Attachment 3

The Attorney General's Asbestos Liability Report to the Congress

Pursuant to Section 8(b) of the Asbestos School Hazard Detection & Control Act of 1980

September 21, 1981

PLAINTIFF'S EXHIBIT
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SOTA-151

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IV. INDUSTRY AWARENESS OF ASBESTOS HEALTH HAZARDS

This section discusses the issue of asbestos industry awareness of occupational health hazards. What asbestos manufacturers knew or should have known is important for purposes of establishing "failure to warn," "failure to test," and "foreseeability of harm." These elements are predicates for the restitution and products liability theories of recovery, discussed in Section II of the Legal Issues Section of this report.

For example, plaintiffs may attempt to impute knowledge based on such things as a 1918 bulletin on "Mortality from Respiratory Diseases in Dusty Trades," by the U.S. Bureau of Labor Statistics reporting "that it was the practice of American and Canadian insurance companies not to insure asbestos workers due to their assumed health risks." 60/

The focus of discussion here however, is a series of letters allegedly between various members of the asbestos industry recently discovered during products liability litigation. 61/ These letters have been used by plaintiffs in products liability litigation against the industry to contend that members of the asbestos industry sought to obscure data on the relationship between asbestos exposure and disease.

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60/ Asbestos Litigation Reporter, February 7, 1979, reprinted in 1979 Hearings, supra note 2, at 485, 492.

61/ The documents referred to in this section were produced in litigation against the industry in Barlieb v. Turner & Newall, Ltd., Civil Action No. 78-1027 (E.D. Pa., Consolidated Nov. 26, 1980).

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It is stressed at the outset that industry defendants may dispute the authenticity of the documents cited in this section, or may otherwise contest the of conclusions drawn from the documents. We do not attempt to raise or resolve such issues, but do set forth examples of the documents, since the government obviously may attempt to use them to help prove "failure to warn," "failure to test," and "foreseeability of harm," if litigation should be brought against asbestos manufacturers to recover the costs of abating asbestos hazards in the schools.

While the narrative of the following documents is set forth in an affirmative style to aid comprehension - inserting the word "allegedly" in every sentence would become painfully repetitious -- we expressly caution that there may be perfectly valid objections as to the authenticity or admissibility of any or all of the letters, reports, studies, minutes, or other documents discussed or quoted, in the remainder of this section.

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In a December 10, 1934 letter from Vandiver Brown, General Counsel for Johns-Manville, to Dr. A.S. Lanza, Medical Director of the Metropolitan Life Insurance Co., Brown pointed out that Lanza omitted from a galley proof of an article he was preparing, entitled, "Effects of the Inhalation of Asbestos Dust on the Lungs of Asbestos Workers," observations appearing in the original draft which minimized the seriousness of disease due to asbestos exposure. Brown went on to say, "observations included in your original report presented an aspect of your survey that was favorable to the industry and we should like to see them retained."

On September 25, 1935, A.S. Rossiter, editor of Asbestos, wrote to Sumner Simpson, President of Raybestos-Manhattan, requesting permission to report on asbestosis and the work being done to reduce or eliminate the disease. Rossiter stated that "[a]lways you have requested that for certain obvious reasons we publish nothing, and, naturally your wishes have been respected." On October 1, 1935, Sumner Simpson wrote to Vandiver Brown about the letter from Rossiter and commented, "I think the less said about asbestos, the better off we are, but at the same time, we cannot lose track of the fact that there have been a number of articles on asbestos dust control and asbestosis in the British trade magazines." Simpson further commented on Rossiter's cooperation

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saying "[t]he magazine 'Asbestos' is in the business to publish articles affecting the trade and they have been very decent about not reprinting the English articles." Vandiver Brown replied on October 3, 1935, "I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity."

Regarding foreign research, Brown suggested to Simpson that th

> warn the editors to use American data on the subject rather than English. Dr. Lanza has frequently remarked, to me personally and in some of his papers, that the clinical picture presented in North American localities where there is an asbestos dust hazard is considerably milder than that reported in England and South Africa.

The industry allegedly began supporting its own research at Saranac Laboratory, Saranac, New York.

