IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: Asbestos Products Liability Litigation	:	CIVIL ACTION NO. MDL 875
This Document Relates to:	:	
ALL CLAIMS BASED UPON UNION CARBIDE'S ALLEGED SUPPLY OF RAW ASBESTOS TO U.S. GYPSUM AND GEORGIA-PACIFIC AND GOVERNED BY TEXAS, OHIO, CALIFORNIA, FLORIDA, OR NEW YORK LAW	:	

MEMORANDUM OF UNION CARBIDE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS BASED UPON ITS ALLEGED SUPPLY OF RAW ASBESTOS TO U.S. GYPSUM AND GEORGIA-PACIFIC AND GOVERNED BY TEXAS, OHIO, CALIFORNIA, FLORIDA, OR NEW YORK LAW

Herbert L. Zarov
Gary A. Isaac
Susan E. Brice
Kara K. Gibney
Cristina C. Tilley
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, Illinois 60603
Phone: 312-782-0600
Fax: 312-701-7711

James L. Stengel
ORRICK, HERRINGTON & SUTCLIFF LLP
666 Fifth Avenue
New York, New York 10103
Tel: 212-506-5000
Fax: 212-506-5151

Dated: March 14, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

<u>Regulations and Rules</u>:

Restatement:

Other:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: Asbestos Products Liability Litigation	CIVIL ACTION NO. MDL 875
This Document Relates to:	
ALL CLAIMS BASED UPON UNION CARBIDE'S ALLEGED SUPPLY OF RAW ASBESTOS TO U.S. GYPSUM AND GEORGIA-PACIFIC AND GOVERNED BY TEXAS, OHIO, CALIFORNIA, FLORIDA, OR NEW YORK LAW	

MEMORANDUM OF UNION CARBIDE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS BASED UPON ITS ALLEGED SUPPLY OF RAW ASBESTOS TO U.S. GYPSUM AND GEORGIA-PACIFIC AND GOVERNED BY TEXAS, OHIO, CALIFORNIA, FLORIDA, OR NEW YORK LAW

Defendant Union Carbide Corporation ("Union Carbide") respectfully submits this Memorandum in support of its Motion for Summary Judgment on All Claims Based Upon Its Alleged Supply Of Raw Asbestos To U.S. Gypsum and Georgia-Pacific And Governed By Texas, Ohio, California, Florida, or New York Law.

INTRODUCTION

Although asbestos litigation is now in its fourth decade, Union Carbide has only recently emerged as a principal target of the plaintiffs' bar. In the first three decades of asbestos litigation, Union Carbide was a second tier defendant, as befit its late entry into, and small participation in, the industry.[1] By 2002, however, Union Carbide had become a principal target of the plaintiffs' bar – named in over 50,000 cases in that year alone – not because of new facts that have come to light about its involvement in the asbestos world, but because the cascading bankruptcies of the traditional asbestos defendants has left it among the largest of the companies remaining in a precipitously shrinking pool of solvent defendants.[2] The immense burden of defending this avalanche of claims threatens to overwhelm Union Carbide and render its legal defenses beside the point.

This motion is filed to re-inject the merits into the litigation against Union Carbide. The undisputed facts are that United States Gypsum Company ("USG") and Georgia-Pacific Corporation ("GP") designed, manufactured and sold a wide variety of asbestos-containing products, some of which contained Union Carbide raw material. Those products differed in the types and concentrations of asbestos they contained, the material in which that asbestos was imbedded, and the amount and type of asbestos dust, if any, they released in their intended uses.

1/ In the early 1980s, Union Carbide was receiving fewer than 2,000 claims annually. By 1999, that number had risen to between 15,000 and 20,000, virtually all of which were resolved through the Center for Claims Resolution pursuant to a formula whereby Union Carbide paid a small allocated amount commensurate with the limited level of its industry participation. The sudden explosion of claims against Union Carbide occurred after the collapse of the CCR in February 2001. The majority of these claims allege exposure to joint compounds and similar products made by sophisticated and experienced third-parties, such as U.S. Gypsum and Georgia-Pacific, that allegedly contained a very small amount of raw chrysotile asbestos supplied by Union Carbide.

2/ The trend toward seeking protection under the bankruptcy laws is accelerating. Indeed, the *Wall Street Journal* has reported (December 13, 2002) that roughly 60 companies have sought bankruptcy protection from asbestos creditors, with the Rand Institute for Civil Justice reporting some 22 bankruptcy filings in the period between January, 2000 and Spring, 2002 alone. *See* Rand Institute for Civil Justice, "Asbestos Litigation Costs and Compensation, An Interim Report," dated August, 2002, at page vii.

USG and GP always retained and exercised the sole power to warn their customers of potential product dangers and decided themselves on what warnings to provide. Their decisions on whether to warn, and if so, the content of the warnings, were made after reviewing a wide variety of information gleaned from, among other sources, literature and presentations from trade associations to which they belonged, their own research and testing, and the public record.[3/] Warnings changed over time, differed from company to company and product to product, and depended, among other things, on the design, formulation and properties of the individual products, all of which were controlled by USG and GP. Union Carbide, by contrast, had no role whatever in designing, manufacturing or selling USG's and GP's products. It had no practical ability to warn end users of those products. And while Union Carbide warned both USG and GP of the potential hazards of inhaling asbestos dust, neither USG nor GP ever consulted Union Carbide on what warnings to affix to their end products.

Given these uncontested facts, Union Carbide cannot be liable to the plaintiffs here for failure to warn them of the alleged dangers of USG and GP products containing Union Carbide asbestos. Under settled principles of law, a bulk supplier who supplies raw materials incorporated in a product designed, manufactured and sold by another has no duty to monitor the way in which those raw materials are used or to warn end users of the supposed hazards of those

---

[3/] Indeed, to this day, both USG and GP maintain that their various joint compounds were safe for their intended uses and that where warnings were appropriate, they were adequately made.

products. These basic principles have been adopted throughout the United States and are reflected in the *Restatement of Torts* and in myriad cases.[4]

The bulk supplier doctrine applies with special force where, as here, the undisputed facts are that the manufacturers made their decisions on whether and how to warn with knowledge of the potential hazards of asbestos generally and of their own finished products in particular. USG and GP were both Fortune 500 companies in the business of designing, manufacturing and selling asbestos-containing products long before Union Carbide began selling raw asbestos to them. (Union Carbide did not begin selling raw asbestos until mid-1963 and did not begin selling asbestos to USG and GP for use in joint compounds until 1968 and 1970 respectively.) It is black-letter law that manufacturers such as USG and GP are "held to the knowledge and skill of an expert." This "means that at a minimum [they] must keep abreast of scientific knowledge, discoveries, and advances and [are] presumed to know what is imparted thereby."[5] And by 1968 and 1970, scientific knowledge about the potential hazards of using asbestos was widely and publicly available. Moreover, at all times relevant to this motion, both USG and GP were, *in fact*, made aware of the *general* hazards of asbestos not only from the public record, but also from (i) information provided by industry groups to which they belonged, (ii) their own research

---

[4] In order to make more manageable the resolution of Union Carbide's legal and factual arguments, we have limited our motion here to the laws of the critical states of Texas, Ohio, California, Florida and New York, and have sought to apply those laws in the factual context of USG and GP, the two third-party manufacturers whose products appear to be most frequently alleged by plaintiffs as the source of exposure to asbestos fibers supplied by Union Carbide.

[5] *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) (applying Texas law); *White v. Dealers Transit, Inc.*, 446 N.E.2d 460, 466 (Ohio App. 1980); *Carlin v. Superior Court*, 920 P.2d 1347, 1351 n.3 (Cal. 1996); *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 942-43 (Fla. 2000); *George v. Celotex Corp.*, 914 F.2d 26, 28 (2d Cir. 1990) (applying New York law).

and product testing, (iii) Union Carbide disclosures about potential asbestos hazards set forth in warning labels affixed to containers of its raw asbestos and in literature about such hazards, including its own toxicology reports, and (iv) widely available public literature. Finally, USG and GP were in a far better position than Union Carbide to evaluate the *specific* potential hazards of their own asbestos-containing end-products.

The principal policy behind the bulk supplier doctrine is that it is unreasonable to expose suppliers to ruinous liability where the suppliers have neither power over how their material is to be used nor the ability to warn end users of the final products' supposed hazards. Here, the case for applying the policy is peculiarly powerful because the undisputed facts are that USG and GP knew of the very hazards about which Union Carbide allegedly failed to warn. Accordingly, Union Carbide's motion for summary judgment on all claims involving use of its raw asbestos in products manufactured by USG and GP should be granted.

STATEMENT OF UNDISPUTED FACTS

A. Union Carbide Sold Raw Asbestos To USG And GP, But Never Exercised Control Over Whether USG Or GP Used Asbestos In Their Products And, If So, Whether Or How To Warn Of The Hazards Of Using Those Products.

Union Carbide sold its unique, short-fiber raw chrysotile asbestos from August,1963 until June, 1985, first under the name "Union Carbide Asbestos," and then under the trade name "Calidria." Affidavit of John Myers ("Myers Aff."), ¶ 4. Union Carbide sold Calidria in bulk to various manufacturers who used it in a wide variety of products. *Id.*, ¶ 4. USG and GP both used Calidria as an ingredient in certain of their tape joint compounds. *Id.*, ¶ 4.

USG began selling products that contained asbestos as long ago as the 1920s, and over the years, manufactured and sold over 70 different asbestos-containing products, including tape joint compounds, with widely varying compositions and concentrations of asbestos. *See* Affidavit of Susan Gilefsky ("Gilefsky Aff."), Ex. A (a true and correct copy of verified USG interrogatory responses dated January 23, 2001) at Exs. 1 and 2. Union Carbide first sold Calidria for use in tape joint compounds to USG in 1968 (Myers Aff., ¶ 5), many decades after USG had entered the asbestos products business.

On April 28, 1965, GP acquired the Bestwall Gypsum Company, a manufacturer of products containing asbestos. GP continued to manufacture, sell and distribute such products after that acquisition. Gilefsky Aff., Ex. B (a true and correct copy of verified GP interrogatory responses dated November 2, 2001) at Response # 14. GP manufactured and sold approximately 13 different products containing asbestos after its acquisition of Bestwall. Gilefsky Aff., Ex. B at Response # 15. GP's asbestos-containing products likewise were made from various formulas calling for varying concentrations of asbestos. *Id.* Union Carbide first sold Calidria for use in tape joint compounds to GP in 1970. Myers Aff., ¶ 5.

Union Carbide was never affiliated with USG or GP. Myers Aff., ¶ 5. Union Carbide never had or exercised any control over the formulation, packaging, labeling, marketing, selling, or distribution of any finished USG or GP product, including the decision to use asbestos fiber or the manner in which the fiber would be used. Myers Aff., ¶ 8. USG and GP decided on their own whether to warn their customers or end users about the hazards of asbestos, and if so, the contents of such warnings. Myers Aff., ¶ 9.

B. Union Carbide Warned USG and GP Of The Possible Dangers Associated With Use Of Asbestos.

There was, of course, no way for Union Carbide to provide warnings directly to end users of USG and GP products containing asbestos supplied by Union Carbide. But the undisputed facts demonstrate that Union Carbide did take a variety of actions to warn *its* customers – including USG and GP – about potential asbestos hazards.

