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## Asbestos Abatement in the Public Schools: Who Gets the Bill?

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# Asbestos Abatement in the Public Schools: Who Gets the Bill?

## I. INTRODUCTION

Asbestos, the wonder material of the 1960's and 1970's, may now be responsible for several deadly diseases including:

[A]sbestosis, a nonmalignant scarring of the lungs that causes extreme shortness of breath and often death; lung cancer; gastrointestinal cancer; and mesothelioma, a cancer of the lung lining or abdomen lining that develops 30 years after the first exposure to asbestos and that, once developed, invariably and rapidly causes death.<sup>1</sup>

In 1986 Congress addressed the burgeoning asbestos cleanup problem, brought on by the discovery of the material's carcinogenic characteristics, and enacted abatement statutes requiring cleanup. This article explores the obstacles a school district faces when attempting to recover the cost of asbestos abatement.

There are at least four concerns that a school district must consider when deciding how to pay for the cleanup: first, legislative and regulatory schemes requiring asbestos contamination to be removed from the public schools; second, legal theories and defenses which school-asbestos litigants have used in asbestos abatement cost recovery cases; third, how some of these theories and defenses have been applied in recent cases; and finally, practical concerns a school district must consider when deciding whether to pursue litigation.

## II. THE REGULATORY SCHEME

With the passage of the Toxic Substances Control Act<sup>2</sup> (TSCA), Congress authorized the Environmental Protection Agency (EPA) to begin solving the growing problems caused by asbestos exposure. In an attempt to better address the prob-

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1. *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 50 (2d Cir. 1988).

2. 15 U.S.C. §§ 2601-71 (1988).

lems of asbestos in schools and to provide financial assistance to schools with severe asbestos problems, Congress passed the Asbestos Hazard Emergency Response Act of 1986<sup>3</sup> (AHERA).<sup>4</sup> This legislation required the EPA to devise and implement a comprehensive plan providing for the discovery, reporting, cleanup, and monitoring of asbestos problems in public schools.<sup>5</sup> Although AHERA provides guidelines for how and by whom the abatement work is to be done,<sup>6</sup> the burden of completing the abatement work falls directly on local school districts.<sup>7</sup> The statute requires both the EPA and local school districts to establish deadlines for completing cleanup plans and finishing abatement work.<sup>8</sup> The statute further requires schools to pay a fine of not more than \$5,000 for each day the school is in violation after the deadline has expired.<sup>9</sup> The EPA issued the final rule in October 1987.<sup>10</sup> This rule specifically requires local education agencies to ensure that all building occupants involved in abatement efforts are properly trained and warned about the dangers of asbestos. Further, the local agencies must ensure that all abatement work is carried out according to EPA regulations.<sup>11</sup>

The expense of identifying and eliminating asbestos hazards is large for any school district where asbestos has been used.<sup>12</sup> Districts where many of the school buildings were built or renovated during the 1960s and 1970s<sup>13</sup> face a partic-

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3. 15 U.S.C. §§ 2641-54 (1988).

4. For a more complete discussion of AHERA, see James C. Stanley, Comment, *Asbestos in Schools: The Asbestos Hazard Emergency Response Act and School Asbestos Litigation*, 42 VAND. L. REV. 1685 (1989).

5. 15 U.S.C. § 2643 (1988).

6. *Id.* § 2646.

7. *Id.* § 2643(i).

8. *Id.* § 2643(a) requires the EPA to promulgate a final rule implementing the provisions of the Act within 360 days of October 22, 1986 and 15 U.S.C. § 2643(i) (1988) requires each local educational agency to develop an asbestos management plan within 990 days of October 22, 1987.

9. 15 U.S.C. § 2647(a) (1988).

10. 52 Fed. Reg. 41826 (1987), now codified at 40 C.F.R. § 763 (1991). However, local schools were ordered to inspect for asbestos as early as June 1983. See 40 Fed. Reg. 23360 (1983).

11. 40 C.F.R. § 763.84 (1991).

