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ASBESTOS CLEANUP: CLAIMANTS IN SEARCH OF ABATEMENT COSTS

American courts have been forced to reckon with a new class of plaintiffs in the continuing saga of asbestos tort litigation. These plaintiffs are not asbestos insulation workers or other trade and factory workers who through occupational exposure have suffered severe personal injury by inhaling high levels of the toxic asbestos dust. Rather, they are a growing number of school districts and city and state governments which are filing property damage suits for identifying, removing and replacing or sealing the asbestos building materials already installed in their schools, office buildings and various structures.¹ The United States Environmental Protection Agency (EPA) estimates that abatement costs for over thirty thousand public school buildings alone could reach easily two billion dollars.² City and state claims to recover asbestos removal costs in offices, prisons, hospitals, universities and other government structures, have pushed the total abatement bill into the high billions.³ “The real wild card, however, is the possible cost of eliminating friable asbestos [easily crumbled] from other public and private buildings should more states, municipalities or private property owners seek to do so and then sue. [T]he industry’s potential property damage liabilities could soar exponentially.”⁴ A surge of claims resulted initially from the EPA’s announcement in 1982 that “friable” asbestos might be found in 31,000 school buildings and in about 733,000 commercial, residential-apartment and federal buildings.⁵


As the concern over asbestos continues to grow, a new industry has been born—the asbestos abatement industry. This industry encompasses the development and implementation of technology to provide safe and cost effective ways to rid buildings of the problems presented by asbestos.


⁴. Rublin, supra note 2, at 24, col. 1.

Although Congress has attempted to provide federal financing for a program to remove asbestos from public schools, the Reagan Administration believes that asbestos cleanup is a local responsibility. However, sponsors of the Asbestos Hazard Emergency Response Act of 1986 maintain that federal financing should be provided for cleaning up asbestos locally.

Recovery for property damage adds a new dimension to mass toxic tort litigation, particularly in a products liability "failure to warn" scenario. Over 30,000 pending personal injury claims for asbestosis and cancerous asbestos-related diseases have flooded the courts, and millions of claims for latent asbestos injuries could potentially hit the courts over the next thirty to thirty-five years.

This comment focuses on the pivotal issues involved in compensating the massive claims for asbestos abatement costs. First, it explains how the nation-wide asbestos problem spawned the claims for property damage. Second, it raises key legal and policy issues affecting the litigation of these claims or attempted recovery from special trust funds for asbestos property damage established by the bankruptcy courts.

THE EVOLUTION OF PROPERTY DAMAGE CLAIMS IN ASBESTOS LITIGATION

Asbestos is a natural mineral that has been widely used in the twentieth century. Its popularity is due to its versatility and favorable properties. Asbestos is a low cost product that is heat and chemical resistant, strong and provides acoustic insulation. Thus it became the building material of choice, particularly for school buildings constructed between 1940 and 1978. Asbestos material has been used for floor tiles, support beams, ceilings and a variety of...

6. See Battle is Looming on Asbestos Funds, N.Y.Times, Jan. 10, 1987, at A33, col. 1 (Congress is authorized to appropriate up to $125 million for asbestos cleanup projects, but the Reagan Administration's budget proposal for 1988 rescinds $47.5 million of $50 million allocated for this year.).

7. Id.


other insulation purposes.\textsuperscript{19}

The danger of exposure to asbestos in the workplace was confirmed in 1965 by the extensive study of Dr. I. Selikoff, head of Mount Sinai Hospital Environmental Sciences Laboratory in New York. The study concluded that "asbestosis and its complications are significant hazards among insulation workers."\textsuperscript{18} Insulation workers and factory workers exposed to asbestos dust have had a high incidence of asbestosis, a non-malignant scarring of the lungs, and mesothelioma, a malignant tumor of the lungs as well as other asbestos-related cancers.\textsuperscript{14}

Most exposure to asbestos in the workplace occurred after the beginning of World War II. Over four million naval shipyard workers were exposed to the toxic dust during the war.\textsuperscript{18} Asbestos-related diseases have appeared only in the past twenty years because of the long latency period associated with asbestos injuries. Since the landmark case \textit{Borel v. Fibreboard Paper Products Corp.},\textsuperscript{16} personal injury claims have flooded the courts. "Asbestos litigation is already the largest single product tort litigation in history."\textsuperscript{17}

The property damage claims arose out of the fear that exposure to installed asbestos building materials, could present a significant health hazard to a building's occupants. The asbestos industry maintains that the product, when properly installed and maintained, represents no risk at all.\textsuperscript{18} The degree of harm from most hazardous substances is related directly to the degree of exposure. This premise is hotly contested by the parties involved in asbestos litigation. Until 1972, exposure to airborne asbestos in the workplace measured as high as one hundred asbestos fibers per cubic centimeter of air (f/cc).\textsuperscript{19} The Occupational Safety and Health Administration's (OSHA) current standard for maximum average occupational expo-

\begin{flushleft}
12. Comment, \textit{supra} note 10, at 953 n.7.
13. Comment, \textit{supra} note 8, at 181.
15. \textit{Id.} at 181.
17. Comment, \textit{supra} note 8, at 182.
\end{flushleft}
sure is 2 f/cc and may still present a substantial hazard. But studies measuring asbestos concentrations in schools and other non-commercial indoor environments have shown that most are "tens of thousands of times less than historical worker exposure." This is because most of the asbestos building materials are often enclosed behind walls and ceilings or are products from which it is very unlikely that asbestos fibers can become airborne. In addition, school exposure involves chrysotile asbestos fibers which are softer, more stable and less hazardous than the harmful crocidolite or amosite asbestos fibers found in the workplace. The EPA found that 85-92% of asbestos end-product uses have effectively immobilized the asbestos fibers by mixing them into a strong binding material such as cement.

