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EASTERN DISTRICT OF TEXAS
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BEAUMONT, TEXAS

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

S. R. POTTER,
Plaintiff

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL,
Defendants

CIVIL ACTION NO. 6329

MEMORANDUM BRIEF IN BEHALF OF DEFENDANTS, FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

S. R. POTTER, Plaintiff	X	
VS.	X	CIVIL ACTION NO. 6320
FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL, Defendants	X	

MEMORANDUM BRIEF IN BEHALF OF DEFENDANTS,
FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

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General Statement

Plaintiff, an insulator, who worked for some 27 years for various insulation contractors, seeks to recover damages against ten different manufacturers of various products containing some asbestos, as joint and several tortfeasors, because of the development of a disease called asbestosis that made its initial appearance some 27 years after the initial exposure at the age of 28 to asbestos dust and fibre. Plaintiff, therefore, is suffering from a disability resulting from a disease, and not an injury arising out of a sudden and unintended event allegedly produced by some condition of a specific and identifiable product. The hazard that produced the disease was an environmental one that was directly related to his occupation. The hazard was air pollution. It is significant to say that the environmental hazards of air pollution to which people in our society are being exposed are receiving increasing attention by a variety of governmental agencies, by industry, by scientists, by labor unions and by voluntary agencies. Some hazards can be minimized by changes in the design of products; most, however, can be better controlled by the manner in which an activity is carried out; and others can be minimized, especially to users of the products, through the adoption by the user or the user's employees of safer practices.

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The environmental hazard here involved--dust and fibre arising out of the use of products containing some asbestos for construction purposes--is a hazard to workers, and to workers only, and not to the general public. These products are sold to insulation contractors and installed by trained mechanics. It is a hazard that brings on in the course of time and from prolonged and continued exposure a disease that has been classified as an occupational disease, a lung disease producing shortness of breath and coughing; such disease from exposure to dust has been recognized as an occupational disease since 1947 under the Texas Workman's Compensation Act and in many jurisdictions this occupational disease was recognized long before this. In 1924, a case of severe lung scarring was described in England. It was of a man who had spent 20 years weaving asbestos textile products. In the next decade, numerous similar cases were observed so that by the mid-1930's the hazard of asbestos as a pneumoconistic dust was universally accepted. See Statement of Dr. Irvin J. Selikoff before the House Committee on Education and Labor on H.R. 14816, the Occupational and Safety Health Act of 1968, March 7, 1968.

There are several different kinds of occupations related to asbestos involving differing degrees of exposure--the mining operation involves those who are engaged in mining the substances called chrysotile and amosite from which various

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products are made; the textile occupation workers; and construction workers applying insulation products containing some asbestos, the plaintiff being in this latter category. The evidence indicates that the exposure is more intense in general to miners and to textile workers using the pure product than it is to construction workers, although as to construction workers the situation varies with the nature of the task being performed.

About 40% of the insulation materials now being used are asbestos containing. Today, asbestos insulation materials, which contain 10-15% by weight of asbestos, may have pure chrysotile, pure amosite, or a mixture of the two. In addition to asbestos as an insulation material, fibrous glass is widely used, accounting for perhaps half the insulating material. Other materials include the use of foam glass, cork, rubber, etc. See, Cooper and Balzar, Evaluation and Control of Asbestos Exposures in the Insulating Trade; The Second International Conference on the Biological Effects of Asbestos. Dresden, Germany, April 1968.

The insulator's job when working with asbestos containing materials can be divided into six general operations: (1) The prefabrication of materials (10%) in which molded pipe covering or blocks are cut and shaped to fit, using hand or power tools; (2) application (about 40% of his time) includes fitting,

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hammering into place, etc.; (3) finishing (30%), where insulating materials are coated with asbestos containing cement; (4) tearing out (10%) where old insulation is removed; (5) mixing (5%) in which different products are mixed in various combinations; and (6) general work (5%). See Clark and Cooper, Supra.

It appears from the scientific knowledge available that successful reduction of environmental exposures necessitates a combination of industrial hygiene measures which must be taken seriously and forcefully implemented. Methods include: (1) substituting less hazardous materials; (2) enclosing certain work areas; (3) providing local exhaust ventilation; (4) requiring personal respiratory protection; (5) changing work habits and improving general housekeeping. See Clark and Cooper, Supra. In marine and heavy industrial work--and this is from an environmental standpoint probably the most hazardous type of work because of the enclosed conditions under which the work is done--there is no suitable substitute for asbestos insulating products. This is in large part because of its effective insulating qualities against very high temperatures of around 1,000 degrees. Other products are not as heat resistant as is asbestos.

Because of the varieties of conditions, it is the thesis of the defendants that the duty and responsibility for guarding against the hazard of asbestos dust exposure is on the

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particular industrial user, whether it be a miner, a textile factory worker, or a specialty contractor who engages in the task of installing insulating material. But the effort in this case is to subject the makers of products containing some asbestos to joint liability on various theories of negligence and strict liability.

Defendants' contention here is not a novel one. It has already been recognized by others and without reference to any claims that were being asserted in behalf of those victimized by asbestosis. In testifying before a House Committee in 1968, Dr. Irving J. Selikoff, a researcher in the occupational disease areas, stated that the duty and responsibility is primarily that of the government and the scientists in cooperation, to solve the problem. He made it clear that it was an unhappy reflection on the health authorities--government, public health authorities, the medical profession--that at this time in the United States in the 1960's, 7% of all deaths among insulation workers are due to a completely preventable cause, pulmonary asbestosis. He goes on to say--and this was at a time when there was no thought of imposing liability on manufacturers of asbestos products and therefore without any reason for bias--that "it is evident that they had every right to look to their government and public health authorities and to the physicians and the scientists.

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Such information as we now have," he goes on to say, "are measures to improve working conditions including the following: (1) Improved working practices; (2) Availability of improved masks or respirators; (3) Appropriate exhausts; (4) Appropriate health examinations and the vacuuming of clothes before going home; and (5) The substitution of less dusty materials when the job to be done permits it." In view of the variety of things that can be done to lessen the environmental hazards, it is inaccurate, so he says, to blame any segment of the industry. No one really knows where the responsibility lies or what is economically or scientifically feasible. Does it belong with the materials maker? The individual employer? The regional employers' association? The national employers' association? The national materials manufacturers association? The local unions? The international union? Only the Public Health Service can provide the long term surveillance necessary for the detection of effects with a long latent period. See Selikoff, Statement before House Committee, supra.

In view of this situation and for the reasons stated herein, it is submitted that the claim in this case is a preposterous one; and that whereas the incidence of possible harm can no doubt be reduced by a variety of measures adopted by employers and public health agencies, those who have contracted

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this disease over a period of years should be provided with adequate compensation through workman's compensation or social security benefits. In 1956 Congress amended the Social Security Act to provide disability benefits to a limited category, Act of August 1, 1956, Ch. 836 § 103, 70 Stat. 815.

This legislation inaugurated a new social insurance program against disability. Later amendments expanded the area to include a disability that has lasted or can be expected to last "for a continuous period of not less than twelve months." 42 U.S. c §423(d)(1) Supp. III, 1965-67. In fact, this federal social security system is a challenge to state workman's compensation. Plaintiff Potter has received his workman's compensation benefits, and is currently receiving disability benefits under the Social Security Act. Notwithstanding these programs for providing financial security to workers with asbestos containing products who, for many reasons, including their own lack of care and susceptibility, eventually and over a long course of time develop a disabling lung disease, plaintiff seeks a novel and third system that would make an entire manufacturing industry bear the responsibility for those who develop asbestosis. Defendants accept the notion that a manufacturer should be expected to bear the risk of harm resulting from miscarriages in the manufacturing process, but surely not the risk of harm due to so many factors other than a possible defect in the product.

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In discussing motions for summary judgment pursuant to Rule 56, Charles Wright points out that summary judgment should be available to a litigant when there is no genuine issue or any material fact to be tried, and that allegations in the pleadings do not create an issue as against a motion for summary judgment. The very object of summary judgment procedure as then Judge Cardozo said long ago, is "to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial." Wright, Federal Courts (1970) page 444. While the plaintiff is to be given the benefit of all reasonable doubts in determining whether a genuine issue of fact exists, there are two general and underlying reasons for concluding that there are no genuine issues of fact in this case. In the first place, it is the sole legal duty and responsibility of industrial employers to guard against health hazards to their employees from the use of products so long as such employers are as conversant with the risks and hazards involved in the use of such products as the makers are or ought to be in the exercise of ordinary care and so long as such products are manufactured as safely as they appear to be. Plaintiff cannot show any real issue of fact that these conditions were not met during all the period leading up to the time when it was discovered that plaintiff was developing a disability from asbestosis. In the second place, plaintiff

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cannot identify when or why plaintiff's disability was produced or what part, if any, any conduct, if any, of any of the defendants contributed to the plaintiff's disability. While it is true that plaintiff can join two or more defendants in the same suit when he has a right to relief against each, this is permissible only when under Rule 20a the right to relief asserted against each relates to or arises out of a "single transaction or occurrence or series of transactions or occurrences." There has been very little discussion in the cases as to what constitutes the same transaction or occurrence or series of transactions or occurrences. It is suggested that it is absurd to permit joinder of claims and parties based on incidents occurring ten and fifteen years apart and no such joinder has ever been permitted.

NEGLIGENCE - Proposition 1.

