potential to release fibers) of the asbestos-containing products. "Friable asbestos material" is defined by the United States Environmental Protection Agency (EPA) as material that "hand pressure can crumble, pulverize, or reduce to powder." 40 C.F.R. § 61.141 (1988). A disturbance or deterioration of asbestos-containing products can cause the release of asbestos fibers into the air where fibers may be inhaled by building occupants and workers. Once these asbestos fibers enter the lungs, disease may ensue. Indeed, the scope of this hazard is exemplified by the case of a Cleveland office worker who contracted mesothelioma by sitting at her desk for twelve years in an asbestos-contaminated building. *See Layne v. GAF Corp.*, No. 84-074194 (Ohio C.P. Cuyahoga County Apr. 15, 1988) (App. 1); *see also AG Report, supra* p. 14, at 31-33.

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[4] Fifteen (15) copies of this document have been lodged with the Clerk of this Court.

Additionally, Congress has found that there is no scientifically accepted "safe level" of asbestos exposure (20 U.S.C. § 3601(a)(3) (1982)) and has legislated a comprehensive system of federal environmental and public health requirements which affect the States. Through passage of the Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7401-7428 (1982 & Supp. V 1987), Congress has authorized the EPA to identify and to regulate the airborne release of hazardous air pollutants through the adoption of the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations (40 C.F.R. §§ 61.140-.156 (1988)). These NESHAP regulations govern the States' activities during renovation or demolition of buildings and specify extensive emission control procedures, including the packaging and wetting of asbestos-containing materials as work proceeds, the sealing off of all work areas, and the installation of exhaust and ventilation systems to contain airborne fibers. 40 C.F.R. § 61.147 (1988). Once removed, the asbestos-containing building materials require special packaging, labeling, transportation, and disposal to protect the public from hazardous emissions. 40 C.F.R. §§ 61.152, .156 (1988). Some fifty pages of regulations adopted by EPA and the Occupational Safety and Health Administration require extensive protective measures for both public and private sector workers undertaking construction, alteration, repair, maintenance, or demolition of asbestos-containing structures. 40 C.F.R. §§ 763.120-.126 (1988); 29 C.F.R. § 1926.58 (1988). Thus, formerly routine activities such as building repair or maintenance are transformed by the presence of asbestos materials into elaborate and expensive projects for the

processing and disposal of hazardous materials, requiring expert planning and oversight.

The strong congressional interest in the issue of asbestos in buildings is also reflected in the Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 U.S.C. §§ 2641-2655 (1988). AHERA requires both public and private elementary and secondary schools to identify asbestos-containing materials present in buildings and to develop and implement management plans for the appropriate maintenance, repair, or removal of the asbestos materials. 15 U.S.C. §§ 2643-2644 (1988); 40 C.F.R. §§ 763.80-.99 (1988). AHERA contemplates eventual extension to all public buildings (15 U.S.C. § 2653 (1988)), and while it is an open question whether AHERA presently applies to state facilities, a regional office of EPA has issued notices of noncompliance to some state correctional and mental health centers for failure to inspect for asbestos and to file management plans. *See, e.g.*, Letter from Phyllis Reed (U.S. Environmental Protection Agency, Region 5) to Lincoln Developmental Center, Lincoln, Illinois (Apr. 24, 1989) (App. 19).

Presently pending in Congress are the proposed Asbestos Hazard Emergency Response Amendments, H.R. 2123, 101st Cong., 2d Sess. (1989), which would impose an AHERA-like regulatory scheme upon public building owners. In addition, the Service Employees' International Union has filed suit to force EPA to commence rulemaking on asbestos in public and commercial

buildings. *Service Employees' International Union v. Reilly*, No. 89-0851 (D.C. Dist. Ct. filed Mar. 30, 1989) (App. 21). In response to the lawsuit, EPA has convened a public policy dialogue group on the issue of federal regulation of asbestos in public and commercial buildings. It appears that federal regulation of asbestos in the States' buildings is inevitable.

Despite this congressional concern and federal mandates, there are no federal funds available to assist the States to meet the enormous expense of identifying and abating the asbestos hazards. Indeed, the economic burden confronting the States is staggering. EPA projected the total cost of imposing a "full AHERA regulatory approach" on public and commercial buildings (estimated by EPA to be 3.6 million buildings) as "over $51 billion." *EPA Study, supra* p. 15, at 33. One expert estimates that the total number of affected public and commercial buildings is closer to 8.4 million and that the total contingent liability to building owners for losses associated with asbestos is $750 billion. *See* MacDowell, *EPA's Buildings Number Is in Need of Refinement*, Mealey's Litigation Reports: Asbestos Property Actions, Nov. 4, 1988, at 35 (App. 37). The taxpayers of the States cannot afford this expense at a time when vital state programs such as education and housing are in financial crisis.

II.

THIS CASE WARRANTS THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION BECAUSE IT IS BROUGHT BY A MAJORITY OF THE STATES SEEKING TO PROTECT THE HEALTH AND WELFARE OF MILLIONS OF THEIR CITIZENS AND TO PRESERVE THEIR PUBLIC PROPERTY

The States, suing in their capacity as *parens patriae* and as property owners, present a justiciable controversy over which this Court has original jurisdiction pursuant to Article III, Section 2 of the United States Constitution and Section 1251, Paragraph (b)(3) of Title 28 of the United States Code.

A. The States Present A Claim Of Serious Magnitude Deserving Of This Court's Consideration

A state may sue as *parens patriae* and as property owner to assert its quasi-sovereign and proprietary rights for judicial relief to prevent or repair harm of serious and extraordinary magnitude. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945); *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-259 (1972) (listing cases establishing the right of a state to sue as *parens patriae* to support its "quasi-sovereign" interests). As *parens patriae*, the States seek to protect the health of millions of occupants and users of public buildings contaminated by the products of the Asbestos Companies. Cf. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (Missouri, on behalf of Missouri citizens, allowed to sue Illinois and a Chicago sanitation district to enjoin discharge of sewage into Mississippi River).

Further, the cost of abatement represents such a significant portion of the budgetary resources of the States

that, without appropriate and efficient judicial redress, the entire economic burden of abatement and cost recovery actions will ultimately and unfairly fall upon all citizens, be it in the form of reduction of vital state services, higher taxes, or both. All states have a distinct interest in protecting their citizens from substantial economic injury. *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981). In Maryland, this Court assumed original jurisdiction due, in part, to the magnitude and effect of the anticipated $150 million yearly tax imposed upon consumers in thirty states. That amount pales by comparison to the $51 billion to $750 billion pricetag that has been estimated as necessary to abate asbestos in all public and commercial buildings.

As the proprietors of public properties, the States seek relief from the financial burden resulting from abating the asbestos contamination in their public buildings. A state suffers economic injury apart from that suffered by its citizens. Addressing the injury to a state's economy resulting from the effects of discriminatory railroad rates, this Court stated:

> They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. . . . Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opportunities of her people, shackles her industries, retards her development and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.

Georgia v. Pennsylvania Railroad Co., 324 U.S. at 450-451. The economic well-being of a state may also affect its ability to borrow funds. The ability and power of a state to borrow funds is important to all 50 states. *South Carolina v. Regan*, 465 U.S. 367, 382 (1984).

The States submit that the "seriousness and dignity" of their claim require the attention of this Court. *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972). The States acknowledge that the sheer number of states petitioning this Court may not, in and of itself, warrant assumption of jurisdiction. *See Washington v. General Motors Corp.*, 406 U.S. 109 (1972). *But see South Carolina v. Regan*, 465 U.S. at 382 (court granted leave to file original claim by South Carolina, joined by twenty-four states as amici curiae, alleging injury to states' borrowing power which was of "vital importance to all fifty States"). The case at bar, however, presents additional matters implicating the unique concerns of federalism. *See, e.g., Maryland v. Louisiana*, 451 U.S. at 743, 744. The States seek to avoid interstate competition for the limited resources of the Asbestos Companies and the natural resultant disharmony that can flow therefrom. This Court was established by the framers of the Constitution to avoid just such consequences. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 450.

The States seek to protect their people and property from further serious harm, to enhance the public weal, and to preserve their economic vitality. Through the exercise of its original jurisdiction, this Court should address the serious injury caused to the States by the manufacturers, distributors, and marketers of asbestos-containing products.

B. There Is No Adequate Alternative Forum With Authority To Grant Comprehensive And Uniform Equitable Relief

As demonstrated above, the Court has jurisdiction to entertain the States' action. While the Court exercises its original jurisdiction "sparingly," *Utah v. United States*, 394 U.S. 89, 95 (1969), it should do so here given the "want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 464; *accord Maryland v. Louisiana*, 451 U.S. at 739-40.

This Court has held that a state's inability to join defendants in one convenient forum warrants the assumption of original jurisdiction. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 466. Here, the States have no other tribunal to which they may turn. The lower federal courts lack diversity jurisdiction over the States' action because 28 U.S.C. § 1332 (1982) does not include matters in which a state is a party and 28 U.S.C. § 1251(b)(3) (1982) does not confer jurisdiction on the district courts. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971).

This Court has refused to grant leave to file in the two most recent cases which sought to invoke original jurisdiction pursuant to 28 U.S.C. § 1251(b)(3) because those plaintiffs could turn to alternative forums. *Id.; Washington v. General Motors Corp.*, 406 U.S. 109. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, is easily distinguished from the present case. In *Ohio* the Court determined: 1) that Ohio state courts would be a suitable forum; 2) there existed a multiplicity of governmental

agencies already involved in attempting to settle the specific matter; 3) the case was too technically complex, even for a Special Master; 4) the issues were primarily of local law; and 5) the Court would be distracted from its other duties. In the present case: 1) there is no one state forum that can adequately obtain jurisdiction over all of the parties; 2) the issue of asbestos cost recovery is not currently being addressed other than through building-specific lawsuits in the courts; 3) any technical matters arising here have been litigated in many other trials so there are no novel issues for resolution by this Court; 4) the legal issues presented by the States are not dependent upon the local law; and 5) the magnitude of the asbestos litigation problem is such that, in the long run, resolution of these matters may severely reduce the number of cases subsequently appealed to this Court.

In *Washington v. General Motors Corp.*, 406 U.S. 109, the Court found that federal question jurisdiction existed, thus allowing the federal district courts to address the issue of automobile emissions. The case at bar is also distinguishable from *Washington*. The Court there determined: 1) granting leave would interfere with the administration of the appellate docket; 2) federal question jurisdiction existed pursuant to the federal clean air statutes; and 3) as a practical necessity, the remedies were dependent upon local conditions. In this case: 1) the matter could be referred to a Special Master as is done in interstate river disputes; 2) there exists no federal question jurisdiction as no federal statute covers the matters raised here; and 3) although the amount of recovery will be determined on a state by state basis, the underlying

remedy can be uniformly applied regardless of local conditions. Therefore, neither the decision in *Ohio v. Wyandotte Chemicals Corp.* nor the decision in *Washington v. General Motors Corp.* prevents this Court from exercising its original jurisdiction in this matter.

Further, problems associated with personal jurisdiction via long-arm statutes appear to foreclose the commencement of the States' action in a single state tribunal. *See generally Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County,* 480 U.S. 102 (1987) (evaluation of minimum contacts required to establish substantial connection between defendant and forum state so as to support personal jurisdiction). Also, manageability problems could preclude the certification of a class action in state courts. *See, e.g., Sisters of St. Mary v. Aaer Sprayed Insulation,* 445 N.W.2d 723 (Wis. App. 1989).

In addition to being prohibitively expensive, separate state court actions would fail to promote judicial economy. Absent this Court's exercise of jurisdiction, the States would be forced to engage in piecemeal litigation where inconsistent rulings would inevitably result. In the event of punitive damage awards, the limited pool of assets would be divided by the first few States to reach judgment, depleting funds available for restitution. In *Jackson v. Johns-Manville Sales Corp.,* 750 F.2d 1314 (5th Cir. 1985) (dissent), *cert. denied,* 478 U.S. 1022 (1986), the Chief Judge of the United States Court of Appeals for the Fifth Circuit, joined by four members of the court sitting *en banc* in an asbestos personal injury case, addressed this subject:

> The Supreme Court, as the only institution other than Congress capable of imposing the

> uniformity necessary to resolve this problem in a just manner, should be afforded the chance to deal with the singular problem presented by these cases. That Court has the power to formulate federal common law which will ensure equitable compensation for all claimants. Its ability to address the controlling issues with a single voice is not only necessary for just resolution of pending litigation; it is even more important to expeditious and equitable settlement of claims. A uniform set of rules would not only protect the rights of individual claimants and the effective functioning of the judicial system, but would also aid the efforts of the asbestos companies and their insurers to develop an effective procedure for resolving these disputes on a rational basis without resorting to the courts. The potential for disparate outcomes in the different states could encourage many plaintiffs to remain in the courts rather than resorting to a unified nationwide facility for resolving these disputes.

Id. at 1333.

And in *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985) the Fifth Circuit discussed the consequences of the deluge of asbestos cases on the judiciary:

> The case-by-case adjudication process will delay decision for years if not decades, burden both claimants and manufacturers with massive litigation costs, leave claimants uncertain about the possibilities of eventual recovery and manufacturers unable to determine their financial exposure, and clog judicial systems so that parties to other litigation are also denied speedy resolution of their disputes.

Id. at 1146.

Admittedly, the Court must conserve its time to administer its appellate docket. The Court, however, must assume original jurisdiction where to decline to do so would "disserve any of the principal policies underlying the Article III jurisdictional grant." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 499. Here, declination of jurisdiction would undermine the fundamental principles of comity and federalism which inform the exercise of federal jurisdiction. *See Maryland v. Louisiana*, 451 U.S. at 744. The States here seek to reinforce, through cooperation, the loftiest goals of our federal system.

Last, the Court's assumption of jurisdiction should not prove to be unduly burdensome. As in the context of interstate river disputes, which now are treated as exemplars for the Court's invocation of its original jurisdiction, *Texas v. New Mexico*, 462 U.S. 554, 566 n.11 (1983), a master here may conduct proceedings which initially will result in proposed findings of liability and subsequently in a proposed equitable allocation of the Asbestos Companies' resources. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d at 1324 (analogy to river disputes drawn by Johns-Manville, a major asbestos manufacturer).