"Friable" asbestos, asbestos which is susceptible to easy destruction or which can be crushed by hand, can become airborne and, thus pose a threat to the inhabitants of a building. Many school districts fear that as their school buildings age and experience wear and tear, asbestos fibers will be released into the air and inhaled by students and school employees. But studies of materials presumed to be "friable" have shown almost no threat of fiber release.Only "friable" asbestos that is very old or unusually deteriorated can create a health risk. Consequently, most buildings with asbestos containing materials "will not result in fiber release and therefore will not threaten the health of children or building occupants."

Air samplings of schools and office buildings reveal very low fiber levels and therefore very low exposure levels for building inhabitants. Studies done by the Ontario Royal Commission in 1984 revealed that buildings containing asbestos insulation often registered fiber levels similar to buildings without asbestos and similar to fiber levels in the outdoor air. A study by the State of New Jersey study

20. Id.
21. Id.
22. Id. at 75 (asbestos fibers used or applied in liquid state are held down by the liquid and fibers embedded in solid material form solid products).
23. Id. at 86.
24. Id. at 75.
26. Id.
27. Cross, supra note 19, at 75. See Ontario Royal Commission Report.
28. Id. at 76.
29. Id.
30. Id. at 77.
actually found that "wet applied" asbestos indoors yielded lower concentration levels than outdoor levels in the same area.  A 1984 study by the EPA Office of Toxic Substances reported an average asbestos concentration of 0.0002 f/cc at twenty-four school sites.  Consequently, the EPA "acknowledges that in-school exposures are 10,000 to 100,000 times lower than levels in industry workplaces where asbestos-related diseases," have occurred.

As a result of the Toxic Substance Control Act of 1982, the EPA has mandated that all school districts inspect their buildings for "friable" asbestos products and notify parents and employees of their findings.  The Act defines "friable" asbestos as "any material applied onto ceilings, walls, structural members, piping, ductwork, or any other part of the building structure which, when dry, may be crumbled, pulverized or reduced to powder by hand pressure." But the EPA does not mandate any remedial action nor has it set any standard for "safe" environmental exposure levels.  Consequently, most school districts are taking precautionary measures and instituting some type of abatement procedure wherever "friable" or non-"friable" material is found in their school buildings.  "The real public hazard, [asbestos] industry members charge is the EPA, which by refusing to establish environmental asbestos safety thresholds, has failed to put the 'asbestos scare' in perspective."

A major problem the EPA faces in coping with the hazards of

32. Id. at 80.
33. Id.
34. See 40 C.F.R. § 763.100-.111 (1986).
35. 40 C.F.R. § 763.103(d) (1986). The regulation reads:
§ 763.103 Definitions.
For the purposes of this part:
(a) "Act" means the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601, et seq. [sic]
(b) "Asbestos" means the asbestiform varieties of: chrysotile (serpentine); crocidolite (riebeckite); amosite (cummingtonite-grunerite); anthophyllite; tremolite; and actinolite.
(c) "Asbestos-containing material" means any material which contains more than 1 percent asbestos by weight.
(d) "Friable material" means any material applied onto ceilings, walls, structural members, piping, ductwork, or any other part of the building structure which, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure.

Id.
36. Rublin, supra note 2, at 6, col. 1.
37. Id. at 7.
asbestos is that it is dealing with a carcinogen for which no exposure level is absolutely safe. "To the best of our current scientific knowledge, there is no threshold level below which there is zero risk from asbestos." A "margin of safety" from risk is therefore impossible to set. Thus, scientists assume that risk is proportional to exposure and must quantitatively assess the risk of environmental exposure based on the mortality data from the higher occupational exposure levels.

The EPA has concluded that the increased risk of cancer to school occupants is only ten in one million. This risk is comparatively low when measured against the rare risks a student faces from being injured by lightning (35 per million), tornadoes (49 per million), or hurricanes (28 per million). In addition, the EPA estimates that the risk from average school asbestos exposure is equivalent to the risk of cancer that a person who smokes five cigarettes per day would experience.

The Ontario Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos conducted an extensive study and concluded that "the risk which asbestos poses to building occupants to be insignificant and therefore...[found] that asbestos in building air will almost never pose a health hazard to building occupants." The Commission noted one exception—the elevated exposure level which results from the disturbance of asbestos, especially as a result of removal projects. The Commission observed that the real and immediate risk of the drive to school everyday is far more dangerous than the speculative and future risk of school-related asbestos exposure. The Ontario Commission and a special New Jersey Committee Report concluded that there is no demonstrable evidence of any harm from asbestos in buildings because there are no documented cases of lung cancer associated with low level asbestos exposure over a lifetime.

38. Cross, supra note 19, at 82.
39. Id. at 100 n.172.
40. Id. at 82.
41. Id. at 83.
42. Id.
43. Id. n.71.
44. Brief of National Gypsum Co. & W.R. Grace & Co. in Support of Motion for Transfer For Coordinated PreTrial Proceedings at 10, reprinted in ASBESTOS LITIG. REP. (Andrews) 9416 (Dec. 21, 1984). See also, ONTARIO ROYAL COMMISSION REPORT.
45. Cross, supra note 19, at 87.
46. Id. at 85.
School exposure has existed for over thirty years and if the theory of heightened susceptibility were true, we would have expected the number of non-occupational cases of mesothelioma to develop. The absence of such cases is strongly indicative of the fact that school exposures are so low that they are not a health problem.\footnote{Id. at 87.}

The EPA only recently proposed a plan to immediately ban five widely used asbestos materials and to gradually eliminate over ten years all mining, processing, manufacturing and importing of asbestos.\footnote{Shabecoff, \textit{E.P.A. Proposes Plan to Curb Asbestos}, N.Y. Times, Jan. 24, 1986, at A21, col. 1. (Proposed rule immediately bars use of asbestos roofing and floorings felts, vinyl asbestos floor tile, asbestos cement pipe and fittings and asbestos clothing.).} The proposed new rule, however, does not affect asbestos products already in use and the EPA would not require the removal of asbestos from private or public buildings or motor vehicles.\footnote{Id. at A21, col. 1.}