Simpson wrote to F.B. Schluter, President of Thermoid Rubber Co., on November 10, 1936, describing a proposal for asbestos manufacturers to take over Dr. Gardner's study on dust at Saranac Laboratory, each one paying an equal amount. After completion of the research, the subscribers could then decide whether to publish the results. Simpson added, "My own idea is that it would be a good thing to

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distribute the information among the medical fraternity, provided it is of the right type and would not injure our companies." Simpson stated that the industry needs information to support them in Court and that "[w]e do know that Asbestos Fibres can, and do, get into the lungs, and may set up a Fibrosis condition, which, for want of a better name, some doctors have called Asbestosis."

On November 20, 1936, Vandiver Brown, sent a letter to Dr. Gardner regarding the terms of agreement for research by Saranac Laboratory for the asbestos industry. The agreement included the understanding that:

> the results obtained will be considered the property of those who are advancing the required funds, who will determine whether, to what extent and in what manner they shall be made public. In the event it is deemed desirable that the results be made public, the manuscript of your study will be submitted to us for approval prior to publication.

Having embarked upon the three year study of asbestos dust at Saranac Laboratory, Simpson wrote to Rossiter (Asbestos magazine) on March 22, 1939, about means of dust abatement, and of his intention to hold back such information until the report is completed. Simpsen added, "I can tell you confidentially, but am not willing to make it public, that the air can be kept below five million microns, with proper controls, but I am not willing to start a controversy with my competitors." On March 23, 1939, Rossiter responded

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in a letter to Simpson, expressing his understanding that any preliminary research from the Saranac research should be kept confidential:

> The information you give as to your Saranac investigation is most interesting. Of course we understand that all this information on asbestosis is to be kept confidential and that nothing should be published about asbestosis in "ASBESTOS" at present.

It has been asserted that "[f]rom the war years on, an avalanche of data was forthcoming from the scientific community about the relationship of asbestos to asbestosis and cancer." 62/ In 1949 a health survey of 708 Johns-Manville employees was completed. The company's report found that 75% of the workers (534 of 708) given x-rays showed as a minimum some degree of fibrosis of the lungs. Nevertheless, it is alleged that the conclusions and recommendations were neither made public nor communicated to the workers. The report stated:

> X-rays of these men show that the increase in fibrosis of the lung is directly proportional to the length of exposure to asbestos dust.
>
> There are 7 cases of asbestosis and 52 cases in a "Pre-Asbestosis Group." These 59 are probable compensation claims.

Another 475 had early signs of a non-specific fibrosis, "all of whom will show progressive fibrosis if allowed to continue working in dusty areas." The report further stated:

62/ Asbestos Litigation Reporter, supra note 60, at 488.

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> It must be remembered that although these men have the x-ray evidence of asbestosis, they are working today and definately [sic] are not disabled from asbestos. They have not been told of this diagnosis for it is felt that as long as the man feels well, is happy at home and at work, and his physical condition remains good, nothing should be said.... [A]s long as the man is not disabled ... he can live and work in peace and the Company can benefit by his many years of experience. Should the man be told his condition today there is a very definite possibility that he would become mentally and physically ill, simply through the knowledge that he has asbestosis.

Although the men were not disabled at the time from asbestosis, the report conceded that the fibrosis was irreversible and employees with this condition had a more difficult time when stricken by secondary infections such as pneumonia and influenza. An August 1949 memo attached to the survey commented on the results:

> The conclusions seem unavoidable -- that the dust is causing significant lung changes in many cases, it largely being a matter of time, and the further conclusion that many cases are likely to result in claims.

If in fact such a study was performed and the results deliberately withheld, the results may have been extremely unfortunate. It may be argued that workers with early fibrosis could have changed occupations, thereby escaping later death or disablement had they known of the danger. New and future workers could have demanded safeguards or exercised an informed choice to engage in

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other occupations. The shareholders of the company may have been forewarned. 63/ Medical and public knowledge of the hazards of asbestos fibers may have been significantly advanced if the results of the study had been disseminated.

The documents which may be used in attempts to support claims against manufacturers, were allegedly not confined to one or two members of the industry. Additional documents may be used to contend that the Asbestos Textile Institute (ATI), an industry association, discouraged research and publication that would confirm the carcinogenicity of asbestos fibers.

Minutes of the June 9, 1955 General Meeting of the ATI discussed two proposed studies -- a cardio-pulmonary study, and an autopsy study. The cardio-pulmonary study "would be desirable," but was rejected because of the "inability of member companies to obtain candidates for participation in the project." The autopsy study "was considered ill-advised at this time due to its implication that a relationship existed between asbestosis and carcinogenic development, a condition which, to date, has not been established although it has been given rather wide-spread publicity in the press."

