1982 WL 189171 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 18, 1982

***1 SUBJECT: Education, Liability, Limitations on Action, School District**

(1) There are at least six potential theories of recovery available to the school districts to recover through litigation the cost of removing or containing friable asbestos from our public schools.

(2) The statutes of limitation applicable to the various theories should not present an insurmountable obstacle to recovery in most instances.

Governor Richard Riley

QUESTIONS:

1. What rights do school districts have to recover, through litigation, the cost of removing or containing friable asbestos in our public schools?

2. What, if any, statute of limitation problems might arise with this type of litigation?

DISCUSSION:

Introduction:

The issue of concern is whether a school district may recover the costs of containing or removing asbestos from schools. Asbestos is a carcinogen and has been the cause of thousands of deaths in industry due to inhalation of asbestos fibers. It is estimated that 67,000 cancers will be attributable to asbestos exposure per annum, 'or about 17% of all cancers detected annually in the United States.' The Attorney General's Asbestos Liability Report to the Congress, Sept. 21, 1981, citing Commercial Union Insurance Companies, Environmental Issues Task Force, Asbestos—A Social Problem at 12-14 (May 12, 1981). As a result of common occurrences, such as building vibrations due to equipment operation, friable asbestos releases fibers into the air, and therefore constitutes a hazard to the health of students and school employees.

Generally speaking, in order for a school district to recover from an asbestos manufacturer or any other available party, it will be necessary for the school district to establish that a defendant breached a duty which resulted in legally cognizable injury to the plaintiff. In this regard, contract and tort theories of liability have been reviewed.

Whether a cause of action can be established on breach of contract will, of course, depend upon what agreements were made between the parties involved and the specifics or terms of the agreements. This determination can only be made after a careful review of the contracts involved in each specific case. Privity between the parties is required in contract actions and may present a formidable obstacle to action being taken against manufacturers of asbestos who did not contract directly with the school districts for sale of the product. Another potential problem which may accompany an action for breach of contract is the effect of the applicable statute of limitation. § 15-3-530(1), 1976 S. C. Code of Laws, as amended, provides for a six year limitation on actions brought in contract. The six year period begins to run from the time when the cause of action accrues. The case

law in South Carolina has held that a cause of action accrues when the plaintiff has a legal right to sue on it. See Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962); W. J. Klein Co., Inc. v. Kneece, 239 S.C. 478, 123 S.E.2d 870 (1962). Ordinarily, in a contract action where obvious harm has occurred accrual would take place at the time the breach occurred (e.g., failure to deliver goods to a construction site). If that is the case, then the breach in cases seeking to recover for cost of removing asbestos would be determined to have occurred when the material was delivered. Since, in most instances, the school buildings were constructed over six years ago, recovery would be prohibited by the statute of limitation. However, in situations such as the present one, where the breach produces a latent injury, the courts have generally applied what has become known as the 'discovery' rule. Under this 'discovery' rule, the six year period begins to run from the time when the latent defect is or should have been discovered. See Hunt v. Star Photo Finishing Co., 115 Ga. App. 1, 153 S.E. 2d 602 (1967); Cunningham v. Frontier Lumber Co., 245 S.W. 270 (Tex.Civ. App. 1922); Hilton v. Duke Power Co., 254 F.2d 118 (4th Cir. 1958); Webb v. Greenwood County, 229 S.C. 207, 92 S.E.2d 688 (1956).

***2** While no strong precedent exists in South Carolina for applying the 'discovery' rule in a breach of contract action, the trend seems to be toward its application and a persuasive argument certainly can be made for its application when dealing with latent defects of friable asbestos.

It should also be noted that, in South Carolina, under § 36-2-725(2), the 'discovery' rule applies to contracts for sale of goods which come within the purview of the UCC. No further attention will be given to recovery on the basis of contract since the success of a cause of action based on contract will depend on what was contracted for and by whom and such determinations must be made on a case by case basis.

Tort theories for addressing hazardous activities and dangerous products such as strict liability, negligence and implied warranty, have been considered because of the unsafe nature of asbestos materials. Since privity is not required and the determination as to when a cause of action occurred in tort is made under the 'discovery' rule, tort theories should prove to be favorable grounds for action by the school districts. Whether an action based in tort will be successful depends on whether the plaintiff can establish three things. The first is that he has been injured by the product. The second is that the injury occurred because the product was defective, unreasonably unsafe. The third is that the defect existed when the product left the hands of the particular defendant. See Prosser, Law of Torts, at 671 (4th ed. 1971).