School districts, fearful of the speculative health risk and potential liability, nevertheless, have begun expensive abatement procedures. Hysteria and a crisis atmosphere have prompted the demand for total removal of asbestos containing materials not only by school districts, but also by other concerned groups such as Parent Teacher Associations (PTA's). Due to the huge costs involved in finding, covering, or removing and replacing the asbestos in school buildings, many districts have sought legal remedies to help recover their costs.\footnote{Comment, supra note 10, at 952.}

The Federal funds that have been allocated for asbestos abatement in the schools have proven to be insufficient.\footnote{Not only is the finding inadequate, but the competition for these funds is counterproductive because more time is spent seeking funds than is spent addressing the asbestos problem. \textit{Id.} at 956.} The Asbestos School Hazard Abatement Act of 1984 provides financial assistance to local educational agencies on a school by school basis for abatement programs.\footnote{20 U.S.C.A. § 4011-4021 (West Cumulative Annual Pocket Part 1987).} But § 4017 of the Act gives the federal government the right to sue on behalf of any financial recipient "any person determined by the Attorney General to be liable to the recipient for the costs of any activities undertaken by the recipient under such sections."\footnote{20 U.S.C.A. § 4017. The statute reads: § 4017. Liability for abatement activities and costs (a) Authorization of Federal actions against identified defendants; use of proceeds for repayment of loan, grant and interest.} The school districts' claims against the manufacturers of
asbestos are subrogated to the federal government, thereby increasing the number of suits against manufacturers. Moreover, the EPA has bowed to public pressure and is pressing school districts to remove asbestos and has threatened to file civil actions against those districts that have not "adequately dealt with the health problems posed by crumbling asbestos." Thus the asbestos companies are subject to a dual onslaught of lawsuits: directly from the school districts and indirectly from the federal government, when school districts apply for financial assistance to recover their costs. Public pressure on school districts is further adding to the numbers of "rip and replace" suits. For instance, teachers' and parents' groups in New Jersey have filed asbestos suits against school boards and also state education agencies.

The first national class action in a property damage product liability case was certified by a federal judge in Philadelphia on September 28, 1984. The action joined 14,000 school districts proceeding against fifty-five asbestos companies to recover their estimated cleanup cost of $1.4 billion plus undetermined punitive damages. "By certifying a class of all public school district and private schools in the nation, U.S. District Judge James Kelly with one stroke

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(1) As a condition of the award of any financial assistance under section 4014 of this title, the recipient of any such loan or grant shall permit the United States to sue on behalf of such recipient any person determined by the Attorney General to be liable to the recipient for the costs of any activities undertaken by the recipient under such sections.

(2) The proceeds from any judgment recovered in any suit brought by the United States under paragraph (1) (or, if the recipient files a similar suit on its own behalf, the proceeds from a judgment recovered by the recipient in such suit) shall be used to repay to the United States, to the extent that the proceeds are sufficient to provide for such repayment, an amount equal to the sum of—

(A) the amount (i) outstanding on any loan and (ii) of any grant made to the recipient; and

(B) an amount equal to the interest which would have been charged on such loan were the loan made by a commercial lender at prevailing interest rates (as determined by the Administrator).

(b) Expeditious Federal recovery Proceedings

The Attorney General shall, where appropriate, proceed in an expeditious manner to recover the amounts expended by the United States to carry out this subchapter from the persons identified by the Attorney General as being liable for such costs.


broadly expanded asbestos property damage cases.”

The aggressive asbestos abatement programs may actually be creating a far greater health problem than they are attempting to alleviate. “[M]any fly-by-night contractors with poorly equipped and poorly trained workers [have undertaken] asbestos removal without instituting proper precautions or procedures and by so doing, to stir up asbestos dust levels far greater and more hazardous than those they were supposed to be abating.” The Justice Department and EPA have charged three states, Conrail, a New Jersey school district and several other defendants with violating federal standards for the handling of asbestos.

The Clean Air Act, which regulates the use of asbestos, requires that asbestos material must be removed before renovation or demolition of buildings; must be kept wet from the time of removal until disposal and must be dumped in an approved disposal site. Despite these guidelines, one official at the Justice Department’s Land and National Resource Division has concluded that “[t]he emission of asbestos from renovation and demolition activity is a national environmental problem.” Poor removal jobs have created a great health risk to the abatement workers and have actually increased the airborne fiber levels that existed prior to the removal. Even removals conducted in accordance with EPA requirements stir up previously enclosed fibers and result in high airborne concentrations. The EPA recognizes “that removal is a ‘radical’ action that very often ‘generates significant levels of asbestos.’” The EPA found that even the best removal operation resulted in a concentration of 0.5 f/cc, a level significantly higher than the upper range of current school exposure levels. The National Institute of Building Sciences has warned Congress that unnecessary abatement is counterproductive and will only aggravate health risks to school children. Their researchers point out that removal risks are not only due to unqualified workers, but also to a lack of scientific knowledge and technology regarding how to conduct asbestos activities in a safe and

57. Brodeur, supra note 5, at 337.
60. Shenon, supra note 58.
61. Cross, supra note 19, at 89.
62. Id. at 90.
63. Id. at 91.
efficient manner.  

Maximum exposure levels for schools have been set in some jurisdictions. In Massachusetts and the Province of Ontario, the standard is 0.04 f/cc. Rhode Island’s standard is set at 0.01 f/cc because this level was found to be the lowest that removal can achieve. Thus removal of asbestos would be indicated for ambient air levels significantly above 0.01 f/cc. Otherwise, encapsulation or enclosure of the asbestos materials may be the preferred response.