When this Court first invoked its power to equitably apportion interstate streams, it noted the influence of "rapidly changing conditions of life and business" in its exercise of jurisdiction. *Kansas v. Colorado*, 206 U.S. 46, 80 (1907). The States, affected by rapidly changing conditions manifested in the form of life-threatening exposure to asbestos-containing products in public buildings,

entreat this Court to exercise its jurisdictional grant pursuant to Article III, Section 2 of the United States Constitution and Section 1251, Paragraph (b)(3) of Title 28 of the United States Code.

C. The Lack Of Complete Diversity Does Not Defeat The Jurisdiction Of This Court

The States submit that the diversity provisions of Article III, Section 2, Clause 1 of the United States Constitution are self-executing and directly confer original jurisdiction upon this Court in actions brought by a state against citizens of another state. *California v. Arizona*, 440 U.S. 59, 65 (1979). This Court, citing *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-531 (1967), stated: "It is settled that complete diversity is not a constitutional requirement." *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978). The States contend that because they rely upon constitutional language essentially the same as that considered in *State Farm*, this Court likewise has jurisdiction over the States' action as pleaded in the Complaint (paragraphs 2 and 3).

The States acknowledge that some of the Court's decisions contain language to the contrary. *See, e.g., Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 464; *California v. Southern Pacific Co.*, 157 U.S. 229, 261-62 (1895). It is respectfully submitted, however, that such language represents a mere incantation of *Strawbridge v. Curtiss*, 3 Cranch (7 U.S.) 267 (1806) (if there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States to sustain jurisdiction),

without the refined analysis of the necessary distinction between constitutional and statutory diversity which the Court later drew in *State Farm*.

Tellingly, the Court has never considered this question squarely. *See Utah v. United States*, 394 U.S. at 96 (recognizing the difficult constitutional nature of such an issue in the context of potential intervention by a non-diverse party). Nor has the Court discussed the issue in the context presented here: a majority of the states, in furtherance of their quasi-sovereign and proprietary interests and without recourse to any other adequate forum, having joined together to sue an industry-wide group of defendants. The States submit that the constitutional interpretation of the diversity requirement in *State Farm* should extend to the case at bar, and they ask the Court to so hold in this case. The States have, however, pleaded in the alternative to permit the voluntary dismissal of non-diverse defendants as to particular States in the event the Court would require complete diversity for retention of jurisdiction. *See Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 463-64.

III.

THE PUBLIC ASSISTANCE DOCTRINE PROVIDES THE STATES WITH A CAUSE OF ACTION

In their Complaint, the States allege a cause of action pursuant to the Public Assistance Doctrine which is embodied in the *Restatement of Restitution* § 115 and provides:

> A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge

or consent, is entitled to restitution from the other if

(a) he acted unofficiously and with intent to charge therefor, and

(b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

This cause of action is supported by the position of the U.S. Attorney General who, in a 1981 Report to Congress addressing the question of whether the school districts could sue the asbestos manufacturers for abatement costs, stated:

> Restitution appears to be the most desirable remedy from the prospective plaintiff's standpoint, because it most closely fits the problem and also may offer the most appropriate and favorable treatment in terms of statutes of limitation. The school districts could allege that the manufacturers who supplied friable asbestos for use in classrooms *without warning* that asbestos fibers are dangerous, and *without testing* to determine the danger in an environmental as opposed to an occupational setting, have a *duty* to *abate* the resultant hazard and must compensate the party abating the hazard, if the manufacturer refuses to do so.

AG Report, supra p. 14, at 118 (footnote omitted).

In his report, the Attorney General analyzed a series of cases that utilized section 115 to address modern legal problems. In *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 204 (1967), this Court recognized section 115 as the predicate for allowing the government's claim for restitution when it raised a sunken chlorine-laden barge

from the Mississippi River to avoid a potential threat to the public health and safety. And in *United States v. Consolidated Edison Co. of New York, Inc.*, 580 F.2d 1122 (2d Cir. 1978), the Second Circuit Court of Appeals found Consolidated Edison to be liable to the federal government pursuant to section 115 for the costs incurred in providing emergency electrical power to the customers of Consolidated Edison during a power shortage. More recently, the Fifth Circuit Court of Appeals in *United States v. P/B STCO 213, ON 527 979*, 756 F.2d 364, 371 (5th Cir. 1985), stated:

> Courts consistently have recognized these principles [of restitution] and have imposed on defendants a quasi-contractual obligation to reimburse a plaintiff, who has performed a duty, at his own expense, where the defendant was primarily obligated to discharge the duty. This is especially true where the performance of the duty was necessary to preserve the public's welfare and safety.
>
> The Supreme Court has held that a defendant has a quasi-contractual obligation to reimburse the government when it incurs costs discharging a duty the defendant would not perform. *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 . . . (1889).

Numerous courts have followed the recommendation of the U.S. Attorney General. In *Adams-Arapahoe School District No. 28-J v. Celotex Corp.*, 637 F. Supp. 1207 (D. Colo. 1986), the court ruled that Colorado law recognized a cause of action under the Public Assistance Doctrine in an asbestos property damage case, and rejected the defendants' argument that they had no duty to remove asbestos products from plaintiff's buildings. *Id.* at 1209.

That same argument was rejected in *In Re State and Regents Buildings Asbestos Cases*, Nos. 99081 and 99082, slip op. at 4 (Minn. Dist. Ct. Dakota County July 23, 1986) (order denying dismissal) (App. 48), wherein the court observed that since no safe level of asbestos exposure had yet been defined, "[e]ach day of exposure to asbestos puts the plaintiff in a position involving 'an immediate necessity for action.' " *Id.*, quoting *Restatement of Restitution* section 115 comment a; *accord Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, No. Civ. 3-86-185, slip op. (D. Minn. Aug. 31, 1988) (order denying summary judgment) (App. 63). And in *West Virginia v. Aaer Sprayed Insulations*, No. 86-C-458, slip op. at 3 (Cir. Ct. W.Va. Monongalia County Sept. 4, 1987) (order denying dismissal) (App. 75), the court ruled that a restitution claim under section 115 was recognized in West Virginia and was "particularly suitable to an asbestos property damage case."

The cases that have denied a viable cause of action under section 115 have narrowly interpreted the duty element in that section to require a duty "in the first instance" to remove asbestos, independent of duties that may be imposed under tort or contract law. *Board of Education of City of Chicago v. A, C and S, Inc.*, 131 Ill.2d 428, 465-466 (1989); *Town of Hookset School District v. W.R. Grace and Co.*, 617 F. Supp. 126, 134 (D.N.H. 1984). This narrow interpretation, however, is not universally accepted.

Another opinion interpreting the duty in section 115 provided:

> Third, Gypsum asserts that Hebron has failed to allege facts that would impose on Gypsum the duty to have removed the asbestos. A necessary element of section 115 is an independent duty to act by the defendant party, which the plaintiff party fulfills upon the inaction of the defendant party. This duty need not be absolute, and need not be of a type or degree that would otherwise give rise to legal liability. *United States v. Consolidated Edison Co. of N.Y.*, 580 F.2d 1122, 1127 (2d Cir. 1978). Section 115's duty element is a "flexible concept," that can be met by the "manifest" responsibilities of a party in a given "factual context" as well as by common law or statutory mandates. *Id.*

Hebron Public School District No. 13 v. U.S. Gypsum, 690 F. Supp. 866, 869 (D.N.D. 1988), *appeal docketed*, No. 89-5565 ND (8th Cir. Nov. 8, 1989).

The States contend that the Asbestos Companies owe to them the duty to abate the hazards caused by the presence of their asbestos-containing products in public facilities. The predicate for this duty arises from the Asbestos Companies' breach of their duty to test their products prior to distribution and marketing and breach of their duty to warn of the hazards associated with asbestos exposures. *See* W.P. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts* § 92 (5th ed. 1984).

Additionally, the States submit that there is another applicable duty that has not been addressed by the above decisions. A party has a duty to exercise reasonable care to prevent injury to another when the party has created a condition, whether by tortious or innocent act, and subsequently the party realizes that the condition so caused

has created an unreasonable risk of harm to another. *Restatement (Second) of Torts* § 321 (1977). This duty is independent of a tort or contract cause of action based upon the original act of the party.

Another element of *Restatement of Restitution* § 115, discussed in comment a thereunder, provides that the party having the duty must first be requested to perform that duty. The prior request element is waived if considerations of urgency render such a prior request unfeasible or the party has indicated an intent not to comply with such a request. While it is difficult to reconcile this comment with the section 115 language "acting without the other's knowledge," in any event, such request would have been futile. The Asbestos Companies have known of the dangers caused by their products since the 1930's; the Asbestos Companies have known that the EPA restricted the use of many of their products in 1978 (43 Fed. Reg. 26,372 (June 19, 1978) (codified at 40 C.F.R. §§ 61.140-.156)); the Asbestos Companies have known that Congress condemned their products as unsafe in 1980 (20 U.S.C. § 3601(a)(3)); the Asbestos Companies have been subjected to repeated litigation concerning the dangers posed by their asbestos-containing products, and no Asbestos Company has come forth to remove its products from any buildings other than its own. *See City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559, 572 (D.S.C. 1986), *aff'd*, 827 F.2d 975 (4th Cir. 1987) (discussion of the abatement of W.R. Grace's corporate headquarters). As the Asbestos Companies have failed to act to abate the asbestos hazards in state-owned facilities, the States must act to protect the public health. Therefore the States seek

restitution for their costs of abatement pursuant to the Public Assistance Doctrine.

The opinion in *Hebron Public School District No. 13 v. U.S. Gypsum*, 690 F. Supp. at 869, addressed all the above issues. In *Hebron* the court upheld the plaintiff's claim for restitution under the *Restatement of Restitution* § 115, rejecting the defendant's contention that the asbestos hazard does not require the immediate action envisioned by section 115. In particular, the court observed that although asbestos is a slow acting carcinogen, the need to remove it is immediate. *Hebron Public School District No. 13 v. U.S. Gypsum*, 690 F. Supp. at 869. Further, the court found that the school district had sufficiently pleaded that U.S. Gypsum owed a duty to the public schools to ensure that the building material it supplied was safe. *Id.; accord City of New York v. Keene Corp.*, 132 Misc.2d 745, 505 N.Y.S.2d 782 (Sup. Ct. New York County 1986), *aff'd*, 129 A.D.2d 1019, 513 N.Y.S.2d 1004 (1st Dep't 1987) (*per curiam*). Thus, the *Restatement of Restitution* § 115 clearly establishes the predicate for awarding the States compensation for the costs incurred in performing the duty of the Asbestos Companies to abate the hazards created by the presence of their products in the States' facilities.

CONCLUSION

The claim of the States is of serious and extraordinary magnitude. This Court is the only adequate forum available for resolution of the States' claim. Therefore, the original jurisdiction of this Court is properly invoked.

The Asbestos Companies owed to the citizens of the States a duty not to poison their air or damage their property. The Asbestos Companies manufactured, distributed and marketed inherently dangerous products which have lessened the value and utility of the property of the States and threatened irreparable harm to the health of the citizens of the States. The legal obligations of the Asbestos Companies to the States may be fulfilled by providing restitution to reimburse the States for the cost of the abatement of the asbestos-containing materials manufactured, distributed, and marketed by the Asbestos Companies.

For all of the foregoing reasons, the States' Motion for Leave to File the Complaint should be granted.

Respectfully submitted,

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January 29, 1990

APPENDIX

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APPENDIX

STATE OF OHIO	)	IN THE COURT OF
	) SS:	COMMON PLEAS
CUYAHOGA	)	CASE NO. 84-074194
COUNTY	)	JUDGE JAMES J. McMONAGLE

GERALDINE LAYNE, Plaintiff, vs. GAF CORPORATION, et al., Defendant.	)	OPINION AND JUDGMENT ENTRY (Filed April 15, 1988)

On October 6, 1987, a $400,000 verdict was returned in favor of Geraldine Layne who had claimed that she had contracted mesothelioma during her employment as a word processor from 1973 until 1985 in the Anthony J. Celebrezze Federal Office Building in Cleveland, Ohio. The plaintiff proved to the jury's satisfaction that in-place asbestos had been released into the ambient air during numerous renovations of the building. The verdict was returned against the sole remaining non-settling defendant, United States Mineral Products Company (USM), a company who admitted that in the late 1960's they had manufactured and marketed a product called Cafco which contained asbestos and was used in the Celebrezze Federal Building as insulation, fire retardant and as a noise softening product.

Much attention has been focused on this case because of its impact upon hundreds of thousands of buildings in the United States that contain some form of in-place asbestos-containing materials. Defendants and other commentators, who have been involved in this proceeding at both pre- and post-verdict stages, had referred to this

verdict as signaling the beginning of the end of asbestos litigation because not only are we talking about a secretary who is dying because of her work exposure in an office, but also about the effect upon the value of asbestos-infected property. The cost of making both the work place and the residences safe will have to be reflected in the market value of properties. Products liability has a societal purpose of compensating people who are injured because of defective products by allocating loss to those who are most able to pay for damages and thus to encourage safer products. The product liability legal theories have only developed since our society has become economically stable and, therefore, able to address the needs of the individual. Before the economy was self-sufficient, the law permitted a greater degree of personal sacrifice to promote common economic good. Whether or not there are repercussions from the creation of a new class of plaintiffs is not proper criteria for evaluating the defendant's motion for judgment n.o.v. and for setoff.

A listing of the defendant's basis for its motion is attached herewith as Exhibit A. Because of the fungible nature of the claimed errors, the Court will not deal with these individually. This Court is guided in its determination by Rule 50 of the Ohio Rules of Civil Procedure, and the appropriate test is "whether the defendant is entitled to judgment as a matter of law when the evidence is construed most strongly in the favor of the plaintiff." *Cataland v. Cahill* (1984), 13 Ohio App. 3d 113 at 114.