Duty, Breach of Duty, Injury

There are three common elements to any theory of recovery in tort. The first common element to any theory of recovery in tort and the predicate for an action related to asbestos in the schools is to establish that the defendant had a duty to the plaintiff. [A] manufacturer or even a dealer has a responsibility to the ultimate consumer, based upon nothing more than the sufficient fact that he has so dealt with the goods that they are likely to come into the hands of another, and to do harm if they are defective. Prosser, Law of Torts at 642 (4th ed. 1971).

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

The asbestos manufacturers, therefore, have been subject to a duty not to cause foreseeable harm to purchasers of their products, or to those in the vicinity of the product's probable use. Id. at 662.

A second common element is the breach of the duty. To the extent that friable asbestos is dangerous, the danger appears to be inseparable from a properly made product of the particular kind. The product may also have been improperly designed. It has been reported that problems have now been eliminated by binding asbestos into other materials or encapsulating it so the deadly fibers cannot escape. Failure to test a product to discover dangerous properties or failure to give adequate warnings of unreasonable dangers which the manufacturer knows or should know, arise from the use of the product are also examples

of breach of duty which may be proved against the manufacturer of the asbestos materials. See Prosser, Law of Torts at 644, 646, 647 (4th ed. 1971).

***3** In the landmark asbestos liability case, Borel v. Fibreboard Paper Products Corp., 493 F. 2d 1076, 1104 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), it was determined that all of the asbestos manufacturers involved in that case provided no warnings accompanying their products prior to 1964, and that the warnings provided after that date were inadequate. The Attorney General's Asbestos Liability Report to the Congress, September 21, 1981, at pp. 59-66, points out that the two defendant asbestos manufacturers who have responded to discovery in the school district litigation have admitted failure to test, and were unable to show that warnings accompanied their products.

A final element common to any theory of recovery is to prove the injury. This involves two aspects; first, the factual existence of injury, and second, the issue of whether the injury is one for which recovery may be obtained. The factual issue of injury will be determined by juries or judges on the basis of expert scientific and medical evidence but it does appear that there is sufficient knowledge and information about the danger of asbestos to establish that friable asbestos can and does present a real health hazard to those exposed to it.

The recovery for injury contemplated here is for the cost of containing or removing hazardous asbestos products. An action brought to recover damages for costs of repair and replacement of defective goods is one for 'economic loss' as opposed to 'property damage,' which is physical harm to the user's property. See White & Summers, Uniform Commercial Code, Sec. 11-4 at 405 (2d ed. 1980). This distinction is important because a majority of the courts do not allow recovery for economic loss in actions brought under negligence, strict liability, or implied warranty. The general rule in South Carolina, where economic loss is the sole damage, is to allow recovery only under warranty and only if the damage was foreseeable under § 36-2-715(2)(a). Gasque v. Eagle Machine Co., Ltd., 270 S.C. 449, 243 S.E. 2d 831 (1978). Recovery for economic loss on a strict liability theory has not been allowed. Cooley v. Salopian Indust. Ltd., 383 F. Supp. 1114 (D. S.C., 1974). In the case denying recovery on basis of strict liability, the economic loss was not caused by a hazardous product or from a tort 'independent' of the sale of a defective product. Many commentators are urging the courts to allow recovery for economic loss where it is occasioned by the irresponsibility of a company placing into the stream of commerce a potentially dangerous product without taking necessary steps to assure safety of the public who will be exposed to it. A persuasive argument could be made along those lines that might convince the court to allow recovery for economic loss on strict liability under the circumstances of this particular case. Without a doubt, the economic loss issue is a pivotal issue in whether actions in strict liability, negligence, and possibly even restitution, since it is based on a products liability theory, will be successful. An in-depth discussion of the issue is contained in The Attorney General's Asbestos Liability Report to the Congress, Sept. 21, 1981, pp. 99-108.