The sparcity of property damage suits from the private sector may be only a temporary phenomenon. Many private companies have already spent large sums cleaning up their plants and offices. These companies may find it preferable to absorb these costs rather than pay the expense of complicated litigation. Furthermore, big corporations with lots of building space may be reluctant to publicize the presence of asbestos, especially if many employees and the public utilize the buildings. Finally, private companies face only slight public pressure to remove asbestos and there are no federal or state laws to compel companies to inspect and abate asbestos hazards. But this situation could change easily. If public pressure mounts or if the government enacts new rules for the private sector, private suits will multiply as quickly as the public ones.

The property damage suits are based on alternative legal theories of negligence, strict liability, breach of warranty or nuisance. The negligence and strict liability claims parallel those for personal injury. The negligence claim is founded on the manufacturer’s failure to warn that the asbestos materials may be a health hazard. The pivotal question here is what the manufacturer knew or should have known regarding the foreseeability of danger to school inhabitants at the time the asbestos materials were purchased. Strict liability claims for property damage have been doctrinally supported by the courts in adoption of the Second Restatement of Torts § 402A which encompasses both personal injury and property damage inflicted by “[o]ne who sells any product in a defective condition unreasonably

64. Id. at 93.
65. Id. at 99 n.170.
66. Id. n.171.
67. Flaherty, supra note 3, at 24, col. 1.
68. Id.
69. Id.
70. Id. at 23.
71. Comment, supra note 10, at 957.
dangerous to the user or consumer or to his property.”

Breach of warranty claims for property damage are brought under the provision of the Uniform Commercial Code (U.C.C.) § 2-314 Implied Warranty: Merchantability; Usage of Trade. A warranty that the goods are fit for the ordinary purposes for which such goods are used is implied in the contract for their sale if the seller is a merchant with respect to goods of that kind. U.C.C. § 2-725 Statute of Limitations in Contracts for Sale, imposes a four year statute of limitations on claims for breach of implied warranty. A breach of warranty in a sale of goods occurs most commonly on the date of delivery. “A cause of action accrues when the breach occurs regardless of the aggrieved party’s lack of knowledge of the breach.” Thus, under the U.C.C., a cause of action for breach of implied warranty usually is time barred in an asbestos abatement suit.

The nuisance theory is based on the 1984 congressional finding that “the presence of friable or easily damaged asbestos creates an unwarranted health hazard” and that the presence of “friable” asbestos could constitute a public nuisance necessitating abatement. Evidence, such as the Ontario Royal Commission report, which disputes these findings weakens this legal theory. Moreover, although the Asbestos School Hazard Abatement Act expresses the congressional findings, the Act disavows any intent to affect the legal rights of any party “in connection with the purchase or installation of asbestos materials in the schools.” Furthermore, in accordance with a basic principle of tort law, a nuisance charge may be made only against one who is in control of the nuisance creating instrumentality. Asbestos building materials, the alleged nuisance creating

73. Comment, supra note 11, at 480.
75. U.C.C. § 2-725(2).
77. 20 U.S.C.A. § 4019(1)-(2). The statute reads:
§ 4019. Legal remedies and rights under other laws unaffected
Except as otherwise provided in section 4017 of this title, nothing in this subchapter shall—
(1) affect the right of any party to seek legal redress in connection with the purchase or installation of asbestos materials in schools or any claim of disability or death related to exposure to asbestos in a school setting; or
(2) affect the rights of any party under the other law.
property, are within the sole possession and control of claimant from the time of purchase.\textsuperscript{79}

\textbf{LEGAL AND POLICY ISSUES IN LITIGATION OF CLAIMS}

\textbf{A) Manufacturers' Knowledge and Duty to Warn in Non-Occupational Exposure}

Property claimants must first establish the threshold issue of liability. Liability depends on whether the manufacturers of asbestos owe a duty to these plaintiffs. Such a duty could be established if the manufacturers' knowledge of the dangers of asbestos exposure in the workplace caused them to be aware of, and thus requires them to warn of unknown and undocumented health risks that might result from mere environmental exposure.

Property claimants have sought to establish the manufacturers' knowledge of the danger and the foreseeability of harm from environmental exposure on the basis of judicial findings in asbestos personal injury cases.\textsuperscript{80} The industry admits knowing, as early as 1942, that asbestos dust inhaled by factory workers could cause asbestosis.\textsuperscript{81} Property claimants insist a duty be imposed on the industry to have foreseen the still unproven health risk of low level environmental exposure to asbestos. They argue further that manufacturers' knowledge of the health risk relative to factory workers should be imputed to occupants of buildings containing asbestos materials.\textsuperscript{82}

"The manufacturers' duty to warn users of the potential danger inherent in its product is commensurate with its actual knowledge of the risk involved to those users of the knowledge constructively imparted to it by available scientific or other medical data. . . ."\textsuperscript{83} Asbestos manufacturers can and do defend, however, by arguing that the personal injury cases involved workers exposed to high levels of asbestos fiber concentration and that such knowledge should not im-

\textsuperscript{79} Id. (court also held that the county stated no cause of action under nuisance theory but allegations of property damage against defendants which mined, manufactured and sole asbestos products used by the county in school construction sufficiently stated a cause of action for strict liability in tort).

\textsuperscript{80} Comment, \textit{supra} note 10, at 959.

\textsuperscript{81} \textit{Karjala v. Johns-Mansville Products Corp.}, 523 F.2d 155, 158 (8th Cir. 1975).

\textsuperscript{82} \textit{Id}. at 158-159. Court affirmed jury instruction to determine whether knowledge of hazard relative to factory workers required manufacturers to warn installation workers exposed to lower degree of asbestos dust.