Union Carbide began placing warnings on bags of asbestos beginning in June of 1968, years before OSHA required such warnings. Myers Aff., ¶ 10. Moreover, in 1972, when the OSHA standards governing asbestos exposure were enacted, Union Carbide revised the warning on its bags of asbestos to provide the precise warning set out in the new OSHA regulations:

CAUTION

Contains Asbestos Fibers
Avoid Creating Dust
Breathing Asbestos Dust May Cause
Serious Bodily Harm

Myers Aff., ¶ 11.

But Union Carbide did much more. In 1964, Union Carbide's Toxicology Department prepared an Asbestos Toxicology Report (Myers Aff., ¶ 12), providing comprehensive information about the potential health risks of asbestos. Union Carbide distributed and made the Toxicology Report available to Calidria customers. Myers Aff., ¶ 12. The original Union Carbide "Asbestos Toxicology Report" (Myers Aff., Ex. A) notes that workers exposed to high concentrations of asbestos dust "were prone to develop a disabling lung disease . . . known as asbestosis," and that "[s]everal years ago, it was reported that there was an increase in the incidence of cancerous tumors, especially of the lung, associated with asbestosis." *Id.* at p. 1. The report further states that "[c]ontrol of asbestos dust exposure is therefore necessary" and recommends several "control methods," as well as the use of "[p]re-employment and periodic physical examinations" (including chest x-rays) of workers who might be exposed to respirable asbestos fibers. *Id.* at p. 1-2. Finally, the report warned that asbestos dust at the then-prevailing

Threshold Limit Value of 5 million particles per cubic foot of air "is generally not visible in the average work area." *Id.* at p. 1.

Union Carbide also incorporated a slightly-revised copy of the Toxicology Report in an October 1968 brochure that it provided to tape joint compound manufacturers (Myers Aff., Ex. B), and further revised its Toxicology Report in 1969, 1970, and 1972, to reflect evolving knowledge of health risks potentially associated with asbestos. Myers Aff., ¶ 14 & *id.*, Exs. C, D, and E. Union Carbide's 1969 Toxicology Report specifically discussed the risk of mesothelioma (*id.*, Ex. C), and its 1972 Toxicology Report included a 1971 publication by the National Academy of Sciences entitled "Airborne Asbestos," specifically warning that inhalation of asbestos fibers "can cause disabling fibrosis of the lungs," that "[a]n association between occupational exposures to asbestos and bronchogenic carcinoma has been established," and that "[e]vidence of a causal association between some but not all exposures to asbestos fibers and diffuse malignant mesotheliomas of the pleura and peritoneum is substantial" (*id.*, Ex. E at p. 8).

Union Carbide distributed these Toxicology Reports to its customers in face-to-face meetings and by mail. Myers Aff., ¶ 18. Indeed, a copy of Union Carbide's October, 1968 brochure for tape joint manufacturers, which incorporated the Toxicology Report, was found in GP's Document Repository. Affidavit of A. McCampbell Gibson ("Gibson Aff."), ¶ 22 & Ex. N. Similarly, a copy of Union Carbide's revised Asbestos Toxicology Report, dated May 8, 1969, was found in USG's Document Repository. Gibson Aff., ¶ 9 & Ex. A.

In addition to these Toxicology Reports, Union Carbide maintained for customer distribution a list of published regulations, reports and scientific and medical literature regarding potential health risks of asbestos. *See* Myers Aff., ¶ 19 & Ex. F. Included in such materials were the 1972 OSHA Regulations, the 1973 EPA Regulations, the National Academy of Sciences report entitled "Airborne Asbestos", and a World Health Organization Report. *Id.* Union Carbide provided copies of these published regulations, reports and literature to customers during meetings and by mail. *Id.*, ¶ 19 & Ex. F at p. 2. Moreover, Union Carbide thoroughly educated its salesmen about the health hazards and any regulatory requirements associated with asbestos, and encouraged its salesmen to share this information with customers through phone calls, sales calls, mailings, seminars and meetings. Myers Aff., ¶ 6.

C. By The Time USG And GP Began Purchasing Raw Asbestos From Union Carbide For Use In Tape Joint Compounds, The Hazards Of Asbestos Were Widely Known.

As explained above (*see* p. 4 & n. 5), manufacturers such as USG and GP are held to the knowledge and skill of an expert, have a duty to keep abreast of scientific knowledge, discoveries, and advances, and are presumed to know what is imparted thereby. It has been plaintiffs' position in all cases against Union Carbide of which we are aware that, at all times relevant to this Motion, USG and GP knew or should have known on the basis of publicly-available information that exposure to asbestos could cause disease. And, indeed, by 1968 and 1970 – the dates when Union Carbide began selling asbestos to USG and GP, respectively, for use in tape joint compounds – the health hazards of asbestos were widely known, and had been the subject of extensive discussion not only in the scientific literature, but also in a wide variety of media, including union publications, daily newspapers, and general circulation magazines like Popular Mechanics.

The first reports of asbestosis were published in the medical literature in the *1920s* (*see, e.g.*, Cooke, W.F., "Fibrosis of the Lung Due to the Inhalation of Asbestos Dust," New England

Journal of Medicine (Dec. 1, 1924)), and by *1955*, the link between asbestos exposure and lung cancer had been discussed in the medical literature as well (Doll, Richard, "Mortality from Lung Cancer in Asbestos Workers," British Journal of Industrial Medicine (Aug. 10, 1955)). Similarly, the newsletter of the American Federation of Labor discussed asbestosis by as early as *1936* (Hamilton, Alice, "Industrial Poisons," The American Federationist (July 1936)), and the risk of lung cancer from asbestos exposure by as early as *1955* (Abrams, Herbert, "Cancer in Industry," The American Federationist (March 1955)). In addition, state governments began covering asbestos-related diseases as part of their workers compensation programs by as early as *1935*, and by *1962*, over 40 states provide such coverage. (U.S. Department of Labor, "Growth of Labor law in the United States," cited in hearing before U.S. House of Representatives, Committee on Education and Labor (April 17, 1962)). And by *1964*, Dr. Irving Selikoff had published his landmark study on the rate of mesothelioma among asbestos workers (*see, e.g.*, Selikoff, I.J., et al., "Asbestos Exposure and Neoplasia," 188 JAMA at 22-26 (April 6, 1964). Finally, by the time that USG and GP began purchasing asbestos from Union Carbide, there had been widespread discussion of the hazards of asbestos in the *general news media* as well. *See, e.g.*, Popular Mechanics (August 1966) ("it is known that asbestos, if inhaled in sufficient quantities, can cause lung disease, including malignant tumors"); Time (February 7, 1969) ("workers who inhale tiny, indestructible fibers of asbestos . . . can contract lung cancer"), and Good Housekeeping (March, 1969) ("That health hazards do exist for at least some groups of asbestos workers is not disputed").

D. By The Time USG and GP Began Purchasing Raw Asbestos From Union Carbide For Use In Tape Joint Compounds, They Had Actual Knowledge Of The Potential Hazards Of Asbestos.

Not only is the knowledge of the scientific community imputed to USG and GP as a matter of law, but the undisputed facts establish that USG and GP *actually learned* of the hazards of asbestos from (i) Union Carbide's disclosures (discussed above) (ii) information provided by industry groups to which USG and GP belonged, (iii) their own research and product testing, and (iv) widely available public literature.

1. <u>USG</u>

USG began selling products that contained asbestos as long ago as the 1920s and, over the years, has manufactured over 70 different asbestos-containing products, including tape joint compounds. *See* Gilefsky Aff., Ex. A at Ex. 1.

USG has admitted in prior sworn interrogatory answers that it "*has been aware since the mid-1930s* that inhalation of large quantities of asbestos fibers for long periods of time could produce a pneumoconiotic lung condition known as *asbestosis*"; that E.C. Beuthin, USG's first Safety Director, has testified that he attended a conference *in 1955* at which the relationship between the inhalation of asbestos fibers and the development of *bronchogenic carcinoma* was discussed; and that G.R. Krug, a former USG Safety Director, has testified that he became aware of the association between exposure to asbestos dust and the development of *mesothelioma in the early to mid-1960s*. *See* Gilefsky Aff., Ex. A at Ex. 9 (emphasis added).

Similarly, USG representatives attended over two dozen Gypsum Association meetings at which the health hazards of asbestos were discussed, including meetings in 1966, 1967 and 1968.

Gilefsky Aff., Ex. A at Ex. 8.[6] USG was also a member of the Health and Safety Council of Asbestos Cement Products Association. USG's representatives attended a half dozen Association meetings between 1968 and 1970 in which the health hazards of asbestos were discussed. *Id.* Finally, USG provided warnings beginning in *1966* on bags of an asbestos-containing product that it manufactured called SprayDon. By 1969, the bags of SprayDon manufactured by USG provided the warning: "Caution: This product contains asbestos which may be harmful to lungs if inhaled." Gilefsky Aff., Ex. A at Ex. 3.

USG's own internal documents corroborate its admissions that USG was aware of asbestos hazards well before it began purchasing asbestos from Union Carbide.

In the 1930s, Dr. Leroy U. Gardner of the Saranac Laboratories conducted dust survey investigations at some of USG's plants. Gilefsky Aff., Ex. A at Response # 8. An August 13, *1936* memorandum from USG's General Services Manager to W.L. Keady, Vice President of USG, reported that Dr. Gardner had (i) found that there was a "[s]erious asbestos dust hazard" at USG's Jersey City plant, (ii) diagnosed five Jersey City employees with asbestosis, and (iii) concluded that five others might have contracted the disease as well. Gibson Aff., Ex. GG at p. 1. USG's General Services Manager thus recommended that "steps be taken to provide respirators" and that "prompt action be taken to install necessary dust prevention and ventilation equipment." *Id.* at p. 3. *See also* Gibson Aff., Ex. B (August, 1936 USG letter reporting that Dr. Gardner had found "a very hazardous dust condition" at the Jersey City plant with a number of employees suffering from asbestosis).

---

[6] USG has been a member of the Gypsum Association since 1930. Gilefsky Aff., Ex. A at Ex. 8.

By at least *1943*, USG had issued an internal Operating Bulletin entitled "Elimination of Dusty Conditions," which required employees exposed to high concentrations of dust to wear respirators, and mandated that if a job applicant had "a questionable history of exposure to asbestos or silica dust," he could not be hired until he passed a satisfactory medical exam. Gibson Aff., Ex. C at Bates Number 0P001 0298. As amended in February of *1954*, the USG Operating Bulletin provided, under the heading "Asbestos Exposure," that "[o]perations involving manual handling of asbestos in any plant shall be considered in an area in which employees shall be required to wear adequate respiratory equipment." Gibson Aff., Ex. D at Bates Number OP001 0296. *See also* Gibson Aff., Ex. E at Bates Number OP001 0317 (including asbestos in USG list, circa 1948, of "Hazardous Chemicals Used in Paint Manufacture" and reporting on danger of asbestosis).

