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CONFIDENTIAL and PRIVILEGED ATTORNEY'S COMMUNICATION

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February 3, 1969

Mr. J. M. Atkinson,
Group Solicitor
Turner & Newall Ltd.
Asbestos House
Fountain Street
Manchester 2, England

Dear Mr. Atkinson:

I write in response to your letter of January 24, 1969.

I am sure that you can appreciate that our interest in the labeling of asbestos fiber is primarily social and humane rather than legal. However, I shall set forth the salient legal considerations in our present thinking. At the outset, I should state that the decision to label or imprint the bags containing the fibers has to date only been made with respect to shipments to buyers situated in Canada or the U.S.A. For the present, I am going to confine myself to the laws of the latter.

preponderant
The preponderant part of our fiber sold to buyers in the U.S.A. is mined in Canada (although some is mined in the U.S.A.). Orders for such Canadian fiber are solicited here by Johns-Manville Sales Corporation, a Delaware corporation, and are forwarded for acceptance or rejection by a Canadian J-M corporation in Canada. Thus, title to any of such Canadian fiber sold to buyers in the U.S.A. is transferred in Canada. However, while we would vigorously contest such an approach, we feel that a substantial possibility exists that the American courts might take jurisdiction and apply "U.S.A. law" to a claim brought by a U.S.A. citizen for injury sustained by such a citizen in the U.S.A. while working with or being exposed to asbestos fiber in the U.S.A. The distinct possibility that the courts will assert jurisdiction over a U.S.A. J-M corporation through a "piercing of the corporate veil" must be recognized. (Of course, fiber mined in the U.S.A. simply presents an a fortiori problem.)

Further, it indeed lies within the realm of realistic legal contemplation that in determining the applicable law, the American courts would not be governed by technical considerations of where title passed, but rather would resort to the law of one of our 50 states, depending upon which state's law the courts deemed applicable under conflict of laws rules.

The law that would be relevant may well vary somewhat from state to state and so we can only approach it for purposes of this discussion

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in terms of generalities. Throughout the U.S.A. (on a state by state basis) the law in this area is presently undergoing a significant and rapid change and we stand today in the midst of the development of new legal concepts. Traditionally, two lines of legal thought would be applicable to the questions of the liability of a "manufacturer" (using that term broadly) of asbestos fiber to various persons for damages sustained by them through the inhalation of such fibers. These are the law of tort and the law of contract.

Until 1916 both of these approaches were generally limited by the requirements of privity, which encompassed both horizontal and vertical relationships. The initial concept horizontally was that only the purchaser (and not others, such as members of the purchaser's family, other contemplated users or unforeseen bystanders) could sue. The vertical concept was that the purchaser could only sue the party with respect to which the purchaser stood in a relationship of immediate privity. In 1916 the Court of Appeals of the State of New York eliminated the privity concept with respect to the vertical relationship in the landmark case of MacPherson vs. Buick, 217 N.Y. 382. That is, the Court determined that a purchaser of an automobile could sue the manufacturer thereof in tort for negligence even though the purchaser was not in privity with the manufacturer because he bought the automobile from a dealer. This was the beginning.

Subsequent decisions have generally eliminated the horizontal privity requirements so that anyone, even a bystander not a contemplated user of the product, can now sue the manufacturer for injuries sustained as a result of the manufacturer's negligence in the production of the product. The concept of production here includes the packaging and the failure to warn of hazards known to the producer.

The law of tort throughout the U.S.A. is today on the verge of going even further. It is approaching the idea of imposing strict manufacturer's liability (i.e. without regard to negligence) for the benefit of all parties who could reasonably be contemplated by the manufacturer as users of the product. There is even some advocacy of extending this approach to cover unforeseen victims, i.e. persons not contemplated by the manufacturer. I am enclosing a photocopy of Sec. 402 A of the current American Law Institute's Restatement of Torts. While this particular paragraph may not be applicable to asbestos fiber for various reasons, which will be apparent to you when you read it and the comments thereto, it is an indication of the present legal thinking of the legal intelligentsia. In this connection, I should like to point out to you that the "Restatement" title is something of a misnomer as it is largely an original statement. The "Restatement" is prepared by a committee of leading legal scholars, judges and practitioners and expostulates what they think the law should be. It is in no way binding upon the courts of the various states in the sense of stare decisis. However, most of the time its recommendations are gradually adopted jurisdiction by jurisdiction. The continuance of the trend of imposing strict liability in tort upon the manufacturer for the benefit of an ever expanding number of persons is thus more

than a mere speculative possibility.

A comparable trend is evident in a law of contract. Just as the requirement of vertical privity was eliminated in tort in MacPherson vs. Buick supra, the requirement of privity of contract has been eliminated in the very recent case of Kassab vs. Central Soya, (Sup. Ct. of Penna., Oct. 11, 1968), at least insofar as the State of Pennsylvania is concerned. The Supreme Court of Pennsylvania, of course, speaks only for Pennsylvania, but Pennsylvania, like New York, is a leading state in the development of commercial law and the courts of less industrialized states generally follow the lead of their more advanced sister states. Through the approach of coupling the imposition of an implied warranty of merchantability (non-defectiveness) upon the sale of a product with the destruction of the requirement of vertical privity, the courts can approach the strict liability of the manufacturer imposed in tort because the warranty of merchantability can be breached without regard to negligence on the part of the manufacturer. The possibility of horizontal expansion of this doctrine is evidenced by Sec. 2-318 of the Uniform Commercial Code which provides as follows:

"2-318. Third Party Beneficiaries of Warranties Express or Implied.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

Obviously, this section does not encompass all persons injured because of defects in the product; but it, too, evidences a trend towards the elimination of the privity requirement on the horizontal level.

Perhaps I should explain that the Uniform Commercial Code is statutory in nature and governs, among other things, the law of sales. It has been enacted (with only minor variations) by individual state legislatures on a state-by-state basis throughout the United States in every state but Louisiana (having, incidentally, been initially enacted by the State of Pennsylvania). Thus, while the Code is not a federal statute, its general state-by-state enactment gives it almost the same effect. I am enclosing a photocopy of the opinion of the Court in Kassab vs. Central Soya, supra.

In summation, we feel that substantial risk exists that a "manufacturer" of asbestos fiber will be held liable to parties who are injured as a result of the inhalation of those fibers, whether those parties are purchasers of the fiber, employees of such purchasers or entire strangers unless that manufacturer warns of risks known to it. Stated

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affirmatively, on the present state of medical knowledge there may today exist a legal duty to warn against the recognized dangers of inhalation of asbestos fiber in significant dosages over longer periods of time. A failure to so act might constitute negligence and a plaintiff would not have to concern himself with the concept of strict tort liability, or the law of warranty or the concept of privity.

However, these concepts might lead to even greater exposure to liability than would obtain under the concept of negligence. It is with all this in mind that we have determined to label or imprint all shipments of fiber to purchasers within the U.S.A. or Canada.

I have on order and shall send you within 20 days or so certain scholarly articles which deal more extensively with the problems that I have touched upon herein. If you have any questions of a specific nature, do not hesitate to call upon me further. Of course, you understand that this letter is written to you in the strictest professional confidence.

Very truly yours,

encs.