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NA FORM 13040 (10-86)

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

OCT 20 1969 19.....
James R. Cooney, Clerk, U. S. Court
By Imogene K. Jones DEPUTY

CLARENCE BOREL :

VS. : CIVIL NO. 6449

FIBREBOARD PAPER PRODUCTS :
CORPORATION, ET AL :

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CLARENCE BOREL, hereinafter called plaintiff, complaining of:

(1) FIBREBOARD PAPER PRODUCTS CORPORATION, a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(2) COMBUSTION ENGINEERING, INC., a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(3) JOHNS-MANVILLE PRODUCTS CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, Prentice-Hall Corporation System, Littlefield Building, Austin, Travis County, Texas;

(4) OWENS-CORNING FIBER GLASS CORPORATION, a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(5) EAGLE-PICHER INDUSTRIES, INC., a corporation duly organized, created and existing under and by virtue of the laws of the State of Ohio, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(6) PITTSBURGH CORNING CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Pennsylvania, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(7) UNARCO INDUSTRIES, INC., a corporation duly organized, created and existing under and by virtue of the laws of the State of Illinois, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(8) PHILIP CAREY CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Ohio, with an agent for service, to-wit, Prentice-Hall Corporation System, Littlefield Building, Austin, Travis County, Texas;

(9) ARMSTRONG CONTRACTING AND SUPPLY CORPORATION, a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(10) STANDARD ASBESTOS MANUFACTURING AND INSULATING COMPANY, a corporation organized, created and existing under and by virtue of the laws of the State of Missouri, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(11) RUBEROID COMPANY, a Division of GAF CORPORATION, a corporation organized, created and existing under the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas,

hereinafter called Defendants; and for cause of action, plaintiff alleges:

1.

That the ground upon which jurisdiction of this Court depends is diversity of citizenship of the parties hereto.

2.

That the amount in controversy herein exceeds the sum of Ten Thousand Dollars, exclusive of interest and costs.

3.

That plaintiff is a resident of the State of Texas, and resides in Jefferson County, Texas.

4.

That defendants during all the times herein mentioned and for a long time prior thereto, have been and now are engaged in the manufacture of materials used for insulation containing

asbestos; that the products manufactured, compounded and prepared by defendants, acting through their servants, employees, representatives and agents were and are placed on the market to be purchased and used by the public.

5.

The plaintiff says that during the years 1936 to 1969, inclusive, he was employed as an insulator, and that in the performance of his duties as an insulator, he was required to handle large quantities of the products manufactured and distributed by the above named defendants. That in addition to the fact that the plaintiff actually used the products manufactured by the above named defendants, and many more, as an insulator, and specifically many and various products containing asbestos, the plaintiff says that on many of the jobs, while not using himself the specific products manufactured by the defendants, he was nevertheless exposed to the dangerous materials and especially asbestos dust and fibers which were used by others workers in the same are at which plaintiff was working.

6.

That during the period of time in which plaintiff was employed as an insulator from the year 1936 to 1969, inclusive, in the course of his employment, under strict liability and violation of the Uniform Commercial Code, and alternatively, due to the negligence and carelessness of the defendants, he was caused to come in contact with the insulation produced and manufactured and distributed by the defendants, and its chemical compounds, deleterious substances and matter, did sustain severe, permanent and disabling injuries as hereinafter set forth.

7.

That the injuries and damages complained of herein were

directly and proximately caused by the following acts of the defendants in the following additional particulars:

(a) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that the insulation they so prepared, manufactured and distributed were deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, notwithstanding which, defendants negligently failed to take any reasonable precautions or exercise reasonable care to warn plaintiff of the danger and harm to which he was exposed while handling the defendants' said insulation.

(b) That the defendants knew or in the exercise of ordinary care ought to have known that their said insulation was deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, and that plaintiff would not know of such dangerous character, notwithstanding which defendants failed and omitted to provide the plaintiff with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances, if in truth there was any, to protect him from being poisoned and disabled as he was by exposure to such deleterious and harmful compound substances and other material contained in said defendants' insulation.

(c) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that their insulation was deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently and carelessly packaged said insulation so that in the ordinary handling for

installation thereof, this plaintiff would come in contact with such deleterious, poisonous and highly harmful compound substances and other material contained in said defendants' insulation.

(d) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that the insulation they produced contained deleterious, poisonous and highly harmful substances to the human body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently failed to take any reasonable precautions or exercise reasonable care by placing any warnings on their containers of said insulation to warn the handlers thereof of the dangers to health in coming in contact with said insulation.

(e) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation contained deleterious and highly harmful substances to plaintiff's health, body, lungs, respiratory system and skin, notwithstanding which defendants negligently failed to take reasonable precautions or exercise reasonable care to warn plaintiff of said danger and to instruct the plaintiff in the proper handling of their said insulation, or to take any reasonable precautions or exercise any reasonable care to protect plaintiff from harm and negligently failed to adopt and enforce a reasonable safe plan and method of handling and installing said insulation.

8.

In addition, the plaintiff says that the defendants breached their warranties to plaintiff in the following respects:

(a) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation was defective and that such insulation was not suitable for the purposes for which it was intended.

(b) That the defendants should have tested their products, especially those containing asbestos, to ascertain the safe or dangerous nature of such products before offering them for sale, or in the alternative, should have removed such products from the market upon ascertaining that such products would cause asbestosis.

(c) That the defendants should have devised a method of application of their products, especially those containing asbestos, that would have kept those using such products from contracting asbestosis if the defendants would not remove such products from sale to the public.

(d) That the products of the defendants, especially those containing asbestos, were warranted, either expressly or impliedly, to be merchantable, when in truth they were not, and therefore the defendants breached to the plaintiff, as well as to others, the warranty of merchantability.

9.

The plaintiff would further show unto the Court that at all the times material hereto, over the period of years in which plaintiff has been employed as an insulator, the manufacture, sale and distribution of insulation materials with which plaintiff came in contact, was under the exclusive control of the defendants, their agents, servants and employees, and that had the defendants herein not been guilty of negligence as hereinabove set forth, plaintiff would not have sustained his injuries and damages as herein set forth, and therefore, plaintiff says that he is entitled to recover from the defendants

under the doctrine of res ipsa loquitur.

10.