12. This cost is exacerbated by the fact that every phase of the abatement program must be completed by contractors who have been specifically accredited according to a state contractor accreditation plan. A model accreditation plan is provided at 40 C.F.R. § 763, Subpart E, Appendix C. (1991).

13. Although asbestos has been used in construction since the 1870's, this period was the high water mark for use of asbestos in construction materials.

ularly severe financial burden. For example, the cost to one school district faced with the cleanup of four asbestos-contaminated buildings was over \$1.6 million.<sup>14</sup> The total cost of the cleanup nationwide is estimated to be more than \$100 billion over the next twenty-five years.<sup>15</sup> AHERA does provide funds to assist schools with the unavoidable and ever-increasing cleanup expenses.<sup>16</sup> However, these funds will be inadequate to meet the overwhelming cost of abatement.<sup>17</sup> In an attempt to shift the financial burden of the cleanup, schools have turned to common law tort litigation.<sup>18</sup>

### III. LEGAL THEORIES AND DEFENSES

Injuries resulting from products like asbestos create unique, delayed-injury problems for those seeking to recover damages. These problems are especially perplexing in the school asbestos context. The typical delayed-injury case stems from exposure to a product during a period of time when the product was thought to be safe. Only years later do the symptoms of illness appear. In fact, it is often the subsequent development of these symptoms that reveals the dangers of a product previously thought harmless.

Asbestos plaintiffs have sued under many traditional legal theories such as: products liability, negligence or strict liability, fraud, breach of contract warranties and contract restitution. The difficulty with many of these theories is that they were not intended to address the unique problems associated with delayed injuries. This delay leaves the door wide open for many traditional tort defenses including: statute of limitations,<sup>19</sup> lack of causation,<sup>20</sup> and state of the art technology.<sup>21</sup> For ex-

14. *Clarksville-Montgomery Co. Sch. Dist. v. United States Gypsum Co.*, 925 F.2d 993 (6th Cir. 1991).

15. *Stanley*, *supra* note 4 at 1691.

16. 15 U.S.C. § 2646(e) (1988).

17. For a comparison of the funds required to complete asbestos abatement in the schools and the funds available through federal programs see *Stanley*, *supra* note 4 at 1691.

18. A tort is a private or civil wrong or injury resulting from a breach of a legal duty that exists by virtue of society's expectations regarding interpersonal conduct, rather than by contract or other private relationship. BARRON'S LAW DICTIONARY, *Tort*, 482 (1984).

19. This defense places an outer limit on the number of years after tortious conduct has occurred that a party may bring a suit for damages.

20. Causation addresses whether the defendant's action or inaction is actually responsible for the plaintiff's injuries. The problem is particularly acute when the

ample, the statute of limitations<sup>22</sup> often cuts off the right to sue on contract provisions years before a school becomes aware that it has any asbestos problems. Although statute of limitations concerns may also arise in tort actions, proving causation of injuries poses a more acute problem. Tort recovery is usually limited to personal injury or property damage, as opposed to economic loss, which is the foundation of contract law.<sup>23</sup>

Despite the difficulties, schools continue to turn to the courts to avoid some of the costs of cleanup. Because suits brought by schools attempting to reduce their share of the cleanup costs are distinguishable from traditional asbestos products liability cases, likelihood of success is low.

First, the traditional asbestos related lawsuit is a personal injury claim where the health of the plaintiff has been harmed. The injury to the school is the cost associated with cleanup. Second, the injury to the traditional plaintiff is related to the inherent properties of the asbestos itself. However, the injury to the school results from the interplay between asbestos' latent potential to cause future injury and the regulatory scheme requiring potential future injury to be abated presently. These distinctions illustrate why recovery in school asbestos cases is harder than in more traditional personal injury cases.

An examination of one of the more frequently employed tort theories, products liability,<sup>24</sup> and a survey of recent school-asbestos cases show the frustration school districts encounter when they take asbestos manufacturers to court.

