

COPY

JAN 18 2001

CAUSE NO. 2000-05-1962-C

DISTRICT COURT OF CAMERON COUNTY, TEXAS
Elvira S. Ortiz DEPUTY

ROBERT HENRY VILLARREAL,
Individually and as Personal Representative
of the Heirs and Estate of JOHN HENRY
VILLARREAL

Plaintiffs,

vs.

**GAF CORPORATION
HOLDINGS, INC.), ET AL.**

Defendants.

IN THE DISTRICT COURT OF

PLAINTIFF'S EXHIBIT

USG-563

CAMERON COUNTY, TEXAS

197TH JUDICIAL DISTRICT

MEMORANDUM OF LAW IN SUPPORT OF MOTION
IN LIMINE OF DEFENDANT UNITED STATES
GYPSUM COMPANY TO EXCLUDE ALL POST-SALE EVIDENCE
AND ALL EVIDENCE RELATING TO PRODUCTS NOT AT ISSUE

Defendant U.S. Gypsum Company ("U.S. Gypsum") respectfully submits this memorandum of law in support of its motion *in limine* to exclude all post-sale evidence and all evidence relating to products not at issue.

I. INTRODUCTION

At the trial of this case, plaintiff may attempt to introduce evidence concerning U.S. Gypsum's post-sale conduct or knowledge and evidence relating to products not at issue in this litigation. Plaintiff may attempt to offer this evidence to show that the products at issue were defective, or that U.S. Gypsum was negligent. This evidence may include evidence regarding (1) U.S. Gypsum's actions or conduct after the alleged exposure to the asbestos-containing U.S. Gypsum product at issue, (2) knowledge acquired by U.S. Gypsum post-sale regarding the alleged health risks associated with asbestos (post-sale evidence), or (3) products not at issue in this litigation (other-product evidence).

Exhibits for:

Memorandum of Law in Support of
Motion *In Limine* of Defendant
United States Gypsum Company to
Exclude All Post-Sale Evidence and
All Evidence Relating to Products
Not at Issue

A handwritten signature in dark ink, appearing to be "L. J. [unclear]", with a stylized flourish underneath.

Exhibit A

APR 18, 1994

HONORABLE JAMES E SATT, Retired, JUDGE

E A DESPOL DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

P REES

CLERK / JUDGE PRO TEM

E SOTTILE ~~CLERK~~ / ERM
(Paras and counsel checked if present)

1

C 728 816 C/W WEC 137 826 (Trans to J H SNYDER CO, ETC. Central)	Counsel for Plaintiff	MORENO-PURCELL-SCHINDLER by GILBERT L PURCELL ✓ PATRICK A DeBLASE ✓	1 2
CAREY CANADA, INC., ETC., ET AL FILED: 6-26-89 TYPE: PD/OTHER/ASBESTOS AT-ISSUE: 07-22-92/30-40 days	Counsel for Defendant	BREIDENBACH-SWAINSTON-WAY by THOMAS C CORLESS ✓ MORGAN LEWIS & BOCKIUS by RAYMOND T CULLEN ✓ KEVIN M DONOVAN ✓	3 4

NATURE OF PROCEEDINGS

CIVIL TRIAL/JURY

PD/O/ASBESTOS

Cause resumes from APR 17, 1994, with all counsel present as heretofore. Also present is JEROME SNYDER and MICHAEL WISE representing J H SNYDER CO.

OUTSIDE THE PRESENCE OF THE ELECTRONIC RECORDING MONITOR: The Court and counsel further confer regarding possible settlement. The Court finds that there is no possibility of settlement.

IN THE PRESENCE OF THE ELECTRONIC RECORDING MONITOR: Motions in limine are argued and ruled upon as follows:

Plaintiff's motion 10, previously partially argued, is further argued and DENIED:

- 11) To exclude all Evidence that jurors are breathing asbestos fibers is argued and GRANTED as prayed for;
- 12) To exclude all evidence concerning other potential chemicals or Hazardous substances in plaintiff's buildings is GRANTED except the final subdivision public report, if used for impeachment;
- 13) To exclude all evidence which differentiates asbestos by fiber type is DENIED -- under §352 Evidence Code the probative value outweighs the prejudicial;
- 14) To exclude references to threshold limit values or any equivalent term is argued and DENIED -- under §352 Evidence Code the probative value outweighs the prejudicial;
- 15) To exclude evidence concerning comparative and/or quantitative risk assessment evidence and limiting defendant expert KENNETH S CRUMP testimony GRANTED.