In addition, plaintiff says that he pleads the doctrine of strict liability as well as breach and violation of the Uniform Commercial Code. That as a producing cause or alternatively as a direct and proximate cause of the aforesaid occurrence and circumstances, strict liability and violation of the Uniform Commercial Code, and the negligence and carelessness of the defendants, and the defendants' breach of warranties, as well as the fact that these products precipitated great harm which was not a consequence of unique or unforeseeable reaction of the user, the plaintiff was permanently and severely injured; that he has sustained a very serious and permanent injury to his lungs and respiratory system, which has affected other parts of his body; that he is suffering from the disease asbestosis; that he suffers from shortness of breath, inability to breathe, clubbing of the fingers and toes; that it is necessary that plaintiff have available to him at all times a container of oxygen in order that he may be able to breathe; that plaintiff has extreme difficulty sleeping; that he tires easily; that he constantly coughs; that his future outlook is very dim; that he has sought the services of physicians in an effort to cure or arrest the condition from which he is suffering, but to no avail; that the plaintiff has lost his good health, all of which is permanently disabling to him.

11.

That by virtue of the mentioned reasons, the defendants, and each of them, and their breach of warranties as hereinabove alleged, and their acts of negligence as hereinabove alleged, and because of the harm and injury to plaintiff's health and

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the resulting disability therefrom, the plaintiff has suffered a total loss of wages and earnings and will continue to suffer such loss; that he was unable to continue in his employment as an insulator, an employment that he had been engaged in for many years, or to engage in any gainful activity at the present time, and his earning capacity has been greatly and forever permanently diminished and impaired.

12.

That in an effort to treat, relieve and heal himself of said injuries and to regain his health, the plaintiff was obliged to incur and will incur in the future an expense amounting to a considerable sum of money for medical and hospitalization care, expenses for medicines, supplies, and so forth, the amount of which plaintiff is unable to accurately estimate at this time.

13.

That by reason of the facts hereinabove alleged, plaintiff has suffered and sustained at the hands of the defendants, and each of them, general and special damages in the sum of Five Hundred Thousand ($500,000.00) Dollars.

14.

The plaintiff further says that his injuries and damages were directly and proximately caused by the gross negligence, omission, conscious indifference and utter disregard for the welfare of plaintiff on the parts of the defendants herein, their agents, servants, employees, managers, superintendents, supervisors and officers; that the award for this count should be in such an amount that it would act as a deterrent to the defendants and others from the future commission of like offenses and wrongs; and plaintiff further says that if each of the acts of negligence alleged above did not independently

and of themselves constitute gross negligence, then certainly all of said acts of negligence combined and in the aggregate constituted gross negligence, and the proximate cause of the plaintiff's injuries; that as a result of plaintiff's injuries, he has suffered actual damages as herein shown, which were the direct and proximate cause of his injuries, for which the plaintiff is entitled to recover exemplary damages in the sum of Five Hundred Thousand ($500,000.00) Dollars.

15.

That by reason of the facts hereinabove alleged, plaintiff has suffered and sustained at the hands of the defendants, and each of them, general and special damages in the sum of Five Hundred Thousand ($500,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendants and each of them in the sum of Five Hundred Thousand ($500,000.00) Dollars general and special damages, together with the sum of Five Hundred Thousand ($500,000.00) Dollars exemplary damages, together with his costs and disbursements herein, and interest on said judgment from the date thereof until paid at the rate of six (6%) per cent per annum, and such other and further relief to which he may be entitled to receive.

STEPHENSON AND THOMPSON

By _____
Attorneys for Plaintiff
Stephenson Building
Orange, Texas 77630

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
DEC 23 1969
By DEPUTY

CLARENCE BOREL	§	
	§	
VS.	§	CIVIL ACTION NO. 6449.
	§	
FIBREBOARD PAPER PRODUCTS	§	
	§	
CORPORATION, ET AL	§	

ANSWER OF DEFENDANT, COMBUSTION ENGINEERING, INC., TO PLAINTIFF'S ORIGINAL COMPLAINT.

Now comes Combustion Engineering, Inc., one of the defendants in the above-entitled and numbered cause, and makes and files this, its Answer to the Plaintiff's Original Complaint, and for such answer says:

This defendant admits the allegations of paragraph (2) under the first unnumbered paragraph of said Complaint, being the preamble thereof; and as to paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10) and (11), these paragraphs do not relate to this defendant and defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof.

1.

As to the allegations of paragraph 1 of said Complaint, this defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof, inasmuch as it does not have knowledge as to the citizenship of the parties other than this defendant.

2.

This defendant admits the allegations of paragraph 2 of said Complaint to the effect that the amount in controversy herein exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs, but denies that the plaintiff is entitled to any recovery herein against this defendant in any amount.

3.

This defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity of the allegations of paragraph 3 of said Amended Complaint.

4.

With reference to the allegations of paragraph 4 of said Complaint, this defendant denies that it was engaged in the manufacture of materials used for insulation prior to December 31, 1967, but admits that since said date it has been and is now engaged in the manufacture of materials used for insulation, some of which contain asbestos. Defendant denies that the insulation products manufactured by this defendant are placed on the market to be purchased and used by the general public, but to the contrary, this defendant sells its products to insulation contractors who employ experienced insulation workers in the application of the products.

This defendant does not purport to answer said allegations for or as to the other defendants named in this cause.

5.

This defendant denies the allegations of paragraph 5 of said Complaint.

6.

This defendant denies the allegations of Paragraph 6 of said Complaint.

7.

Answering the allegations contained in paragraph 7, this defendant denies that any injury and damage complained of by plaintiff were directly and proximately caused by any negligence or careless of this defendant.

In reply to the allegations contained in Paragraph 7 (a), this defendant, answering only for itself, denies said allegations.

This defendant denies the allegations of Paragraph 7 (b), (c), (d) and (e) and each of them.

8.

Answering the allegations of paragraph 8, this defendant denies that it breached any warranty to the plaintiff or any other person in any respect, and denies the allegations of Par. 8 and of subsections (a), (b), (c) and (d) and each of them.

9.

This defendant denies the allegations of paragraph 9 of said Complaint.

10.

Answering the allegations of Paragraph 10, this defendant denies the allegations thereof reading, "In addition, plaintiff says that he pleads the doctrine of strict liability as well as breach and violation of the Uniform Commercial Code. That as a producing cause or alternatively as a direct and proximate cause of the aforesaid occurrence and circumstances, strict liability and violation of the Uniform Commercial Code, and the negligence and carelessness of the defendants, and the defendants' breach of warranties, as well as the fact that these products precipitated great herm which was not a consequence of unique or unforeseeable reaction of the user, the plaintiff was permanently and severely injured", and this defendant denies any breach or violation of the Uniform Commercial Code, and denies that it was guilty of any negligence or carelessness and denies any breach of warranties on its part, and denies that any injury or disability from which he is suffering, if any, has resulted from any act or omission of this defendant, or from the use of any product manufactured by this defendant, or from any breach of warranty, if any, by this defendant. As to the remaining allegations of Par. 10, this defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or falsity thereof.

