Legal Corner

Larry Schnapf

Insulating against asbestos liability

Increasingly stringent federal and state asbestos cleanup laws are imposing substantial legal and financial burdens on owners and operators of commercial buildings laden with asbestos-containing materials (ACM). As a result, landlords are having problems finding tenants, owners are offering steep discounts to lure reluctant purchasers, and buyers are having problems lining up lenders and other institutional investors who are fearful of becoming targets of lawsuits.

In some areas of the country, the sales price of office buildings with ACM has been discounted as much as 20 percent while rents have been reduced by as much as 15 percent.

Many financial institutions are shunning buildings with ACM because they are afraid they will be sued by victims of asbestos for wrongfully facilitating a sale of a building with ACM or fear that they will be liable as owners if they foreclose on the property and the ACM is mishandled or wrongfully disposed. Indeed, the Federal National Mortgage Association (Fannie Mae) has instituted an environmental hazards management program which contains comprehensive asbestos inspection requirements. The effect of these and federal or state asbestos regulations has been to reduce the amount of mortgage money available for rehabilitation or refinancing.

Until the dangers of asbestos became known, asbestos was used extensively to insulate, fireproof, and soundproof the majority of commercial buildings constructed between 1920 and 1970. Indeed, many municipal building codes mandated that asbestos be applied to new buildings. Asbestos is also found in acoustical plaster, wallboard, ceiling panels, floor tiles, roofing materials, reinforcements in concrete waterpipes, and as a thermal insulator in boiler and HVAC rooms.

A recent study published by the U.S. Environmental Protection Agency (EPA) found that 733,000 of the 3.5 million public and commercial buildings in the United States have ACM, and 500,000 or 14 percent of those buildings will require some sort of cleanup work while 317,000 contain significantly damaged ACM. A separate report conducted by New York City revealed that 68 percent of the buildings surveyed contained asbestos and that 87 percent of those buildings posed some risk to their occupants because the asbestos was damaged.

Despite the hazards posed by ACM, it was not until the EPA began aggressively enforcing existing federal asbestos regulations and states began adopting asbestos cleanup laws that building owners and operators became concerned about asbestos.

Federal regulation of asbestos

Asbestos is regulated by the federal government under a number of laws. The regulations of chief importance to building owners and operators are the asbestos standards established under the National Emission Standards for Hazardous Air Pollutants (NESHAPs) of the federal Clean Air Act, which ban spray applications of ACM in new buildings and also establish procedures for demolition and renovation of buildings containing friable ACM.

Under the Clean Air Act regulations, all owners or operators of a building that has friable ACM, which is ACM that can be crushed into powder by hand, are required to notify the EPA at least 10 days before commencing demolition or renovation work. The agency must be provided with the name and address of the owner or operator, a description and location of the building being demolished or renovated, and an estimate of the amount of friable asbestos in the building.

If the amount of friable asbestos within the building exceeds 260 linear feet or 160 square feet, the owner or operator must also follow certain work practices designed to control asbestos dust emissions during removal and storage. Materials containing friable ACM must be properly disposed of at an approved waste disposal site. If an owner or operator fails to comply with these regulations, the government may seek an injunction halting the operation and assess penalties.

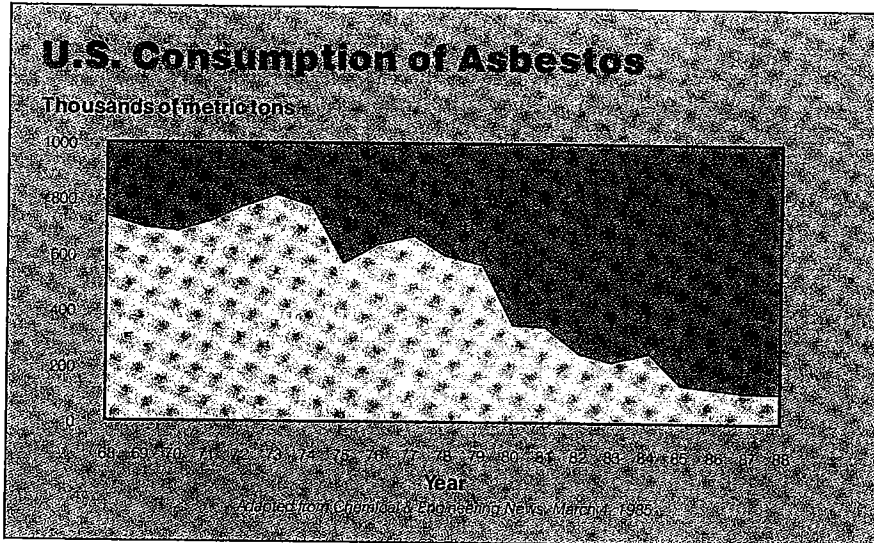
The EPA has estimated that there are over 100,000 renovation and demolition jobs involving ACM each year. Because it perceives that there is only a 50 percent compliance rate with the work practice rules at construction sites, the agency has been aggressively enforcing these asbestos regulations against contractors and building managers. Recently, the EPA filed 13 civil suits for NESHAP violations involving improper removal of ACM from apartment buildings, high schools, colleges, boiler rooms, hospitals, warehouses, restaurants, hotels, and casinos.

