EPA AND OSHA ALLOW SOME EASE ON ASBESTOS ISSUES

BY HOWARD FINE

Mention asbestos and building owners cringe. They have visions of paying millions to remove asbestos from their buildings or multimillion dollar lawsuits from employees fearful of contracting diseases from the thin insulation material.

But recent developments may serve to cushion the blow for those building owners or operators grappling with the problem of asbestos. A federal agency has come out with revised guidelines that downplay the threat from asbestos, a move that has stirred controversy among union and health groups. And a New York court decision last month could bring tax relief to building owners in that state whose buildings contain asbestos.

Real estate groups may soon press for similar treatment of asbestos-laden property in California. "The asbestos fiber mania that prevailed several years ago has cooled, to be replaced by a more common-sense and cautious approach to the long-term management of asbestos," says David Kahane, vice president of Forensic Analytical Specialties Inc., a Hayward-based asbestos consulting firm.

"Yet building owners cannot completely ignore asbestos," Kahane says. "They will have to accept the fact that asbestos will have to be dealt with eventually. And it may be just as expensive over the long run to manage asbestos on site."

As if to underscore this point, some regulators may be tightening their regulations. "It is quite likely that there will be mandatory inspections in buildings known to contain asbestos," says Greg Hurley, an attorney with the Irvine construction and environmental law firm of Ernest Brown & Co. "This by itself could prove very expensive."

The EPA is under court order to decide whether to revise asbestos regulations by July 1. Currently the EPA is undergoing a significant policy shift. While they have mandated the removal of asbestos in schools, the agency's July 1990 publication entitled "Managing Asbestos in Place" downplayed the need to remove asbestos, focusing instead on how to keep the asbestos fibers from becoming airborne.

"Based upon available data, the average airborne asbestos levels in buildings seem to be very low," the agency states. "Accordingly, the health risk to most building occupants also appears very low. 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."

This policy has outraged some health and union groups, who see it as a formula for builders to do nothing about asbestos. "All asbestos is dangerous at all levels," says Paul Safchuck, president of the White Lung Association who says he is also a victim of asbestosis, a fatal lung disease. "There is no such thing as safe asbestos. It must all be removed."

The EPA maintains that this policy is not a "do-nothing" formula, but rather a way in which to minimize the amount of asbestos fibers that are released into the air. More impetus for building owners to leave asbestos undisturbed may come from rules currently undergoing final review at the Occupational Safety and Health Administration.

The agency is considering tougher airborne asbestos fiber exposure limits. OSHA's 1986 rules, which lowered the acceptable exposure limits from 2.0 asbestos fibers per cubic centimeters to 0.2 fibers per cubic centimeter, were immediately challenged in court by the building and construction trades. Since then OSHA has granted several exemptions and has eased the standard to 1.0 fibers per cubic centimeter in other cases.

Now OSHA is considering rules that would lower the overall exposure limit to 0.1 fibers per cubic centimeter. Those rules, which are expected to be released in early 1992, would also mandate automatic inspections and asbestos enclosure policies for any building demolition or renovation.

OSHA health scientist Carol Jones says that the tougher standards for ambient air exposure should not impact buildings where asbestos is left undisturbed, unless there is an asbestos fiber leak.

While the federal government remains tied up in revising asbestos regulations, the most significant state legislation in asbestos management has been on the books for two years. AB 3713 was passed at the end of the 1988 legislative session and requires any owner of a building completed before 1979 who knows the building contains asbestos to notify the tenants or employees. The law was amended early last year to include provisions for the drawing up of asbestos management plans.

Even though both the state and federal regulations stress in-place asbestos management, building owners still face the prospect of years of asbestos-related problems and difficulties in selling asbestos-contaminated property.

A sign of relief may have arrived in the form of a court-mandated tax rebate for owners of buildings with asbestos. The March court decision in the case of Bass v. New York State Tax Commission could mean thousands of dollars in savings in property taxes on buildings with asbestos.

The case itself involved the 50-story, 2.5 million-square-foot One New York Plaza building. The building owners sought property tax relief on the basis that the presence of asbestos lowered the market value of the building by adding costs of up to $30 per square foot for asbestos removal.

