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WHO'S IN CHARGE HERE?

A discussion of the relative duties and responsibilities of the employer, the union and the manufacturer/supplier of materials used in the workplace: legal responsibilities, record-keeping, education, right-to-know, testing, industrial hygiene, and other matters.

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INTRODUCTION

At trial, plaintiffs' counsel often attempt to make the jury believe that their clients were injured due to exposure to unsafe working conditions which were directly caused by the manufacturers of asbestos-containing products. There are strategies that may be utilized by defense counsel, however, to negate plaintiffs' inaccurate implication. As set forth below, employers have and had certain duties under federal and state law to provide a safe workplace for their employees. Also, various activities were conducted by unions, such as medical screenings and retaining of doctors as consultants regarding asbestos-related disease, that may be brought to the jury's attention in appropriate cases to lessen the impact of the plaintiffs' characterization of the duties of manufacturers. Finally, there are certain responsibilities that lie with the plaintiff/employees themselves.

I. DUTIES AND RESPONSIBILITIES OF THE EMPLOYER

A. UNDER FEDERAL LAW

1. Statutes Pertaining Directly to Asbestos --


   The Walsh-Healey Government or Public Contracts Act, while not itself directly addressing asbestos, provides that the Secretary of Labor may prescribe such rules and regulations as may be necessary to administer the Act.\(^1\) 41 U.S.C. § 38. Accordingly, in 1952, the

\(^1\)The provisions of the Walsh-Healey Act itself as they pertain to the employer's duty to provide a safe workplace are more fully discussed infra at section I.A.2.b.
Secretary of Labor promulgated "Safety and Health Standards for Contractors Performing Federal Supply Contracts under the Walsh-Healey Public Contracts Act."

Section III.B.1. of that document dealt with "Control of atmospheric contaminants." Generally, the section mandated that "[w]orkers shall not be exposed to concentrations of atmospheric contaminants hazardous to health," and provided that the most recent standards of the American Conference of Governmental Industrial Hygienists (ACGIH) would be used as a guide in evaluating hazards and controls. The section also outlined certain methods for atmospheric control, such as substitution of product, exhaust ventilation, isolation, enclosure, wet methods, and increased general ventilation. Specifically, in section III.B.1.(c), the standard called for a maximum allowable concentration of asbestos dust of five million particles per cubic foot of air. This, of course, was the same standard adopted by and for the ACGIH. In 1969, Walsh-Healey adopted the standard of two million particles per cubic foot, which became the standard for the ACGIH in 1970. Below are listed pertinent portions of the Federal Register regarding the threshold limit value following 1952.

1. Walsh-Healey standards for 1952
2. Portion of Federal Register of July 17, 1959
3. " " " " " September 20, 1968
4. " " " " " January 17, 1969
5. " " " " " May 20, 1969
6. " " " " " May 12, 1971
7. " " " " " May 29, 1971
b. Safety and Health Regulations for Ship Repairing — 29 C.F.R. Subtitle A, Part 8

Effective March 21, 1960, the Secretary of Labor promulgated safety and health regulations for ship repairing pursuant to amended section 41 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 941, now referred to as the Longshore and Harbor Workers' Compensation Act, which required that employers of such employees provide safe employment and a safe place of employment for them). The regulations provide that "[w]hen
employees are exposed to unsafe concentrations of particulate contaminants, such as dusts and fumes, mists and fogs or combinations of solids and liquids, they shall be protected by either air line or filter respirators. . . ." 29 C.F.R. Subtitle A, Part 8, § 8.82(d)(1). The safe concentration for asbestos dust was listed as five cubic particles per cubic foot. Id. Appendix 1, Threshold Limit Values, Mineral Dusts. Interestingly, asbestos was not listed in the section referring to specifications for filters for pneumoconiosis-producing dusts:

Filter respirators shall be equipped with the proper type of filter. Different filters are approved for specific protection against groups of contaminants, as follows:

(i) Pneumoconiosis-producing dust and nuisance dust filters which provide respiratory protection against pneumoconiosis-producing dusts, such as aluminum, cellulose, cement, charcoal, coal, coke, flour, gypsum, iron ore, limestone and wood.