Indeed, by *1966*, USG was communicating with at least one of its customers about the potential hazards of asbestos in USG *tape joint compounds*. In a January 12, 1966 letter, USG advised the Campbell Soup Company that USG's "Perf-a-Tape Joint Compounds . . . contain mica and *asbestos*, both of *which can be hazardous if inhaled over a long period of time*," that this "dust hazard" could occur "while the compounds are being mixed with water," and that a "dust respirator and protective goggles make adequate protective equipment even if there is not adequate ventilation." Gibson Aff., Ex. F at Bates Number CS006 0564 (emphasis added).

Moreover, USG's internal memoranda demonstrate that, by *1970*, USG was actively considering affixing warnings to its tape joint compounds. To be sure, USG decided not to do so. But that decision was made *for commercial reasons* – not because USG was unaware of asbestos dangers. Thus, for example, a December 14, 1970 USG memorandum re "Hazardous Labelling [sic] – Joint Compounds" – reported:

> We are presently faced with a perplexing situation which deals with *possible liability that we might incur by not labeling our joint compound products as hazardous because of the asbestos fiber content.*
>
> We have had several meetings with Mr. Kipp and the Attorneys because *they have requested that we indicate on our containers that the compound contains asbestos and therefore could be hazardous.*

Gibson Aff., Ex. G at Bates Number GP036 2053 (emphasis added). But USG took no action to provide warnings because "Product Management feels that we *would be at a decided disadvantage if we were to label our products*, whereas none of our competition at this time is so doing." *Id.* (emphasis added).[7]

By mid-1971, USG officials were privately acknowledging that dust created during joint compound use could violate OSHA limits. Gibson Aff., Ex. I. Specifically, USG concluded that the mixing of powdered joint compound and the dry sanding of applied compound was likely to create asbestos dust. For that reason, it considered discontinuing powdered compound and adopting a label recommending sponging instead of sanding to eliminate these hazards. Gibson Aff., Exs. I and J. But, again, USG made a conscious decision – for purely commercial reasons – *not* to warn:

---

[7] *See also* Gibson Aff., ¶ 16 & Ex. H (June 11, 1970 USG memorandum re "Asbestosis Hazard" reporting on recent information about asbestos health hazards and observing that "[i]t would appear that now being knowledgeable of the hazards appraised by the medical profession and being aware of the increasing publicity the subject is receiving in the industry and the newspapers, it behooves us to institute some concrete program toward alleviating exposure to asbestos used in our formulations").

> It is our considered opinion that it would be unwise for us to place any label on our present compounds which could be construed as implying that a hazardous substance exists. *No other manufacturer has taken such a step and we believe we would be placed at a competitive disadvantage. More seriously, however, we could precipitate action prematurely which could result in some individual, such as a Senator or a Ralph Nader, drawing attention to our products.*

Gibson Aff., Ex. J (emphasis added).[8/]

The Occupational Safety and Health Act was enacted in late 1970, and on June 7, 1972, OSHA issued its permanent regulations. The OSHA regulations not only set forth permissible asbestos exposure levels, but provided that "[c]aution labels" were to be affixed to "raw materials" and "products containing asbestos fibers." 37 Fed. Reg. 11318, 11321 (June 7, 1972) (adding 29 C.F.R. § 1910.93a(g)(2)). No such label was required, however,

> "where asbestos fibers have been modified by a bonding agent, coating, binder, or other material so that during any reasonably foreseeable use, handling, storage, disposal, processing, or transportation, no airborne concentrations of asbestos fibers in excess of the exposure limits prescribed [elsewhere in the regulations] will be released."

Id. USG has stated that it first provided a warning with its joint compound products in 1972, when it adopted the warning prescribed by the new OSHA regulations:

> Caution: Contains Asbestos Fibers. Avoid Creating Dust.
> Breathing Asbestos Dust May Cause Serious Bodily Harm.

[8/] By mid-1971, USG apparently was working hard to develop an *asbestos-free* joint compound. *See* Gibson Aff., ¶ 19 & Ex. K at Bates Number GP028 1518 (October, 1972 USG memorandum reporting that "Our Research Section has been working toward an asbestos free joint compound for the past 18 months or so" to enable USG to "[s]tay in business under increasingly stringent government standards and rising environmental concerns").

Gilefsky Aff., Ex. A at Ex. 3. But even after taking that action, USG continued – both as a member of the Gypsum Association and independently – to consider whether to provide additional warnings to users of its tape joint products.

For example, an August 15, 1973 letter from the Secretary of the Gypsum Association's "Special Committee on Asbestos in Joint Treatment Compound" to the Committee's members, was found in the USG document repository. Gibson Aff., ¶ 20 & Ex. L. That letter described an August 8, 1973 Special Committee meeting – attended by representatives of both USG and GP – "to plan a field testing program to evaluate the hazard levels resulting from dry mixing and sanding of joint treatment compounds." *Id.*, Ex. L at Bates number GP036 2038. The "meeting opened with a historical review of events" leading to the formation of the Committee, including the adopting of specific exposure levels in the recently-issued OSHA regulations, and included a discussion "of the problem areas involved in the use of joint compound containing asbestos." *Id.* The letter reported that "the Committee felt strongly that the industry has an obligation to its customers, generally contractors, to caution them when asbestos was involved in their products, and to give them guidance so that protection could be afforded to workers exposed to the hazard." *Id.* The letter also reported that the Special Committee had "reviewed the preliminary test data available from National Gypsum Company and United States Gypsum Company," which "indicated that sanding of joints would release asbestos fibers within prescribed OSHA limits, while the mixing of dry joint compound would exceed limits." *Id.* at Bates Number GP036 2039. The letter reported as well that "[i]n order to acquire more definitive information," the Special Committee had decided to undertake testing to measure asbestos fiber release from the mixing and sanding of various manufacturers' tape joint compounds. *Id.* The letter concludes with a discussion of specific warnings about dry mixing and sanding that the Committee recommended be placed on containers of both dry and "ready mix" (wet) joint compounds in addition to the standard asbestos caution labels prescribed by OSHA. *Id.* at Bates Number GP036 2041.

An August 17, 1973 USG memorandum written by K.S. Freeman regarding "Caution Labels for Joint Compounds," likewise describes USG's participation in the Gypsum Association's Special Committee. Gibson Aff., Ex. M. Mr. Freeman reports that one proposal at the Special Committee's recent meeting "was that all joint compound manufacturing members of the Gypsum Association affix the OSHA asbestos caution label on all containers of joint compounds, powder *and* ready-mix." *Id.* at Bates Number GP034 1609 (emphasis added). Mr. Freeman reported, however, that USG's data had indicated that "fiber concentrations" resulting from sanding of both "powder and ready-mix joint compounds, were all lower than OSHA standards," and that this had led to a decision by USG in August, 1972 "to print the OSHA asbestos caution label on all bags of powder joint compounds, but *not* to label the containers of ready-mix compounds." *Id.* (emphasis added). Mr. Freeman further reported that National Gypsum "*was* affixing the OSHA asbestos caution label on containers" even of "ready-mix joint compound on their contention that the applicator has the right to know that a product contains a potentially hazardous ingredient," and that the "other committee members concurred." *Id.* (emphasis added). But Mr. Freeman made clear that *USG* would not necessarily agree. To the contrary, he told the Committee that "approval by USG of the OSHA asbestos caution label on ready-mix joint compound containers was contingent on approval by our Marketing and Legal Departments." *Id.* Accordingly, Freeman recommended referring the decision whether to provide an asbestos caution label on ready-mix compounds "to the Marketing and Legal Departments for approval," and that "a final decision on the adoption of a uniform Gypsum Association dust hazard label be deferred until the [independent] mixing and sanding tests" undertaken by the Special Committee "are conducted." *Id.* at Bates Number GP034 1610.

Four months later, on December 14, 1973, USG's J.N. Walker circulated a memorandum recommending "that all joint compound and texture paints that contain asbestos have labels that include asbestos warning information . . . even though some of the products do not require the label by current federal regulations." Gibson Aff., ¶ 42 & Ex. HH.

According to its sworn interrogatory answers, in 1974, USG modified the warning it had been providing with its tape joint products since 1972 to add a warning specifically about the release of dust during mixing or sanding:

> Observe the following precautions. Wet sanding or sponging finished joints is recommended rather than dry sanding to avoid creating dust. If dry sanding, mixing, or otherwise working in a dusty atmosphere containing this material, use dust collector, or wear eye protection and a respirator approved by the Bureau of Mines or NIOSH, to remove nuisance dust.

Gilefsky Aff., Ex. A at Ex. 3.

2. <u>Georgia-Pacific</u>

As GP's prior interrogatory answers establish, GP was aware of potential asbestos hazards *before* 1970, when it first purchased Union Carbide asbestos for use in tape joint compound. More specifically, GP has admitted that "beginning in the *late 1960's*, it became aware of *potential health hazards to persons* who worked in industries unrelated to commercial and residential construction, *who were exposed to certain types of asbestos fibers and/or asbestos in substantial quantities*." Gilefsky Aff., Ex. B at Response # 71 (emphasis added). GP also admits that "[a]t or about the same time," it "became aware of disputes within the medical or scientific community as to whether and under what circumstances breathing asbestos dust could cause or contribute to *asbestosis, mesothelioma or lung cancer*." *Id.* (emphasis added). Indeed, GP has also admitted that, in 1970, it "*received information which suggested a potential health hazard associated with asbestos-containing products used in the building construction industry*," and that GP thus "immediately began an effort to eliminate asbestos from its products." *Id.* at Response # 38 (emphasis added).[9]

Contemporaneous documents also reflect GP's awareness of potential asbestos hazards. Significantly, two GP representatives attended a September 20, *1966* meeting of the Gypsum Association Safety Committee during which, according to the meeting minutes:

> The chairman mentioned a potential problem area in the industry where asbestos is used. *Government investigations indicate the possibility of the use of asbestos as a cause of lung diseases in* [*the*] *industry.* Payment of claims arising from this could cost our industry many dollars unless counteraction is taken. The chairman indicated that he would inform the Association directors of this potential problem at the Semiannual Meeting in October and recommend that action be taken against dust problems in the industry.

Gibson Aff., Ex. II at p. 2 (emphasis added).[10]

One year later, on September 19, 1967, GP representatives attended another meeting of the Gypsum Association Safety Committee. Minutes of that meeting reflect that "[o]ne member noted a recent problem involving the asbestos industry where a number of lung carcinoma cases had been reported by inhabitants of the neighborhood surrounding an asbestos plant. It was

---

[9] GP's decision to eliminate asbestos from its products is reflected in a May 7, 1970 GP internal memorandum. Gibson Aff., ¶ 23 & Ex. O.

[10] GP joined the Gypsum Association in 1965. Gilefsky Aff., Ex. B at Response # 50.

further noted that clinical tests and investigations had resulted in legal action against the manufacturer by the claimants." Gibson Aff., Ex. JJ at p. 2.[11]

GP's document repository also contains a copy of Union Carbide's October, 1968 brochure (Gibson Aff., ¶ 22 and Ex. N) which, as discussed above (*see* p. 8), incorporated Union Carbide's "Asbestos Toxicology Report" and specifically discussed the relationship between asbestos exposure and certain diseases, such as asbestosis and lung cancer.

