No. 116, ORIGINAL

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.

BRIEF OF DEFENDANT NATIONAL GYPSUM COMPANY IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

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No. 116, ORIGINAL

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SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF ALABAMA, et al.,

Plaintiffs,

against

W.R. GRACE & COMPANY, et al.,

Defendants.

BRIEF OF DEFENDANT NATIONAL GYPSUM COMPANY IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE COMPLAINT

Defendant National Gypsum Company[1] respectfully prays that the motion for leave to invoke the original jurisdiction of this Court over the complaint captioned *Alabama v. W.R. Grace & Co.* be denied in the exercise of the Court's discretion or, in the alternative, the case should be dismissed for lack of jurisdiction.

JURISDICTION

While the plaintiff states purport to invoke the jurisdiction of the Court pursuant to article III, section 2 of the United States Constitution and section 1251 of title 28 of the United States Code, original jurisdiction is lacking because this action involves claims between states and their own citizens and is therefore not within the federal judicial power.

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1. Pursuant to Rule 29.1 of the Rules of the Supreme Court, National Gypsum Company makes the following statement disclosing parents, non-wholly-owned subsidiaries and affiliates:

Aancor Holdings, Inc.

Valley Office & Industrial Park, Inc.

LaFarge Coppée S. A.

COUNTER-STATEMENT OF THE CASE

Unlike the states of Kentucky, Maryland, Minnesota, Mississippi, Pennsylvania, South Carolina, Virginia, and West Virginia, all of which have filed actions in their own state courts under their own states' laws to recover damages allegedly attributable to the presence of asbestos-containing materials in their buildings,[2] thirty states seek leave to file a single consolidated action in this Court allegedly for equitable relief.[3] No matter how fanciful plaintiffs' pleading, this action fundamentally is a suit for damages allegedly incurred because defendants manufactured and distributed to plaintiffs an allegedly defective product; and these claims, like the thousands of products liability cases filed annually in state and federal courts throughout the United States, sound in each state's law of tort and contract. Nor do the facts that the allegedly defective product is asbestos and the damages claimed are the costs of removal from publicly owned buildings magically convert these claims into ones of "serious magnitude" warranting the exercise of the Court's original jurisdiction.

Asbestos has been used since the beginning of the century in thousands of building materials installed in a variety of buildings, including elementary and secondary schools, colleges

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2. *Maryland v. Keene Corp.*, No. 1108600 (Cir. Ct. Anne Arundel County Md. filed Sept. 20, 1984); *Virginia v. Owens-Corning Fiberglas Corp.*, No. LJ-414-3 (Cir. Ct. City of Richmond Va. filed Feb. 26, 1985); *Minnesota v. ACandS, Inc.*, No. 99081 (Dist. Ct. Dakota County Minn. filed Mar. 20, 1985); *Kentucky v. United States Gypsum Co.*, No. 85-CI-1915 (Cir. Ct. Franklin County Ky. filed Dec. 30, 1985); *West Virginia ex rel. Moore v. Aaer Sprayed Insulations*, No. 86-C-458 (Cir. Ct. Monongalia County W.Va. filed July 17, 1986); *South Carolina v. W.R. Grace & Co.*, No. 87CP405052 (Ct. C.P. Richland County S.C. filed Sept. 18, 1987); *Moore ex rel. Mississippi v. Flintkote Co.*, No. 89-5138(2) (Cir. Ct. Jackson County Miss. filed Apr. 26, 1989); *Pennsylvania Dep't of Transp. v. Congoleum Corp.*, No. 45-MD-1990 (Commw. Ct. Pa. filed Feb. 12, 1990). The Minnesota case has been settled. Summary judgment for defendants has been entered in the Virginia case on the grounds that the case is barred by the applicable statute of repose. *Virginia v. Owens-Corning Fiberglas Corp.*, 238 Va. 595, 385 S.E.2d 865 (1989).

3. The original motion was filed by twenty-nine states. New Jersey has now filed a motion to intervene.

and universities, office buildings, commercial buildings, hospitals, churches, libraries, jails, airports, and residences, owned and operated by government entities and private consumers. In the past decade, growing public awareness of the link between asbestos exposure and disease[4] has led building owners to remove asbestos-containing products from their buildings at a cost of billions of dollars. There is a growing body of scientific evidence that such removals are unnecessary and indeed counter-productive;[5] nonetheless, the "fiber phobia"[6] persists.

Inevitably, building owners, looking for an external source of funding for these expensive removal projects, have sued the

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4. There is no dispute that prolonged exposure to high levels of asbestos has been linked with asbestosis, lung cancer, and mesothelioma. However, the level of exposure that has resulted in disease must be distinguished from the extremely low levels of asbestos fiber found in the air in buildings in which asbestos-containing products have been installed. For example, a 1987 EPA study found that air levels in a group of General Services Administration buildings were "so low as to be virtually indistinguishable from levels outside these buildings." *Hearings Before the Subcommittee on Health and Safety of the House of Representatives Committee on Education and Labor,* 101st Cong., 2nd Sess. (Apr. 3, 1990) (Statement of Linda J. Fisher, Assistant Administrator for Pesticides and Toxic Substances, U.S. Environmental Protection Agency at 12) (reproduced in Appendix at A-19) [hereinafter *Fisher Testimony*].

5. As the EPA recently advised Congress:

> Removal is often *not* a building owner's best course of action to reduce asbestos exposure. In fact, an improper removal can create a dangerous situation where previously none existed.

Fisher Testimony at 12 (App. at A-19); Mossman, Bignon, Corn, Seaton & Gee, *Asbestos: Scientific Developments and Implications for Public Policy,* 247 Science 294, 299 (1990); Mossman & Gee, *Asbestos-Related Disease,* 320 New Eng. J. Med. 1721, 1729 (1989); J. Spengler, H. Ozkaynak, J. McCarthy & H. Lee, *Summary of Symposium on Health Aspects of Exposure to Asbestos in Buildings* 21-22 (1989); *see also* Fumento, *Great Asbestos Rip-Off,* Reader's Digest, Jan. 1990 at 172; Editorial, *The Asbestos Removal Fiasco,* 247 Science 1017 (1990); *Risk is Seen in Needless Removal of Asbestos,* N.Y. Times, Jan. 19, 1990 at A20; Review & Outlook, *Puncturing a Panic,* Wall Street J., Sept. 18, 1989.

6. J. Spengler, H. Ozkaynak, J. McCarthy & H. Lee, *Summary of Symposium on Health Aspects of Exposure to Asbestos in Buildings* 7 (1989).

asbestos manufacturers. Since 1980, when the first asbestos-in-buildings case was filed by a New Jersey school district,[7] approximately 200 such cases have been filed in various state and federal courts throughout the United States. Though the cases involve different types of buildings, different size claims, and varying numbers of plaintiffs and defendants, the cases are all products liability actions seeking to compel defendant miners of asbestos and manufacturers of asbestos-containing products to reimburse the building owners for the costs of removal, containment, or repair of the products. While the level of environmental lifetime risk from exposure to airborne asbestos in buildings is less than the risk from one transcontinental flight per year, or eating one charcoal-broiled steak per week, or being killed by lightning,[8] the building owners premise their complaints on the allegation that the presence of the asbestos in the buildings creates an unacceptable health hazard making abatement imperative. *See, e.g.*, ¶¶ 9 and 16 of Plaintiffs' Complaint. Relying upon a panoply of legal theories — including negligence, strict liability, breach of warranty, fraud and misrepresentation, nuisance, and restitution — the plaintiffs in all these asbestos-in-buildings cases seek to have the defendants held liable for the cost of abatement.

The case which the states seek to bring before this Court is just one of these cases. However, by joining their claims together in a single action and then invoking their unique Constitutional position, the states seek to have their products liability claims resolved in a unique forum and thereby gain some priority over the other consumers of asbestos-containing building products.

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7. *Cinnaminson Township Bd. of Educ. v. United States Gypsum Co.*, No. 80-1842 (D.N.J. filed May 14, 1980).

8. Commins, *Estimations of Risk from Environmental Asbestos in Perspective* in Non-Occupational Exposure to Mineral Fibres 476, 484 (Bignon, Peto & Saracci ed. 1989). The EPA has recently acknowledged that "the present evidence suggests that building occupants face only a very slight risk." *Fisher Testimony* at 11-12 (App. at A-19).

SUMMARY OF ARGUMENT

The asbestos-in-buildings products liability claims of the thirty states who seek to invoke original jurisdiction in this case are heard more appropriately in their individual state courts, rather than in this Court. Unlike this Court, those courts are familiar with the individual state laws that will govern the states' claims and are equipped to handle the extensive fact-finding by a jury that resolution of these claims will require. Moreover, there is no factual or jurisprudential justification for affording the states access to this unique forum. First, the states' cost recovery claims are but a small piece of the much larger issue of asbestos-in-buildings currently being addressed by courts, legislatures, regulatory agencies, and scientists worldwide. Second, the complaint fundamentally seeks damages attributable to an allegedly defective product and such claims, even though made by states, do not involve significant concerns of federalism. Finally, the fact that the case involves asbestos in public buildings does not justify original jurisdiction inasmuch as the states are acting as ordinary consumers rather than as sovereigns. Accordingly, the motion for leave to file the complaint should be denied.

Should the Court reach the jurisdictional issue, the case should be dismissed because twenty of the defendants are citizens of the plaintiff states and such a case is not within the federal judicial power. The Court's original jurisdiction is but a subset of the federal judicial power and that power is constitutionally limited to "controversies between a State and citizens of another State." Moreover, this limitation cannot be circumvented by the states' asserting their individual claims only against their non-citizens. That proposal only confirms that this case consists of thirty separate actions which each state should pursue in its own courts.

ARGUMENT

I. ASSUMING THIS CASE IS ENCOMPASSED WITHIN THE FEDERAL JUDICIAL POWER, THE COURT SHOULD DENY LEAVE TO FILE THE STATES' JOINT COMPLAINT BECAUSE EACH STATE HAS AN ADEQUATE ALTERNATIVE FORUM AND THEIR CLAIMS DO NOT WARRANT THE EXERCISE OF THIS COURT'S ORIGINAL JURISDICTION.

By including actions by a state against non-citizens within the federal judicial power and vesting original jurisdiction over those cases in this Court, the Constitution assured these governments access to the nation's highest court for purposes of exercising their sovereign powers. However, that rationale does not support original jurisdiction each time a state seeks to sue a non-citizen. Accordingly, as the Court said in *Washington v. General Motors Corp.*, 406 U.S. 109, 113 (1972), when it refused to exercise original jurisdiction over eighteen states' antitrust claims against four automobile manufacturers, "[t]he breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired."

The Court's discretion to entertain suits by a state against citizens of another state is constrained by "the diminished societal concern in [the Court's] function as a court of original jurisdiction and the enhanced importance of [its] role as the final federal appellate court." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 499 (1971). Therefore, when a state can bring its claim elsewhere, the Court has almost always refused to exercise original jurisdiction; and the Court has established criteria for identifying those rare cases where original jurisdiction is warranted. Because this products liability case so clearly fails to satisfy those criteria, the Court should deny leave without reaching the jurisdictional issue addressed in Part II of this brief.

A. It Is Not Necessary That This Court Accept Jurisdiction Because Each State Could More Efficiently Sue The Defendants In Its Own State Courts.

The Court has stated that, "In the exercise of our original jurisdiction . . . we must also inquire whether recourse to that jurisdiction . . . is *necessary* for the State's protection." *General Motors,* 406 U.S. at 117 (emphasis added).[9] While plaintiffs contend that there is no forum where they can obtain jurisdiction over all the parties,[10] jurisdictional barriers do not prevent them from separately bringing their own claims in their own state courts. Contrary to plaintiffs' suggestion, if this Court declines to accept jurisdiction, the economic burden of asbestos abatement need not fall on each state's taxpayers nor precipitate the states' economic ruin (*see* Plaintiffs' Brief at 20-21); the states

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9. On occasion, the Court has refused leave to invoke its original jurisdiction even though the plaintiff had no alternative forum. *See United States v. Nevada,* 412 U.S. 534, 538-40 (1973); *Arizona v. New Mexico,* 425 U.S. 794, 796-97 (1976).

