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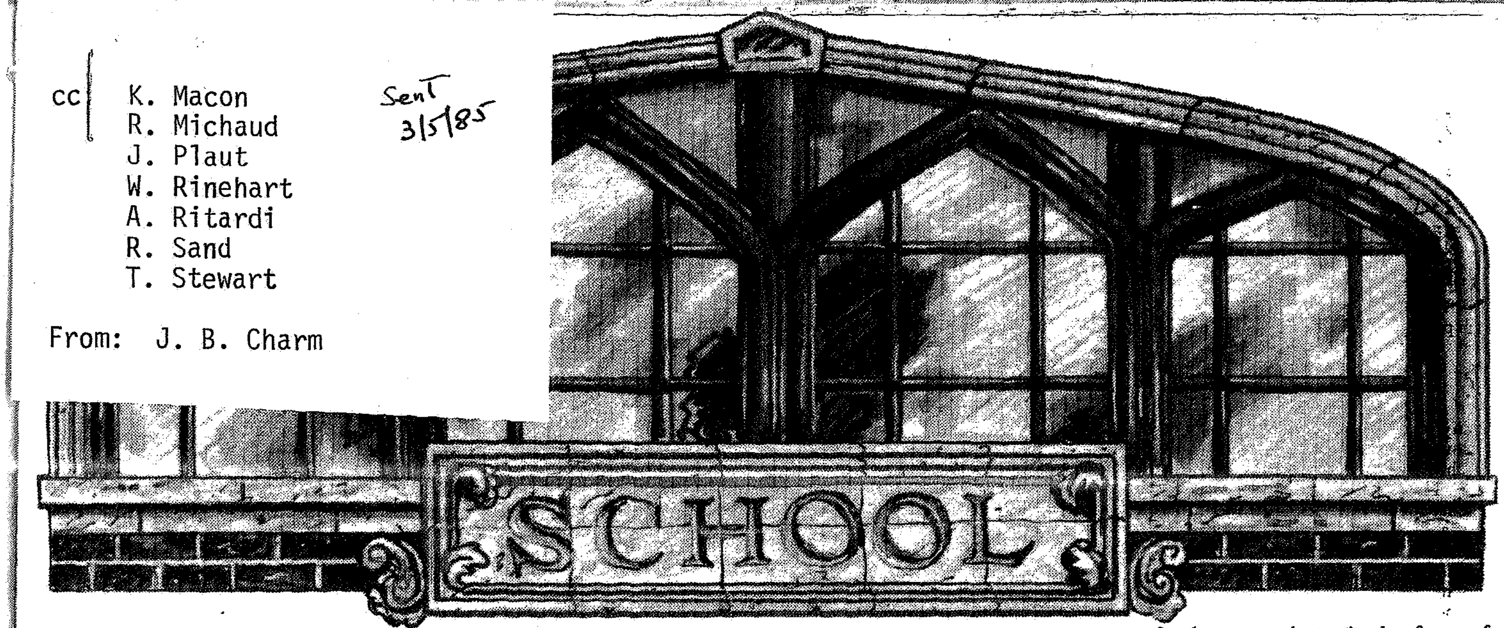

Asbestos Fallout

It Can Be Hazardous To a Company's Financial Health

By LAUREN R. RUBLIN

IT SEEMED as simple as A-B-C. In the summer of 1983, like dozens of school boards across the country, the Aurora, Colo., Board of Education commenced a program to seal off, remove or otherwise abate all asbestos-containing materials in local schools. In order to reduce any risk to students, the contractors toiled away on weekends and holidays, working without incident until the schools' Christmas break. They completed a particularly thorough clean-up job—but they neglected to clean up after themselves.

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When the dust finally settled, Aurora confronted an embarrassing case of mistaken identity. The asbestos "fallout" proved to be spray paint residue from an encapsulation job. What is especially noteworthy about the episode, however, is the town's panicky reaction. Similar anxieties have gripped other communities which are grappling with the often monumental task of identifying and abating asbestos materials in their schools.

