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PLAINTIFF'S EXHIBIT NC-84

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May 16, 1975

RESEARCH CENTER

Adv. Warning Label

A. Earl Mays, Esq.
Legal Department
Secretary's Office
Armstrong Cork Company
Lancaster, Pennsylvania 17604

Dear Mr. Mays:

I am writing you this letter to further amplify the comments in our phone conversation regarding appropriate warnings as to asbestos products. After considerable reflection on the problem, it is our view as counsel for National Gypsum Company that, while some added benefit may possibly accrue to a vendor who makes special reference to asbestosis and cancer on labels of asbestos products, that possible benefit may be more than outweighed by the additional lawsuits fomented by the constant references to asbestosis and cancer on labels.

Accordingly, we think it would be advisable to reconsider whether any such references should be included in the warning label.

This view is based chiefly on four factors:

1. Our concern whether more lawsuits will be brought which otherwise would not be;

2. Our belief that to include such terms may be an overreaction to the unfortunate facts of the Borel decision;

3. Our belief that the OSHA required label gives adequate warning since the average workman must realize that the "serious bodily harm" that may be caused by breathing asbestos dust can only refer to a possible serious lung involvement; and

4. Our belief that asbestos cement products such as those purchased by Armstrong from National probably would not involve any violation of current OSHA standards since the asbestos fibers are locked in, the products are precut and involve very little cutting on the job because they can be scored and snapped without cutting.

In rereading the Borel case (493 F.2d 1076) with this question in mind, our attention was drawn to a number of comments. A brief review of those comments may be helpful.

First, the Court noted Borel's ignorance that any serious illness could result.

At page 1081:

"... he [Borel] never realized that it could cause any serious or terminal illness. Borel emphasized that he and his fellow workers thought that the dust 'dissolves as it hits your lungs'."

At page 1093:

"For present purposes, it is sufficient to note that Borel testified that he did not know that inhaling asbestos dust could cause serious illness ..."

At page 1098:

"Borel testified that he never realized that inhaling asbestos dust could cause serious illness..."

At page 1104:

"... he never realized that it could cause any serious or terminal illness."

Secondly, the Court noted the complete lack of any warning:

At page 1090:

"... during Borel's working career no manufacturer ever warned contractors or insulation workers, including Borel, of the dangers associated with inhaling asbestos dust..."

PLAINTIFF EXHIBIT 1765 (2

After referring to belated warnings that inhalation in excessive quantities over long periods of time may be harmful, the Court noted at page 1104:

"... none of these so-called 'cautions' intimated the gravity of the risk ..."

At page 1099:

"... defendants gave no instructions or warnings at all."

At page 1103:

"Here, there was a duty to speak, but the defendants remained silent."

At page 1105:

"Thus, there were no warnings when they could have effectively allowed Borel to make the choice of encountering or not encountering a known risk."

On page 1105 appears what is seemingly the only basis in the decision for making a specific label reference to asbestosis or cancer:

"... our references to failure to warn refer to failure to warn of the gravity of the danger, that is, the exposure to asbestosis, mesothelioma and other cancers ...."

Thirdly, it noted that failing to follow proper instructions would negate any claim against the manufacturer. It started at page 1083 and noted the Restatement's definition of unreasonably dangerous products:

"... a product is unreasonably dangerous only when it is 'dangerous to an extent beyond that contemplated by the ordinary consumer who purchases it'...."

It approved the Trial Court's charge at page 1098 which stated:

"... if you find ... that the deceased knew of the dangerous nature of the asbestos products with which

PLAINTIFF'S EXHIBIT 1765 (3)

RESEARCH CENTER
6429

he was working and appreciated the danger ... then you would find against the plaintiff ..."

It reiterated that approval at pages 1107 and 1108 noting:

"If you find ... that the deceased knew of the dangerous nature ... and that he assumed the risk by continuing his work, then you would find ... in favor of the defendants."

On page 1099 it referred specifically to two Texas decisions where the plaintiff's failure to follow the manufacturer's instructions were found to be misuse and a valid defense to the claim against the manufacturer.

We certainly recognize the difficult position in which all sellers of asbestos products now find themselves but we do believe that there may be considerable merit in avoiding reference to asbestosis, a term probably unknown to the average reader, and to cancer, a too well known and scary term that might generate otherwise unbrought lawsuits.

I certainly appreciate the opportunity to discuss this question with you and will look forward to hearing further from you when you have had a chance to reconsider it.

Very truly yours,

William L. Rieth

William L. Rieth

Bhl

cc: Mr. A. H. Fay
Mr. W. E. Hoffman
Mr. F. H. Zimmerman
R. L. Beck, Esq.
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