An internal GP memorandum, dated June 3, 1970, reports that, in the course of its asbestos-related disease research, Mt. Sinai Hospital in New York had run tests on drywall joint finishers and found a spot on the lung of one man who primarily did the joint sanding on the job. The memorandum expresses concern that "[i]t is possible that the drywall industry might be one of the next targets for their lung research. This information might be of interest to the Gypsum Association Safety Committee." Gibson Aff., Ex.

One week later, on June 9, 1970, GP's M. F. Fink wrote to F. J. Rogers of the Gypsum Association Safety Committee, noting that "[*a*]*sbestos is very harmful*, however we question whether the percentage used in a formula and after it is mixed in a batch could be considered harmful." He further noted: "We realize that someone will be the whipping boy, also product liability will be stressed. *It is our opinion that the entire blame can be placed on the contractor, for not insisting on respirators and dust masks when sanding*." Gibson Aff., Ex. Q (emphasis added). *See also* Gibson Aff., Ex. R at Bates Number GP 008261 (July 27, 1971 memorandum from Mr. Fink to all GP plant managers advising that "[t]he medical profession and hygienists

---

[11] The minutes reflect that this meeting, like the September 20, 1966 meeting, was attended by, among others, representatives of USG. Gibson Aff., Ex. II at p. 1 and Ex. JJ at p. 1.

have stated that exposure to asbestos dusts are harmful as the respiratory system cannot expel the dusts").

On September 24, 1971, GP's President, W.H. Hunt, received a letter from National Gypsum's Vice President for Research and Marketing specifically advising: "*Our tests indicate that sanding of joint treatment products* and particularly the spraying of wall finishes *offers some substantial potential hazards*," and that "[y]ou may feel it advisable to check into this." Gibson Aff., Ex. S (emphasis added). Two weeks later, on October 7, 1971, GP's C.W. Lehnert sent a response to Mr. Hunt, advising that GP was "try[ing] to eliminate the asbestos in . . . joint compounds and interior surfacing textures," and explaining that GP planned to tackle texture products first "because they are spray applied and there would be more danger of inhaling the fibers," although "[i]f National Gypsum is correct, the joint compounds will also come under considerable pressure from the environmental people." Gibson Aff., Ex. T.

On April 5, 1972, representatives of GP (as well as USG) attended the Annual Meeting of the Gypsum Association. Gibson Aff., Ex. U at Bates Number GP 008319. That meeting included a briefing on rules promulgated by NIOSH concerning asbestos exposure. *Id.* at Bates Number GP 008320. It was also reported at the meeting that "[a]ny product containing more than 1% asbestos must be marked with a warning label." *Id.*

On November 20, 1972, GP's W.N. Gettel circulated an internal memorandum about GP's ongoing efforts to develop asbestos-free joint system products, and reported, "[f]or the benefit of those receiving copies," that "the use of asbestos is considered a health hazard and rigid controls are being enacted." Gibson Aff., Ex. V at Bates Number GP 008417.

Likewise, a June 19, 1973 internal memorandum from GP's Mr. Lehnert states that "*it is recognized that there is some exposure during mixing of dry products and the sanding of joints after the joint compounds have been applied* . . . The industry is planning tests to determine the level of airborne asbestos during the mixing and sanding. In the meantime, it would probably be advisable for workers engaged in those operations to wear respirators." Gibson Aff., Ex. W at Bates Number GP 009365 (emphasis added).

GP has stated in its prior interrogatory answers that it began affixing caution labels to containers of its asbestos-containing products – worded in accordance with the OSHA regulations – at some point in 1973. Gilefsky Aff., Ex. B at Response # 27. On June 29, 1973, GP's Mr. Lehnert prepared a draft letter for distribution to the sales force explaining the need for, and purpose of, the new asbestos warning labels. Gibson Aff., Ex. Y. The letter observed that OSHA had established a warning requirement for all asbestos-containing products, and advised that "[t]he concern is the breathing of air which contains asbestos fiber." *Id.* at Bates Number GP 008772. Although GP's 1973 warning label did not recommend the use of respirators, the Lehnert letter acknowledged that "[i]t is recognized that there is some exposure to asbestos fiber during the mixing of the dry products and in the sanding of the joints," making it "advisable for workers engaged in these operations to wear respirators." *Id.* at Bates Number GP 008773.

On August 8, 1973, GP's E.D. O'Neill attended the meeting of the Gypsum Association's "Special Committee on Asbestos in Joint Treatment Compound." This meeting is described at length in the August 15, 1973 letter from the Secretary of the Special Committee (Gibson Aff., Ex. L) discussed above. *See* pp. 16-17 above. An internal GP memorandum also discusses the Special Committee meeting. Gibson Aff., Ex. Z. The GP memorandum reports that "[i]nitial laboratory tests by USG and National [Gypsum] indicate that nuisance dust and asbestos levels are above the limit as set by OSHA during the mixing operation of bagged joint compounds on the job," and that "[b]ecause of the fact that these products contain asbestos, all should be labeled with the standard asbestos caution label. This includes ready mix." Gibson Aff., Ex. Z at Bates Number GP 009020. After describing USG's and National Gypsum's "findings" that "applicators are probably exposed to excess dust and asbestos as defined by the law in the mixing operation of bagged joint compounds," the GP representative reported that:

> *It was also agreed that immediate action be taken to label ready mix and bags* to protect the manufacturer from liability due to asbestos and dust; i.e., ready mix would be labeled with the caution asbestos label as recommended by OSHA and all products would have the following instructions – "When mixing and/or dry sanding, wear eye protection and respirator. Wet sanding or sponging is recommended where practical."
>
> *The final wording will be decided by the Gypsum Association attorney and the individual manufacturer's lawyers.*

Id. at Bates Number GP 009021 (emphasis added). The GP memorandum also discussed the Special Committee's decision to commission a series of field tests "to evaluate the actual hazards involved." Gibson Aff., Ex. Z at Bates Number GP 009021.[12]

---

[12] A June 11, 1973 letter from the Gypsum Association to, among others, GP's G.E. Wilson, indicates that the Directors of the Gypsum Association had approved such tests "last April" to determine "the asbestos dust hazard in joint treatment materials." Gibson Aff., Ex. X at Bates Number GP 008529. The results of that testing are summarized in a November 19, 1973 report, entitled "Evaluation of Exposure to Asbestos During Mixing and Sanding of Joint Compounds," found in the GP document Repository. *See* Gibson Aff., ¶ 35 & Ex. AA. The report described the association between asbestos exposure and diseases such as asbestosis and mesothelioma (Gibson Aff., Ex. AA at Bates Number GP 009210), and concluded that "it is apparent that the exposures of workers engaged in mixing and sanding of the various joint compounds used during this test would be to concentrations approaching or exceeding five fibers, greater than five micrometers in length, per cubic centimeter of air." *Id.* at Bates Number GP 009214. The report further concluded that "[i]t is clear that persons engaged in the mixing and sanding of joint compounds similar to those used during this test would be exposed to

Based on this report and GP's ongoing experience, one of GP's senior executives wrote in a memorandum dated August 17, 1973 that "we need to take immediate steps to monitor all of our joint cement operations from the asbestos fiber standpoint and take whatever steps are necessary to get the fiber level in the air down to acceptable levels." Gibson Aff., Ex. BB.

As noted above (*see* p. 22), GP has stated that it began affixing the OSHA warning to all of its asbestos-containing products at some time in 1973. GP has stated in its prior interrogatory answers that "where appropriate," the additional language "WHEN MIXING OR SANDING USE APPROVED RESPIRATOR" or "USE APPROVED RESPIRATOR WHEN SANDING" appeared in its labels. Gilefsky Aff., Ex. B at Response # 27. GP memoranda reflect that GP added such language to its warning labels after the middle of 1974. *See* Gibson Aff., Ex. DD (June 4, 1974 GP memorandum directing that "[t]he next time we print bags we should add the following to the caution label: 'When mixing or sanding use approved respirator.'"); Gibson Aff., Ex. EE (June 7, 1974 GP memorandum responding to "concern over the changes in the asbestos warning labels" to add the warning "'Respirator Protection Required When Sanding,'" and advising that "our attorneys are also deeply concerned over recent findings of asbestosis in workers in the construction industry which is a result of working with joint system products")[13/]; Gibson Aff., Ex. FF (June 10, 1974 GP memorandum from Mr. Lehnert to Ed Sing directing that

---

concentrations of airborne asbestos in excess of two fibers per cubic centimeter during the entire course of their work. This value is the proposed acceptable limit for an eight-hour time-weighted average exposure to asbestos which is scheduled to become effective July 1, 1976." *Id.*

[13/] A May 17, 1974 GP intra-company memorandum from O. E. Burch to G. E. Wilson attaches an article in Walls & Ceilings magazine, which reports that "[t]aping and spackling compounds used in drywall finishing may expose workers to dangerous levels of asbestos fibers" and that nine of seventeen painters in a New York study showed evidence of fibrosis. Gibson Aff., Ex. CC at Bates Number GP 009268.

Sing should continue to use his labels that did not refer to the "use of respirators" "until such time as new labels are furnished").

ARGUMENT

UNION CARBIDE IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF TEXAS, OHIO, CALIFORNIA, FLORIDA, AND NEW YORK LAW.

It is axiomatic that summary judgment is required under Fed. R. Civ. P. 56 "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Blair* v. *Scott Specialty Gases*, 283 F.3d 595, 603 (3d Cir. 2002) (quoting Fed. R. Civ. P. 56(c)). Facts are considered "material" only if they could affect the outcome of the suit under the governing substantive law. *Chisolm* v. *McManimon*, 275 F.3d 315, 321 (3d Cir. 2001) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Here, the undisputed facts establish that Union Carbide is entitled to summary judgment as a matter of Texas, Ohio, California, Florida, and New York law.

A. Union Carbide Is Entitled To Summary Judgment Under Texas Law.

This case is virtually on "all fours" with *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998), in which the Fifth Circuit held that a bulk supplier of raw asbestos was entitled to judgment on plaintiffs' claims as a matter of Texas law.

In *Cimino*, plaintiffs asserted claims against Asbestos Corporation, Ltd. ("ACL"), alleging that ACL sold chrysotile asbestos to a third-party manufacturer ("Fibreboard"), which had incorporated ACL's asbestos in various finished products. *Id.* at 329. Like Union Carbide here, ACL was never involved in the design, manufacture, sale or distribution of any of the asbestos-containing finished products that incorporated its raw asbestos as an ingredient. *Id.* at 330.

ACL contended that it was entitled to judgment as a matter of law because "as a mere bulk supplier of a raw material" that Fibreboard incorporated into various finished products, "it owed no duty to the plaintiffs who were harmed by exposure to that raw material through exposure to one particular type of finished product (insulation products)." *Id.* at 331. The District Court rejected ACL's argument, and found against ACL based "on ACL's failure to warn" end users of asbestos-containing insulation products made by Fibreboard. *Id.* On appeal, the Fifth Circuit reversed, holding that plaintiffs' claims against ACL failed as a matter of Texas law.

In so holding, the Fifth Circuit predicted that the Texas Supreme Court would apply the principles set forth in section 5 of the *Restatement Third, Torts: Products Liability* (1997) (the "*Restatement*"). As the Fifth Circuit explained, "[t]he Texas Supreme Court has long looked to the *Restatement of Torts* as an influential guide in products liability law, and has recently heavily relied on the refinements in such law reflected in *Restatement Third, Torts: Products Liability.*" *Cimino,* 151 F.3d at 334 (citations omitted).