\textsuperscript{83} \textit{Id}. at 159.
pose a duty to warn of the alleged risks from significantly lower level fiber exposure in school and office buildings. 84

B) Injury in Fact and Recovery in Tort

To recover abatement costs under strict liability in tort, a plaintiff must establish that the presence of asbestos constitutes physical injury to persons or that the abatement procedures damage property other than the product itself: 85 Section 402A of the Restatement provides that a seller of a product in a defective condition unreasonably dangerous to the user or to the user's property is subject to strict liability in tort.

Despite the U.S. congressional finding that the presence of "friable" asbestos in school buildings presents a health hazard, it remains undetermined whether environmental exposure represents personal injury in fact, thereby enabling plaintiffs to recover for abatement costs and damages. 86 Medical, scientific and legal findings disagree as to hazardous levels relative to non-industrial exposure to asbestos. 87 "No conclusive medical evidence exists to establish that non-occupational exposure to friable asbestos is hazardous and no cases of disease associated with exposure in schools have been documented." 88 Yet, the EPA, however, continues to refuse to issue standards for assessing safe levels of exposure in buildings constructed with asbestos materials. 89 "The ultimate absurdity is that [the] EPA has created a high level of concern about asbestos, but refuses to tell anyone how to deal safely with the substance." 90 Thus without specific criteria and safety levels, school districts, motivated by fears created from unsubstantiated overgeneralizations about the hazard of asbestos fiber, are rushing to rip out and replace asbestos building materials. The asbestos industry continues to maintain that it is erroneous to conclude that injury exists at the environmental level of exposure on the basis of the data which establishes a health hazard at the occupational level. Moreover, the manufacturers contend that the mere presence of "friable" asbestos does not automatically pose

84. Comment, supra note 10, at 959.
85. Id. at 967.
86. Id. at 962.
87. Id.
88. Id. at 969.
89. Id. at 962.
90. EPA Declines to Assess Risks of Asbestos or Require Abatement, ASBESTOS LITIG. REP. (Andrews) 9405, 9406 (Dec. 21, 1984).
For these reasons, property damage claimants thus carry a difficult evidentiary burden of proving personal injury in fact. The courts may be forced to decide, on a case by case basis, what level of dust and fiber released into the air is hazardous. "Until specific standards are drafted for denoting a hazard and delineating when abatement is necessary, which could be applied universally to all schools, the existence of injury in fact will probably depend upon the court's determination." 92

If property damage claimants can demonstrate damage or injury to property other than the defective product, they can recover under strict liability in tort. 93 The Ninth Circuit, in Arizona v. Cook, has held that the removal of a defective product is mere consequential damage stemming from the product's failure to meet consumer expectation. 94 The Ninth Circuit affirmed this decision in Aetna Casualty & Surety Co. v. PPG Industries, Inc., where the court declared that the property damage caused by the installation of defective or hazardous insulation is economic harm and not actionable under the theories of strict liability and negligence. 95

Plaintiffs claiming a right of recovery for property damage often cite Shooshanian v. Wagner, an Alaska Supreme Court decision allowing plaintiffs' claim for removal and replacement costs of urea formaldehyde foam insulation that emitted toxic fumes causing physical harm to building occupants and which would continue to pose a health threat. 96 The court emphasized that "[t]he critical issue is whether the product is dangerously defective and whether the dangerous defect caused the property damage." 97 Asbestos removal suits, however, differ because there are no conclusive findings that asbestos building materials are dangerously defective in the environmental setting. 98 Before the courts can determine whether abatement

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91. Comment, supra note 10, at 963.
92. Id. at 966 n.65.
93. Id. at 970.
95. See Aetna Casualty & Surety Co. v. PPG Industries, Inc., 554 F. Supp. 290 (D. Ariz. 1983) ("[p]roperty damage" is a term of art used in insurance contract clause it is broader than and should be equated with damages to property. The district court concluded that property damage included a diminution of value caused by the installation of the hazardous insulation).
97. Id. at 464.
98. See Common Questions of Fact Are at Core of Asbestos School Litigation, ASBES-
procedures are necessary and constitute property damage in a particular case, the threshold question regarding the danger of non-occupational exposures must be answered. Unless the courts know at what level of concentration the airborne fiber becomes a health hazard outside the workplace, the product should be deemed dangerously defective in property damage suits.

C) Causation Problems: 1. The Indeterminate Defendant

In a products liability case sounding in tort, the plaintiff must establish a causal connection between the defect in the defendant's product and the plaintiff's harm. It has been suggested that three important questions relative to causation must be answered and proved at trial: 1) Was the defendant's product the one that actually harmed the plaintiff? 2) But for the defect in defendant's product, would plaintiff have suffered harm? 3) Was the plaintiff's harm a reasonably foreseeable result of defendant's distribution of the defective product?

The most difficult situation, presenting extraordinary proof problems for plaintiffs, occurs when the allegedly harmful product is a "type of product manufactured and distributed by many companies, under circumstances where the plaintiff cannot prove which company actually produced and distributed the defective, harm causing product unit." Plaintiffs in a personal injury or property damage asbestos suit are frequently exposed to asbestos manufactured by a number of companies. If the plaintiff can prove the identity of all parties producing the product to which he was exposed, these parties may be held jointly and severally liable. In a property damage asbestos suit, where environmental exposure to multiple asbestos materials is most likely, it is probably impossible to prove that a par-

TOS LITIG. REP. (Andrews) 9402, 9403 (Dec. 21, 1984) But see, supra note 44, at 94 (court concluded both personal injury and property damage claims state cause of action for strict liability in tort based on court's determination of state legislative intent found in relevant statute of limitations exempting "any action resulting from exposure to asbestos").