As stated above, a plaintiff school district must first overcome the assumption that such tort actions are usually intended to redress physical or property damage and not economic

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appearance of injuries is delayed because there are potentially limitless numbers of exposures to the dangerous product as opposed to a single identifiable incident as in an automobile accident.

21. "In the context of products liability cases this means the level of pertinent scientific and technical knowledge existing at the time of manufacture." BLACK'S LAW DICTIONARY 1409 (6th ed. 1990). In other words, the defendant did not have sufficient technical knowledge of the product's dangers to prevent the injury.

22. *Supra* note 19.

23. PROSSER AND KEETON, THE LAW OF TORTS § 95a (5th ed. 1984).

24. Products liability is defined as (1) the legal liability of manufacturers and sellers to compensate buyers, users, and even bystanders for damages or injuries suffered because of defects in goods purchased; and (2) a tort which makes a manufacturer liable if his product has a defective condition that makes it unreasonably dangerous to the user or consumer. BLACK'S LAW DICTIONARY 1209 (6th ed. 1990).

loss.<sup>25</sup> Although asbestos may cause damage to the health of the people who frequent the building, people who are injured must address the harm. The school has no cause of action for the harm suffered by such individuals and cannot sue on their behalf.<sup>26</sup> The mere presence of asbestos causes no structural damage to the building, thus eliminating causes of action based on structural defects or breach of contract. In other words, a builder could have used asbestos in construction and still have complied with all applicable governmental and contractual requirements. Indeed, if Congress had not required nationwide asbestos abatement in public school buildings, many schools would never attempt to cleanup asbestos hazards.<sup>27</sup> The economic loss schools seek to recover results not from asbestos hazards directly, but from costs stemming from Congress' mandate that potential harm be abated.

If the school is able to overcome the first obstacle, it may proceed under one of two tort products liability theories: negligence or strict liability.<sup>28</sup> Under a negligence approach the plaintiff must prove the following: (1) the asbestos manufacturer owed some duty of care to the school; (2) the manufacturer breached that duty; (3) the school suffered actual injury; and (4) the breach was the cause of the school's injury.<sup>29</sup> Under strict liability, the school is not required to prove any breach of duty on the part of the manufacturer.<sup>30</sup> However, the school must prove that the product was unreasonably dangerous when it left the manufacturer's control and that the dangerous condition caused the school's injury.<sup>31</sup> To prove the product was

25. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

26. A school may, however, be sued by a person who was injured by the asbestos in the school buildings. In such a case, the school would, in turn, bring the asbestos manufacturer into the lawsuit in an attempt to reduce the school's liability. Such an action, however, must be instigated by the person who suffers personal injury.

27. Although many schools may not have voluntarily undertaken abatement efforts, some would have been forced to do so as a result of being named as defendants in personal injury cases. Likewise, public political pressures may also have driven some districts to begin abatement programs. However, it is unlikely that these pressures would have had the far-reaching effect of AHERA. See *supra* note 4.

28. In addition to tactical considerations concerning which of these theories to pursue, some jurisdictions have restricted or eliminated one or the other as a cause of action.

29. PROSSER AND KEETON, THE LAW OF TORTS § 96 (1984).

30. *Id.* § 98.

31. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

unreasonably dangerous, the school must show that the manufacturer knew of and disregarded evidence of the dangers of asbestos.<sup>32</sup> Naturally, if the best scientific evidence at the time of manufacture indicated that asbestos was safe, it could not be unreasonably dangerous.<sup>33</sup> In spite of these concerns, school districts have frequently pursued products liability law suits.