11.

This defendant denies the allegations of paragraph 11 of said Complaint.

12.

This defendant denies the allegations of paragraph 12 of said Complaint.

13.

This defendant denies the allegations of paragraph 13 of said Complaint, and denies that the plaintiff is entitled to any recovery against this defendant.

14.

This defendant denies the allegations of paragraph 14 of said Complaint, and denies that the plaintiff is entitled to any recovery against this defendant.

15.

This defendant denies the allegations of paragraph 15 of said Complaint, and denies that the plaintiff is entitled to any recovery against this defendant.

This defendant denies the allegations of the prayer of said Complaint, and denies that the plaintiffis entitled to recover any damages or any relief against this defendant.

AFFIRMATIVE DEFENSES.

16.

Further answering, and by way of affirmative defense, this defendant says that the products which this defendant manufactured and sold were at all times reasonably fit and suitable for the purposes for which manufactured and sold, and defendants deny that the same were in anywise defective for the use for which they were manufactured.

17.

Defendant denies that the plaintiff sustained any injury as the result of contact with or use of any product manufactured by this defendant, and denies that any product or products which it manufactured and sold in anywise caused or brought about any injury or illness, if any, to the plaintiff, and defendant further says that the physical condition of which plaintiff complains was in nowise caused or brought about by any product manufactured and sold by this defendant, and that such condition was due solely to disease and other causes.

18.

Further answering herein, defendant alleges that if the plaintiff did sustain any injury as the result of the use of any product manufactured by this defendant, which is not admitted but expressly denied, then such injury was sustained as a result of the occupation of the plaintiff as an insulator or worker in the insulation field for a number of years; and at all times he knew that he was working in dust laden air

which contained asbestos dust and other dust particles, created by his own work and the work of other insulators, and by the failure of his employers or the owners of the premises on which he was working to provide facilities and means for the elimination of dust laden air, and therefore, any such injury as he may have sustained was some occupational disease resulting from his continued occupation over a long period of time as an insulator, and not as a result of any isolated incident or contact with any product manufactured by this defendant; and this defendant is not legally liable therefor; and further, this defendant denies that the plaintiff worked with products manufactured by this defendant.

19.

This defendant denies the existence of any warranty on the part of this defendant and denies any fault or breach of warranty on the part of this defendant, but to the contrary, says that the insulation product or products manufactured by it were at all times reasonably fit and suitable for the purpose of insulation which was the purpose for which they were manufactured and sold, and the plaintiff's injury, if any, did not result from any defect in said product. Further, any and all dust conditions which resulted from use of the product were created during the application thereof at which time the product was cut or changed from the original form in which it was manufactured by this defendant, and the conditions under

which the plaintiff worked were at all times prescribed by his employer or the owner of the premises where the plaintiff was employed, and defendant had no responsibility for the condition or conditions at the place of work where plaintiff was performing his work.

20.

Further answering herein, if need be, and by way of further affirmative defense, this defendant specially denies that the plaintiff sustained any injury as a result of contact with or use of any product manufactured by this defendant, and specially denies any fault or breach of warranty on the part of this defendant, and specially denies that it or any of it s servants, agents or employees, were guilty of any negligence proximately causing or contributing to cause the plaintiff's alleged injuries and damages, if any; but on the contrary this defendant alleges that the plaintiff himself was guilty of various acts, wrongs and omissions, each and all amounting to negligence, which, acting together or separately, were the sole proximate cause of his alleged injuries and damages, if any, or in the alternative, were a proximate cause thereof.

21.

Further answering herein, and in the alternative, defendant alleges that the plaintiff's alleged injuries and damages, if any, were caused solely, or in the alternative, were proximately caused by acts, wrongs, omissions and negligences of third parties or a third party, for whose acts this defendant is in nowise liable or responsible; or, in the

alternative, the physical condition of which plaintiff complains was due solely to causes other than any negligence, fault or breach of warranty, none of which are admitted but denied, on the part of this defendant.

22.

Further answering herein, and in the alternative, defendant would show unto the Court that all situations and conditions, and the danger, if any, arising from the continued use of such insulating material or materials were open and obvious to the plaintiff, and if any dangers existed as claimed by him, which are not admitted but denied, same, if existing, were apparent and were easily discernible by him, and the plaintiff knew as much about same as did the defendant, and such matters were well known to him or should have been known to him; but nevertheless, he continued to work as an insulator and continued to subject himself to air which was laden with insulation material, and such conditions, if existing, were not such that this defendant would be legally liable to the plaintiff therefor.

23.

In the alternative, defendant alleges that the plaintiff at all times knew of the dangers involved with insulation materials containing asbestos and in working in due laden air where insulation materials were in use, and he had actual notice and knowledge thereof, or in the alternative should have known of same, and he knew and appreciated the nature or extent of such dangers, if any, and he continued to use and to work with

such materials and under such conditions with such knowledge, and therefore, this defendant owed him no duty to warn him of any potential dangers involved, if any, and defendant pleads the doctrine of volenti non fit injuria herein.

24.

Further answering herein, in the alternative, defendant would show that there is and was no legal liability on the part of this defendant, because of the fact that the alleged happenings in question were brought about or caused by transitory conditions arising in the course of the work the plaintiff was doing, and ordinarily incident thereto, the plaintiff and his employers using their own manner, method and means of doing the work, and defendant owed no duty with respect thereto.

25.

Further answering herein, in the alternative, this defendant says that the plaintiff's alleged injuries and damages, if any, were the result of an unavoidable accident.

26.

Further answering herein, in the alternative, this defendant says that any cause of action, if any, which the plaintiff has or may ever have had against this defendant, which is not admitted but denied, accrued more than two years prior to the commencement of this suit against this defendant, and is barred by the Texas Two-Year Statute of Limitations, Article 5526, Vernon's Texas Civil Statutes, and defendant pleads same in bar to this suit.

27.

Further answering herein, in the alternative, this defendant says that any cause of action, if any, which the plaintiff has or may ever have had against this defendant, which is not admitted but denied, accrued more than four years prior to the commencement of this suit against this defendant, and is barred by the Texas Four-Year Statute of Limitations, Article 5529, Vernon's Texas Civil Statutes, and defendant pleads same in bar to this suit.

28.

As a further grounds of relief and pleading in the alternative, this defendant says that if any judgment is entered herein jointly and severally against it and other defendants, that in such event this defendant is entitled to contribution against such other defendants in accordance with the provisions of Article 2212 of Vernon's Annotated Civil Statutes of the State of Texas.