As the Fifth Circuit recognized, the "general rule" under section 5 is that "component sellers should not be liable when the component itself is not defective" (*Cimino*, 151 F.3d at 333, quoting *Restatement* § 5 cmt. a)[14/]:

> The refusal to impose liability on sellers of nondefective components is expressed in various ways, such as the "raw material supplier defense" or the "bulk sales/sophisticated purchaser rule." However expressed, these formulations recognize that component sellers who do not participate in the integration of the component into the design of the product should not be liable merely because the integration of the component causes the product to become dangerously defective.

[14/] *Cimino* makes clear that "[p]roduct components include raw materials, bulk products, and other constituent products sold for integration into other products." 151 F.3d at 332 (quoting *Restatement* § 5 cmt. a).

Id. at 332-33 (quoting *Restatement* § 5 cmt. a). Indeed, section 5 "subjects component sellers to liability" only "when the components themselves are defective or when component providers substantially participate in the integration of components into the design of the other products." *Id.* at 333 (quoting cmt. a).

Turning to the issue of product defect, the Court observed that, under settled tort law, "a product is defective if it contains a manufacturing defect or a design defect or because of inadequate warnings or instructions." *Id.* at 334 (citing *Restatement* § 2). The Court held that there was no basis for a claim based upon any *manufacturing* defect, because "[a] manufacturing defect exists 'when the product departs from its intended design,'" and "[t]here is no evidence or finding that this was the case with ACL's raw asbestos, or that it was any different from any other chrysotile asbestos." *Id.* (quoting *Restatement* § 2(a)).

Nor was there any basis for a *design* defect claim, because section 5 of the *Restatement* "makes it clear" that a basic raw material like asbestos "'cannot be defectively designed.'" *Id.* at 333 (quoting § 5 cmt. c).[15] The conclusion that plaintiffs could not maintain a design defect

[15] Indeed, "[c]haracterizing a naturally occurring raw material as defectively *designed*" would be "nonsensical" because a raw material – like the asbestos at issue here – "cannot in any sensible way be '*re*designed.'" Madden, "Liability of Suppliers of Natural Raw Materials And The Restatement (Third) of Torts: Product Liability – A First Step Toward Sound Public Policy," 30 U. Mich. J. L. Reform 281, 284 n.14 (1997) (emphasis added) (cited in Reporter's Note to *Restatement* § 5 cmt. c). Given that asbestos *cannot* be re-designed but has many important uses, a bulk supplier like Union Carbide should, at most, be subject to *duty to warn* claims – claims that would be subject to the rules discussed in the text below. *See Restatement* § 2 cmt. l ("*when an alternative design* to avoid risks *cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient* to render the product reasonably safe") (emphasis added). Finally, subjecting a supplier of raw asbestos to a *design defect* claim – as opposed to a duty to warn claim – would be tantamount to a ban on the sale of asbestos or asbestos-containing products – a result that would be contrary to longstanding public policy in this country. The federal government has *never* adopted a wholesale ban on asbestos or asbestos-containing products, and OSHA regulations *still* permit many asbestos-containing

claim was required as well by the Court's prior holdings that "not all asbestos-containing *finished* products are defective or unreasonably dangerous." *Id.* at 331 (emphasis added and citations omitted). As the Fifth Circuit explained, "[i]f asbestos-containing *finished* products are not all unreasonably dangerous or defective, then it necessarily follows that *ordinary raw asbestos* sold to a sophisticated and knowledgeable manufacturer of such products *is not of itself defective or unreasonably dangerous*." *Id.* (emphasis added).

Finally, the Court held, liability could not be predicated upon a failure to warn theory, because under section 5 of the *Restatement*, as a bulk supplier of raw asbestos, ACL owed the plaintiffs themselves no *duty* to warn. Adding its own italics for emphasis, the Fifth Circuit cited as support for that conclusion comment c to § 5, which specifically addresses the situation of a raw material supplier like ACL (or Union Carbide):

> "*c. Raw Materials.* Product components include raw materials. See Comment *a* . . . Regarding the seller's exposure to liability for defective design, *a basic raw material* such as sand, gravel, or kerosene *cannot be defectively designed.* Inappropriate decisions regarding the use of such materials are not attributable to the supplier of the raw materials but rather to the fabricator that puts them to improper use. The manufacturer of the integrated product has a significant comparative advantage regarding selection of materials to be used. Accordingly, *raw-materials sellers are not subject to liability for harm caused by defective design of the end-product.* The same considerations apply to failure-to-warn claims against sellers of raw materials. *To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use* of raw materials *by manufacturers over whom the supplier has no control. Courts uniformly refuse to impose such an onerous duty to warn.'*"

---

products to be sold *without any warning labels at all. See* 29 C.F.R. § 1910.1001(j)(6). *See, e.g., Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985) (recognizing that "OSHA has declined to impose a warning requirement" on many asbestos-containing products). Thus, as the Sixth Circuit recognized in *Stark v. Armstrong World Industries, Inc.*, 21 Fed. Appx. 371, 378 (6th Cir. 2001), "an asbestos-containing product, even one without a warning label, is not inherently defective as a matter of law."

Id. at 333 (quoting *Restatement* § 5 cmt. c) (emphasis supplied by Fifth Circuit).

The Fifth Circuit also stressed that the District Court had not found "that ACL failed to adequately warn *Fibreboard* or that *Fibreboard* was not fully knowledgeable of the relevant risks posed by its asbestos-containing insulation products," and that "the evidence virtually compels the conclusion that Fibreboard *was* so aware." *Id.* at 331 (emphasis added). "That being the case," the Court concluded, "any failure to warn Fibreboard would be clearly *immaterial*." *Id.* (citing *Restatement* § 2 cmt. i) (emphasis added). As the Court explained, "[w]arning of an obvious or generally known risk in most instances would not provide an effective additional measure of safety. It is obvious here that no warning ACL failed to give Fibreboard would have provided any 'effective additional measure of safety' for plaintiffs." *Id.* (citing *Restatement* § 2 cmt. j).

Thus, "[a]pplying section 5 of the *Restatement* . . . as [it] believe[d] the Texas Supreme Court would," the Fifth Circuit held that ACL was entitled to judgment as a matter of law based on the following facts: (i) ACL's "raw asbestos, as sold to Fibreboard, was not adulterated or other than normal chrysotile asbestos, and it was not itself defective in the sense of section 2 of the *Restatement*"; (ii) "Fibreboard was a sophisticated, expert, and knowledgeable manufacturer" who purchased raw asbestos from various suppliers, and "who produced diverse finished products into which it incorporated, after refining it, the raw asbestos purchased from ACL (and from other suppliers)"; (iii) "not all of such finished products [were] shown to be defective"; (iv) "there [was] no basis for finding . . . that Fibreboard either did not know exactly what it was getting from ACL or that it was unaware of the asbestos-related risks presented by its finished insulation products"; (v) "ACL had no role in the design, manufacture, sale, or distribution of the . . . products at issue"; (vi) "ACL and Fibreboard were not affiliated"; and (vii) "there [was] no

UCC asbestos in pellets – claims unique product.

Call reports

practical way ACL could have warned plaintiffs of the risks posed by Fibreboard insulation products." *Id.* at 334-35. The Fifth Circuit's holding applies with equal force to this case, which presents virtually identical circumstances.

Here too, plaintiffs' claims against Union Carbide rest, not upon the manufacture of any finished asbestos-containing products, but upon the sale of raw asbestos that *others* – namely, USG and GP – used in manufacturing particular finished products. Here too, the raw asbestos that Union Carbide sold was "not of itself defective or unreasonably dangerous." *Cimino*, 151 F.3d at 331. *Accord id.* at 333 ("*a basic raw material . . . cannot be defectively designed*") (quoting *Restatement* § 5 cmt. c) (emphasis added by Fifth Circuit). Here, too, USG and GP were "sophisticated, expert, and knowledgeable manufacturer[s]," with long experience in the manufacture of asbestos-containing products, who, in the words of the Fifth Circuit, "kn[e]w exactly what [they] [were] getting from [Union Carbide]." *Cimino*, 151 F.3d at 334-35. Indeed, Union Carbide itself provided warnings to its asbestos customers, including USG and GP. *See* pp. 6-9 above. Moreover, both USG and GP have *admitted* – and the documents found in their respective document repositories confirm – that they were aware of the potential hazards of asbestos before they even began to use Union Carbide as a supplier for their tape joint compounds (*see* pp. 11-25 above), and USG and GP were certainly in a better position than Union Carbide to know about the risks posed by the use of asbestos in their *particular* finished products. Here, too, Union Carbide was not affiliated with USG or GP, and "had no role in the design, manufacture, sale, or distribution of the . . . products at issue." *Cimino*, 151 F.3d at 335. *See* p. 6 above. And, finally, here, too, "there [was] no practical way" that Union Carbide "could have warned" end users themselves "of the risks posed by" USG's and GP's tape joint products. *Cimino*, 151 F.3d

– DR. EGLEMAN REPORT RE: UCC EXTENSIVE KNOWLEDGE OF HEALTH ISSUES

8941428.12 31303 1445C 02978237

at 335. Accordingly, like the asbestos supplier in *Cimino*, Union Carbide is entitled to summary judgment here as a matter of Texas law.

That conclusion is confirmed by the Texas Supreme Court's decision in *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588 (Tex. 1986), on which the Fifth Circuit also relied. In *Alm*, plaintiff brought suit for personal injuries suffered when the cap on a 7-Up bottle he had purchased exploded off the bottle and struck him in the eye. The evidence established that Alcoa had known about the risk of personal injury from bottle cap blow off for some time, and the Court thus found that "Alcoa had a duty to warn users of the hazard of improperly applied caps." *Id.* at 591. Alcoa argued that it had satisfied its duty to warn by adequately warning JFW, the bottling company to whom Alcoa had supplied the capping machine.

The Texas Supreme Court "*agree[d]* that a manufacturer or supplier may, in certain situations, depend on an intermediary to communicate a warning to the ultimate user of a product," *id.*, explaining that "[s]ome courts have . . . held that *a bulk supplier*, one who sells a product to another manufacturer or distributor who in turn packages and sells the product to the public, *need only warn its intermediate distributor and not each individual consumer*." *Id.* at 592 (emphasis added). The issue, the Court noted, "is whether the supplier's reliance on the intermediary is reasonable." *Id.* And "[i]n determining whether a bulk supplier's duty to warn extends to ultimate users of a product, courts may consider whether the distributor is adequately trained, whether the distributor is familiar with the properties of the product and its safe use, and whether the distributor is capable of passing on his knowledge to consumers." *Id.*

Although the Court in *Alm* decided the case against Alcoa based upon the particular facts of that case, as the Fifth Circuit recognized, the "clear holding" of *Alm* "is that an adequate warning to JFW [the intermediary] would have protected Alcoa," *Cimino*, 151 F.3d at 332, and that even without such a warning, the bulk supplier will have no liability if the intermediary to whom it made the bulk sale was itself "*otherwise* knowledgeable of the relevant hazards." *Id.* (emphasis added). *Accord Munoz v. Gulf Oil Co.*, 732 S.W.2d 62, 66 (Tex. App. 1987) ("[i]n any situation in which there is a duty to warn, the warning is required in order to impart special knowledge. If that special knowledge already exists, further information is not necessary"). *Alm*, the Fifth Circuit held, was "thus distinguishable from the case at bar, in which a supplier of raw material to a sophisticated and knowledgeable manufacturer of diverse finished products which incorporate that material is held liable for failure to warn users of one type of such finished products of the dangers posed by the raw material's presence in the product." *Cimino*, 151 F.3d at 332.