'Persons' Potentially Liable

***4** This opinion is presented under the assumption that action will be brought against the manufacturers of the asbestos since they are the persons most obviously liable for costs. However, it is important that some attention be given to the potential liability of others involved, such as the distributor, architect, general contractor and the subcontractor. Whether or not to include parties other than the manufacturer is a decision individual counsel will have to make based on the facts of his particular situation. It should be noted here that in the two cases filed to date, the sole defendant has been the manufacturer. See Cinnaminson Township Board of Educ. v. National Gypsum Co., No. L-49430-79 (N.J. Super. Ct. Law Div., filed May 19, 1980) and Dayton Independent School Dist. v. U. S. Gypsum Co., No. B81-277-CA (U.S. Dist. Crt. E.D. Tex. Beaumont Div., filed April 22, 1981).

Where distributors were involved in the sale of asbestos used in school construction, and can be identified, their potential liability should be assessed. The general rule is that distributors are not liable in negligence for latent defects in the products they distribute where the product is shipped by the manufacturer in a sealed package or container (the most likely way asbestos products were sold) and the distributor is nothing more than a conduit for the manufacturer. Distributors are, however, required to exercise reasonable care to prevent injury due to known dangers and must in such circumstances transmit proper warnings

and instructions. The Attorney General's Asbestos Liability Report to the Congress, Sept. 21, 1981, p. 188, citing 2 A.L. Frumer & M. Friedman, Products Liability, § 18.01, 18.02, 18.03, 20.02 (1980).

Liability for latent defects in products sold in sealed containers will normally be imposed on a breach of warranty theory where privity exists. Id. at 189 citing § 19.03(4)(c), 20.04[1]. In South Carolina, as in most jurisdictions, distributors of pre-packaged products will be liable for latent defects under the doctrine of strict liability in tort. See § 15-73-10, Code of Laws of South Carolina, 1976, as amended; Prosser, Law of Torts, at 664 (4th ed. 1971).

An architect is required under the law to exercise the skill and diligence ordinarily required of architects. He must use the ordinary and reasonable skills usually exercised by one in his profession in preparing the plans and specifications, and he must guard against defects in the plans as to design, materials, and construction. He is generally only liable for failure to exercise reasonable care and skill. See, e.g., 5 Am. Jur. 2d., Architects, § 8 (1962). However, South Carolina follows a minority view that a design professional undertaking to furnish plans and specifications impliedly warrants their sufficiency for the intended purpose. Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885, 888; 25 A.L.R. 2d 1080 (1951). Under this standard of care an architect would probably be liable for breach of warranty, irrespective of the fact that the use of sprayed asbestos in building construction was an accepted practice by architects during the relevant time period, if the architect knew, or should have known, of the hazard involved in using asbestos in a school situation.

***5** A usual requirement of public construction contracts (and most private construction contracts as well) is the issuance of a certificate of performance. In order to avoid litigation or delay, public works contracts usually contain stipulations requiring that the work be done under the supervision of an architect or engineer, who is given authority to resolve questions concerning execution of the work. Such stipulations usually permit payment to the general contractor only upon issuance of the certificate certifying that all work has been properly performed. Absent fraud, acceptance of authorized construction work by the owner after issuance of a certificate of performance by the architect is usually prima facie evidence that the project is complete and the work was performed in a workmanlike manner. See, e.g., 64 Am.Jur. 2d., Public Works and Contracts, §§ 116, 117 (1972). However, acceptance of the architect's final certificate and the project by the building owner does not constitute a waiver of latent defects caused by deficient plans or specifications, or by defective and improper workmanship, where the defects were unknown at the time of acceptance and were not discoverable by simple inspection. See, e.g., 13 Am. Jur. 2d., Building and Construction Contracts, § 35, 55 (1964).

The general contractor's obligations generally end upon completion of the project, and he is not normally responsible for defects or weaknesses in the structure itself, since he does not guarantee the sufficiency of the plans and specifications, but only the skill with which he performs his work. In most jurisdictions, a contractor who has followed the plans and specifications furnished him by the owner or his architect, but which later prove to be defective or insufficient, will not be responsible to the owner for any resulting loss or damage after the work has been completed, provided the contractor has not been negligent in carrying out the work, and the damage is solely attributable to inadequacies in the plans or specifications. See, e.g., 13 Am.Jur. 2d, Building and Construction Contracts, § 27, 28 (1964). Annot., 6 ALR 3d 1394 (1966). If a contractor, on the other hand, fails to carry out the construction work in a proper, workmanlike manner, he will be liable to the building owner, not only for breach of contract, but also in tort for negligent performance of the contract. See, e.g., 13 Am. Jur. 2d. Building and Construction Contracts, § 138 (1964); Edward's of Byrnes Downs v. Charleston Sheet Metal Co., 253 S.C. 537, 172 S.E.2d 120 (1970). Thus, in those instances where a friable asbestos problem exists in a school because the asbestos was negligently applied, the general contractor may be potentially liable, and where the architect was required to supervise the construction work, he may also be potentially liable.