Id. § 8.82(d)(2).

c. The Occupational Safety and Health Act -- The Asbestos Standard -- 29 C.F.R. § 1910.93

On December 7, 1971, an emergency temporary standard relating to asbestos exposure was published in the Federal Register (36 Fed. Reg. 23207) pursuant to the Occupational Safety and Health Act (OSHA). The threshold limit value was twelve fibers per milliliter greater than five microns in length, or two million particles per cubic foot, based on an eight-hour time-weighted average concentration. The temporary standard was effective upon its publication in the Federal Register.

On June 7, 1972, the Department of Labor, pursuant to the OSHA, promulgated a "stepped" threshold limit value for ambient asbestos fibers. The first standard, effective July 7, 1972,
limited an employee's exposure to airborne asbestos fibers to a concentration of not more than five fibers longer than five micrometers per cubic centimeter of air using an eight-hour time-weighted average. 29 C.F.R. § 1910.93a(b)(1). Effective July 1, 1976, the standard was reduced to 2 such fibers within the same parameters. Id. § 1910.93a(b)(2). The ceiling concentration was set at no more than ten fibers in excess of five micrometers per cubic centimeter of air. Id. § 1910.93a(b)(3).

The fiber concentration was to be measured within six months of the publication of the standard, using prescribed methods; if the standard in subsection b was exceeded, the employer was to undertake a compliance program immediately. Id. § 1910.93a(e), (f)(1). After the initial measurement, monitoring was to be undertaken at intervals not greater than six months, both for personal monitoring (i.e., with the breathing zone of the employee) and for environmental monitoring. Id. § 1910.93a(f).

Also, the employer, as opposed to the manufacturer of asbestos-containing products, was required to place caution labels on all products containing asbestos, or on their containers, and post caution signs in areas where asbestos-containing products were being used.

Employers have myriad other duties under the OSHA asbestos standard, including, but not limited to:

1) Use of certain engineering methods such as, but not limited to, isolation, enclosure, exhaust ventilation, and dust collection;

2) Provision of local exhaust ventilation and dust collection systems in accordance with ANSI standards;
3) Provision of local exhaust ventilation systems for hand-operated and power-operated tools which may produce or release asbestos fibers in excess of the exposure limit;

4) Ensuring the use of certain work practices, such as the wetting, where practicable, of asbestos-containing products, the wetting, enclosure, or ventilation of asbestos-containing cement or similar product, and the use of personnel rotation, where permitted;

5) Provision of respirators which comply with the standards set by the U.S. Bureau of Mines in given situations, to wit; where the ceiling of the eight-hour time-weighted average airborne concentrations is reasonably expected to exceed no more than ten times the prescribed limits, a reusable or single use respirator may be used; where such concentrations are reasonably expected to exceed ten times, but not one hundred times, the prescribed limits, a powered air purifying respirator shall be used; and where such concentrations are reasonably expected to exceed more than one hundred times the prescribed limits, a type "C" continuous flow or pressure-demand, supplied-air respirator shall be used;

6) Provision of special clothing (coveralls, head covering, gloves, and foot coverings) to those employees exposed to concentrations greater than the prescribed ceiling level;

7) Provision of "change rooms" and separate lockers or containers for clothing;

8) Observance of certain procedures for transport and laundering of clothing which may contain asbestos fibers;
9) Posting of caution signs at certain locations which conform to given specifications and which state: Asbestos -- Dust Hazard -- Avoid Breathing Dust -- Wear Assigned Protective Equipment -- Do Not Remain In Area Unless Your Work Requires It -- Breathing Asbestos Dust May Be Hazardous to Your Health.