The U.S. Environmental Protection Agency has never mandated such remedial action, nor has it set a standard for "safe" environmental asbestos exposure levels. Since 1982, however, the agency has required all school districts to inspect their buildings for friable—easily crumbled—asbestos products, and notify parents and employees of their findings.

The EPA has determined that an estimated 30,830 American schools now harbor such products, which, when damaged, could release millions of microscopic asbestos fibers into the air. The mineral itself is a demonstrated carcinogen, linked to lung cancer and other pulmonary diseases. Like the EPA, the U.S. Attorney General and even the U.S. Congress have deemed its presence *in friable form in buildings an unqualified health hazard.*

Little wonder, then, that school boards have been falling over themselves to get the stuff out, despite the asbestos industry's insistence that its products, when properly installed and maintained, represent no risk at all.

Many schools thus far have dipped into general operating funds or bond sale proceeds to proceed with their abatement work. Now, though, they're increasingly demanding restitution, through legal channels, from the products' former manufacturers, whom they accuse of having fraudulently marketed dangerous goods, while conspiring to conceal their alleged hazards.

Nor is the latest burst of litigation simply more of the horrendous legal action that has besieged the asbestos industry and forced Manville Corp. into bankruptcy. Rather, these so-called property damage suits are a breed apart from the roughly 25,000 personal injury claims now pending against industry members; and many seasoned observers of the asbestos scene believe that, in terms of damages sought, they ultimately could dwarf those claims.

In early October, Adams-Arapahoe School District 28-J, which includes Aurora, filed suit seeking $40 million for abatement costs from 14 current or former manufacturers of asbestos products. And that's practically peanuts, compared with Baltimore's $225 million suit against 55 companies, or a state of Maryland suit which seeks $500 million in relief for clean-up of some 3,000 state-owned buildings. According to Andrews Publications' School Asbestos Alert, which has kept tabs on the situation since September, more than 40 property damage lawsuits now are pending in state and federal courts around the nation.

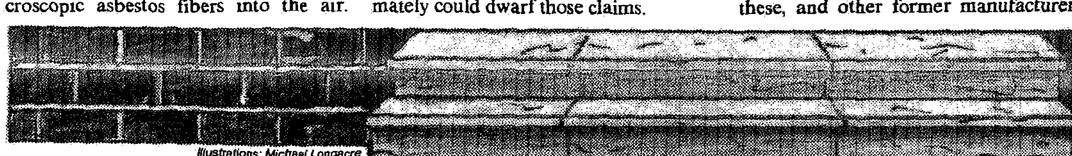
What's more, a federal court judge in Philadelphia has certified a mandatory class action for punitive damages, and a voluntary, or opt-out, class action for compensatory damages, on behalf of all school districts against 53 concerns formerly in the asbestos field. This ruling supersedes an earlier mandatory class action certification for all damages against three former asbestos ceiling spray makers, USG Corp. (formerly U.S. Gypsum), National Gypsum and W.R. Grace & Co., whom plaintiffs' attorneys contend accounted for more than 50% of the acoustical ceiling spray market in the years from 1946 through 1972. (Precise market share figures for these, and other former manufacturers of asbestos products, is the focus of discovery in almost all current lawsuits.)

Just what is the industry's potential exposure in these and future suits? That's practically impossible to pin down, both plaintiffs and defendants agree. But it could run into the billions—perhaps many, many billions. And, even if the defendants ultimately triumph, mounting a defense against such an onslaught of lawsuits, as Manville learned, can be an onerous burden, indeed.

The personal injury suits were slapped primarily on Manville and other asbestos miners and processors, by employees (or relatives of deceased employees) who alleged grave, often fatal, consequences from their occupational exposure to high levels of the mineral. The "new wave" of litigation focuses on a different group of more than 50 defendants, including the aforementioned USG, National Gypsum and W.R. Grace, as well as U.S. Mineral Products Co., Owens-Corning Fiberglas, Owens-Illinois, Bairnco's Keene Corp. subsidiary and Jim Walter's Celotex.