Where, however, damage to an improvement to real property is caused by a product's defect or failure, liability is sometimes difficult to determine. The general rule is that, where the contractor is without knowledge that construction materials contain defects and in good faith are incorporated in a structure and the structure is accepted by the owner, the contractor is ordinarily not liable when the defects are subsequently discovered. See, e.g., Annots. 6 A.L.R.3d 1394 (1966); 61 A.L.R. 3d 792 (1975). However, S. C. common law provides a remedy for defective construction by implying a warranty. Three South Carolina cases have held the contractor (or one in his shoes) liable for construction defects without requiring any proof of fault. Hill v. Polar

Pantries, 219 S.C. 263, 64 S.E. 2d 889 (1951); Lane v. Trenholm Building Co., 267 S.C. 497, 229 S.E. 2d 728 (1976); Terlinde v. Neely, 275 S.C. 395, 95 271 S.E.2d 768 (1980). In both Lane and Terlinde, the court held the builder liable even though the defect was a latent one in the materials used. Although Lane and Terlinde are perhaps factually distinguishable from the type of large construction case involving commercial as opposed to residential buildings, the logical extension of the broad holdings would hold a general contractor liable for the construction of a commercial building, with any latent defect, even though no fault can be proven.

***6** When subcontractors are brought in by the general contractor, they are normally under contract to the contractor, but not with the building owner. In South Carolina, as in most jurisdictions, a building owner may not sue a subcontractor for breach of his subcontract with the general contractor on the theory that the owner is a third party beneficiary; suit is usually denied on the ground that the owner is merely an incidental beneficiary of the subcontract. Accordingly, any suit by a building owner against a subcontractor will usually sound in tort. Negligence claims against the subcontractor are assertable and would follow the same principles as those asserted against the general contractor. As is the case with a general contractor, a subcontractor is equally liable for latent defects in the materials he uses in construction under the principles of Hill and Terlinde.

Potential Theories of Recovery

Having presented the previous information for background purposes, the following six potential theories of recovery are presented for consideration in the following order: equitable restitution, strict liability, negligence, implied warranty, misrepresentation, and unfair trade practice.

Equitable Restitution

Restitution is a desirable remedy from the school district's standpoint because it most closely fits the problem and it offers an appropriate and favorable treatment in terms of the Statute of Limitation.

Under this theory, the school district would allege that the manufacturer who supplied the friable asbestos for use in the classrooms without placing a warning that asbestos fibers are dangerous and without testing to determine the danger from such fibers in an environmental as opposed to an occupational setting, have a duty to abate the resultant hazard and must compensate the party abating the hazard, if the manufacturer refuses to do so.

The Restatement of Restitution sets forth the elements of a restitution claim under the public emergency assistance doctrine:

Section 115. Performance of Another's Duty to the Public.

A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if (a) he acted unofficiously and with intent to charge therefor, and (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

Under this theory, the person having the duty must first be requested to perform it unless considerations of urgency render a prior request infeasible. In cases where actions have already been taken to rectify the asbestos problem without first making a request to the manufacturer, the school district may argue that the opening of the school was imminent and there was no time to delay in making the necessary repairs.

The cases dealing with actions based on equitable restitution involve plaintiffs in situations which are closely analogous to the situation of the school districts needing to remove or contain asbestos. In Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967), a barge loaded with liquid chlorine had negligently sunk in the Mississippi River. The Government concerned that if any chlorine escaped it could be hazardous, demanded removal by Wyandotte Trans. Co., Wyandotte refused to remove the

barge. The Government subsequently removed the barge and recovered for the cost of doing so from Wyandotte on the theory of equitable restitution. For other cases, see Brandon Township v. Jerome Builders, Inc., 80 Mich. App. 180, 260 N.W.2d 326 (1978); United States v. Consolidated Edison Co. of N. Y., 1680 F.2d 1122 (2nd Cir. 1928).