The aggressive posture that the EPA has taken regarding asbestos violations was demonstrated in *United States v. Geppert Bros., Inc.*, where the agency commenced a civil action against both the demolition contractor and the building owner for failing to comply with the asbestos regulations.

The owner of the building argued that the regulations only applied to contractors who are actually performing the demolition work and not building owners. However, the court held that the owner of a building that is being demolished becomes an owner and operator of a demolition by purchasing the services of the contractor.

Likewise, in *United States v. Tzavah Urban Renewal Corp.*, an owner of a hotel was enjoined from completing renovations and ordered to abate violations of the asbestos regulations. In that case, piles of unwetted ACM remained uncovered for over a year despite the issuance of several compliance directives.

The building owner argued that the EPA was not entitled to relief because he had not knowingly violated the federal asbestos regulations. However, the court likened improper removal of ACM to engaging in "ultrahazardous activity" and said the owners must therefore be strictly liable for their fail-



ure to comply with the regulations.

Recently, the EPA also filed a suit against the Consolidated Edison Company in New York charging that the company failed to notify federal authorities when it removed ACM from turbines, boiler doors, and other equipment in 11 buildings. They are seeking $1 million in penalties. The EPA has asserted that the company allowed asbestos fibers to be released into the air and failed to wet down or otherwise seal friable asbestos on the doors of eight boilers that were transported on a flatbed through the streets of New York.

The EPA has also sought sanctions for failing to file the required pre-construction notices or submitting false information. A site operator was indicted in *U.S. v. Donahoo* for knowingly filing a false notification of renovation work. In that case, the Department of Justice brought felony charges against the principal owner of a demolition firm because the contractor initially failed to provide the notice required by the NESHAP regulations. When the notice was submitted, an EPA site inspection revealed that the work had begun prior to the date stated in the submission.

In addition, the EPA recently toughened its settlement policy for NESHAP violators. The minimum penalty is now based on the costs avoided by noncompliance, which the agency has determined are $20 per linear foot for each improperly performed job site.

The EPA has also promulgated asbestos inspection and abatement regulations under the Asbestos Hazard Emergency Response Act (AHERA). These rules require all local school districts to conduct inspections of all school buildings within their jurisdiction and to develop asbestos management for controlling and abating releases of asbestos.

The EPA was directed under AHERA to determine whether the mandatory asbestos inspection and management rules should be extended to public and commercial buildings. While the agency declined to extend the program to such buildings, in the face of a petition from the Service Employees International Union (SEIU) and a bill introduced in the House of Representatives by Congressman James Florio (D-N.J.) that would extend the inspection program to commercial and public buildings, the EPA has agreed to hold public meetings on a possible expansion of the inspection program to those buildings.

Asbestos regulations have also been issued under the federal Occupational Safety and Health Administration Act (OSHA) which are designed to protect employees against excessive concentrations of asbestos in the workplace. These requirements apply to work sites in buildings where renovation or demolition work is performed.

Asbestos is also regulated as a hazardous substance under the federal Superfund law which holds owners and operators of property liable for the cleanup of hazardous substances. Under the Superfund regulations, a release of one pound or more of asbestos into the air will require building owners or operators to report the release and undertake a cleanup. As a result, several property owners who have incurred asbestos abatement costs have filed private actions under the federal law against former owners and operators of buildings with ACM seeking recovery of their abatement costs.

The Fannie Mae asbestos requirements only apply to the secondary mortgage market but nevertheless have an impact on developers and building management seeking to finance construction or rehabilitation projects. Fannie Mae will purchase mortgages for single and multi-family dwellings with ACM provided the asbestos does not pose a hazard to anyone living or working on the property.