CROSS-CLAIM

Now comes Combustion Engineering, Inc., one of the defendants in the above-entitled and numbered cause, and files this, its Cross-Claim against the other defendants herein, Fibreboard Paper Products Corporation, Johns-Manville Products Corporation, Owens Corning Fiber Glass Corporation, Eagle-Pitcher Industries, Pittsburgh Corning Corporation, Unarco Industries, Inc., Philip Carey Corporation, Armstrong Contracting and Supply Corporation, Standard Asbestos Manufacturing and Insulating Company and Ruberoid Company, all hereinafter called cross-defendants, and says if the plaintiff sustained any injury as the result of any act or omission on the part of this defendant, Combustion Engineering, Inc., which is not admitted but denied, then such injury was caused and brought about and contributed to and proximately caused by the acts and omissions of the remaining defendants above-named, and if any judgment is entered herein against this defendant, then in such event this defendant is entitled to indemnity from each and all of the other defendants; or, in the alternative, is entitled to contribution against each and all of the other defendants in accordance with the provisions of Article 2212, Vernon's Annotated Civil Statutes of Texas.

WHEREFORE, this defendant prays judgment that plaintiff take nothing against it herein, and that it go hence with its costs, without day: and in the alternative, that it have judgment for indemnity, or in the alternative, for contribution, as set forth above.

ATTORNEY FOR DEFENDANT AND CROSS-PLAINTIFF, COMBUSTION ENGINEERING, INC.,
1014 San Jacinto Bldg., P.O. Box 1632,
Beaumont,Texas

CERTIFICATE OF SERVICE.

I hereby certify that the above and foregoing instrument has been served upon the interested parties by mailing true and correct copies thereof to the following named attorneys of record for the respective parties, this 29 day of December, 1969:

Mr. Ward Stephenson, Attorney,
Stephenson & Thompson,
Stephenson Bldg.,
Orange, Texas,
Attorneys for PLAINTIFF.

Mr. George E. Duncan, Attorney,
P.O. Box 3708,
Beaumont, Texas 77704
Attorney for defendant
PITTSBURGH CORNING CORPORATION

Mr. Gordon R. Pate, Attorney,
1119 Beaumont Savings Bldg.,
Beaumont, Texas 77701
Attorney for Defendant,
JOHNS-MANVILLE PRODUCTS CORP.

Mr. W.N. Arnold, Jr., Attorney,
Fulbright, Drooker, Freeman,
Bates & Jaworski,
Bank of the Southwest Bldg.,
Houston, Texas 77002
Attorneys for Defendants,
PHILIP CAREY MFG. CO., and
ARMSTRONG CONTRACTING AND
SUPPLY CORP.

Mr. Ben L. Reynolds, Attorney,
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877 San Jacinto Bldg.,
Houston, Texas 77002
Attorneys for Defendant,
EAGLE-PICHER INDUSTRIES, INC.

Mr. James W. Mehaffy, Sr., Attorney,
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14th Floor, San Jacinto Bldg.,
Beaumont, Texas,
Attorneys for Defendant,
STANDARD ASBESTOS MFG. AND
INSULATION COMPANY.

Mr. Geo. A. Weller, Attorney,
Weller, Wheelus & Green,
P.O.Box 350,
Beaumont, Texas 77704
Attorney for Defendant
FIBREBOARD PAPER PRODUCTS CORP.

Mr. Gerald P. Coley, Attorney,
Vinson, Elkins, Searls & Connally,
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Houston, Texas 77002
Attorneys for Defendant,
UNARCO INDUSTRIES, INC.

Mr. Robert E. Barnes, Jr., Attorney,
P.O. Box 5098,
Beaumont, Texas 77706
Attorney for Defendant,
RUBEROID COMPANY.

Mr. John G. Tucker, Attorney,
Beaumont Savings Bldg.,
Beaumont, Texas 77701
Attorney for Intervenor,
CHARTER OAK FIRE INSURANCE CO.

ATTORNEY FOR COMBUSTION ENGINEERING, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MAR 30 1970
JAMES R. COONEY, CLERK
BY DEPUTY

CLARENCE BOREL §

VS. § CIVIL ACTION NO. 6449

FIBREBOARD PAPER PRODUCTS §

CORPORATION ET AL §

ANSWERS AND OBJECTIONS OF DEFENDANT, COMBUSTION ENGINEERING, INC., TO PLAINTIFF'S FIRST SET OF INTERROGATORIES UNDER RULE 33, FEDERAL RULES OF CIVIL PROCEDURE.

Now comes the defendant, Combustion Engineering, Inc., in the above-entitled and numbered cause, and makes and files the following answers and objections to Interrogatories heretofore served upon said defendant under Rule 33, Federal Rules of Civil Procedure, denominated as First Set of Interrogatories to Defendants:

1.

Defendant, Combustion Engineering, Inc., did not manufacture any type of insulating materials prior to December 31, 1967.

However, R & I Refractory and Insulation Corporation, which was acquired by Combustion Engineering, Inc., by purchase in June, 1963, but which was operating as a separate entity until December 31, 1967, at which time it was merged with Combustion Engineering, Inc., began, on or about April 7, 1964, to manufacture the following insulating materials:

(1) Griptex, a mineral fiber block insulation, consisting of mineral wool, packaged in cardboard cartons of about 3 cubic feet capacity.

(2) Detrick Blanket insulation, being spun mineral fibers felted in large flat sheets and encased between metal fabrics, consisting of mineral wool and wire facings, packaged in cardboard cartons of about 12 cubic feet capacity.

(3) Detroc Asbestos Board, being asbestos board insulating material, comprised of asbestos Portland cement, packaged in crates of 10 sheets per crate.

(4) Detrick Easy Seal Cement, insulating cement comprised of asbestos and clay, packaged in 40 pound bags.

(5) Detrick Bonding Cement, insulating cement, comprised of mineral wool, asbestos and clay, packaged in 50 pound bags.

(6) Detrick Thinsuliner cement, insulating cement, comprised of clay, asbestos and Portland cement, packaged in 50 pound bags.

(7) Detrick Pyroscat, light-weight fire-proofing protective treatment for structural steel, being a preblended mixture of high temperature aggregates, asbestos fibers, hydraulic binder and other materials.

(8) Detrick casing cement, comprised of asbestos and Portland cement, packaged in 50 pound bags.

(9) Detrick T-60 Insulating Finish, insulating finish cement, comprised of mineral wool, asbestos and Portland cement and clay, packaged in 50-pound bags.