***7** In addition to the support of the case law, indemnity principles suggest that restitution is appropriate. The ultimate responsibility for the hazard created rests with the manufacturer not the school districts, and if an action were brought for death or injury caused by asbestos exposure against the school district, clearly the school district could seek indemnification from the manufacturer.

The major advantage of pursuing this theory of recovery is that there is no problem with the statute of limitation. § 15-3-530 of 1976 S. C. Code of Laws, as amended, provides for a six-year limitation within which actions in contract or tort must be brought. Also, there is a general ten-year statute of limitation which applies to actions not fitting within the six-year statute. The case law in South Carolina has held that neither of these statutes are applicable to suits in equity. McKinnon v. Summers, 224 S.C. 331, 79 S.E.2d 146 (1953); Parr v. Parr, 268 S.C. 58, 231 S.E.2d 695 (1977.) Since an action based on equitable restitution would be a suit in equity, neither the six or ten years limitation would be applicable, but the doctrine of laches may apply and bar the action if it would be inequitable or unfair to permit the case to be brought at the present time. The length of time in itself is not a bar to recovery under this doctrine. Factors to be considered in a determination are whether there is an excuse for the delay, whether the delay would work a hardship on the defendant, and whether because of the change of circumstance, the delay would greatly increase the change of reaching an erroneous decision. Clearly, in the case involved here, the school district could argue that it was ignorant to the hazardous condition of the asbestos until recently and that this ignorance was contributed to by the fact that the substance was manufactured without warnings as to its danger.

The major disadvantage to this theory of recovery is that the theory is based in products liability and therefore the fact that economic loss is not recoverable in strict liability or negligence in South Carolina may defeat recovery.

If a school district decides to proceed with an action based on equitable restitution, it should first ascertain the name of the responsible asbestos manufacturer and make a formal demand for abatement. If the request is refused, the school district must be prepared to establish that asbestos is a hazard and that the failure of the manufacturer to warn and to abate is a breach of the manufacturer's duty to the school district which demands compensation.

Strict Liability

Strict liability is a more recent development than either liability for negligence or breach of warranty. It is the preferred products liability cause of action because it is unnecessary to prove negligence against the manufacturer, and contractual privity between the manufacturer and the injured product user is not required. The Restatement (Second) of Torts sets forth the elements of a strict liability claim.

Section 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

***8** (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

§ 15-73-10 of 1976 S. C. Code of Laws, as amended, adopts the language of § 402A of The Restatement (Second) of Torts.

It should be noted that under the doctrine of strict liability the seller may be required to give warning as to the product's use in order to prevent it from being unreasonably dangerous. Furthermore, no privity of contract is necessary, thus allowing the school district to sue the manufacturer even when the manufacturer did not sell directly to the school district.

The critical issue in an action brought by the school district would be whether the alleged danger of asbestos products to school children was foreseeable so as to establish that the manufacturer had a duty to test and warn prior to selling the product. The industry's knowledge of the danger to factory workers has already been recognized in the case law as well as the duty to test, and warn of dangers connected with the product in an occupational setting. Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), cert. denied., 419 U.S. 869 (1974); Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975). It does not seem that it would be too difficult to extend this knowledge and its attendant responsibilities to the release of asbestos fibers from friable products in classrooms.

One potential obstacle in bringing a successful action on strict liability is the fact that, in the majority of courts, including South Carolina, recovery for economic loss is not allowed on the ground of strict liability. It is possible that the plaintiff could overcome this obstacle by arguing that due to the hazardous and dangerous nature of the product involved, recovery should be allowed. If the schools were replacing asbestos because it had become unsightly or was falling from the ceilings, the injury would appear correctly characterized as a loss of bargained-for expectations, which is traditionally a matter of contract rather than tort law. But the sole reason for removal of the asbestos is that school authorities are concerned that inaction may result in death or injury to the students and employees for whom they are responsible. This argument is persuasive and has been successful in at least one case. Gladiola Biscuit Co. v. Southern Ice Co. 267 F.2d 138 (5th Cir. 1959). In Gladiola, the court allowed a biscuit manufacturer to recover against an ice manufacturer its costs of destroying biscuits containing glass mixed in with the ice furnished by the defendant, on a strict liability theory. Many commentators have argued for and the courts of England have allowed recovery in tort for economic losses resulting from hazardous products. Nevertheless, the present state of the law is not to allow recovery in strict liability for economic loss.