The plaintiff does not dispute that USM is entitled to a setoff for all monies received from the other settling

defendants. The amounts paid by the other defendants is as follows:

Asbestos Claims Facility Defendants	$50,000.00
Raymark Industries, Inc.	8,850.00
Crown Cork & Seal	800.00
Rock Wool Manufacturing Co., Inc.	1,200.00
Flintkote Co.	850.00
	$61,700.00

USM mistakenly claims that the amount of the setoff should be the amount demanded in negotiations rather than the amount actually received by the plaintiff. O.R.C. 2307.32(F) specifically provides that good faith settlements will reduce a claim "to the extent of any amount stipulated by the release or the covenant." Defendant, therefore, will be entitled to a setoff of $61,700.00.

USM contends that the granting of a total of six peremptory challenges to plaintiff was prejudicial and cites to *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St. 3d 121. In *LeFort,* there was held to be no prejudice in the trial court granting three peremptories to each of several defendants. Herein, the plaintiff's interests regarding each defendant is different and antagonistic so the Court permitted the plaintiff an equal number of peremptories as to each defendant. To permit otherwise would permit multiple defendants effective control of jury selection.

USM broadly states the Court has misconstrued and misapplied the status of products liability law in Ohio as it relates to asbestos litigation.

USM has no standing to assert these claimed errors. Ohio Civil Rule 51(A) states in pertinent part:

> "A party may not assign as error the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The following colloquy took place between the Court and counsel for the defendant after the Court had given its complete charge to the jury:

> "Before we go any further, is there anything by way of addition to, deletion from, or amendment to the charge . . . "
>
> MR. TAYLOR (attorney for USM): "Nothing, your honor. Thank you very much."

The above quoted transcript indicated the defendant was fully satisfied with the Court's interpretation and recitation of the law in Ohio as it would apply to this case. Rule 51(A) has consistently been affirmed by the Eighth District Court of Appeals.

However, in order to promote consistency in further cases, a short discussion of Ohio products liability law is in order.

Ohio recognizes three different circumstances that give rise to a products liability cause of action:

1. Manufacturing defect – where the product fails and creates a hazard because it was not manufactured or did not perform as designed. *Lonzrick v. Republic Steel Corp.* (1966) 6 Ohio St. 3d 227.

2. Design defect – where a product's very design creates the hazard. *Leichtamer v.*

American Motors Corp. (1981) 67 Ohio St. 2d 456.

3. Failure to warn – a variation on the concept of design defect; the product is unsafe or inherently dangerous unless accompanied by adequate warning of risks or instructions. *Seley v. Searle* (1981) 67 Ohio St. 2d 192, 423, N.E. 3d 831.

Defendant claims that a failure to warn product liability cause of action does not exist in the State of Ohio except for prescription drug cases. Even though this issue has not been directly addressed by the Supreme Court, a broad survey of law in other jurisdictions indicate that a duty to warn is usually dependent upon the following product characteristics:

1. Inherently dangerous characteristics of the products to the foreseeable user or a person in a zone of danger;

2. Whether or not a few individuals may only be adversely affected by the product's defects;

3. Unavoidably unsafe; or

4. The product presents a high risk of danger under certain unusual or unintended usage.

Some commentators have indicated that using criteria such as the above provides hindsight liability,[1] but as in

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[1] Huber, Peter, *Knowledge of the Law Is No Excuse,* 1988 Manhattan Institute for Policy Research:

(Continued on following page)

all product liability, the focus is upon the performance of the product and not on the manner and circumstances under which it was manufactured.

(Continued from previous page)

In his whimsical poem, "The Objection to Being Stepped On," Robert Frost recounts how he accidentally "stepped on the toe of an unemployed hoe." The implement instantly "rose in offense" and struck Frost a blow "in the seat of [his] sense." Yes, the Bible had foretold the day when weapons would be turned into tools. "But what do we see? The first tool I step on, Turns into a weap-on."

There is great insight here. The line between tools and weapons is exceedingly fine. Knives cut, irons scorch, dynamite explodes, poison kills. In the wrong hands, or under the wrong foot, the tamest and most domestic object quickly becomes an instrument of assault and battery.

Until the 1950s, the law on these matters was fairly simple. Wherever possible, the old tort law left it up to the individual to distinguish between weapons and tools in his own private universe. If someone wanted to buy a fast horse, lightweight canoe, sharp knife, or strong medicine, that was his business and his risk, or more precisely, it was a risk that he and his seller could allocate between themselves as they chose.

The new tort jurisprudence that developed in the 1960's was quite different. Tort law advanced; contract principles receded. A new tort system gradually stepped in to preempt and rewrite a million allocations of risk and responsibility that had once been decided by contract. The new tort system was much busier than the old. And having made product "defects" the center of its attention, it had a very much more technocratic function.

In *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, the Ohio Supreme Court adopted Section 402A of the Restatement (Second) of Torts. Therein, the Court held that in order to recover on a claim such as has been presented here, that the plaintiff would have to prove the following four elements:

1. That the defendant manufactured or sole [sic] asbestos-containing products;

2. that the defendants were normally engaged in the business of selling such products;

3. that the asbestos-containing products were expected to and did reach this plaintiff without substantial change in the condition in which they were sold; and

4. that at the time of such manufactur [sic] or sale, the asbestos-containing products were in a defective condition and were unreasonably dangerous.

The dynamics of asbestos litigation wherein the disease process can have a gestation period from anywhere between 5 and 40 years from the date of exposure, when coupled with the dates when the manufacturers either had actual knowledge or should have had actual knowledge of the defectiveness of their product, involve Comment k and Comment j of the Restatement of Torts (Second) Section 402A.

Seley v. G. D. Searle & Co., supra endorsed Comment k to the Restatement (Second) of Torts, Section 402A. Comment k addresses products which are unavoidably unsafe because, at the present state of human knowledge,

such products are incapable of being made safe for their intended use. Comment k reads as follows:

> Unavoidable unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. *** Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk. 2 Restatement of Torts 2d 353-354.

In the case of an unavoidably unsafe product, the manufacturer will not be held strictly liable for injuries resulting from use of the product if the product is properly prepared and adequate warnings as to the inherent danger of the product are given. Absent adequate warnings of the danger, the product is held to be "unreasonably

dangerous", and in accordance with *Temple v. Wean United, supra* apply.

Even when a product is not found to be unavoidably unsafe but because of the potential for serious harm caused by asbestos intrinsic propensities, Comment j to the Restatement of Torts (Second) Section 402A will impose strict liability. This section provides as follows:

> In order to prevent a product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonably developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.
>
> But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumer [sic] in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may

> over a period of time have a deleterious effect upon the human heart.
>
> Where adequate warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

This commingling of the appropriate sections of 402A thus also permits the manufacturer to assert a state of the art defense even though this exact issue has not been ruled upon by any other court in the State of Ohio. *Accord, Overbee v. Van Waters & Rogers* (1983) 706 F. 2d 768; *Moran v. Johns Manville Sales Corp.*, (1982) 691 F. 2d 811; *Sterns v. Johns Manville Sales Corp.*, Dec. 1985 Case No. C79-2088 USDC, N.D. Ohio; *Cleveland Board of Education v. Armstrong World Industries* (1985) 476 N.E. 2d 397; *Borel v. Fibreboard Paper Products Corp.*, (1973) 493 F. 2d 1076 cert. denied (1974), 419 U.S. 869.

In light of the above statement of law, the following charge was correctly given to the jury.

NOW IN THIS CASE THE PLAINTIFF, GERALDINE LAYNE CLAIMS A RIGHT OF RECOVERY AGAINST THE DEFENDANT, U. S. MINERAL PRODUCTS CORPORATION UNDER A PRINCIPLE OF LAW KNOWN AS STRICT PRODUCT LIABILITY. PLAINTIFF CLAIMS THAT THE DEFENDANT MANUFACTURED AND DISTRIBUTED A PRODUCT THAT WAS DEFECTIVE AND UNREASONABLY DANGEROUS TO THE PLAINTIFF, AN EMPLOYEE IN THE FEDERAL BUILDING,

LOCATED AT THE CORNER OF EAST 9TH AND LAKESIDE FROM APPROXIMATELY THE YEARS OF 1973 UNTIL 1985.

THE DEFENDANT DENIES THAT THEIR PRODUCT WAS DEFECTIVE AND UNREASONABLY DANGEROUS. AND ALSO ASSERTS THAT THEY HAD PROVIDED AN ADEQUATE WARNING.

NOW UNDER OHIO LAW THERE IS AN OBLIGATION KNOWN AS STRICT PRODUCT LIABILITY. IT IS IMPOSED UPON THE MANUFACTURER OF A PRODUCT, WHICH IS IN A DEFECTIVE CONDITION, UNREASONABLY DANGEROUS TO A PERSON WHO WOULD BE FORSEEABLY EXPOSED TO THAT PRODUCT FOR PHYSICAL HARM CAUSED THEREBY TO SUCH PERSON IF, NUMBER ONE, THE MANUFACTURER IS ENGAGED IN THE BUSINESS OF MANUFACTURING SUCH A PRODUCT. AND, SECONDLY, IT IS EXPECTED TO AND DOES REACH A PERSON SO SITUATED WITHOUT SUBSTANTIAL CHANGE IN THE CONDITION IN WHICH IT IS SOLD.

NOW THIS RULE APPLIES ALTHOUGH THE SELLER HAS EXERCISED, THE SELLER AND/OR MANUFACTURER, HAS EXERCISED ALL POSSIBLE CARE IN THE PREPARATION AND SALE OF HIS PRODUCT. AND EVEN THOUGH THE PLAINTIFF HAS NOT BOUGHT THE PRODUCT HERSELF FROM THE MANUFACTURER OR EVEN HAS ENTERED INTO ANY CONTRACTUAL RELATIONSHIP WITH THE MANUFACTURER OF THE PRODUCT.

NOW AN ACTION IN STRICT PRODUCT LIABILITY CANNOT BE MAINTAINED SOLELY UPON THE

FAILURE OF GIVING OF AN ADEQUATE WARNING. NOW FOR A PLAINTIFF TO RECOVER SHE MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THERE WAS, IN FACT, A DEFECT IN THE PRODUCT MANUFACTURED BY THE DEFENDANT. SECONDLY THAT SUCH DEFECT EXISTED AT THE TIME THE PRODUCT LEFT THE HANDS OF THE DEFENDANT. AND THIRDLY THAT THE DEFECT WAS A PROXIMATE CAUSE OF THE PLAINTIFF'S INJURY.

THE CRUX OF A STRICT PRODUCTS LIABILITY ACTION IS THAT THE PRODUCT MUST PERFORM IN ACCORDANCE WITH THE EXPECTATIONS OF THE ORDINARY USER. A PRODUCT THAT DOES NOT MEASURE UP TO SUCH EXPECTATIONS IS UNREASONABLY DANGEROUS AND HENCE DEFECTIVE.

NOW A PRODUCT WILL BE FOUND UNREASONABLY DANGEROUS IF IT IS DANGEROUS TO AN EXTENT BEYOND THE EXPECTATIONS OF AN ORDINARY PERSON OR A PERSON WHO WOULD BE FORSEEABLY EXPOSED TO IT WHEN IT IS USED AS INTENDED OR IN A REASONABLY FORESEEABLE MANNER. NOW THE RULE JUST STATED DOES NOT APPLY TO THE A PRODUCT THAT IS UNAVOIDABLY UNSAFE IF AN ADEQUATE WARNING HAS ACTUALLY BEEN PROVIDED.

NOW THERE ARE SOME PRODUCTS, WHICH IN THE PRESENT STATE OF HUMAN KNOWLEDGE, ARE QUITE OR IN THE PRESENT STATE OF HUMAN KNOWLEDGE WHEN MANUFACTURED ARE QUITE INCAPABLE OF BEING MADE SAFE FOR THEIR

INTENDED USE. SUCH A PRODUCT PROPERLY PREPARED AND ACCOMPANIED BY PROPER DIRECTIONS AND WARNINGS IS NOT DEFECTIVE NOR IS IT UNREASONABLY DANGEROUS SO LONG AS THE PRODUCTS ARE PROPERLY PREPARED AND MARKETED AND PROPER WARNING IS GIVEN WHERE THE SITUATION CALLS FOR IT.

THE SELLER OR MANUFACTURER WILL NOT BE HELD TO STRICT LIABILITY FOR UNFORTUNATE CONSEQUENCES ATTENDING THEIR USE MERELY BECAUSE HE HAS UNDERTAKEN TO SUPPLY THE PUBLIC WITH AN APPARENTLY USEFUL AND DESIRABLE PRODUCT INTENDED WITH A KNOWN BUT APPARENT REASONABLE RISK. NOW IF YOU FIND THAT THE ASBESTOS PRODUCTS WERE USEFUL AND DESIRABLE AND YET UNAVOIDABLY UNSAFE, THEN IF YOU ALSO FIND A PROPER WARNING OF THEIR HAZARDS WAS GIVEN, THEN THEY WOULD NO LONGER BE UNREASONABLY DANGEROUS.

NOW WHERE A MANUFACTURER KNOWS OF OR LEARNS THAT HIS PRODUCT IS IN A DEFECTIVE CONDITION, UNREASONABLY DANGEROUS, AND THAT SUCH DANGER IS NOT OBVIOUS TO A USER OR A PERSON WHO WOULD BE FORSEEABLY EXPOSED TO THAT PRODUCT, SUCH MANUFACTURER HAS A DUTY TO GIVE AN ADEQUATE AND SUFFICIENT WARNING SO THAT IT WOULD BE COMMUNICATED TO A PERSON WHO WOULD BE FORSEEABLY EXPOSED TO THAT PRODUCT.

A WARNING IS ADEQUATE WHERE UNDER ALL THE CIRCUMSTANCES IT REASONABLY DISCLOSES

ALL RISKS INHERENT IN THE USE OF THE PRODUCT OF WHICH THE MANUFACTURER BEING HELD TO THE STANDARD OF AN EXPERT IN THE FIELD KNEW OR SHOULD HAVE KNOWN TO EXIST.

NOW ONE WHO MANUFACTURES A PRODUCT FOR SALE IN USE BY OTHERS IS HELD TO THE SKILL OF AN EXPERT IN THAT BUSINESS AND TO AN EXPERT'S KNOWLEDGE OF THE ARTS, MATERIALS AND PROCESSES INVOLVED IN THE DEVELOPMENT, PRODUCTION AND MARKETING OF THAT PRODUCT. THE MANUFACTURER HAS A DUTY TO REMAIN REASONABLY CURRENT WITH SCIENTIFIC KNOWLEDGE, DEVELOPMENT, RESEARCH AND DISCOVERIES CONCERNING HIS PRODUCT.