63/ Johns-Manville had its financial statement qualified by its auditors because of the growing, but unknown ultimate cost of asbestos litigation to the company. See Asbestos Litigation Reporter at 3,056-59 (Mar. 13, 1981).

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On March 7, 1956, the ATI Air Hygiene Committee and the Board of Governors met separately. The minutes of these meetings discussed, "A Quest Into the Environmental Causes of Cancer of the Lungs," Public Health Monograph No. 36 (1955), by Dr. W.C. Hueper, Chief of Environmental Cancer, National Cancer Institute, National Institute of Health, Bethesda, Maryland. The Air Hygiene Committee reported that the publication "ties together Asbestosis and Cancer throughout - creating a new word for the Medical Dictionary such as Asbestosis-Cancer," and that according to Dr. Hueper, "Asbestosis-Cancer can be found after exposure of 6 months to 42 years in ages of people from 25 to 65 years.... According to him all workers in this industry are susceptible." Hueper also had suggested the presence of environmental hazards due to asbestos by "infer[ring] that Asbestosis-Cancer may be determined in an autopsy performed on persons living in the area of a plant."

Dr. Kenneth Smith, Medical Director of Johns-Manville Corp., characterized Hueper's Public Health Monograph No. 36, as well as other Hueper publications, such as "Silicosis, Asbestosis, and Cancer of the Lung," as "damaging information." Consequently, Smith recommended to the Air Hygiene Committee that the ATI "begin a study of the relationship of Lung Cancer to Asbestosis in our industry." Dr. Smith said that

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"he has no evidence that there is <u>not</u> a relationship between Asbestosis and Cancer," and that the study be performed by the Industrial Hygiene Foundation of America, Inc., Mellon Institute, Pittsburgh, Pennsylvania.

The Air Hygiene Committee reported to the ATI Board of Governors on March 7, 1956. The minutes stated that:

> [m]uch of the information set forth in [the Hueper] report is unsubstantiated and is in variance with established understanding and knowledge of informed men in the medical profession. However this article is apparently assumed to be the only authentic treatise today....

Dr. Smith then recommended before the Board of Governors that the ATI "initiate a program of investigation and publicity to counteract the unfavorable publicity presently directed to the asbestos industries as a result of the work of Dr. Hueper."

On March 8, 1956, minutes of the General Meeting of the ATI also discussed the Hueper report. It was announced at this meeting that the Board of Governors "appropriated sufficient funds to initiate a preliminary survey to investigate the possibility of more concerted action designed to refute the work of Dr. Hueper."

One year later to the day, March 7, 1957, the Air Hygiene and Manufacturing Committee of ATI met. They discussed and rejected two memoranda on proposed studies prepared by the Industrial Hygiene Foundation (IHF) for the ATI. Both studies were rejected. The first, "Memorandum on Proposed Epidemiological Study of

Lung Cancer in Asbestos Workers," was rejected because "[t]here is a feeling among certain members that such an investigation would stir up a hornet's nest and put the whole industry under suspicion." The second, "Memorandum Regarding Environmental Dust Survey," was turned down because ATI "did not believe it to be of great enough value to justify the cost." In an April 26, 1957 letter, D.R. Holmes, Chairman of the Air Hygiene Committee informed Dr. Daniel Braun, Medical Director, Industrial Hygiene Foundation, that the ATI had rejected both IHF proposals.

The Johns-Manville Health Review Committee minutes of 1957 and 1958 between a team of doctors and company officials, discussed the health of various employees. The focus was on potential liability -- whether funds should be set aside for impending claims, whether employees should be told about their medical conditions, and whether the reason for a transfer should be discussed with a worker. Dr. Smith commented during a March 5, 1958 meeting on the medical condition of various employees, "We take the x-rays for our own protection, not for social obligation." And regarding the use of a respirator which would protect a worker, C. Sheckler, a Johns-Manville official commented, "I would rather see us move him out than wear a respiratory [sic]. All the key men, salaried employees, are in this area. If I move Trilone, I might as well see him off."

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In a December 30, 1957 letter to Ivan Sabourin, Quebec Asbestos Mining Association (Q.A.M.A.), Dr. Smith commented approvingly on the condensation of a survey by the Industrial Hygiene Foundation, Mellon Institute, which deleted all references to the association of asbestosis and lung cancer, and the reference to smoking and lung cancer. Smith then reminded Sabourin that "this report will be subjected to criticism when published because all other authors today correlate lung cancer and cases of asbestosis."