A manufacturer of a product that contains no defect, that is intended for industrial use and by specialized contractors, and that does not create any new risk that was not already inherent in the constituent parts being used has no duty to advance the state of scientific and medical knowledge as to the risks and dangers involved to employees of the user from any known characteristic of the product that may produce under some conditions an environmental hazard. When such a hazard results and disability develops from long-continued use, the condition

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is regarded as an occupational disease and is compensable in that way only or through our federal social security system. The duty and responsibility for advancing the state of scientific knowledge is with the Public Health authorities, the industries who use such a product, and organized labor.

The environmental hazard here involved was a kind of dust and fibre arising out of the use of various kinds of products containing some asbestos, under a variety of working conditions. One cannot escape the conclusion, and this could seemingly be conclusively established, that all dusts, irrespective of their nature, if breathed in sufficient quantities and for sufficient time may cause profound changes and damage to the lungs. See, Mancuso, Medical Aspects of Occupational Disease, 19 Ohio St. L.J. 612 (1958). The author writing in 1958 classified occupational diseases into four categories. Those were:

(1) Diseases resulting from toxic dusts, mists, fumes, vapors and gases;

(2) Those resulting from physical states of the environment such as abnormal temperatures;

(3) Those resulting from mechanical factors such as vibrations;

(4) Those resulting from infectious agents.

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It should be clearly understood that an occupational disease is not an accident. It arises out of an occupation and is of slow development over a long period of time. The nature of the conditions that produce such a disease is well known to the insulation contractors and the asbestos workers union as well as to the industrial worker, even if neither may realize the magnitude of the danger. The nature of the product and the environmental conditions produced by application of the product is as well known if not better known to the employer of insulation workers and often to the workers themselves than the manufacturer, especially since conditions vary so much from job to job. It is a disease which is due wholly to causes and conditions that may be present or anticipated and characteristic of the particular occupation, and this means that science and industry has not yet learned how completely to eliminate it. There are many such diseases in the first or dusty category and silicosis and asbestosis are two of the best known.

It has been said that perhaps the best definition for the term "occupational disease" is to be found in the frequently quoted case of Victory Sparker & Specialty Co. v. Francks, 128 A 635, 638, 147 Mo. 368, 44 ALR 363 (1925). It is as follows: "An occupation or industry disease is one which arises from causes incident to the profession or labor of the parties occupation or calling. It has its origin in the inherent danger or

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mode of work of the profession or industry and it is the usual result or concommitant. If, therefore, a disease is not a customary or natural result of the profession or industry per se, but is the consequence of some extrinsic condition or independent agencies, the disease or injury cannot be imputed to the occupation or industry, and it is in no accurate sense an occupation or industry disease." This is a recognition of the fact that even when utmost care is exercised there will be some incidence of the disease.

There is reason and good sense to the notion that as a matter of law the maker of a product should not be held liable for inherent risks from dust in the use of a product that are as well known to sophisticated industrial users as they are to the makers of such products. Diseases from dusty conditions constitute a public health problem. It is a problem that cannot be satisfactorily solved except through organized research and by way of public regulation of those industries engaged in occupations where such conditions exist. Asbestosis, as already observed, has been recognized in Texas as an occupational disease since 1947 and the legislature must have concluded as a matter of law that it was insofar as manufacturers of products containing some asbestos are concerned a potential hazard to employees, and who should therefore be compensated for permanent disability

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resulting therefrom and as a cost of operating the employer's enterprise. No doubt some might argue that the Workman's Compensation recovery is inadequate, and further that industry cannot be depended upon to eliminate bad conditions or improve surroundings because it may be less expensive to provide for a Workman's Compensation recovery than to improve conditions, or increase the state of the knowledge. If so, the answer is not to hold all kinds of makers of products, however valuable those products, responsible for advancing the state of knowledge about preventive medicine simply because others have found no solution.

Prevention of disease from such conditions is a governmental responsibility and is at all times being studied by various governmental health agencies. Moreover, organized labor is aware of the occupational disease problem. It is one for the joint efforts of government, labor and industries but until the government, through regulatory processes, fixes responsibility to advance knowledge and improve working conditions, the duty and responsibility for known hazardous working conditions is on the employer as set forth more fully under the next proposition.

It is not socially desirable or economically feasible for each manufacturer to undertake separate research projects for the purpose of ascertaining how and in what ways the incidence of harm could be reduced from asbestos dust. This kind

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of uncoordinated research would be excessively expensive as well as non-productive. Such research as is legally required should be required pursuant to a plan developed by various legiglative and administrative agencies of the government and such research should obviously extend to other kinds of dust that produces lung disorders.

A manufacturer of a new product such as a drug or chemical has without doubt a duty to make such investigations through experts, as a reasonable man would make to ascertain any risks or dangers that might be created by a new product that he develops. Anyone who enters a special field of manufacturing will be held to the knowledge and skill of an expert and must keep abreast of techniques used by practical men in the industry. Wright v. Carter Products, Inc., 244 F (2d) 53 (2nd Cir. 1957) (applying N.Y. Law); Noel v. United Aircraft Corp., 219 F. Supp. 556 (D. Del. 1963) (duty to develop promptly propeller feathering control); Holland v. St. Paul Mercury Ins. Co., 135 So. (2d) 145 (La. App. 1961) (pest control company bound to know ingredients of rat poison consumed by child). But no new risk or danger was created out of the materials used by manufacturers of asbestos products. The occupational risk or hazard from the dust and fibre involved in the use of asbestos was already inherent in the substance that was mined; and the existence of some risk or hazard

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was well known. The duty and responsibility for guarding against an occupational disease from the dust generated by the kind of job to be done was the duty and responsibility of the insulation contractor.

NEGLIGENCE - Proposition 2.

It is the sole duty of the asbestos contractors to protect insulation workers and other employees from, or warn of risks and dangers of which the contractors could be expected to be as fully informed as the makers of the products containing some asbestos.

It is the duty and responsibility of employers to provide their employees with safe working conditions, and to protect them against hazards necessarily incident to the employment, especially occupational diseases; it was the duty of the construction contractors and not the duty of makers of products containing some asbestos to advise insulators of the risks and dangers of which the employer-contractors were calculated to be and ought to be as fully informed as were the makers of the products. The contractors were as fully informed or indeed better informed about the potential hazards of installing insulation containing some asbestos as were the makers of the products.

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The liability of the maker of a product on a theory of negligence has in general been limited to so-called hidden dangers, like the defective wheel in MacPherson, or the defective fork stem of the wheel chair in Putnam v. Erie Mfg. Co., 338 F (2d) 911 (5th Cir. 1964), or the live virus in polio vaccine. Gottsdanker v. Cutter Labs, 6 Cal. Rptr. 320 (Ct. App. 1960). This means hidden to the ultimate purchaser, which in this case would be the construction contractors. See Keeton, Products Liability - Current Developments, 40 Tex. L. Rev. 193, 197 (1961). His duty, whether or not it is a duty of reasonable care or some kind of duty imposing liability without fault, is a duty as to dangers hidden from the ultimate purchasers of such products. This no-duty rule, both as to negligence and strict liability theories prevents recovery not only on the part of the purchaser but also those in the vicinity of the use of such products and all those who come into contact with the product with the permission of the ultimate purchaser. For example, in Murphy v. Cory Pump and Supply Co., 197 N.E. (2d) 849 (1964) an action was brought against the maker of a riding power lawnmower for injuries received by a child who fell in front of a mower and had her leg mangled in the mower blade. There was no guard in front of the blades, but the Court concluded that no one was misled by its appearance and that the user or purchaser fully realized the

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nature and danger of the product he was using. The duty of care was on the user to use the mower in such a way as to avoid harm to bystanders. One of the most recent cases involving an alleged improper design is Schemel v. General Motors, 384 F (2d) 802 (7th Cir. 1967). As a ground of recovery the plaintiff alleged negligence and improper design in making the Chevrolet Impala capable of being driven at a rate of speed in excess of 115 miles per hour. In denying recovery the Court said that the dangers attendant on excessive and unlawful speed are neither latent nor concealed. The duty and responsibility of the maker is to put the ultimate purchaser on notice of those inherent dangers involved in the use of the product of which he is aware or ought in the exercise of ordinary care to be aware and with respect to which he has reason to believe that the purchaser will not be aware.

In this situation there is much more justification for the application of this idea than is present when the product is one to be used by members of the general public. Here the defendants were dealing with sophisticated purchasers who not only know as much about the dusty and fibrous conditions of the atmosphere in which their employees work; they probably know more and should be expected to know more. Moreover, as stated before and as has been brought out in the interrogations of the defendants,

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asbestosis has been recognized as an occupational disease since 1931 in an Act of Parliament and so the industrial users and the contractors who purchased asbestos products during the years that the plaintiff exposed himself to the risk of asbestosis must necessarily have known of the risk of harm from continued exposure to asbestos dust and fibre.

There is good reason and good sense to the notion that generally and as a matter of law, the maker of a product should not be held liable for inherent dangers in products that are as well known to sophisticated purchasers to whom they will ultimately be entrusted as they are to the makers. This is because nothing is so safe that it could not be made safer, but most of the products that have been a boon to humanity, such as prescription drugs, have inherent dangers that victimize some people. But when the benefits from the use of such products are considered to outweigh the magnitude of the danger, all that is expected of the maker is that he make known the dangers to those who can, because of their expertness, be entrusted with their use; including insulation contractors who purchase and utilize products containing some asbestos continuously.

In the Restatement of Torts, it is said: "One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous

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character if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition, and realize the danger involved. . . ." It is only when the supplier, having "special experience knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger" that he will be required to inform them of the risk of which he himself knows or should know in the exercise of ordinary care. Rest. Torts (Rev. Ed. Sec. 388 (1966).)