***9** Consideration must be given to the application and effect of the statute of limitations on an action in strict liability. Case law has held that § 15-3-530, 1976 S. C. Code of Laws, as amended, which requires that an action be brought within six years of the time when the cause of action accrued, is the applicable statute for tort actions. Newman v. Lemmon, 149 S.C. 417, 147 S.E. 439 (1929). A cause of action accrues when the plaintiff has a legal right to sue on it. Brown v. Finger, 240 S.C. 102, 124 S.E.2d 781 (1962). Ordinarily, accrual would take place at time the injury occurs, where obviously direct harm has occurred (e.g., automobile accident). However, where the tort produces latent injury, the legislature and the courts have generally applied what has become known as the ‘discovery’ rule. Gattis v. Chavez, 413 F. Supp. 33, 39 (D.S.C. 1976). In South Carolina, § 15-3-535 states, in pertinent part:
‘. . . all actions initiated under Item 5 of § 15-3-530 as amended shall be commenced within six years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.’ Gattis v. Chavez, 413 F. Supp. 33, 39 (D.S.C. 1976); Mills v. Killian, 273 S.C. 66, 254 S.E.2d 556, 558 (1979); Brown v. Finger, 240 S.C. 107, 124 S.E.2d 781 (1962).

Under the ‘discovery’ rule, the application of the six-year limitation should produce a favorable result for the school districts. The Asbestos School Hazard Detection & Control Act was not enacted until June 14, 1980, and only since then have school districts been directed by competent rational authority to detect asbestos hazards in schools, and only as recently as a week ago has the South Carolina Dept. of Health & Environmental Control promulgated rules to comply with a detection program.

It could conceivably be argued that the nature of the action brought by the school district to recover the cost of containment or removal of asbestos from the school is more in the nature of an action for damage to real property and therefore subsection three rather than five of § 15-3-530 would be applicable and accrual would take place at the time of the first injury to the property (i.e., time of installation). Because in many cases installation was probably in excess of six years ago, this argument, if accepted, could defeat a successful action on the ground of strict liability. However, it appears that the developing trend in the case law

is toward a 'discovery' rule even in situations involving damage to real property. Terlinde v. Neely, 275 S.C. 395, 271 S.E. 2d 768 (1980); Lane v. Trenholm Building Co., 267 S.C. 497, 229 S.E.2d 728 (1976). Therefore, regardless of which subsection of § 15-3-530 is applied, the results should be favorable for an action brought on strict liability.

Negligence

The Restatement (Second) of Torts, Sections 388 and 394 (1965), sets forth the elements of a products liability claim for negligence. The Restatement provides that a supplier or manufacturer of a chattel known to be dangerous for its intended use is liable for bodily harm resulting from the use if he (a) knows, or should know, that the chattel is likely to be dangerous, (b) has no reason to believe that the user will know the danger, and (c) fails to warn the user of the dangerous condition.

***10** The standard for strict liability is essentially the same as the standard for establishing negligence: the manufacturer has a duty to warn of the foreseeable dangers. A major difference in the two theories is the fact that an action for negligence can be barred by proof of contributory negligence on the part of the plaintiff. This defense is not available on a strict liability claim.

An extended discussion of a negligence cause of action is not necessary since, in general, the conclusions stated with respect to strict liability are also applicable to a negligence claim. Also the conclusions as to the applicability and effect of the statute of limitations are the same. On the issue of recovery of economic loss in negligence, there is a dearth of law in South Carolina. However, it would appear that recovery of economic loss where it is the sole damage would not be recoverable in negligence. It should be noted that some cases in other jurisdictions, while denying recovery for economic loss on strict liability, have allowed recovery where negligence was found. Western Seed Production Corp. v. Campbell, 250 Or. 262, 442 P. 2d 215, 218 (1968). See also Berg v. General Motors Corp., 87 Wash. 2d 584, 555 P.2d 818 (1976); Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977).