Defendants' motions in limine are argued and ruled upon as follows:

- A) - To exclude all post-sale evidence and evidence relating to products not at-issue in this case is argued and GRANTED as more fully reflected in the records of the Electronic Recording Monitor, which are incorporated herein by reference;

CONTINUED ON MINUTE ORDER PAGE 1A.

310/CCW
JEP

MINUTE ENTERED
APR 18, 1994
CLERK

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WESLEY THEOLOGICAL SEMINARY
OF THE UNITED METHODIST CHURCH,

DOCKET NO.
CA 85-1606

PLAINTIFF

WASHINGTON, D.C.
MAY 6, 1988
9:30 A.M.

VS.

UNITED STATES GYPSUM COMPANY,
ET AL.,

DEFENDANTS

VOLUME I

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOYCE HENS GREEN
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:
FOR THE PLAINTIFF:

ASHCRAFT & GEREL
BY: PETER T. ENSLEIN, ESQ.
JAMES M. HANNY, ESQ.
MICHELLE A. PARFITT,
WILLIAM C. BURGY, ESQ.,
KARL W. MARSHALL, ESQ.
ATTORNEY-AT-LAW
2000 L STREET, N.W.
WASHINGTON, D.C. 20036
MR. SMITH, REPRESENTATIVE

FOR DEFENDANT U.S. GYPSUM: MORGAN, LEWIS & BOCKIUS
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ATTORNEY-AT-LAW
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WASHINGTON, D.C. 20036

MORGAN, LEWIS & BOCKIUS
BY: THOMAS B. KENWORTHY,
ESQ.
PETER J. LYNCH
2000 ONE LOGAN SQUARE
PHILADELPHIA, PA 19103

FREEMAN & HAWKINS
BY: JULIA BENNETT JAGGER,
ATTORNEY-AT-LAW
2800 FIRST ATLANTA

POWER, A  Betz & Strouse, Inc.

1 APPEARANCES (CONTINUED):

2 FOR DEFENDANT NATIONAL GYPSUM: SCHWALB, DONNENFELD,
3 BRAY & SILBERT
4 BY: JOHN M. BRAY, ESQ.
5 1025 THOMAS JEFFERSON
6 STREET N.W.
7 SUITE 300 EAST
8 WASHINGTON, D.C.
9 20007

7 HOYLE, MORRIS & KERR
8 BY: SUSAN HERSCHEL,
9 ATTORNEY-AT-LAW
10 JOHN MC SHEA, ESQ.
11 ONE LIBERTY PLACE
12 SUITE 4900
13 1650 MARKET STREET
14 PHILADELPHIA, PA
15 19103

12 OFFICIAL COURT REPORTER:

13 GORDON A. SLODYKO
14 4806-A U.S. COURTHOUSE
15 WASHINGTON, D.C. 20001
16 (202) 535-3404

24 COMPUTER-AIDED TRANSCRIPTION OF STENOGRAPHIC NOTES
25

1 tell them they can go home.

2 Nonetheless, I wanted to see if we could
3 do any movement because we have three days next week,
4 that's it. And however much we accomplish, that's
5 all to be given to the cause.

6 MR. ENSLEIN: Your Honor, the only thing
7 that occurs to me is a short deposition of Mr. Clark,
8 three or four pages, which is I think the only other
9 thing we have by way of testimony to be put in.