While giving to a third person through whom a chattel is supplied all the information necessary to its safe use is not in all cases sufficient, the courts have held that notice to an employer satisfies any duty and responsibility of the manufacturer because he is entitled to rely on the employer to convey this information to his employees. If, moreover, it is information that the employer already has, no duty to take any other measures is required. After all, the employer is in fact considered to be the ultimate user. As is stated in the comment to Sec. 388 of the Restatement, "modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so", Comment N, page 308.

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In this connection, it can be said that the Supreme Court of Texas has generally adopted and followed the rules and principles set forth in the Restatement of Torts when deciding unsettled questions of law related to personal injury litigation. The citation of the following cases will suffice to show this: Fisher v. Carrousel Motor Hotel, 424 SW (2d) 627 (Tex. 1967) (offensive contact held actionable citing Sec. 18 of Rest. Torts); McKisson v. Sales Affiliates, Inc., 416 SW (2d) 787 (Tex. 1967) (adopting strict liability for unreasonably dangerous products, citing Sec. 402A, Rest. Torts); Halepeska v. Callihan Interests, Inc., 371 SW (2d) 368 (Tex. 1963) (detailed discussion of the position taken in the Restatement on assumed risk in land cases); Seideneck v. Bayreuther, Assoc., Tex. Sup. Ct. 1970, 451 SW (2d) 752, 754 (citing Sec. 343a of Rest. Torts in a slipping and falling case).

In May v. Allied Chlorine & Chemical Products, Inc., 168 SO (2d) 785 (Fla. App. D.C. 1964), plaintiff's theory was that the manufacturer of chlorine gas had a duty to warn an employee that only a particular kind of gas mask would be effective in a heavy concentration of chlorine gas. The Court in upholding a summary judgment for the defendant said that when a product like chlorine gas was regularly used in an employer's business and its dangerous characteristics were known, it could "find no

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theory of law upon which the maker or distributor of chemical products must inform user's employees of the details of precautionary measures which should be taken in the event of a misuse of the product." Likewise, in Haley v. Allied Chemical Corp., 231 NE (2d) 549 (Mass. 1967) the Court held that it was the sole duty and responsibility of the employer to warn employees of any dangers of which it knew or ought to have known and which were not reasonably obvious to them. The plaintiff was an employee of an electronics concern. The employer bought liquid chemicals from the defendant, Allied Chemical Corp. Among the chemicals were hydrofluoric and nitric acids, both being extremely corrosive. Neither acid alone generates gas, but if hydrogen peroxide is added there is quickly liberated a gas which if confined in a jug would cause the jug to explode. The failure to provide the particular employee who was victimized by an explosion with this information may have been a cause for the explosion. The jugs received by the victim's employer did not warn against this particular hazard. The Court said: "Allied had shipped each of the chemicals in a specially manufactured container closed by a cap specially and adequately designed to guard against the hazards which might reasonably be anticipated from the particular chemical during shipment and storage prior to use. We think Allied could reasonably have

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relied on Electronics thereafter to take proper safety precautions and to instruct its own employees on the proper technique to be used in handling these dangerous acids."

Where there was evidence in the plaintiff's case that a construction company's foreman knew of the possibility that dynamite placed in freshly drilled holes would explode prematurely from the heat therein, it was held there could be no recovery from the manufacturer on the ground of any failure to give adequate warning to employees. Hopkins v. DuPont de Nemours & Co., 212 F (2d) 623 (1954) certiorari denied 348 N.S. 872, 99 L. Ed. 686, 75 S. Ct. 108.

A recent Kansas case involved a situation where an industrial user sought damages for injuries received as a result of inhaling chemical compounds. The case was submitted to the trial court on the defendant's motion for summary judgment. It was admitted that the chemical products, Dowel Corning R671 resin and TOLVAL, used to spray jig-parts to prevent adhesion of organic materials to jig patterns were potentially hazardous to the health of persons using it in industrial processes if they were used without adequate ventilation, and if vapors inhaled for long periods of time. The trial court sustained the motion for summary judgment "for the reason that the defendants, having given adequate warning to their immediate vendees of the

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potential health hazards of their products, defendants have fully discharged any duties that they may have had." Younger v. Dow Corning Corp., 451 P (2d) 177, 179 (Kans. 1969). In upholding the trial court, it was held that Sec. 388 of the Restatement of Torts was applicable and the court quoted at length from the Restatement. The court made a special point of the fact that the products were for industrial use and were being sold to industrial users who had the responsibility and duty of safeguarding its employees. This case is directly in point. Cases involving products intended for general public use are of course not applicable; adequate notice to an intermediate seller would obviously not satisfy the makers duty of ordinary care in many such instances.

In a very comprehensive article on the subject of Products Defective Because of Inadequate Directions or Warnings, Dix Noel cites a number of cases--and none are cited to the contrary--holding that a manufacturer has no duty to warn employees of employer-purchasers. 23 Sw. Law Journ. 258, 282 (1969); Berton v. Turco Products Inc., 252 F (2d) 726 (3rd Cir. 1958) (applying N. Jersey law); West v. Hydro Test Inc., 196 SO (2d) 598 (A. App. 1967) (No need to attach instructions to each item, exposed to all sorts of weather); Thomas v. Arvon Products Co.,

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227 A (2d) 897 (Pa. 1967) (warning to employer of need for ventilation when using product; directions for use to employer sufficient).

In Delhi-Taylor Oil Corp. v. Henry, 418 SW (2d) 390 (Tex. 1967), the Supreme Court of Texas held that where a dangerous condition on the land of the occupier-defendant was as well-known to the independent contractor and his foreman as it was to the occupier, the occupier could not be held liable for injury occurring to an employee of the independent contractor. In that case, the injured employee was engaged in welding operations when a dragline bucket, operated by another employee, punctured a pipeline of the occupier-defendant. The Court adopted the principle that an adequate warning to an independent contractor discharges as a matter of law the occupier's duty to employees of independent contractors. The Court recognized that an issue of fact might sometimes exist as to adequacy of warning but if the warning is such as to give full notice to the independent contractor of the dangers involved, the sole responsibility for preventing injuries thereafter is on the independent contractor whose liability is absolute and governed by the Texas Workman's Compensation laws. The principle was based on the notion that any other doctrine would impose an intolerable burden on the possessor. The same rule applicable to the possessor on

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whose land insulation contractors do their work should also be applicable to the maker of products that are utilized by the independent contractor, and any other rule would be intolerable.

NEGLIGENCE - Proposition 3.

It is the duty and responsibility of industrial and other employer-entrepreneurs who specialize in the use of particular types of products and of organized labor in such industries and of governmental agencies, especially when the magnitude of the danger varies because of a variety of processes and conditions under which the products are used, to institute safety programs, to install safety devices, and to educate their employees in the handling of the product. It is not the duty and responsibility of the maker of products to protect employees of their purchasers, but rather the responsibility of employers to safeguard and protect their employees, just as the miner of chrysotile is responsible for his employees and the textile maker for his employees. Each employer is faced with different conditions and each is in a better position to appreciate and find out the potential risk involved in his process, and the ways and means to minimize such risk.

This proposition follows as a logical deduction from the holdings of the Court that the duty of the manufacturer is

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satisfied by giving notice of risks that the employer is not likely to know about.

STRICT LIABILITY - Proposition 1.

Courts have not imposed liability anywhere against manufacturers on the basis simply that a condition of the product caused harm when used as intended. Instead, they have imposed liability on warranties or strict tort theories only when the product was defective at the time he sold it.

The plaintiff must impugn the product, and as has been pointed out the question is "How harmful does a product have to be in order to breach the obligation of the maker and its distributors?" Keeton, Some Observations About Strict Liability of the Maker of Prescription Drugs: The Aftermath of MER/29; also Dickerson, Products Liability: How Bad Does a Product Have to Be? 42 Ind. L.J. 301 (1967). The only difference between negligence and strict liability is that plaintiff must impugn the defendant when a negligence theory is relied upon, whereas he must impugn the product under strict liability theories. Virtually all products intended for intimate bodily use, such as drugs, cosmetics, food, cigarettes, and drinks, including whiskey, will inevitably result in substantial physical harm to a certain percentage of persons. Whitmore, Allergies and Other

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Reactions Due to Drugs and Cosmetics, 19 SW L.J. 76 (1965). But this fact alone even when injury follows from proper use has never been a basis for recovery in any jurisdiction, and especially would this be true when the injury is of slow development over many years, as for example lung cancer from smoking cigarettes.

The long history of one lung cancer case is illustrative. This is Green v. American Tobacco Co. There have been four 5th Circuit opinions, the first being in 1962 and the last being in 1969. In the last opinion, the Court of Appeals in an en banc hearing held (8-3) for the defendant, with a majority concluding that reasonable fitness was the test and a minority of three dissenting on the ground that "the one inescapable consideration is that a jury found as a fact that Mr. Edwin Green, Sr. died of primary cancer of the lung caused from smoking Lucy Strike cigarettes. . . . The decisive point is that when the jury so found there simply remained no further strict liability issue in the case." Green v. American Tobacco Co., 391 F (2d) 97 (5th Cir. 1968).

The defendants are aware of no holding from any state court of last resort or any Federal Court of Appeals that liability would be imposed simply because injury followed from an appropriate use of a product. In the recent case of Davis v.

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Wyeth Laboratories, Inc., 399 F (2d) 121 (9th Cir. 1968) it was contended on behalf of a victim of Sabin Oral Vaccine that a maker should be regarded as guaranteeing that the drug was fit and safe for each and every user and not simply reasonably fit and reasonably safe for use by the public as a whole, but the Court said that it was unwilling to make such a far-reaching change in the law.