(10) Detrick MHD Finishing Cement, finishing cement, consisting of asbestos and Portland cement, packaged in 50 pound bags.

(11) Detrick No. 7 Asbestos Cement, straight asbestos fiber cement, comprised of asbestos, packaged in 100-pound bags.

(12) Detrick Asbestos Ropes, consisting of two types, blue fiber rope and white fiber rope, comprised of long fiber amosite, finished in 100 foot coils 1/2 to 2 inches in diameter.

(13) Loose wool, comprised of wool fibers, packaged in 40-pound bags.

(14) Granulated wool, comprised of wool fibers, packaged in 40-pound bags.

(15) Slag Fiber, which is the material of which all mineral wool is made.

(16) Super No. 711 Mineral Wool Cement, insulating cement, comprised of asbestos, wool and clay, packaged in 50-pound bags.

(17) Utility Thermal Finish Cement, thermal finishing cement, comprised of asbestos, wool, Portland cemand and clay, packaged in 50-pound bags.

(18) Hilite, insulating and finishing cement, comprised of mineral wool, asbestos, Portland cement and clay, packaged in 50-pound bags.

Prior to the year 1940 and until the year 1959, but not since the year of 1959, the said R & I Refractory and Insulation Corporation manufactured the following insulating blocks:

(1) No. 12 insulating blocks, comprised of expanded perlite, cement binder, 5% amocite fiber, packaged in cardboard coartons of about 3 cubic feet capacity.

(2) No. 18 insulating Block, comprised of expanded vermiculite, cement, and diatomaceous clay, packaged in cardboard cartons of about 3 cubic feet capacity.

(3) No. 19 insulating blocks, comprised of expanded vermiculite, cement and diatomaceous clay, packaged in cardboard cartons of about 3 cubic feet capacity.

Prior to its acquisition by and merger with Combustion Engineering, Inc., and beginning prior to the year 1940, R & I Refractory and Insulation Corporation manufactured and still manufactures (now operating as C-E Refractory Division of Combustion Engineering, Inc.) the following insulating materials:

(1) Super Stic Tite, an insulating cement comprised of asbestos, wool and clay, packaged in 50-pound bags.

(2) Super Finish Stic Tite, finishing insulating cement, comprised of asbestos, wool, Portland cement and clay, packaged in 50-pound bags.

(3) R & I Insulated Felt (Blankets), laminated sheets secured with galvanized wire, comprised of mineral wool, packaged in cardboard cartons of about 12 cubic feet capacity.

(4) Loose wool, comprised of mineral wool, packaged in 40 pound bags.

(5) Stic Tite, insulating cement, comprised of asbestos, wool and clay, packaged in 50-pound bags.

(6) Super Finish, insulating finish cement, comprised of asbestos,wool, Portland cement and clay, packaged in 40 pound bags.

(7) Pourinsul, granulated fibrous material, consisting of clay, wool and Portland cement, packaged in 40-pound bags.

(8) Packinsul, granulated mineral fibers, comprised of wool, packaged in 40-pound bags.

(9) Finish Stic Tite, insulating finish cement, comprised of wool, asbestos, Portland Cement and clay, packaged in 25 and 50 pound bags.

(10) Guninsul, insulating seal material, comprised of wool, banded vermiculite and clay, packaged in 50 pound bags.

(11) Casabloc, insulating pouring cement, comprised of wool, vermiculite and cement, packaged in 50 pound bags.

(12) Mix A, semi-expansion insulation, comprised of asbestos, mineral wool and clay, packaged in 50 pound bags.

As stated, on December 31, 1967, R & I Refractory and Insulation Corporation merged with Combustion Engineering, Inc., and has since that time operated as a Division of Combustion Engineering, Inc.

2.

This defendant objects to Interrogatory No. 2 and says the same is argumentative; and defendant denies the products manufactured by it were of a dangerous nature, and says that each of the products manufactured by it were suitable and reasonably fit for the purpose for which the products were intended.

3.

Defendant has not made the studies referred to.

4.

See answer to Interrogatory No. 3.

5.

Defendant, Combustion Engineering, Inc., did not, prior to December 31, 1967, package and sell any products containing asbestos. However, R and I Refractory and Insulation Corporation, which was formerly owned by Combustion Engineering, Inc., and which merged with Combustion Engineering, Inc., on December 31, 1967, packaged and sold the products listed in answer to Interrogatory No. 1 to contractors throughout the United States, through representatives, distributors and direct salesmen, some of which products, as shown by the answer to Interrogatory No. 1, contained asbestos and other materials, and the answer to Interrogatory No. 1 is here referred to; and in addition, sold, but did not package, the following products:

(1) Duriseal, a blend of asphalt mastics, comprised of asphalt and asbestos fibers, obtained pre-packaged in drums of 5, 30 and 55 gallon capacity.

(2) Permiseal, insulating sealer and weather-coating, comprised of asphalt and asbestos fibers, obtained pre-packaged in drume os 5, 30 and 35 gallon capacity.

(3) Weathercoat, protective coating, comprised of asphalt and asbestos fibers, packaged in 5, 10 and 55 gallon drums, and obtained pre-packaged.

6.

Defendant's products were used generally throughout the United States.

7.

Defendant objects to interrogatory No. 7 because same is argumentative and ambiguous, unintelligible and irrelevant to any issue in this case. Subject to such objection, defendant answers same No.

8.

No studies have been made directly by this defendant.

9.

No.

10.

No, defendant's experience has not indicated the need for doing so, and defendant does not regularly inspect the areas where workers are using products manufactured by defendant, and does not have any control over such work areas or sites where such products are used, and defendant does not make surveys in the field where such products are used.

31

11.

Defendant objects to Interrogatory No. 11 for the reason that same is argumentative, ambiguous, immaterial and irrelant, and is not within the purview of the Rule relating to Interrogatories to a Party, and is not a proper matter for discovery and cannot lead to the discovery of matters which are relevant, or to proper matters of discovery.

12.

Defendant objects to Interrogatory No. 12 for the reason that same is argumentative, ambiguous, immaterial and irrelevant, and is not within the purview of the Rule relating to Interrogatories to a Party, and is not a proper matter for discovery and cannot lead to the discovery of matters which are relevant or to proper matters of discovery.

13.

Defendant objects to Interrogatory No. 13 for the reason that same is argumentative, ambiguous, immaterial and irrelevant, and is not within the purview of the Rule relating to Interrogatories to a Party, and is not a proper matter for discovery and cannot lead to the discovery of matters which are relevant or to proper matters of discovery.

14.

No.

15.