These companies, and others, incorporated asbestos into building products such as acoustical ceiling and beam sprays, fireproof floor tiles and pipe and boiler insulations—products, ironically, whose use at times was mandated by government building codes in the years between World War II and 1972. Moreover, in those years, in some cases, these products accounted for less than 1% of company revenues. (The EPA banned the use of sprayed asbestos for fireproofing and insulation in 1973, and outlawed the use of friable asbestos in pipe and boiler wrappings in 1975.)

Since at least the early 1960s, strong scientific evidence has linked workplace exposure to high levels of asbestos to several deadly diseases, including lung cancer and mesothelioma, a cancer of the lung or stomach linings. The former asbestos products makers maintain, however, that their liability in property damage suits can't be assumed on the basis of their potential liability in personal injury litigation, owing to vast



Illustrations: Michael Longacre

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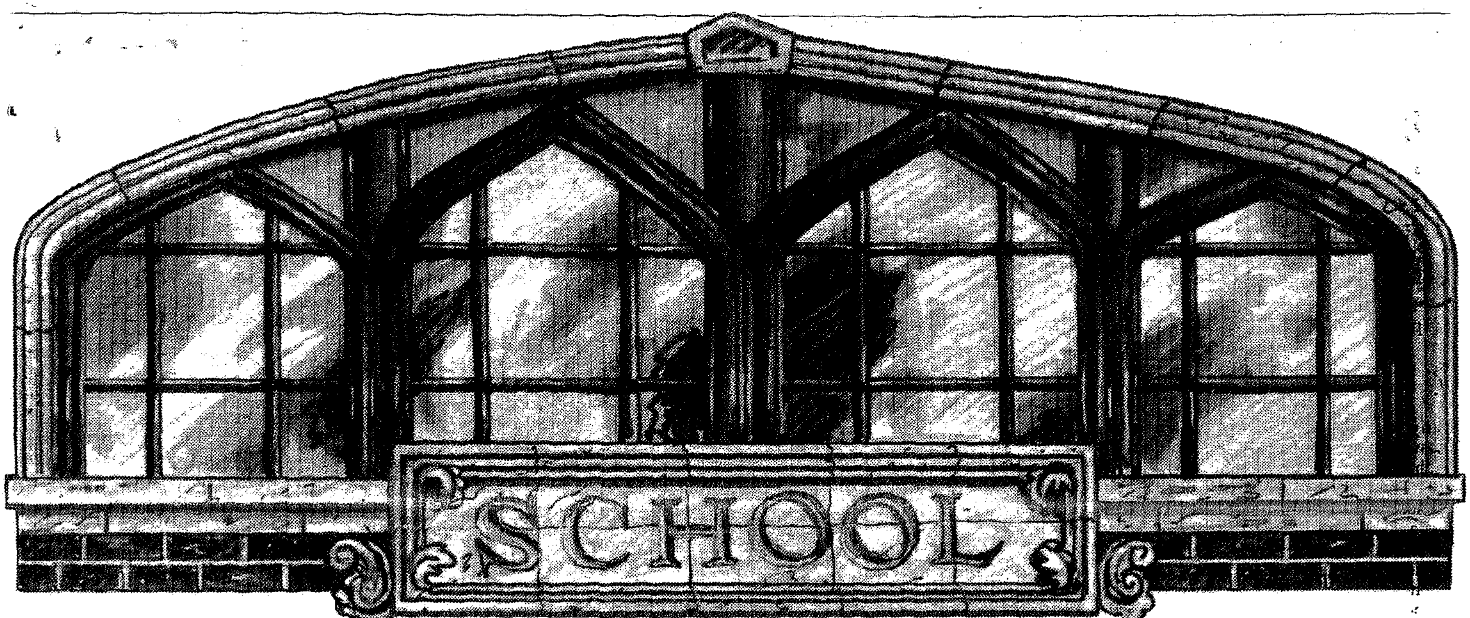