This subject has been bedeviled by the confusion resulting from the fact that the attack on fault as a prerequisite to recovery has proceeded along two separate and distinct lines. The attack was initially started by the elimination of privity of contract as a requirement for recovery on a warranty theory; then there followed an attack on fault as a basis for recovery on negligence theory and the adoption by the American Law Institute of Sec. 402A of the Restatement of Torts got much acceptance. The test for strict liability on a tort theory pursuant to Sec. 402A, and the test articulated on a warranty theory pursuant to the Uniform Commercial Code are not necessarily the same. Under Sec. 2-314 of the U.C.C., a product is unmerchantable if "unfit for the ordinary purposes for which such goods are used" and if fit in that sense, there is no liability for a foreseeable but out-of-the-ordinary use or perhaps even for a misuse. Under Sec. 402A of the Restatement of Torts

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a product must be defective and unreasonably dangerous. There is no necessary reason why "unreasonably dangerous" cannot be interpreted in such a way or a tort concept of badness defined by the courts in such a way as to eliminate the complexity resulting from two theories of recovery that are not coextensive. This point is developed under the next proposition.

So even if it were an established fact that during the 27 years of plaintiff's exposure to asbestos dust and fibre there had been no misuse, no negligence on the part of contractors and no appreciation of any risk on the part of the plaintiff himself, plaintiff does not make out a prima facie case simply by showing injury followed use. No court to the defendants' knowledge has ever so held and this would be especially so where a liability without fault scheme for the compensation of a victim has already been provided by the legislature through our workman's compensation system.

STRICT LIABILITY - Proposition 2.

A product is regarded as defective at the time of sale only if the following conditions are met:

(1) The product as marketed was at the time of sale unreasonably dangerous; and

(2) The risk or hazard involved in the product's use was a concealed or hidden danger; and

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(3) The risk or hazard that made the product so dangerous was a scientifically known fact at the time of sale and was one that could have been feasibly reduced by the application of techniques known at such time.

STATEMENT AS TO SUBDIVISION (1) OF PROPOSITION 2.

The requirements of subdivision (1) are not met unless it can be found from the evidence that a reasonable man with knowledge of the condition and the risks incident to the use of the product as marketed, would not have marketed the product as he did because the magnitude of the danger in fact from so doing outweighed the utility or justification for so doing.

As to design defects, this means that a manufacturer cannot be regarded as selling an unreasonably dangerous product that is designed in a universally accepted or customary manner in the absence of either expert testimony that would serve as a reasonable basis for a finding that safer products could have been made feasibly, or evidence of a violation of some regulatory measure, or finally, evidence that some makers followed a safer procedure.

In seeking to recover against a maker or purveyor of goods for physical harm produced by some characteristic or condition of a product, plaintiff may adopt one or more of three

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general approaches. He may contend that the product was defective at the time of sale by the defendant in that it was not in the condition that the maker intended it to be; he may contend that the product was purposely designed or produced with some condition that involved a risk of the kind that resulted in the plaintiff's harm, and that a maker who designs a product in such a way ought to be responsible for harm resulting from such an inherent risk; or, finally, the plaintiff may seek to recover because the maker or other seller supplied incomplete, incorrect, or misleading information about the risk and dangers involved in the use of such a product and the measures that can or ought to be taken to avoid harm.

In the vast majority of the cases where the maker of a product has been held liable either on a negligence theory or on some kind of warranty or other strict liability theory, the claim was based on the first ground, namely, that a specific product was defective because of a miscarriage in the manufacturing process and the defect brought about some kind of a sudden and unintended accident out of which plaintiff's injury arose. This case involves either the second or third category or a combination of the two. But in any event, as both Judge Wisdom and Judge Thornberry have pointed out "demanding that the defect render the product unreasonably dangerous reflects a realization

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that many products have both utility and danger." Helene Curtis Indust., Inc. v. Pruitt, 385 F (2d) 841, 850 (5th Cir. 1968) (Thornberry) and Ross v. Up-Right, Inc., 402 F (2d) 943 (5th Cir. 1969) (Wisdom). The first case involved a product for dyeing hair and the second case involved a combination scaffold and ladder for use in overhead repair work. In the last cited case, the contention of the plaintiff was as here a contention that the product was designed improperly. The Court quotes from an article by Wade, Strict Tort Liability of Manufacturers, 19 SW L.J. 5, 15 (1965) wherein Wade said "The only real problem is whether the product is unreasonably dangerous." The Supreme Court of Texas has made it clear in all cases where liability has been imposed that the product must be found to be unreasonably dangerous and not just dangerous. Shamrock Fuel & Oil Sales Co. v. Tunks, 416 SW (2d) 779, 785 (Tex. 1967); McKisson v. Sales Affiliates, Inc., 416 SW (2d) 787 (Tex. 1967); Derryl v. Ford Motor Co., 440 SW (2d) 630 (Tex. 1969).

Designs as Unreasonably Dangerous. It is not by coincidence that the vast majority of the cases involving strict liability have been cases involving defective products, products that turned out to be different from what the maker intended them to be. There was a miscarriage in the manufacturing process and the risk of concealed defects from miscarriages in the manufacturing process have been allocated to the manufacturer. This

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is because the utility involved in the use of the vast majority of products that are so marketed outweigh the risks involved in their use. In designing a product risk and utility are necessarily taken into consideration by those who design it.

Since the magnitude of the danger alone is not the test for ascertaining when a product is unreasonably so, it must almost of necessity follow as has been pointed out that whatever utility or purpose is served by the product must be outweighed by the danger involved in its use. Keeton, Products Liability - Allocation of Risks, 64 Mich. L. Rev. 1329, 1335 (1966); Wade, Strict Tort Liability of Manufacturers, 19 SW L.J. 5, 15 (1965). This, of course, is the language of Sec. 402A of the Restatement of Torts, and this concept seems to have been unequivocally accepted by the Supreme Court, Texas, and the Fifth Circuit. As stated in Helene Curtis Co., supra, the test is whether a reasonable man, with knowledge of the condition and the risks incident to the use of the product would not have marketed the product as he did. This is also Dean Wade's formulation.

As already stated, most of the cases involving alleged unreasonably dangerous products have involved physical damage caused by a single damaging event resulting from a miscarriage in the manufacturing process. This is not to say that it is not possible for the plaintiff to establish that a design used by a

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maker was unreasonably dangerous, but most courts have not permitted juries to pass on designs prepared by experts, particularly when the purchaser can choose between different designs. Noel, Products Defective Because of Inadequate Directions or Warnings, 23 SW L.J. 256 (1964).

Some courts have held industry practice conclusive. Ketterer v. Armour & Co., 247 F. 921 (1917); Barton v. Myers, 1 Mich. App. 460, 130 NW (2d) 765 (1965); McClaren v. Robins & Co., 162 SW (2d) 856 (Mo. S.Ct. 2nd Div. 1942). Most courts have not done so, but unless the situation involves a simple problem which a layman could understand without benefit of expert opinion, it is clear that custom is conclusive unless one or more of the following conditions are met: (1) There is expert evidence as to the feasibility of a safer method; Hardman v. Helene Curtis Indust., Inc., 48 Ill. App. (2d) 42, 198 NW (2d) 681 (1964); Varas v. Barco Mfg. Co., 205 Cal. App. (2d) 246, 22 Cal. Rptr. 737 (Dist. Ct. App. 1962) (earth tamping machine apt to spray gasoline on operator from inadequate tank cap); Rosin v. International Harvester Co., 262 Minn. 445, 115 NW (2d) 50 (1942) (seal to keep differential lubricant away from brake lining of insufficient size, strength, and flexibility); (2) As in the case of a vaporizer that became overheated when the water boiled away, there is evidence that some manufacturers made a

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safer product, thereby establishing its feasibility and marketability; Lindroth, Walgreen Co., 87 NE (2d) 307 (1949) (Ill. App.) affirmed 94 NE (2d) 847 (Ill. 1950); (3) There was a failure to conform to some standard of safety required by legislation.

The passage of legislative and administrative regulations (especially in this case because of the choice between changing the nature of the products and altering working conditions) provides the only practical solution to the reduction of disease. It is not practical to submit industry standards to a jury for evaluation. An administrative agency, such as a Public Health agency, should create such standards since such an agency can understand engineering, medical, and scientific complexities better than a jury, and can better balance against safety the other interests such as economy, performance, and the like. See, Noel, Products Defective Because of Inadequate Directions or Warnings. Doubtless these considerations influenced the Court in Evans v. General Motors Corp., 359 F (2d) 822 (7th Cir. 1965) cert. denied 385 U.S. 836 (1966) involving a Chevrolet station wagon designed with an "X" frame. See, Muncy v. General Motors Corp., 367 F (2d) 493 (5th Cir. 1966) cert. denied, 386 U.S. 1037 (1967) (no duty to design ignition system so key could not be removed without turning off motor and taking unbraked car out of gear). Case decided the same way in

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the State Court. 357 S.W. (2d) 430 (Tex. Civ. App. 1962); Gossett v. Chrysler Corp., 359 F (2d) 84 (6th Cir. 1966).

In this case plaintiff must, in order to recover, be asserting the proposition that virtually all asbestos products of all manufacturers have been designed in an unreasonably dangerous manner. This is on its face preposterous. Defendants have been unable to find a single case holding an entire industry subject to liability for an occupational disease that develops after 20 or more years when a variety of different products made by different manufacturers have been used under a variety of conditions not under the maker's control.