10. *See* Plaintiffs' Brief at 22-27. Plaintiffs contend that they could not collectively bring an action in a state tribunal because of problems of personal jurisdiction and class action manageability. While, as a practical matter, political pressures may prevent one state attorney general from suing in his colleagues' courts, *cf. Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. at 500, the two reasons proffered by the states do not mandate that conclusion: all of the defendants in this case are repeatedly sued in asbestos cases throughout the country without problems of personal jurisdiction; and if a class action of 30 states would not be manageable, why is a consolidated action any more so?

Moreover, there are serious questions whether the claims of the states are properly joined in a single action pursuant to Fed. R. Civ. P. 20(a), which is applicable to original actions in the Court pursuant to Sup. Ct. R. 17.2. That rule of civil procedure permits joinder where plaintiffs' right to relief arises "out of the same transaction [or] occurrence." Although the transactions between each state and the relevant manufacturers are arguably similar to one another, they are not the same transaction; the states' claims arise out of tens of thousands of sales of different products over decades. *See, e.g., Saval v. BL, Ltd.,* 710 F.2d 1027 (4th Cir. 1983); *Papagiannis v. Pontikis,* 108 F.R.D. 177 (N.D. Ill. 1985); *Paine, Weber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 564 F. Supp. 1358 (D. Del. 1983).

need only successfully sue the asbestos manufacturers in their own state courts — a difficult, but not impossible, task.[11]

Indeed, in addition to being possible, it will almost certainly be more efficient to try these actions separately before courts which are familiar with the governing state law and which have experience in receiving evidence and making findings of fact. Thus, plaintiffs' assertion that separate actions in state courts would be prohibitively expensive and would fail to promote judicial economy (Plaintiffs' Brief at 24) is belied by the fact that, even if there are a few common questions of fact in the states' cases,[12] these actions will by necessity be based on jurisprudence which differs from state to state and on factual issues which differ from building to building depending upon the type and condition of the asbestos-containing products. Moreover, unlike the Chinese menu approach to litigation set forth in Exhibit A to the proposed complaint, individual actions in a state's courts would allow each state to sue all the manufacturers of the products in its buildings, not merely its non-residents.

Thus, this Court should exercise its discretion to deny leave to file the complaint and invite the states to file their claims in their own state courts, as eight states have already done.

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11. Thus far, 26 asbestos-in-buildings cases have been tried to jury verdict, with the juries finding in favor of defendants in 14 cases and in favor of the plaintiffs in 12 cases (including one case that was tried twice and one case that was bifurcated for trial by product). See Appendix A at A-1 through A-4.

12. *See, e.g., In re Asbestos School Litigation*, 104 F.R.D. 422, 429 (E.D. Pa. 1984), *aff'd in part*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986) (identifying the following four common questions: "(a) the general health hazards of asbestos; (b) defendants' knowledge or reason to know of the health hazards of asbestos; (c) defendants' failure to warn/test; and (d) defendants' concert of action and/or conspiracy involving formation of and adherence to industry practices").

B. This Court Is Not The Appropriate Forum For Resolving This Products Liability Action, Which Involves No Significant Federal Interests And Only A Small Segment Of The Asbestos-In-Buildings Controversy, But Will Require Application Of Varying State Laws And Intensive Fact-Finding.

In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), the Court declined to exercise its original jurisdiction over a state's case complaining of an alleged environmental nuisance for four reasons. First, the case would be based on state law and would raise no serious issues of federal law. Second, the case presented complex and technical factual questions which a court unaccustomed to fact-finding could not be expected skillfully to adjudicate. Third, several governmental and quasi-governmental organizations already were grappling with the environmental problems complained of in the complaint. Fourth, the plaintiff's own state courts, under modern *in personam* jurisdiction, could adjudicate the controversy. Those same factors militate against the Court's accepting original jurisdiction in this matter.

1. In this multi-state products liability action, each state's claims will be based on its own state law; and this Court has no claim to special competence for such a case.

Given the Court's paramount responsibilities with respect to the development of federal common, statutory, and constitutional law, the extent to which the claims of an original jurisdiction plaintiff are based on state rather than federal law is a significant factor in the decision whether to accept original jurisdiction. *See Ohio v. Wyandotte,* 401 U.S. at 497- 98. Given the number of cases raising significant federal issues for which this Court is the forum of final appellate review, this Court has not, and should not, entertain cases involving issues of state law to which the Court has "no claim to special competence." *Id.*

While plaintiffs have striven to cast this suit as one involving a uniform, national law of restitution,[13] at bottom it remains a products liability action in which each state's claim must be governed by its own substantive law.[14] Moreover, even if, unlike most asbestos plaintiffs,[15] these states choose to limit themselves to a single theory of recovery, the law of restitution differs from state to state.

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13. The plaintiffs premise their claim for restitution on the public assistance doctrine of the *Restatement of Restitution* § 115 (1937), which 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.

The use of the public assistance doctrine in asbestos abatement claims recently has been criticized. Stanley, *Asbestos in Schools — The Asbestos Hazard Emergency Response Act and School Asbestos Litigation*, 42 Vand. L. Rev. 1685 (1989).

14. *See, e.g., In re Asbestos School Litigation*, Master File No. 83-0268 (E.D. Pa. Jan. 27, 1989 and March 20, 1990) (Pretrial Orders Nos. 167, 220, and 224) (applying the laws of Virginia, Tennessee, and South Carolina to the claims of class members, depending on where they reside); *Sisters of St. Mary v. Aaer Sprayed Insulation*, 151 Wis. 2d 708, 445 N.W.2d 723 (Wis. App.), *review denied*, 449 N.W.2d 275 (Wis. 1989) (refusing class certification in an asbestos-in-buildings case because of the necessity to apply varying state laws); *see also Phillips Petroleum Corp. v. Shutts*, 472 U.S. 797 (1985).

15. *See, e.g., Board of Educ. of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 546 N.E.2d 580, 584 (1989) (allowing claims for negligence, strict liability, and negligent misrepresentation, but rejecting claims for restitution, concert of action, intentional misrepresentation, consumer fraud, breach of warranty, and an implied cause of action under Illinois' Asbestos Abatement Act); *City of New York v. Keene Corp.*, 132 Misc. 2d 745, 505 N.Y.S.2d 782 (1986), *aff'd*, 129 A.D.2d 1019, 513 N.Y.S.2d 1004 (1987) (allowing claims for negligence, strict liability, indemnity, and restitution, but rejecting claims for nuisance, public nuisance, fraud, implied warranty, express warranty, and conspiracy); *City of Boston v. Keene Corp.*, No. 82254 (Super. Ct. Suffolk County Mass. Apr. 13, 1987) (allowing claims for negligence, public nuisance, and implied warranty, but rejecting claims for restitution, strict liability, fraud, misrepresentation, and conspiracy.)

In many states, restitution is not a cause of action; it is a remedy that, like damages or injunctive relief, may be awarded only if a plaintiff prevails on a cause of action such as negligence or breach of contract. D. Dobbs, *Handbook on the Law of Remedies* §4.1 at 222 (1973).[16] In these states, including two plaintiffs in this action, a plaintiff may not assert a claim in restitution independently of other causes of action, any more than it may assert separate counts for negligence and damages.[17] Yet that is precisely what the plaintiffs attempt in their complaint.

In other states, restitution is available when the plaintiff has relieved the defendant of the burden of performing a duty imposed either by statute[18] or by some common law theory.[19] In the present case, the defendants are under no duty imposed by either federal or state statute to abate the asbestos-containing

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16. Professor Dobbs explains that restitution "is not a form of action, but a general description of the relief afforded. It is thus not a parallel to terms like assumpsit, or trespass, or conversion, but parallel to terms like damages, or injunction."

17. *See, e.g., Franklin County School Bd. v. Lake Asbestos of Quebec, Ltd.*, No. 84-AR-5435-NW (N.D. Ala. Feb. 13, 1986); *Crotched Mountain Rehabilitation Center, Inc. v. National Gypsum Co.*, No. C85-488-L (D.N.H. Dec. 27, 1985); *Independent School Dist. No. 709 v. Air-O-Therm Application Co.*, No. 155716, slip op. at 8 (Dist. Ct. St. Louis County Minn. May 20, 1987). In *Franklin County*, the court explained its dismissal of the claim:

> Count VII is entitled "Restitution." It is difficult to conceive of a prayer for *relief* as constituting a separate cause of action. Plaintiff in its brief bottoms its Count VII on Restatement of Restitution, § 115. The non-existence of "restitution" as a separate legal remedy in Alabama, when there is no duty by any defendant here shown requiring it to remove an offending asbestos product, closes the door on Count VII.

Slip op. at 12 (emphasis in original).

18. *See, e.g., Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *United States v. Dae Rim Fishery Co.*, 794 F.2d 1392 (9th Cir. 1986); *United States v. Consolidated Edison Co. of New York, Inc.*, 580 F.2d 1122, 1127 (2d Cir. 1978).

19. *See, e.g., State v. Schenectady Chemicals, Inc.*, 103 A.D.2d 33, 38-39, 479 N.Y.S.2d 1010, 1013-14 (1984), *aff'g*, 117 Misc. 2d 960, 963-64, 459 N.Y.S.2d 971, 975 (1983); *Brandon Township v. Jerome Builders, Inc.*, 80 Mich. App. 180, 263 N.W.2d 326 (1977).

materials from the plaintiffs' facilities;[20] thus, in these states, one must look to state common law to determine whether there is such a duty. Here, too, there is significant variation from state to state.

Since the Attorney General of the United States first suggested restitution as a viable theory of recovery for asbestos-in-buildings claimants,[21] state and federal courts have considered whether the manufacturer of asbestos-containing materials has a duty to remove those products from those buildings. In Tennessee, there is no such duty and the courts have consistently rejected a claim sounding in restitution.[22] Similarly, the

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20. To the contrary, the Asbestos Hazard Emergency Response Act ("AHERA"), a federal statute pertaining to asbestos in school buildings, states explicitly that it does not create a cause of action. 15 U.S.C. § 2649(d) (1988).

21. Pursuant to the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §§ 3601-3611 (1982), the United States Attorney General was required to advise Congress whether the federal government could obtain reimbursement from the asbestos product manufacturers for grants to school districts pursuant to the act; the Attorney General concluded that cost recovery actions were better pursued by the building owners and, analogized the schools' cases to cases in which § 115 was the basis for the remedy of restitution. U.S. Dep't. of Justice, *The Attorney General's Asbestos Liability Report to the Congress* iv-v and 117-31 (1981). However, the cases relied on by both the Attorney General and the states involved breaches of specific duties, for which a restitutionary remedy was deemed proper because plaintiffs had undertaken performance of the defendants' statutory or common law duty.

22. In *City of Greeneville v. National Gypsum Co.*, No. CIV-2-83-294, slip op. at 12-13 (E.D. Tenn. Dec. 21, 1983), the district court dismissed a restitution claim based on § 115:

> The plaintiff argues that federal legislation and regulations requiring abatement of asbestos problems in public buildings imposes an implied duty on the defendants. Such a duty simply cannot be implied therefrom. Nor can such a duty be implied simply because the plaintiff alleges that it has a contract or tort action against the defendants. To infer such a duty under these circumstances would allow plaintiffs in all products liability cases to recover under a § 115 theory. Obviously this was not the purpose of § 115, for such an interpretation would provide plaintiffs an avenue to circumvent the traditional requirements for recovery in products liability cases merely by alleging violations of § 115.