100. Id.

101. Id. at 193.

102. Comment, Issues in Asbestos Litigation, 34 HASTINGS L.J. 871, 889 (1983). See also, supra note 99, at 229-32 (problem of the indeterminate plaintiff: inability of any veteran to identify the manufacturer of the herbicide to which he was exposed. But unlike Agent Orange defendants who may have negligently allowed destruction of the evidence by supplying harmful products with knowledge it would be mixed and become unidentifiable, asbestos is not susceptible to disguise through mixture with other products of its kind).
ticular product is responsible for plaintiff's harm. Further burdening the plaintiff's case is the Fifth Circuit's decision in Migues v. Fibreboard Corp. which held that not all asbestos products are unreasonably dangerous as a matter of law. The court concluded that the jury could decide whether in a particular case the asbestos product, unaccompanied by adequate warnings, was unreasonably dangerous.

2. Market Share Liability

Plaintiffs who are unable to identify any of the manufacturers whose product caused their harm and therefore fail to establish causation in fact, have resorted to theories of market share liability. The plaintiff need only allege exposure to the harmful product and join as defendants all manufacturers which had a substantial share of the market. The burden shifts to the defendants to prove individually that their product could not have caused the harm or to apportion damages among themselves according to their respective market share. Many courts, however, have rejected market share liability in asbestos cases because asbestos is not a fungible generic product and plaintiffs have often been able to identify at least one manufacturer who produced the asbestos to which he was exposed. "Where . . . the plaintiff is able to identify at least one manufacturer who caused his injury, the reasons for imposing market share liability do not exist." Secondly, not all types of asbestos are equally harmful and since products contain different percentages of harmful asbestos, the pathogenicity of asbestos products varies widely. Thirdly, authorities agree that cigarettes are co-carcinogens with asbestos, causing a smoker, who has been exposed to asbestos, to be at significantly greater risk of contracting lung cancer. "As a result, in asbestos suits it may be impossible to quantify market share relative to harm
such that apportionment of damages would reflect fault." Other critics, opposed to the use of the theory of market share liability in asbestos property suits, object to the abandonment of the causation in fact requirement, a basic principle of tort liability. Other critics, opposed to the use of the theory of market share liability in asbestos property suits, object to the abandonment of the causation in fact requirement, a basic principle of tort liability. Other critics, opposed to the use of the theory of market share liability in asbestos property suits, object to the abandonment of the causation in fact requirement, a basic principle of tort liability. Other critics, opposed to the use of the theory of market share liability in asbestos property suits, object to the abandonment of the causation in fact requirement, a basic principle of tort liability. Other critics, opposed to the use of the theory of market share liability in asbestos property suits, object to the abandonment of the causation in fact requirement, a basic principle of tort liability.

Applying market share liability to asbestos litigation may unreasonably distort the actual liability of a defendant manufacturer. First, in contrast to other toxic tort litigation, where plaintiff's injury resulted from limited exposure to the harmful product, asbestos plaintiffs are exposed to the product over the course of many years. Asbestos manufacturers are burdened with disproving causation over a wide frame of time. Second, the identified manufacturers in a particular case would be liable for full damages whereas the unidentified manufacturers are privileged to pay proportionate damages based on their market share. But the greatest distortion of defendant's liability occurs because the market share theory requires the joined defendants to be responsible for one hundred percent of the judgment. Liability is apportioned according to relative market shares even if the joined defendants represent less than one hundred percent of the market. Asbestos plaintiffs, however, may be unable to join the requisite substantial share of the market that supplied the harmful product. Major asbestos manufacturers, suffering bankruptcy or reorganizing under the bankruptcy code, may not be amenable to suit. The burden of satisfying the judgment then falls upon defendants who may not have injured the plaintiff in fact, but who lack proof to exculpate themselves.

Where the identifiable tortfeasor is insolvent or is not amenable to suit within the forum, plaintiff's interest might best be served by relying on the market share theory. The end result is that plaintiffs involved in industry wide litigation fare better than the ordinary injured party who must take his defendant as he finds him.

A lack of uniformity in the use of market share liability further contributes to the questionable suitability of this theory in mass tort

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111. Id.
112. See Copeland, 447 So. 2d at 918.
113. Id. at 919 (citing dissent in Sindell).
114. Comment, supra note 102, at 892.
115. Id. at 894.
116. Id.
litigation such as asbestos. Liability will fall haphazardly on asbestos manufacturers who find themselves amenable to suit in states that choose to adopt the theory. Thus, the use of market share liability in asbestos litigation may distort the manufacturer's actual liability to such a degree that the court will be unable to determine and will possibly be unconcerned with determining whether the defendant's product was the cause in fact of plaintiff's harm.

3. Defending "But For" Allegations

The alleged defect in property damage claims is the manufacturers' failure to warn consumers that exposure to asbestos building materials in schools and other buildings may constitute a health hazard. Claimants contend that "but for" this failure to warn, their buildings would be asbestos free. This assertion implies that had plaintiffs known of the alleged risk associated with the use of asbestos materials, they never would have purchased the materials to use in the construction of their buildings. This assertion is proven at least weak if not false by examining the number of school districts and property owners who continued to use asbestos building materials after 1964, when the risk of exposure to asbestos workers was widely publicized. The EPA first banned the use of asbestos as a building material only in the late 1970's.

"A warning is only one of a product's many design attributes that weigh in the balance of dangers against utility to determine whether the product is unreasonably dangerous." Failure to warn of the potential health risk of environmental exposure was virtually unfeasible, since the only documented risk to date concerns exposure in the workplace. Thus, the failure to warn of risks relative to occupational asbestos exposure is probably not a pivotal design attribute question in the environmental exposure setting. Property damage claimants may not have heeded the warnings regarding exposure in the workplace because their use of and exposure to asbestos products were remote from the hazardous use of which they had been warned. "If we overuse warnings we invite mass consumer disregard and ultimate contempt for the warning process."