There can be no issue of any material fact for the jury pursuant to a theory of strict liability unless evidence is available to show that it was feasible to make and sell safer asbestos products without diminishing the utility of such products. As was pointed out at the outset of this memorandum, there is no adequate substitute for asbestos for certain purposes because of its heat resistant properties and plaintiff has not suggested any feasible or practical way for altering the way the asbestos products are being made.

As stated at the very outset, there are two better ways to provide for compensation of the victim, through an adequate workman's compensation award, and by way of social

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security benefits for disability. Moreover, prevention should be accomplished by research and public regulation supported by research. Plaintiff has the burden of providing some evidence to show as to each product that he impugns why its design could have been more safely made in view of the variety of purposes for which the product was being used. As insulation workers themselves would say, there is no feasible way to make insulation products that could be used without altering them on the work site and causing dusty conditions in the absence of a proper ventilation system. Plaintiff cannot condemn all products because he thinks some products might have been defective. Defendants are aware of no doctrine that would permit such and plaintiff therefore must deal with each product separately.

It is submitted that the few decisions that have permitted a recovery on behalf of allergic victims to ingredients in certain cosmetics that may appear to be inconsistent with the position that the product must be unreasonably dangerous are not so. In some of the cases, the product was marketed to the general public without any warning to prospective users of the fact that a certain percentage of users become allergic to one of the ingredients. Thus there was a failure to warn uninformed users. This seems to have been true in several cases where recovery was allowed. Bianchi v. Denholm & McKay Co., 19 NE (2d) 697 (1939)

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(aniline dye in face powder); Reynolds v. Sunray Drug Co., 52 A (2d) 666 (N.J. Ct. Err. & App. 1947) (lipstick); Zirpala v. Adam Hat Stores, Inc., 4 A (2d) 73 (N.J. Ct. Err. & App. 1939); Esborg v. Bailey Drug Co., 378 P (2d) 298 (Wash. 1963) (hair tint). In Crotty v. Shartenberg's New Haven, Inc., 162 A (2d) 513 (1960), the defendant besides warning of the possibility of allergic injury gave instructions for a patch test and yet the court imposed liability, but apparently this meant that plaintiff must show an appreciable number of those who receive a negative result on the recommended patch test are affected. Thus, liability was based on an express misrepresentation that there would be no injury if a negative result was first obtained on the patch test. This interpretation is borne out by a later decision that there is no breach of warranty when there is "due and ample warning of any harmful and deleterious ingredient." Harmon v. Digliani, 174 A (2d) 1007 (1964). This interpretation seems to be the position of the Restatement of Torts which contains the statement in a commentary that when a substantial number of the population are allergic to an ingredient, and the ingredient is one whose danger is not generally known, or if known, is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it. Rest. Torts, Sec. 402A, Comment J.

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Finally, it is worth noting that even if the normal person would not suffer an adverse reaction to a cosmetic, this does not mean that a prudent person, with knowledge of the percentage of persons who are allergic would sell such product even though most people would not be affected. This is because there would probably be adequate substitutes to serve the same purpose at no greater cost and thus the magnitude of the harm to those who are affected could outweigh any utility it has for those who are not allergic.

The same cannot be said for drugs, and the same cannot be said for products containing some asbestos because of the lack of availability of adequate substitutes.

STATEMENT AS TO SUBDIVISION (2) OF PROPOSITION 2.

A product is not unreasonably dangerous unless it fails as regards safety features to conform to the normal and reasonable expectations of those for whose use the product is intended.

If it does not so fail to meet the expectations of the ultimate purchaser as to safety features, the duty and responsibility for avoiding illness, disability or damaging events is on the user and whether or not such a duty and responsibility of the user calls for strict liability or negligence varies. The industrial user is strictly accountable to his employees for occupational diseases.

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The product must betray the reasonable, established expectations of the type of purchaser who will be acquiring the product. A number of cases have already been cited heretofore holding that a manufacturer's duty is limited to guarding against concealed or hidden dangers. The satisfaction of the ultimate purchaser's right to be informed so that he can make an informed judgment about price and choice of products has been held in nearly all situations to satisfy legal requirements. This is well-illustrated by the cases involving burns resulting from ready-mixed concrete containing lime. This product is used for the most part by contractors or others who realize the risk, but even plaintiffs who have never used the product before have failed to recover on the ground that the risk is obvious. Katz v. Arundel-Brooks Concrete Corp., 151 A (2d) 731 (Md. 1959). There are similar holdings in Simmons v. Rhodes & Jamieson, Ltd., 293 P (2d) 26 (Cal. 1956); Dalton v. Pioneer Sand & Gravel Co., 227 P (2d) 173 (1951). It is virtually always assumed that if the ultimate purchaser is aware of the risk or hazards involved in the use of the product there can be no liability. Most of the litigation centering around this proposition has related to the question of when a duty to warn exists in view of the obvious nature of the danger. A recent 5th Circuit case is an excellent example. This is Thibodaux v. McWane Cast Iron Pipe Co., 381 F

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(2d) 491 (5th Cir. 1967) (applying Louisiana law). The defendant manufacturer had supplied cast iron pipe for underground use for a natural gas system in a city in southern Louisiana. The soil in the area was of such a nature as to cause iron to corrode at an unusually rapid rate. As a result of corrosion, an explosion occurred which injured the plaintiff who was living in a house situated above the pipe, and killed his wife and daughter. The court assumed the pipe manufactured for the sole purpose of distributing natural gas was "highly dangerous and was likely to cause injury to persons" in this city and that the manufacturer was chargeable with this knowledge. In affirming dismissal of the action, the court stated that since the manufacturer was chargeable with this knowledge of the danger, there ordinarily would be a duty to warn. It found no duty in this case because the city or its consulting engineers were "likewise chargeable with the same knowledge" adding that there is no duty to warn "where the other party is already aware of the danger." Id. at page 495.

The primary justification for the decision lies in the fact that apparent dangers of this sort do not violate the normal expectations of the typical user of the product, and as a result the product is not defective, even in the absence of a warning,

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since it is not "dangerous beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics." 2 Rest. Torts (Second) Sec. 402A, Comment J (1965). Dickerson, Products Liability; How Good Does a Product Have to Be? 42 Ind. L.J. 301 (1967). When strict liability is sought to be applied on warranty motions, the same principle is applicable. It is said in the Uniform Commercial Code that when the buyer has full opportunity to examine the goods, there is no implied warranty with regard to defects which an examination ought to have revealed. The official Comment adds, "if the buyer discovers the defect and uses the goods anyway, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty." See Uniform Commercial Code, Sec. 2.316(b) and Comment 8.

The above seems to be clearly recognized in Texas. The definition of unfit as given by the trial judge in Hoover & Son v. Franklin Serum Co., 444 SW (2d) 596 (Tex. 1969) fits this notion. It was as follows: The term "unfit for its intended use" means a product sold in a defective condition unreasonably dangerous to the user or consumer or to his property, that is to say dangerous to an extent beyond that which would be contemplated by the ordinary user with the knowledge available to him as to the characteristics of the product.

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It has been suggested that the consumer's right to be informed should not necessarily and in all circumstances satisfy the maker's legal obligation. Keeton - Products Liability - Inadequacy of Information, 48 Tex. L. Rev. 398 (1970). But it was pointed out that the apparent danger involved in the use of a product is quite relevant to the issue about the unreasonableness of the danger "because the nature of the use of the product can be altered in the light of its known dangers. It is also, of course, relevant to the issue whether the user was himself negligent in the way in which he used the property." Id., at page 400. It should be said also that this was said about products intended for use by the general public.

As to products intended for industrial use or for contractors and the unions that represent employees who can reasonably be expected to be as fully informed about the dangers as are the makers, the obvious nature of the danger should be conclusive. Certainly in this area economic efficiency in the satisfaction of consumer demands can best be promoted by fixing legal liability for harm resulting from obvious dangers on the industrial user. The contractors and the unions that work with them are in the best position to decide what practices and procedures should be followed in the handling of products containing some asbestos and to choose between paying more for safer products

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or spending more on better working conditions. So, until it is decided to impose by public regulation different standards for the application of products containing some asbestos or making it unlawful to sell or use such products, those now in force should be conclusive especially as to those characteristics about the product that are as well known to the contractors, labor unions in this area, and to the vast majority of the employees of contractors as they are to the makers.

There was obviously no concealed condition about the products containing some asbestos. If the condition of any particular asbestos product is to be regarded as concealed it would have to be because the employers of insulation workers did not appreciate or had no reason in the exercise of ordinary care to appreciate the risk from dust and fibre to an insulation worker. It could not be because of any lack of knowledge as to the existence or presence of dust and fibre related to working conditions. Moreover, it could not be because there was no appreciation of a risk of some danger in view of the availability of respirators at various plants and in view of so much information available about asbestosis as an occupational disease long before the onset of plaintiff's lung disability.

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STATEMENT AS TO SUBDIVISION (3) OF PROPOSITION 1.

The state of the art at the time of sale. Perhaps, medical and scientific knowledge as to the magnitude of the danger of lung disease from asbestos dust and fibre is available now that was not available during much of the time that the plaintiff voluntarily exposed himself to a known risk. It appears that about 1965 the public health authorities and medical experts became more knowledgeable about the danger because the history of some insulation workers who developed lung disease indicated the cause was the long period of inhalation of dust under a variety of conditions. In fact, it appears that the basic theme of the experts seems to be to wear respirators at all times. Moreover, much attention is now being given to the development of better ventilation systems where the insulator is working in close quarters. All of this is apparent from what was said at the outset of this memorandum. Scientific information available during the time that plaintiff worked as an insulator was to the effect that a safe guideline for working conditions would be 5 million particles per cubic foot, whereas in 1969 an Association of Government Hygienists came out for the first time with a recommended change to 2 million particles per cubic foot. See, Threshold Limit Values of Airborne Contaminants Adopted by A.G.G.I.H. for 1969 and Intended Changes; also, Cooper

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and Balzer, Evaluation and Control of Asbestos Exposures in the Insulating Trade, Second International Conference on the Biological Aspects of Asbestos, Dresden, Germany, April 1968.