#### IV. RECENT CASE LAW

In *Clarksville-Montgomery County School District v. United States Gypsum Co.*,<sup>34</sup> the school district (Clarksville) sought to recover the cost of completing the removal of asbestos from its buildings, suing under theories of products liability, negligence, misrepresentation, fraud and concealment. Clarksville asserted that installation of Audicote, an acoustical plaster containing asbestos, between 1966 and 1970, was unreasonably dangerous because it created an imminent health hazard to building occupants. Clarksville also alleged that at the time of installation the defendant, United States Gypsum (USG), knew or reasonably should have known of the dangers of asbestos.<sup>35</sup> Clarksville presented evidence that USG-funded research (the Saranac experiments) indicated as early as 1943 that asbestos presented a significant health risk.<sup>36</sup>

USG contended that, at the time of installation, asbestos-laden Audicote was the best available technology. The company's architects testified that their use of Audicote clearly met all pertinent regulations<sup>37</sup> and at the time, the fact that Audicote contained asbestos was considered a virtue.<sup>38</sup> Indeed, Dr. Peter Elmes testified that until 1987 the medical and scien-

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32. PROSSER & KEETON, THE LAW OF TORTS § 99 (1984).

33. See *supra* note 21.

34. 925 F.2d 993 (6th Cir. 1991).

35. *Id.* at 996.

36. The research, known as the Saranac documents, was funded by several asbestos companies including the defendant USG. The companies contracted with Saranac Lake Laboratories and Dr. Leroy U. Gardner to perform animal experiments with asbestos dust. *Clarksville*, 925 F.2d at 999.

37. USG presented evidence that when Clarksville's buildings were constructed, the American Conference of Governmental Industrial Hygienists had established a safe "threshold limit value" (TLV) of 30 fibers per cubic centimeter. Although the TLV is now 0.2 fibers per cubic centimeter, a TLV of 30 fibers per cc was an acceptable level at that time. *Clarksville*, 925 F.2d at 996.

38. *Id.*

tific consensus was that asbestos risks were confined to individuals with heavy and extended industrial asbestos exposure.<sup>39</sup>

Over Clarksville's objections, USG rebutted Clarksville's assertion that the company knew or should have known of the dangers of asbestos by presenting letters from Dr. Gardner who helped to conduct the research.<sup>40</sup> These letters stated the reasons why Dr. Gardner felt the Saranac experiments were flawed.<sup>41</sup>

The jury found for USG on all counts. Clarksville appealed the admissibility of Dr. Gardner's letters. But the appellate court sustained the lower court ruling because it felt the letters were necessary to give the jury a complete picture of USG's knowledge of asbestos dangers at the time.<sup>42</sup> By having employed state-of-the-art technology, USG avoided all liability associated with Clarksville's asbestos cleanup costs.<sup>43</sup>

In *Clarksville* the school lost on the merits of the case. However, in *Dayton Independent School District v. U.S. Mineral Products., (Dayton II)*,<sup>44</sup> the plaintiff school districts lost on procedural issues which will make future litigation increasingly difficult. Dayton Independent School District (Dayton) originally brought suit against United States Gypsum (USG) in *Dayton I*<sup>45</sup> to recover cleanup costs. This suit quickly expanded to include over 100 plaintiffs and several asbestos-manufacturing defendants.<sup>46</sup> The federal trial court eventually dismissed *Dayton I* with prejudice for lack of federal diversity-of-

39. *Id.*

40. *Supra* note 21.

41. The Saranac research was performed on several animals including cats, dogs, rats, guinea pigs, and white mice. The eleven white mice used were of an uncontrolled strain and were the only animals to develop cancer. The letters indicated that because of this, Dr. Gardner was uncomfortable with suggestions of an asbestos-cancer link. *See Clarksville*, 925 F.2d at 999.

42. *Id.* at 1000.

43. *Id.* at 1001; *see also* Anderson County Bd. of Educ., 821 F.2d 1230 (6th Cir. 1987) (upholding a jury verdict in favor of defendants on counts of negligence, strict liability, misrepresentation and fraud and affirming the trial court's ruling dismissing a breach of warranty claim because the statute of limitations had run). *But see* Spartanburg County Sch. Dist. Seven v. National Gypsum Co., 805 F.2d 1148 (4th Cir. 1986) (arising out of South Carolina holding the state-of-the-art defense to be invalid against a breach of implied warranty claim).

44. 906 F.2d 1059 (5th Cir. 1990).

45. *Dayton Indep. School Dist. v. United States Gypsum Co.*, 682 F. Supp. 1403 (E.D. Tex. 1988) [hereinafter *Dayton I*].