See, e.g., Methodist Health Systems v. W.R. Grace & Co., No. 85-2553 GA

Supreme Court of Illinois recently held that manufacturers of asbestos-containing products have no duty to abate their products from buildings, even though plaintiffs had adequately pleaded claims in contract and tort:

> There must be an independent basis which establishes a duty upon the defendant to act and the defendant must have failed to abide by that duty. To hold otherwise would create a restitution action any time there is a products liability claim.

Board of Educ. of Chicago v. A, C & S, Inc., 131 Ill. 2d 428, 466, 546 N.E.2d 580, 598 (1989).[23] The law in New Hampshire is to similar effect.[24]

Other jurisdictions have allowed claims for restitution, finding them supported by other causes of action. Thus, in Michigan, a claim under section 115 was allowed when it was supported by common law theories such as nuisance, fraud, and misrepresentation:

> liability under §115 can arise not only when one performs another's unperformed statutory duty, but an unperformed duty arising out of the common law, such as . . . a common law duty to abate nuisances . . . . [T]he duty allegedly not performed by defendants arises out of the several common law tort theories alternatively pled in the complaint.

Board of Educ. of Detroit v. Celotex Corp., No. 84- 429634NP,

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(W.D. Tenn. Apr. 17, 1989); *County of Knox v. Celotex Corp.*, No. CIV-3-87-925 (E.D. Tenn. Dec. 22, 1988).

23. *See also Altoona Area Vocational Technical School v. United States Mineral Products Co.*, C.A. 86-2498, slip op. at 7-8 (W.D. Pa. Apr. 13, 1988) also reported in Asb. Litig. Rep. (Andrews June 3, 1988) ("Section 115 is intended to provide relief for those who assume another's duty to the public, not to provide relief for those whose duty to the public is triggered by the improper actions of another party").

24. In *Town of Hooksett School Dist. v. W.R. Grace & Co.*, 617 F. Supp. 126, 134 (D.N.H. 1984), the district court dismissed the claim for restitution stating "[p]laintiff appears to have been acting as a volunteer when it removed the asbestos; perhaps a prudent volunteer, but nonetheless a volunteer"; *see also Crotched Mountain Rehabilitation Center, Inc. v. National Gypsum Co.*, No. C85-488-L (D.N.H. Dec. 27, 1985).

slip op. at 51 (Cir. Ct. Wayne County Mich. Feb. 1, 1988).[25] Similarly, in North Dakota, the requirement of an independent duty to act was deemed satisfied by allegations of fraud, nuisance, and breach of warranty. *Hebron Public School Dist. No. 13 v. United States Gypsum Co.*, 690 F. Supp. 866, 869 (D.N.D. 1988). That same conclusion was reached in a case brought by New York City. *City of New York v. Keene Corp.*, 132 Misc. 2d 745, 749-51, 505 N.Y.S.2d 782, 785-87 (1986), *aff'd*, 129 A.D.2d 1019, 513 N.Y.S.2d 1004 (1987).[26]

By contrast, in a case filed by Minnesota in its own state court, the court found that Minnesota law imposed a duty "to remove [a defective] product." The court never referred to the state's other causes of action, but instead relied on an underlying "duty to refrain from putting abroad in the marketplace a defective product." *In re State and Regents' Building Asbestos Cases*, Nos. 99081, 99082, slip op. at 4 (Dist. Ct. Dakota County Minn. July 23, 1986).[27] Similarly, Colorado, in *Adams-Arapahoe School Dist. v. Celotex Corp.*, 637 F. Supp. 1207 (D. Colo. 1986), has rejected the argument that there is "no duty to remove," although this conclusion was never explained.[28]

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25. *See also Bridgeport-Spaulding Community School Dist. v. W.R. Grace & Co.*, No. 85-22194-NZ-3 (Cir. Ct. Saginaw County Mich. May 30, 1989) (asbestos property damage suit based on common law nuisance theory).

26. *Brooklyn Law School v. Raybon, Inc.*, No. 40959/88, slip op. at 6-7 (Sup. Ct. N.Y. County N.Y. Mar. 29, 1989), also reported in 1 Asbestos Prop. Actions B-1 (Mealey's Litig. Rep. Apr. 21, 1989) (restitution and indemnity claims grounded on breaches of duty alleged in negligence and strict liability counts).

27. *See also Federal Reserve Bank of Minneapolis v. Carey Canada, Inc.*, No. CIV-3-86-185, slip op at 5-6 (D. Minn. Aug. 30, 1988), also reported in 1 Nat. J. of Asbestos-in-Buildings Litig. 24 (McGuire Sept. 9, 1988); *but see Independent School Dist. No. 709 v. Air-O-Therm Application Co.*, No. 155716, slip op. at 8 (Dist. Ct. St. Louis County Minn. May 20, 1987).

28. A subsequent Colorado case stated that it was doubtful that manufacturers of asbestos-containing materials owe building owners any duty to abate; it did not dismiss the restitution claim because, unlike the states here, the plaintiff was simultaneously pursuing other theories of relief and the court did not believe that a judgment on the restitution claim would have any effect on the case. *Perlmutter v. United States Gypsum Co.*, No. 87-M-510, slip op.

In short, there is a panoply of differing state laws which must govern the thirty states' claims, even if their claim is limited to restitution. Given that this case would be based on state laws — and a diverse and evolving matrix of state laws at best — and would raise no serious issues of federal law, this Court should deny leave to file this complaint.

2. The resolution of these claims will require extensive product-specific fact-finding, a task for which this Court is ill-equipped.

When deciding whether to exercise original jurisdiction, this Court also considers the extent to which the resolution of plaintiffs' claims will require extensive fact-finding. The Court has recognized that it is "structured to perform as an appellate tribunal, ill-equipped for the task of fact-finding." *Ohio v. Wyandotte,* 401 U.S. at 498. It is unrealistic to expect this Court to preside over the trial by jury to which defendants are constitutionally entitled;[29] however, it would be equally unre-

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at 6 (D. Colo. Sept. 15, 1987). Here, in the absence of a restitution claim, the states have not stated a claim for relief.

29. Recognizing that this Court is not equipped to empanel a jury, plaintiffs' decision to limit their theories of recovery to restitution and their characterization of that claim as "equitable" apparently is an effort to deprive defendants of their right to jury trial. The reimbursement of abatement costs sought by plaintiffs presents legal issues requiring a jury trial under the seventh amendment. *See In re Acushnet River and New Bedford Harbor: Proceedings re Alleged PCB Pollution,* 712 F. Supp. 994, 1002 (D. Mass. 1989), holding that defendants were entitled to a jury trial because the restitution of pollution abatement costs could not be characterized as an equitable remedy; "the label 'restitution' is not a talisman before which all distinctions between legal and equitable issues must disintegrate." In this case, plaintiffs' claim for restitution is fundamentally one for legal damages, requiring a jury trial. *See In re Asbestos School Litigation,* 104 F.R.D. at 438:

> [P]laintiffs seek equitable restitution for the costs of asbestos abatement remedial action already undertaken. They seek reimbursement under this theory for the monies expended performing a duty which they claim was the responsibility of the defendants.
>
> Despite the ingenuity of plaintiffs' claims for equitable remedies, this case remains at bottom, one for legal damages.

Moreover, plaintiffs seek punitive damages (and justify the exercise of this

alistic, even without a jury and with the services of a competent special master, to expect the Court to perform the complicated fact-finding that this case will demand. *See* 401 U.S. at 504.[30]

In the case at bar, liability for restitution will require a finding, on a building-by-building and product-by-product basis, of an asbestos hazard requiring immediate abatement to protect building occupants. Section 115 sets a standard for restitution for services that were "*immediately necessary* to satisfy the requirements of public . . . health . . ." (emphasis added). While the EPA has precluded the application of certain asbestos-containing products since the 1970's[31] and requires their removal prior to building demolition or renovation,[32] it has never found that the mere presence of asbestos-containing materials presents a hazard which makes removal "immediately necessary." To the contrary, just this month an Assistant Administrator of the Environmental Protection Agency testified before Congress that the mere presence of asbestos on an

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NOTES *(Continued)*

Court's original jurisdiction on the need to distribute any punitive damages awarded among the states) and that claim assuredly requires a jury trial.

30. *Compare Maryland v. Louisiana,* 451 U.S. 725, 759-60, 761 n.1 (1981), which the Court decided on the pleadings.

31. EPA National Emission Standards for Hazardous Air Pollutants, 40 C.F.R. §§61.140-.156 (1989). Promulgated under the Clean Air Act, 42 U.S.C. §§7401-7642 (1982 & Supp. V 1987), these regulations apply to outdoor air only. EPA Toxic Substances; Asbestos Abatement Projects, Final Rule: Supplementary Information, 51 Fed. Reg. 15722, 15727 (Apr. 25, 1986); *see also* EPA Proposed Standards for Asbestos, Beryllium, Mercury, 36 Fed. Reg. 23239 (Dec. 7, 1971).

32. The EPA's "NESHAP" regulations impose controls on demolition or renovation of buildings in which asbestos-containing materials have been installed. EPA National Emission Standards for Hazardous Air Pollutants, 40 C.F.R. §§61.140-.156 (1989). However, the EPA has distinguished NESHAP removals from the removals that the states contend are necessary:

> Clearly, asbestos removal before the wrecking ball swings into action is appropriate to protect public health. However, this cannot be said of arbitrary asbestos removal projects, which, as noted above, can actually increase health risk unless properly performed. This, in part, is why EPA has *not* mandated asbestos removal from buildings beyond the NESHAP requirement . . . .

Fisher Testimony at 13 (App. at A-20).

auditorium ceiling "no more implies disease than a potential poison in a medicine cabinet or under a kitchen sink implies poisoning." *Fisher Testimony* at 11 (App. at A-18).[33] This conclusion is premised on EPA's belief that asbestos-in-building situations are "hazard specific." *See* EPA Asbestos-Containing Materials in Schools, Final Rule: Supplementary Information, 52 Fed. Reg. 41826, 41838 (Oct. 30, 1987). If EPA is correct that each individual situation must be individually assessed, then similarly building-specific fact-finding will be required to determine the accuracy of the states' allegation of an "imminent danger to public health."[34]

However, even should there be a determination that the mere presence of asbestos-containing materials in a building presents an unreasonable hazard to buildings such that abatement is immediately necessary to protect public health — a result in no way supported by science, regulations, or plaintiffs' conduct — a host of other factual issues nonetheless will remain to be resolved before there can be any determination of liability. An illustrative, but by no means complete, list of issues would include, on a building-by-building and product-by-product basis: product identification, dates of installation, and the state's

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33. *Accord* letter from Lee M. Thomas, EPA Administrator, to George Bush, President of the Senate, and James C. Wright, Jr., Speaker of the House of Representatives, at 2 (Feb. 26, 1988), included in U.S. Environmental Protection Agency, *EPA Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* (1988) [hereinafter *Thomas Letter*] ("it is not the mere presence of asbestos which poses a health risk to building occupants; the true hazard is presented by damage and disturbance of that asbestos which releases fibers to the air that are inhaled by people") (reproduced in Appendix B at A-6).

34. Indeed, the need in a restitution claim for immediate action is underscored by the decision in the *City of Boston* case, where the court dismissed plaintiffs' restitution claim for failure to state a claim, reasoning:

> Where, as here, plaintiffs have not yet made most of the repairs they allege are necessary and have not shown what repairs have been done, the lack of immediacy is obvious. Without such immediacy, a claim for restitution cannot lie.

