PLAINTIFF'S EXHIBIT WRG-56

EXHIBIT PX-351 3-18-88

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

ROCKVILLE, MD. 20852

JUL 8 1971

3175-1

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

TO : Dale C. Miller
Chief, Case Guidance Staff
Bureau of Product Safety

FROM : William W. Goodrich
Assistant General Counsel
Food, Drugs, and Environmental Health Division

SUBJECT: Asbestos - Status Under FHSA

The following comments are keyed to your memo of June 17, 1971.

1. For FHSA to apply to fabric containing 8% asbestos, it must be found that the fabric is a substance which "may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use ...", 15 U.S.C. 1261(f)(1)(A), and that the fabric is toxic, 15 U.S.C. 1261(f). A toxic substance is defined as one which is "capable of producing personal ... illness in man through ... inhalation ..." The asbestos appears to be capable of producing personal illness through inhalation. Therefore, the FHSA could apply and the remedies available thereunder would also apply.

2. The fact that inhalation of asbestos particles presents a long term rather than an acute hazard would have no bearing upon the applicability of the definition of "toxic" in §2(g) to the suspected fabric. The act does not speak in terms of long range or short range hazard, but merely in terms of hazard to public health.

3. Since the toxic definition could apply, there would probably be no necessity for a finding under Section 3(a). The Secretary could, under 3(a), declare the fabric to be a toxic, hazardous substance, within the definition of 15 U.S.C. 1261(f)(1)(A). Formal administrative rulemaking procedures would be required.

4. It is not necessary to declare the products imminent hazards before proceeding. If the fabric is "toxic" and likely to cause bodily injury, it would be deemed a misbranded hazardous substance under the FHSA for failure to adequately warn potential users of the danger involved in its use. 15 U.S.C. 1263(a). As a misbranded hazardous

3175

substance, the fabric would be subject to seizure and condemnation. Since it appears that the fabric has already been completely distributed, there would be no need to seek either an injunction or restraining order against further distribution.