THE MANUFACTURER MUST COMMUNICATE ITS SUPERIOR KNOWLEDGE IN A MANNER THAT WOULD SUFFICIENTLY NOTIFY ALL INDIVIDUALS WHO WOULD BE FORSEEABLY EXPOSED TO THAT PRODUCT AND TO AN INDIVIDUAL WHO THUSLY WOULD BE, BY THEIR OWN LIMITED KNOWLEDGE AND INFORMATION, UNABLE TO PROTECT THEMSELVES WHILE BEING EXPOSED FORSEEABLY TO THE PRODUCT.

HOWEVER, A MANUFACTURER NEED NOT INSTRUCT OR WARN OF ITS PRODUCT UNLESS AND UNTIL THE STATE OF MEDICAL, SCIENTIFIC AND TECHNICAL RESEARCH AND KNOWLEDGE HAS REACHED A LEVEL OF DEVELOPMENT THAT WOULD MAKE A REASONABLY PRUDENT MANUFACTURER AWARE OF THE UNREASONABLE RISKS OF HARM IN THE EXPOSURE TO THE PERSONS WHO

WOULD BE FORSEEABLY EXPOSED TO THAT PRODUCT, AND AWARE OF THE NECESSITY TO INSTRUCT OR WARN THOSE INDIVIDUALS AGAINST SUCH RISKS OF HARM.

NOW A PARTY SEEKING RECOVERY MUST NOT PROVE—MUST NOT PROVE ONLY A VIOLATION OF THIS STRICT LIABILITY LAW, WHICH I HAVE OUTLINED FOR YOU, BUT ALSO MUST SHOW THAT THIS VIOLATION OR THIS WRONGFUL ACT WAS A PROXIMATE CAUSE OF INJURY.

NOW PROXIMATE CAUSE IS DEFINED AS AN ACT OR OMISSION WHICH DIRECTLY CAUSES OR DIRECTLY FAILS TO PREVENT AN INJURY.

NOW THE CAUSAL CONNECTION BETWEEN A DEFENDANT'S VIOLATION OF STRICT PRODUCT LIABILITY AND THE PLAINTIFF'S INJURY MAY BE BROKEN BY INTERVENING CAUSE. IN ORDER TO BREAK THE CHAIN OF CAUSATION THE INTERVENING CAUSE MUST BE ONE NOT BROUGHT INTO OPERATION BY THE ORIGINAL WRONGFUL ACT, BUT OPERATING ENTIRELY INDEPENDENT THEREOF. AND IT MUST BE SUCH A CAUSE AS WOULD HAVE PRODUCED THE RESULT WITHOUT THE OPERATION OF THE ORIGINAL WRONG. THE INTERVENING CAUSE MUST BE ONE THAT IS NOT REASONABLY FORSEEABLE BY A DEFENDANT.

NOW IT IS NOT NECESSARY THAT THE PROXIMATE CAUSE BE THE IMMEDIATE CAUSE IN POINT OF TIME, BUT IT SHOULD BE NEAREST IN CAUSAL CONNECTION. AND MAY BE DEFINED AS THAT WHICH IN A NATURAL AND CONTINUOUS

SEQUENCE OF EVENTS PRODUCED A RESULT WITHOUT WHICH IT WOULD NOT HAVE HAPPENED.

NOW IF YOU FIND THAT THE PLAINTIFF HAS SUSTAINED THAT BURDEN OF A VIOLATION OF THE PRODUCTS LIABILITY LAW, AND FURTHERMORE THAT THE DAMAGES CAUSED WERE PROXIMATELY CAUSED BY IT, THEN YOU SHOULD THEN GO ON TO A CONSIDERATION OF DAMAGES. THE DAMAGES THAT MRS. LAYNE WOULD BE ENTITLED TO IF YOU FIND THAT PLAINTIFF HAS SUSTAINED HIS BURDEN ARE WHAT WE WOULD CALL COMPENSATORY DAMAGES.

USM has asserted that since they had warned the building owner and/or contractor of the potential hazards of asbestos, the learned intermediary rule will absolve them from liability. In this regard the Court instructed the jury on an intervening cause thereby permitting them to assert a defense that is not normally existent in these types of cases.

The learned intermediary rule has only been affirmed in prescription drug cases. No one can seriously say that owners of buildings are in the same relationship to manufacturers of asbestos-containing products as are doctors to manufacturers of prescription drugs. Because of the complexity and interrelationship of various drugs, the adjective "learned" is a dynamic part of this type of a defense. The societal reasons for protecting prescription drug manufacturers from liability under product liability laws should be obvious. The defendant's reliance on *White v. Wyeth Laboratories, Inc.* (1987) Nos. 52108 and 52564, 8th District Court of Appeals is misplaced.

Defendant's last complaints regarding the argument of counsel as being prejudicial cannot be affirmed in light of the conservative jury verdict in the amount of damages incurred by the plaintiff.

Defendant's Motion for Judgment n.o.v. denied.

Judgment for plaintiff reduced to $338,300.00.

/s/ James J. McMonagle
JAMES J. McMONAGLE,
JUDGE

DATED: 4/15/88

NOTICE OF SERVICE

A copy of the foregoing Opinion and Judgment Entry has been sent via ordinary U. S. Mail on this 15 day of April, 1988, to Robert E. Sweeney, Esq., and Michael V. Kelley, Esq., Suite 950, 55 Public Square, Cleveland, Ohio 44113; and to Hilary S. Taylor, Esq., 2500 Terminal Tower, Cleveland, Ohio 44113.

/s/ James J. McMonagle
JAMES J. McMONAGLE,
JUDGE

EXHIBIT "A"

LISTING OF DEFENDANT'S BASIS FOR MOTION

(1) Ohio does not recognize a failure to warn strict liability cause of action;

(2) The duty to warn does not extend beyond the sale to a learned intermediary;

(3) The dismissal of the negligence case should have resulted in the dismissal of this case;

(4) In Ohio there is no continuing duty to warn in strict liability;

(5) The granting of six preemptory challenges to the plaintiff was prejudicial to USM;

(6) Plaintiff's demand for 5.5 million dollars in final argument was in violation of Civil Rule 54(C);

(7) Plaintiff's claim is barred by the Statute of Limitations.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

REGION 5

230 SOUTH DEARBORN ST.

CHICAGO, ILLINOIS 60604

REPLY TO THE ATTENTION OF:

CERTIFIED MAIL April 24, 1989 5SPT-7
RETURN RECEIPT REQUESTED

LINCOLN DEVELOPMENTAL CENTER
861 SOUTH STATE ST.
LINCOLN, ILLINOIS 62656

NOTICE OF NONCOMPLIANCE
Re: Asbestos-in-Schools

Dear LEA Administrator:

Notice is hereby given that your Local Education Agency (LEA) is in violation of the United States Environmental Protection Agency's (U.S. EPA) regulation: Asbestos-Containing Materials in Schools; Final Rule and Notice (40 C.F.R. Part 763).

This regulation was promulgated pursuant to the Asbestos Hazard Emergency Response Act of 1986 (AHERA) (Public Law 99-915) and was published in the *Federal Register* on October 30, 1987. It required that all elementary and secondary public and private schools be inspected for asbestos-containing materials. Management plans, based on these inspections, were to have been developed and submitted by October 12, 1988, to an Agency designated by the Governor of your State. Subsequent legislation permitted LEAs to request from the State Agency a deferral of the management plan submission until May 9, 1989. This request was to have been

made by October 12, 1988. The U.S. EPA has been informed by your State Agency that your LEA has neither submitted a management plan, nor requested a deferral of this submission.

Within fourteen (14) days of receipt of this Notice of Noncompliance (NON), you must submit a written statement which explains why your LEA has not complied with this regulation. Within sixty (60) days of receipt of this NON, you must submit a written statement which documents that your LEA has satisfied the inspection and management plan requirements of the regulation. Failure to submit either of these statements will warrant additional enforcement action which may result in civil penalties. The U.S. EPA also reserves its rights under all applicable Federal regulations and statutes.

Your written statements regarding this matter should be addressed to Mr. Anthony Restaino, Regional Asbestos Coordinator (5SPT-7) at the above address. If you have any questions, you may contact Mr. Restaino at (312) 886-6003.

Sincerely,

/s/ Phyllis A. Reed,
Phyllis A. Reed, Chief
Pesticides & Toxic Substances Branch

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

SERVICE EMPLOYEES INTERNATIONAL UNION 1313 L Street, N.W. Washington, D.C. 20006 Plaintiff. v. WILLIAM REILLY, ADMINISTRATOR UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 1200 West Tower 401 M Street, S.W. Washington, D.C. 20460 Defendants.	)	Civil Action No. 89-0851

COMPLAINT

INTRODUCTION

1. Asbestos is a known carcinogen and several life threatening or disabling diseases, including lung cancer, mesothelioma, gastrointestinal cancer and asbestosis can be caused by exposure to airborne asbestos. Asbestos Containing Materials ("ACM") were used extensively during World War II as fire retardants for battleships. Between the end of the War and 1972, ACM were routinely sprayed on walls and ceilings and wrapped around pipes and boilers to fireproof, insulate and soundproof

buildings. ACM building materials may deteriorate and become "friable," which means that they crumble and can be pulverized with the touch of a hand. When ACM is damaged or disturbed—for example, by maintenance work—asbestos fibers may be released. Airborne fibers create a potential hazard for building occupants.

2. The United States Environmental Protection Agency ("EPA") has banned the use of sprayed-on asbestos in buildings. EPA regulations require inspection for ACM in school buildings, and require that school building occupants be notified and that further steps be taken where ACM is found. EPA recognizes that ACM is present in hundreds of thousands of other (non-school) public and commercial buildings, and that in many cases it is significantly damaged. EPA recognizes that in many buildings there has been no inspection to determine whether the buildings contain ACM, and that in many other cases, where ACM is known to be present, action to control potential hazard may not be adequate, and may actually increase risk. EPA has stated that further EPA regulation may be needed to control the potential hazard posed by ACM in public and commercial buildings, but it has declined to undertake this regulation. This complaint seeks an Order requiring EPA to initiate a rulemaking proceeding to provide for inspection and control of ACM in (non-school) public and commercial buildings, including, but not limited to, office buildings, public buildings, hotels and hospitals.

JURISDICTION AND VENUE

3. This action arises under the laws of the United States, specifically the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

4. This Court has jurisdiction over the claims presented herein by reason of 15 U.S.C. §§ 2619, 2620(4)(A), 28 U.S.C. §§ 1331(a) (Federal Question), 1337 (Regulation of Commerce), and 1361 and 1651 (Mandamus).

5. Venue properly lies in this district pursuant to TSCA, 15 U.S.C. Section 2620, or Section 2619(a) (2).

PARTIES

6. Plaintiff Service Employees International Union, AFL-CIO ("SEIU") is a labor organization with approximately 860,000 members employed in more than 4,000 different job classifications. SEIU members include more than 100,000 building service workers who are exposed to ACM used in boiler rooms and on the walls of buildings. SEIU members also include clerical employees, health care workers, and professional and industrial workers who are potentially exposed to ACM in buildings.

7. SEIU has long had an interest in assuring that its members, and other members of the public, are protected against the hazards presented by ACM. In mid-1983 an SEIU study found broad noncompliance with EPA's asbestos in schools inspection rule. In November 1983 SEIU petitioned EPA to initiate a rulemaking regarding asbestos in schools and other public and commercial

buildings. Upon EPA's failure to take action, SEIU sought a court order that it do so. In 1985, pursuant to SEIU's request, EPA issued rules to apply to public workers U.S. Occupational Safety and Health Administration ("OSHA") regulations governing the conduct of abatement work. In 1986 a Federal District Court granted SEIU's request for summary judgment and ordered EPA to initiate the rulemaking requested by SEIU. *SEIU v. Lee Thomas et al., CA No. 84-2790* (D.D.C.) September 30, 1986 Order (unpublished). Virtually simultaneously, the Congress enacted the Asbestos Hazard Emergency Response Act ("AHERA") which required EPA to issue comprehensive asbestos in schools rules. Senator Stafford, the Senate author of AHERA, stated that the information discovered by SEIU in its lawsuit "demonstrated the inadequacies of the EPA asbestos program and the need for legislation obligating EPA to take appropriate regulatory actions." The House Report noted that AHERA is "designed to provide the same relief sought in the [SEIU] lawsuit; issuance of adequate and appropriate regulations regarding asbestos in schools."

8. Defendant William Reilly ("Administrator") is the Administrator of the United States Environmental Protection Agency ("EPA") and, as an officer or employee of the United States, in his official capacity is responsible for the administration and enforcement of the Toxic Substances Control Act ("TSCA"). His activities must be in compliance with the standards contained in the Administrative Procedures Act ("APA").

9. Defendant EPA is the agency responsible for the administration and enforcement of TSCA. Its activities

must be in compliance with the standards contained in the APA.

THE TOXIC SUBSTANCES CONTROL ACT

10. TSCA, enacted in 1976, was passed in order that "adequate authority . . . exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2601(b) (2).

11. TSCA Section 6, 15 U.S.C. § 2605, requires EPA to promulgate appropriate rules where there is a "reasonable basis to conclude" that, *inter alia*, a chemical substance "presents or will present an unreasonable risk of injury to health or the environment."

12. TSCA Section 21, 15 U.S.C. § 2620, permits any person to petition EPA for the issuance, amendment, or repeal of a TSCA Section 6 rule. The EPA is given 90 days following receipt to determine whether or not to grant the petition. 15 U.S.C. § 2620(b) (3).

13. If the petition is denied, or if the EPA fails to decide within 90 days whether to grant or deny, the petitioner may seek review in Federal District Court, where the "Petitioner shall be provided an opportunity to have such petition considered by the Court in a *de novo* proceeding." (TSCA, Section 15 U.S.C. 20(b) (4) (B) (ii).