City of Boston v. Keene Corp., No. 82254, slip op. at 3 (Super. Ct. Suffolk County Mass. Apr. 13, 1987); *see also University of Vermont v. W.R. Grace & Co.*, ___Vt. ___, 565 A.2d 1354, 1356 n. 2 (1989).

abatement activities. These issues involve numerous factual questions, such as:

1. *Which asbestos-containing products are in which state buildings, how much product is present, where is it located, and what is its condition?* As plaintiffs acknowledge, asbestos was used in thousands of different types of products, including acoustical plaster, fireproofing, thermal insulation, ceiling tiles, floor tiles, cloth, etc. Moreover, the term "asbestos" itself refers to a group of minerals that differ in composition, morphology, and biologic effects.[35] Under EPA regulations, different products, by virtue of their formulation and accessibility, may be more or less in need of abatement. *See* EPA Regulations Concerning Asbestos-Containing Materials in Schools, 40 C.F.R. §763.90 (1989). Accordingly, courts have often bifurcated the trial of asbestos-in-buildings cases along product lines.[36] At a minimum, any determination of liability would require specific factual findings concerning the products for which the plaintiffs seek damages. In *Washington v. General Motors Corp.*, 406 U.S. at 115-16, original jurisdiction was denied in part because of the significance of local geographic and meteorological conditions to the air pollution claims at issue. Similarly, in asbestos-in-buildings litigation, the use of each

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35. Building products generally contain chrysotile rather than amphibole asbestos and therefore pose a lesser health concern. Mossman, Bignon, Corn, Seaton & Gee, *Asbestos: Scientific Developments and Implications for Public Policy*, 247 Science 294, 299 (1990) ("[t]he available data and comparative risk assessments indicate that chrysotile asbestos, the type of fiber found predominantly in U.S. schools and buildings, is not a health risk in the non-occupational environment").

36. *See, e.g., Maryland v. Keene Corp.*, No. 1108600 (Cir. Ct. Anne Arundel County Md. Apr. 2, 1990) (scheduling separate trials relating to surface treatments and pipe and boiler insulation); *Mayor of Baltimore v. Keene Corp.*, No. 842680681/ CL25639 (Cir. Ct. Baltimore City Md. Dec. 5, 1989) (pretrial order arranging trials for surface treatment, pipe and boiler insulation, and floor tile products); *City of Boston v. Keene Corp.*, No. 82254 (Super. Ct. Suffolk County Mass. Aug. 1, 1989) (same); *Cincinnati Bd. of Educ. v. Armstrong World Indus.*, No. A8405380 (Ct. C.P. Hamilton County Ohio Sept. 21, 1989) (same).

building and the unique conditions of the various products are important to an assessment of the relative risk to building occupants.

2. *Which company manufactured those products?* There can be no determination of any defendant's liability to any state, nor even a settlement, until the company which produced each particular asbestos-containing product in each particular building is identified. The history of cases filed by other states is instructive in this regard. As a result of an order requiring Minnesota to identify the products for which it sought damages, the case was reduced in size from one involving 4,699 buildings to one involving 109 buildings. *In re State and Regents' Building Asbestos Cases,* Nos. 99081, 99082 (Dist. Ct. Dakota County Minn. June 17, 1986) (Pretrial Order No. 5). Similarly, in West Virginia's case, where a similar order was entered, 107 buildings are now at issue rather than over 400. *State of West Virginia Public Building Asbestos Litigation,* No. 86-C-458 (Cir. Ct. Monongalia County W. Va. Dec. 9, 1988) (Pretrial Order No. 12). Finally, the *State of Maryland* case has been reduced in scope from approximately 1000 buildings to fewer than 100, and the parties have just completed a series of hearings before special masters to resolve the parties' product identification disputes. *Maryland v. Keene Corp.,* No. 1108600 (Cir. Ct. Anne Arundel County Md. Jan. 12, 1988) (Pretrial Order No. 7). Similar requirements would need to be imposed on each of the states here.

3. *When was each asbestos-containing material sold?* This issue is relevant to whether the states' claims are barred by the applicable statute of repose. All of the claims in one state have already been held to be so barred. *Virginia v. Owens-Corning Fiberglas Corp.,* 238 Va. 595, 385 S.E.2d 865 (1989). In Maryland, the state's claims for many buildings have been held to be barred because of a Maryland statute of repose. *Maryland v. Keene Corp.,* No. 1108600 (Cir. Ct. Anne Arundel County Md. Sept. 1, 1989) (order granting summary judgment); *see also Baltimore County v. Keene Corp.,* No. 84-CG-1776 (Cir. Ct. Baltimore County Md. Apr. 12, 1988) (order granting summary

judgment).[37] However, even in those states where a statute of repose is not applicable, the date of installation is relevant to whether the asbestos-containing product in a building was sold when the state of medical and scientific knowledge imposed a duty on the manufacturer to test or to warn. In those states where a "state of the art" defense is recognized,[38] defendants' liability will differ depending on when the asbestos-containing materials in each building were installed. Thus, there will need to be a factual determination of when each defendant should have known of the alleged hazard to building occupants and whether its asbestos-containing products were in a given building before or after that date.

4. *What, if any, abatement activities have already been undertaken in each building; what, if any, abatement activities will be necessary in the future for each building; and how much will these abatement activities cost?* The amount of damages incurred will be unique to each state and will depend on factors like the number of buildings in which asbestos-containing products have been installed, the quantity and type of material in each building, the condition of the material, and the extent to which the material has been removed or otherwise abated.

This abbreviated list of the factual questions which must be resolved before there can be any determination of liability strongly suggests that this Court should deny leave to file this complaint.

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37. Frequently associated with statute of repose issues are statute of limitations issues. Assuming that not all the states are protected by the doctrine of *nullum tempus occurrit republicae* (time does not run against the state), this issue raises the question when did each *plaintiff* know, or when should it have known, that the presence of asbestos-containing products in its buildings allegedly pose an unreasonable risk to building occupants?

38. *Compare Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 464 A.2d 288 (1983) (defendants' use of a "state of the art" defense in strict products liability actions is reasonable and permissible) *with Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) *and Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984) (former asbestos manufacturers may not use "state of the art" defense to show that warnings were impossible in failure-to-warn strict liability actions).

3. The resolution of the states' asbestos abatement claims will not resolve the asbestos-in-buildings issue currently being addressed by courts, legislatures, regulatory agencies, and scientists worldwide.

This Court has refused to exercise its original jurisdiction where the issue to be litigated is but "a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 503. While the states seek to distinguish *Wyandotte* on the grounds that "the issue of asbestos cost recovery is not currently being addressed other than through building-specific lawsuits in the courts" (Plaintiffs' Brief at 23), the issue of cost recovery is but "a small piece of a much larger" issue: the underlying issue of when exposure to asbestos presents an unreasonable risk.

The principal question that divides plaintiffs and defendants in asbestos-in-buildings cases — whether "the low-level exposure to asbestos constitutes an excessive risk of harm . . . . or whether only a higher concentration creates a danger . . . "[39] — is one that is currently being addressed not only in the courts but also by legislatures,[40] regulatory agencies,[41] and scientists worldwide.[42] For example, as a result of the EPA's advising

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39. *In re School Asbestos Litigation*, 789 F.2d 996, 1009 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

40. *See, e.g.*, Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. §§2641-2655 (1988); Asbestos School Hazard Abatement Act, 20 U.S.C. §§4011-4022 (Supp. II 1984); Asbestos School Hazard Detection and Control Act, 20 U.S.C. §§3601-3611 (1982).

41. *See, e.g.*, EPA Asbestos in Public and Commercial Buildings; Public Meetings, 54 Fed. Reg. 36234 (Aug. 31, 1989) (giving notice of EPA public policy dialogue); OSHA Occupational Exposure to Asbestos, 29 C.F.R. §1910.1001 (1987), being revised pursuant to *Construction Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1258 (D.C. Cir. 1988).

42. There is a growing consensus in the international scientific community that the exposures experienced by building occupants do *not* pose a health concern. *See, e.g.*, Commins, *Estimations of Risk from Environmental Asbestos in Perspective* in Non-Occupational Exposure to Mineral Fibers 476, 484 (Bignon, Peto, & Saracci ed. 1989); J. Spengler, H. Ozkaynak, J. McCarthy & H. Lee, *Summary of Symposium on Health Aspects of Exposure to Asbestos in*

Congress that "important deficiencies in the information base . . . limit the Agency's present ability to . . . make recommendations concerning the regulation of asbestos in public and commercial buildings,"[43] Congress appropriated two million dollars, to be matched by contributions from the private sector, for scientific studies concerning asbestos exposures in buildings and the effectiveness of asbestos management and abatement strategies. *See* H.R. Rep. No. 100-817, 100th Cong., 2d Sess. 15 (1988). Following the completion of those studies, EPA can be expected to consider whether to issue the federal regulations of asbestos in the states' buildings, which plaintiffs believe are "inevitable." Plaintiffs' Brief at 18. Thus, the issue of what responses are necessary for asbestos in buildings has been placed in the hands of the scientific and regulatory communities. This Court need not, and should not, devote its resources to considering the issue.

Accordingly, the very developments which lead the states to characterize this litigation as involving a "National Asbestos Problem" worthy of the Court's attention in fact demand the opposite result.

4. The states have not made claims of "serious magnitude" as this standard has been interpreted by this Court.

In deciding whether to exercise its original jurisdiction, the Court has looked to "the seriousness and dignity of the claim." *Illinois v. Milwaukee,* 406 U.S. 91, 93 (1972) (denying original jurisdiction to Illinois' suit for pollution of Lake Michigan). Although plaintiffs admit that the sheer number of states petitioning this Court does not, in itself, warrant the assumption of jurisdiction, they nonetheless contend that their claims are of

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NOTES *(Continued)*

Buildings 21 (1989); R. Doll & J. Peto, *Asbestos: Effects on Health of Exposure to Asbestos* 53 (1985); *Report of the Royal Ontario Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario* 585 (1984).

43. U.S. Environmental Protection Agency, *EPA Study of Asbestos-Containing Materials in Public Buildings: A Report to Congress* 21 (1988); *see also Thomas Letter,* App. at A-9.

sufficiently "serious magnitude" to warrant the exercise of original jurisdiction. Plaintiffs' Brief at 21.

First, trying to come beneath the wing of cases such as *Maryland v. Louisiana,* 451 U.S. 725, 743-744 (1981),[44] which recognize that the Court's original jurisdiction is properly asserted in controversies between states which inherently raise "unique concerns of federalism," plaintiffs argue that this case involves competition among the plaintiffs for the limited resources of the defendants. The assumption underlying this argument is that plaintiffs will win substantial awards which defendants will be unable satisfy; the states ask this Court to provide a forum for the states to divide the defendants' assets. National Gypsum vigorously disputes the states' assumption. But even if any of the defendants had insufficient assets to satisfy its asbestos obligations, the proper forum for dividing that company's assets would be the bankruptcy courts, not this Court.[45] The relations among states will be affected only to the extent that they, like other asbestos plaintiffs, claim a portion of the defendant's estate. There is no precedent for the exercise of original jurisdiction in this Court based upon such a speculative potential effect on federalism. Moreover, the states should not be permitted to utilize their ability to invoke the original jurisdiction of this Court to obtain a priority over other consumers allegedly injured by such a company's products.

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44. *Maryland v. Louisiana* was a suit by several states, the U.S. Federal Energy Regulatory Commission, and a number of pipeline companies, challenging a Louisiana tax on natural gas. Under 28 U.S.C. §1251(a)(1) (1976), the Court had *exclusive* jurisdiction of the case. By contrast, this case has been brought under 28 U.S.C. §1251(b)(3) (1982), which establishes this Court's original but concurrent jurisdiction over actions by a state against the citizens of another state.

45. *See, e.g., In re Raymark Indus.,* 99 Bankr. 298 (Bankr. E.D. Pa. 1989); *In re Standard Insulation, Inc.,* No. 86-03413-KMS-11 (W.D. Mo.); *In re Forty-Eight Insulations, Inc.,* No. 85-B-5062 (N.D. Ill.); *In re Johns-Manville Corp.,* Nos. 82-B-11656 — 82-B-11676 (S.D.N.Y.); *In re Amatex Corp.,* No. 82-05220K (E.D. Pa.); *In re UNR Indus., Inc.,* Nos. 82-B09841 — 820-B-9851 (N.D. Ill.).