As to negligence, it is of course of fundamental importance on the issue of negligence of a manufacturer or other seller to consider (1) what is scientifically known, (2) what the seller actually knew at the time of sale, and (3) what he is to be charged with knowing in the exercise of ordinary care. But a manufacturer cannot be charged with knowing and discovering the incidence of harm from working under dusty conditions of one kind or another in the absence of the availability in some place or in the scientific literature of such information. The only difference between negligence and strict liability as regards design conditions and inadequacy of warnings is that a manufacturer may in the exercise of ordinary care be justified in failing to discover what is scientifically known whereas the same is not true as regards strict liability. As to the latter, he must act as a reasonable person would act with the knowledge of what is a scientifically known fact. In Lartigue v. Reynolds Tobacco Co., 317 F (2d) 19 (1963), Judge Wisdom dealt with a claim for lung cancer from inhaling cigarette smoke over a long period of years. He said: "We agree that the manufacturer of tobacco should be classified with the food processor and held to warrant

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the wholesomeness of his product (that is, he is strictly liable in tort for an unwholesome product)--but as in the case of the food processor, the strict liability should apply only when. . . the damages were foreseen or could easily have been foreseen, as likely to result from putting the thing sold to the use for which it was sold." Now, he did not mean that plaintiff must show that the defendant ought in the exercise of ordinary care to have foreseen trouble, for he says: "Under the doctrine of strict liability it is not necessary for the plaintiff to show that the defendant failed to use due care or that the defendant have knowledge of the defective condition. However, it is necessary to show that the warranted product contained an element from which, on the basis of existing human knowledge, harm might be expected to flow." The Eighth Circuit followed Lartigue in Ross v. Phillip Morris & Co., 328 F (2d) 3 (1964).

The goods a manufacturer sells must comply with reasonable and ascertainable standards of safety. He is responsible for foreseeable risks and by foreseeable risks is meant risks scientifically known whether or not the defendant knew or should have known about such risks. He is not an insurer against unknowable risks, and he cannot be held liable as an absolute insurer against consequences of which no developed human skill and foresight could afford knowledge. It is conceded that the Florida

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Supreme Court in response to a certified question, a doubtful procedure, Green v. American Tobacco Co., 154 So (2d) 169 (1963), arrived at a different answer (it must be said that even with the different answer the Fifth Circuit Court of Appeals finally held that utility of cigarettes outweighed the danger of cancer) and said that a manufacturer's or other seller's actual knowledge or opportunity for knowledge at the time of sale of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty.

The result Judge Wisdom reached must be regarded as the law in Texas. Cudmore v. Richardson-Merrill, Inc., 398 SW (2d) 640 (Dallas Civ. App. 1966) (Writ Ref. NRE). In that case involving the development of cataracts from the use of an anti-cholesterol drug called MER/29, the court said: "The burden was on appellant to show that he was part of an appreciable class of persons who might have been foreseen to have been harmed by MER/29 at the time he was using it." Citing also Howard v. Avon Products, Inc., 395 P (2d) 1007 (Colo. 1964). In Howard, the court held that a user of a cosmetic could not recover for harm suffered by an allergic reaction since it was not a known scientific fact that there was a substantial percentage of persons allergic to an ingredient in the product.

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The position that has been taken by Judge Wisdom and the Court of Appeals for the Fifth Circuit, and the law as it now stands in Texas is the position taken by the American Law Institute in the Restatement of Torts. In Comment J. to Sec. 402H, it is said:

"In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warnings on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger." 2 Rest. Torts (Rev. Ed. 1965) page 353.

So, the law is that the manufacturer is liable for harm resulting from unreasonably dangerous conditions that can be theoretically avoided and such is regarded as a risk or cost

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of doing business; but he is not liable when harm results from a risk that is unknown. The seller is in no position to spread such a risk. He is in a position to spread risks that are actually known even when unavoidably harm results. Society as a whole must take this risk in its ceaseless quest for improving the human lot. Conolly, Liability of a Manufacturer For Unknowable Hazards Inherent in His Product, 32 Ins. Counsel Journ. 303 (1965).

Even if this were not the law applicable with respect to the sale of products intended for use by the general public, it should surely be so with respect to the sale of products intended for industrial use or use by contractors who are or should be as sophisticated or more so about the health hazards involved from working in an environment saturated with asbestos dust as are makers of asbestos products, especially when proper care in the use of the product is not exercised. It has been suggested that the fact that a risk that makes a product a bad product under the conditions in which it is marketed is scientifically undiscoverable at the time of sale should not necessarily excuse the manufacturer. Keeton, Products Liability - Inadequacy of Information, 48 Tex. L. Rev. 398, 407 (1970). But this was said in connection with a discussion about products (1) intended for use by the general public, and (2) where there was not any already

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known recognizable risk of the kind in question, and (3) where there was no existing scheme available for providing financial security for the victims. There is a liability without fault scheme available to employees through workman's compensation acts, such acts having been passed for the very purpose of allocating risks of harm for unavoidable injury or disease arising out of one's employment to employers as a cost of doing business. This is where the liability should remain, especially in view of the fact that there is a high degree of likelihood that the disease contracted by a particular employee could have been avoided if proper precautions had been taken by the employee himself and by his employer as regards the use of respirators, the provision for proper ventilating systems, and the like.

The issue here is not simply one of recognizing the dangers involved. The question is whether or not, if techniques are now known that make it possible to reduce the hazards from using asbestos products, makers of products should be held responsible for harm resulting prior to the time that it was scientifically known how it could be done. Surely, manufacturers of old products made 20 years ago are not to be held liable for harm resulting from those products simply because at that time the state of the art had not advanced as far as it has today.

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FACTUAL CAUSATION - Proposition 1.

(A) In general, plaintiff must, in order to recover damages for physical harm, prove specific conduct on the part of the defendant without which at least some of the harm would not have occurred; moreover, plaintiff can recover only such damages as he can show were in all reasonable probability attributable to the defendant's conduct and to the aspect of that conduct that made it tortious. Thus, the plaintiff, in order to recover anything, is put to the burden of showing not only the fact of damage, but the amount of damage which can be attributed to specific conduct on the part of the particular defendant.

(B) When plaintiff can show that specific wrongful conduct on the part of the defendant has by the greater probability caused some harm, the courts have in certain exceptional circumstances permitted an injured person who suffered harm in a single and identifiable damaging event to join two or more wrongdoers or two or more persons, one or the other of which was probably responsible, and hold all responsible for the entire harm or a proportionate part thereof; there is, however, no authority which serves to support the joinder of a number of manufacturers of a variety of products and virtually an entire industry with a recovery against them for an occupational disease contracted by plaintiff as a result of exposure to hundreds of damaging events

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over a long period of time and produced in substantial part by work conditions of his employers. Plaintiff cannot recover by simply saying that each defendant's product or products were being used at one time or another during the period of the development of the disease, and some of these products on some of the occasions could have been the cause for the disease.

(C) Therefore, plaintiff cannot recover against any defendant because his injury did not flow from a single damaging event or series of interrelated events in close proximity as to time and because no evidence can be adduced to show what contribution, if any, each defendant made to the totality of plaintiff's harm by virtue of his tortious conduct, if any.

Through all the diverse theories of proximate cause runs a common thread; all agree that defendant's tortious conduct must be a cause in fact of plaintiff's injury before there is liability. This is an ordinary, matter of fact inquiry into the existence or non-existence of causal relation. When the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable that the injury was the result of one cause as the other, plaintiff cannot have a recovery since he failed to prove that the negligence of the defendant caused the injury. Plaintiff must have evidence which

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affords a reasonable basis for the conclusion that it is more likely than not that the aspect of the defendants conduct that made it tortious was a substantial factor in bringing about the result. Prosser, on Torts, Sec. 41, p. 245. Phillips Petroleum Co. v. West, 284 SW (2d) 196 (Tex. Civ. App. 1955) (writ refused, N.R.E.); West Texas Utilities Co. v. Harris, 231 SW (2d) 558 (Tex. Civ. App. 1950) (writ refused, N.R.E.); Texas & Pacific Railway v. McCleery, 418 SW (2d) 494 (Tex. 1967). The plaintiff in the last cited case was a passenger in a truck that collided with the defendant's freight train late one night in Dallas. The Supreme Court reversed a jury finding for the plaintiff on the ground that as a matter of law the plaintiff had failed adequately to show that his injuries were in fact caused by the excessive speed of the train. It is important to note that a tortious act is legally responsible for that harm, and only that harm, of which his negligence aspect of his conduct is a cause in fact. It is not enough that his conduct be a cause in fact. That aspect of the defendant's conduct that made it tortious must be a cause in fact. Thus, in McCleery, the defendant's conduct was a cause in fact, but his excessive speed was not. This means that plaintiff is required to show that which is impossible in this case, namely that specific tortious conduct and the aspect of such conduct that made it tortious was a cause in fact of some harm to plaintiff.

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When several tortfeasors contribute to the totality of plaintiff's injury, the prevailing rule is that each is liable only to the extent of the part he caused; unless it can be said that each caused the entire harm. Thus, if each of several riparian owners contribute to pollute a stream somewhat, he is liable only for the damage resulting from his own contribution to the pollution. Jackson, Joint Torts and Several Liability, 17 Tex. L. Rev. 399, 415 (1939); 2 Harper & James, page 1125 (1956).

