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Dear Larry:

Thank you for the copy of the Cadwalader Memorandum in regard to "state of the art".

To my view, the so called "state of the art defense" represents a trap for most of the defendants in the present case. It is an intellectually attractive legal argument but, unfortunately, it is not supported by the facts. In my view, these facts are such that the defense is fraught with danger and its use will provide a capable plaintiff's attorney with an opportunity to introduce issues of moral culpability and otherwise create "heat" in the cases so as to greatly raise their value.

From the standpoint of Lake Asbestos, the defense must be evaluated in light of the fact that we never sold asbestos commercially prior to 1959. Therefore, discussions of what was known in the 1930's, 1940's or the early 1950's are at best academic exercises for us.

These defenses are, of course, considerably attractive to Johns-Manville partly in view of the accusations that have been hurled at that company in regard to its hiding of the dangers of asbestos inhalation from its workers. The Washington Post, New York Times and local papers have certainly been full of these claims within the past 10 days. In this regard, I am enclosing a copy of an article which appeared in the November 19, 1978, Newark Star Ledger relating to testimony given by Dr. Demy, formerly of Somerville, New Jersey, before the United States House of

Representatives subcommittee.

It would appear from the facts that it would be hopeless to try to convince a jury that asbestosis was not a danger of asbestos exposure known by Lake as of 1959. It is true that concentration levels considered acceptable at that time would not be considered acceptable today. However, as of 1959, we (and the other miners) had no warnings which accompanied our asbestos. It is hard to see how the state of the art as to what was an acceptable level as of 1959 could end up as a successful defense in the case of an unsophisticated insulation worker employed by a equally unsophisticated employer. The Cadwalader Memo points out that during the 1960's evidence began to appear indicating that the 5 Million particles per cubic foot of air level would not provide any assurance that asbestosis would not occur (Memo, page 95). The Cadwalader Memo further suggests that:

> "...it is not enough simply to prove that asbestos work was viewed as safe in the low dust occupations or in the presence of dust controls. Evidence should be offered on the issue of how much dust the plaintiff was actually exposed to, as well as on the question of under what conditions a supplier-defendant could reasonably expect its product to be used."

The Cadwalader memo suggests that through 1964 the industry had reason to believe that the dangers of asbestosis were eliminated by dust controls. The fact of the matter is that most of the sales for which we are charged occurred subsequent to 1964 and it would therefore be suicidal to prove a justified lack of knowledge prior to 1964, if, at the same time, we would be proving the lack of justification for our acts subsequent to 1964.

The Cadwalader memo indicates that although some felt that asbestos could cause lung cancer as early as 1935, the bulk of the medical literature indicates that there was no proven relationship between asbestos and lung cancer through 1965. However, it would appear that most of the plaintiffs suing us had exposure subsequent to 1965. Of course, we offered no warnings at any time prior to 1972.

In regard to lung cancer, the Cadwalader memo points out a 1955 article indicating that "the epidemiologic and pathologic evidence supporting a causal relationship between asbestosis and cancer of the lung...is quite substantial." That memo makes much of the medical conclusion that lung cancer could be caused by asbestos exposure only if asbestosis intervened.

In regard to mesothelioma, a possible causal connection was posited in 1962, and, as pointed out in the Cadwalader memo, there was strong opinion that pleural mesothelioma was in fact caused by asbestos dust. Most of the sales for which we are charged occurred subsequent to this date.

The only part of the state of the art defense which has much promise for us is that part which suggests that there may have been assumed safe levels at the time which have been subsequently proved unsafe. However, this would be a more appealing defense if we had given some indication that exposure to the product was unsafe at certain levels. The fact is we gave no warnings at all.

My reaction to the "state of the art defense" is bolstered by my further feeling that cases that might be successfully defended on causation or on basic factual grounds relating to small amounts of material supplied by us, etc. will be greatly increased in value by discussion in regard to state of the art, an argument which we must lose.

Of course we may have little choice in strategy as most of the other defendants remain enamored of this defense. However, I am convinced that some of the large verdicts produced to date are the result of the mistaken use of this defense in cases where it is not appropriate.

I am more firmly convinced than ever that the best possible defense in these cases is one based upon the reasonableness of our conduct when selling to a knowledgeable and sophisticated buyer--- such as Raybestos Manhattan or Owens Corning. Here we have a firm factual basis for the defense and a logical argument. The greatest thrust of our efforts can be directed towards establishing the high level of knowledge of such employers. Some of the

co-defendants will be unhappy with this approach on our behalf as it runs somewhat contrary to the proofs of lack of knowledge required for the state of the art defense. However, I am certain that this is the best course for Lake Asbestos. We shall of course use the state of the art defense where it is appropriate, but I intend to bend my efforts toward convincing the co-defendants that each case must be considered individually and that defense should not be asserted in every case in an indiscriminate fashion.

One of the arguments made against my position is that the state of the art is really the only defense available in the insulation worker cases. At the moment, we have relatively few insulation worker cases, but even if we had more, I would feel that Lake would have a slim chance of winning those cases based upon the state of the art theory and would be better off pressing other justifiable lines of defense including industry standards and practices, lack of causation, lack of significant damages, etc. The over-reliance on "state of the art" has resulted in the Georgia defense group not even obtaining physical examinations of the plaintiffs. I am pleased to say that I convinced them that such exams should be obtained promptly and the cases should be fought in more traditional fashion.

As you know, Johns Manville had success in winning its first couple of cases based upon the state of the art defense. This has obviously impressed the remaining defense counsel. However, it should be pointed out that once the plaintiffs became more sophisticated on the facts, this defense has not succeeded in winning any case, and, in fact, the recent $750,000 verdict in Norfolk was returned in a case in which the jury clearly rejected that defense. Another case won by the defense has subsequently been reversed on the grounds that Raybestos Manhattan's documents were allegedly secreted and that these documents would have shown full knowledge by Johns Manville of the dangers, and perhaps even a conspiracy between Johns Manville and others to hide the known facts from people who would be working with asbestos.

I am sure that we will have the opportunity to further discuss our strategy on lines of defense.

Very truly yours,

Myron J. Bromberg

MJB:nmw
Encl.
cc: Alex J. Gillespie, Jr.