10 MR. KENWORTHY: I would like to address
11 Mr. Clark.

12 THE COURT: Can we have the deposition or
13 a copy or do you have a copy, Joe?

14 MR. ENSLEIN: It was one of our
15 designations.

16 THE COURT: Could you tell me what number?

17 MR. ENSLEIN: It was listed as -- one
18 moment, your Honor -- we filed designations.

19 THE COURT: Thank you, Joe.

20 MR. ENSLEIN: It is our designation number
21 11, which is I think in our second binder there.

22 THE COURT: Thank you so much. Number 11.
23 All right. Richard Clark. Now, tell me what is
24 being proffered as to Mr. Clark, and then you'll
25 have a chance to speak to it, Mr. Kenworthy, if you

1 believe it is appropriate.

2 MR. ENSLEIN: This deposition is a
3 deposition of a principal in a company called
4 Mechanical Asbestos Removal, Inc., which several
5 years ago did some removal of asbestos from an U.S.
6 Gypsum facility outside of Baltimore.

7 And our intention of putting this
8 deposition in is to show in part that U.S. Gypsum,
9 even in its own facilities, has removed asbestos,
10 recognizing the fact that -- to show awareness on
11 the part of this defendant of a potential hazard of
12 this material in place.

13 THE COURT: Its own facility of course is --
14 what kind of a facility of U.S. Gypsum, I don't want
15 to guess at it.

16 MR. ENSLEIN: I believe it is a
17 manufacturing facility.

18 THE COURT: An industry type, in any event?

19 MR. ENSLEIN: Yes.

20 THE COURT: Manufacturing what in
21 particular?

22 MR. ENSLEIN: Some form of building
23 product, as I understand it. I am not sure this
24 deposition goes into the specifics of that.

25 THE COURT: Did he address any differences

1 that there might be between that kind of a facility
2 and the facility that we have at issue in this case?

3 MR. ENSLEIN: As I read the deposition,
4 that was not addressed in the deposition. It was
5 merely a deposition taken to establish that this
6 removal in fact took place, which is why we want to
7 offer it.

8 THE COURT: Why don't I just glance
9 through it. It is a very short deposition. Why
10 don't I skim the pages, then I'll hear whatever
11 argument you have to make with a little more
12 reinforcement of knowledge.

13 (Pause.)

14 THE COURT: Mr. Enslein, was the entire
15 project there -- I may be just looking at a portion
16 of it. Was the entire project there removing
17 approximately 970 feet of piping insulation?

18 MR. ENSLEIN: I believe that's right.

19 THE COURT: That was the one project that
20 the witness said he was aware of?

21 MR. ENSLEIN: Yes.

22 THE COURT: All right. With that in mind,
23 let me keep looking through here.

24 MR. ENSLEIN: Your Honor, I may have
25 misspoken.

1 THE COURT: The last page, did we just
2 reach the last page at the same time, both of us?
3 February 6, 1986, 4 p.m., job canceled by U.S.
4 Gypsum, no asbestos abatement was done.

5 MR. ENSLEIN: Yes. But that was not the
6 point I was referring to.

7 THE COURT: Sorry.

8 MR. ENSLEIN: Page 82, I think they talk
9 about 8 million for linear square feet of pipe
10 insulation being removed on page 82 of the
11 deposition.

12 THE COURT: What I am looking at is
13 Plaintiff's Exhibit 820; is that right?

14 MR. ENSLEIN: Yes.

15 THE COURT: And the pages that I have --
16 oh, yes, I am sorry. You are talking about 82?

17 MR. ENSLEIN: Page 82.

18 THE COURT: All right. 870 linear feet of
19 pipe insulation, main gas line, U.S. Gypsum six-inch
20 gas line \$8,400.

21 MR. ENSLEIN: I think it is a
22 typographical error. I think they put a dollar sign
23 in front of that number.

24 THE COURT: It is confusing when was it
25 performed late December 1985 then the last sheet I

1 just referred to may have been talking about a
2 different work order, but it was 1986 date that
3 indicated the job had been canceled.

4 MR. ENSLEIN: Yes, I think it refers to
5 another job.

6 THE COURT: All right. Let me hear now
7 from you, Mr. Kenworthy.

8 MR. KENWORTHY: I still have not seen why
9 Mr. Enslein suggests that is in any way relevant to
10 this breach of warranty case with acoustical plaster.
11 It is an entirely different product. It was not
12 manufactured by United States Gypsum, it has
13 absolutely nothing to do with the issues in this
14 case about this product under these conditions.