See answer to No. 10. Defendant does not make dust samplings in the field.

16.

Defendant objects to Interrogatory No. 16 on the grounds that same are irrelevant and immaterial in that plaintiff does not claim he has asbestos-induced cancer, and subject to this objection answers said interrogatory No. 16 no.

17.

Defendant objects to Interrogatory No. 17 on the grounds that same is immaterial and irrelevant in that plaintiff does not claim he has the disease of mesothelioma.

18.

Beginning in 1969, the following warning has been placed on this defendant's products containing asbestos, such warning being to all who use such products: "CAUTION: This product contains asbestos fibers. Excessive inhalation of asbestos may be harmful. If adequate ventilation is not possible, wear respirators approved by the U. S. Bureau of Mines." This was done because there was much discussion about the matter and acting on the advice of industry spokesmen it was decided to transmit this information to workers using the product if they did not already have this information

19.

Interrogatory No. 19 is objected to on the grounds that it is irrelevant and immaterial in that plaintiff does not claim he has cor pulmanale.

20.

Defendant recognizes that asbestos is a durable material but does not recognize that asbestos fiber exists for an invinity of years.

21.

Defendant recognizes that year by year more asbestos is used in the United States, but the remainder of the interrogatory No. 21 is answered no.

22.

No.

23.

No.

24.

See answer to No. 10 above.

25.

No.

26.

Defendant objects to Interrogatory No. 26 for the reason that same is ambiguous, argumentative, orrelevant and immaterial and assumes a fact not in evidence.

27.

See answer to Interrogatory No. 26 above.

28.

See answer to Interrogatory No. 26 above.

29.

Yes, these products can be distinguished by their appearance.

30.

Yes, generally speaking.

31.

Combustion Engineering, Inc., was incorporated under the laws of the State of Delaware October 25, 1912, and Windsor, Connecticut, is one of its domiciles.

32.

Combustion Engineering, Inc., has been engaged in the manufacture of products containing asbestos and which are commonly used by insulators and asbestos workers since December of 1967. However, it acquired by purchase, in June, 1963, R and I Refractory and Insulation Corporation, which had manufactured insulation containing asbestos, the latter having begun the manufacture of such products in about the year 1938.

33,

Defendant contends respirators are currently on the market which will materially reduce inhalationof asbestos dust and fibers. Such respirators are available under the United States Bureau of Mines Schedule 21B. Tests upon which said approval are based were designed and conducted by that governmental agency and are described in the Respiratory Productive Devices Manual published by the American Industrial Hygiene Association, American Conference of Governmental Hygienists, 1963. One such respirator, "Dustfoe 77", Catalog No. 10-9600, is manufactured by the Mine Safety Appliances Company.

34.

See answer to No. 32 above. Further answering such interrogatory No. 34, defendant says such products have not been placed "upon the open market to be purchased and used by the public" but are sold within a specific trade for a specific use.

35.

No; no tests have been made, but defendant has had no harmful effects on personnel involved with the manufacture of these products.

36.

Not to the knowledge of this defendant.

37.

Defendant objects to Interrogatory No. 37 in that it is not within the purview of the Rule relating to Interrogatories to a party, calls for an opinion and an assumption, and is argumentative, ambiguous, irrelevant and immaterial, and assumes facts not in evidence.

38.

(1) Generally mixed with water.

(2) Defendant does not manufacture.

(3) Defendant manufactures no bricks or blocks of all asbestos. Asbestos containing pro-blocks are generally scribed or cut with a saw or knife.

(4) Defendant does not manufacture.

(5) Generally mixed with water.

(6) Defendant does not manufacture.

(7) Defendant does not manufacture.

The worker can avoid inhalation of asbestos dust or fibers by working in properly ventilated places and by wearing face masks and inhalators, if there is any asbestos dust or fibers. Insofar as defendant's products are concerned, when the cements are mixed with water, there is no dust present and can be used without contributing dust to the environment.

39.

The number of employees who have worked for this defendant for 20 years or more and had any indication of lund disease was three, and upon reexamination in November, 1968, no evidence of asbestosis was indicated.

40.

Defendant does not have the medical information or knowledge referred to.

41.

Defendant objects to Interrogatory No. 41 for the reason that the matter called for therein is immaterial and irrelevant to any issue in this cause, and same is not the subject of discovery nor within the purview of the Rule in regard to interrogatories to a party, and cannot lead to matters which are the subject of discovery, and said interrogatory is irrelevant and immaterial to any issue in this cause.

42.

Defendant objects to Interrogatory No. 42 for the reason that the matter called for therein is immaterial and irrelevant to any issue in this cause, and same is not the subject of discovery nor within the purview of the rule in regard to interrogatories to a party, and cannot lead to matters which are the subject of discovery.

43.

Defendant objects to Interrogatory No. 43 for the reason that the matter called for therein is immaterial and irrelevant to any issue in this cause, and same is not the subject of discovery nor within the purview of the rule in regard to interrogatories to a party, and cannot lead to matters which are the subject of discovery.

44.

President of Combustion Engineering, Inc., - Arthur J Santry, Jr., 62 Vineyard Lane, Greenwich, Connecticut.

There is at present no Chairman of the Board.

45.

No answer required.

46.

Defendant objects to Interrogatory No. 46 for the reason that same calls for a conclusion and an opinion, and such matter is not within the purview of the rule relating to interrogatories, and is an attempt by the plaintiff to bolster the witness and lead to the introduction of medical articles, and defendant should not be required to pass on thequalifications of Dr. Selikoff.

47.

Defendant objects to Interrogatories Nos. 47 to 84, Incl., and each of them, for the reason that same call for conclusions and opinions on questions of law.

48.

Defendant, Combustion Engineering, Inc., objects to Interrogatory No. 85 on the ground that the plaintiff is inquiring into medical facts which will necessarily have to be developed through expert testimony at the time of the trial, and said interrogatory is argumentative and improper; and said question is too general and is not limited to the products manufactured by this defendant but deals with "asbestos" as a general term, and the types of products containing asbestos which are manufactured by this defendant contain different percentages and different types of asbestos than those manufactured by the other defendants, and this defendant should not be called upon

to answer a question which calls for a medical conclusion and may also be one of the ultimate issues to be tried in this case because there is a wide difference of medical and expert opinion.

Chas. S. Pipkin

ATTORNEY FOR DEFENDANT.
Combustion Engineering, Inc;
1014 San Jacinto Bldg., P.O.Box 1632,
Beaumont,Texas.