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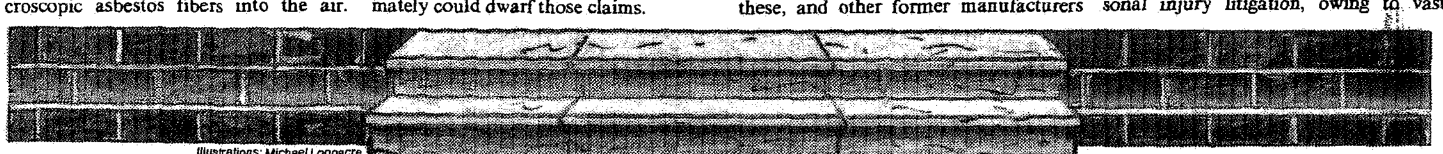

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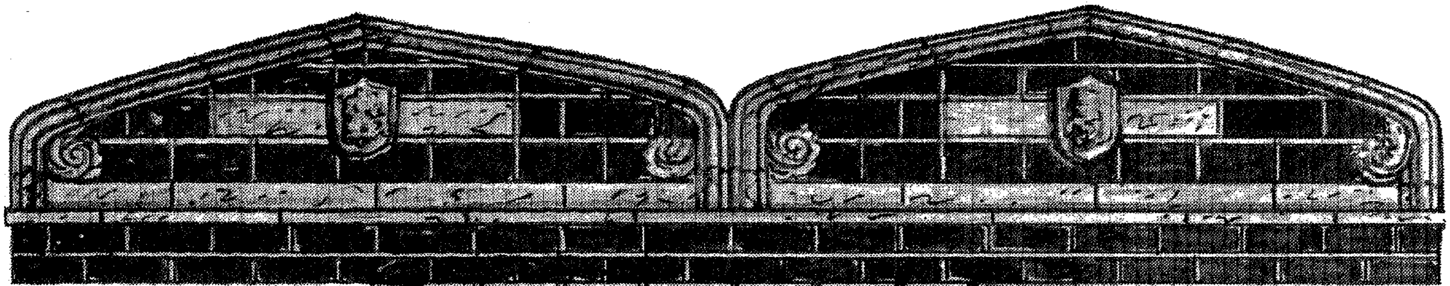

differences in orders of magnitude of exposure. The occupational risks of manufacturing asbestos products, argues Axel Swanson, National Gypsum's vice president for finance and treasurer, aren't "at all relevant to what risk, if any, is being caused by this so-called 'low-level' " exposure allegedly found in schools.

The industry, in formulating its defense, has drawn heavily on the research of a Canadian commission that recently studied the asbestos situation in Ontario buildings. The commission calculated that "the air in buildings with sprayed asbestos-containing insulation usually averages less than . . . 0.001 fibers per cubic centimeter," a level at which, it concluded, "asbestos in building air will almost never pose a health hazard to building occupants."

The industry takes pains to point out that 0.001 f/cc is a magnitude of dosage lower than the U.S. Occupational Safety and Health Administration's current allowable workplace exposure limit of 2 fibers/cc, on a time-weighted basis, or OSHA's recently proposed reduced levels of either 0.5 fibers/cc or 0.2 fibers/cc.

The *real* public hazard, industry members charge, is the EPA, which, by refusing to establish environmental asbestos safety thresholds, has failed to put the "asbestos scare" in perspective. Instead, accuses National's Swanson, "certain quarters have beat emotion and hysteria up to a faretheewell." In the end, he adds, "I think you'll find that the problem is not significant, and that the money [school districts are spending] is getting thrown down a rathole."

Not so, school board and government officials counter. True, they agree, the mere presence of asbestos in buildings poses no risk, but it's impossible to expect asbestos-containing materials, even if properly installed, to remain unfriable over several decades. The likelihood of deterioration, they argue, is particularly acute in schools, which suffer constant wear and tear.

The bottom line, according to the plaintiffs and the EPA, is that there is no known safe threshold of exposure to asbestos fibers; any exposure carries some risk. Comparing environmental asbestos levels with OSHA workplace standards, they say, also is both dangerous and misleading. Notes Dr. Irving Selikoff, a Mount Sinai Medical School professor and prominent asbestos authority: "The OSHA standard is not safe—it's feasible. It will reduce the risk, but it's not going to prevent disease."