15 The deposition wasn't taken in this case,
16 it wasn't taken with reference in mind to being
17 relevant to the product in this case. It is a
18 situation where, pursuant to law, you are required
19 to separately remove under the NESHAPs regulation
20 this type of material. There is no suggestion even
21 as to that particular product that it is a
22 recognition that under its circumstances is even
23 defective.

24 And even if it were, certainly public
25 policy would never permit that type of action, even

1 if it were done for a safety purpose in 1986 to be
2 used to suggest that there is in fact a defect with
3 an entirely different product that was sold in 1958.
4 Every court that has addressed this issue of
5 allowing that has excluded it.

6 THE COURT: It has been asked before?

7 MR. KENWORTHY: Not this particular one,
8 but other ones for all of those reasons of prejudice,
9 it is totally different from the product in issue
10 and it would be against public policy certainly to
11 allow something that even might address a safety
12 problem that was done in 1986 to be suggestive of a
13 defect in a product that was sold in 1958.

14 MR. ENSLEIN: Your Honor, it is my
15 understanding that in the City of Greenville case,
16 similar testimony was offered and allowed against W.
17 R. Grace where Grace was removing asbestos-bearing
18 materials from its own facilities to establish the
19 fact Grace -- in fact, Grace's awareness of the fact
20 that material posed a potential health hazard.

21 That is our intention of offering this
22 testimony to establish an awareness within United
23 States Gypsum Company that asbestos-bearing
24 materials in a building pose a potential health
25 hazard, not to show knowledge -- not to show

1 knowledge in the 1950s of -- that it posed a hazard,
2 but rather to show that, in fact, contrary to the
3 representations at length to the jury in the
4 witnesses that material once in place does not pose
5 a hazard, an awareness that in fact it does.

6 MR. KENWORTHY: Your Honor, we made no
7 representations in this case about the hazards of
8 pipe insulation. The case that Mr. Enslein
9 represents is entirely different. United States
10 Gypsum tried the last case tried against United
11 States Gypsum which is the only other case that has
12 been a pure warranty case other than this. It was
13 tried before the exact same judge that had heard the
14 Anderson -- the City of Greenville City Hall case.
15 He excluded this testimony in a breach of warranty
16 case, and he particularly distinguished the fact
17 that that was not NESHAPs mandated, and there was
18 some showing of similarity and it was in close
19 proximity to the installation, those were both in
20 the early 1970s that the sale took place in
21 Greenville City Hall and that the removal took place
22 in Greenville City Hall.

23 We are dealing here with a period of a
24 30-year difference in an entirely different product
25 in a warranty case. And for the reasons previously

1 stated, it clearly should be excluded.

2 THE COURT: All right. It shall be
3 excluded, and these selected pages from the
4 deposition of Mr. Richard Clark will not be used in
5 this case, the relevancy, confusing different type
6 of facility, not one of defendant's products,

7 Public policy, I will not go that far, Mr.
8 Kenworthy, but it certainly would be confusing and
9 misleading and inappropriate to develop before this
10 jury. So be it.

11 Let me tell the jury that when I told them
12 that I thought we had abbreviated the testimony
13 substantially, I didn't know how true that was.
14 This will be a surprise to them.

15 Why don't you just bring them in here, and
16 they don't have to take their seats. It will be
17 10:15 on Monday. And Monday we can go up to just
18 shy of 4:30. I think there is a 4:30 meeting with
19 lawyers who want to talk about Rule 11. I think you
20 all heard about that subject. So they are getting
21 their little interviews with judges a few at a time.

22 THE COURT: Yes, Mr. Enslein.

23 MR. ENSLEIN: After the jury is excused, I
24 have one more matter.

25 (Jury present.)

Exhibit C

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

3 SPARTANBURG COUNTY SCHOOL)
DISTRICT SEVEN,)

4 PLAINTIFF,)

5 vs.)