THE STATE OF TEXAS, §

COUNTY OF JEFFERSON §

CHARLES S. PIPKIN, being duly sworn, on oath deposes and says that he is attorney for the defendant, Combustion Engineering, Inc., in the above cause and as such is duly authorized to make, dile and serve the foregoing answers to interrogatories and this affidavit, and that he does so acting on such authority and authorization; that he has read over the foregoing answers and the same are true and correct.

Chas. S. Pipkin

SUBSCRIBED AND SWORN TO before me, the undersigned authority, this 25 day of March, 1970, to certify which witness my hand and seal of office.

Lucia S. Butcher

NOTARY PUBLIC IN AND FOR
JEFFERSON COUNTY, TEXAS.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 1970, a true and correct copy of the foregoing instrument was mailed to the following named attorneys of record:

Mr. Ward Stephenson, Attorney,
Stephenson and Thompson,
Stephenson Building,
Orange, Texas. 77630
ATTORNEY FOR PLAINTIFF, S.R.Potter

Mr. W.N.Arnold, Jr., Attorney,
Fulbright, Crooker, Freeman, Bates & Jaworski,
Bank of the Southwest Bldg.,
Houston, Texas 77002
ATTORNEY FOR DEFENDANT, ARMSTRONG CONTRACTING AND SUPPLY CORP., AND PHILIP CAREY CORPORATION

Mr. Robert E. Barnes, Attorney,
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Attorney for Defendant,
RUBEROID COMPANY, A DIVISION OF GAF CORPORATION

Mr. Dale Dowell, Attorney,
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OWENS-CORNING FIBERGLAS CORP.

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FIBREBOARD PAPER PRODUCTS CORPORATION

Mr. Gerald P. Coley, Attorney,
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Attorney for Defendant,
STANDARD ASBESTOS MANUFACTURING AND INSULATING COMPANY

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JOHNS-MANVILLE PRODUCTS CORP.

Mr. George E. Murphy, Attorney,
615 San Jacinto Bldg.,
Beaumont, Texas
Attorney for Intervenors,
NATIONAL SURETY CORPORATION [illegible]

ATTORNEY FOR DEFENDANT,
COMBUSTION ENGINEERING, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED
JUL 10 1970
By Margaret Turner DEPUTY

CLARENCE BOREL	:	
VS.	:	CIVIL ACTION NO. 6449
FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL	:	

PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME THELMA FREIDA BOREL, in her own right as the surviving widow of Clarence Borel, deceased, and in behalf of her adult children, namely, MRS. SHERRY ANN BERSIN, MRS. PHYLLIS JEAN MARTINEZ, BRACY DAVID BOREL, MRS. SYLVIA SUE STEPHENS, MRS. BRENDA GAIL ANDERSON, and MRS. KATHELEEN MARIE DEAN, hereinafter called plaintiffs, leave of the Court having been first had and obtained, and file this their second amended original complaint, complaining of:

(1) FIBREBOARD PAPER PRODUCTS CORPORATION, a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(2) COMBUSTION ENGINEERING, INC., a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(3) JOHNS-MANVILLE PRODUCTS CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, Prentice-Hall Corporation System, Littlefield Building, Austin, Travis County, Texas;

(4) OWENS-CORNING FIBER GLASS CORPORATION, a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(5) EAGLE-PICHER INDUSTRIES, INC., a corporation duly organized, created and existing under and by virtue of

the laws of the State of Ohio, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(6) PITTSBURGH CORNING CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Pennsylvania, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(7) UNARCO INDUSTRIES, INC., a corporation duly organized, created and existing under and by virtue of the laws of the State of Illinois, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(8) PHILIP CAREY CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Ohio, with an agent for service, to-wit, Prentice-Hall Corporation System, Littlefield Building, Austin, Travis County, Texas;

(9) STANDARD ASBESTOS MANUFACTURING AND INSULATING COMPANY, a corporation duly organized, created and existing under and by virtue of the laws of the State of Missouri, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(10) RUBEROID COMPANY, a Division of GAF CORPORATION, a corporation organized, created and existing under the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County,Texas;

(11) ARMSTRONG CORK COMPANY, a corporation organized, created and existing under and by virtue of the laws of the State of Pennsylvania, with an agent for service, to-wit, C. T. Corporation Syustem, Republic National Bank Building, Dallas, Dallas County, Texas;

hereinafter called Defendants; and for cause of action, plaintiffs allege:

1.

That the ground upon which jurisdiction of this Court depends is diversity of citizenship of the parties hereto; that the amount in controversy herein exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

2.

That all of the plaintiffs, with the exception of Bracy David Borel, reside in Jefferson County, Texas; that the said Bracy David Borel resides in Harris County, Texas.

3.

That the said Thelma Freida Borel is the surviving wife of Clarence Borel, deceased; that the remaining plaintiffs are the adult surviving children of the deceased; that the said Clarence Borel died testate on the 3rd day of June, 1970, but that the will of the deceased has not yet been offered for probate; however, in this connection, the deceased will, devised and bequeathed unto his wife all of his estate; that the adult surviving children of the deceased were not dependent upon the deceased for their support and maintenance. That the parents of the deceased died prior to his death.

4.

That this action is brought under the Wrongful Death Statute, Article 4671, Revised Civil Statutes of the State of Texas, as well as Article 5525, Revised Civil Statutes of the State of Texas.

4-A.

That defendants during all the times herein mentioned and for a long time prior thereto, have been and now are engaged in the manufacture of materials used for insulation containing asbestos; that the products manufactured, compounded and prepared by defendants, acting through their servants, employees, agents and representatives were and are placed on the market to be purchased and used by the public.

5.

The plaintiffs say that during the years 1936 to 1969, inclusive, the deceased, Clarence Borel, was employed as an insulator, and that in the performance of his duties as an insulator, he was required to handle large quantities of the products manufactured and distributed by the above named defendants. That in addition to the fact that the deceased

actually used the products manufactured by the above named defendants, and many more, as an insulator, and specifically many and various products containing asbestos, the plaintiffs say that on many of the jobs, while not using himself the specific products manufactured by the defendants, the deceased was nevertheless exposed to the dangerous materials and especially asbestos dust and fibers which were used by other workers in the same area at which the deceased was working.

6.

That during the period of time in which the deceased was employed as an insulator, from the year 1936 to 1969, inclusive, in the course of his employment, due to the negligence and carelessness of the defendants, he was caused to come in contact with the insulation produced and manufactured and distributed by the defendants, and its chemical compounds, deleterious substances and matter, and directly in consequence of said negligence and carelessness of the defendants, did sustain severe, permanent and disabling injuries, resulting in his death on June 3, 1970, as hereinafter set forth.

7.