It has been asserted that it was not until 1964, when the report by Dr. I. J. Selikoff was published on his study of 1,500 workers showing a high incidence of cancer, that some of the asbestos companies began providing warnings to accompany some of their asbestos products. 64/ The seminal case in asbestos products liability litigation however, found these post-1964 warnings to be inadequate:

> It should be noted that none of these so-called "cautions" intimated the gravity of the risk: the danger of a fatal illness caused by asbestosis and mesothelioma or other cancers. The mild suggestion that inhalation of asbestos in excessive quantities over a long period of time "may be harmful" conveys no idea of the extent of the danger. The admonition that a worker should "avoid breathing the dust" is black humor. There was no way for insulation workers to avoid breathing asbestos dust. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 at 1104 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

64/ Asbestos Litigation Reporter, February 7, 1979, reprinted in 1979 Hearings, supra note 2, at 488.

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In 1969, at Johns-Manville:

> A policy of refusing to sell asbestos fiber for non-essential uses that might unduly expose the general public to the inhalation of asbestos dust, has been established. For example, during the year, Johns-Manville ceased selling fiber to manufacturers of modeling compounds used in grade schools.... 65/

There are approximately 10,000 asbestos liability cases now pending, most of which have been brought by workers who used asbestos products on the job, seeking recovery from asbestos manufacturers for death or disablement. The most widely cited asbestos products liability decision concluded that "[t]he unpalatable facts are that in the twenties and thirties the hazards of working with asbestos were recognized....During his working years, he [Borel] received no warnings of any kind from three of the six defendants. The other three defendants issued no warnings until 1964-1966, by which time adequate warnings would have come too late for Clarence Borel." Borel v. Fibreboard Paper Products Corp., 493 F. 2d 1076, 1106 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

In conclusion, the state of medical (discussed in section III, infra) and industry knowledge (discussed here) of the hazards of asbestos fibers may be contended to be sufficient to impute a "duty to warn" and a "duty to test" to the manufacturers of asbestos products, and to provide a basis for asbestos school hazard claims against them based on restitution, strict liability, and negligence. 66/

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65/ Report to the Board of Directors on Asbestos and Health, Johns-Manville, June 15, 1969.

66/ See Summary Section of Legal Issues portion of this Report, infra.

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Finally, it is again stressed that there may be perfectly valid objections as to the authenticity or admissibility of any or all of the purported industry documents that have been discussed or quoted here. At the same time, it should be recognized that foreseeability, failure to warn, and failure to test were established in the Borel case prior to discovery of these documents, based on imputed knowledge of the types of medical studies discussed in section II, infra, including the 1938 Public Health Service Report, and the 1945 Fleischer-Drinker Report. See discussion of Borel decision at p. 139, supra.

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A. Duty

The predicate for an action related to asbestos in the schools is to establish that the defendant had a duty to the plaintiff.

> [A] manufacturer or even a dealer has a responsibility to the ultimate consumer, based upon nothing more than the sufficient fact that he has so dealt with the goods that they are likely to come into the hands of another, and to do harm if they are defective. 105/

This responsibility has become generally accepted since the manufacturer of a car with a defective wheel was held liable for negligence to the ultimate purchaser, who was injured by the vehicle's collapse, in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

The asbestos manufacturers, therefore, have been subject to a duty not to cause foreseeable harm to purchasers of their products, or to those in the vicinity of the product's probable use. 106/ This duty is similar under the relevant theories of action. This Report reviews restitution, and the products liability theories of strict liability, negligence, and implied warranty.

B. Breach of Duty

To the extent that friable asbestos is dangerous, the danger appears to be "inseparable from a properly made product of the

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105/ Id. at 642.

106/ Id. at 662.

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particular kind." 107/ However, the products may also have been improperly designed -- "[a]sbestos product manufacturers say that such [health] problems have now been eliminated by binding asbestos into other materials or encapsulating it so that the deadly fibers cannot escape." 108/

In Section I it was pointed out that asbestos has many important uses. However, a manufacturer, even of a useful, properly made product, may still be held negligent for failing to test a product to discover dangerous propensities, pursuant to the standard expected of an expert in the field, 109/ or for failing to give adequate warnings of unreasonable dangers which it knows, or should know, arise from the use of the product. 110/ "The warning must be sufficient to protect third persons who may reasonably be expected to come in contact with the product and be harmed by it." 111/ These duties -- to test and to warn -- appear to be the specific duties making up the asbestos manufacturers' general duty to not cause harm to the users of friable asbestos.