Furthermore, as a 1981 U.S. Attorney General's report on the subject revealed, medical investigations throughout the 1960s and 1970s documented numerous cases of mesothelioma contracted by people who had been environmentally exposed to low levels of asbestos, often only briefly.

"We don't know as a matter of medical knowledge what causes cancers of any kind," rebuts Thaddeus Snell, USG's vice president and general counsel. Adds Nick Hluchyj, government affairs counsel for the Asbestos Information Association: "We know there are other causes of mesothelioma, but asbestos is the easy target. It's a large industry, and there are a lot of lawyers ready to litigate [against it]."

Nearly all those lawyers allege, in the latest spate of property damage suits, that asbestos products manufacturers knew full well they were playing with fire for years, before they let on to their customers the inherent hazards of the mineral.

"Members of the asbestos industry, through . . . their participation in the funding of the ATI [Asbestos Textile Institute], their funding and control of the Saranac [N.Y.] asbestos dust studies during the 1930s, their control over trade publications, and through other agreements . . . cooperated and assisted each other in the suppression and active concealment . . . of the relationship between asbestos and various diseases as early as the 1930s," charged plaintiff Barnwell, S.C., School District No. 45 in its suit against U.S. Gypsum et. al, one of the bases for the current class action pending in U.S. District Court in Philadelphia. The complaint goes on, "all industry members . . . adhered to an industry-wide practice of refusing to provide necessary warnings as to the hazards presented by exposure to asbestos and asbestos-containing products." Retorts the asbestos group's Hluchyj, "It's a monstrous thing to postulate."

Meanwhile, the former asbestos concerns formed a new trade organization, the Safe Building Alliance, last fall, which has been lobbying the industry's position on Capitol Hill, and attempting to force the EPA's hand in the matter of nationwide asbestos identification and abatement standards. Busily defending themselves on scientific grounds, the companies involved aren't, at first blush, working themselves into a public lather about their alleged financial liabilities in the school suits.

"Much ado about very little," is Hluchyj's opinion, on behalf of the AIA. And, in response to a query about Maryland's whopping claim, USG President Robert Day recently quipped at an analysts' meeting, "It's kind of a trendy thing for attorneys general who want to be reelected to have a suit against somebody for something."

Moreover, the major asbestos products manufacturers continue to insist they're innocent, and that a resolution of the snowballing asbestos cases won't materially pinch their pocketbooks.

Nor are these companies currently setting up reserves to cover potential damages. Explains USG's Thad Snell: "We've got to build up a little kitty as we go along, to meet things as they come down the pike. But we haven't built up anything substantial." National Gypsum is providing for anticipated legal bills each quarter, according to Edward Fordyce, Snell's counterpart there. "The legal bills are the lion's share of it. The settlements are very small," he says.

Drawing confidence, perhaps, from such statements, Wall Street seems particularly unfazed by the latest turn in asbestos-related events. To be sure, news of yet another staggering suit, or a defendant's disappointing day in court, has given some stocks a momentary jolt, but nothing lasting. National Gypsum and Grace closed Friday at 44 and 41⅝ respectively, not far from their all-time highs; USG, somewhat weaker of late, closed at 64½.

Recent developments in the litigation arena, however, suggest that a little worry might well be in order. Consider these statistics: National Gypsum, in its 1983 annual report, alerted shareholders to 25 "completed construction" suits it was defending. By last year's third quarter, that number had nearly doubled, and it's still on the rise. National noted, in its quarterly, that it had offered to settle with plaintiffs in "up to" five individual school district cases, although the company has refused to disclose the sums involved or comment further on its position. National also is a defendant in more than 2,500 personal injury suits.

USG's exposure similarly has increased dramatically during the past year; indeed, the company has been named in nearly every pending property damage suit. USG also is contesting well over 2,000 personal injury cases, although it has managed to dispose of many of these suits for around $250 apiece.