In granting summary judgment under Texas law to DuPont and other bulk suppliers of Teflon in the jaw implant MDL, Judge Magnuson likewise relied on *Alm*, explaining that "the Supreme Court of Texas" in that case "unequivocally adopted the bulk supplier doctrine." *In re TMJ Implants Prods. Liab. Litig.*, 872 F. Supp. 1019, 1032 (D. Minn. 1995), *aff'd*, 97 F.3d 1050 (8th Cir. 1996).[16/] Judge Magnuson relied as well on *Munoz v. Gulf Oil Co.*, 732 S.W.2d 62 (Tex.

[16/] There is presently pending in the Texas Supreme Court an appeal from the appellate court's decision in *Humble Sand & Gravel, Inc. v. Gomez*, 48 S.W.3d 487 (Tex. App. 2001), *review granted* (2002). There, the appellate court held, *inter alia*, that a supplier of silica sand that allegedly failed to provide adequate warnings to its customer would not be absolved of liability by the sophisticated purchaser doctrine in a case brought by one of its customer's employees, where the court found (i) that the silica supplier could have provided better warnings on its bags of sand, and (ii) that, if such warnings had been put on the bags, *they would have reached the plaintiff-employee*. *Id.* at 496. But the *Humble Sand* court specifically recognized that "[w]hen a *bulk supplier* supplies silica sand, *it is reasonable for the supplier to rely on the knowledgeable intermediaries to disseminate warnings to workers because the supplier has little or no opportunity to warn later users*." *Id.* at 496 (emphasis added). That is precisely the situation presented by this Motion. Union Carbide supplied its asbestos in bulk to USG and GP, and those companies used the asbestos as an ingredient in manufacturing – and packaging – finished products. Union Carbide had "little or no way to warn later users" of USG's and GP's

App. 1987), in which plaintiffs brought suit against several oil and gas companies for injuries caused by an explosion of propane gas. Plaintiff alleged that the defendants should be held liable because they had breached a duty to warn that mercaptan, the malodorant added to the propane gas, would wear out. The trial court entered summary judgment for the defendants, and the Appellate Court affirmed.

As the Appellate Court noted, "ordinary prudence would require a manufacturer to put his warning on a package where it would be available to all who handle it, *but the bulk wholesaler has no way of telling who the ultimate purchaser might be and has no package on which to relate his warning*." *Id.* at 66 (emphasis added). For that reason, "*[a] manufacturer so selling owes no duty to warn the ultimate consumer*, and his failure to do so is not negligence and does not render the product defective." *Id.* (emphasis added and citation omitted). Echoing the Texas Supreme Court's earlier decision in *Alm*, the *Munoz* Court held that a bulk supplier fulfills any duty to warn "when he ascertains that the distributor to whom he sells is adequately trained/is familiar with the properties of the [product] and safe methods of handling it/and is capable of passing on his knowledge to his customers." *Id.*

- CMC reports?

The undisputed facts here establish that Union Carbide took a variety of actions to assure that its customers would be "adequately trained" by advising them of the potential hazards associated with the use of asbestos. *See* pp. 6-9 above. The undisputed facts likewise establish that USG and GP were themselves well aware of the "properties" of asbestos and of the "safe methods of handling it," and were more than "capable of passing on [their] knowledge to [their]

- specify! (pp. 11-25)

---

products.

customers." *See,* pp. 11-25 above. Accordingly, *Cimino*, *Alm*, and *Munoz* all make clear that Union Carbide is entitled to summary judgment under Texas law.

B. Union Carbide Is Entitled to Summary Judgment Under Ohio Law.

Courts applying Ohio law have likewise held that a bulk supplier "can discharge its duty to warn by providing the necessary information to an intermediary upon whom it can reasonably rely to communicate the information to the ultimate user of the product." *Midwest Specialties, Inc. v. Crown Indus. Prods. Co.*, 940 F. Supp. 1160, 1165 (N.D. Ohio 1996) (*citing Restatement (Second) of Torts* § 388 & cmt. n), *aff'd,* 142 F.3d 435 (6th Cir. 1998); *see also Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1456 (6th Cir. 1984) (same). This principle "applies when a product is sold in bulk to purchasers which then repackage the product *or incorporate it into another product as a component*." *Ditto v. Monsanto Co.*, 867 F. Supp. 585, 592 (N.D. Ohio 1993), *aff'd,* 1994 U.S. App. LEXIS 26546 (6th Cir. Sept. 16, 1994). In applying the bulk supplier doctrine, "the pivotal question becomes the reasonable~~ness of the~~ supplier's reliance on the intermediary to provide the necessary warning." *Midwest Specialties, Inc.*, 940 F. Supp. at 1165. Where, as here, the material facts are not in dispute, the courts presented with this question have repeatedly granted summary judgment to bulk suppliers as a matter of Ohio law.

In *Adams v. Union Carbide Corp.*, for example, plaintiff alleged that she developed asthma from exposure to toluene diisocyanate ("TDI") manufactured by Union Carbide and sold to her employer, GMC. She further alleged that Union Carbide was liable for failing to warn GMC *employees* of the hazards of TDI. The evidence presented to the court demonstrated that the TDI was supplied to GMC in bulk form, that Union Carbide had provided GMC with extensive information about the hazards of TDI (737 F.2d at 1454-55), and that "[a]fter the delivery, GMC had exclusive control over both the chemical and the GMC employees who came into contact with it." *Id.* at 1456-57. In affirming the grant of summary judgment, the Sixth Circuit explained that:

> The fact that GMC repeatedly updated its information about TDI from Union Carbide, coupled with the fact that GMC itself had a duty to its employees to provide them with a safe place to work, supports the inescapable conclusion that it was reasonable for Union Carbide to rely upon GMC to convey the information about the hazardous propensities of TDI to its employees within the context of comment n of the restatement [*(Second) of Torts* § 388].

Id. at 1457.

Applying Ohio law, the Third Circuit likewise affirmed the entry of summary judgment in favor of a bulk supplier of silica in *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 739 (3d Cir. 1990). Citing the *Restatement (Second) of Torts* § 388 and the Sixth Circuit's decision in *Adams* (927 F.2d at 739-41 & n.2), the Third Circuit held that the intermediary's awareness of the hazards of silica inhalation, "coupled with the duty owed by [the intermediary] to provide its workers with a safe working environment and the *virtual impossibility of the sand suppliers reaching the ultimate users*, is, in our view, sufficient . . . to justify the sand suppliers' reliance on [the intermediary], as a knowledgeable purchaser, to warn the ultimate sand users." *Id.* at 741 (emphasis added).

Midwest Specialties is to the same effect. In that case, Midwest sued for damages incurred when a cleaning solvent reacted with aluminum causing hydrochloric acid fumes. Midwest sued the manufacturer of the chemical ingredient in the solvent (PPG), an intermediate supplier of that chemical (Hydrite), and the company that used the chemical to produce the cleaning solvent (Crown) that Midwest ultimately purchased. Midwest claimed that these parties failed to properly warn it that the cleaning solvent would react with aluminum. PPG moved for summary judgment on the ground that it did not have a duty to warn, and the District Court agreed, holding that "[s]ince PPG supplied both intermediaries with warnings, and both intermediaries had actual knowledge of the product's danger, PPG's belief that the intermediaries were adequately informed was reasonable." 940 F. Supp. at 1166.[17]

Finally, in *Ditto*, plaintiff's decedent worked for an electric transformer servicing company. Plaintiff alleged that the decedent developed leukemia from exposure to Monsanto's dielectric insulating fluid containing PCBs used in transformers on which he was working. Monsanto moved for summary judgment, arguing that it had no duty to warn the decedent under the bulk supplier doctrine. The Court agreed and granted summary judgment, explaining that

> Under the holding in *Adams*, Monsanto had no duty to warn the employees of SunOhio/ENSR. The electrical equipment manufacturers which sealed the PCBs in the equipment, and SunOhio/ENSR which serviced the equipment, knew of the dangers of PCBs, the manufacturers had exclusive control over the fluids and their employees after Monsanto delivered the product, and Monsanto's customers had a duty to warn the ultimate user of the dangers of servicing their product, the transformers.

867 F. Supp. at 593. Further, the court explained that, as a practical matter, Monsanto *could not* have warned ultimate users such as Ditto.

> Monsanto had no way to put a warning on the product, no way by which to know or become familiar with who purchased or serviced the equipment, and no way by which to know for whom Ditto worked or the conditions under which he serviced the electrical equipment.

CALL REPORTS!
↓
VCC DID HAVE FEEDBACK ON HOW PRODUCT WAS BEING USED.

---

[17] In *Midwest Specialties*, plaintiffs argued that PPG was not entitled to summary judgment because there was an issue as to whether PPG had properly warned Hydrite and Crown of the dangers of the chemical during *all* of the relevant years. Nevertheless, it was undisputed that Hydrite and Crown – the intermediaries – were fully aware of the dangerous properties of the chemical being supplied by PPG at all pertinent times. *See* 940 F. Supp. at 1165. The court thus rejected plaintiffs' argument, holding that "[a] manufacturer does not act unreasonably by failing to warn intermediate purchasers of dangers of which the intermediate purchasers are already knowledgeable." *Id.*

Id.

Here too, the raw asbestos that Union Carbide sold in bulk was used as an ingredient in products made by USG and GP. Union Carbide "had no way" to warn end users of USG's and GP's products, but, as shown above, Union Carbide placed warnings on the bags of fiber that it sold to third-party manufacturers, and took various other actions to advise those customers of the potential health hazards of asbestos. Union Carbide's customers, such as the joint compound manufacturers, had an independent duty to warn purchasers and users of their products of any hazards associated with the products' use, assuming the products in fact required a warning. And, finally, USG and GP were fully cognizant of asbestos hazards before they even began purchasing asbestos from Union Carbide for use in their tape joint products. Accordingly, as a matter of Ohio law, it was reasonable for Union Carbide to rely on USG and GP to fulfill their duties as manufacturers to warn end users about any hazards associated with the use of their joint compound products. *See Adams*, 737 F.2d at 1457; *Smith*, 927 F.2d at 741; *Midwest Specialties*, 940 F. Supp. at 1166; *Ditto*, 867 F. Supp. at 593.[18] Union Carbide thus is entitled to summary judgment under Ohio law.

