

ASBESTOS TEXTILE INSTITUTE

FOUNDED 1944



MEMO TO: ALL MEMBER COMPANIES OF ATI AND ATI, INC.

SUBJECT: Potential Liability of Members for Tortious Acts
Done by the Association or the Corporation

At the request of the Ad Hoc Litigation Committee, Wendell B. Alcorn, Jr., Esq., Cadwalader, Wickersham & Taft, has prepared the attached memorandum discussing the potential liability of individual members of Asbestos Textile Institute and of Asbestos Textile Institute, Inc.

Since the memorandum is privileged, you are cautioned not to distribute it outside of your control group.

January 21, 1977

Doris M. Fagan

Doris M. Fagan,
Executive Secretary

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January 14, 1977

At the Annual Meeting in Savannah, Georgia, the Ad Hoc Committee of the Asbestos Textile Institute, an unincorporated trade association formed and existing under the laws of the State of New York (hereinafter referred to as "the Association"), requested a memorandum on the question of legal exposure of the individual member companies in the event that the Association or the Asbestos Textile Institute, Inc. (hereinafter referred to as "the Corporation"), is found liable in a lawsuit.

This memorandum does not constitute an opinion of law and should not be relied upon as such. Rather, the views expressed herein should be reviewed by the respective general counsel of the individual companies and/or local counsel in pertinent jurisdictions if a legal opinion on these questions is desired.

The Association

To date, the Association has been named as a defendant in only two related actions, Yandle v. PPG Industries, Inc. and Kay v. PPG Industries, Inc.

They are pending in the United States District Court, Eastern District of Texas, and have been consolidated for purposes of pretrial discovery.*

*The Judicial Panel on Multidistrict Litigation recently issued an order to all parties in all the asbestos cases in Federal courts to show cause why these cases should not be consolidated for pretrial proceedings. The Panel held a hearing on October 29, 1976, at which the summoned parties voiced their unanimous opposition to such consolidation. The Panel has agreed to consolidate the cases for pretrial proceedings.

The potential liability of individual members of the Association in these cases was discussed in a letter from Gene Leff, Esq., an associate at this firm, to the members of the Association, dated March 7, 1974. Apparently there have not been any new developments in Texas law in this area since that letter and therefore I will simply reiterate Gene Leff's conclusions. I suggest that you refer to his letter for a more detailed analysis.

Under the law of the State of Texas, those members who assent to or ratify the acts in question of a non-profit unincorporated association become personally liable for a judgment entered against the association. However, it would appear that associate members, who are not entitled to vote, and regular members who joined ATI after the acts in question occurred (without ratifying such acts) would not be exposed.

The Corporation has been named as a defendant in state court actions brought against asbestos manufacturers and others in the states of Pennsylvania and Virginia.* Although the Association has not been named in any of these suits, the plaintiffs involved could amend their complaints to include it. Therefore, I have reviewed the law of these two states with respect to the liability of members of an

*The Corporation was also named as a defendant in an action in state court in Michigan. A voluntary dismissal without prejudice was entered after the Corporation's attorneys filed a motion to dismiss the complaint.

unincorporated association for a judgment entered against such association.

Rule 2153 of the Pennsylvania Rules of Civil Procedure gives a plaintiff the right to sue an unincorporated association and to join as defendants any individual members of such association for the purpose of enforcing any individual liability of such members on the cause of action sued upon. However, the Pennsylvania courts have held that a plaintiff may enforce liability against the individual members only where it is shown that some basis for individual liability exists. Binkowski v. Highway Truck Drivers and Helpers, Local 107, 389 Pa. 116, 132 A.2d 281 (1957). Therefore, it would appear that in any action brought in Pennsylvania against the Association, individual members would be liable only if there were some basis for such liability, i.e., if they had authorized or ratified the acts which gave rise to the liability. As in Texas, associate members, who are not entitled to vote, and those members who joined the Association after the acts in question occurred (prior to 1974 in two of the pending cases) and did not ratify such acts, should not be exposed. These general criteria for the imposition of individual company liability raise questions of fact that would be unique for each member.

The extent of the liability under Virginia law of individual members of an unincorporated non-profit association for a judgment against such association is not so clear.

Section 8-66 of the Code of Virginia states that

"All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. Process against such association or order or notice to it may be served on any officer or trustee, director, staff member or agent of such association or order."

From the language of this statute, it could be argued that a judgment against an unincorporated association only binds the property of such association and the individual members are not liable since shareholders of a corporation are not individually liable. However, at least one court has interpreted this provision to be merely procedural. Hawthorne v. Austin Organ Co., 71 F.2d 945 (4th Cir.), cert. denied, 293 U.S. 623 (1934). Therefore, the liability of members would be based on Virginia common-law principles, for which one must look to judicial pronouncements.

Unfortunately, there is a dearth of Virginia court decisions in this area. The only language on the topic that I discovered was in the dissent in Hawthorne v. Austin Organ Co., supra, at 952, where Judge Parker noted the

"well-settled rule that members of an unincorporated association who give their assent to contracts entered into in its behalf are personally liable thereon."