14. TSCA Section 2620(b) (4) (B) (ii) further provides that:

> [i]f the petitioner demonstrates to the satisfaction of the court by a preponderance of the evidence that . . . there is a reasonable basis to

> conclude that the issuance of such a rule or order is necessary to protect health or the environment against an unreasonable risk . . . the court shall order the [EPA] Administrator to initiate the action requested by the petitioner.

FACTUAL BACKGROUND AND FOUNDATION FOR THIS ACTION

The Asbestos Hazard

15. Asbestos is a term used to describe various types of fibrous minerals. Asbestos-containing materials ("ACM") were frequently sprayed on walls and ceilings to fireproof, insulate, soundproof, and decorate buildings built or renovated prior to 1973. ACM may also routinely be found as insulation for pipes and other materials in boiler rooms, fan and machinery rooms, sink closets and store rooms.

16. Exposure to even small quantities of asbestos fibers can lead to an array of diseases, including cancer and asbestosis, an incurable lung disorder. Asbestos-related diseases typically strike their victims many years after exposure. Medical experts are now only learning of the magnitude of problems created many years ago.

17. EPA has long recognized asbestos to be hazardous. EPA's 1988 Report to Congress on "Asbestos Containing Materials in Public Buildings" ("Report to Congress") summarized EPA's recognition of the facts (Attachment 1 at 5):

> Asbestos is known to be extremely hazardous, based upon studies of both laboratory animals and asbestos workers and their families. Several life-threatening diseases, such as lung cancer and mesothelioma, can be caused by exposure to

> airborne asbestos. No safe threshold has been established for asbestos . . .

EPA's 1988 Report to Congress and SEIU's Petition

18. In addition to requiring EPA to issue rules to control ACM in schools, AHERA required EPA to conduct a study of the extent of asbestos hazard in (non-school) public and commercial buildings, and to determine whether these buildings should also be subject to these or further regulations.

19. In light of the AHERA mandate that EPA "study" the need for rulemaking regarding "other buildings" the portion of the District Court's order on SEIU's 1983 petition regarding "other buildings" was vacated. *SEIU v. Lee Thomas et al., CA No. 84-2790* (D.D.C.), July 17, 1987 Memorandum Order (unpublished). The case was subsequently settled.

20. In a February 26, 1988 letter accompanying the Request to Congress, Lee M. Thomas, then Administrator of EPA stated (Attachment 1, Recommendations at 4 and 5):

> I do not believe that a comprehensive regulatory inspection and abatement program such as was recently implemented for the Nation's schools under the AHERA school rule is appropriate at this time.
>
> * * *
>
> This should not be interpreted as ruling out an inspection rule or even greater Federal regulation of these public and commercial buildings at some later time.

21. On November 8, 1988, plaintiff SEIU submitted a petition to EPA under TSCA stating that (Attachment 2 at pp. 13-14):

> EPA must initiate a rulemaking to, at the least, (a) require adequate inspection for, and identification of, the presence of ACM and communication of this knowledge to those at risk; and (b) establish procedures to be followed where actual or potential hazard is present. To the extent that resource limitations presently mitigate against otherwise desirable actions, EPA should establish rules to ensure that the most beneficial and least harmful actions consistent with resource limitations are taken.

22. SEIU's petition further explained that (Attachment 2 at 2-3) (fn. omitted):

> EPA has long counseled that owners/operators of such buildings inspect to identify the presence of asbestos, and take appropriate action where it is found. However, EPA is well aware that in many buildings asbestos hazard has not even been identified and that in many instances where it has been identified, resulting ill advised or poorly executed action may actually increase risk. EPA, however, has declined to initiate rulemaking. In defense of inaction, EPA does not state that rulemaking is not necessary; rather, it states that because of resource commitments required by the asbestos in schools rules enacted pursuant to AHERA "a major initiative in other buildings could [presently] do more harm than good." EPA's refusal to proceed with rulemaking is a tragic contradiction in terms where EPA simultaneously broadly encourages (and expects private pressures will further stimulate) the very breadth of action which it claims could do more harm than good.

23. EPA did not act to grant or deny the SEIU November 8, 1988 petition within 90 days of its filing. On March 28, 1989, the Administrator denied it. (Attachment 3).

Asbestos in Public and Commercial Buildings

24. EPA's Report to Congress found (Attachment 1, at 12):

> Based on the results of EPA's 1984 national survey, approximately 733,000 or 20 percent of the 3.6 million public and commercial buildings in the survey contain friable asbestos. Approximately 501,000 of these buildings contain damaged material. About 317,000 of the 3.6 million buildings contain at least some significantly damaged material.

25. EPA has recognized that the greatest risk posed where asbestos is present in public and commercial buildings is posed to those who may be exposed to "peak exposures." Ms. Susan Vogt, Director of EPA's Asbestos Action Program, explained to Congress that peak exposure occurs, for example, when:

> . . . the custodian, without knowing it, cuts through asbestos, or puts a broom up and sweeps across the ceiling to get at cobwebs not knowing that it's asbestos. . . ."

(Asbestos Exposure: Hearings on EPA Efforts to Control Asbestos Hazards and the Asbestos Hazard Emergency Response Act of 1986 Before the Subcommittee on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce, 99th Cong., (1986), at 293.)

26. In issuing a rule requiring inspection for asbestos in schools, EPA explained (47 Fed. Reg. at 23363; May 27, 1982):

> Peaks up to 500,000 ng/m3 [nanogram/cubic meter] may be common due to simple maintenance or cleaning chores or to vandalism and other damage [citation omitted]. This is at least 1000 times higher than the prevailing levels discussed above.

27. In issuing the school inspection rule in 1982, EPA stated (47 Fed. Reg. 23,365):

> EPA finds that the presence of unidentified friable asbestos-containing materials in schools and the absence of notice of their presence and of instructions on proper handling and maintenance procedures to reduce exposure constitute an unreasonable risk of injury to school employees. These unreasonable risks can occur when school employees unknowingly disturb friable asbestos materials or such materials are allowed to deteriorate. When activities by school employees disturb or promote deterioration of friable asbestos materials, risk to users of school buildings may be elevated. Therefore, the Agency finds that this rule is needed to prevent such activities as lead to unreasonable risk.

28. EPA explained in support of the 1987 issuance of its asbestos in schools rule (emphasis added):

> EPA acknowledges that many building air measurements show prevailing low levels. However, peak levels during serious disturbances can be extremely high and cause very serious risk to individuals involved.

52 Fed. Reg. 41,848.

Regulation of Asbestos in Buildings

29. In 1973, EPA, acting under the National Emission Standards for Hazardous Air Pollutants ("NESHAPS"), as authorized by the Clean Air Act ("CAA"), partially banned spray-applied ACM in new buildings, and established procedures for handling ACM during demolition. The regulations were subsequently revised to cover building renovations, and the use of all types of insulating ACM in new buildings.

30. In 1987, pursuant to AHERA, EPA issued regulations requiring inspection for and abatement of asbestos hazard in schools.

31. In enacting AHERA Congress recognized that abatement actions that are not performed by competent personnel, or according to protocol, may actually increase hazard.

32. The AHERA regulations require schools to employ state accredited personnel to (1) inspect for asbestos; (2) provide a plan for the management of asbestos that is found to be present; and (3) implement action to limit potential hazard where it is present.

33. AHERA requires that maintenance workers be notified where ACM is present and that they be trained to take, and take, precautionary actions ("operation and maintenance").

34. In the Report to Congress EPA found that service workers, including many SEIU members, are equally at risk in public buildings as in schools. EPA's Report stated (Attachment 1 at 16):

> Service workers may encounter higher episodic exposures, particularly if their activities disturb ACM. They appear to be equally at risk, whether employed in public or commercial buildings or in schools.

35. EPA's "guidance" document identifies action to be taken where inspection identifies potential hazard. The guidance document begins by explaining that (Attachment 4 at 5-1):

> Although not required to do so by federal law, the prudent building owner will take steps to limit building occupants' exposure to airborne asbestos.

36. EPA's Report to Congress stated (Attachment 1 at 18):

> The AHERA schools rule is also now part of the baseline and may provide voluntary guidelines for public and commercial building owners.

37. EPA does not require inspection for asbestos in buildings other than schools.

38. EPA does not require abatement plans in (non-school) public and commercial buildings where ACM is present.

39. EPA does not require that maintenance workers in (non-school) public and commercial buildings where ACM is present be notified of its presence and trained and required to take precautionary measures.

40. EPA does not require (non-school) public and commercial building owners/managers who voluntarily inspect for asbestos and/or take further action to use accredited personnel, as is required by AHERA.

41. In many public and commercial buildings in which ACM is present there has been no action to identify the presence of ACM, and, therefore, workers and other building occupants have not been notified of the presence of ACM.

42. In many public and commercial buildings in which ACM is present workers who are likely to come into contact with ACM have not been trained and instructed to take precautionary measures, as provided for by AHERA for school workers and by EPA's "guidance" for workers in all buildings.

43. In many public and commercial buildings in which ACM is present, action has been, or is being, undertaken, but is not conducted by accredited experts. Incompetent action may not adequately reduce risk, and may actually increase it.

44. EPA recognizes that strong private pressures exist that are resulting in action that increases hazard. The Administrator's February, 1988 letter accompanying the Report to Congress stated (Attachment 1, Recommendations at 2):

> If we are not careful we will stimulate more asbestos removal actions in public and commercial buildings during the next few years than the infrastructure of accredited professionals and governmental enforcement can effectively handle. For example, as public and commercial buildings are sold, investors are increasingly insisting that the asbestos in the building be removed, as a condition of the purchase. We already have anecdotal information which leads us to believe that irresponsible and potentially

> dangerous removal action is taking place outside of carefully monitored programs, and we do not want to exacerbate this problem by our actions.

45. EPA has encouraged voluntary action and stated its expectation that private pressures for action will increase:

Attachment 1, at 16)

> For many years now, EPA has been encouraging building owners to identify asbestos, manage materials properly and notify occupants of the results. The agency's record on this, documented in the EPA 'Purple Book', is very clear. And more and more, building owners are taking these steps as they find qualified persons available. There are strong private sector incentives for doing so – liability, property values, good management relations with workers. We anticipate these pressures increasing in the future, not decreasing.

COUNT

46. SEIU incorporates by references paragraphs 1-45.

47. SEIU petitioned EPA on November 8, 1988, to conduct rulemaking to adequately protect its members and the public from the risks posed by exposure to friable asbestos in public and commercial buildings. EPA has denied SEIU's Petition. SEIU is entitled, in accordance with TSCA Section 2620(b) (4) (B), to a de novo proceeding in this Court concerning the need for rulemaking.

48. There is more than a reasonable basis to "conclude that the issuance of" rule(s) sought by SEIU is

"necessary to protect health . . . against an unreasonable risk of injury. . . ." 15 U.S.C. § 2620(b) (4) (B) (ii). SEIU is therefore entitled to an order that EPA initiate a rulemaking proceeding.

PRAYER FOR RELIEF

WHEREFORE, in view of the foregoing, SEIU requests that the Court grant the following relief:

1. That the Court find:

a. that Defendants have denied SEIU's request that the EPA initiate a rulemaking on asbestos in public and commercial buildings, and that SEIU is therefore entitled to a de novo proceeding before this Court in accordance with TSCA Section 2620(b) (4), and

b. that, as provided for by TSCA, unreasonable risk exists which requires the initiation by EPA of a rulemaking proceeding.

2. That the Court enter an order establishing a de novo proceeding in this case, and a schedule for the conduct of that proceeding.

3. That at the conclusion of the de novo proceeding, the Court enter an order requiring EPA to initiate rulemaking in accordance with SEIU's November 8, 1988 Citizens' Petition.

4. That the Court award Plaintiff SEIU its costs of suit, and reasonable fees for attorneys and expert witnesses;

5. That the Court grant such other and further relief as it deems appropriate.

Respectfully submitted,

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COMMENTARY

EPA'S BUILDINGS NUMBER IS IN NEED OF REFINEMENT

By Peter MacDowell

(Editor's Note: Peter MacDowell is the director of marketing for the National Abatement Corp. in New York. He is involved in marketing professional engineering and architectural asbestos management services to governmental, national and international real estate and industrial markets. MacDowell presented new estimates on the number of asbestos-affected properties at the National Asbestos Council's Fall Technical Conference & Exposition in Boston in September.)

It is a truism that definitive terminology varies between professional disciplines, and so it is with the word "impact" in the phrase – the financial "impact" of asbestos-affected properties. Real estate economists refer to the term as a discounted market value; real estate investors, as a deal maker/breaker; attorneys, as property damage; accountants, as a reduction in asset value; bankers, as a discount factor of their asset portfolio; investment bankers, as an item for due diligence and disclosure; stockholders, such as J.C. Penny's, as an annotation in the annual report as a factor affecting asset value or performance and Congress, as a policy issue.

Whatever the jargon employed and regardless of how the property is carried on the books, the bottom line is that an asbestos-affected property represents an unavoidable and absolute contingent liability having a material effect in transactions, portfolios and the balance sheet, hence the future performance of corporate America.

Though it is a risk that can be quantified, the total dollar value attributable to asbestos removal liability on industry and the nation, is now in serious question.

The questionable figures referred to are the EPA's much touted estimates of 733,000 asbestos-affected buildings, representing one in five of those surveyed, in a statistical universe of 3.6 million buildings, carrying a contingent liability value according to the EPA of ±$100 billion. This estimate has to date:

·Become the foundation for the architecture of proposed legislation by Rep. James Florio of New Jersey, for the application of a new standard of health and safety inspections and asbestos management for all governmental, corporate and commercial buildings (AHERA).

·Been considered by litigants as the maximum commercial and corporate property damage exposure of the asbestos manufacturing industry as a whole.

·Been used to convey the upside growth of the youngest segment of the construction industry, the emerging business of asbestos management/abatement.

·Become the mostly widely quoted statistic by the media, industry professionals, lawyers, accountants and real estate industry organizations in publications, discussions and presentations on the topic of the asbestos-effect.

An analysis of easily accessible information, brings one to the conclusion that the EPA's figures are dangerously misinforming and do not even closely constitute a risk assessment. As such, they serve to drive the nation,

the courts, the real estate industry, shareholders, investors and Congress into a false perception of the monumental economic impact of this legislated construction task.