The New York state Supreme Court sided with the plaintiffs and ordered the New York State Tax Commission to refund the building owners $24 million in overpayed taxes. Ernest Brown & Co.'s Hurley says that building owners in California were likely to push for similar tax rebates, citing places like the mid-Wilshire district, which has many buildings containing asbestos that are similar in size to the One New York Plaza building.

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Asbestos Lowers the Tax Toll

A New York State Supreme Court judge recently reduced the tax assessment of a Manhattan office building. In part, it was because of the presence of asbestos in the structure.

Judge Stanley Parness cut the assessment for One New York Plaza for six tax years by a total of $360 million. "The property has significant physical and functional impairment, which impacts upon its market value. The problem of first magnitude is the existence of asbestos throughout the building," said Parness.

The tax assessment reduction case was the first to go on trial in the state in 10 years, according to Joel R. Marcus. Marcus was the attorney who argued the case while he was with the law firm of Shea & Gould.

According to the *Wall Street Journal*, Marcus said that the decision will almost certainly inspire owners around the country to try the same route in an effort to lower assessments. He noted, however, that lowering a building's assessment for tax purposes doesn't ordinarily reduce the property's resale value since lower taxes can make a property more attractive than it otherwise would be.

An attorney for the city said that after reviewing the decision the city would probably appeal.

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NRCA petitions EPA to reconsider asbestos rules for roofing material

The National Roofing Contractors Association (NRCA) has taken action to prevent potentially unsafe and unnecessary work during roofing projects involving asbestos materials.

NRCA petitioned the U.S. Environmental Protection Agency (EPA) to reconsider certain provisions of the Nov. 20, 1990 "clarification" of its asbestos emission standards. NRCA filed a separate petition for judicial review of the standard in the U.S. Court of Appeals for the District of Columbia Circuit.

The EPA regulates the discharge of asbestos fibers into the environment under its National Emission Standards for Hazardous Air Pollutants (NESHAPs). The new rule by EPA requires: notification to EPA of *all "renovation"* jobs; having a "trained" worker on all asbestos-containing roof projects; wetting—at least during operations involving mechanical roof cutters, and vacuuming and disposing of the "dust" generated by mechanical roof cutting operations.

In the past the EPA regulated only "friable" materials containing more than one percent asbestos by weight that hand pressure can crumble, pulverize or reduce to powder when dry.

Roofing materials, for the most part, were found to be nonfriable. Therefore, the regulation was not applied to roofing operations.

In January 1989, the EPA asked for public comments on proposed revisions to NESHAP, which generally exempted roofs that were "in good condition." NRCA testified at the EPA hearings and submitted comments at that time.

On Jan. 26, 1991, NRCA Executive Vice President William Good wrote a letter to EPA Administrator William Reilly citing two reasons for requesting a reconsideration.

The first reason Good cites is inadequate notice of the provision of the final rule as it relates to roofing operations. Second, there was no opportunity for public comment on certain key documents placed in the record after the comment period was closed.

Good said, "It appears that we have a classic case of a well-intentioned agency that simply doesn't understand the industry it is attempting to regulate. EPA's remedy—to wet and vacuum along cut lines—is unsafe, unworkable and, most of all, unnecessary."

He also commented that, "The petition for judicial review was filed simply to preserve our legal rights. The rule provided that such petitions had to be filed by January 20 and we felt compelled to protect ourselves. Our real hope, however, is to arrive at a reasonable solution in cooperation with the EPA." □

ROOFING/SIDING/INSULATION APRIL 1991

Asbestos regulations get axed

JUNEAU — Alaska has decided to revoke regulations for cleaning up asbestos and other hazardous materials, and will follow less stringent federal regulations.

According to Nancy Usera, state labor commissioner, the stricter state regulations, completed in the final days of Gov. Steve Cowper's administration, were quickly done and required revision.

She said last month, that the state would revoke the new regulations and return to the federal standards.