C.A. 83-1744-3

6 NATIONAL GYPSUM COMPANY AND)
7 UNITED STATES GYPSUM COMPANY,)

8 DEFENDANTS.)

ANDERSON, SC
APRIL 17, 1987
9:55 A. M.

10 TRANSCRIPT OF PRETRIAL CONFERENCE

11 BEFORE THE HONORABLE G. ROSS ANDERSON, JR.
12 UNITED STATES DISTRICT COURT JUDGE

13 APPEARANCES:

14 FOR PLAINTIFF:

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15 FOR NATIONAL GYPSUM:

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18 ERIC B. HENSON, ESQ.
GAETAN J. ALFANO, ESQ.
19 HOYLE, MORRIS & KERR
1424 CHESTNUT STREET
20 PHILADELPHIA, PA 19102

21 FOR U.S. GYPSUM:

EDWIN P. MARTIN, ESQ.
TURNER, PADGET, GRAHAM & LANEY
22 P. O. BOX 1473
COLUMBIA, SC 29202

23 THOMAS B. KENWORTHY, ESQ.
24 FRANK L. CORRADO, ESQ.
2000 ONE LOGAN SQUARE
25 PHILADELPHIA, PA 19103

COURT REPORTER: GERRI M. DUNN, P. O. BOX 1752, ANDERSON, SC 29622
(803) 226-2034

These proceedings taken by machine shorthand, transcribed by
reporter.

1 THE COURT: Well, you've got to file a copy of
2 it.

3 MR. DUFFY: Judge, does the same rule apply to
4 testimony from the transcript of the first trial of this case?
5 How do we handle that? Same way?

6 THE COURT: Same way.

7 MR. KENWORTHY: The only other thing I'd bring to
8 the Court's attention, I think we probably all agree -- we've
9 gotten the exhibit lists, subject to the Court's rulings, and
10 the witnesses. I don't think there's going to be much
11 question -- it probably looks like we could be able to be
12 done, even on normal trial days, on Wednesday. I think that
13 is a fair -- certainly Thursday morning. I just wanted to
14 bring that to the Court's attention and see if you really
15 still felt you wanted to schedule the night sessions.

16 THE COURT: Well, to help you out, I'm going to
17 rule on number six. I'm ready to rule on that. Now removal
18 from their own premises of the unsound product, I'm going to
19 exclude that. The advertising documents have been stipulated. I
20 have got to -- on your other documents, I'm going to allow,
21 which is the biggest group or so I'm informed, number seven,
22 communication with the defendants and building owners, it is
23 going to come in for the limited purpose of showing that the
24 breach -- notice of the breach would have been futile, that
25 they already knew it and that is the limited purpose of it,

Exhibit D

1 IN RE: BALTIMORE CITY * IN THE
2 PERSONAL INJURY * CIRCUIT COURT
3 AND WRONGFUL DEATH * FOR
4 ASBESTOS CASES * BALTIMORE CITY
5 * * * * *
6 ABATE, et al. *
7 Plaintiffs * CONSOLIDATED
8 vs. * FILE NO.
9 ACandS, INC., et al. * 89216704
10 Defendants *

11 * * * * *

12

13 DOCUMENT DISPUTE HEARING REGARDING
14 DEFENDANT UNITED STATES GYPSUM COMPANY

15 A Document Dispute Hearing Regarding the
16 Defendant United States Gypsum Company in the
17 above-entitled action was held on Monday, January 27,
18 1992, commencing at 9:15 a.m., at Room 232, Courthouse
19 East, Baltimore, Maryland 21202, before The Honorable
20 Marshall A. Levin, and reported by Barbara J. Evans, a
21 Notary Public.

19

20 EVANS REPORTING SERVICE
21 4358 Parkside Drive
Baltimore, Maryland 21206
(410) 483-2963

ORIGINAL

1. I understand.

2. MR. REELEY: Mr. Kipp, who talks about that
3. is mentioned in the first sentence. Mr. Kipp is their
4. insurance man at U.S. Gypsum's -- I think he was
5. called manager of insurance.

