

cc: ^{done} ALL ASBESTOS ATTORNEYS

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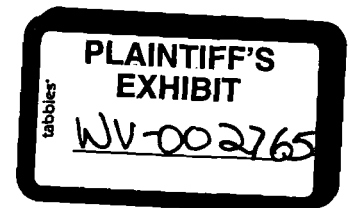
ASBESTOS TEXTILE INSTITUTE
AD HOC COMMITTEE MEETING
JUNE 3, 1976

Among THE DOCUMENTS
PRODUCED BY H.K. Porter
in Charlotte were many
concerning legal advice.
These had previously
been
edited by ATI.

The enclosed is
an interesting
discussion of
the asbestos
litigation in
1976.

Ton
10-14-82

ORIG TO
H.K. Porter
file.



ASBESTOS TEXTILE INSTITUTE

AD HOC COMMITTEE MEETING

June 3, 1976

Stouffer's National Center Inn, Arlington, Virginia

Chairman: D. H. Markusson, Esq., Johns-Manville Corporation

Vice Chairman: E. C. Bratt, Southern Asbestos Company

IN ATTENDANCE: Amatex Corporation -- M. J. Scanlan
Asarco Inc. -- R. J. Muth, Esq.
Garlock Inc. -- A. Kuzmuk
Nippon Asbestos Co. Ltd. -- S. Shima
Raybestos-Manhattan, Inc. -- C. D. Colson;
P. G. Dolan, W. A. Guenther, Esq.;
C. A. Kennedy; M. Q. Scowcroft
Southern Asbestos Company -- E. C. Bratt
TBA Industrial Products Ltd. -- H. J. Corson
W. B. Alcorn, Jr., Esq., ATI Trial Counsel,
-- Cadwalader, Wickersham & Taft
D. H. Markusson, Esq. -- Johns-Manville Corporation
D. M. Fagan, ATI Executive Secretary

M I N U T E S

1. TYLER LITIGATION: No remarkable change in the Tyler Litigation is anticipated during the next 3-5 months and very little has happened with the case. ATI's posture remains unchanged. Basically the situation can be summed up by saying that the court is remaining open for additional plaintiffs to join the lawsuit. Plaintiffs are still coming in and are being given a reasonable time for discovery. The court will not address the jurisdictional issues, including ATI's motion to dismiss, until all discovery is completed. As far as our request for a voluntary dismissal is concerned, plaintiffs' counsel will not decide until discovery is completed.

2. SHOUP LITIGATION: A complaint was filed in March in Detroit, Michigan, by William Carl Shoup against Johns-Manville Products Corporation, et al., including The Asbestos Textile Institute, a Pennsylvania corporation.

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a) Of special interest is that this is the first time ATI has been made a party in a litigation involving an insulation worker, as opposed to factory workers as is the case in the Tyler Litigation. The Shoup action represents the first attempt to draw ATI, as a trade association, rather than a product manufacturer into user-type litigation. Mr. Alcorn was quite correct in filing a motion to dismiss -- and before the motion was heard he was able to successfully negotiate a voluntary dismissal. The voluntary dismissal is "without prejudice," which means that at any time until the Statute of Limitations runs out, ATI can be rejoined as a party defendant. However, the likelihood of that happening is remote. The plaintiff has a number of good, solid, viable defendants who did supply insulation products and there is no question Mr. Shoup was exposed to those products. There is very little involvement that would warrant the rejoinder of ATI or of any of the trade associations.

b) Of interest are the allegations as to trade associations in a "user" case. The plaintiff acknowledges that:

The organizations are trade associations:

Each is engaged in research and development and in the collection, promulgation and dissemination of information to its members, to users of its products and to the public-at-large and ultimate consumers;

The defendants are involved in the trade associations that, collectively, had knowledge for many years as to the hazards of the inhalation of asbestos dust and there was a suppression or misrepresentation of that knowledge.