In Landers v. East Texas Salt Water Disposal Co., 248 SW (2d) 731 (Tex. 1952) the Supreme Court of Texas saw fit to recognize an exception to the usual requirement that plaintiff must prove the amount of damages attributable to the defendant's tortious conduct. In that case, the defendant oil company and the defendant salt water company were alleged to have been negligent in contributing to the pollution of a lake at about the same time and the effect of that pollution brought about the killing of some fish. The court said that the allegations were sufficient and that the rule hereafter would be that when the tortious acts of two or more wrongdoers join to produce an indivisable injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages, and the injured party may

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proceed to judgment against any one separately or against all in one suit.

There are several very important differences between this case and the situation in Landers. In the first place, the injury or damage in Landers was the result of a single polluted condition, whereas plaintiff's alleged illness in this case was the product of hundreds of polluted conditions over a period of many years. The court was specific in limiting recovery to a situation where the conduct joined to produce the event that caused the harm. In the second place, each defendant was alleged to have negligently contributed to that specific polluted condition of the stream and thus his negligence would have to be identified, and the only uncertainty would then be uncertainty as to the amount of each defendant's contribution to the polluted condition. Here, in the potentially damaging events being isolated in time, it is obvious that each defendant did not contribute to each such event and it will always of necessity be unclear as to which of such events actually contributed to plaintiff's disability. In the third place--and quite important it is--in Landers, unless the court held both defendants responsible for all, or a proportionate amount of the loss, plaintiff would have had no remedy although it is clear that but for the wrongful conduct, and the aspect of such conduct that made it wrongful,

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plaintiff would not have suffered the damage. In this case, the plaintiff has two remedies--his recovery pursuant to our social security system and his recovery pursuant to the workman's compensation system. These programs have been created and adopted for the very reason that otherwise most of those who are victimized in the course of their labors by the contraction of occupational diseases would have no assured recovery. In Landers, the court was unwilling and soundly so to embrace any longer the philosophy that "it is better that the injured party lose all of his damages than that any of several wrongdoers should pay more of the damages than he individually and separately caused." The underlying policy reason for abandoning the normal rule that plaintiff can recover only such damages as he can show were in all reasonable probability attributable to defendant is therefore unavailable to the plaintiff in this case. There is yet a fourth difference in plaintiff's claim here and plaintiff's claim in Landers. In this case, there is more likelihood that employers and the plaintiff himself caused the onset of plaintiff's disability and the seriousness thereof by failing to take proper precautions regarding the conditions under which asbestos products were used in the various installation processes in which the plaintiff was involved as there is that tortious conduct on the part of manufacturers did so.

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A statement made by the New York Court of Appeals involving a question as to the applicable statute of limitations period for recovery of damages for injuries allegedly caused by a faulty glass door seven years after installation is quite pertinent on this question. "Surely an injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance. It is our opinion that to guard against the unfounded actions that would be brought many years after a product is manufactured, we must make that presumption conclusive by holding the contract Statute of Limitations to be applicable to the instant action and limit appellants to their action in negligence." Mendel v. Pittsburg Plate Glass Co., 25 N.Y. (2d) 340, 253 NE (2d) 207 (1969).

It is obvious that the nature of the work to be performed, the place where the work was to be performed, the working conditions under which the insulator performed his work, and the plaintiff's own conduct have been contributing factors in the development of his asbestosis. Plaintiff has throughout his working life been exposed to air polluted with asbestos dust and fibre, brought about by a variety of conditions, sometimes in closed quarters. It is quite likely that if all the insulation contractors and the plaintiff himself had conducted themselves

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properly on all occasions no disability would have been incurred. The finger of suspicion is on the insulation contractors and the plaintiff himself. The same can be said about smoking cigarettes too frequently, or using whiskey excessively. It is for these reasons among others that compensation for those who are victimized should continue to be made available through recovery pursuant to our workman's compensation laws. If this is inadequate, it should be made adequate. If disease is occurring when it should not, then there should be public regulation establishing higher standards for making working conditions better and perhaps ways and means can be found to improve the products themselves.

The proposition that where two or more causes combine to produce a single result incapable of division on any logical or reasonable basis, each is liable for entire harm, has only been applied when it is established either that the conduct of each was a proximate cause of the entire harm as in the case of an automobile collision or when each has been found to contribute substantially to a single polluted or other dangerous condition and this brings about a damaging event that can be established to have occurred at a particular time.

There is a second type of case--also applying to a situation involving an injury arising out of a single damaging event--where courts have sometimes allowed joinder of and recovery

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from two or more persons, one or the other of which caused the harm. See Jackson, Joint Torts and Several Liability, 17 Tex. L. Rev. 399 (1939). These situations have been carefully limited. In Summers v. Tice, 199 P (2d) 1 (Cal. 1948) noted in 27 Tex. L. Rev., the plaintiff was a member of a party of hunters. Two other members negligently shot at a quail and one shot from one of the guns struck the plaintiff. In this case the court concluded that since both defendants were proven to have been negligent, it was better to hold both jointly liable than to require plaintiff to go without any relief. In Dement v. Olin-Mathieson Chemical Corp., 282 F (2d) 76 (5th Cir. 1960) the court permitted a joinder of manufacturers who made different parts of a charge of dynamite that prematurely exploded on the theory that one or the other was responsible for the single damaging event and said "where the consequences are so devastating and the risk of human life so great, manufacturers of products which are components designed to be used with other known products may not thus evade the responsibility to come in and explain. That is basically what the res ipsa doctrine requires." This doctrine was carefully limited to the situation there involved--a single damaging event produced by one or the other of two components of the assembled product. It is obviously not applicable here. As a matter of fact, it was not applied in Helene Curtis Indust., Inc.

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v. Pruitt, 385 F (2d) 841 (5th Cir. 1968) because the circumstances did not point an accusing finger at the products but rather to the user.

Defendants are aware of no authority decided anywhere at any time that would authorize the joinder of several defendants on theories even of negligence, not to speak of strict liability when two other strict liability recoveries are already available to the plaintiff, in an effort to reconstruct allegedly separate and distinct damaging events occurring 20 years and more before the suit was brought. The limits to effective judicial processes require the granting of summary judgment.

Factual Causation. When a plaintiff seeks recovery on the theory that the manufacturer supplied incomplete or inadequate information to ultimate purchasers about the risks or dangers involved in the use of a product or the measures that ought to be taken in the use of such product to avoid such harm, plaintiff must show that adequate warnings or adequate instructions would have prevented the harm. This is true whether or not recovery is sought on the theory of negligence or strict liability.

Even if the proposition last asserted were not accepted, plaintiff would have no basis for recovering on any theory of negligence for failing to give adequate warning. Broadly speaking, the defendant has not harmed the plaintiff by injuring him

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as a result of inadequate warnings when it appears just as likely as not that the plaintiff would have suffered the same physical loss or injury if adequate warnings had been given. Sec. 432 of the Rest. of Torts provides: "Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." In the comment it is then said: "The statement in this Subsection is most frequently, although not exclusively, applicable where the actor's tortious conduct consists in a failure to take some precautions which are required for the protection of another's person or land or chattels. In such case, if the same harm, both in character and extent, would have been sustained even had the actor taken the required precautions, his failure to do so is not even a perceptible factor in bringing it about and cannot be a substantial factor in producing it." Ford v. Trident Fishers Co., 232 Mass. 400, 122 NE (2d) 399 (1919). In this case the defendant failed to provide a lifeboat but it was found that the storm was so heavy that had there been a lifeboat it could not have been launched in the sea then running. Evidence bearing on the likelihood or not of reliance on a warning is of fundamental importance. This requirement has been discussed with reference to products liability by Keeton in two articles, one

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of which is entitled, Products Liability - Problems Pertaining to Proof of Negligence, 19 S.W. L. Journal 26, 33 (1965), and the other just recently in an article, Products Liability - Inadequacy of Information, 48 Tex. L. Rev. 398, 413 (1970). In this first article it is stated that evidence bearing on the likelihood of reliance on a warning if it had been given is relevant both to the issue of whether there was negligence in failure to warn and to the issue of whether such failure, if negligence, was a cause of harmful consequences. Citing: Kaempfe v. Lehn & Fink Prods. Corp., 249 NYS (2d) 840 (1964); Pfizer & Co. v. Branch, 365 SW (2d) 832 (Tex. Civ. App. 1963) error dism. As the court said in Love v. Wolf, 38 Col. Reptr. 183 (Dist. Ct. App. 1914) however negligent a drug manufacturer may be in his over promotion of a drug or in his failure to give adequate warning, he is not liable if the drug is one usable only by prescription of a doctor, and if the overprescription was not caused by the over promotion. The truth is that the evidence in this case all indicates that the contractors and the plaintiff himself were aware of the risk of harm because of the presence of respirators that were available for use and because they were as fully acquainted with the risks and hazards of inhaling dust at any given time as the makers of products containing asbestos.

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While sometimes circumstances are such as would lead a reasonable person to believe that a warning would more likely than not have avoided an accident, and under such circumstances the question of causation is for the jury, Pfizer & Co. v. Branch, 365 SW (2d) 832 (Tex. Civ. App. 1963) no such inference can be drawn here even if all the products had been made by the same manufacturer. The probabilities are that the contractors and plaintiff would not have altered their activities in such a way as to have prevented plaintiff's disability.