6. MR. LEECH: I still don't understand how
7. this document relates to U.S. Gypsum's involvement or
8. purported involvement with the Asbestos Information
9. Committee of North America which concerns other
10. defendants, and if they have information about other
11. defendants involved in that committee or organization,
12. they should put that in through other documents which
13. concern those other documents, but not U.S. Gypsum.

14. THE COURT: Well, I overrule the objection
15. primarily because, despite that argument, the people
16. at USG seem to find the AIA Committee of North America
17. something of interest to them in the asbestos
18. picture.

19. The next number.

20. MR. REELEY: Next number, your Honor, is 360.
21. And you can consider it with 362 and that will

1 conclude this set.

2 THE COURT: All right.

3 (Pause.)

4 THE COURT: What is your objection, sir?

5 MR. LEBOR: Your Honor, these documents
6 concern U.S. Gypsum's compliance with NESHAPS, the
7 National Emissions Standards for Hazardous Air
8 Pollutants.

9 It only sets forth a portion of U.S.
10 Gypsum's policy with respect to the removal of pipe
11 insulation and other asbestos-containing products
12 during any renovation or demolition of a facility or a
13 plant, a U.S. Gypsum plant. It has no relevance as to
14 whether U.S. Gypsum's products are hazardous or
15 defective in any nature.

16 As a matter of fact, in the Clarksville
17 opinion, your Honor, the Court said that the
18 plaintiffs there; to which Mr. Berly would like to use
19 in this case, is fraud because the regulations were
20 enacted after the construction of the buildings at
21 issue in the case, and they are not probative of

1 The argument would be that, if U.S. Gypsum
2 was trying to take asbestos products out of their own
3 plants where the exposure levels they typically argue
4 are many times less than they would be to somebody who
5 works with it, then certainly the people that worked
6 with it that have the greater exposure are even
7 significantly more in danger.

8 These are just two of the very many
9 documents we have that show U.S. Gypsum's internal
10 corporate policy of taking the asbestos out of their
11 own buildings.

12 MR. LIBOR: Your Honor, this document 362 is
13 misleading in that the, quote, recently developed
14 policy, and quote, there is that the products in the
15 buildings were to remain in place unless they were
16 part of renovation or demolition of the facility.

17 Plaintiffs typically designate the testimony
18 of Frank May, who is the person who authored Exhibit
19 362, and Mr. May testifies that the company's policy
20 is that products remain in place unless they have to
21 be removed because of MESHAPS where the company does

1. whether Andicote which was at issue, which the
2 plaintiff plans to present evidence in this case was
3 defective, reasonably dangerous or whether U.S. Gypsum
4 was reasonably negligent.

5 MR. BAILY: I offer it for a different
6 reason than what it was offered for in Clarksville,
7 Clarksville being an asbestos property damage, this
8 being a personal injury case, where I think that
9 people will agree that the exposures these individual
10 plaintiffs suffered would have been higher than that
11 typically found in a building.

12 And in this instance, the reason for
13 offering these documents is, particularly if you look
14 at 362, you will see U.S. Gypsum had a corporate
15 policy to go in and to remove asbestos material that
16 is in a deteriorated condition.

17 I mean, that is something that they are
18 undertaking on their own volition. That is not
19 something that they are being mandated to do by some
20 federal requirement somewhere, the NESHAPS or what
21 have you.

1 renovation or demolition.

2 The issues concerning HESZAPS have no
3 relevance at all as to whether or not products when
4 they were constructed or installed in the building are
5 dangerous.

6 THE COURT: I am going to sustain objections
7 to 360 and 362.

8 THE COURT: Okay. We will take a brief
9 recess.

10 (A break was taken.)

11 THE COURT: All right, sir.

12 MR. BEELEY: Your Honor, the next set that we
13 can look at together very quickly is 266, 268, 278.
14 That's it.

15 THE COURT: Okay.

16 MR. BEELEY: These all tell one brief story.
17 And that is that, in the 1955 period, U.S. Gypsum
18 experimented with substituting in part for its
19 asbestos paper in its Audicote product, one of their
20 acoustical plaster products.

21 And they were able to devise an Audicote