Similarly, plaintiffs try to insinuate a conflict among the states premised on the frequently made argument that defendants should not be repeatedly subjected to punitive damage awards in mass tort litigation.[46] Plaintiffs' Brief contains a lengthy quotation from the dissenting opinion in *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1333 (5th Cir. 1985), to the effect that only this Court has the ability to establish a federal common law governing the availability of punitive damages in mass tort litigation. Without suggesting that the states support such a uniform rule, and indeed implying to the contrary, the states quote from the *Jackson* dissent in support of the unrelated argument that the Court should exercise its original jurisdiction in this case to preclude awards of punitive damages in favor of some states that will impair the ability of other states to recover even compensatory damages. While National Gypsum Company has argued that due process precludes repeated awards of punitive damages for the same conduct, the consolidated action proposed by the states will not accomplish the states' objective of insuring that punitive damage awards in favor of one asbestos plaintiff will not impair the ability of other asbestos plaintiffs to recover damages. As this Court is aware, asbestos litigation is not limited to these thirty states; it includes over 60,000 asbestos personal injury claimants, all the

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46. *See, e.g., In re School Asbestos Litigation*, 789 F.2d at 1004-05; *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1571 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J. dissenting), *cert. denied*, 459 U.S. 988 (1982); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 526 (5th Cir. 1980), *vacated in part en banc*, 750 F.2d 1314 (5th Cir.), *questions certified*, 757 F.2d 614 (5th Cir.), *certification denied*, 469 So. 2d 99 (Miss. 1985), *subsequent opinion*, 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233 (D.N.J. 1989); *In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mandamus denied sub. nom. In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887, 898 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

nation's school districts, as well as scores of other building owners, including the twenty states that have not joined in this action. Thus, the states' proposal suffers from the same fatal flaw that led the Third Circuit to overturn the certification of a mandatory punitive damages class for the nation's school districts in asbestos litigation:

> If a limit is ever placed on the total punitive damages to be imposed on the asbestos defendants, then that limit probably would apply to all claims whether they arise in property damage or personal injury suits. The school claims [or the thirty states' claims, for that matter] would be but a small portion of this total . . . .
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> . . . .
>
> . . . Rule 23(b)(1)(B) exists to protect potential claimants and provide equality of treatment. Certification of a punitive damage class under that provision here will not accomplish these objectives.

In re School Asbestos Litigation, 789 F.2d at 1005-6.

Thus, neither plaintiffs' claims for compensatory damages nor their claims for punitive damages present a conflict uniquely among the states, as contrasted with other consumers of asbestos-containing products. Accordingly, this case is but one of thousands of asbestos cases, and it does not raise issues of "serious magnitude" regarding federalism that would justify this Court's assuming original jurisdiction.

As a result, plaintiffs' argument that this case deserves this Court's consideration devolves to the argument that this Court must accept jurisdiction "to protect the health of millions of occupants and users of public buildings . . . ." Plaintiffs' Brief at 19. This is just not so. National Gypsum agrees with the numerous scientists who have concluded that "there is no reason to believe that asbestos in buildings constitutes a major threat to

the public health."[47] However, this Court need not accept National Gypsum's position on the merits of plaintiffs' claim to reach the conclusion that whether or not this Court accepts original jurisdiction over the states' claims, the states will be free to take whatever action they deem necessary to protect the health of their citizens. The questions raised by this motion are not health and welfare, but financial and judicial – where can the states pursue their claims to recover the costs of whatever abatement actions they voluntarily undertake. National Gypsum submits that such standard commercial litigation is properly heard in each state's own courts.

II. BECAUSE THE STATES FILED AN ACTION AGAINST THEIR OWN CITIZENS, THIS COURT SHOULD DISMISS THIS ACTION FOR LACK OF JURISDICTION.

More fundamentally this action does not belong in this Court because the federal judicial power does not encompass actions between a state and its own citizens; therefore, there is no original jurisdiction in this Court. The states seek to invoke the jurisdiction of this Court over twenty-six companies, twenty of whom are citizens of one of the plaintiff states. See Plaintiffs' Complaint ¶4. To illustrate the point, Delaware has asserted claims against many Delaware citizens, including National Gypsum which is incorporated in that state.[48] While the states suggest that they each are amenable to suing only their non-citizen defendants, this alternative suggestion does not bring the case within the federal judicial power.

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47. Editorial, *Predicting the Risks from Asbestos,* The Lancet 954 (Apr. 26, 1986); *accord* Editorial, *The Asbestos Removal Fiasco,* 247 Science 1017 (1990); *see also* articles cited in notes 5 and 42, *supra.*

48. Unlike the statute governing corporate residence for purposes of diversity cases in the federal district courts, *see* 28 U.S.C. §1332(c) (1982) (defining state of residence as including a company's principal place of business), residence for purposes of the Court's original jurisdiction is limited to place of incorporation. 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶356.01 (2d ed. 1989).

A. Actions By States Against Their Own Citizens Are Not Encompassed Within The Federal Judicial Power.

The federal judicial power is defined to include actions "between a State and Citizens of another state" and this Court has held repeatedly that this does not encompass an action by a state against its own citizens. For example, in *Pennsylvania v. Quicksilver Mining Co.*, 77 U.S. (10 Wall.) 553 (1870), the Court dismissed for lack of jurisdiction a claim by Pennsylvania against a corporation incorporated in that state. The Court noted that article III extends the judicial power "to all controversies between a State and the citizens of another State." 77 U.S. at 555. Article III then distributes this judicial power between an enumerated list of cases within the Court's original jurisdiction — "all cases affecting ambassadors, &c., and those in which a State shall be a party" — and all other cases where the Court's jurisdiction is appellate. *Id.* Because the clause distributing jurisdiction "does not profess to confer any," the federal judicial power is limited to "controversies between a State and the citizens of another State." The Court concluded: "A State, therefore, may bring a suit, by virtue of its original jurisdiction, against a citizen of another State, but not against one of her own." 77 U.S. at 556. In other words, the Court's original jurisdiction is a subset of the federal judicial power and can never reach beyond its confines.

This analysis is consistent with the Court's prior holding in *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 252 (1863), that its original jurisdiction includes only those cases encompassed by the actual text of article III: "The rule of construction of the Constitution . . . declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases." 68 U.S. at 252. By expressly including within the federal judicial power only actions between a state and citizens of another state, article III prohibits this Court from exercising jurisdiction over actions by states against their own citizens. *See also California v. Southern Pacific Co.*, 157 U.S. 229, 261 (1895).

This limitation on the federal judicial power, and hence the Court's original jurisdiction, has been a basis for denying jurisdiction when the state's own citizen is only one of many defendants, the others being "diverse." *See, e.g., Louisiana v. Cummins,* 314 U.S. 577, *reh'g denied,* 314 U.S. 712 (1941); *California v. Southern Pacific Co.,* 157 U.S. 229 (1895). For example, the Court dismissed the *Southern Pacific* case — in which the named defendant was diverse but two California citizens were indispensable parties — for lack of original jurisdiction in that California's claim "embrace[d] a suit between a state and citizens of another state and of the same state." 157 U.S. at 261-62; *accord Minnesota v. Northern Sec. Co.,* 184 U.S. 199 (1902). Similarly, defendants who are citizens of a plaintiff state must be dismissed before the state may pursue an original jurisdiction action against non-citizen defendants. *Georgia v. Pennsylvania R.R. Co.,* 324 U.S. 439, 463-64 (1945); *Texas v. I.C.C.,* 258 U.S. 158, 162-63 (1922); *New Mexico v. Lane,* 243 U.S. 52, 58 (1917).

In the face of this precedent, plaintiffs nonetheless contend that "complete diversity" is not required by the Constitution and that this Court may exercise original jurisdiction over this matter even though some defendants are citizens of plaintiff states. Plaintiffs' Brief at 27-28. Plaintiffs argue that the Court's contrary decisions in *Pennsylvania Railroad* and *Southern Pacific* were a "mere incantation" of the "complete diversity" required for the lower courts' diversity jurisdiction since *Strawbridge v. Curtiss,* 7 U.S. (7 Cranch) 267 (1806), and that, as suggested in *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523, 530-31 (1967), and *Owen Equip. and Erection Co. v. Kroger,* 437 U.S. 365, 373 n.13 (1970), any requirement of complete diversity — whether for the lower courts' section 1332 jurisdiction or this Court's section 1251 jurisdiction — is not a limitation grounded in article III. In short, plaintiffs would have this Court decide that the federal judicial power includes cases involving suits by a state against both non-resident and resident defendants.

Contrary to the states' implication, the Court's prior decisions on this issue were not mere statutory interpretation.

Because Congress has no authority to expand or restrict this Court's original jurisdiction, *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 174 (1803), this Court's prior decisions in *Cummins, Northern Securities,* and *Southern Pacific* necessarily interpreted the *constitutional* limits of the federal judicial power. Indeed, in *Southern Pacific,* the Court explicitly stated that the inability of the Court to invoke its original jurisdiction over cases involving a state and its own citizens was constitutional:

> [Original] jurisdiction does not obtain simply because a state is a party. Suits between a state and its own citizens are not included within it *by the constitution* . . . .

157 U.S. at 261 (emphasis supplied).

Thus, plaintiffs' assertion that complete diversity is not constitutionally required in suits by states against citizens of other states is simply a request that this Court overrule these prior decisions.[49] Yet plaintiffs offer no reason for doing so, and no reason for doing so exists. The rationale for permitting a state to sue citizens of another state in this Court is to provide a forum in which there will be no bias against the out-of-state party. *See Wisconsin v. Pelican Ins.* Co., 127 U.S. 265, 289 (1888),

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49. This Court is also being asked to contradict its statements made in accord with these holdings in *Texas v. I.C.C., New Mexico v. Lane,* and *Georgia v. Pennsylvania R.R. Co.*

Citing *Utah v. United States,* 394 U.S. 89, 96 (1969), plaintiffs say that this Court has never considered "squarely" the issue of "complete diversity" for original jurisdiction cases involving a State. The comment on which plaintiffs rely was made in the context of resolving a Utah resident's motion for leave to intervene in a case where Congress had legislated that this Court should have jurisdiction over a long-standing dispute between Utah and the United States over ownership of the Great Salt Lake. While the basis of the statutory grant of original jurisdiction was the same clause relied upon here (article III, section 2, clause 2's inclusion of cases in which "a State shall be a Party"), the source of federal judicial power was article III, section 2 clause 1's provision with respect to "Controversies to which the United States shall be a party." Thus, jurisdiction did not rest on diversity and the Court's comment, which makes no reference to *Southern Pacific* or the other cases discussed above, is dictum relating only to intervention.

overruled on other grounds, Milwaukee v. W.E. White Co., 296 U.S. 268 (1935); 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4046 at 209 (2d ed. 1988). This rationale does not justify allowing a state to sue its own citizens in this Court.

Moreover, this products liability case does not involve any interests of federalism that could justify overruling this Court's precedent; indeed, to interpret the original jurisdiction provision as plaintiffs suggest would make this Court a forum for any products liability action in which a state is the disappointed consumer and only one of the defendants is diverse. The Constitution extended the judicial power, and this Court's original jurisdiction, to various types of cases in which a state was a party so that states could exercise their sovereign powers, not so that they could pursue standard commercial litigation in a unique forum.

B. The States Cannot Circumvent Article III's Limitation On The Federal Judicial Power By Asserting Their Individual Claims In A Consolidated Action Only Against Their Non-Citizen Defendants.

Recognizing the flaws in their own analysis, plaintiffs propose to modify their complaint so that each state is suing only non-resident defendants.[50] *See* Plaintiffs' Brief at 28; Plaintiffs' Complaint, Exhibit A. This alternative is legally inadequate because the non-diverse defendants would still be parties to a case in which their own states were plaintiffs. This runs counter to *Strawbridge's* holding that federal jurisdiction can be sustained, when there is more than one plaintiff, only if each plaintiff is capable of suing each of the defendants in the courts of the United States, whether or not such a claim is in fact asserted. *Accord Soderstrom v. Kunjsholm Baking Co.*, 189 F.2d 1008, 1013-14 (7th Cir. 1951). Consequently, plaintiffs' modified action is also beyond the Court's original jurisdiction.