The above is alternatively pleaded that either the trade associations engaged in a suppression of the knowledge of the hazard or they misrepresented the nature of the hazard. The other allegation is that they did suppress or misrepresent the knowledge but they did so in the form of a civil conspiracy with the other defendants. The civil conspiracy aspect is not too alarming because it is a difficult thing to prove. However, a charge of suppression or misrepresentation of knowledge is one of which trade associations must be cognizant and on guard. The reasoning behind this statement is that since the companies are the source of the information for the trade associations, the associations become operational arms of the companies. This might be construed that the members of the associations are liable in that they were negligent in not doing enough investigation and in not pursuing the leads indicated by medical literature.

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As a practical matter, however, the likelihood of that happening in the Shcup case is somewhat remote. It is difficult for the plaintiff to prove and there is little pragmatic reason for him to attempt to do so. He already has plenty of defendants; why worry about the trade associations.

c) It is becoming increasingly clear how people are thinking in "user-type" cases -- and that is a collective organization of defendants suppressing or misrepresenting information and the duly-elected representatives in the trade associations being negligent in their duties of pursuing the information and of investigating it -- and that leads to such questions as: After a certain committee is formed and active, what did it do with the information it gathered? Why did it take or not take a particular course of action? It seems evident there will be more attempts to join trade associations with "user-type" litigations.

3. A PRODUCT EXPOSURE LITIGATION: A case that went to trial in Louisville, Kentucky, is of interest in that it is the type of litigation that could more directly involve, if not a trade association such as ATI, at least its member companies. It is quite unlike the usual insulation case because it involves the use of a finished product that someone other than the original manufacturer (in this case, Johns-Manville) had further fabricated or processed. The plaintiff had worked in a factory for some years, was exposed to the product, contracted mesothelioma and, subsequently, died.

a) The case was tried by a jury. Counsel for the defendants proceeded with a state-of-the-art defense to indicate what knowledge was held by the companies at what point in time. The defendant lost the case but the verdict was very "small" -- \$10,000 for a 51-year-old man for lost wages during time of illness and for pain and suffering and medical expenses; and \$80,000 to the widow for what should have been the remainder of the plaintiff's lifetime. Workmen's Compensation totaled about \$22,000. The outcome reflects a minimal liability on the part of the primary manufacturer.

b) In analyzing the case, two points became clear. It is extremely difficult to sell jurors on a state-of-the-art defense since they are not familiar with the situation nor with the literature. The problem is translating to the year 1976 that working with asbestos was a hazard in factories in the United Kingdom in the 1920's. All the literature tends to be effectively lumped together by the plaintiffs and there is little

segregation of points in time when the data became meaningful in the insulation trade -- when there began to be an awareness of bronchogenic cancer or mesothelioma.

c) A surprising fact was the sophisticated reasoning of the jury. They seemed to ask was it really reasonable to expect companies in the past to be concerned with the health hazard -- nobody else was!

d) Another interesting reaction on the part of the jurors was that, although they were aware of workman's compensation, they did feel strongly that the employer should be held liable. They did not feel the employer should be totally absolved, but there was no way to hold him liable because of the structure of the complaint. They felt there was something inherently unfair about an employee spending his entire working life in a factory, becoming ill and dying as a result of conditions at the factory -- and then a third party who did nothing but supply raw materials was charged with the whole burden, especially when the case boiled down to whether or not the manufacturer knew of a hazard and labeled his products accordingly. The jury was fairly well convinced that proper labeling would have had little consequence.

Sophisticated
Employer

e) Factually the case shaped up rather well. Unfortunately, the jury had difficulty working with the instructions given it by the court. The instructions did not deal with labeling but with whether or not there was knowledge and if so there was an accompanying duty -- and there was failure to satisfy the duty.

f) The decision is being appealed on the grounds that the manufacturer defendant was successful in getting the court to submit an interrogatory to the jury which asked: Do you find from the evidence that the defendant gave adequate warning to the defendant's employer? The jury's answer was "yes." To clarify, there is a series of cases under Kentucky law, primarily in the mining industry involving dynamite, that says: Warning to the employer is warning to the employee. This is not the rule in all jurisdictions but there is a growing body of law leaning this way. If this is so in the Kentucky courts, it will set up, based on the evidence that there was an intervening cause by another party, to wit, the employer. This would absolve the manufacturer from liability.