That the injuries and resulting death of Clarence Borel and damages complained of herein were directly and proximately caused by the negligence and carelessness of the defendants in the following additional particulars:

(a) That the defendants knew, or in the exercise of ordinary or reasonable care ought to have known, that the insulation they so prepared, manufactured and distributed were deleterious, poisonous and highly harmful to the deceased's body, lungs, respiratory system, skin and health, and that the deceased would not know of such danger to his health, notwithstanding which, defendants negligently failed to take any reasonable precautions or exercise reasonable care to warn

the deceased of the danger and harm to which he was exposed while handling the defendants' said insulation.

(b) That the defendants knew or in the exercise of ordinary care ought to have known that their said insulation was deleterious, poisonous and highly harmful to the deceased's body, lungs, respiratory system, skin and health, and that the deceased would not know of such dangerous character, notwithstanding which defendants failed and omitted to provide the deceased with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances, if in truth there was any, to protect him from being poisoned and disabled as he was by exposure to such deleterious and harmful compound substances and other material contained in said defendants' insulation.

(c) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that their insulation was deleterious, poisonous and highly harmful to the deceased's body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently and carelessly packaged said insulation so that in the ordinary handling for installation thereof, the deceased would come in contact with such deleterious, poisonous and highly harmful compound substances and other material contained in said defendants' insulation.

(d) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that the insulation they produced contained deleterious, poisonous and highly harmful substances to the human body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently failed to take any reasonable precautions or exercise reasonable care by placing any warnings on their containers of said insulation to warn the handlers thereof of the dangers to health in coming in contact with said insulation.

(e) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation contained deleterious and highly harmful substances to the deceased's health, body, lungs, respiratory system and skin, and defendants knew or in the exercise of ordinary or reasonable care should have known that the deceased would not know the dangerous characteristics of their said insulation, notwithstanding which defendants negligently failed to take reasonable precautions or exercise reasonable care to warn the deceased of said danger and to instruct the deceased in the proper handling of their said insulation, or to take any reasonable precautions or exercise any reasonable care to protect the deceased from harm and negligently failed to adopt and enforce a reasonable safe plan and method of handling and installing said insulation.

8.

In addition, plaintiffs say that the defendants breached their warranties to the deceased in the following respects:

(a) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation was defective and that such insulation was not suitable for the purposes for which it was intended.

(b) That the defendants should have tested their products, especially those containing asbestos, to ascertain the safe or dangerous nature of such products before offering them for sale, or in the alternative, should have removed such products from the market upon ascertaining that such products would cause asbestosis.

(c) That the defendants should have devised a method of application of their products, especially those containing asbestos, that would have kept those using such products from contracting asbestosis if the defendants would not remove such

products from sale to the public.

(d) That the products of the defendants, especially those containing asbestos, were warranted, either expressly or implied, to be merchantable, when in truth they were not, and therefore, the defendants breached to the deceased, as well as to others, the warranty of merchantability.

8-A.

In addition, plaintiffs say that the defendants, and each of them, knew that their insulating products containing asbestos would be sold to the public and would be used by persons such as the deceased and would be relied on by such persons to safely do the job for which they were manufactured; that the defendants and each of them knew that the insulating products containing asbestos manufactured and distributed by them would cause harm to the deceased, and the defendants, because of their positions as manufacturers, owed a strict duty to the deceased not to harm the deceased through the use of defendants' products; that the defendants placed on the market products in a defective condition that were unsafe for their intended use or which were unreasonably dangerous; that the defendants placed the products on the market knowing that they would be used without inspection for defects; that the deceased used the defendants' insulating products containing asbestos in a manner that was reasonably foreseeable; that the defects in the products of the defendants were a proximate cause of the injuries and resulting death of the said Clarence Borel; that as a result of the use of the defendants' products by the deceased, he suffered serious, severe, disabling and permanent injuries, resulting in his death, and as a result thereof, defendants and each of them are strictly liable to the plaintiffs for their failure to deliver a product to the deceased that would not cause the

deceased harm.

9.

Plaintiffs would further show unto the Court that at all the times material hereto, over a period of years in which deceased was employed as an insulator, the manufacture, sale and distribution of insulation materials with which deceased came in contact, was under the exclusive control of the defendants, their agents, servants and employees, and that had the defendants herein not been guilty of negligence as hereinabove set forth, the deceased would not have sustained his injuries which resulted in his death, and plaintiffs would not have sustained their damages as herein set forth, and therefore, plaintiffs say that they are entitled to recover from the defendants under the doctrine of res ipsa loquitur.

10.

That as a direct and proximate cause of the aforesaid occurrence and circumstances, and the negligence and carelessness of the defendants, and the defendants' breach of warranties and breach of strict liability, the deceased was permanently and severely injured; that he sustained very serious and permanent injuries to his lungs and respiratory system, which affected other parts of his body; that prior to his death, he suffered from shortness of breath, inability to breathe, clubbing of the fingers and toes; that he underwent surgery in which one of his lungs was removed; that he suffered excruciating pain prior to his death; that it was necessary that the deceased be given injections of narcotics to relieve the pain; that prior to the deceased's death, it was necessary that he have available to him at all times a container of oxygen in order that he might be able to breathe; that he had difficulty sleeping, tired easily, and constantly coughed. That the deceased's condition was diagnosed as asbestosis, and although he sought

the services of physicians in an effort to cure or arrest the condition, his condition steadily worsened, and he died on the 3rd day of June, 1970, while confined in a hospital.

11.

That by reason of the negligence and carelessness of the defendants, and each of them, and their breach of warranties as above alleged, and their breath of strict liability, and because of the injuries to the deceased's health and the resulting disability therefrom, the deceased suffered a total loss of wages and earnings from about the 17th day of January, 1969, to the date of death on the 3rd day of June, 1970, a period of approximately sixteen months. That prior to this period of total disability, the deceased had earned from Seven Thousand to Eleven Thousand ($11,000.00) Dollars per year.

12.

That in an effort to treat, relieve and heal himself of his injuries and to regain his health, the deceased was obliged to incur and did incur expenses amounting to a considerable sum of money for medical and hospitalization care, expenses for medicines, supplies, and so forth, the amount of which the plaintiffs are unable to accurately estimate at this time.

13.

Further, plaintiffs say that the deceased at the time of his death was 57 years of age, and had a life expectancy of at least 18.0 years, according to the Life Expectancy Tables of the United States Department of Health, and was making at least Seven Hundred ($700.00) Dollars per month prior to the period of total disability. That the deceased and plaintiff Thelma Freida Borel were lawfully married, and had lived

750