46. *See Dayton II*, 906 F.2d at 1061.



citizenship<sup>47</sup> or federal-claim jurisdiction<sup>48</sup> under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>49</sup>

In the related subsequent suit, *Dayton II*,<sup>50</sup> the same bloated plaintiff class again tried to sue many of the same manufacturers as before. In *Dayton II* the plaintiff school districts unsuccessfully attempted to avoid the *res judicata*<sup>51</sup> effects of *Dayton I* by naming different companies as lead defendants. However, the court held that their diversity jurisdiction failed because the plaintiffs again joined a non-diverse defendant.<sup>52</sup> The court also held that Congress did not intend for CERCLA to include companies that produce otherwise consumer-useful products.<sup>53</sup>

The rulings in *Dayton I* and *Dayton II* do not necessarily mark the end of the litigation road for plaintiff school districts. Rather, plaintiffs will be able to pursue, in state court, any claims that have not been decided on the merits. However, in state courts, plaintiffs will be subject to a new set of procedural headaches in attempting to gain state court jurisdiction over out-of-state defendants.

It is important to note that a lawsuit in tort is a jurisdiction-specific cause of action. Different states have differing rules concerning the application of theories, defenses and procedure. For example, the court in *In re Asbestos Litigation: Danfield v. Johns-Manville Sales Corp.*<sup>54</sup> held that the New Jersey Supreme Court's elimination of the state-of-the-art defense did not violate the Equal Protection Clause.<sup>55</sup> New Jersey's highest court held that since the state's common law

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47. 28 U.S.C. § 1332(a)(1) (1988) requires that parties to a civil action in the federal district courts be "citizens of different states." Since one of the defendants joined in the *Dayton I* action was from the same state (Texas) as one of the plaintiffs, the case could not be tried in the federal courts on diversity grounds.

48. *Id.* § 1331 allows a plaintiff to bring a civil claim in federal court if the claim arises "under the Constitution, laws, or treaties of the United States."

49. 42 U.S.C. § 9607(a) (1988).

50. 906 F.2d 1059 (5th Cir. 1990).

51. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. BLACK'S LAW DICTIONARY 1309 (6th ed. 1990).

52. *Dayton II*, 906 F.2d at 1063.

53. *Id.* at 1064-66.

54. 829 F.2d 1233 (1987) [hereinafter *Danfield*].

55. *Cf. Spartanburg County Sch. Dist. Seven v. National Gypsum Co.*, 805 F.2d 1148 (4th Cir. 1986).

recognized products liability as a cause of action for strict liability, what the defendant knew or was able to know is irrelevant.<sup>56</sup> The New Jersey Court reasoned that the expenses arising from asbestos litigation would be allocated to the manufacturer's cost of production, thus giving the manufacturer an incentive to improve product safety.<sup>57</sup>

In short, these cases show that school districts pursuing products liability claims face procedural rules which will make bringing all the necessary defendants into the same suit difficult, if not impossible. Furthermore, these districts face the problems of trying to make do with a legal theory which is ill-suited to the unique injury they have suffered.

#### V. PRACTICAL CONCERNS

In addition to the frustration a school district may face in court, there are other pragmatic concerns which a district must consider when deciding whether to sue an asbestos manufacturer. For example, in *Jenkins v. Raymark Industries, Inc.*<sup>58</sup> the district court pointed out that as of March, 1983, approximately 24,000<sup>59</sup> people had filed product liability lawsuits claiming asbestos-related injury.<sup>60</sup> This onslaught of asbestos litigation spelled the end for many asbestos product producers. At the time of the *Jenkins* decision in 1985, six major asbestos corporations had declared bankruptcy.<sup>61</sup> Although plaintiffs have traditionally seen manufacturing corporations as a deep pocket, it appears that with respect to asbestos-injured litigants, the corporate pockets are nearly empty. Whether or not asbestos manufacturers' insurance carriers will ultimately be responsible for successful claims against the manufacturers is an issue that remains unresolved.<sup>62</sup>

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56. *Danfield*, 829 F.2d at 1235, (citing *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982)).