10) Affixing of caution labels to all raw material, mixtures, scrap, wastes, debris, and other products containing asbestos fibers, or to their containers (unless the asbestos fibers have been modified by a binding agent, coating, binder, etc. so that no airborne concentrations of fibers in excess of the prescribed exposure limits would result in reasonably foreseeable use), which labels shall state: CAUTION -- CONTAINS ASBESTOS FIBERS -- AVOID CREATING DUST -- BREATHING ASBESTOS DUST MAY CAUSE SERIOUS BODILY HARM;

11) Observance of certain housekeeping principles, particularly pertaining to cleaning and waste disposal;

12) Maintenance of records of personal and environmental monitoring, with access to such records provided to each affected employee, and with notification to an affected employee who has been exposed to concentrations greater than the prescribed levels;

13) Provision to each employee engaged in occupations exposed to airborne concentrations of asbestos fibers of an annual comprehensive medical examination which shall include a chest x-ray, a history, and pulmonary function tests;

14) Provision of such a medical examination within thirty days before or after termination to terminated employees who worked in occupations exposed to airborne concentrations of asbestos fibers;
15) Maintenance of medical records for at least twenty years.

That evidence of the threshold limit values and other government standards can benefit the defense in asbestos-related litigation is amply demonstrated in *Lorenz v. Celotex Corp.*, 896 F.2d 148 (5th Cir. 1990) (applying Texas law). In that case, plaintiff's decedent, a boiler technician, had worked aboard a United States Navy vessel from 1966 to 1968, removing and replacing asbestos-containing insulation on the pipes and valves in the boiler room. He later contracted lung cancer, which caused his death. Defendant Celotex Corporation presented evidence that the insulation products at issue "produced asbestos dust counts below the maximum level established by the official and unofficial safety standards in place at the time of Lorenz’s exposure." *Id.* at 149. The trial court instructed the jury that "[c]ompliance with government safety standards constitutes strong and substantial evidence that a product is not defective." *Id.* The jury found in favor of the defendant on both the negligence and strict liability claims. The appellate court affirmed, holding that evidence that use of a manufacturer's asbestos-containing products produced dust counts below the threshold limit was strong and substantial evidence that the manufacturer did not known or should not have known that its products were so dangerous or defective that they required a warning.

*See also Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985); *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985); and *Simien v. S. S. Kresge Co.*, 566 F.2d 551 (5th Cir. 1978) (all holding that compliance with government standards constitutes
substantial evidence that the product at issue is not defective or unreasonably dangerous). But see *Loznicka v. Flexitallic Gasket Co.*, 489 So. 2d 1229 (Fla. App. 1986) (compliance with the OSHA standards does not diminish or eliminate common-law duty to warn of dangers of asbestos-containing products). See also *Cordeiro v. Brock*, 698 F. Supp. 373 (D. Mass.), aff'd sub nom *Cordeiro v. Secretary of Labor*, 860 F.2d 1073 (1st Cir. 1988) (OSHA inspections fall within "discretionary functions" clause of the Federal Tort Claims Act and therefore employee of private employer, who suffered disabling lung condition, could not sue federal government due to alleged failure of OSHA to inspect the work place properly).

d. The Department of Health, Education, and Welfare — Statement of Secretary Joseph A. Califano, Jr.

On April 26, 1978, the Secretary of the Department of Health, Education, and Welfare issued a news release relating to the possible risk for lung disease for "workers who have been heavily exposed" to asbestos. Although not a statute, of course, the news release was intended to notify physicians and past workers, as well as others who could be at risk, of the potential hazards associated with exposure to asbestos. Both the physicians' advisory and public information campaigns suggested specific actions that individuals exposed to asbestos could take to minimize any risk, chief among them, the cessation of smoking. Secretary Califano also detailed numerous sources of information concerning asbestos, including the Surgeon General's advisory (which was attached to the news release), Drs. Selikoff and Hammond's article in *Ca-The Cancer Journal for Clinicians*, and papers available from the American
Medical Association, the American Cancer Society, the American Lung Association, the National Cancer Institute, and all state medical societies.

