Johns-Manville

Internal Correspondence

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Subject: ASBESTOS POLICY
DISCLOSURE OF HEALTH & SAFETY STUDIES

On December 31, 1979, the EPA proposed a rule under § 8(d) of the Toxic Substances Control Act requiring, among other things, manufacturers or processors of asbestos to disclose health and safety studies regarding asbestos.

As shown below, this proposed rule may have a profound impact on the asbestos litigation if we are currently in possession of some important health and safety studies which have been kept from plaintiffs' counsel under some theory of privilege or work product. The applicable law is discussed below.

Section 8(d) of TSCA authorizes the EPA to promulgate rules requiring any person who manufactures, processes, or distributes in commerce any chemical substance or mixture to submit to the EPA "lists of health and safety studies (A) conducted or initiated by or for such person . . ., (B) known to such person, or (C) reasonably ascertainable by such person . . . ."

TSCA § 3(6) defines "health and safety study" to mean "any study of any effect of a chemical substance or mixture on health or the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this Act."

Section 14 of TSCA controls the disclosure of data submitted pursuant to the Act. Section 14(b) specifically deals with data from health and safety studies and authorizes disclosure of health and safety studies, or data contained therein, for any chemical substance or mixture which has been offered for commercial distribution unless the release of the data would disclose processes used in the manufacturing or processing of a chemical or, in the case of a mixture, would disclose the portion of the mixture comprised by any of the chemical substances in the mixture.

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Section 14(b)(2) makes it clear that if a health and safety study is not excluded from disclosure because, as described above, it reveals manufacturing processes or mixture percentages, then the EPA may not deny an FOIA request for disclosure on the basis of 5 U.S.C. § 552(b)(4), which is the section of the FOIA which authorizes an agency not to disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

In summary, it would appear that a health and safety study is not protected from disclosure under the FOIA merely because the study is privileged or confidential with respect to the plaintiffs in the asbestos litigation. Thus, if our asbestos litigation involves any health and safety studies which must not be disclosed to plaintiffs, we must discuss an appropriate strategy to deal with the proposed rule.

Comments to the rule are required by February 29, 1980, so we will need to discuss this as soon as possible.

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