C. Union Carbide is Entitled to Summary Judgment Under California Law.

California law also forecloses any attempt to impose upon Union Carbide a duty to warn end users of USG's and GP's asbestos-containing products. Indeed, it is well-settled in California that where, as here, a defendant supplies an allegedly toxic component in bulk to an intermediary (such as a manufacturer), who exercises exclusive control over the subsequent compounding, packaging, labeling and marketing of a finished product containing the component, the bulk supplier has *no* duty to warn end users of the component's toxicity so long as it provides warnings to the intermediary. *Groll v. Shell Oil Co.*, 196 Cal. Rptr. 52, 55 (Ct. App. 1983). *See Macias v.*

[18] Plaintiffs may cite *Adkins v. GAF Corp.*, 923 F.2d 1225 (6th Cir. 1991), for the proposition that they are entitled to pursue a *design defect* claim against Union Carbide even if the cases discussed in the text foreclose any claim for *failure to warn*. But there is every reason to conclude that the Ohio Supreme Court would reject any such design defect claim. First, *Adkins* is contrary to *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691 (Ohio 1987), in which the Ohio Supreme Court squarely rejected the contention that all asbestos is dangerous. *See id.* at 701 ("Goldman contends that exposure to *any* amount of asbestos is dangerous, and that asbestos-containing products are defective as a matter of law. . . . Goldman's argument is simply wrong.") (emphasis in original). *Accord Cimino*, 151 F.3d at 331 ("[i]f asbestos-containing finished products are not all unreasonably dangerous or defective, then it necessarily follows that ordinary raw asbestos sold to a sophisticated and knowledgeable manufacturer of such products is not of itself defective or unreasonably dangerous"). Second, *Adkins* cannot be squared with the Sixth Circuit's *own* subsequent decision in *Stark v. Armstrong World Industries, Inc.*, 21 Fed. Appx. 371, 378 (6th Cir. 2001), which held that "an asbestos-containing product, even one without a warning label, is *not* inherently defective as a matter of law" (emphasis added). Third, as shown by the cases discussed in the text, the Ohio courts have routinely relied upon the *Restatement of Torts* in applying Ohio products liability law, and it is likely that the Ohio courts would look to the *Restatement (Third)* in the same way that they have historically relied on the *Restatement (Second)*. Finally, the Ohio Supreme Court would likely follow section 5 of *Restatement (Third)* – which recognizes that "a basic raw material . . . cannot be defectively designed" – and reject any design defect claim against Union Carbide here because characterizing a naturally-occurring mineral like asbestos as defectively "designed" makes no sense, and would be contrary to settled public policy. *See* pp. 27-28 n. 15.

California, 897 P.2d 530, 536 (Cal. 1995) (recognizing that "judicially created doctrines such as the 'sophisticated purchaser' and 'bulk supplier' defenses have become familiar maxims of product liability law") (citing *Groll*; *Restatement (Second) of Torts* § 388 cmt. n).

In *Groll*, for example, the defendant shipped a flammable liquid in bulk to a distributor and enclosed a bulletin detailing the potential hazards associated with the product. 196 Cal. Rptr. at 55. The first distributor shipped the bulk product and the accompanying warning to a second distributor. That distributor repackaged the liquid for retail sale in individual containers bearing an inadequate warning label. *Id.* The court refused to impose a duty to alert retail consumers on the bulk supplier, reasoning that the bulk supplier was simply unable to communicate warnings to users of the finished product because it had relinquished control over the packaging of its component when it sold to a distributor. *Id.* Instead, the court concluded, the duty of a bulk supplier to provide warnings "must be absolved at such time as it provides adequate warnings to the distributor who subsequently packages, labels and markets the product." *Id.* As the court explained:

> *Appellant asks respondent to bear a tremendous burden if it is to be responsible for warning the ultimate consumer.* Cases which have imposed a duty on the manufacturer to warn the ultimate consumer have typically involved tangible items that could be labeled, or sent into the chain of commerce with the manufacturer's instructions . . . . Other cases have imposed such a duty when the manufacturer controlled the means to communicate the warning to the consumer, i.e., by packaging or labeling the ultimate product . . . . The case at bar is distinguishable in that *respondent did not have the ability to prepare the warning because [the toxic component] was sold in bulk and subsequently packaged and labeled by [the distributor].*

Id. (emphasis added). Accordingly, the court affirmed the entry of nonsuit in favor of the bulk supplier defendant.

Similarly, in *Walker v. Stauffer Chem. Corp.*, 96 Cal. Rptr. 803, 805 (Ct. App. 1971), the defendant had supplied sulfuric acid in bulk to a purchaser that incorporated it into drain cleaner subsequently sold through distributors. The purchaser of the bulk sulfuric acid used it as an ingredient in the drain cleaner, which it then packaged, labeled, and marketed. *Id.* As the court explained in affirming the entry of summary judgment for the defendant bulk supplier in a claim arising out of the use of the drain cleaner:

> We do not believe it realistically feasible or necessary to the protection of the public to require the manufacturer and supplier of a standard chemical ingredient such as bulk sulfuric acid, not having control over the subsequent compounding, packaging or marketing of an item eventually causing injury to the ultimate consumer, to bear the responsibility for that injury. The manufacturer (seller) of the product causing the injury is so situated as to afford the necessary protection.

cmu reasons!

Id. at 806. Indeed, the court in *Walker* specifically rejected the plaintiff's argument that because the bulk supplier sold a "dangerous substance," it had a "'duty to the *general public* to see that they are not harmed.'" *Id.* (emphasis added). As the Court made clear, "*[t]he mere fact that bulk sulfuric acid is potentially dangerous is no reason to render Stauffer liable to plaintiff* in the instant case." *Id.* (emphasis added).

Persons v. Salomon North America, Inc., 265 Cal. Rptr. 773 (Ct. App. 1990), is to the same effect. In that case, the court held that a supplier of ski bindings to a ski rental shop had no duty to warn individual skiers that its bindings might be incompatible with certain ski boots. The court reasoned that while the binding manufacturer had no means to communicate such a warning to the skiers, the ski shop had sufficient expertise to understand the supplier's warnings and to pair appropriate boots and bindings for the consumer. *Id.* at 778-79. Moreover, the ski shop "had an independent duty to exercise reasonable care in supplying this equipment and was itself subject to strict liability for failure to warn its customers of the dangerous propensities" of the equipment. *Id.* at 779. As the court made clear, "*[w]hen a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning.* 'Modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so.'" *Id.* (emphasis added); *see also Stevens v. Cessna Aircraft Co.*, 170 Cal. Rptr. 925, 926 (Ct. App. 1981) (holding that an aircraft manufacturer had no duty to warn passengers as to load capacity so long as appropriate warnings were provided to the pilot in the owner's manual).

Groll, Walker, Persons and *Stevens* establish that under California law, a bulk supplier has no duty to warn end users when the finished product that allegedly caused the harm was compounded, packaged, labeled and marketed by a third-party, where the bulk supplier had no control over the finished product and no practical way to warn end users, and where the bulk supplier provided an appropriate warning to its customers -- the manufacturers. Here, the undisputed evidence establishes precisely that: (i) Union Carbide sold its chrysotile asbestos in bulk to USG and GP; (ii) Union Carbide never had or exercised any control over the formulation, packaging, labeling, marketing, selling or distribution of any finished USG or GP product containing Union Carbide's Calidria asbestos, including the decision to use asbestos fiber and the manner in which the fiber would be used; (iii) Union Carbide was not involved in the process by which USG and GP, respectively, decided whether or not to warn their customers or end users about the hazards of asbestos, and if so, the content of any such warning; and, finally, (iv) because USG and GP utilized the asbestos fibers purchased from Union Carbide as an ingredient in a finished product, Union Carbide had no means of communicating warnings to end users of

cite reports

is this really true?

USG's and GP's products. Accordingly, Union Carbide is entitled to summary judgment as a matter of California law.[19]

D. Union Carbide Is Entitled To Summary Judgment Under Florida Law.

Union Carbide is entitled to summary judgment under Florida law as well.

In *Shell Oil Co. v. Harrison*, 425 So. 2d 67, 68 (Fla. Dist. Ct. App. 1982) ("*Shell Oil*"), for example, Shell Oil was a bulk supplier of a soil fumigant known as Nemagon, which a manufacturer (Kerr-McGee) purchased and incorporated into a retail lawn treatment that it sold

---

[19] Plaintiffs may argue that even if they have no viable *duty to warn* claim against Union Carbide, they may nevertheless pursue a *design defect* claim under *Arena v. Owens-Corning Fiberglas Corp.*, 74 Cal. Rptr. 2d 580, 589 (Ct. App. 1998). In *Arena*, a California appellate court held that "raw asbestos is a product that may have a design defect." The *Arena* court acknowledged the *Restatement* "rule" (then still only in draft form) that "'a basic raw material . . . cannot be defectively designed,'" but found the rule "inapplicable" to raw *asbestos* because "asbestos is not a component material that is usually innocuous, such as sand, gravel, nuts or screws." *Id.* There is no reason to believe that the California Supreme Court would follow *Arena*'s lead and reject the *Restatement* "rule" in asbestos cases. To the contrary, the California Supreme Court has long relied on the *Restatement of Torts* in fashioning products liability law, and has recently relied on the *Restatement (Third)* itself. *See Jiminez v. Superior Court*, 58 P.3d 450, 454 (Cal. 2002) (citing *Restatement (Third)* § 19(b)); *id.* at 458-59 (Kennard, J., concurring) (*citing Restatement (Third)* §§ 5 and 21); *id.* at 460 n.1, 461, 462 n.2, 465 n.5 (Brown, J., concurring and dissenting) (citing *Restatement (Third)* §§ 19 and 21). There is every reason to believe the California Supreme Court would follow the *Restatement (Third)* here as well. *See also, e.g., Artiglio v. General Electric Co.*, 71 Cal. Rptr. 2d 817, 821-23 (Ct. App. 1998) (citing section 5 of the then-Proposed Final Draft of the *Restatement (Third)*); *Morson v. Superior Court*, 109 Cal. Rptr. 2d 343, 351-52, 358 (Ct. App. 2001) (citing discussion of "design defect" claims in section 2 of the *Restatement (Third)*). Moreover, the suggestion that the California Supreme Court would hold that raw asbestos is defectively "designed" is difficult to reconcile with its approval of the Ohio Supreme Court's decision (discussed above at 37 n. 18) in *Goldman*, which specifically rejected the argument that "exposure to *any* amount of asbestos is dangerous, and that asbestos-containing products are defective as a matter of law." 514 N.E.2d at 701 (emphasis in original). *See Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1216 (Cal. 1997) ("'Asbestos-containing products do not create similar risks of harm because there are several varieties of asbestos fibers, and they are used in various quantities, even in the same class of product.'") (*quoting Goldman*, 514 N.E.2d at 697). Finally, the California Supreme Court would likely apply the *Restatement* "rule" that raw materials cannot be defectively designed because human beings do not design minerals, and because the view that asbestos itself is *per se* defective is contrary to public policy to boot. *See* pp. 27-38 n. 15.

is this so

through retail dealers in Florida. Concern arose during the 1960s and 1970s about the possible harmful effects of Nemagon, particularly the effects of using and storing it in or around the home. *Id.* The plaintiff in *Shell Oil* was exposed to Nemagon while cleaning up Kerr-McGee's lawn treatment product that had spilled in his garage.