Then, there's the matter of USG's recent reorganization, into a holding company with nine independent operating units. The ostensible reason for the corporate makeover? Greater efficiency, flexibility, operating independence and the like. However, the proxy material requesting shareholder approval for the

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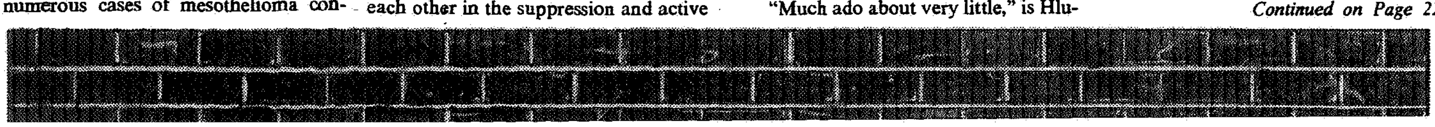

Asbestos Fallout

Continued from Page 7

move also said that "segmentation . . . may better insulate each business from obligations and liabilities incurred in unrelated operations."

Thad Snell scoffs at the suggestion USG's top brass had asbestos on the brain in rigging this plan. "The asbestos situation was not the reason for the reorganization. This basically is not in the picture. Nobody wants to walk away from things and leave a company behind," he contends. "We feel it's only fair to tell the world we're something more than a gypsum company."

On another front, the major defendants are engaged in long-running, and still unresolved, disputes with their respective insurance carriers. USG has sued its insurers, allegedly seeking "clarification" on policy issues such as who covers what, and when. National is in "discussions" with its carriers, apparently over similar subjects. Executives at both clearly believe their companies are insured, and eventually will recover most of their asbestos defense and settlement costs. Some plaintiffs, though, aren't so sure.

According to Snell, the insurance industry currently is "playing a cat and mouse game" for two reasons. "One, they don't want to do anything that would prejudice the position they are asserting in court—that they have no liability," he explains. "Secondly, they also have the use of the money in the interim."

He hastens to clarify that *publicly* the carriers are disclaiming any obligations, although "*privately* we are in discussions as to how much they might be willing to pay." The inconsistency, Snell elaborates, stems from the carriers' concern that "talk about insurance tends to inflate the appetites of plaintiffs' lawyers." Thus, he says, the insurance industry doesn't want to lead USG into thinking it will recover, because "[we] might pass that along to the *plaintiffs*."

In any case, things aren't exactly going swimmingly for the defendants in court. According to Axel Swanson, his company, and others, have had a bit of trouble convincing some judges that "we're not looking at anything like a tort or a bodily injury. [We've argued that] we have been looking at some type of economic or contractual loss"—a breach of warranty, in other words, that presumably would be barred from a hearing by statutes of limitation. Alas, he says, that defense has been struck down "in the few cases where that has been decided."

USG, as sole defendant, suffered a setback last April, when it settled, for nearly double the $378,000 in damages sought, the first and only property damage suit that's actually gone to trial. On the trial's fourth day, according to Dan Speights, who represented the plaintiff, the Lexington County, S.C., school board, "[We] got a corporate employee on the stand who denied the company had any knowledge of the dangers of asbestos until the late 1960s."

Documents produced in discovery, however, indicated that U.S. Gypsum helped fund the 1936 industry study of asbestos dust hazards, and agreed to keep the results confidential. Lawyer Speights also produced a 1948 internal document classifying asbestos as dangerous, and a 1954 company bulletin requiring employees working with the mineral to wear respirators. "Then we settled the case," he crows, and for a healthy $675,000, to boot.

USG, not surprisingly, recalls the events somewhat differently. Says Snell: "We had produced some documents in a different case that had recently been discovered in our files, and . . . we did not know they were there at the time we answered interrogatories in the Lexington case." Because, he claims, Lexington went to trial on rather short notice (a charge Speights vigorously disputes), the company hadn't yet amended answers to the interrogatories to reflect those additional documents. "Mr. Speights made a little apparent hay out of that situation with one of our witnesses," he adds.