Identification of the Economic Models

The final removal of all asbestos, or the contingent liability, as mandated under the Clean Air Act, at the time of disturbance and/or demolition, is in fact only a construction task. Granted that it is one which requires serious health/safety considerations and engineering constraints, but a construction task nonetheless. Therefore unlike abstract personal injury guesstimates, the individual construction activities are quantifiable in their operational nuances. These readily accepted, engineering costing principles allow for an accurate assessment of the costs to cure.

It should also be noted that asbestos has become a negotiations function within all buy/sell and leasing transactions. After the investment banking, legal, qualified property appraisal and due diligence is complete, risk assessment of the asbestos-effect alone is awkwardly left to be wrestled with on the negotiations table. Asbestos unquestionably has become the ultimate deal maker or breaker in transactions involving affected properties.

Prudent business management therefore dictates that analysis of financial exposure and investment risk in these transactions must include along with the abatement cost, the downside factors for the costs of professional consulting expertise; asbestos management, over time;

financing; tenant/employee dislocation; lost income; rebuild back to its highest and best use and the ongoing cost for waste disposal. The EPA's figures totally lack any semblance of the intelligent application of these factors in their "risk assessment" exercise.

Additionally the contingent liability associated with the hidden costs inherent in an abated property, which once contained spray-on fireproofing some of which cannot be removed until the time of dismantling and demolition, is also quantifiable. This is also true of any other asbestos containing material (ACM) such as vinyl asbestos tile, left in place after abatement.

The volume of ACM remaining in place could well be as high as 10 percent of the total ACM removed from the "abated" property. Factors governing this volume are dependent on the structural matrix and systems design, engineering specifications and/or the owner's preference to leave specific types of ACM in place. However it is important to note that even these amounts and the associated future cost to cure ARE quantifiable.

The attributes of the EPA's model, or any economic model for that matter, must take into account this remaining liability, in terms of its continuing effect on the discounted market value of the property(ies). The property value will be burdened for the life of the property by the presence of this inaccessible material. Hence its presence should be a consideration in all future transfers of title, investment and financial transactions and tax appraisal considerations. Until such time as demolition occurs and the asbestos totally removed, placed in a land fill and/or

vitrified—the true value of the property forever carries this ongoing contingent liability or discount.

Further upward adjustment to the model must be made for tax reappraisal, increased property value upon abatement, increased cash flow for appreciated lease income, etc. Unfortunately with these upside adjustments, one must initially experience the downside expense before any offsetting benefits become available.

Under any circumstance however, the expense of the abatement function inherent in the construction task, represents only a fractional portion of the total asbestos-effect. Indeed over time, this capital improvement becomes minimal in relationship to future building maintenance expenses such as carpet, paint, etc.

It has been stated that less than two percent of corporate America need concern themselves with the personal injury side of the asbestos equation, but 99 percent plus of the total population of this country will bear the cost of the asbestos-effect through increased prices, taxes, etc. It is of some comfort to again note though, that the dollar value of each of the imput [sic] parameters in this construction risk model are quantifiable. Therefore an accurate assessment of the future liability of the asbestos-effect, as it relates to construction, is a defensible computation.

A More Correct View of the Date [sic]

A trip to the library and perusal of public records, annual reports, and published government figures quickly discloses that the universe of affected corporate/

commercial buildings far exceeds the EPA's 3.6 million building figure. 8.4 million buildings including government facilities, but excluding schools, universities, churches and the military can be easily extrapolated and is more the number.

With acceptance of the EPA's figure of one in five, or 20 percent of the buildings as affected, one can model the individual parameters and associated costs as outlined above and arrive at a total contingent liability, or discounted market value for all corporate and commercial property in the United States at $750 billion.

Considering a national policy decision on asbestos-affected buildings is imminent, accurate input data is necessary. At the recent National Asbestos Council's Convention in Boston, when confronted with the results of this modeling effort, the EPA's spokesperson's admission, that, "The study itself omits several categories of buildings. Our job in 1984 was not to count buildings out there. Our job was to get some idea that one (1) in five (5) buildings contains asbestos," evidences a laze [sic] faire attitude about risk assessment at the expense of the agency's 1984 search for statistical accuracy.

The EPA's further admission that, "You are correct in saying there are more buildings out there and the potential impact on a regulatory program could be much greater than the Agency expected," evidences a new high in this organizations ability to communicate misinformation.

Those misleading figures might well impact, not only future legislation and real property investment transactions, but could well result in clouding sound business

decisions regarding continued litigation vs. the seeking of shelter in the courts by the asbestos manufacturing industry. A $100 billion downside risk is one thing, but a three quarters of a trillion dollar (or most likely greater) level of collective exposure, might well force that industry to follow, en masse, in the footsteps of Johns Manville. The ripple effect would be staggering.

Irregardless of the final number, the citizens of this country will eventually pay the entire bill for control and eventual abatement of all asbestos. We deserve to have an accurate count of the number of affected buildings—including the military. (It should be noted here that a serious effort on the part of the military, to survey and remove asbestos in overseas operations, is presently underway).

A Suggested Solution

In this light the following suggestion is offered for arriving at an accurate count of the affected buildings in the next few months. It would be a relatively simple task for Congress to require the EPA to request, from the local taxing authorities in cities and counties with a population of say 50,000+, the number of commercial and corporate properties on their rolls, the square footage, etc. It is also strongly suggested that the survey include a count of vacant and abandoned properties.

This audit could be complete before Congress reconvenes and adds substance to any new policy. Until such information can be provided to Congress by the EPA, impacted industry segments, financial institutions and shareholders, the legislation must be delayed.

Conclusion

Future asbestos-related personal injury claims, Superfund liability and corporate pension fund obligations combined, pale in the shadow of the total contingent financial liability. In the real world this liability is mirrored in the real estate marketplace as the discounted market value of asbestos-affected properties. Each of these future obligations have a material effect on investors, shareholders, corporations and this nation's population.

For that singular reason, let us construct the forthcoming National Environmental Policy for Asbestos in Corporate and Commercial Buildings (NEPACC) on a solid foundation of accurate date. The actions of Congress must reflect an intelligent analysis of impact on this nation's ability to allocate resources and dollars, and be based on this easily achievable, accurate number of affected buildings.

Regardless of the agency's perception of its 1984 mandate, the Congressional edict in 1988 must be to revise those outdated numbers and provide an accurate risk assessment model of the problem's impact. I believe the effort to be "doable" and am confident that the forthcoming legislation will be imminently more realistic.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

In Re:	ORDER
State and Regents' Building Asbestos Cases	File No. 99081 " " 99082

The above-entitled mater came on for hearing before the undersigned on motions by all defendants, through liaison counsel, to dismiss Counts I, IV, V, VII, VIII, IX and X of the plaintiffs' complaints.

Harvey Jones, Michael Sieben, Richard LaVerdiere, Michael Strom and Joel Tierney appeared as attorneys for the plaintiffs. Thomas Seifert appeared as attorney for defendant, National Gypsum Company; John Borger appeared as attorney for defendants, Dana Corporation and Owens-Corning Fiberglas Corporation; Anthony Mills appeared as attorney for defendants, Celotex Corporation and Carey-Canada, Inc.; Reid Shaw and Catherine Cella appeared as attorneys for the defendant, GAF Corporation; Sandra Wallace appeared as attorney for defendant, United States Gypsum Company; Kyle Mansfield appeared as attorney for defendants, A. H. Bennett Company and Standard Insulations, Inc.; Wayne Hergott appeared as attorney for defendant, Flintkote Company; Thomas Shiah appeared as attorney for defendant, Pfizer, Inc.; Michael LaFountaine appeared as attorney for defendants, H. K. Porter Company, Inc., and Southern Textile Corporation; Mark Suby appeared as attorney for defendant, Armstrong World Industries; and

Eugene Buckley appeared as attorney for defendant, Pittsburgh Corning Corporation.

The motions are grounded in three separate propositions:

a) The plaintiffs fail to state claims upon relief can be granted (Count I);
b) Plaintiffs have failed to satisfy notice prerequisites for suit (Counts I, IV and V); and
c) The causes of action claimed are not applicable to the facts of these actions (Counts I, VII, VIII, IX and X).

On all of the files, records and proceedings herein, together with the arguments and briefs of counsel,

IT IS HEREBY ORDERED:

1. The defendants' motions for summary dismissal of Counts I, IV, V, VII, VIII and IX of the plaintiffs' complaint are in all things denied; and

2. The defendants' motion to dismiss Count X of the complaint is granted and the defendants ought to have judgment dismissing Count X of the complaint, without costs to any party on the occasion of these motions.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 23 day of July, 1986.

BY THE COURT:

/s/ Jack A. Mitchell
Jack A. Mitchell
Judge of District Court

(See attached Memorandum)

MEMORANDUM

Each count of the complaint should, on the defendants' motion, be considered in turn.

Section I. Count I – Restitution.

(A) Failure to state a claim.

Count I alleges that the defendants caused asbestos-containing products to be used in the plaintiffs' buildings without warning the plaintiffs of the "deleterious, poisonous, carcinogenic and highly harmful" nature of the products, makes "formal demand upon the defendants to properly abate the hazard," and alleges damage to the plaintiffs since "prior requests to abate have been futile."

The defendants argue that "Restitution" is not a cause of action; that it is a remedy for other genuine causes of action—they call it "shorthand for a collection of equitable remedies." It is suggested that Section 4(f) of the Restatement of Restitution providing a remedy in the form of "a judgment at law or decree in equity for the payment of money, directly or by way of a setoff or counterclaim" is available only on the plaintiffs showing that the defendants have been unjustly enriched.

Section 106 of the Restatement of Restitution provides:

> A person who, incidentally to the performance of his own duty or to the protection of the improvement of his own things, has conferred a benefit upon another, is not entitled to contribution.

This is claimed to negate the plaintiffs' claim that the State and University's now abating the asbestos confers a measurable benefit upon the defendants.

Defendants' argument fails to adequately address the applicability of Section 106 when considered in the light of Section 115 of the same Restatement. The emergency assistance doctrine of Section 115 calls for recovery when a plaintiff, at its own expense, performs a duty owed by or remedies a wrong done by another. *Wyandotte Trans. Co. v United States*, 389 U.S. 191 (1967); *United States v. Consolidated Edison Co. of New York*, 580 F.2d 1122 (2nd Cir. 1978). An unjust enrichment occurs when the cost of performing an act is shifted from the one whose duty it was to perform the act to another. *United States v. P/B STCO 213*, 756 F.2d 364 (5th Cir. 1985). Section 106 denies recovery to those who confer some benefit on another only as an incident "to the performance of [its] own duty."

Neither is it significant that the duty plaintiffs seek to impose on the defendants is not a statutory duty as in *Wyandotte*. No rule limits recovery for an unjust enrichment to those instances arising from one's discharging another's statutory duty. The presence or absence of a statutory genesis has nothing to do with the shift of the costs attendant upon the discharge of another's duty or with the savings enjoyed by the latter not having to devote resources to the satisfaction of its own duty.

When, in *County of Anderson v. United States Gypsum*, No. Civ-3-83-511 (E.D. Tenn. 1984), the trial judge, dismissing that plaintiff's restitution count, held that "the defendants . . . had no 'duty' either statutory or implicit to remove the asbestos . . . ," he ignores the reality that the defendants may be under a duty to answer in damages—to pay for the consequences of the harm done unless the harm were removed, avoided or abated by

them. When that court suggested that to allow recovery on this theory "would allow plaintiffs in all products liability cases to recover under a Section 115 theory," its position is overstated and its reading of the rule overbroad. That position ignores the distinction between property damage and personal injury cases. In the personal injury setting, the harm having already befallen the plaintiff, the remedy must be only damages. The plaintiff cannot be made uninjured. In the property damage case, by contrast, the plaintiff can be made to be uninjured—the defective product can be removed. If the defendants are unwilling to remove the product (to restore the property to an "uninjured", nonhazardous condition) notwithstanding a duty to refrain from putting abroad in the marketplace a defective product, the plaintiffs may well find themselves confronted with an emergency (the impending exposure of an unaware public of users and occupants of the plaintiffs' facilities) to which the plaintiffs must respond. When, then, defendants have been given the opportunity to restore the properties and have refused to do so, all expenses to which the plaintiffs are put in the restoration confer on the defendants a dollar-for-dollar benefit for which they may be liable.

For purposes of a Rule 56 motion, these plaintiffs must be given an opportunity to prove, as alleged, the existence of the hazard, the source of the hazard, and the duty of the defendants to restore the property, their failure to do so, and the amount of the expense to which the plaintiffs will be put in effecting the restoration.

That the plaintiffs' actions must have been performed in an emergency is a necessary element for consideration. The lengthy latency period commonly existing between

the exposure to asbestos and its medical consequences does not relegate this to a nonemergency situation. Each day of exposure to asbestos puts the plaintiff in a position involving "an immediate necessity for action." Restatement of Restitution, Section 115, Comment a. No "safe" level of exposure to asbestos has been defined. Any exposure may bear the consequence of catastrophic illness. The emergency is the immediacy of exposure to asbestos, not the immediacy of the onset of its diagnosable medical consequences, if any. Neither is the lengthy timetable for pending and future abatement actions evidence of an absence of immediate concern. It is no more than evidence of the realities of limited funding being available to the plaintiffs, limited resources in the form of technically competent personnel to accomplish the abatement, and the ironic circumstance that in some instances abatement with its attendant disturbance of otherwise fixed and stable quantities of asbestos-containing products may result, at least temporarily, in a greater health hazard than doing little or nothing. This lawsuit, however, recognizes that inevitably that asbestos must be removed—no building or facility is truly permanent.

The unjust enrichment of which these plaintiffs complain is the defendants' avoidance and consequent shifting to them of the cost of performing the duty to prevent exposure of the public to asbestos-containing products that is primarily the obligation of the defendants. *United States v. P/B STCO 213*, supra.

(B) Failure to give prerequisite notice for action.

The defendants protest that plaintiffs have failed to give that notice reasonably required by Sections 106 and 115 of the Restatement of Restitution.

