

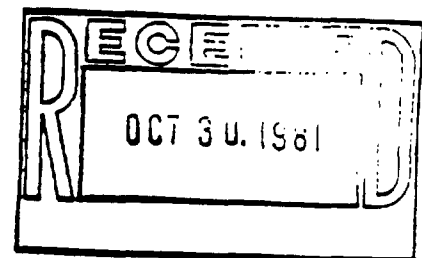


The Attorney General's Asbestos Liability Report to the Congress

Pursuant to Section 8(b) of the
Asbestos School Hazard Detection
& Control Act of 1980

September 21, 1981

SUMMARY AND RECOMMENDATIONS
AND
INTRODUCTION TO REPORT
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SUMMARY AND RECOMMENDATIONS

As a result of occupational health problems associated with inhalation of asbestos fibers, people have become concerned that asbestos products in schools may pose a hazard to the future health of children now in school. Accordingly, on June 14, 1980, the Asbestos School Hazard Detection and Control Act of 1980 was enacted. 1/ The purpose of the Act is to assist states and local educational agencies to ascertain the extent of the danger to the health of school children and employees from asbestos products in schools; and to provide grants assisting the identification of asbestos hazards and loans for the mitigation of asbestos hazards.

Section 8(b) of the Act directed the Attorney General to:

conduct an investigation to determine whether, by using all available means, the United States should or could recover, from any person determined by the Attorney General to be liable for such costs, the amounts expended by the United States to carry out this Act [federal grants and loans to detect, remove and contain friable asbestos in the schools]. Within one year after the effective date of this Act, the Attorney General shall submit to the Congress a report containing the results of the study, together with any appropriate recommendations. 2/

A detailed report setting forth the results of our factual investigation and legal research is attached. Our summary, and recommendations, are as follows:

Asbestos is a term for a group of naturally occurring materials that separate into fibers. Asbestos is a valuable product with many uses, including noise and heat insulation and use as a binder.

However, tiny asbestos fibers, if released into the air and then inhaled into the lungs, can cause death from mesothelioma, and death or disablement from asbestosis and lung cancer. General Background, Section III, infra.

1/ Pub.L. 96-270 (June 14, 1980), 94 Stat. 495, 20 U.S.C. 3601 et seq.

/ 20 U.S.C. 3607(b).

At least one court has concluded that knowledge of the dangers of airborne asbestos fibers can be attributed to the asbestos manufacturing industry as early as the mid-1930's and "conduct throughout the industry despite the danger has been summarized as one of indifferent silence." Hardy v. Johns-Manville Sales Corp., 509 F.Supp. 1353, 1355 (E.D. Tex. 1981).

As many as 10,000 cases have been filed by people, usually workers, alleging death or injury resulting from asbestos fibers since the landmark decision of Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), which allowed recovery by an asbestosis and mesothelioma victim under the tort theory of strict liability, predicated on "failure to warn" and "failure to test."

Despite the danger, the industry was "silent with respect to the dangerous relationship between asbestos and cancer." Hardy v. Johns-Manville Sales Corp., supra, 509 F.Supp. at 1355. Further, a convincing case can be made based upon industry documents produced in litigation, that certain industry officials actively sought to obscure data linking asbestos and fatal diseases. General Background, Section IV, infra.

Mesothelioma, like asbestos, has a long latency period. The latency period -- 35 to 40 years ^{3/} -- is so long that it is not yet possible to correlate mesothelioma deaths with the use of sprayed asbestos in the schools, which occurred primarily between 1946 and 1972. Unlike asbestosis, which generally requires exposures over a long period of time, mesothelioma, "extraordinarily painful and always fatal . . . may result from one exposure to asbestos dust or fibers." Hardy v. Johns-Manville Sales Corp., supra, 509 F.Supp. at 1355.

Congress has determined that "medical science has not established any minimum level of exposure to asbestos fibers which is considered to be safe to individuals exposed to fibers" and "the presence in school buildings of friable or easily damaged asbestos creates an unwarranted hazard to the health of the school children and school employees who are exposed to such materials." 20 U.S.C. 3601(a)(3), (6).