Federal standards were augmented in the mid-1980s for removing asbestos. These standards were believed to be not strong enough to protect workers by some state officials. They set up a task force to draft new regulations. //

DAILY JOURNAL OF COMMERCE-SEATTLE APRIL 18, 1991

PARTS REBUILDERS FEAR KNOCK-OUT PUNCH

Clutch rebuilding will come to an end on August 23, 1993, and brake rebuilding on August 25, 1996 if a new US EPA regulation goes unchallenged by the industry ... The agency determined that the removal of asbestos linings and facings is "processing" and not "disposal," even though the rebuilders don't reuse the linings and facings, and must dispose of them properly ... The industry association, Automotive Parts Rebuilders Association (based in Mc Lean VA), pointed out that while only the clutches and brakes with asbestos parts are included in the EPA regulation, the effect would be to shut down all rebuilding of these parts since "a used non-asbestos lining or facing is indistinguishable from a used asbestos" component ...

... The organization recently hired Harker Collins to conduct an economic impact study in the industry, the consumer and the environment ... Collins is widely known for his leadership of Bandag, the $2 billion tire rebuilder firm ... Previously he served as a Bendix division Vice-President and was VP at Grote Manufacturing ... APRA seeks members to be classified as a "disposer" of asbestos and not a "processor" ... According to one industry estimate 80% to 90% of aftermarket brake drums and 75% of aftermarket clutches are rebuilt, representing 120 million brake units and six million clutches, respectively.

AUTOMOTIVE WEEK APRIL 22, 1991

ASBESTOS FOUND IN OPEN LANDFILL AT RESEARCH BASE IN ANTARCTICA

Asbestos is littering an open landfill near McMurdo Station, an American research base in Antarctica, according to health and safety investigators.

Officials have closed the landfill until the asbestos can be removed or stabilized. The landfill, located at a site known as Fortress Rock, has long been the source of complaints by environmental pressure groups.

Waste has been burned at the site in open fires, which prompted the Environmental Defense Fund to threaten the National Science Foundation with a lawsuit, sources report.

ASBESTOS CONTROL REPORT APRIL 25, 1991

Asbestos cases here form biggest trial ever

By Sheridan Lyons

At the end of this month in Baltimore's Circuit Court, the biggest batch of cases ever consolidated for one trial anywhere in the United States is to go before a jury: 9,032 claims of death and disease from asbestos exposure against 12 companies from around the nation.

Judge Marshall A. Levin had hoped it would be otherwise.

Handed the asbestos litigation on the eve of his planned retirement after 15 years on the bench, Judge Levin first tried to settle the cases through arbitration. When that failed, he invited the plaintiffs to file a class-action suit. They declined.

Then he devised a plan to have four judges spend virtually all their time trying asbestos cases. That didn't work either: His plan would have cleared only 220 cases a year, but even as those cases were being resolved, one Baltimore lawyer alone was filing 200 cases a month.

Finally, he came up with another plan, to hold one giant trial and have a jury decide the most basic questions: Whether the asbestos products injured or killed the plaintiffs, whether the defendants knew of the danger and whether their conduct was so reckless that the plaintiffs should receive punitive damages.

In a trial full of firsts, Judge Levin, 70, will take his place on the bench April 29 in the ceremonial courtroom in the Old Post Office on Calvert Street and begin picking a jury for a trial expected to tie up scores of lawyers for four to six months.

> "This is the biggest consolidated action in U.S. history."
>
> PETER G. ANGELOS
> Baltimore attorney

"This is the biggest consolidated action in U.S. history," said Baltimore lawyer Peter G. Angelos, who represents 90 percent of the plaintiffs.

Indeed, according to Steven E. Hairston, staff associate of the National Center for State Courts, a research group in Williamsburg, Va., the size of Judge Levin's case dwarfs the previous largest, a federal case in Houston with a mere 274 plaintiffs.

"That's the largest, either class-action or consolidated case, ever," Mr. Hairston said.

To help him manage the cases, the judge has retained a national expert in so-called "toxic torts," law professor Francis E. McGovern of the University of Alabama School of Law in Tuscaloosa, who is sorting and grouping the cases and the issues for the various trials.

The case to be tried here will involve asbestos claims that have been filed in four Maryland counties as well as Baltimore. On the theory that he was going to be hearing the 6,000 asbestos cases filed in Baltimore anyway, Judge Levin invited the transfer of some 3,000 cases from Baltimore, Prince George's, Montgomery and Allegany counties.