It can only be hypothesized that Virginia will follow the analogous general rule for liability of members of an unincorporated association in tort actions.

"While membership in an association does not per se impose liability on individual members for the torts of an association or its agents, the members may be held responsible for torts committed by the association within the scope of its purposes or for torts of association agents acting within the scope of their employment." 7 C.J.S. Associations §32(c).

If Virginia were to follow this rule, then the exposure of members of the Association would be similar to that in the Pennsylvania and Texas cases.

Dissolution of the Association could help its former member avoid paying duplicative legal fees for their own and the Association's defense in suits in which the Association was not named prior to its dissolution. The basic common-law rule is that, unless permitted by statute an unincorporated association is not amenable to suit.

7 C.J.S. Associations §36; West Virginia Secondary School Activities Comm. v. Wagner, 143 W. Va. 508, 102 S.E.2d 901 (1958). Although Pennsylvania, Texas and Virginia each have a statute which permits an unincorporated association to be sued, the language of each of these statutes seems to require the association to be in existence at the time the suit is instituted. Therefore, if the Association were dissolved, it could be argued that it was no longer subject to suit. Cf. Cavalier Poodle Club v. Cavalier Poodle Club, 206 Va. 945, 147 S.E.2d 68 (1966). Further, if any plaintiff were to prevail, such dissolution could help individual members avoid double liability - in their own right and as members

of the Association. Of course, such dissolution would not relieve any member of the Association for liability for its own tortious conduct either within or without the context of the Association.

The Corporation

The Corporation has been named as a defendant in several suits in Pennsylvania and in Virginia. Further, it may be expected that the Corporation will be named in future suits in these and other states. Therefore, the potential individual liability of members of the Corporation for a judgment against the Corporation in both of these jurisdictions is discussed below.

Since the Corporation did not come into existence until August 27, 1975, it is potentially liable only for events which occurred after that date. Furthermore, because of its short existence and the limited liability of its members, it should be much easier to defend than the Association and would be a less attractive defendant in the eyes of future plaintiffs.

Under Pennsylvania law, the members of a non-profit corporation are not personally liable for the debts, liabilities or obligations of such corporation, except to the extent of any unpaid membership dues or assessments. 15 Pa. Cons. Stat. Ann. §7554 (Purdon Supp. 1976). Therefore, the

individual members of the Corporation should not be liable for a judgment against such corporation in any of the Pennsylvania cases. The liability of the individual members of the Corporation for their own acts, taken apart from the Corporation, is, of course, beyond the scope of this memorandum.

In the Virginia actions as well, individual members of the Corporation apparently would not be exposed to personal liability if a judgment were rendered against the Corporation, since that state would be likely to take the same approach to the matter as does Pennsylvania.

"[I]t is a well-settled rule of the common law that in the absence of any constitutional provision or statute law to the contrary there is no liability upon the stockholder of a corporation to pay its debts or liabilities beyond his subscription." 4B M.J., Corporations, §139 (1974).

See Martin v. South Salem Land Co., 94 Va. 28 (1896).

Under the Virginia Code, the only liability a subscriber or shareholder has to creditors of a corporation is for any unpaid amounts he owes for his shares. Va. Code §13.1-22 (Supp. 1975). There is no similar provision in the statute for non-stock corporations such as the Corporation.

Although there is no case directly in point, the Virginia courts should apply to the Corporation either the Virginia common-law rule or, by analogy, the rule for stock corporations. In either event, the effect would be to limit

the liability of each of the Corporation's members to the amount of any unpaid assessment.

In the unlikely event that Virginia's law on this subject was determined to be different from that of Pennsylvania, the liability of the individual members of the Corporation should still be limited.

Under both Restatement of Conflict of Laws §187 (1934) and Restatement (Second) of Conflict of Laws §307 (1971), the existence and extent of liability of shareholders of a corporation to the creditors of the corporation is determined by the law of the state of incorporation.

Since the Corporation was incorporated in Pennsylvania, in the event that a Virginia court believes there is a conflict between Virginia and Pennsylvania corporate law provisions, it should apply Pennsylvania law. Therefore, the individual members of the Corporation should not be liable for a judgment against the Corporation except to the extent of any unpaid dues or assessments. 15 Pa. Cons. Stat. Ann. §7554 (Purdon Supp. 1976).

Dissolution of the Corporation should not reduce the exposure of its individual members for past activities. Both Virginia and Pennsylvania have statutes which provide that any liability incurred by a corporation, its officers or members will survive the dissolution of such corporation. 15 Pa. Cons. Stat. Ann. §7971 (Purdon Supp. 1976) and Va.

Code §13.1-264 (1973). However, such dissolution would eliminate potential liability for future acts.

In view of the confidential nature of this memorandum, please do not circulate it outside appropriate management and legal officers of your company.

If we may be of further assistance with respect to the subject matter discussed above, please do not hesitate to let us know.

WBAjr.