118. See id. at 921 (dissent reports only limited acceptance of market share theory of liability).
119. Comment, supra note 10, at 961.
120. Rublin, supra note 2, at 6.
121. HENDERSON & TWERSKI, supra note 99.
122. Id. at 451.
The ‘government contract’ defense is another affirmative defense to “but for” allegations in asbestos litigation. Although the failure to warn remains as the product’s defect, the government contract becomes an intervening and superseding cause of plaintiff’s harm. Asbestos building materials were used at the direction and for the benefit of the United States during World War II, mainly for shipbuilding in United States Navy and private shipyards. “Every ship built for the Navy had to conform to specifications, including the requirement that asbestos be used as an insulator.” Furthermore, between 1940 and 1972, government building codes mandated the use of asbestos products for acoustical ceilings and beam sprays, fireproof floor tiles and pipe and boiler insulation.

As early as 1938, both the United States Public Health Service and Navy Maritime Commission knew that occupational exposure to asbestos dust could be dangerous. Substantial evidence shows that the government’s knowledge of the risks of occupational exposure were equal to the knowledge of the asbestos manufacturers. The government ignored this information, however, not wanting to interfere with the war effort.

Shipyard workers have brought relatively few personal injury suits directly against the government because financially viable asbestos companies have been available as defendants. The federal government, however, should be ultimately liable for asbestos-related diseases of workers exposed to asbestos in shipyards. Asbestos manufacturers, therefore, should assert the government contract defense in personal injury and property suits in which claimants seek recovery for abatement costs for asbestos building materials that were used in accordance with government specifications and requirements.

The defendant claiming protection under the government contract defense must prove the following four elements to defeat all claims of liability: 1) the product must have been supplied to the government pursuant to a contract; 2) the government must have promulgated specifications for the product; 3) the product must have

124. Comment, supra note 8, at 194.
125. Id.
126. Rublin, supra note 2, at 6.
127. Comment, supra note 8, at 194.
128. Rivkin, supra note 123, at 1234.
129. Comment, supra note 8, at 195.
130. Id. at 195 n.126.
met government specifications in all material respects; 4) the government knew as much as or more than the defendant regarding the hazards associated with the use of the product.\textsuperscript{131} This defense is available where private shipyards purchased asbestos insulation pursuant to government specifications.\textsuperscript{132} The asbestos need not have been used for weapons or military necessity.\textsuperscript{133} Claimants seeking abatement costs for asbestos building materials used pursuant to a government contract will face likely dismissal of their case if the defendant manufacturers, who supplied the materials, can launch the government contract defense successfully.

4. Defending Allegations of Reasonably Foreseeable Harm

"While product hazards exist independently of whether anyone knows about them, feasibility is almost by definition, a function of contemporary perceptions and priorities."\textsuperscript{134} If knowledge of the risk relative to environmental exposure to asbestos is currently unknown, the feasibility of warning against these risks at the time of the asbestos materials' distribution is truly impossible. Thus, the plaintiff's harm could not be seen as a reasonable foreseeable result of defendant's distribution of a defective product.

D) Adapting Indemnification Arguments

Asbestos companies, facing a swarm of personal injury and property damage suits and trying to avoid bankruptcy, have sought relief from their insurers, claiming that the alleged damages are covered by their comprehensive general liability insurance policies (CGL).\textsuperscript{135} Insured school districts have sought indemnification for all abatement costs including the loss of the buildings' use during abatement and the reduction of the buildings' market value due to

\begin{itemize}
  \item \textsuperscript{131} Rivkin, \textit{supra} note 123, at 1228.
  \item \textsuperscript{132} \textit{Id.} at 1231.
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} J. HENDERSON JR. & A. TWERSKI, \textit{supra} note 99.
  \item \textsuperscript{135} Arness & Eliason, \textit{Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases}, 72 VA. L. REV. 943 (1986) ("Insurance policies define property damage in many different ways, but by far the most common definitions are those contained in the insurance industry's standardized CGL [comprehensive general liability] policies. The standardized policy first appeared in 1940 and was revised in 1943, 1955, 1966, and 1973. Most insurance coverage questions now deal with the 1966 and 1973 versions, although with the long latency period of injuries caused by some toxic substances the earlier policy forms still surface from time to time. . . . Because of the differences between 1966 and 1973 policies, the presence or absence of coverage in some cases will depend upon which policy is in force.").
\end{itemize}
the presence of asbestos. Insurance companies fear that asbestos-related property damage claims easily could surpass the dollar amount of personal injury claims. It is therefore no surprise that coverage disputes between insurance companies and their insureds have erupted concerning the property damage claims.

Arguments used by the insurers, claiming a failure to trigger property damage coverage, may be effectively adapted and used in turn by the asbestos companies to defend themselves against property damage claims. First, the mere incorporation of asbestos containing products does not constitute property damage where the insurance policy defines property damage as physical injury to tangible property. "Only the incorporation that damages the exchange value of the property can constitute property damage." Asbestos insulation, sealed behind a plaster wall, poses no health hazard that would reduce a building's value. Furthermore, asbestos is not an integral component of the larger building structure as is the case with a cement foundation or steel girders. Injury to an integral component part of a structure would obviously be an injury to the building as a whole. However, any asbestos, necessitating removal, is exposed material and a readily removable part of the larger structure. Thus, the property damage claim must fail because removal does not physically injure the structure itself. Second, the 1966 CGL policy allows compensation for loss of use of property during abatement as consequential damages only where property damage has been found. Under the 1973 CGL policy, however, property damage coverage can be triggered by the loss of use of physically uninjured property. Compensation, is based on economic loss sustained by the insured because of the inability to conduct his business during removal and replacement of the asbestos. Third, claiming that the presence of a health hazard requires repair and removal does not trigger property damage coverage under the 1966 or 1975 CGL pol-

