PLAINTIFF'S EXHIBIT
UC-536

COMMENTARY ON MEMORANDUM OF APRIL 30, 1975
ON OSHA REGULATIONS-ASBESTOS USE WARNINGS

The commentary on the letter has been done in two parts; one covers the letter itself and the other presents specific remarks on the five recommendations. The memorandum opens with a discussion of §402A liability as it applies to a "defective" product. We are not selling a "defective" product so it is not clear how this is relevant to our problem. The real heart of the matter would seem to lie with comments k and l, i.e.,

> "recognition has been given to those products which are inherently dangerous, incapable of being made safe, and yet their utility to the consumer market counter-balances the risk."

There are two portions of this statement which deserve careful examination, 1) "incapable of being made safe," and 2) "consumer market." If "consumer market" means the general public, that is the type of end use now being studied by the CPSC and the FTC. Very little of our product reaches this market without being materially altered in ways to reduce the potential to produce airborne dust. If "consumer market" means industrial users the situation is obviously different. We need an interpretation of this relative to where our warnings should go.

The phrase "incapable of being made safe" also presents an interesting consideration. Dry, open, asbestos fiber has a definite tendency to become airborne when handled. We have a great deal of data that shows that our asbestos can be handled in a way that the airborne fiber levels are below the OSHA limits. The potential is constantly present, however, that the material can be mishandled to exceed these levels by a substantial amount.

It is technically feasible to treat our opened products to greatly reduce or eliminate their potential to cause airborne dust under normal handling situations (except abrasion when held by certain binders). One of our competitors, Johns-Manville, has already done this with a product used in the drilling industry and the patent literature contains a substantial amount of information on other applications. It would seem to me that treating our products to make them virtually dustless would be an outstanding defense under general liability. On the other hand, failure to do so, particularly in areas where others have, might leave us wide open to charges of defective product; i.e., one which could be rendered safe but was not, regardless of the extent of our warnings. Commentary on this by counsel is suggested.

The next section of the letter where a question occurs is in the discussion of compliance with OSHA regulations as a defense against strict liability. A number of cases "brought by a private citizen" are cited and the statement is made that "Section 16 of the OSHA regulations provides that states may assume jurisdiction where OSHA does not apply." This leads to the critical conclusion that we must do considerably more than comply with OSHA to avoid responsibility under strict liability.

The mention of "private citizen" and "where OSHA does not apply" leads to the following areas that need clarification:

1. Do the cases cited cover the situation where the exposure causing the alleged injury took place only in the industrial situation and where the appropriate state or federal regulations were complied with?

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2. Our products used in the United States will usually pass through an industrial handling that will be regulated by the Federal OSHA standards or by a state enforced standard that is at least as stringent as the Federal. We would not appear to be involved here with a situation here where the state is "assuming jurisdiction where OSHA does not apply." Is it correct that under these circumstances we can be sued for an occupational injury that occurs even though the employer complies with all applicable regulations?

3. Are we making a clear-cut distinction in our planning between an injury that occurs in an occupational setting and one which occurs to a private citizen who purchases a product containing our asbestos?

In essence, the thing that bothers me here is the situation where the Federal Government held extensive hearings, consulted a wide variety of experts, allowed cross-examination of witnesses, and, after evaluation of the input, promulgated a regulation that was required by law to protect the health and safety of the workers. The procedure used to arrive at the regulation was subsequently upheld in court. Is it really true that the company manufacturing asbestos must have superior wisdom and go beyond these regulations to protect itself against liability arising from occupational use of asbestos within the scope of the regulations?

The last general comment concerns the section that discusses "adequate warning" and concludes that the OSHA warning is obviously inadequate. The OSHA warning starts with the words "Caution" in capital letters on a single line. It is followed by the key statement:

"... breathing asbestos dust may cause serious bodily harm..."

In contrast the Borel label does not use any direct warning word, does not say that the effects may be serious and adds the qualifications of "excessive quantities" and "long periods of time." Thus:

"Inhalation of asbestos in excessive quantities over long periods of time may be harmful."

The OSHA wording is admittedly much less alarming than "can cause permanent lung damage such as asbestosis, mesothelioma or other cancers," but I submit that it is considerably stronger than the Borel label and it is by no means obvious that it is inadequate.

Comments on the specific recommendations are as follows:

1. There is no question that Union Carbide Corporation should continue to use the OSHA label.

2. The question of the second label has been discussed adequately elsewhere.

3. Regarding a literature file that includes both positive and negative articles, I feel that this is an ineffective way to handle the situation.

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a. The positive articles are used to counter the massive negative publicity that appears in the press. The customer already has the other side.

b. Any customer who has the competence to read and evaluate the serious literature in the field already has access to it.

c. Unless we put together a specified balanced package and insist that the field representatives use it, the negative information will stay in the files.

It is suggested that literature like "Asbestos and Health" and concensus articles like the "WHO Summary" and the "NAS Report" are adequate and appropriate to do the job. A more complex approach would be a summary like "Asbestos and Health" edited to mention the adversary position. This would have to be blessed by some recognized medical authority like Dr. Wright.

4. Regarding the MSDS, I agree that there are certain statements that can be misleading and should be changed. The same comments made previously regarding the wording of the revised warning apply here.

5. Regarding our obligations to make a reasonable effort to "acquaint anyone who comes into direct contact with asbestos with the hazards," some definition is needed. This should certainly be limited to those whose contact is above the action level. The OSHA regulations proposed recently contain an employee information requirement. This may help take care of the problem for all users who handle fiber.

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