Implied Warranty

The two implied warranties utilized in cases of this nature are the implied warranty of merchantability of the UCC reflected in § 36-2-314, 1976 S. C. Code of Laws, as amended, and the implied warranty of fitness for a particular purpose of the UCC, reflected in § 36-2-315, 1976 S. C. Code of Laws, as amended.

The elements of an implied merchantability claim are:
(1) that a merchant sold goods,

(2) which were not 'merchantable' at the time of sale, and

(3) injury and damages to the plaintiff or his property

(4) caused proximately and in fact by the defective nature of the goods, and

(5) notice to seller of injury.

The key requirement for merchantability is that the product be fit for the ordinary purposes for which it is intended.

The elements for an implied warranty of fitness claim not required for an implied warranty of merchantability claim are:
(1) The seller must have reason to know the buyer's particular purpose.

(2) The seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods.

(3) The buyer must, in fact, rely upon the seller's skill or judgment.

It appears that the school district could state a claim for relief grounded upon these elements for implied warranty of merchantability and a warranty of fitness for a particular purpose.

It is clear that if friable asbestos is hazardous as claimed, it is and was unfit for use in classrooms.

There is no statute of limitation problem readily apparent with an implied warranty claim. § 2-725 of the Uniform Commercial Code was liberally amended in South Carolina to provide for a six as opposed to a four-year period for bringing an action and to provide for an accrual rule based on when the breach was or should have been discovered, rather than at the time of delivery. See § 36-2-725, 1976 S.C. Code of Laws, as amended. The argument could be advanced that the UCC is not applicable here, since the defective product has been incorporated into real property. The successful assertion of this defense is questionable. Courts have found many of the structural components which, when combined with other materials, ultimately become a part of the building, to be 'goods' within the meaning of the UCC. Wilson v. Reeves Red-Di-Mix Concrete, Inc., 39 Ill. App. 3d 353, 350 N.E.2d 321 (1976); Kunian v. Development Corporation of America, 165 Conn. 300, 334 A.2d 427 (1973); Belmont Industries v. Bechel Corp., 425 F.Supp. 524 (E.D. Pa. 1976). However, in the event the argument should be greeted with acceptance, the applicable statute of limitations would be § 15-3-530 which as previously discussed under strict liability provides for a six-year period of time in which to commence an action from the accrual date of the cause of action. Under subsection five of § 15-3-530, the six year limitation begins to run from the time when the cause of action is or should have been known. If section three is applicable, it could be argued that the time runs from the initial injury, but based on recent judicial trends, an argument for application of the 'discovery' rule would more likely succeed. Therefore, it appears that no matter which argument is accepted there will be a favorable outcome for the plaintiff in regards to the statute of limitations.

***11** The economic loss hurdle faced in strict liability claims will not be an obstacle to an implied warranty claim. In South Carolina economic loss as the sole damage is recoverable under warranty if it was foreseeable under § 36-2-715(2)(a). This section applies to any breach of warranty; therefore, it will be necessary to review the contract and specification documents pertaining to the original construction and sales contract, to determine whether there is an express warranty or other provision, on which a contractual claim for relief can be founded.

Misrepresentation

The elements of the tort cause of action in deceit (or fraudulent misrepresentation) are: (1) the making of a false representation by the defendant; (2) the statement is either knowingly false or not known by the defendant to be true; (3) the defendant intends the plaintiff to act on the misrepresentation; (4) the plaintiff justifiably relies on the statement; (5) the reliance results in damage to the plaintiff. An additional element of importance here is that liability may extend to parties not directly communicated with, but who the defendant desires to influence or whose reliance on the representation should be anticipated. See Prosser, Law of Torts, at 685-86, 696 (4th ed. 1971).

There are a number of documents, which are easily discoverable, evidencing industry knowledge of the hazards of asbestos as long ago as the 1930's. If nondisclosure can serve as the basis for an action in deceit, then this theory of action may be maintainable against asbestos manufacturers who sold their products in the absence of warning. The older rule was that deceit would not lie for nondisclosure. Id. at 696. However, according to Professor Prosser, the recent trend in the laws is toward the conclusion that full disclosure of all material facts must be made wherever elementary fair conduct demands it. Id. at 698.