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50. For example, Delaware would dismiss its claims against National Gypsum and the other corporate citizens of Delaware listed among the twenty-six defendants.

Even if plaintiffs could overcome this jurisdictional bar, the proposed restructuring of the complaint would create multiple law suits within an action that pretends to be a unified law suit. The proposed modification confirms that this case consists of thirty separate actions which each state should pursue in its own courts. The states seek to invoke a mutant form of joinder to achieve an unfair priority in the resolution of their run-of-the-mill products liability actions. If the states were permitted to co-opt this Court as their exclusive forum for products liability litigation involving asbestos, they would do so for numerous other defective products where the states are major consumers — motor vehicles, building products, computers, pharmaceuticals, etc. Such a result not only would be unfair to other consumers and potentially detrimental to the Court's more traditional functions, but also would permit the Court's original jurisdiction to be invoked in a controversy that does not involve the fundamental issues of federalism that such jurisdiction was intended to address.

For all these reasons, the Court should hold that, with or without the exclusions of Exhibit A, this Court lacks original jurisdiction over a complaint in which the plaintiff states' own citizens are among the defendants.

CONCLUSION

The Court should rebuff this transparent effort by thirty states to transform their individual products liability actions into an unprecedented and unnecessary joint action invoking the American Law Institute's *Restatement of Restitution* rather than their own states' laws, asserting an "equitable" claim for reimbursement rather than a legal claim for damages, tying up this Court rather than their own states' courts, and depriving defendants of the juries that traditionally resolve such fact-bound cases. National Gypsum Company, a defendant in seven similar cases individually filed by state attorneys general, two of which already have been resolved, urges the Court to deny the motion for leave to invoke the Court's original jurisdiction so that any asbestos-in-buildings cases involving state-owned-and-operated buildings will be heard and decided in each state's own courts before local juries applying that state's laws as interpreted by its own judges.

Respectfully submitted,

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April 12, 1990

Appendices

Appendix A

Results of Jury Trials in Asbestos-In-Buildings Litigation Through April 1, 1990

Results of Jury Trials in Asbestos-in-Buildings Litigation Through April 1, 1990

Plaintiff	Defendants	Court	Date of Jury Verdict	Jury Verdict	Appellate Proceedings
County of Anderson, Tennessee	National Gypsum Company United States Gypsum Company	No. CIV-3-83-511 (E.D. Tenn.)	March 12, 1985	Defense Verdict	Affirmed, 821 F.2d 1230 (6th Cir. 1987)
Spartanburg County School District Seven, South Carolina	National Gypsum Company United States Gypsum Company	No. 83-1744-14 (D.S.C.)	August 15, 1985	Defense Verdict	Vacated and remanded in part, 805 F.2d 1148 (4th Cir. 1986) (affirmed defense verdict on negligence; reversed and remanded on breach of warranty)
	United States Gypsum Company		April 28, 1987	Plaintiff's Verdict for $106,000 Compensatory Damages	Affirmed, 842 F.2d 1292 (4th Cir. 1988)
City of Greenville, South Carolina	W.R. Grace & Co.	No. 85-1693-3 (D.S.C.)	January 24, 1986	Plaintiff's Verdict for $4.8 million Compensatory Damages and $2 million Punitive Damages	Affirmed, 827 F.2d 975 (4th Cir. 1987)
Corporation of Mercer University, Georgia	National Gypsum Company W.R. Grace & Co.	No. C85-126-3 MAC (M.D. Ga.)	April 11, 1986	Plaintiff's Verdict for $403,000 Compensatory Damages and $2 million Punitive Damages	Reversed, 877 F.2d 35 (11th Cir.), cert. denied, 110 S. Ct. 408 (1989)

Results of Jury Trials in Asbestos-in-Buildings Litigation Through April 1, 1990

Plaintiff	Defendants	Court	Date of Jury Verdict	Jury Verdict	Appellate Proceedings
School District of City of Independence No. 30, Missouri	United States Gypsum Company	No. CV84-5334 (Cir. Ct. Jackson County Mo.)	November 14, 1986	Plaintiff's Verdict for $650,000 Compensatory Damages	Affirmed, No. WD39135 (Ct. App. Mo. Mar. 1, 1988)
St. Joseph Hospital, Georgia	United States Gypsum Company Celotex Corporation	No. CV186-047 (S.D. Ga.)	November 15, 1986	Plaintiff's Verdict for $500,000 Compensatory Damages	Reversed, 874 F.2d 764 (11th Cir. 1989), cert. denied, 110 S. Ct. 1138 (1990)
Athens City Board of Education, Tennessee	National Gypsum Company	No. 1-85-355 (E.D. Tenn.)	January 28, 1987	Plaintiff's Verdict for $553,000 Compensatory Damages	Appeal withdrawn
Adams-Arapahoe School District No. 28-J	Celotex Corporation (pipe and boiler products)	No. 84-C-1974 (D. Colo.)	March 4, 1988	Plaintiff's Verdict for $134,000 Compensatory Damages	Appeal withdrawn
	United States Gypsum Company (surface treatment products)		May 19, 1989	Plaintiff's Verdict for $540,000 Compensatory Damages	
Wesley Theological Seminary, Washington, D.C.	National Gypsum Company United States Gypsum Company	No. 85-1606 (D.D.C.)	May 27, 1988	Defense Verdict	Reversed in part, 876 F.2d 119 (D.C. Cir. 1989)
City of Greenville, Tennessee	United States Gypsum Company	No. CIV-2-83-294 (E.D. Tenn.)	July 22, 1988	Defense Verdict	No Appeal

Plaintiff	Defendants	Court	Date of Jury Verdict	Jury Verdict	Appellate Proceedings
Reorganized Church of Jesus Christ of Latter Day Saints, Missouri	United States Gypsum Company	No. 85-0322-CV-W-6 (W.D. Mo.)	August 31, 1988	Defense Verdict	Affirmed, 882 F.2d 335 (8th Cir. 1989)
Kershaw County Board of Education, South Carolina	United States Gypsum Company	No. 87-CP-28-289 (Cir. Ct. S.C.)	October 28, 1988	Plaintiff's Verdict for $225,000 Compensatory Damages	Appeal filed, No. 87-CP-28-289 (Sup. Ct. S.C. Nov. 4, 1988)
Cinnaminson Township Board of Education, New Jersey	United States Gypsum Company	No. 80-1842 (D.N.J.)	November 3, 1988	Defense Verdict	Affirmed, 882 F.2d 510 (3d Cir. 1989)
Benton Harbor Area Schools, Michigan	National Gypsum Company	No. 85-3008-NZ-Z (Cir. Ct. Berrien County Mich.)	March 28, 1989	Defense Verdict	No Appeal
Clarkesville/Montgomery County Board of Education, Tennessee	United States Gypsum Company	No. 3:84-0315 (M.D. Tenn.)	April 13, 1989	Defense Verdict	Appeal filed, No. 89-6325 (6th Cir. Oct. 18, 1989)
City of Berea, Kentucky	United States Gypsum Company	No. 86-172 (E.D. Ky.)	June 20, 1989	Defense Verdict	No appeal
Hebron Public School District No. 13, North Dakota	United States Gypsum Company	No. A1-86-184 (D.N.D.)	July 15, 1989	Plaintiff's Verdict for $382,000 Compensatory Damages and $450,000 Punitive Damages	Appeal filed, No. 89-5565ND (8th Cir. Nov. 7, 1989)

Results of Jury Trials in Asbestos-in-Buildings Litigation Through April 1, 1990

Plaintiff	Defendants	Court	Date of Jury Verdict	Jury Verdict	Appellate Proceedings
Beavercreek Local Schools, Ohio	Basic, Inc.	No. 85 CV-369 (Ct. C.P. Green County Ohio)	August 17, 1989	Plaintiff's Verdict for $250,000 Compensatory Damages	Appeals filed, No. 89-CA88 (2d App. Dist. Green County, Ohio Nov. 11 and Nov. 30, 1989)
Mt. Lebanon School District, Pennsylvania	W.R. Grace & Co.	No. GD 83-13686 (Ct. C.P. Allegheny County Pa.)	October 12, 1989	Defense Verdict	
3250 Wilshire Boulevard Building, California	W.R. Grace & Co.	No. 87-6048-WMB (C.D. Cal.)	November 20, 1989	Defense Verdict	Appeal filed (9th Cir.)
Highline School District No. 401, Washington	United States Gypsum Company Celotex Corporation Fibreboard Corporation	No. 86-2-16632-7 (Super. Ct. Wash.)	December 15, 1989	Defense Verdict	No Appeal
Johnson County Community College, Kansas	National Gypsum Company	No. 88-2031-0 (D. Kan.)	January 18, 1990	Defense Verdict	
Rowan County Board of Education, North Carolina	United States Gypsum Company	No. 85-CVS-948 (Super. Ct. N.C.)	January 26, 1990	Plaintiff's Verdict for $812,000 Compensatory Damages and $1 Million Punitive Damages	Appeal filed, (Ct. App. N.C. Mar. 9, 1990)
Methodist Health Systems, Tennessee	W.R. Grace & Co.	No. 85-2553-GA (W.D. Tenn.)	February 15, 1990	Defense Verdict	

Appendix B

Letter from Lee M. Thomas, EPA Administrator, to George Bush, President of the Senate, and James C. Wright, Jr., Speaker of the House of Representatives (February 26, 1988)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460
FEBRUARY 26, 1988

THE ADMINISTRATOR

Honorable George Bush
President of the Senate
Washington, DC 20510

Honorable James C. Wright Jr.
Speaker of the House
of Representatives
Washington, DC 20515

Dear Mr. President and Mr. Speaker:

On October 22, 1986 the Congress passed the Asbestos Hazard Emergency Response Act (AHERA) which required this Agency to conduct a study to determine ". . . the extent of danger to human health posed by asbestos in public and commercial buildings and the means to respond to any such danger." This letter transmits that report and contains my recommendations.

The Congressional mandate for this report focused our attention on two major lines of inquiry:

(1) The extent and condition of asbestos in public and commercial buildings; and

(2) Whether public and commercial buildings should be subject to the same inspection and response action requirements that apply to school buildings under the AHERA school rule.

To no one's surprise, our study determined that friable asbestos-containing materials can be found in about one fifth of the public and commercial buildings in this country. Two thirds of these asbestos-containing buildings have at least some asbestos which is already damaged.

The asbestos present in approximately 730,000 of the public and commercial buildings in this country represents a potential health hazard which deserves our careful attention. However, it is not the mere presence of asbestos which poses a health risk to building occupants; the true hazard is presented by damage and disturbance of that asbestos which releases fibers to the air that are inhaled by people.

Removal of asbestos from buildings, although attractive in concept, is not always the best alternative from a public health perspective. In fact, improperly performed removal of asbestos can result in a very high level of exposure for the occupants of that building and perhaps others as well. Response actions short of removal, such as encapsulation, and good housekeeping procedures during the life of the building can be safer in some circumstances. This is why the AHERA school regulations, promulgated last October for asbestos in schools, established a carefully structured process by which case-by-case determinations are to be made by trained professionals about the proper solution to the presence of asbestos in particular schools. Where removal is deemed appropriate, careful procedures to prevent exposure to the public both during and after the removal are mandated.

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 buildings be removed, as a condition of the purchase. Unless such removals are done correctly, exposure of asbestos to the public may actually be increased. 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.

I therefore strongly recommend that we take steps now to focus our attention on assessing and improving the QUALITY of the asbestos-related actions that currently take place in public

and commercial buildings. I recommend that the following steps be taken over a three-year period:

(1) *Enhance the Nation's Technical Capability.*

Ideally, owners of public and commercial buildings should use trained and accredited professionals, just as the schools are required to do for inspection and abatement activities. Under the AHERA school rule, States are now establishing accreditation programs for asbestos control professionals. Since we do not want to divert the limited supply of these professionals from the implementation of AHERA, we need to encourage an increase in the supply of these qualified professionals.