g) The results of the case have a bright side. The asbestos industry has a story to tell. It is a story that, when told,

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doesn't come out sounding half bad. It is doubtful that anyone, absent a runaway jury, will be able to show willful or wanton misconduct on the part of the asbestos industry. When the information was put together and presented to the jury, no one on the jury said the asbestos industry had gone out of its way to hurt people. On the contrary, they felt there had been a responsible effort by the industry. Unfortunately, much of what was decided was based on wrong information. The asbestos industry can prepare a responsible, honest defense, one that should not lead to horrendous financial repercussions.

4. A CLASS ACTION CASE: Also of interest is the class action case in New Jersey involving Raybestos-Manhattan, Inc., and its former employees at Passaic. A motion is pending to have the case certified as a class action and briefs have been filed in opposition. It is expected the class action will be denied and the case will proceed as a multiple plaintiff litigation. Informal meetings with the court indicate the defendant Canadian companies will be held in the case. Discovery is continuing and depositions of some of the plaintiffs have been taken. The injuries thus far appear to be minimal and the case seems to be diminishing in proportion.
5. COMPANY DOCTORS: In the news recently have been reports of several cases in California involving company doctors. They involve Johns-Manville plant contract physicians, i.e., private practitioners in the local community who have contracts with the company to provide limited time for pre-employment physicals, annual check-ups and minor medical problems. The situation arose from a case about two years ago where an employee sued the company doctor on a straight malpractice complaint for failure on the part of the doctor to disclose to the patient the nature of his pulmonary illness. The jury imposed about \$385,000 on the doctor and the case was closed. Subsequently, six other employees have filed similar cases against the doctor who, in turn, has impleaded Johns-Manville on the grounds it was not his responsibility to disclose the information to the employee.

a) There is another group of cases in California involving large punitive damage claims, where the employees have brought actions directly against Johns-Manville and the doctor -- J-M on the theory of gross, willful and wanton negligence; the doctor on the theory of malpractice. The effort is to try to get the cases out of the purview of workmen's compensation; the general rule being that workmen's compensation is a complete bar on negligence but is not a complete bar if it is a willful action on the part of the employer.

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b) There has been a great deal of union involvement in the cases and more of these types of occupational disease lawsuits are anticipated -- at least 20 or 30 in California alone. It would behoove employers to review with house counsel and the doctor exactly what are the ground rules in getting medical data from the doctor's office either to the employee or to his family physician. What makes the situation awkward is the peculiarities of a doctor-patient relationship. One way or another, the problems all filter through to the doctor. CSEA and several representatives are well aware of the problems and realize if the situation continues it will become increasingly difficult to find good physicians willing to enter the field of occupational medicine. It is indeed a serious problem. Already industry is finding physicians reluctant to become company doctors and if a company is successful in securing one, the doctor wants full insurance coverage from the first dollar. To make it even more difficult, first dollar coverage is not available in the marketplace; it cannot be bought.

5. FINANCIAL REPORT: As of April 30, 1976, the cash balance on hand in the Litigation Defense Fund totaled \$8,757.91. From that total, the following bills will be paid by the end of June 1976:

Tyler -- Hathaway; 10/15/75 thru 4/30/76	= \$1,599.00
Tyler -- Cadwalader; First Quarter 1976	= 570.23
Shoup -- Kerr, Wattles and Russell	= 1,649.09
Shoup -- Cadwalader, Wickersham & Taft	= 927.59
	\$4,745.96

Based on the above known disbursements, the expected cash balance at June 30, 1976, will be \$4,011.95, deemed by the Committee to be sufficient through the end of this Fiscal Year. The Financial Report as of April 30, 1976, is attached to these Minutes as Attachment I.