The transfer required a change in the Maryland court rules and was resisted bitterly by some of the defendants. But the change was made, and now, "Baltimore is the center of it all" in asbestos litigation, Judge Levin said.

For Judge Levin and the lawyers, the courtroom work has already begun. Two weeks ago he began hearing pretrial motions. This week, lawyers are arguing over the admissibility of evidence.

Last week's crowd of more than 50 lawyers — some of whom came from as far away as San Francisco — was "a small one," said Judge Levin, who usually draws 100 to 130 to his pretrial gatherings in the asbestos cases.

Although much of the day proceeded calmly, there were occasional heated outbursts over issues such as "the sophisticated user" and "the government contracts defense," and whether one company that simply *put its own label on an asbestos* product should be tried with the manufacturers.

"They've fought me at almost every step," the judge commented with a smile at the end of the long day of pretrial motions last week. Just two months ago, he recalled, he threatened to hold some parties on both sides in *contempt* of court if they didn't pay their share of the unsuccessful arbitration.

This trial will focus on claims against 12 corporations alleged to have manufactured asbestos-laden pipe-covering, cement and block without warning of the health hazards posed by the naturally occurring mineral, whose heat-resistant properties made it a widespread insulating material.

The plaintiffs charge — and must prove — that asbestos fibers, once inhaled, remain in the body and can cause various forms of lung, gastrointestinal and other cancers, and asbestosis.

Of the the 9,000 plaintiffs, Mr. Angelos said, from 1,500 to 2,000 have died and are represented by their families.

The long latency of the disease, from 10 to 40 years before symptoms appears, is one factor that makes trying asbestos cases unique and difficult, Judge Levin said.

"This will be an historic trial, which I hope will resolve the issues of the dangers of asbestos and when those dangers were known," he said. "It will be unusual in that it will be an abstract trial on the issues. You won't see a given plaintiff on the stand and the jury awarding him money for a disease."

Rather, both sides will call experts to persuade the jury whether the asbestos product was dangerous or not and what was known about it and when — the all-important "state-of-the-art" test, which holds that a company should have known all current information about potential hazards in their products.

These contentions will be challenged by the 12 defendants.

The number of defendants could change before and during the trial if settlements are reached, both sides said.

To help pick those able to serve for an extended period on a jury, Judge Levin had a random mass mailing of letters to 2,000 potential jurors, asking them simply whether a six-month trial would be a hardship. Of 1,452 responses thus far, he said, only 343 people said they would be available.

If the jurors vote for the defendants, that in effect will end asbestos personal-injury litigation in Maryland, Judge Levin said.

If the jurors find that the products, used properly, did cause asbestos-related disease *when the* defendants knew or should have known they would, the jury will be asked to decide whether the company's conduct was so "wanton and reckless" that the plaintiffs should get additional — punitive — damages.

And that will end th e jury's job, the judge said, because it won't be awarding the dollars. That will be a job for other juries.

Having answered the big questions, the Baltimore jury will be dismissed, the 3,000 non-Baltimore cases will be sent back to the counties, and a series of mini-trials will begin.

In these mini-trials, each plaintiff must prove that he has an asbestos-related disease, what products he was exposed to and *his* actual losses. The jury then will decide the amount of punitive damages.

Also to be tried, if the plaintiffs win in the initial trial, is an alleged cover-up by some defendants, said to have known and concealed evidence of the dangers of their products.

And beyond is the prospect of a new mass trial, in which the plaintiffs are suing another group of defendants: contractors, installers and distributors of asbestos products.

ST0706187 BALTIMORE SUN APRIL 18, 1991

Soviets join Canadian asbestos program

Offers safety advice and training to Third World customers

IAN AUSTEN
SOUTHAM NEWS

OTTAWA — In an apparent bid to protect growing export markets in the developing world, the Canadian Asbestos Institute has convinced its Soviet counterpart to join a international safety group.

Announced yesterday, the deal between the Asbestos Institute and Vaiiproectasbest essentially expands a program run by the Canadian group for many years.

It attempts to boost asbestos sales by offering safety advice and training to customers, particularly in the developing world.

"If there is no safety, there is no future for the asbestos industry," institute president Michel Gratton said.