Perhaps, the plaintiff will argue that some companies are now placing warnings on containers that should have been placed on containers heretofore, but if this be assumed, it would be the rankest sort of speculation to conclude that such warnings, if given, would have prevented this disease. This is so because:

(1) Many, if not all, of the contractors were already aware of risk of this disease and so a warning would not in any way have altered their conduct to the extent necessary to have prevented plaintiff's disability; and

(2) Some employees, and indeed even the plaintiff, may have been fully aware of some risk long before he became disabled, but yet refused to take precautions that were available to them.

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ASSUMPTION OF THE RISK

If plaintiff became aware of the existence of a substantial risk of asbestosis before he became totally disabled or before total disability became inevitable or his disease became irreversible, he cannot recover for his disability because the defense of voluntary assumption of the risk or volenti non fit injuria applies.

If it could somehow be found that some of the manufacturers of asbestos products sold defective products used by this plaintiff and that the obvious nature of the danger involved in their use was not sufficient to escape responsibility because of the likelihood of use by some employee who was not made aware of the danger because of the intervening negligence or misconduct of insulation contractors, he would not be able to recover if he himself became aware of the risk of asbestosis before it became too late for him to cease work of this nature. This would be because the aspect of the defendant's conduct that was the basis for his liability was the failure to bring to his attention the risks and dangers involved. But if he himself acquired this information, through his labor union, through consultation with his doctor, and as a result of signs and symptoms of coughing and shortness of breath, in time to have avoided his disability, there can be no recovery for this disability.

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In Comment N to Sec. 402A of the Rest. of Torts, it is said that contributory negligence of the plaintiff is not a defense to strict liability when such negligence consists merely in a failure to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk is a defense under this section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred of recovery.

This distinction between assumption of the risk and contributory negligence in failing to discover a defect has been recognized in a number of cases. Thus, in Baker v. Rosemurgy, 4 Mich. App. 195, 144 NW (2d) 660 (1960) liability was denied to the purchaser of a rifle who used it with knowledge that it was defective. In Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A (2d) 746 (1966) it was a complete defense to strict liability in tort that the buyer, aware of defect, voluntarily and unreasonably proceeds to use a product or encounter known danger. Applying this rule, it was for jury to say whether it was unreasonable for plaintiff to continue to use truck with knowledge of defects

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(wheel locking and accelerator pedal dislodging). In Preston v. Up-Right, Inc., 243 Cal. App. (2d) 636, 52 Cal. Reptr. 679 (1966) plaintiff was required to prove he was injured while using product in a way it was intended to be used as a result of defect in design or manufacture of which plaintiff was not aware that made the article unsafe for its intended use.

The cases are not clear as to whether voluntary exposure is by itself sufficient. In Baker, supra, involving the rifle, use with knowledge of the danger were sufficient to bar recovery, and this would seem to be the rule in any case where a manufacturer's duty was satisfied by giving notice of danger as it would be with respect to virtually all cases involving alleged design defects as to be distinguished from miscarriages in the manufacturing process. While the Supreme Court of Texas has held that contributory negligence in failing to discover or guard against a defect does not bar recovery, it has recognized the defenses of assumption of the risk and misuse. McKisson v. Sales Affiliates, Inc., 416 SW (2d) 787 (Tex. 1967); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 SW (2d) 779 (Tex. 1967).

The best statement of the policy which bars recovery of a plaintiff who chooses to encounter a known risk in the use of a product was by Judge Gewin of the Fifth Circuit in McDevitt v. Standard Oil Co. of Tex., 391 F (2d) 364 (1968). The basic

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purpose of strict liability is to provide judicial protection for the otherwise defenseless consumer who usually will lack the ways and means to discover or prove the defect in a product he purchases in reliance on the massive advertising campaigns and widespread acceptance.

MISUSE AND PROXIMATE CAUSE

Misuse of a product or use of a product with knowledge and appreciation of a dangerous condition will often constitute a new and independent intervening cause thereby insulating the manufacturer for any liability either on a negligence theory or on a theory of strict liability. Plaintiff has the burden of proof to establish that a defect in a product, if any, was a proximate cause of his injuries. Therefore, he must be able to negative the existence of any new and independent intervening acts on the part of users.

Since it is almost certain that the extent of the concentration of particles emanating from the insulation product and the hazards associated with such dusty conditions were produced in part by conduct of insulation contractors, plaintiff cannot recover as a matter of law simply because of his inability to show that proximate cause requirements are satisfied.

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Ford Motor Co. v. Wagoner, 192 SW (2d) 840 (Tenn. 1946) is one of the leading cases on this proposition. In that case, an action was brought against a manufacturer for negligence in the sale of a car with a defective catch in the hood. This design defect on the model in question was discovered and notice given to the purchaser of the defect. Although the purchaser was requested to return the car for repairs, he failed to have it fixed, and sold it to another without disclosing the danger. While plaintiff was driving the car as the guest of the owner, the hood flew up, plaintiff's vision was obscured, and he was injured in an ensuing wreck. The court, in holding that the defendant manufacturer could not be liable because the defect could not be regarded as a proximate cause of plaintiff's injury, said:

"Is it conceivable that he (the original purchaser who became aware of the defect) could have maintained an action against his vendor under the circumstances? Surely, he would have been held to have assumed the risk . . . . on the same grounds and for like reasons he became a conscious agency, which intervening destroys by his negligent act of omission the causal connection between the first person concerned, Ford Company, and the ultimate injury sustained by the plaintiff."

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This principle has been generally followed and defendants are aware of no courts holding the contrary. Those who suffer harm as a result of a dangerous characteristic of a product that became known to the ultimate purchaser before the damaging event occurred have frequently been denied recovery for any harm resulting from negligence in the use of the product thereafter. Kapp v. DuPont de Nemours & Co., 57 F. Supp. 32 (E.D. Mich. 1944); Harley v. General Motors Corp., 103 SE (2d) 191 (1958); Ford Motor Co. v. Atcher, 310 SW (2d) 500 (1957); Ford Motor Co. v. Wagoner, 192 SW (2d) 840 (1946). In the last cited case, the court said:

"By its very nature a latent defect ceases to be latent when it is discovered. In order to recover under the theory of the law relied on by the plaintiff here, the injury sued for must have occurred while the defect was still latent. In the instant case, the plaintiff's father discovered the defective condition of the accelerator rod before it had caused any injury . . . . once the defect was discovered and the dangerous condition became apparent, that discovery insulated the manufacturer from any damages resulting from its manufacture of a latently defective machine."

In DeFelice v. Ford Motor Co., 255 A (2d) 636 (1969), the defendant set up by way of a special defense to an allegation that the car was improperly designed that plaintiff was

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operating the car at a rate of speed that was excessive, etc. The court held that this raised an issue of proximate cause even if contributory negligence was not a defense, and the court went on to say that the burden under strict liability still remains on the plaintiff to prove that an alleged defect was a proximate cause of his injuries.

In Freeman and Friedman's comprehensive treatise on products liability, Sec. 1601(3), they say:

"While it is clear that plaintiff need not prove negligence in a warranty-products liability case, it is not clear whether contributory negligence as such is a defense to such an action. While there is authority to the contrary, it is arguably the better view that contributory negligence as such as distinguished from misuse of the product is not a defense."

Thus, it is that whereas contributory negligence in failing to discover a defect is not a defense to strict liability in Texas, misuse or use with knowledge of the existence of a defect will bar not only the users recovery but also that of any one else simply because such misuse constitutes the sole proximate cause of the injury.

In McKisson v. Sales Affiliates, Inc., 416 SW (2d) 787 (Tex. 1967) and Shamrock Fuel Oil & Sales Co. v. Tunks, 416 SW (2d) 779 (Tex. 1967) the Supreme Court of Texas in holding

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that contributory negligence in failing to discover or guard against a possible defect did not bar recovery specifically distinguished misuse or improper use from such a category. Citing and referring to Comment (N) of Sec. 402A of the Restatement of Torts. In Shamrock, the jury found that the minor plaintiff was contributorily negligent in directing his brother to pour the kerosene upon a smouldering stick, and that such negligence was a proximate cause of his injuries sustained as a result of an explosion. The court said that it was unnecessary to decide whether or not improper use, as well as use with knowledge of a defective condition would bar recovery since the issue was too broadly submitted to make it possible to identify the various reasons jurors might have had for concluding that there was contributory negligence. In so saying, the court did not disapprove of a statement made in the opinion of the Court of Civil Appeals that if by reason of the manner in which plaintiff used the product, he would have been injured had the kerosene conformed to the statutory standard, he would be barred of recovery. This statement is most important because of its relevance to plaintiff's claim in this case. It is more likely than not that misuse and negligence in the use of the insulation products containing asbestos contributed to the development of plaintiff's disability of asbestosis.

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There is good sense and sound policy underlying the notion that misuse or improper use should insulate a manufacturer from liability on theories of strict liability. In such a case as this, even if it were reasonable to conclude that a maker, notwithstanding the great utility of his product, should be responsible for those who suffer harm when the product is used as it was intended to be used, surely the allocation of such a risk to a non-negligent party would not make sense when a person can be located who was guilty of culpable conduct in causing the injury. The imposing of risks of accidents on blameless manufacturers for harm produced by misuse of their products would vastly increase the price of products and would encourage irresponsibility in the use of all products. In one of the landmark cases on products liability, the following statement was made in Judge Traynor's opinion: "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which the plaintiff was unaware that made the Shopsmith unsafe for its intended use."

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WHEREFORE, the defendants say that the plaintiff does not have a cause of action under the existing law and the facts, and each pray that the Court grant it a summary judgment in this cause that plaintiff take nothing.

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