There is a tendency to find a duty of disclosure where the defendant has means of knowledge not open to the plaintiff and the defendant is aware that the plaintiff is acting under a misapprehension as to the facts which could be of importance to him, and would probably affect his decision. Even though the facts withheld are likely to cause only economic loss, the modern rule is that the seller who fails to disclose latent defects known to him is liable for resulting economic loss. Id. at 697-698. See, e.g., Gilbert v. Mid-South Machinery Co. 267 S.C. 211, 227 S.E.2d 189 (1976).

There is no apparent problem with the statute of limitation and recovery under the theory of misrepresentation. The six year limitation under § 15-5-530(7) is the applicable time period within which any action on the ground of fraud must be brought. Under the language of this section, the discovery rule is applicable to determining the accrual of negligent or intentional misrepresentation causes of action.

Under the theory of misrepresentation, there is no obstacle to recovery of economic loss. In fact, the ordinary purpose of a misrepresentation action is to recover 'economic loss.' In addition to damages for deceit, misrepresentation may also be the subject of equitable remedies, such as imposition of a constructive trust, designed to redress the plaintiff where a defendant has been unjustly enriched. It should be noted that the misrepresentation does not have to be intentional to justify equitable remedies. Id at 687. The retention of profits by asbestos manufacturers who, allegedly, knowingly sold hazardous products to school districts who must now abate the hazards, may be found to constitute unjust enrichment.

Unfair trade practices

***12** § 39-5-10 et. seq. of the 1976 S. C. Code of Laws, as amended, is known as the South Carolina Unfair Trade Practices Act. (Act) Under the Act, unfair or deceptive acts or practices are declared unlawful. What is unfair or deceptive is determined on a case-by-case basis. If there are facts sufficient to bring a claim for misrepresentation it is highly probable that these same facts would constitute a cause of action under the Act. Clearly, it would be an unfair and deceptive act on the part of a manufacturer to sell a product which he knows to be dangerous without giving a warning of any kind.

§ 39-5-150 provides for a period of three years after the discovery of the unlawful conduct in which an action must be brought. This 'discovery' rule should have a favorable result for the school districts since the knowledge of the hazardous condition in the schools resulting from the asbestos has only recently been discovered.

Under § 39-5-140 of the Act '[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another of an unfair or deceptive method, act or practice . . . may bring an action . . . to recover actual damages.' (emphasis added) 'Person' has been defined to include any legal entity, therefore, the school district would fit within this section. It seems clear that this section would allow recovery for the economic loss of removing the friable asbestos since such a loss would be actual damage resulting from the deceptive acts of the manufacturer who sold the asbestos material without proper warning. § 39-5-140 further provides for an award of treble damages if the court finds that the unfair or deceptive method, act or practice was a wilful or knowing violation of § 39-5-20. The statute also provides for the award of attorney's fees and costs.

Conclusion

It is the opinion of this office that the school districts have at least six potential theories for recovery from the manufacturer or any other person who may be liable for the cost of containing or removing the friable asbestos from our schools. Because the 'discovery' rule has been liberally applied in determining accrual time of the cause of action by both the legislature and the courts, the statutes of limitation should not present an unsurmountable obstacle to recovery under any of the potential theories of action at the present time.

It is my opinion that there are no apparent legal obstacles to recovery under implied warranty and if the facts as they are discovered are sufficient to support an action for implied warranty, there is a good likelihood of success on this theory. While proof of deception or fraud may be more difficult to establish under misrepresentation and The South Carolina Unfair Trade Practice Act, careful consideration should be given to their inclusion. Because of the fact that economic loss is not recoverable under strict liability and negligence in South Carolina, these theories have less appeal; however, it is possible that a court could be convinced that due to the hazardous condition which has been created by the actions of those asbestos manufacturers they should under this set of facts be held liable for the cost of removing the hazard from the environment of many innocent children.

Likewise, this same argument can be advanced under the equitable restitution theory of recovery. It is my opinion that since the factual situations in which the school districts find themselves are so similar to the factual situations involved in the cases allowing recovery through equitable restitution, this theory should be given careful consideration.

***13** The material presented here is given for information purposes only. It is by no means an exhaustive list of causes of actions which may be available to the school districts. It will be imperative for counsel for the appropriate school districts to ascertain the facts of the particular circumstances with which he or she will be dealing and to determine whether or not the potential theories demonstrated herein are applicable to his particular case.

B. J. Willoughby
Assistant Attorney General

1982 WL 189171 (S.C.A.G.)

End of Document