Not all uses of asbestos are dangerous. If the fibers are encased in a hard product such as tile, there should ordinarily be no danger, although if hard materials are damaged, fibers may be released. Accordingly, the Act is concerned with "friable or easily damaged asbestos." 20 U.S.C. 3601(a)(6). The most common use with which we are concerned is sprayed-on, "friable" asbestos

^{3/} Selikoff, Hammond and Seidman, Latency of Asbestos Disease Among Insulation Workers in the United States and Canada

-- most often used on classroom, corridor, shop, gym, music room, boiler room, or storage room ceilings, in a noise insulation or decorative product. "Friable" means that the substance, which has a spongy, irregular, or textured appearance, can be crumbled by hand. Asbestos may constitute from two to fifty per cent or more of the sprayed product.

Spraying for fireproofing and insulation purposes of materials containing more than one percent asbestos was banned by the Environmental Protection Agency in 1973 (and in 1978 for virtually all purposes), because of the hazard posed by release of fibers into the air during the spraying. The application of asbestos products by trowel, however, has not been banned.

Asbestos fibers are microscopic and sub-microscopic in size so that once disturbed they remain airborne for extended periods of time. Even after settling to the ground, the fibers will again become airborne if disturbed by walking or sweeping -- normal activities in classrooms and corridors.

Friable asbestos will release fibers into schoolroom air if disturbed by vibrations from operation of machinery, maintenance activities, ventilation systems, product deterioration, intentional or accidental student contact, and water damage. In New Jersey, experts visited a sample of 48 asbestos-containing schools, "and 33 of these were found to have visible evidence of damage to asbestos contents." ^{4/} The preparers of this Report have personally observed in schools visited, evidence of fiber release including: places where large sections of friable asbestos have simply fallen away as a result of deterioration, loss of bonding, or water damage; gouge marks presumably made by long-handled objects in shop classrooms; holes made by thrown objects including an embedded pencil; and the recollections of two teachers regarding the falling away of pieces of asbestos for many years from ceilings in their classrooms.

Fortunately, it appears that most of the nation's schools do not contain any friable asbestos. However, in the schools that do contain friable asbestos -- and these schools range geographically from Massachusetts to California -- the square footage of coverage and therefore the cost of removal or containment, can be quite extensive. The Cinnaminson Township Board of Education, Burlington County, New Jersey, alleges that it has expended over one million dollars to deal with the asbestos problem in three schools. As an example of the extent of the problem, approximately 20% of New York City public schools and 10% of New Jersey schools have been found to contain asbestos materials in student use areas. ^{5/}

^{4/} S.Rep. No. 96-710, 96th Cong., 2d Sess. 7 (1980).

^{5/} Id.

Abatement of school asbestos hazards currently rests in the hands of local and state governments, since Congress has not appropriated any funds under the Act to make federal grants and loans. Also, the Environmental Protection Agency has cancelled plans to promulgate a rule under the Toxic Substances Control Act requiring school authorities to take corrective action -- it "has concluded that identifying hazards will provide local school districts with enough information to take corrective action on their own." 6/

FINDINGS AND RECOMMENDATIONS

1. The parties most likely liable are the asbestos processors and manufacturers, and manufacturers of the asbestos spray-on products. It will be necessary to establish that the known danger to asbestos workers should have caused these parties to: (1) test to determine whether friable asbestos could be hazardous as a result of indoor environmental exposures; and (2) warn that asbestos fibers had caused deaths and injuries in occupational settings, and if released from asbestos products, could prove harmful as a result of indoor environmental exposures. General Background, Sections III, IV, infra. In the case study we examined in the greatest detail, the school district was not even informed that the products applied in its schools contained asbestos. However, to establish liability, it will also be necessary to prove either as a matter of law or by trial of a factual issue, that friable asbestos is hazardous. The desirability of including as defendants other parties in addition to asbestos and asbestos spray-on manufacturers, such as distributors, installers, architects, and contractors, would best be determined on a case-by-case basis.
2. It is often possible through investigation, architect or contractor recollection, plans and specifications, or state archives, to ascertain the identity of the manufacturer of the asbestos product used in a particular school. General Background, Section VI, infra.
3. Despite the potential liability of the asbestos and asbestos spray-on manufacturers, the United States should not attempt to recover for the elementary reason that no funds have been appropriated to make federal grants and loans under the Act. (Moreover, there are no indications that funds will be appropriated in the future).
4. Even if funds were to be appropriated, this recommendation would remain unchanged for the following reasons:

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(a) The fiscal impact of providing federal aid to school authorities to remedy the asbestos problem should be understood in advance. While recovery may be obtained through litigation in some some situations, it is by no means certain. The Act as currently enacted offers what may be an illusory hope of reducing federal expenditures through litigation. Thus, if federal funds are provided, the burden should be understood to fall on the federal taxpayer, unless liability is imposed on the asbestos manufacturer by statute similar to the Superfund and Black Lung programs, and similar to a provision in the Asbestos School Hazard Detection and Control Act deleted prior to enactment. 7/

(b) Even though most schools apparently do not contain friable asbestos, there are still a large number of situations of potential liability across the nation. Case-by-case litigation brought by the United States under state law, is a comparatively inefficient means of addressing the problem. If Congress is convinced that liability should be federally imposed on the manufacturers, other options should be reconsidered, including imposing liability or creation of a federal cause of action with a special statute of limitation. Also, appropriate federal agencies could review their authorities under such statutes as the Toxic Substances Control Act and the Consumer Products Safety Act to determine whether the school asbestos problem should be addressed by administrative action.

(c) Remedies can be more efficiently sought by local and state authorities, because the outcome of litigation will depend on distinct state laws and varying factual situations.

5. Although this Report recommends that the United States should not sue, the government could recover if suit were brought to recover federal funds ultimately expended. The viable theories of recovery include:

- (a) equitable restitution, Restatement of Restitution, §115;
- (b) strict liability, Restatement of Torts, §402A;
- (c) negligence; and

7/ The present section 8 mandating this Report was substituted for the industry detection fund provision in the House Committee on Education and Labor mark-up of H.R. 1524 on May 1, 1979, which bill was then substituted into H.R. 3282 and reported out the same day. See generally, Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1 (1976) (upholding imposition on mining operators of burden of providing benefits to Black Lung victims).

- (d) breach of implied warranties of merchantability and fitness for a particular purpose.

The basis for the restitution claim is the contention that the asbestos manufacturers have a duty to abate the asbestos hazard in the schools, and that public authorities performing that duty have a right to restitution from the manufacturers.

The strict liability and negligence claims are predicated on the manufacturers' failure to warn of the dangerous propensities of asbestos fibers, and failure to test to determine if friable asbestos could be hazardous. The implied warranty claims are based on the unsuitability of the product for its intended use.

6. The primary obstacles to successful litigation are:

(a) A majority of American decisions have held that "economic loss" is not recoverable in tort. However, the presence of a hazardous product creates a situation in which it may be persuasively contended that tort recovery is appropriate against a manufacturer that sold asbestos products used in schools in the absence of warnings or tests.

(b) Because of the time elapsed since installation of the asbestos, usually at least nine years, statutes of limitation constitute potential obstacles to recovery. However, the asbestos manufacturers continue to contend that friable asbestos in schools is not dangerous. The manufacturers are faced with the dilemma of on the one hand arguing that the danger was obvious so as to commence the running of a "discovery" or "manifestation" statute of limitation, while on the other hand denying, even today, that the product is dangerous.

7. School authorities faced with substantial expenditures in removing or containing friable asbestos should, as a matter of the utmost urgency, consult with qualified counsel to determine whether they should file litigation on their own, as at least three school districts already have done. Urgency is necessary because of statutes of limitation. Litigation on the theories set forth in recommendation 5, supra, may prove to be a desirable method of reducing fiscal burdens on taxpayers. School districts contemplating litigation should consult with counsel to insure that adequate tests and other measures are performed and retained to support the proof requirements of litigation. Finally, we note that in the three cases we know of filed by school districts to date, each district retained qualified products liability counsel.

8. Though the problem of friable asbestos in the schools is in one sense a national one, the absence of a federal law assigning liability suggests that the better solution is at the local or

as quickly as possible. Illusory hopes of federal assistance can obstruct rather than aid attainment of this goal.

At the same time, it is clearly in the national interest that those school districts facing substantial abatement expenditures be able to recover from those who manufactured and sold asbestos products without warning of the dangers of breathing asbestos fibers. School districts should keep the Department of Justice informed about such litigation so that the Department can determine whether assistance in the litigation is appropriate. The Department contact for counsel representing state or local authorities is:

Policy, Legislation and Special Litigation Section
Land and Natural Resources Division
Room 2615 Main Justice Building
Washington, D.C. 20530
(202) 633-2847

CONCLUSION

Litigation, but by school authorities rather than the federal government, should be quickly investigated by school authorities and their counsel as one potential means of reducing the fiscal impact on taxpayers of abating asbestos hazards in the schools. The federal government should support local school authorities in such litigation, but should not bring such actions on its own.