There appear to be two alternative resolutions of the breach of duty issue. First, it may be determined as a matter of law based on previous asbestos litigation that there clearly was a duty to warn of the dangers of friable asbestos used in the

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107/ See id. at 647.

108/ New York Times, July 6, 1981 at D2.

109/ Prosser, Law of Torts at 644 (4th ed. 1971).

110/ Id. at 646-7.

111/ Id. at 647.

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schools. The only remaining issue would be the factual one of whether warnings -- if any -- were adequate. Or, a court could hold that there is an unresolved foreseeability issue based on the difference in the risk caused by environmental exposure of students and school employees to friable asbestos, as contrasted to work-place exposures of factory workers and insulation installers to asbestos. 112/

It was pointed out in Section IV that a pivotal asbestos liability case, Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1104 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), determined that all of the asbestos manufacturers involved in that case provided no warnings accompanying their products prior to 1964, and that the warnings several of them provided after that date were inadequate. In Section VI, it was pointed out that the two defendant asbestos manufacturers who have responded to discovery in school district litigation have admitted failure to test, and were unable to show that warnings accompanied their products. In fact, industry documents summarized in Section IV show that leading asbestos manufacturers and the then-active industry trade association -- the Asbestos Textile Institute -- actively sought to obscure data linking occupational asbestos exposure to asbestosis and cancer.

112/ Cf. Kariala v. Johns-Manville Products Corp., 523 F.2d 155, 158 (8th Cir. 1975) (upholding jury instruction under which jury decided issue of whether known danger to factory workers put manufacturer on notice of danger to insulation workers).

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The asbestos manufacturers had duties to test and to warn if the "harm" suffered by school districts, or threatened against the students and employees for which the school districts are responsible, was or should have been foreseeable.

Clearly, asbestos is a carcinogen. 113/ However, "products containing asbestos fibres have great utility in an industrial society. . . . Asbestos-related cases provide the courts with a classic utility versus danger evaluation." 114/

Because asbestos products both have great utility but pose grave danger, 115/ the court in Hardy v. Johns-Manville Sales Corp. has held "that the only way for insulation products which contained asbestos to escape the strict liability conclusion that the products were unreasonably dangerous as marketed was for such products to have been marketed with an adequate warning." 116/ "The danger of the generic ingredient is the same irrespective of the finished product. The degree of danger may vary with the finished product and, consequently, the duty to warn may vary." 117/ The court also held that the duty to warn of the danger posed by asbestos

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113/ See Section III, infra; Reserve Mining Co. v. EPA, 514 F.2d 492, 508 (8th Cir. 1975), modified, 529 F.2d 181 (8th Cir. 1976); Hardy v. Johns-Manville Sales Corp., 509 F.Supp. 1353, 1354-55 (E.D. Tex. 1981). Asbestos is treated as a toxic and hazardous substance under federal regulations. See 29 C.F.R. 1910.1001 (1980).

114/ Hardy v. Johns-Manville Sales Corp., supra, 509 F.Supp. at 1355.

115/ Id. at 1360.

116/ Id.

117/ Id. at 1362.

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has already been established by prior decisions -- by collateral estoppel, in the case of non-insulation products as well as the insulation products which were the subject of the first asbestos liability cases. 118/ However, "[t]he question of adequacy of a warning, if any was given, is a jury issue in the non-insulation cases." 119/

The conclusion is that as a minimum the known danger of occupational exposures to asbestos fibers should have caused the manufacturers to test their friable or easily damaged products to determine whether they would emit fibers after installation, thereby posing a hazard to consumers. 120/ If in fact the asbestos products do emit fibers -- and it appears that they do, as a result of common occurrences including deterioration, maintenance activities and student contact -- 121/ the duty to warn seems plain.

Accordingly, the duty to warn may be established in cases brought by or on behalf of school districts, either by way of

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118/ Id.

119/ Id. Collateral estoppel or "issue preclusion" may now be used offensively as well as defensively, and "mutuality" of parties is no longer required. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). The Circuits are not in accord as to whether federal collateral estoppel principles control successive federal diversity actions. Compare Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), cert. denied, 423 U.S. 908 (1975) (federal law) with Semler v. Psychiatric Institute, 575 F.2d 922 (D.C. Cir. 1978) (state law).