No express notice requirement is found in either section. Instead, the obligation to give notice is inferred. No recovery ought to be allowed for one discharging the duty of another unless the latter has been given a reasonable opportunity to discharge its own duty. The plaintiffs' complaint alleges that requests to the defendants for abatement "have been futile." Reason requires that the greater the emergency, the shorter the notice period need be to be reasonable. The authors of the Restatement in Comment a to Section 115 recognize this by suggesting that restitution absent notice (a request to abate) "may be denied on the ground that the services were rendered officiously" (emphasis mine) , that is, as a volunteer. The logical corollary of that rule is that restitution may not be denied for want of such request or notice if the request has been or will be futile. The imminence of a health hazard requires such a futility of notice rule. The claimed notice to the defendants to date has triggered no abatement response. The plaintiffs continue to discover new sites and amounts of asbestos-containing products among their many buildings. To require prior notice of thus far unlocated products is absurd. To require future notices serially resulting in denials of responsibility by the defendants individually and collectively would be futile and unnecessary.

Section II. Count IV – Breach of Implied Warranties and
Count V – Breach of Express Warranties.

Count IV alleges an implied warranty that the products "were of good and merchantable quality and fit for their intended purpose." Count V alleges that the products were expressly warranted and advertised to be "safe and particularly suitable for use in the public buildings" of the plaintiffs. In each case, the breach alleged is that the products are "poisonous, carcinogenic, deleterious and highly harmful to the health and welfare of persons using the buildings" in which they are found. The defendants argue that Minn. Stat. § 336.2-607(3) (a) requires that the plaintiffs be "barred." 336.2-607(3) (a) provides:

> The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.

Notice must then be given the defendants in a reasonable form and within a reasonable time of the discovery of the breach. This is true since each defendant must be given an opportunity to "cure" the breach, lest the plaintiff do so in a less economical way and seek restitution from the defendant for an unfairly inflated or incorrect amount. "Cure" is a concept of the Uniform Commercial Code, which exists not to ensure the buyer of the receipt of goods but to put the seller, to the extent fairness and practicality allow it, in control of the consequences of the items it chooses to deliver. To prevent plaintiffs from unfairly enjoying competitive price changes at the expense of preexisting contract obligations

or from inflating damages to their benefit or the detriment of the defendant, the seller is permitted to "cure" a breach. The notice then is required if it is reasonable. It must be in reasonable form. It must be understandable as a notice that legal consequences will befall the seller if a "cure" is not effected, and it must be given in a time that is reasonable under the circumstances. The plaintiff may not discover the defect and sit on its rights, speculating on the comparative advantages to it or consequences to the seller of seeking goods without the defect. Generally, then, the buyer is entitled to inspect the goods, § 336.2-513, and to reject them before delivery or "within a reasonable time after their delivery," § 336.2-602(1). The requirement of notice protects the seller from the plaintiff effecting "cover," § 336.2-712(1), at market terms disadvantageous to those available to the seller and then seeking damages (read Restitution) for the difference, § 336.2-712(2). The Official Comment #4 to 336.2-607 suggests that "the notification which saves the buyer's rights under this [section] need be only such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through litigation." The notice will be sufficient if the defendants are given a chance to correct any defects, if the defendants are afforded an opportunity to prepare for the negotiations and litigation, and if the plaintiff acted within a reasonable time after the defect was or ought to have been discovered. *Shooshanian v. Wagner,* 672 P.2d 457 (Alaska 1985).

As to the latter of these concerns, a substantial issue of fact exists as to when the plaintiffs ought to have discovered the defect. Accordingly, the Court must refuse

to decide or treat the issue for motion purposes as resolved against the moving party.

While a majority of courts do not allow a complaint to serve as the required notice, those that do usually do so in favor of noncommercial parties, most often individual consumers, who should not be barred from a meritorious claim because of an unfamiliarity with statutory requirements. At the outset, it should be apparent that these plaintiffs cannot avail themselves of a protection fashioned for the uninformed or unsophisticated individual shopper. Here, however, substantial allegations of deception and concealment have been made against the defendants, making the likelihood of litigation rather than settlement overwhelming, if true. No purpose then could realistically be served by requiring the largely hollow and mechanical practice of some form of prelitigation notice beyond that already alleged being served as a further condition precedent to suit. If the plaintiffs' allegations are borne out by the proof, the defendants have been preparing for litigation for years before the plaintiffs were actually aware of the problem. If the alleged concealment is shown, the defendants were making litigation-related decisions before the plaintiffs ought to have or could have discovered their claim.

In the "circumstances of" this claim, the notice given was within the definition of "reasonable time," § 336.1-204(2); *Kopet v. Klein*, 275 Minn. 525, 148 N.W.2d 385 (1967); and the complaint was a reasonable form. The defendants point to no actual prejudice they suffer by use of the complaint as notice of the plaintiffs' claim. The defendants' reliance on *Truesdale v. Friedman*, 270 Minn. 109, 132 N.W.2d 854 (1965), as supporting a notice

requirement different from the complaint, ignores the fact that in that case the trial court on its own motion, and only after both sides had finished their proof, announced for the first time that he would submit the case to the jury on a theory of breach of warranty. It was from this that Friedman appealed. That was the lack of notice found as the flaw—not in Truesdale's claim (Truesdale tried his case only on a fraud theory). The flaw was no notice, even through the time of presenting proof, that prejudiced Friedman. No defendant here can suggest similar prejudice.

Section III. Count VII – Conspiracy.

The defendants' argument that Count VII is insufficiently pled, that is is "merely conclusory" and fails to specify an "underlying" intentional tort is without merit. The plain language of Count VII alleges fact. Medical and scientific data, indicating the hazardous nature of asbestos, is alleged to have been withheld from the public by the defendants acting in concert with one another, with the consequence that the plaintiffs and others have been denied the opportunity to avoid exposure to asbestos, to their damage. Nothing more is required to fairly put the defendants on notice of the nature of the plaintiffs' claim in this count. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26 (Minn. 1963). Discovery will permit defendants to examine the details of the plaintiffs' claim. Greater specificity of which defendants conspired with whom, and regarding how they are claimed to have suppressed data of a medical and scientific kind, is not required in notice pleading. The defendants are situated well to contest the claim that those acts were intentional,

not coincidental, and had the complained-of results. The count, when read in the context of the entire complaint, is plainly sufficient. The ultimate facts are not specified in the complaint. They need not be. *Nathan v. St. Paul Mutual Insurance Co.*, 86 N.W.2d 503 (Minn. 1957).

Section IV. Count VIII – Unfair Trade Practices.

The defendants claim that Count VIII must be dismissed because it inadequately cites the statute upon which it is predicated. The argument has been made that "[t]here is no 'Unfair Trade Practices Act' in Minnesota . . . " When, in response, the plaintiffs point to Minn. Stat. § 325D.09 et seq., the defendants argue that it is a "vague statute," "unearthed" by plaintiffs which "has existed in relative obscurity since its enactment." Defendants protest that the statute "has received only glancing attention from the legislature and the courts." Nothing in these arguments calls for dismissal of the count.

Minn. Stat. § 325D.10 defines "person" as including "corporation" and § 645.44, Subd. 6, provides that "person" may extend and be applied to bodies politic and corporate. From this, the plaintiffs are "persons" afforded a remedy for violation of these sections.

Minn. Stat § 325D.09 announces as targeted trade practices, among others, those that mislead "as to the quality, [and] ingredients" of merchandise. The allegations of the count are plainly sufficient.

Section V. Count IX. – Nuisance.

Minn. Stat. § 561.01 defines as a nuisance:

> Anything which is injurious to health . . . or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property.

and provides that:

> An action may be brought by any person whose property is injuriously affected . . . by the nuisance, and . . . the nuisance may be enjoined or abated, as well as damages recovered.

Unlike the characterization made in the defendants' brief, the claim of the plaintiffs is not to magically transform by this section every products liability case into a nuisance action. The statutory language easily can apply to the presence of asbestos in a public building. The rationale of *Dorman v. Ames*, 12 Minn. 451 (1867); *Amax, Inc. v. Sohio Industrial Products Co.*, 469 N.Y.S.2d 282 (N.Y. App. Div. 1983); and *State of New York v. Schenectady Chemicals*, 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984) supports a nuisance action against one who creates a public nuisance on property owned by the plaintiff, even while that property is out of or beyond the control of the defendant. The act of ownership, particularly as a purchaser of improvements, in no way impairs the standing of the land owner to seek damages, injunction or abatement. If, as the defendants claim, a current nexus must exist between the property and those sought to be held liable, that nexus is to be found not in defendants' continuing activities on the land, but, instead, in a continuing hazard arising directly and uninterruptedly from the defendants' past activities in relation to the property.

Section VI. Count X – Indemnity.

This indemnity claim, grounded in the expectation of future possible claims from third parties, must fail. The plaintiffs' claims are necessarily speculative. Where fewer than all of the potential asbestos-related claims have been legally formalized, the "ripening seeds of an actual controversy" necessary to support declaratory relief can be found. *State ex rel. Smith v. Haveland,* 223 Minn. 89, 25 N.W.2d 474 (1946). But where, as here, no such action exists and since none may materialize, the Court has before it no justiciable controversy. While *Holiday Acres No. 3 v. Midwest Federal S&L of Minneapolis,* 271 N.W.2d 445 (Minn. 1978) suggests the propriety of granting declaratory relief at stages of continuing "uncertainties" and before "full-blown" development of claims, it does not support a claim where no more than an expectation of future claims—even numerous claims that are likely to be brought—exists. Speculation is speculation, even if the odds are good. Although the Minnesota Declaratory Judgment Act, § 555.01 et seq., necessarily uses expansive descriptions of its purpose, a genuine controversy must exist. There must be a substantial controversy between parties, having definable adverse legal interests that are immediate and real. *Holiday Acres No. 3 v. Midwest Federal S&L of Minneapolis,* Id.; *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941).

J.A.M.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Federal Reserve Bank of Minneapolis, a United States corporation,

Plaintiff,

v.

Carey Canada, Inc.; The Celotex Corporation, individually and as successor-in-interest to Philip Carey Manufacturing Company, Philip Carey Corporation, Carey Canada, Inc., Briggs Manufacturing, and Panacon Corporation; and W. R. Grace & Company,

Defendants.

Civ. 3-86-185

ORDER

(Filed Aug. 31, 1988)

Michael R. Sieben and Michael R. Strom, Hertogs, Fluegel, Sieben, Polk, Jones & LaVerdiere, Hastings, MN, and Tom C. Baxter, General Counsel, Federal Reserve Bank of New York, New York, N.Y., for plaintiff.

Richard N. Jeffries, Joel A. Flom, Jeffries, Olson & Flom, P.A., Moorhead, MN, and Stephen Madva, Montgomery, McCracken, Walker & Rhodes, Philadelphia, PA, for defendants Carey-Canada and Celotex Corp.

G. Marc Whitehead, Donald M. Lewis, Popham, Haik, Schnobrich & Kaufman, Ltd., Minneapolis, MN, for W. R. Grace & Co.

Defendants Carey-Canada (Carey) and W. R. Grace and Company (Grace) have each made two motions for summary judgment. For the reasons discussed below these motions are denied in part and granted in part.

Background

This action was brought by the Federal Reserve Bank (Bank) against several manufacturers of asbestos fireproofing to recover the cost of removing all asbestos fireproofing from the Federal Reserve Bank in Minneapolis. The specific facts of the case will be discussed below as they relate to the arguments of the parties.

I. Motions for Summary Judgment Based on the Federal Statute of Limitations

Both Carey and Grace argue that this action is barred by the federal statute of limitations contained in 28 U.S.C. § 2415. Bank responds with two arguments: 1) that 28 U.S.C. § 2415 is inapplicable to this case because Bank is not a federal agency, and 2) that even if the statute applies, Bank's cause of action did not occur until after January 13, 1984 and thus the current action is not barred by the three and six year limits of § 2415.

In *Independent School District No. 622 v. Bor-Son*, No. C5-84-1701 (Minn. Dist. March 25, 1987), the court addressed the question of when a cause of action accrued in a similar case and concluded that accrual occurred when plaintiff knew or should have known that "the type and amount of asbestos used in that particular building

constituted a hazard requiring some form of abatement." The affidavit of Melvin L. Burstein, submitted by Bank, supports Bank's claim that it was unaware of the need for abatement until 1984. The issue of when the cause of action occurred is disputed and raises a material question of fact which, if resolved in favor of plaintiff, would allow the instant suit under either the state or federal statute of limitations. The existence of disputed material facts on the issue of accrual precludes summary judgment on statute of limitation grounds. A determination of whether the Bank is in fact a federal agency under § 2415 is thus unnecessary at this stage of the proceedings.

II. Grace's and Carey's Other Motions for Summary Judgment

Grace and Carey each make a second motion for summary judgment, alleging various deficiencies in each count of Bank's complaint. The arguments raised are similar and will be considered together. In its responsive memorandum, Bank withdraws its claims against Grace for Declaratory Judgment, Conspiracy, Building Monitoring, Medical Monitoring and CERCLA. Thus with respect to Grace, these counts may be dismissed. Bank does not formally withdraw these claims against Carey but makes no response to Carey's arguments for summary judgment on Bank's Declaratory Judgment, Medical Monitoring, Building Monitoring and CERCLA claims. Carey's summary judgment motion with respect to these claims is, therefore, granted.

A. Fraud Count

Grace argues that summary judgment is appropriate on Bank's claim of fraud due to a failure by Bank to produce evidence of a false statement by Grace made with the intent to deceive Bank or evidence of Bank's reliance on representations of Grace. Grace further argues that because the allegations of fraud cannot be sustained, Minn. Stat. § 541.051, a statute of repose, applies and bars this action.

Carey argues for summary judgment on the basis that Bank has failed to produce evidence of reliance on alleged misrepresentations of Carey.

Bank argues in response that it has produced sufficient evidence of fraud to sustain the claim against a summary judgment motion. Bank has submitted affidavits and documents in support of its claim that Grace knew by the early 1960's that its product Monokote tended to release asbestos fibers into the air, that such release could present a health hazard and that safer alternatives may have been feasible. Bank has presented evidence supporting its contentions that Grace continued to aggressively market Monokote and that its sales materials misrepresented Monokote as a safe and innocuous material. Bank has also submitted affidavits suggesting that had Grace truthfully represented its product's safety, it would not have been used in the Bank Building. This evidence raises material factual issues which cannot be resolved on a motion for summary judgment, thus, Grace's motion must be denied as to this claim. It is unnecessary for the court to address Grace's argument regarding Minn. Stat. § 541.051 in light of our earlier

holding that the fraud claim precludes application of the statute of repose.