But the new venture and Canada's effort to expand sales to developing nations were both condemned by Lyle Kristiansen, the NDP's occupational health and safety critic.

"There are enough problems in developing countries without us attempting to assuage fears to increase asbestos exports to them," the MP said in an interview. "It's wildly irresponsible."

The institute is funded by the federal government, the province of Quebec and the asbestos industry.

After announcing the deal, Gratton acknowledged that the new group's first task will be to introduce safety standards in the Soviet Union itself.

"Even in the Soviet Union they realize if they don't clean up their act, they won't have an act for very long," Gratton said at a news conference.

While the Soviet Union has long been the world's largest asbestos producer it has rarely exported beyond the former East Bloc, Gratton said.

But he expects the need for hard currency and the loss of captive eastern European markets will prompt the Soviets to look for new markets.

While that will bring the Soviets into direct competition with Canada — the current export leader — Gratton said it's in this country's interest to help improve their standards.

Otherwise, he argued, the Soviets may extend their unsafe practices to other countries and extend the backlash against the cancer-causing fibre.

Gratton admitted that the so-called International Fibre Safety Group will have no power to enforce its recommendations.

As well, he acknowledged that the institute's past efforts at improvement have often fallen on deaf ears. "Where the political will to protect workers does not exist, our actions cannot have much impact."

Despite that, he said, it would be foolish for Canada to unilaterally end exports to countries that ignore safety measures.

He did suggest that the new institute might organize international boycotts of unsafe users.

The Canadian asbestos industry has been concentrating on Third World markets as annual sales to the United States have plummeted to less than 70,000 tonnes from 700,000 tonnes. Asia has become Canada's main customer, taking 44 per cent of its asbestos exports.

The U.S. Environmental Protection Agency will ban all asbestos use by 1996 — a move the Asbestos Institute, the federal government and others are challenging in court. Asbestos use is also falling in Western Europe with Germany, Denmark and Sweden all considering asbestos bans.

THE GAZETTE, MONTREAL, FRIDAY, APRIL 12, 1991

Judge alters way of paying asbestos victims

NEW YORK (AP)—A federal judge Thursday approved the overhaul of the failing Manville trust fund to speed compensation to tens of thousands of asbestos-disease claimants trapped in the nation's biggest worker-health crisis.

In a 503-page opinion, U.S. District Judge Jack B. Weinstein renewed calls for congressional intervention to help end the decades-old legal battle, which he said could cost up to $51 billion to resolve.

The judge also predicted that more companies beyond the dozen that already have sought bankruptcy protection would run out of money to meet asbestos liabilities.

"A national consolidation and integrated solution to the asbestos problem is needed if we are to adequately compensate the injured without destroying the effectiveness of much of our industry and some of our courts," Weinstein wrote.

The class-action settlement was proposed last November after the Manville trust, the nation's main mechanism for compensating asbestos victims, depleted its cash after making inaccurate estimates of claims and payments.

The trust was created in 1988 as part of Manville Corp.'s bankruptcy court reorganization. Manville, once the nation's largest producer and supplier of asbestos and asbestos-containing products, sought bankruptcy protection in 1982 after being inundated by asbestos claims.

Asbestos is an insulation material used widely from the late 1800s until the 1970s.

Weinstein's ruling establishes a new method of paying workers or their families for ailments such as lung cancer caused by inhaling asbestos.

It will pay deserving claimants according to the severity of their illnesses, abandoning a first-come, first-served scheme that drained much of the trust's assets.

Under the restructuring, Manville will contribute an additional $520 million to the trust over the next seven years and the trust will be free to sell a $1.8 billion Manville bond to raise more cash.

Weinstein barred future lawsuits against the trust or the company and ordered tens of thousands of pending cases against the trust dismissed. That was intended to reduce legal expenses, which totaled $50 million last year. The move was achieved by combining all lawsuits against the trust into a single class action.

Legal appeals are expected, however, as the plan raises questions about Weinstein's authority to modify pending litigation. Defendants' and plaintiffs' lawyers alike opposed aspects of the plan.

Also, appeals courts in several jurisdictions have struck down attempted class actions on grounds that legal and factual differences among victims and their diseases make a single mechanism unfair.

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CHICAGO TRIBUNE MAY 17, 1991