

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

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ENVIRONMENTAL HEALTH TASK FORCE

REPORT TO POLICY COMMITTEE

ON MEETING HELD IN LIEU OF LEGAL PROBLEMS SUB-COMMITTEE MEETING

It was determined that in lieu of the Legal Problems Sub-committee Meeting scheduled for July 15, 1969, a second meeting of counsel of asbestos industrial insulation manufacturers would be held. Such meeting was held at the general headquarters of Johns-Manville on August 12, 1969. The following companies (in addition to J-M) were represented by their house counsel and/or outside counsel:

Armstrong Cork Co. Inc.
Certain-teed Products Corporation
Owens-Corning Fiberglas Corp.
Fibreboard Corporation
Combustion Engineering, Inc.
Eagle-Picher Company
Unarco Industries, Inc.
Keene Corp. - Baldwin-Ehret-Hill Div.

Herbert Morton Ball and the writer attended on behalf of the J-M Legal Problems Sub-committee.

The morning portion of the program was devoted to a lecture by Dr. Wright on asbestos and health problems. The purpose of this presentation was to "hit home" to the group the seriousness of the problem which confronts them. It appeared that Dr. Wright's presentation had the desired effect.

After lunch there was a short discussion of the Tomplait case (now settled) and the new case instituted in Beaumont (by Ward Stephenson, Esq., the same lawyer who represented Mr. Tomplait) of Potter vs. Fibreboard Paper Products Corporation, et al.. We were told that Mr. Stephenson has instituted a third case in which we are a named defendant, this time in Louisiana.

The bulk of the afternoon discussion was devoted to devising the best means of handling these cases on an industry-wide basis.

Everybody seemed to favor the formation of an industry-wide committee of house counsel and indicated a general desire to cooperate in these matters. Further, the majority feeling was that if the litigation in this area becomes as extensive as is anticipated the most feasible way to conduct the matter on an industry-wide basis would be through the retention of a single, large "prestige" law firm. This firm would coordinate legal activities on behalf of all of the companies in the industry and direct the conduct of the litigation by the various local counsel that would have to be retained in the different areas where individual suits are instituted from time to time. The previous experience of the manufacturers in the electrical and tobacco industries in using such an approach and the considerable success which resulted therefrom was discussed.

The essential concept underlying such an approach is that the use of one law firm will result in:

1. economies of administration of the defense; and
2. a more efficient and unified defense posture on the part of all of the companies in the industry.

Such a law firm will develop expertise in handling the cases (which in large measure will be essentially similar) and this law firm will utilize its developed expertise to more quickly and cheaply educate local counsel and direct the activities of local counsel. Among other things, the law firm will develop such things as:

1. memoranda of law and legal briefs which will be of general applicability;
2. a library of legal and non-legal relevant information, including the pertinent medical knowledge; and
3. a list of medical and other expert witnesses best qualified to appear on behalf of the defendants.

The firm chosen will have a sufficient number of "young lawyers" to engage in the extensive legal research and brief writing that will prove necessary if any significant number of cases do in fact arise.

The fundamental thought is that the firm can perform these functions on behalf of all of the companies in the industry and that this will avoid a ten-fold duplication of effort and expense which will result if each company has to prepare its own defense in each case (and particularly if this must be done "from scratch" by various local counsel in each action instituted from time to time).

A basic problem is one of the allocation of the costs of such an approach. Mr. Logan of Owens-Corning Fiberglas Corp. asked if the people present were willing to participate on an equal-sharing basis and the response was negative. The lawyers present indicated that they would need some kind of formula to present to their respective managements as to the percentage degree of each company's participation. No dollar figures can be presented because it cannot be determined in advance how many law suits will be instituted and where. A sharing formula based upon the company's respective percentages of sales in the asbestos industrial insulation industry was suggested. I indicated that such a formula based strictly on such an approach would not be acceptable to Johns-Manville.

The group requested me to prepare a proposal in September as to possible bases for the sharing of costs (assuming that such an approach as discussed above will eventually be approved by the respective managements). I agreed to do so, and indicated that I would use as a starting point the respective sales of the various companies in the industry during the period 1940 - 1969. However, there will have to be considerable negotiation from this point. Insofar as the smaller producers are concerned, the hard truth is that in a given case in which they are named as a defendant (by the plaintiff) or as co-defendants (by one of the companies named as a defendant) their legal fees, generally speaking, would be about the same as those of a larger company also named as a defendant in that case. That is, the expenses of defending the case would be about the same to a company which only contributed to 5% of the plaintiff's disease as to the company that contributed 40%. Accordingly, since the purpose of the use of a single law firm is to minimize the costs of everyone insofar as that particular case is concerned, all companies would be benefiting equally vis-a-vis what it would have cost them to defend the case individually; without regard to their respective sizes. Therefore, an allocation of the costs of defense based on respective percentages of sales would not be realistic.

The difficulty in any industry-wide approach is that the interests of the different companies are so diverse. For example, Unarco Industries is no longer in the business and has changed its insurance carriers. Therefore, Unarco looks primarily to its old insurance carriers to take over its defense burdens. On the other hand, Owens-Corning, while one of the largest companies involved, claims that it had a very small percentage of the asbestos industrial insulation market during the relevant period. Further, Armstrong indicates that it has sold out its business and does not know to what degree it has an indemnification liability.

A further problem is presented by the fact that in large measure the various insurance companies involved present a complicating factor. In view of the retrospective rating aspects of the insurance carried by the companies and the fact that expenses

actually incurred are in practice often charged back to the insured with a "mark-up" added. It is questionable whether the presence of insurance companies in these cases is of net benefit. The use of the type of counsel often employed by insurance companies would not appear optimum here. The cases are too important and too uniquely complicated. Moreover, the writer and several others present expressed the view that it would be better if the defendant manufacturing companies could direct the activities of local counsel directly or through a single law firm without having to do so through the insurance companies.

A Committee composed of Eugene Anderson, Esq., of the law firm of Chadbourne, Parke, Whiteside & Wolff (counsel for Keene Co.-Baldwin-Ehret-Hill Div.); E. Judge Elderkin, Esq., of the law firm of Brobeck, Phleger & Harrison (counsel for Fibreboard Corporation); and the writer, is to prepare a list of possible law firms to handle this matter if such an approach is ratified by the various managements.

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cc: W. P. S. Breese
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