57. *Id.* at 1236.

58. 109 F.R.D. 269 (E.D. Tex. 1985).

59. The court in *Carey Canada, Inc. v. Aetna Casualty & Surety Co.*, 691 F.Supp. 17 (D.D.C. 1988), put the figure at 25,000 cases filed in state and federal courts in 1985 and growing at a rate of 550 new cases each month.

60. *Jenkins*, 109 F.R.D. at 276, (citing J. KAKALIK, P. EBNER, W. FELSTINER & M. SHANLEY, COSTS OF ASBESTOS LITIGATION 38 (1983) (also known as THE RAND REPORT (1983)).

61. *Id.* at 276.

62. See *Lac D'Amiante Du Quebec v. Am. Home Assurance Co.*, 613 F. Supp. 1549 (D.N.J. 1985); *Dayton Indep. Sch. Dist. v. National Gypsum Co.*, Nos. B-81-277-CA, B-81-293-CA, B-81-701-CA (E.D. Tex. Feb. 4, 1988) (holding an "occurrence"

A school district must also consider the costs of litigation before deciding whether to pursue a claim. When the defendant is a major corporation with thousands of similar suits pending, delays can become a significant concern. Such a corporation will want to use any kind of precedent, procedural or substantive, that will deter future lawsuits and liability.

*In re Asbestos School Litigation* is a discouraging example of protracted litigation which has not yet produced abatement funds.<sup>63</sup> The case began in 1984 when a plaintiff school district attempted to join into one class "all public school districts and private schools in the nation to recover the costs incurred in undertaking asbestos abatement remedial action."<sup>64</sup> The class is attempting to sue nearly every asbestos manufacturer in the country.<sup>65</sup> Since its inception, the case has made its way up and down the appellate ladder several times. This has resulted in no less than 30 published opinions from various proceedings, challenging a plethora of procedural and legal points. As of January 1992, the case was still in progress. Obviously, one of the chief concerns is that when the litigation finally ends, there will be little left for the school districts to collect. In the end, the only winners in this law suit may be the attorneys.

## VI. CONCLUSION

Because Congress, through the EPA, mandated the cleanup of asbestos in the public schools, school districts across the nation must decide how they will finance the task. Federal funds are available to assist in the abatement effort but are insufficient because of the magnitude of asbestos use and the required expediency of cleanup to avoid further health risks. When evaluating whether to litigate to recoup costs not covered

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is within the policy coverage if any part of the continuing property damage is within the policy coverage). This interpretation of insurance policy language would make the insurance company which insured the asbestos manufacturer at the time of the installation of asbestos ultimately liable for successful claims by schools. *But see Pittsburgh Corning Corp. v. Travelers Indemnity Co.*, No. 84-3985 (E.D. Pa. Jan. 20, 1988) (holding that the insurer at the time of discovery of the asbestos problem is liable unless that policy excludes coverage for such an occurrence). Because most insurers since the onslaught of the asbestos epidemic have attempted to exclude coverage, manufacturers will ultimately be responsible for successful claims under such a policy interpretation.

63. 594 F. Supp. 178 (E.D. Pa. 1984).

64. *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 424 (E.D. Pa. 1984).

65. *Id.* at 425.

by federal funds, schools must consider many legal and practical realities. Some of these realities include: the probability of winning the case on its merits; the legal theories and defenses available to school-asbestos litigants; the financial condition and insurance coverage of the manufacturer being sued; and the costs, in terms of time and money, of pursuing protracted litigation.

Given these considerations, school districts may find that the quickest, wisest and least painful approach may be to simply pay for the cleanup themselves. This may require them to seek a temporary increase in taxes, pursue a public bond offering or cut other budget items to cover the cost of the abatement. Each of these alternatives will, of course, have its own legal and political consequences. Unfortunately, the traditional approach of seeking redress in the courts for the wrongs of others has proven ineffective for school-asbestos abatement.

*Derek D. Rapier*