Bank relies on the affidavit of John MacDonald to refute Carey's argument that Bank could not have relied on any misrepresentation by Carey because asbestos fireproofing was specified in the plans for the Bank. The MacDonald affidavit asserts that Asbestos fireproofing would not have been specified or used in the Bank if Carey and other asbestos manufacturers had not concealed the risks of their products. Bank submits the affidavit of J. Anderson Berly and related documents in support of its contentions that Carey's predecessor knew the hazards of asbestos in the 1950's, knew that its product, Firebar, was susceptible to fiber release, and deliberately concealed its knowledge of the dangers of asbestos and its product. Based on all the evidence submitted, the court finds that issues of material fact exist with respect to Bank's claim of fraud against Carey and, consequently, Carey's summary judgment motion is denied.

B. Restitution

Both Grace and Carey argue that Bank's claim for restitution must be dismissed because it is not a recognized cause of action in Minnesota but is rather a measure of relief to be given. They further argue that even if the restitutionary "emergency assistance doctrine" were to be recognized in Minnesota, it would not apply to this case.

The emergency assistance doctrine, as outlined in Restatement of Restitution at § 115 (1937) provides:

> A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if:
>
> (a) he acted unofficiously and with intent to charge therefore; and
>
> (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health or safety.

Carey argues that the doctrine is inapplicable because Bank's failure to have completed abatement measures demonstrates the lack of immediate necessity in this case. However, as argued by Bank, abatement is a slow and time-consuming process which can take several years to complete. Bank represents that a plan of abatement is being formulated and will be initiated shortly. Thus, the fact that abatement is as of yet incomplete does not conclusively demonstrate the inapplicability of the doctrine.

Carey and Grace both argue that no benefit has been bestowed upon them for which restitution is available. However, in *In Re State and Regents Building Asbestos Cases*, Nos. 99081, 99082 (Minn. Dist. July 23, 1988), a Minnesota court explained that the benefit conferred upon an asbestos manufacturer in a similar case was the shifting of the potential duty to abate the hazards of asbestos fireproofing: "The unjust enrichment of which these plaintiffs complain is the defendants' avoidance and consequent shifting to them of the cost of performing the duty to prevent exposure of the public to asbestos-containing products that is primarily the obligation of the

defendants." *Id.* slip op. at 5. In *State and Regents,* the Minnesota court recognized the cause of action that defendants claim does not exist. Despite defendant's assertions, Bank's claim for restitution is viable under Minnesota law and the motions for summary judgment on this claim are denied.

C. Tort Claims

Carey and Grace allege that they are entitled to summary judgment on the Bank's claims of negligence and strict liability because recovery in tort is unavailable for economic losses under *Superwood Corp. v. Siempelkamp Corp.,* 311 N.W.2d 159 (Minn. 1981). See also *American Home Assurance Co. v. Major Tool and Machine, Inc.,* 767 F.2d 446 (8th Cir. 1985). Bank argues that this is a case of a product causing an unreasonable risk to health, not a case alleging economic loss alone. Bank also argues that the "other property" exception to *Superwood* would apply to this case and allow recovery in tort.

The only Minnesota case addressing the issue of whether claimed asbestos fiber contamination of a building constitutes a case of economic loss for which tort recovery is unavailable is *Independent School District No. 709 v. W.R. Grace Co.,* No. 155716 (Minn. Dist. May 20, 1987). In *District 709* the court found that the asbestos contamination of a public school constituted a physical injury to the premises which was not merely an economic loss. *Id.* slip op. at 7. The court further held that the "other property" exception also applied and since the contamination could conceivably render the building unfit for use, the plaintiff's negligence and strict liability

claims were proper. *Id.* slip op. at 8. This decision comports with the prevailing view in jurisdictions which have addressed this issue. See *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559, 564 (D. S.C. 1986). The court finds that the injury complained of is not mere economic loss for which tort recovery is unavailable. Defendants' motions for summary judgment on Bank's tort claims are denied.

D. Conspiracy

Carey argues for summary judgment on the conspiracy claim against it on the grounds that there is no independent cause of action for conspiracy. An action for conspiracy is available where a plaintiff alleges conspiracy to commit an intentional tort. *Senart v. Mobay Chemical Corp.*, 597 F. Supp. 502 (D. Minn. 1984). Thus, while in light of the above determination to deny Carey's motion for summary judgment on the fraud claim, Bank may maintain its claim for conspiracy.

E. Failure to Warn

Count ten of Bank's complaint alleges that defendants had a duty to warn Bank of the dangers of asbestos fireproofing when they became aware of them even if they were unaware of the dangers at the time of sale and that this duty was breached to Bank's injury. Grace argues that summary judgment should be granted on this count because the post-sale duty to warn does not extend to cases involving economic loss. Grace also argues that any failure to warn could not have caused Bank's claimed injuries because the asbestos was already in place.

As discussed above, the harm in this case is the alleged existence of an unreasonably dangerous substance in a product which requires some corrective action, not mere economic loss. Grace's assertion that a post-sale duty to warn should not apply in this setting because it is outside the individual consumer context of *Hodder v. Goodyear Tire and Rubber Company,* ___N.W.2d___ (Minn. May 6, 1988), is unconvincing. The post-sale duty to warn has been recognized in other asbestos property damages cases and the court believes it should apply to the instant case. *St. Joseph's Hospital v. Celotex,* No. 186-047 (S.D. Ga. Nov. 5, 1986); *City of Enterprise v. W.R. Grace,* No. Cv. 85-87 (11th Cir. Jan. 20, 1987). Bank's allegation that delay in beginning abatement has increased the cost of abatement raises a fact issue with respect to causation and precludes summary judgment.

F. Warranty Issues

1. Failure to Notify

Grace and Carey argue that summary judgment should be granted on both Bank's implied warranty and express warranty claims because of Bank's failure to give them notice of any breach as required by Minn. Stat. § 336.2-607. However, the statue requires notice of any breach from the "buyer" of goods and the term buyer does not extend to third-party recipients of goods. *Independent School District No. 622 v. Bor-Son,* No. C5-84-1001 (Minn. Dist. July 28, 1988). In this case the buyer of the goods was Insulation Sales, not Bank, thus Bank had no duty to give defendants notice. Furthermore, in light of the evidence submitted by Bank tending to show that

Grace and Carey knew their products were a safety risk, they were not prejudiced by any failure on Bank's part to notify defendants of these same risks. *City of Greenville*, 640 F. Supp. at 566.

2. Implied Warranty

Grace and Carey argue that because the plans for the Federal Reserve building specified that asbestos fireproofing be used, no implied warranties of fitness for a particular purpose or of merchantability arose. Instead, argue defendants, the express warranty that the goods met the specifications, namely, that the fireproofing contained asbestos, displaces any implied warranties.

This argument ignores the fact that buyers specifications create express warranties which displace the implied warranty of merchantability only if the express warranty is inconsistent with the implied warranty. See comment to U.C.C. § 2-316; Minn. Stat. § 336.2-317. The implied warranty at issue here is created by Minn. Stat. § 336.2-314(2) (c) which provides that a seller impliedly warrants that goods sold are merchantable and fit for the ordinary purposes for which they are used. A product which is unreasonably dangerous is defective and breaches these implied warranties. *Farr v. Armstrong Rubber Co.*, 179 N.W.2d 64 (Minn. 1970). The only express warranty that was created by the specifications for the building was that the product supplied was asbestos fireproofing. This is not inconsistent with an implied warranty that the product is merchantable and free from defects in the form of safety hazard. Therefore, the specifications do not act to displace the implied warranties

claimed by Bank and a question of fact exists as to whether these warranties have been breached.

3. Express Warranty

Grace argues for summary judgment on the express warranty claim against it on the grounds that Bank has produced no evidence that Grace expressly warranted its product to be safe and suitable for use in public buildings.

In response Bank has supplied the court with copies of advertisements by Grace in which Grace claims that Monokote contained asbestos fibers which were "locked in" and that the product prevented "dusting" in air conditioning and ventilation systems. These same advertisements depict workers applying Monokote without the use of safety equipment. Bank claims that this and other advertisements were relied on by architects in drafting specifications for the Federal Reserve building.

That advertisements and other descriptions by a seller of a product may create express warranties is not disputed by Grace. See *Northern States Power Company v. ITT Meyer Industries*, 772 F.2d 405, 411 (8th Cir. 1985). The court finds that Bank has presented sufficient evidence to raise material questions of fact on its claim of express warranty and sufficient evidence to defeat the motion for summary judgment.

G. Punitive Damages

Both Grace and Carey argue that they are entitled to summary judgment on the issue of punitive damages

because under Minnesota law, a plaintiff may not recover punitive damages in a products liability action when injury to property is the only damage suffered. *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982).

Under Minn. Stat. § 549.20, Subd. 1, punitive damages may be awarded in circumstances where "the acts of the defendant show a willful indifference to the rights or safety of others." Taken as a whole, the allegations of the complaint support a claim for punitive damage considering the gravity of the danger involved in asbestos exposure and the alleged concealment by defendants of their knowledge of the dangers.

Accordingly, Grace's motion for summary judgment is GRANTED with respect to Counts 5, 6, 7, 8 and 9 and DENIED as to the remaining counts. Carey's motion for summary judgment is GRANTED with respect to Counts 6, 7, 8 and 9 and DENIED as to the remaining counts.

Dated:

August 30, 1988

/s/ Edward J. Devitt
EDWARD J. DEVITT
United States District Judge

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel. Governor Arch A. Moore, Jr., etc.,

Plaintiffs,

CIVIL ACTION NO. 86-C-458

vs

AAER SPRAYED INSULATIONS, et al.,

Defendants.

MEMORANDUM ORDER

This matter is before the Court on defendants' Motion to Dismiss all counts of the plaintiff's Amended Complaint. The Court has heard arguments of counsel and reviewed their briefs.

Count I of the Amended Complaint asserts a claim of strict liability and Count II states a negligence cause of action. Defendants move to dismiss claiming the State's damages are not compensable in tort because they are speculative and consist of "economic loss". It is clear that strict liability in tort may be used in West Virginia to recover for property damage when the defective product damages property only. *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W.Va. 1982). Hence, these two claims must be allowed to stand.

Count III alleges that defendants have created a public nuisance. "A nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort." *Martin v. Williams*, 141 W. Va. 595, 610-11, 93 S.E.2d 835, 844 (1956).

See also West v. National Mines Corp., 168 W. Va. 578, 285 S.E.2d 670 (1981); *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d (W.Va. 1985). This Court finds that the plaintiff has asserted a sufficient claim.

Count IV alleges that the defendants breached express and implied warranties given regarding their products. In *Burgess v. Sanitary Meat Market*, 121 W. Va. 605, 5 S.E.2d 785 (1939), the West Virginia Supreme Court established that "an implied warranty of fitness, independent of any statutory provisions, [meant] that the article sold is fit for human consumption." In a more recent case, the Court held that the requirement of notice under the Uniform Commercial Code does not extend to product liability actions. *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 35, 268 S.E.2d 296, 305 (1980). The defendant's motion to dismiss the plaintiff's breach of warranties claim is denied.

In Count V, the plaintiff asserts a claim for fraud and misrepresentation against the defendants. WVRCP Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *See also Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981). "[T]he reference to 'circumstances' [in Rule 9(b)] is to matters such as the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." 5C Wright & Miller, *Federal Practice & Procedure* 1297 (1969). Count V of plaintiff's complaint consists entirely of general allegations, which fail to plead the elements of fraud with particularlity. Plaintiff's allegations fail to indicate which defendants allegedly made misrepresentations, when and where they

made them, the contents of each misrepresentation, or that plaintiff justifiability relied upon these misrepresentations. Thus, plaintiff's fraud claim must be dismissed.

Count VI of the amended complaint alleges a cause of action in indemnity. In *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W.Va. 22, 268 S.E.2d 296, 300 (1980), the court stated that "[t]he general principle of implied indemnity arises from equitable considerations. At the heart of the doctrine is the premise that the person seeking to assert implied indemnity—the indemnitee—has been required to pay damages caused by a third party—the indemnitor." Therefore, under West Virginia law, a party seeking indemnity must have already been required to pay damages caused by the indemnitor. In the instant case, the plaintiff having failed to allege prior damage payments, its claim for indemnity cannot stand.

In Count VII, the plaintiff seeks restitution for the costs of abatement. Section 115 of the Restatement of Restitution states that "[a] person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if . . . the things or services supplied were immediately necessary to satisfy the requirements of public decency, health or safety." Restitution is acknowledged in West Virginia law as a viable cause of action and is particularly suitable to an asbestos property damage case.

Count XII of the amended complaint alleges conspiracy among the defendants. "A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some

purpose, not in itself unlawful, by unlawful means." *Dixon v. American Industrial Leasing Co.*, 162 W. Va. 832, 253 S.E.2d 150, 152 (1979); *Cook v. Heck's, Inc.*, 342 S.E.2d 453 (W. Va. 1986). In order to properly plead a civil conspiracy allegation, a plaintiff must allege the conspiracy with sufficient particularity to clearly identify the unlawful acts purportedly committed. In this case, the plaintiff has neither identified an unlawful purpose nor any unlawful means.

In Counts VIII, IX, X, XI, and XIII, the plaintiff alleges several remedies including respectively market share liability, enterprise liability, concert of action, alternate liability, and risk contribution. These legal theories have never been recognized in West Virginia. Furthermore, the cases which adopted these theories are factually distinguishable from the instant case.

ORDER

In consideration of the above, the Court hereby ORDERS that:

1. The defendant's Motion to Dismiss Counts I, II, III, IV, VII (strict liability, negligence, public nuisance, breach of express and implied warranties, and restitution) are DENIED.

2. The defendant's Motion to Dismiss Counts V, VI, XII, VIII, IX, X, XI, and XIII (fraud, indemnity, conspiracy, market share liability, enterprise liability, concert of action, alternate liability, and risk contribution) are GRANTED.

ENTER: September 4, 1987

/s/ Illegible
JUDGE