136. Id. at 945.
137. Id. at 977 (1966 CGL policy defines property damage as "injury to or destruction of tangible property").
138. Id. at 957 (1966 CGL policy establishes that the incorporation of a defective product into tangible property constitutes property damage if it results in a decrease in the property's market value despite the absence of physical injury to the property itself).
139. See id. at 965.
140. Id.
141. Id. at 969 (under 1966 CGL policy, loss of use falls under consequential damages and is triggered only after property damage has been found).
142. Id. at 968.
cies. A claim that asbestos ceiling tile, in good or deteriorating condition may be a health hazard does not injure the building itself.\textsuperscript{143} "Although the presence of a health hazard may be relevant for triggering bodily injury coverage, it does not follow that a health hazard is itself property damage."\textsuperscript{144} The physical integrity of a building is in no way compromised by airborne asbestos fibers despite the claim that bodily injury may occur in such an environment. Finally, property damage coverage issues are extremely fact sensitive and each case must be analyzed individually.\textsuperscript{145} Asbestos may be found in hundreds of different products within a building and in varying forms (applied in a liquid state, embedded in solid material or exposed in a "friable" condition). The indoor environment is not automatically contaminated by the mere presence of an asbestos containing product, nor is a property claim automatically triggered.

E) Policy Issues

The spectre of enormous liability, threatening to destroy numerous companies whose productivity is vital to the economic life of the nation, favors the dismissal of property damage claims against asbestos manufacturers. Property damage claims will compete with current and future personal injury claims and will deplete the funds from which these top priority claimants may seek to recover. In addition to the use of asbestos as an ingredient in several thousand products and industrial applications, asbestos building materials have been used in almost every building, factory, school, home, farm, automobile, airplane, train, ship and missile constructed in this country.\textsuperscript{146} Property claims could mushroom dramatically, presenting an unprecedented and almost absurd burden on the courts. Personal injury claims will continue to rise over the next twenty to thirty years because of the latent toxicity of asbestos inhaled by factory workers and others who have been exposed to asbestos dust in the workplace. Plaintiffs suffering personal injury, as verified by the documented harmful effects of occupational exposure, deserve priority over plaintiffs claiming harm to property. In the case of Manville Corporation's reorganization plan, for example, more money would be available to fund the victims' trust if the trust fund to pay asbestos-

\textsuperscript{143} See 72 Va. L. Rev. at 961.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 978.
\textsuperscript{146} Brodeur, supra note 5, at 349.
related property damage claims was reduced.  

Claimants in search of abatement costs should not turn to the asbestos industry merely to reach inside a "deep pocket." "[F]astening liability on defendants presumably because they are rich, has understandable popular appeal and might be tolerable in a case disclosing substantially stronger evidence of causation than herein appears."  

But the industry is already burdened with heavy personal injury judgments and the cases of property damage are supported by tenuous arguments. "[A]s a general proposition, a defendant's wealth is an unreliable indicator of fault, and should play no part, at least consciously, in the legal analysis of the problem." Perhaps the cost of removing asbestos should be borne by the taxpayers who have already begun to pay for the cost of asbestos abatement in their school districts. Asbestos cleanup should remain a local concern; although there may be opposition to tax increases resulting from the need to divert budgetary funds for asbestos cleanup, the total cost is kept more equitably diffuse. Otherwise litigation costs will ultimately be more costly for taxpayers and all other parties involved.

Finally, recovery for property damage in asbestos suits may prove to be an unfair windfall for a crafty class of plaintiffs. Owners of aging buildings, in need of repair, but containing asbestos materials, may sue and possibly recover for abatement costs, despite the absence of an asbestos health hazard to building inhabitants. The asbestos manufacturers would then be paying for general building renovation and renewal costs. The courts must not allow the unjust enrichment of property owners claiming damages due to the removal of asbestos building materials in generally dilapidated structures.

**CONCLUSION**

The EPA's most recent proposal to Congress requires inspection of 107,000 public and private school buildings for "friable" asbestos and compels school systems that find dangerous asbestos to use certified contractors to remove or seal off the asbestos. However, pro-

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147. *See supra* note 9 (complex bankruptcy law reorganization plan designed to help Manville cope with thousands of asbestos-related lawsuits).


149. *Id.* at 922.


ponents of the proposal disapprove of the "unacceptably high reoccupancy standard" set by the EPA. Once cleanup action is completed, the buildings can be used if the maximum level is no higher than .10 f/cc.\textsuperscript{152} This level is considerably higher than the .005 f/cc maximum exposure level considered safe by many health experts.\textsuperscript{153} Moreover, the proposal does not specify a maximum exposure level above which abatement procedures must be instituted or whether buildings with any "friable" asbestos, despite low airborne levels, must undergo cleanup. It is thus questionable whether this costly proposal, allegedly designed to protect schoolchildren and school personnel, will deal with the problem of airborne asbestos fibers safely or scientifically.

Property damage claimants have set upon the beleaguered asbestos industry in growing numbers. No one denies the high costs of abatement procedures. Better financial assistance programs, funded by the government, insurance carriers, taxpayers and perhaps even the asbestos industry should be established to jointly help defray necessary abatement costs in both the public and private sectors. But the case against the asbestos manufacturers for total recovery of all abatement costs is unjust and both the proof and policy issues create a clearly tenuous case and enormous problem at best. Unless scientific findings prove conclusively that non-industrial environmental exposure to asbestos containing building materials, above a designated fiber concentration level, is hazardous to the health of building occupants, claimants cannot begin or attempt to reasonably and satisfactorily carry their evidentiary burden. It is obvious and clear that the manner in which the courts deal with property damage claims in the asbestos context in view of all of this will set important precedent for future claims alleging injury to property caused by a toxic substance.

\textit{Harriet Feuer}

\textsuperscript{152} \textit{Id.}, at B15, col. 1.

\textsuperscript{153} \textit{Id.}