



# NEWS & NOTES

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C. R. LARSON

## **THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT OVERTURNS EPA'S BAN RULE ON ASBESTOS**

On October 18, 1991 the U.S. Court of Appeals, for the Fifth Circuit, struck down the Environmental Protection Agency's (EPA's) 1989 rule that would have, by 1996, banned nearly all uses of asbestos in the United States. In response to petitions filed in August 1989 by the Asbestos Information Association/North America, the Asbestos Cement Pipe Producers Association, The Asbestos Institute, and Friend of the Court briefs filed by Canada and Quebec, and other interested parties, the Court held that "EPA failed to muster substantial evidence to support its rule", and that the rule, therefore, is "vacated".

As a result of the decision, the EPA rule, that would have banned manufacture using asbestos of new brakes in 1993, and of replacement brakes, cement pipe, shingles, gaskets, paper and roof coatings in 1996, is wiped off the books. The Court did uphold those portions of EPA's rule that banned, as of 1990, new manufacture of asbestos-containing products that were no longer being manufactured in 1989.

In a comprehensive, 57-page opinion written by Judge Jerry E. Smith, the Court "conclude[d] that EPA has presented insufficient evidence to justify its asbestos ban." The Court stated that its conclusion was based on "the failure of EPA to consider all necessary evidence" and "to give adequate weight to statutory language requiring it to promulgate the least burdensome, reasonable regulation required to protect the environment adequately."

### **ASBESTOS INFORMATION ASSOCIATION**

1745 Jefferson Davis Highway, Crystal Square 4, Suite 509  
Arlington, Virginia 22202 • (703) 979-1150

The Court found EPA's support for a ban under the Toxic Substances Control Act (TSCA) deficient in several major ways.

First, after noting that a ban -- "the death penalty alternative" -- is "the most burdensome of all possible" rules under TSCA, the Court held EPA had failed "to explore in more than a cursory way the less burdensome alternatives to a total ban." EPA failed, the Court stated, "to calculate the costs and benefits" of "each regulatory option", as it is required to do to determine whether "any other regulation... would achieve an acceptable level of risk." The Court explained that EPA had not made such calculations "as it believed there was no asbestos exposure level for which the risk of injury or death was zero," but that this Agency assumption was incorrect as "reducing risk to zero was not the task Congress set for the EPA in enacting TSCA."

Second, the Court found EPA had failed "to evaluate the harm that will result from increased use of substitute products," many of which, the Court noted, contained carcinogens. As a result, said the Court, the ban "actually may increase the risk of injury Americans face."

Third, the Court held EPA had failed by "basically ignoring the cost side of the TSCA equation" to meet the statutory requirement to "balance the costs of its regulation against their benefits." The Court noted that "EPA's willingness to argue [for] spending \$23.7 million to save less than one-third of a life reveals that its economic review of its regulations, as required by TSCA, was meaningless." The Court added "such high costs are rarely, if ever, used to support a safety regulation."

Fourth, the Court found EPA's procedure inadequate, both because it did not permit "full cross-examination of all its major witnesses," and because it "failed to give notice to the public" of the exposure estimates that it "used to support a substantial part" of its rule. The Court found the latter flaw sufficient in and of itself to "overturn" the rule.

Beyond these four major, across-the-board deficiencies, the Court detailed specific flaws in the Agency's justification for banning particular products:

Friction Products: The Court noted that EPA had "failed to study the effect of non-asbestos brakes on automotive safety" and "to evaluate the toxicity of

likely brake substitutes." It mentioned specifically the "credible evidence that non-asbestos brakes could increase significantly the number of highway fatalities." Accordingly, the Court said, "there is no evidence indicating that forcing consumers to replace their asbestos brakes as they wear out on their present vehicles will decrease fatalities" or reduce the "cancer risk upon inhalation" from brake materials.

Asbestos-Cement (A/C) Pipe: The Court found EPA's ban on A/C water pipe unjustified because the Agency over-estimated pipe installer exposures; failed to "consider" less burdensome controls; relied on exposure estimates not presented for public comment; and "refused to assess the risks of substitutes." Noting that EPA conceded that pipe substitute materials (PVC and iron ductile) "will cause cancer deaths," the Court found EPA's conclusions that these products were less hazardous than A/C pipe "speculation," "musings and conjecture."

Gaskets, Roof Coatings and A/C Shingles and Paper: The Court reiterated EPA's general deficiencies with respect to the remaining banned products and added: "In those cases in which a complete ban would save less than one statistical life [over thirteen years], such as those affecting asbestos paper products and certain roofing materials, the EPA has a particular need to examine the less burdensome alternatives to a complete ban." The Court noted that such hypothetical risks are over-shadowed by the actual occurrence of one death each year "from ingested toothpicks."

The Court's decision was issued by a three-person panel of Judges Brown, Smith and Wiener. Judge Brown "reserved the right to file a separate opinion.



In response to the overturning of its asbestos ban, EPA has several options:

- (1) Accept the decision;
- (2) Ask the three-judge panel, or the entire Fifth Circuit Court, to reconsider the decision; or,
- (3) Ask the U.S. Supreme Court to review the decision.

EPA also has the option of proposing all or parts of the ban again in a new

rulemaking in which it follows the directions of the Court as to the correct procedures and substantive criteria to be followed under TSCA.

The Agency has not yet announced which course it will follow.

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## **GENERAL STATEMENT OF AIA/NA ON EPA BAN REVERSAL**

The Asbestos Information Association/North America (AIA/NA) applauds the Fifth Circuit U.S. Court of Appeals's decision reversing EPA's 1989 ban on future use of asbestos. We have consistently believed that EPA erred in its conclusions that today's asbestos products pose unreasonable risk and are gratified that the Court agrees that EPA did not prove its case.

The decision enables AIA/NA's member companies to continue manufacturing and marketing asbestos products that can be used safely.

These products provide significant economic and safety benefits to the American public. Asbestos cement pipe will continue to be marketed to safely carry drinking water; asbestos-containing roof coatings and cements and asbestos-cement siding and roofing shingles will be available for building construction; asbestos in brakes, which has proven reliable for the past 70 years, will assure continued safe and effective braking for the nation's automobiles and trucks; and asbestos-containing gaskets will continue to perform their valuable roles in the automotive and petrochemical industries.

In handing down its decision, the Court affirmed the concept of controlled use of asbestos-- the regulatory pattern adopted in most of the world-- and one that the AIA/NA has long supported. The Court specifically said that EPA had failed to consider whether regulation rather than bans could fully control risks.

Recognizing that asbestos can be hazardous if not used under controlled situations, AIA/NA stands firm in its commitment to support reasonable controls and regulations to ensure its continued safe use.