Assistance to building owners could shape, guide, and enhance the present private sector activity. For instance, identification of proper operations and maintenance activities should result in immediate risk reduction for that segment of the population which may be receiving the largest exposure — the custodial staffs in these buildings. It may also prevent accidental damage or extensive deterioration which could expose other building occupants. Guidance on how to avoid imminent hazard conditions should greatly reduce the risks from asbestos in these buildings.

Based on our experience with a variety of activities conducted under the Asbestos School Hazard Abatement Act and AHERA we believe that $2 million a year for three years would be sufficient to complete this goal.

(2) *Focus attention on thermal system insulation asbestos.*

This report indicates that more public and commercial buildings contain thermal system insulation asbestos than other kinds of friable asbestos. In addition, this thermal system insulation is generally in worse condition and in higher concentrations than the other asbestos found in public and commercial buildings. This asbestos represents a potentially serious health hazard to the custodial and maintenance staff, who work with and around this material on a regular basis. Finally, in contrast to other kinds of asbestos, thermal system insulation is usually easier to repair, encapsulate, or, where appropriate, remove. A $600,000 investment for each of three years should be sufficient

to complete the task of developing and providing proper guidance for dealing with thermal system insulation.

(3) *Improved integration of activities to reduce imminent hazards.*

More can be done to avoid high peak exposures associated with improper or poorly timed asbestos removal activities. It is clear that the recent attention on asbestos in buildings has increased the number of removals, the number of resulting NESHAPs notifications, and the need for additional compliance assistance.

There is a need to develop additional ways to coordinate asbestos-related programs in order to increase the effectiveness and efficiency of our existing asbestos control efforts and address legitimate imminent hazards. In particular, we could institute a field program in which notification and inspection information is regularly integrated across EPA programs and perhaps OSHA. Further, the NESHAP notification procedure can be utilized to provide guidance and direction on good work practices to building owners and contractors BEFORE work commences. Within our own Agency, a regional pilot project to better coordinate various asbestos programs — NESHAP, technical assistance, the ASHAA and AHERA schools programs — can be expanded.

A combination of additional Federal inspection personnel and increased State grant money in States with delegated enforcement programs could dramatically improve compliance with existing regulations. Limited increases in Regional staff devoted to coordinating programs, and delivering technical assistance and guidance to building owners and other affected parties, would provide the critical mass to eliminate duplication and inefficiencies. The total cost of this increased program would be approximately $4 million per year. After three years the effectiveness of these efforts should be assessed and future needs determined at that time.

(4) *Objectively assess the effectiveness of the AHERA school rules and other current activities.*

There are approximately 35,000 school buildings which contain friable asbestos, as compared to more than 730,000

public and commercial buildings. The total cost of the AHERA program is about $3 billion compared to approximately $51 billion for a similar regulatory program in public and commercial buildings. Federal agencies, States, localities, and the private sector are already active in the assessment and control of asbestos in many of these buildings. These facts emphasize the need to assure that the Federal government's intervention in society on behalf of public and commercial buildings is a sound one based on an objective assessment of activities which have only recently been begun.

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. I do recommend that studies be conducted on a priority basis, focused on the effectiveness of the AHERA school rule, and the level and effectiveness of the current activities of the States and private sector.

It would be foolish for the country to consider a large new program of asbestos control without first asking basic questions which could improve our response to asbestos in public and commercial buildings and probably provide public health protection at a lower cost. The nation's study and research program should be proportional to the magnitude of the public investment in controlling the problem which is contemplated, especially when so little is actually known, as this report indicates. Some of these studies could cost many millions of dollars to conduct on a scientifically credible basis. Yet their impact on future abatement programs which carry cost estimates in the tens of billions of dollars could be profound. Perhaps a cooperative effort between industry and the government for these studies should be explored with principal funding by the private sector. I could envision the actual studies being conducted by a third party.

In conclusion, asbestos in commercial buildings, like asbestos in schools, represents a potential health hazard that deserves careful attention. However, we need to continue to place our primary focus on asbestos in schools. This report highlights the wisdom of this priority attention. Children, since they have the

longest life expectancy would appear to incur the greatest risk, particularly to contracting mesothelioma. Children also spend a great deal of time in school where any asbestos is especially susceptible to disturbance by the occupants. We have only recently put in place the comprehensive AHERA school regulations which call for inspections and the development of management plans by October 1988. The implementation of these plans must begin no later than July 1989. The successful implementation of this school program should remain our first concern, and we all have much to learn from it. In addition, until the necessary national infrastructure to manage asbestos problems on a much larger scale exists, I fear a major initiative in other buildings could do more harm than good.

It has taken a great effort over six years to put the school asbestos program in place. We should be very careful not to take steps which undermine its completion. During the next several years, AHERA school rule activities will stretch the resources of this country, in terms of trained and accredited inspectors, planners, removal contractors, and laboratories, as well as compliance assistance and enforcement capabilities among Federal, State, tribal and local governments. Although we expect the supply of accredited professionals and laboratories to expand in response to the demand for increased services, any significant additional demand imposed by new and immediate regulation could pose a serious obstacle to the success of the schools program.

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. This is a question we should address in about three years after we have had more experience with the AHERA school rule, have dealt with the large surge of demand for trained professionals, and have completed the important studies I have outlined above.

I hope that you will find these recommendations useful, and I look forward to a constructive dialogue with the Congress in the days ahead.

Sincerely,

Lee M. Thomas

Appendix C

Statement of Linda J. Fisher, Assistant Administrator for Pesticides and Toxic Substances, U.S. Environmental Protection Agency, at Hearings Before the Subcommittee on Health and Safety of the House of Representatives Committee on Education and Labor, 101st Cong., 2nd Sess. (April 3, 1990)

STATEMENT OF
LINDA J. FISHER
ASSISTANT ADMINISTRATOR
FOR PESTICIDES AND TOXIC SUBSTANCES
U. S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON HEALTH AND SAFETY
OF THE
COMMITTEE ON EDUCATION AND LABOR
U. S. HOUSE OF REPRESENTATIVES

APRIL 3, 1990

Mr. Chairman and distinguished members of this Subcommittee, I am Linda Fisher, Assistant Administrator for the Office of Pesticides and Toxic Substances (OPTS) of the U.S. Environmental Protection Agency. I very much welcome the opportunity to discuss the important issues of asbestos worker protection which you are addressing, as well as to clarify the Agency's policies to reduce asbestos exposure in the Nation's schools and other buildings.

Allow me to first address some of the specific concerns you have regarding the training of asbestos abatement workers.

As you are aware, under the Asbestos Hazard Emergency Response Act (AHERA), EPA was directed to issue a model accreditation plan to provide training and accreditation for persons who inspect buildings, develop management plans, or design or conduct response actions in schools. The training and accrediting of sufficient numbers of inspectors and planners to meet the demands being placed on school districts by the AHERA requirements was a major challenge. In response to that challenge, EPA has substantially increased the number of competent asbestos professionals. We believe that EPA's university training centers, described below, and a couple of leading labor training programs have accredited nearly 60,000 individuals. In all, we estimate 100,000 or more AHERA-accredited persons are available nationally for asbestos-related work today.

EPA's asbestos training effort began in 1985 when perhaps only a few thousand persons had any formal asbestos training. Beginning in that year we established special training programs for asbestos abatement contractors and workers in five university-based Asbestos Information and Training Centers and three satellite university centers to facilitate training in proper asbestos abatement techniques. When AHERA was passed in October 1986, we established cooperative agreements with these centers to develop and offer new courses to help meet the AHERA requirements for training and accreditation of school inspectors and management planners. We also provided funding in 1986 to the National Asbestos Council, the Nation's largest asbestos-related interdisciplinary professional association, to develop asbestos training for workers.

In addition to providing accreditation-type training courses through our centers, we also developed and published the Model Accreditation Plan for States, as required by AHERA. The plan was published in the *Federal Register* on April 30, 1987 and applies only to schools. The plan specified criteria necessary for initial training, examination and continuing education required under AHERA for accreditation of persons in all asbestos management disciplines, including inspectors and management planners, abatement supervisors and abatement workers.

These persons can be accredited by States, which are required under AHERA to adopt contractor accreditation plans at least as stringent as the EPA Model Plan by July 1989 or, by completing an EPA-approved training course and passing an examination.

The length of initial training courses for accreditation under the Model Plan varies from three to five days according to discipline. For all disciplines, persons seeking accreditation must also pass an examination and participate in annual retraining. In addition, all States must include procedures for revoking accreditation in their programs for schools. States are also encouraged to include reciprocity provisions, and are urged to consider qualifications, such as education or experience, as part of their AHERA-mandated programs.

We developed a system to insure the fast, efficient, and competent review of proposed accreditation courses submitted to EPA by private training organizations. As of February 1990, a total of 587 training providers are offering 1,113 EPA-approved training courses for accreditation. There are 487 asbestos worker courses, 373 contractor and supervisor courses, 212 inspector/management planner courses and 41 project designer courses.

As we did initially for abatement contractor courses in 1985, EPA has gone beyond the simple requirement of issuing course criteria, and has assured national consistency by publishing model course curricula for AHERA inspector and management planner training. All inspector/management planner and contractor/supervisor course materials are available to course providers and to the public, including the student manuals, instructor guides, overhead slides and 35mm projector slides. Model course materials for abatement workers and custodial and maintenance workers will be available this summer. Key subjects in this training will include asbestos health effects and respiratory protection.

As announced in the *Federal Register* of September 20, 1989, EPA stopped accepting for review and approval any new training courses for AHERA accreditation after October 15, 1989. EPA took this step for two primary reasons. *First,* as required by AHERA, all States should have developed State accreditation programs by July 1989. *Second,* rather than continue to review new course submissions, EPA needed to apply its available resources to field monitoring of the more than 1,000 courses already approved. EPA's phaseout of new course approval means that decisions about asbestos abatement training requirements will now be made at the State level, as envisioned by AHERA and where greater scrutiny can be brought to bear. Under AHERA, States have discretion to determine the particulars of their accreditation programs as long as they are at least as stringent as EPA's Model plan. Because of the large number of asbestos abatement projects and the short-term nature of many of these projects, use of State-certified contractors and

State oversight of projects increases the proximity of the enforcement authority and enables tighter controls to ensure that workers are better protected and that abatement work is done properly.

EPA has financed and implemented several projects in addition to the Model Plan that were designed to develop and enhance State accreditation programs:

- EPA through the National Conference of State Legislatures (NCSL), provided the States with model legislation to assist them in developing contractor certification programs and fee-based funding options to support these programs;
- EPA awarded $2.5 million in grants to 39 States for the purpose of establishing abatement contractor and worker certification programs;
- The Agency approved grants totalling more than $1 million for 17 States to help them develop AHERA inspector and management planner accreditation programs;
- EPA's 1990 State Enhancement Program will allot an additional $1.5 million for State activities, which include accreditation programs.

Today, due in part to EPA seed funding and technical assistance, 20 States now have accreditation programs that meet AHERA standards for abatement contractors and workers who conduct school projects. In addition, another 27 States have some type of licensing or certification program for asbestos abatement which can upgrade to AHERA levels. Of these 47 States, 42 have extended their asbestos training and certification requirements to cover abatement work in public and commercial buildings as well as schools. We believe this shows dramatic improvement from 1985, when only four States had any kind of contractor certification program at all.

The EPA fiscal year 1991 budget will continue to provide assistance to States through its agreement with NCSL and the Agency's State Enhancement initiative. NCSL has focused on ways to improve the quality and effectiveness of State legislatures' efforts in developing programs, policies and standards

which they believe are appropriate to address asbestos hazards in buildings, and assuring that State legislatures will have a strong, cohesive voice in the federal system on asbestos issues.