7. FUTURE MEETINGS: It was agreed that although a low profile is being maintained in the Tyler Litigation, it would be helpful to all Committee members to continue to meet at least twice a year. Doing so would enable all members to keep abreast of other litigations that are concerned with asbestos. It was decided that when there are sufficient data of interest to ATI member companies, the Chairman of the Ad Hoc Committee will call a meeting.

8. AIA/NA LEGAL ADVISORY COMMITTEE: The Board of Directors of the Asbestos Information Association/North America has approved the

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establishment of a Legal Advisory Committee that will employ counsel to address the broad spectrum of the various types of current asbestos litigation. This will place AIA/NA in position to furnish valuable data to its member companies and their managements and to serve as an "information" liaison with local counsel in an effort to provide some legal assistance. The Legal Advisory Committee will offer some degree of collaboration in the pulling together of medical information and of analyses of pertinent legal precedents in the field of product liability.

a) The Committee will be chaired by G. G. Gabrielson, Jr., Chairman of Nicoret, Inc. Committee members will include P. H. Merzless, Executive Director of AIA/NA; D. H. Ibrimsson, Esq., of Johns-Manville Corporation; W. A. Siertham, Esq., Secretary of Raybestos-Manhattan, Inc.; Kurt Pontz, Esq., of Certainkind Corporation; G. Wilson, Esq., of Jim Walter Corporation; and a representative of the small member companies.

b) Part of the scope of the Committee's initial discussions will be the area of cooperation, primarily agreement amongst insurance carriers as to who will handle a given segment of a product liability lawsuit.

c) Via a comment from the floor, the hope was expressed that the Committee could help toward forming a positive approach that would assist in avoiding the kind of devisive battling that is going on in the machine tool industry -- where machine tool manufacturers are being pitted against their customers. Perhaps the problem could be resolved by making workmen's compensation the principal avenue of recourse and having seller and user cooperate in limiting common law liability of all kinds outside workmen's compensation.

d) There is activity afoot as to suggesting some alternative remedies for third party lawsuits -- a legislative solution. If that germinates, it is something to which the AIA/NA Committee could address itself. It is a matter that cannot be resolved in the courts but must be settled in Congress.

9. ADJOURNMENT: There being no further items to be discussed by the ATI Ad Hoc Committee, the meeting was adjourned at 3:15 p.m.

Respectfully submitted,

Doris M. Fagan

Doris M. Fagan,
Executive Secretary

ASBESTOS TEXTILE INSTITUTE
LITIGATION DEFENSE FUND

ESTABLISHED: APRIL 1, 1974

PERIOD: JANUARY 1, 1976, THRU APRIL 30, 1976 -- FISCAL YEAR 1975-76

BALANCE ON HAND - January 1, 1976 \$ 9,364.96

RECEIPTS:

2/13/76 - Bank Service Charge/Waived . . . \$.96

3/25/76 - Bank Service Charge/Waived46

3/31/76 - Interest on Savings 116.02

TOTAL RECEIPTS + 117.44

\$ 9,482.40

DISBURSEMENTS:

1/30/76 - Bank Service Charge \$.96

2/23/76 - Cadwalader, Wickersham & Taft
-- 4th Quarter 1975 646.56

2/ 2/76 - Bank Service Charge46

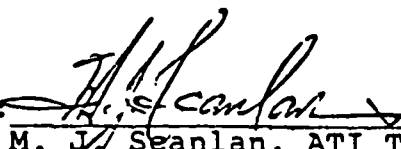
4/ 6/76 - C. P. Stober/Sundry Services re
DMF Affidavit in Shoup Case . . . 15.18

4/30/76 - Office Expenses - 12/75-4/76 . . . 61.33

TOTAL DISBURSEMENTS -\$ 724.49

BALANCE ON HAND - APRIL 30, 1976 \$ 8,757.91*

*Checking Account: \$ 300.47
Savings Account: +8,457.44
\$8,757.91*

Signed: 
M. J. Seanlan, ATI Treasurer

Prepared as of 4/30/76 by D. M. Fagan, Assistant Treasurer.
Subject to Audit.