The plaintiff alleged "that Shell, the manufacturer or distributor of an inherently dangerous commodity [Nemagon], had a duty to the ultimate foreseeable user to give fair and adequate warning of its dangerous potentialities, including any necessary respirators or protective clothing needed." *Id.* at 69. The Court squarely rejected the plaintiff's claim, holding that Shell was entitled to judgment as a matter of law. Finding that it was sufficient that Shell had taken precautions to advise its customer – Kerr-McGee – of the hazards of Nemagon, the Court held that Shell did not owe any duty to warn "ultimate consumers" of products that incorporated the allegedly hazardous ingredient:

> Under the facts as detailed above, did Shell, as the manufacturer and bulk supplier of a dangerous toxic component, have a nondelegable duty to warn ultimate users of the hazards of commodities containing the toxic component when the commodities were formulated, packaged, labeled, and distributed by others? *We think not.*

Id. at 70 (emphasis added).

In so holding, the Court found "dispositive" its prior decision in *Zunck v. Gulf Oil Corp.*, 224 So. 2d 386, 387 (Fla. Dist. Ct. App. 1969), where the Court similarly rejected a plaintiff's attempt to impose a duty to warn end users upon a bulk supplier, and affirmed the entry of summary judgment in favor of the defendant supplier. As the *Shell Oil* Court explained, *Zunck* stands for the proposition that "absent a showing" by the plaintiff that the bulk supplier "had not taken necessary precautions commensurate with the dangers reasonably anticipated under the circumstances," the bulk supplier was "not responsible for warning the ultimate users." *Shell Oil*, 425 So. 2d at 69.

Moreover, in deciding whether to impose a duty to warn upon a bulk supplier like Union Carbide here, Florida courts have considered whether the downstream distributor or manufacturer of the finished product was itself aware of the alleged risks of the product and, thus, capable of warning end-users. As the *Shell Oil* Court explained, for example, "[i]t was shown" in *Zunck* "that the retail distributor knew that the gas was odorless when received from the wholesale distributor." *Shell Oil*, 425 So. 2d at 69. And in *Shell Oil* itself, "[t]here was testimony from a responsible Kerr-McGee official that Kerr-McGee knew of the restrictions on the use or storage of Nemagon products in or around the home as of 1972, two years before the product containers in question were bought." *Id.* Here, too, the undisputed facts establish that USG and GP knew full well – prior to the times when they each began purchasing raw asbestos from Union Carbide – of the potential risks posed by the use of asbestos, and were far better positioned than Union Carbide to know of the particular risks of using asbestos in their finished products. *See* pp. 11-25 above.

UCC knowledge is more extensive

In sum, the undisputed evidence establishes that Union Carbide had no control over how its raw asbestos fiber would be used, formulated, packaged, labeled, marketed, or distributed by USG and GP, and thus no practical way to provide any warnings directly to end users of USG and GP products. Equally important, the undisputed facts establish that Union Carbide repeatedly warned its Calidria customers such as USG and GP of the potential health hazards associated with the use of asbestos, and that USG and GP were independently aware of the purported dangers associated with asbestos well before they began purchasing asbestos from Union Carbide.

Accordingly, under *Shell Oil* and *Zunck*, Union Carbide is entitled to summary judgment as a matter of Florida law.

E. Union Carbide Is Entitled To Summary Judgment Under New York Law.

New York law is to the same effect. Citing the Sixth Circuit's decision in *Adams*, the California Court of Appeals decisions in *Walker* and *Groll*, and the Florida Court of Appeals decision in *Shell Oil* (all discussed above), New York courts have held that a bulk supplier of raw material, which is incorporated into a finished product, has no duty to warn a consumer of the finished product, particularly where (1) the bulk supplier provides "extensive warnings to its immediate distributees"; (2) "each party in the chain of distribution [is] a sophisticated user" and, hence, "aware of the toxicological characteristics of [the bulk product] and the necessary precautions to be taken when handling" it; and (3) the bulk supplier has "no control over the use of [its bulk product] once the form [is] altered." *Rivers v. AT&T Technologies, Inc.*, 554 N.Y.S.2d 401, 405 (Sup. Ct. 1990); *see also Polimeni v. Minolta Corp.*, 653 N.Y.S.2d 429, 431 (App. Div. 1997) ("The bulk supplier doctrine and the informed intermediary doctrine . . . were developed to impose practical limitations upon the manufacturer's obligation to appropriately warn the ultimate consumer. Thus, where a product, such as a gas or a liquid, is sold in bulk with the contemplation that such will be repackaged and resold by the manufacturer's distributee, the manufacturer will have satisfied its duty to act reasonably if it adequately warns the distributee of the risks and dangers associated with the use of its product.")[20]

Core record evidence!

UCC asbestos not merely "repackaged" — it is integrated into product.

---

[20] In *Polimeni*, 653 N.Y.S.2d at 431, the court ultimately denied defendant's motion for summary judgment because, unlike here, there was no evidence that the defendant was a bulk supplier, and it could not be determined whether the defendant's warnings were adequate because there was a "total lack of record evidence as to the [intermediaries'] respective sophistication and expertise regarding the potential health hazards" of the allegedly hazardous component. Here, in contrast, the evidence of USG's and GP's "sophistication and expertise" is

The rationale behind the New York courts' adoption of the bulk supplier doctrine is "that the immediate distributee is in a better position to warn the ultimate consumer of the dangers associated with the finished product and, further, that to require the bulk manufacturer to issue warnings through the entire chain of distribution would be too onerous a burden." *Polimeni,* 653 N.Y.S.2d at 431; *see also Rivers,* 554 N.Y.S.2d at 404 (citing with approval an unpublished New York decision, *Matera v. Worksafe, Inc.*, Index No. 17332/85 (N.Y. Sup. Ct. Nov. 30, 1989), where the court determined that "imposing a duty to warn a distant consumer upon a bulk supplier of prime material, would oblige the manufacturer to research, study, discover and anticipate all possible uses and possible risks of all finished products. Imposing such a requirement upon the manufacturer is not only impractical but also probably not feasible.")

Thus, in *Rivers*, a bulk supplier (DuPont) of a chemical solvent (DMF) delivered DMF in railroad tank cars, tank trucks, and fifty-five gallon steel drums to its distributors, who then transferred the DMF to their own storage tanks and sold it to Sangamo Weston, Inc. ("Sangamo") for use in the manufacture of capacitors. Sangamo manufactured a capacitor containing a solution consisting of DMF mixed with other chemicals. Like Union Carbide here, DuPont had no control over its bulk product once it was mixed with other materials. A lawsuit was brought against DuPont after a Sangamo DMF-containing capacitor (which was installed in a dataphone at the decedent's workplace) failed, thereby releasing DMF into the air, ultimately causing the decedent's death. The plaintiff alleged that DuPont breached its duty to warn that DMF was toxic. *Rivers,* 554 N.Y.S.2d at 402-03.

[illegible] REPORTS

---

overwhelming.

8941428.12 31303 1445C 02978237

DuPont moved for summary judgment, arguing that (1) as a bulk supplier of DMF, DuPont had no duty to warn the decedent of the dangers associated with DMF, and (2) DuPont satisfied any duty owed to decedent by warning its immediate customers. Applying the bulk supplier doctrine, the Court granted DuPont's motion for summary judgment, stating that the decedent "was too remote in the chain of distribution" to require DuPont to provide warnings. In reaching its conclusion, the Court found (i) that "DuPont provided extensive warnings to its immediate distributees," (ii) that "each of the parties in the chain of distribution was a responsible intermediary, fully aware of the implications of exposure to DMF," and (iii) that "DuPont had no control over the use of the DMF once the form was altered." *Rivers,* 554 N.Y.S.2d at 405. Under these circumstances, the New York Court held, "requir[ing] DuPont to provide warnings . . . would place an unduly onerous burden upon DuPont." *Id.*

one reason

The Second Circuit cited *Rivers* with approval in *In re Brooklyn Navy Yard Asbestos Litigation,* 971 F.2d 831, 838 (2d Cir. 1992), in which it recognized that a product manufacturer need not warn ultimate users where "the chain of distribution is such that the duty to warn ultimate users should fall on an intermediary in that chain, rather than on the manufacturer." 971 F.2d at 838. In that case, however, the "chain of distribution" did not protect the defendants. Unlike Union Carbide, the defendants in *Brooklyn Navy Yard* were *not* bulk suppliers of a *raw material* incorporated into a finished product which eventually made its way down the distribution chain to the ultimate user. Rather, the defendants were the manufacturers of *finished asbestos-containing products* that the defendants sold *directly* to the shipyard, where employees were harmed by exposure to those very asbestos-containing products. As finished product manufacturers, the defendants in *Brooklyn Navy Yard could have* provided warnings to end users. Here, of course, Union Carbide was a bulk supplier of a raw material, and thus had no practical means to provide warnings to end users of USG's and GP's products. Moreover, unlike Union Carbide here, the defendants in *Brooklyn Navy Yard* failed to give warnings to *anyone* about the potential dangers of asbestos, including its immediate customer, the Navy. Under those very different circumstances, the Second Circuit found that the defendants were not relieved of liability.

The undisputed facts here are like those in *Rivers*, and establish that here, too, "the chain of distribution is such that the duty to warn ultimate users" should not fall on Union Carbide. First, Union Carbide was a bulk supplier of raw asbestos to GP and USG, who in turn incorporated that asbestos into their own finished products. Second, just as in *Rivers*, Union Carbide "acted reasonably and appropriately in its role as a bulk supplier by adequately warning purchasers of [asbestos] of its dangers." *Rivers,* 554 N.Y.S.2d at 404. *See* pp. 6-9 above. Third, Union Carbide's immediate customers, GP and USG, were well aware of the potential hazards associated with the use of asbestos even before they began purchasing raw asbestos from Union Carbide. *See* pp. 11-25 above. Finally, just as in *Rivers,* Union Carbide did not exercise any control over the formulation, packaging, labeling, marketing, selling, or distribution of GP's or USG's finished products, and therefore had no practical way to warn end users of those finished products about the potential dangers associated with asbestos. *See* p. 6 above. Rather, GP and USG, by virtue of their knowledge about the hazards of asbestos and their control over the formulation, packaging, labeling, marketing, selling, and distribution of their asbestos-containing finished products, were in the best position to warn end users of the dangers associated with their asbestos-containing finished products. Accordingly, Union Carbide is entitled to summary judgment as a matter of New York law.

— Cite documents!

8941428.12 31303 1445C 02978237

CONCLUSION

For all of the foregoing reasons, defendant Union Carbide is entitled to summary judgment on all claims based upon its alleged sale of raw asbestos to United States Gypsum or Georgia-Pacific that are governed by Texas, Ohio, California, Florida, or New York law.

Respectfully submitted,

UNION CARBIDE CORPORATION

By: Herbert L. Zarov

One of its Attorneys

Herbert L. Zarov
Gary A. Isaac
Susan E. Brice
Kara K. Gibney
Cristina C. Tilley
MAYER, BROWN, ROWE & MAW
190 South La Salle Street
Chicago, Illinois 60603
Phone: 312-782-0600
Fax: 312-701-7711

James L. Stengel
ORRICK, HERRINGTON & SUTCLIFF LLP
666 Fifth Avenue
New York, NY 10103
Tel: 212-506-5000
Fax: 212-506-5151

Dated: March 14, 2003