120/ Also, there clearly is a risk of exposure to workers during installation or removal of the products.

121/ See Sections V and VI, supra.

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collateral estoppel as the result of previous litigation, or as a readily demonstrable factual proposition. It also appears likely that the school districts will be able to establish failure to warn and failure to test.

C. Injury

The first task of any products liability plaintiff is to prove his injury. 122/ This involves two aspects; first, the factual existence of injury, and second, the issue of whether the injury is one for which recovery may be obtained.

1. Factual Nature of the Injury

The presence of friable asbestos can and does result in the release of asbestos fibers, which are carcinogenic, into the ambient air of schoolrooms. 123/ The Environmental Protection Agency estimates the prevailing concentration of asbestos in buildings having exposed friable asbestos-containing materials to be between 58 and 270 nanograms per cubic meter, whereas the "ambient air is usually below 10 nanograms per cubic meter." 124/ On the other hand, even the upper figure of 270 nanograms per cubic meter is extremely low in comparison to the occupational standard of 2 fibers per cubic centimeter 125/ which equates to 60,000 nanograms per cubic meter. But, the OSHA standard itself

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122/ White & Summers, Uniform Commercial Code, Section 9-1 at 326 (2d ed. 1980).

123/ See Sections V and VI, supra.

124/ 45 Fed. Reg. 61,966 at 61,969 (Sept. 17, 1980).

125/ 29 C.F.R. 1910.1001 (1980).

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has been criticized by the National Institute of Occupational Safety and Health as being "grossly inadequate" on the ground that there is no safe level of exposure to asbestos. Furthermore, an occupational standard which has been compromised by taking economic considerations into account does not establish that low level environmental exposures are not harmful. 126/

The fact is "[t]here are many reports of cases [of mesothelioma, a rare form of cancer] following short exposures -- a few weeks. Cases have followed exposure to dusty clothes in the home." 127/ At least one court has found that "mesothelioma may result from one exposure to asbestos dust or fibres." 128/

The contention that in the absence of warning -- which would allow the user to make an informed choice whether the utility of the product outweighs its dangerous propensities, friable asbestos products causing a significantly higher than normal exposure to airborne asbestos fibers are unreasonably unsafe, sounds reasonable. In fact, it has been held as a matter of law that "products placed in the stream of commerce containing asbestos are defective for the reason that the same are unreasonably dangerous to the consumer or user of the product." 129/

126/ See text in Section V, at 55, note 84, supra.

127/ J.C. Gilson, supra, Section III, note 38, at 400.

128/ Hardy v. Johns-Manville Sales Corp., supra, 509 F.Supp. at 1355.

129/ Mooney v. Fibreboard Corp., 485 F.Supp. 242, 250 (E.D. Tex., 1980). See also Hardy v. Johns-Manville Sales Corp., 509 (footnote continued)

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Also, Congress has found that "the presence in school buildings of friable or easily damaged asbestos creates an unwarranted hazard to the health of the school children and school employees who are exposed to such materials." 130/

This Report does not undertake to second-guess the Congress by attempting to resolve the issue of whether friable asbestos products are hazardous to students and school employees. The courts may make the determination that the products are hazardous either as a matter of law, by applying collateral estoppel, or by determining the disease relation of the product by resort to judicial notice of adjudicative medical fact, pursuant to Federal Rules of Evidence 201(b)(2), and (c). 131/ In the alternative, the issue of injury will be determined by juries or judges on the basis of expert scientific and medical evidence. It does appear clear that it will be necessary to establish that the products as used are hazardous, as a prerequisite to recovery.

2. Legal Nature of the Injury

Recovery for injuries caused by unreasonably unsafe products may be sought under the tort theories of strict liability and negligence, and the theory of implied warranty. The recoveries

(footnote continued)
F.Supp. 1353 (E.D. Tex. 1981); Flatt v. Johns-Manville Sales Corp., 488 F.Supp. 836 (E.D. Tex. 1980). But see McCarty v. Johns-Manville Sales Corp., 502 F.Supp. 335 (S.D. Miss. 1980).

130/ 20 U.S.C. 3601(a)(6) (1980).

131/ See Hardy v. Johns Manville Sales Corp., supra, 509 F.Supp. at 1362-63 ("Asbestos-related litigation is an appropriate candidate for collateral estoppel because it is a mass tort, a tort against a large undefinable group of people by industry.").

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