EPA has provided funding to the National Asbestos Council to develop standardized examinations for all AHERA accreditation disciplines as part of NAC's State reciprocity program. The NAC reciprocity program will improve coordination among the States and enhance the level of professionalism in the asbestos field.

The NAC program will provide registration for individuals in the asbestos field who have completed EPA-approved training, passed the new NAC examination, and possess the qualifications and experience which the NAC deems necessary to conduct asbestos work. By providing this professional recognition through NAC, States can reasonably expect that NAC-registered professionals will possess the requisite skills to conduct asbestos work properly and safely.

In 1989, EPA also provided $400,000 to several joint labor-management trust funds to increase asbestos worker training. EPA will distribute an additional $1.5 million this summer to these groups to further improve the quality of asbestos training. During 1989 and 1990, EPA will also provide $200,000 to train minority contractors in asbestos abatement.

The asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP) requires asbestos removal to protect public health during major building renovations and demolitions which would disturb asbestos materials. That standard is now being revised to include new training for the on-site work supervisor to better ensure that the abatement workers are properly protected and the abatement is properly conducted. We expect this new training requirement to be established this autumn. In addition to the current revisions, EPA is in the process of examining the full asbestos standard under NESHAP to determine if more protective measures are required to protect the public whenever asbestos must be removed.

Finally, under section 6 of the Toxic Substances Control Act (TSCA), EPA issued a rule in 1985 to extend the protection of the U.S. Occupational Safety and Health Administration

(OSHA) asbestos standards to State and local government employees not protected by State OSHA programs. The current EPA Worker Protection Rule, which was revised on February 25, 1987, afforded the new protection of the OSHA 1986 standards to these workers. OSHA is planning to revise its asbestos standards yet again in April of this year. After the promulgation of this OSHA rule, EPA will update its worker protection standards to provide the same protection to State and local government employees. This is one example of the regular coordination that is taking place between EPA, OSHA and other groups concerned with worker protection, such as the National Institute for Occupational Safety and Health.

To summarize, EPA has mounted a substantial effort over the past three years to help nurture and shape a growing asbestos abatement and control industry from its early stages by:

- establishing the AHERA Model Accreditation Plan;
- providing model legislation and technical assistance to State legislatures;
- developing state-of-the-art model training programs available throughout the nation;
- implementing a systematic and comprehensive program to review and approve training courses as States established their accreditation programs;
- providing financial and technical assistance to States to help them fulfill their AHERA accreditation responsibilities;
- assisting the private sector and States to upgrade accreditation requirements and develop reciprocity arrangements;
- funding labor groups and minority contractors to develop quality asbestos training programs;
- establish standards to train abatement supervisors and to protect public sector asbestos workers.

EPA has more than fulfilled its AHERA accreditation responsibilities. We believe our AHERA accreditation program has been successful in providing for schools the trained personnel to meet the tight time frames established by Congress under

AHERA. In addition, although our training courses were designed with the AHERA school program in mind, it is clear that the public and commercial building sector, when faced with asbestos abatement activities, is increasing its reliance on the types of employees trained through the AHERA program. Although the States now have the primary role in further developing the Nation's accreditation program, EPA is continuing its technical and financial assistance programs to States and the private sector.

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Now that I have discussed issues relating to training and accrediting asbestos workers, let me turn to another topic. Regrettably, EPA's asbestos policies have recently been the subject of several erroneous news reports and at least two seemingly contradictory exposure studies which have confused, rather than enlightened, the public.

For example, a national television news report on asbestos in floor tile last November suggested that dangerous fiber levels were generated through routine floor stripping operations to remove wax from tile. This news report promoted a "one fiber can kill" image in the public's mind of an asbestos material that rarely if ever releases fibers under normal conditions. On the other hand, an article on asbestos published on January 19 in *Science* magazine, followed by various editorials, has been interpreted to suggest that the most common form of asbestos fibers in buildings are "safe" and do not warrant our attention or concern.

Frankly, I appreciate this chance to "set the record straight" on the facts, as we know them, and on the Agency's current policies and requirements for asbestos control in schools and public and commercial buildings.

FACT ONE: Although Asbestos *is* hazardous, human risk of asbestos disease depends upon exposure.

Asbestos is known to cause cancer and other disease if fibers are inhaled into the lung and remain there, based upon studies involving human exposure and particularly at high levels. While

evidence is better for some types of asbestos, there is no clear proof that other types are not as potent. EPA, has in the past, based on careful evaluation of available scientific evidence, adopted a prudent approach in its regulations of assuming that all fibers are equally potent.

While, as the *Science* article indicated, exposure to chrysotile or common white asbestos *may* be less likely to cause some asbestos-related diseases, various scientific organizations, including the National Academy of Sciences, support EPA's more prudent regulatory approach. With respect to the so-called "one fiber can kill" image, the present scientific evidence will not allow us to unequivocally state that there is a level of exposure below which there is a zero risk, but the risk in fact could be negligible or even zero.

However, the mere presence of a hazardous substance, such as asbestos on an auditorium ceiling, no more implies disease than a potential poison in a medicine cabinet or under a kitchen sink implies poisoning. Asbestos fibers must be released from the material in which they are contained, and an individual must breathe those fibers in order to incur any chance of disease.

While scientists have been unable to agree on a level of asbestos exposure at which we, as public policy makers, can confidently say, "there is *no* risk," this does *not* mean that all or any exposure is inherently dangerous. To the contrary, almost every day we are exposed to some prevailing level of asbestos fibers in buildings or experience some ambient level in the outdoor air. And, based upon available data, very few among us, given existing controls, have contracted or will ever contract an asbestos-related disease at these low prevailing levels.

FACT TWO: Prevailing asbestos levels in buildings – the levels that you and I face as office workers or occupants – seem to be very low, based upon available data. Accordingly, the health risk to building occupants – you and me – also appears to be very low.

Indeed, a 1987 EPA study found that air levels in a segment of Federal buildings with management programs were so low as to be virtually indistinguishable from levels outside these buildings. While these data are not conclusive and we are seeking more information through a major research effort, the present evidence suggests that building occupants face only a very slight risk. Severe health problems which we generally attributed to asbestos exposure have been experienced by some workers who held jobs in industries such as shipbuilding, where they were constantly exposed to very high fiber levels in the air often without any of the worker protection now afforded to them under the law.

FACT THREE: Removal is often *not* a building owner's best course of action to reduce asbestos exposure. In fact, an improper removal can create a dangerous situation where none previously existed.

While logic suggests that wholesale asbestos removal from a building would best eliminate any potential hazard, this is not always true as a practical matter. Asbestos removal practices by their very design disturb the material and significantly elevate air levels, which must be carefully contained during the removal project. Unless all safeguards are properly applied and strictly adhered to, exposure in the building can rise, perhaps to levels where we know disease can occur. Consequently, an ill-conceived or poorly conducted removal project can actually *increase* rather than eliminate risk.

FACT FOUR: EPA only requires asbestos removal in order to prevent significant public exposure to asbestos during building renovation or demolition.

Prior to a major renovation or demolition, asbestos material that is likely to be disturbed or damaged to the extent that significant amounts of asbestos would be released, must be removed using approved practices under EPA's asbestos NESHAP. Demolishing a building filled with asbestos, for example, would likely result in significantly increased exposure and could create an imminent hazard. Clearly, asbestos removal before the wrecking ball swings into action is appropriate to protect public health. However, this cannot be said of arbitrary asbestos removal projects, which, as noted above, can actually increase health risk unless properly performed. This, in part, is why EPA has *not* mandated asbestos removal from buildings beyond the NESHAP requirement, which has the effect of gradually and rationally taking all remaining asbestos building materials out of the inventory.

The school regulatory program under AHERA, contrary to many recent media reports, is a *management program, not* a removal program. While school officials, like other building owners, have the option of asbestos removal if they believe it is necessary, it is *not* mandated by AHERA or by the regulations. We should note that at least 94% of the Nation's public and private schools now have completed their AHERA asbestos inspections and developed management plans, thus establishing a comprehensive risk management program to reduce exposure in the Nation's schools, as intended by Congress.

FACT FIVE: EPA *does* recommend in-place management whenever asbestos is discovered.

Instead of removal, a proactive in-place management program, which includes training, awareness, special control procedures and periodic surveillance, will usually control fiber release, particularly when the materials are not significantly damaged and not likely to be disturbed. In-place management, of course, does *not* mean "do nothing." When a building owner

finds asbestos in his facility and ignores it, he can't establish and enforce procedures to ensure that the asbestos is not disturbed. He can't ensure that fiber levels do not rise. An in-place management program does not have to be extraordinarily expensive. Management costs will depend upon the amount, condition and location of the material.

As I'm sure you're aware, maintenance and service workers in these buildings, in the course of their daily activities, may disturb materials and can elevate asbestos fiber levels, especially for themselves, if they are not properly trained and protected. For these persons, risk may be significantly higher. This is a primary concern of EPA and other Federal, State and local agencies which regulate asbestos. An active in-place management program will reduce any unnecessary exposure to these workers and others.

To summarize the facts, as we now know them:

- While asbestos is clearly hazardous, its risk to human health depends on the degree of exposure.
- Asbestos air levels in buildings, and corresponding risk to occupants, appears to be very low, given available data.
- Asbestos removal, while necessary to protect public health during renovation or demolition, is not otherwise required by EPA and is often *not* the building owner's best abatement choice.
- EPA's asbestos program for schools and its guidance for other building owners, which is founded on in-place management, is designed to *keep these low prevalent fiber levels low,* through recognition and management. We agree with Dr. Arthur Upton, former director of the National Cancer Institute and head of New York University's Institute of Environmental Medicine, who, in a letter to *The New England Journal of Medicine,* advocates caution in dealing with asbestos until better information is available. Dr. Upton maintains that "abandonment of asbestos inspection and abatement is not justified" by the current data.

Further, we are presently attempting to increase the knowledge base on asbestos on several fronts, which include a

public dialogue, an evaluation of the AHERA school program and major research.

Through the public dialogue process. . . EPA has sponsored a policy dialogue among groups which have a major interest in the asbestos policy regarding public and commercial buildings. These groups include building owners, realtors, mortgage bankers, insurers, building workers unions, public health interests, asbestos contractors and consultants, asbestos manufacturers, and representatives of federal, state and local organizations which have responsibility for the development and implementation of asbestos policies.

The policy dialogue is scheduled to conclude in April of 1990, and EPA expects the dialogue participants to present the Agency with a set of general recommendations about what they think should be done to address the issue of asbestos in public and commercial buildings. The dialogue participants have discussed at length accreditation, training, and improper removal issues. EPA has made a public commitment to consider thoroughly any recommendations offered by the dialogue participants and to decide, as soon as possible, whether to carry out any or all of the recommendations.

Through the AHERA Evaluation process. . . EPA is conducting an evaluation of the AHERA schools program, due in January 1991, to determine how effectively that regulatory program worked in schools and what components, if any, might be appropriate for public and commercial facilities.

Through the Health Effects Institute Research. . . Finally, asbestos research initiated by the Health Effects Institute (HEI) in Boston with EPA, Congressional and private sector support will include comprehensive monitoring studies to better characterize asbestos exposure in buildings. HEI's initial literature review will also examine current research which deals with fiber potency.

At EPA, we are particularly concerned about potential "peak exposures" — those which might occur in buildings when material is disturbed or accidentally damaged. Such disturbance can elevate levels not only for workers, but perhaps also for building occupants who might ordinarily *not* experience high

levels. "Peak" levels have been known to reach the range of occupational exposure for maintenance and service personnel. HEI's research should be very helpful in increasing our knowledge on the frequency, duration and intensity of these "peaks." I hope this clarifies EPA's strategy to address the concerns regarding the health and safety of asbestos workers and sets the record straight on the Agency's policies and recommendations concerning asbestos. I will be happy to answer any questions that the Subcommittee may have.