The *real* problems in Lexington, claims the company, were "peculiar circumstances in the facts," an extremely hostile judge, and the unavailability of certain expert witnesses. So, Snell says, USG made a tactical decision, in no way an "admission of liability or a prediction of things to come," not to "finish the ballgame." The settlement figure, notes another company executive, covered both the cost of removing "our alleged product," and the plaintiff's defense.

Several days later (a coincidence plaintiffs' counsel also makes "a little apparent hay" out of), attorneys for USG, National Gypsum and W.R. Grace conferred in Philadelphia with David Berger, a local class action expert then representing four school districts, and U.S. District Court Judge James Kelly. The subject: a pending class action on behalf of school boards against the three compa-

Continued on Page 24

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Continued from Page 22

nies. On April 13, apparently at Berger's request and with the companies' agreement not to object, Kelly certified a mandatory national class action against them.

His order didn't sit well with plenty of other school district attorneys, who suspected the class certification really was designed to fatten Berger's pockets and substantially cut the major defendants' potential losses. As a result of such protests, Judge Kelly reheard the matter during the summer. In September, he modified his prior ruling.

Instead and in connection with another pending class action, Kelly certified a mandatory class action for punitive damages, but a voluntary, or opt-out, class for compensatory claims, against some 54 former asbestos products makers. USG, National Gypsum and Grace are conditionally appealing the denial of a mandatory class action. They have argued, since the beginning, that the individual school board suits filed thus far suggest "the tip of the iceberg," and ought best to be consolidated for efficiency's sake.

In the opinion of Edward Westbrook, a Charleston, S.C., attorney representing school boards in some 20 states, the companies' agreement not to fight a class action "was a litigation decision. But it backfired, and now they have the worst of both worlds."

So it would seem. For, while the class action remains bogged down by infighting and myriad certification appeals, individual school districts across the country have been filing their own suits against the industry or busily preparing to file same. Having done their homework in compliance with EPA regulations, many communities were set to launch legal action against the former asbestos products makers just as soon as an opt-out class was declared.

Many small school districts, or those with negligible claims, thus far have included themselves in the class; larger plaintiffs, however, generally feel that they'll get a better hearing on their own turf, before sympathetic local juries. Besides the aforementioned Baltimore and Maryland suits, substantial claims have been filed by the New York City Board of Education, the Los Angeles Unified School District and the District of Columbia.

New York, which boasts one of the nation's most advanced asbestos abatement programs, is seeking $250 million in compensatory damages, and unspecified punitive damages, from 64 companies who were connected in some fashion with asbestos. Los Angeles has sued more than 90 companies for compensatory damages in excess of $135 million, and punitive damages of more than $50 million. And the District of Columbia recently filed suit against dozens of manufacturers and distributors, seeking $400 million to recoup the expected cost of abating asbestos in the city's public schools.

Meanwhile, a Chicago Board of Education attorney warns that the industry "should be hearing from some Illinois school districts within the next month." And what they will be hearing will be a substantial suit. The state's governor, she adds, signed a law in August requiring "removal, not abatement," of all friable asbestos-containing materials from state schools. The state of Virginia, according to a spokesman for its attorney general, also plans to file an asbestos suit against a slew of concerns, for at least $30 million, within the next month.

And, with city and school board officials increasingly anxious about becoming targets, themselves, of parents' and teachers' suits, it's a safe bet that the former ceiling spray and insulation makers face much more of such litigation.

The EPA has estimated that between $300 million and $2 billion, in today's dollars, probably would cover the expense of removing all asbestos-laden school ceilings. (The agency derived its rather expansive range by calculating abatement costs of between $2 and $13 per square foot for approximately 169 million square feet of "contaminated" ceiling space.) Many plaintiffs' attorneys, however, figure the tab will run closer to $2 billion, with abatement work averaging around $10 a square foot.

The EPA hasn't yet calculated the cost of containing or removing asbestos pipe and boiler insulation, even more prevalent in many schools. The real wild card, however, is the possible cost of eliminating friable asbestos from other public and private buildings, should more states, municipalities or private property owners seek to do so, and then sue. At that point, folks who keep an eye on the issue believe, the industry's potential property damage liabilities could soar exponentially. ■