The Fannie Mae requirements include encapsulation of friable asbestos and also compel building managers to conduct inspections of ACM twice a year and air tests every other year. No work is required on pipe wrappings so long as the wrapping is secure, but ceilings with sprayed-on asbestos must be covered by a layer of wallboard. Non-friable asbestos in roofing shingles and floor tiles must be inspected periodically to make sure they have not deteriorated or been damaged.

State regulation of asbestos

While federal law does not currently require inspection and asbestos control programs for commercial and public buildings, 38 states and many cities have enacted local rules that mandate inspections and abatement programs and also require asbestos abatement contractors to be certified.

For example, New York City's Local Law 76 requires the inspection of any building (except single family homes) with ACM before renovation or demolition can begin. In addition, the city requires that ACM be wet down,

sealed, labeled, and separated from other debris when removed. Violations of these provisions may subject the offender to fines of up to $25,000 per day and/or imprisonment of not more than one year.

Approximately 30 cases involving civil and criminal violations of Local Law 76 have been filed by the city. Recently, a developer converting a former hospital into a cooperative apartment building was charged with criminally ordering a building porter to rip asbestos insulation off basement pipes. Moreover, legislation has been introduced in the city council that would mandate inspections and abatement of friable asbestos in commercial buildings.

Recently, California adopted an asbestos right-to-know law which requires owners, tenants, sub-tenants, building managers, and agents of buildings constructed after 1979 to notify anyone working in the building, including contractors, janitors, and security guards, about the presence of asbestos.

The notification requirements include written notices to all employees, results of any samplings or surveys, identification and location of ACM, and posting of conspicuous warnings in areas where ACM may be released because of construction, maintenance, or renovation work. While the law does not expressly require inspections to determine the condition of the ACM, such inspections are presumably implicit in the disclosure obligation.

Common law liability

In addition to state and federal statutes regulating asbestos, owners and operators of buildings with ACM may also be liable under the traditional common law principles.

A commercial landlord has a general duty to protect occupants and visitors from unreasonable risk of harm. As part of this duty, a building manager or owner has an affirmative obligation to exercise reasonable care in inspecting, repairing, and maintaining a building to prevent unreasonable risk of harm to members of the public who may enter the building. The building manager also has an obligation to warn tenants and the public about concealed dangerous conditions.

Thus, an owner or building manager can be held liable if occupants or visitors are injured by exposure to asbestos which the owner/operator knew or should have known existed and which was not repaired or removed. Furthermore, if the owner or manager suspects that ACM is in the building but delays instituting abatement procedures, the owner may be found negligent for exposing plaintiffs to the asbestos. An owner may also be liable if a contractor negligently performs renovation work that exposes occupants to asbestos.

In addition to common law liability, if building management or a tenant fails to warn building occupants of asbestos hazards, this could limit insurance coverage for policies that contain exclusions for failure to warn or where the failure could amount to an intentional concealment that would fall within the intentional tort exclusion.

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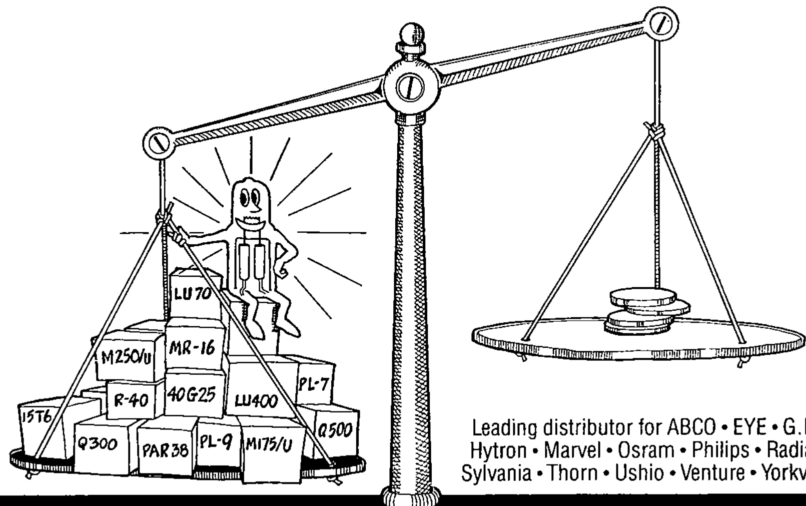
Mr. Schnapf previously served as environmental counsel to Manufacturers Hanover Commercial Corporation and was staff counsel for environmental affairs for the Hertz Corporation. He is a member of the Environmental Law Section of the New York State Bar Association and the Natural Resources Law Section of the American Bar Association.



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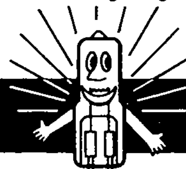

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