2. Statutes Pertaining Indirectly to Asbestos


Under the Occupational Safety and Health Act (OSHA), effective April 26, 1971, employers have the duty to maintain a safe workplace. Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986). Under section 654 of the OSHA, the general duty clause, each employer:

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

29 U.S.C. § 654. Under this section, an employer must take steps to prevent and suppress hazardous conditions and hazardous conduct by employees, which would include proper training and supervision of employees. General Dynamics Corp. v. Occupational Safety & Health Review Commission, 599 F.2d 453 (1st Cir. 1979). This duty may require that employers ensure that employees not only wear, but actually use, safety equipment. Turner Communications Corp. v. Occupational Safety & Health Review Commission, 612 F.2d 941 (5th Cir. 1980). Employers may also be required to monitor air quality. Marshall v. Western Electric, Inc., 565 F.2d 240 (2d Cir. 1977), partially abrogated on other grounds by Martin v. Occupational Safety & Health Review Commission, ___ U.S. ___, 111 S. Ct. 1171 (1991). The employer is not an insurer of its employees' safety.
Ocean Electronic Corp. v. Secretary of Labor, 594 F.2d 396 (4th Cir. 1979). Adherence to actual industry custom and practice may not be adequate under the Act, however. Donovan v. Missouri Farmers Association, 674 F.2d 690 (8th Cir. 1982). Rather, a employer is charged with the duty of eliminating preventable hazards. Baroid Division of NL Industries, Inc. v. Occupational Safety & Health Review Commission, 660 F.2d 439 (10th Cir. 1981).2


The Walsh-Healey Government or Public Contracts Act, usually referred to as simply the Walsh-Healey Act, embodies a federal policy that the government should procure and use only goods produced under safe and fair working conditions. George v. Mitchell, 282 F.2d 486 (D.C. Cir. 1960). To that end, the Act sets forth labor standards which must be observed by those wishing to sell goods to the government. 41 U.S.C. § 35. In particular, contractors must ensure that all state health and safety laws be observed during the performance of the contract and manufacture/furnishing of materials:

That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

2It is worth noting that the employee is also charged with compliance with the general duty clause of the OSHA. 29 U.S.C. § 654(b).
Id. § 35(e). Thus, if a state has promulgated a threshold limit value for asbestos dust, the public contractor must comply with the state requirement pursuant to the above-quoted section.

The Walsh-Healey Act was passed June 30, 1936, and applies to those entities which enter into contracts with any agency of the United States for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000. Id. § 35.


The Davis-Bacon Act, passed in 1931, applies to:

every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair ... of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers.


The Service Contract Act, effective October 22, 1965, applies to contractors and subcontractors that furnish services to or perform maintenance service for federal agencies based upon a contract in excess of $2,500. The Act formerly defined the class of persons to be protected, "service employees," as guards, watchmen, any person engaged in a recognized trade or craft, or in unskilled, semi-skilled, or skilled manual labor occupation; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount
requirement. 41 U.S.C. § 357(b) (prior to amendment). In 1976, however, this section of the Act was amended to substitute the following definition of service employee:

[A]ny person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title [which exempts contracts under the Davis-Bacon and Walsh-Healey Acts] . . . and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

41 U.S.C. § 357(b) (as amended).

The Act requires that contracts subject to the Act contain:

A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

Id. § 351(a)(3).

B. THE UNITED STATES NAVY


The Federal Tort Claims Act provides that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances," except for pre-judgment interest and punitive damages. 3 28 U.S.C. § 2674. A broad exception lies in the "discretionary function" clause, however, that prohibits "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, . . . . or based upon the exercise or performance or the failure to exercise or perform a

3It should also be noted that strict liability claims are not cognizable under the Federal Tort Claims Act. Lively v. United States, 870 F.2d 296 (5th Cir. 1989).
discretionary function or duty, . . . whether or not the discretion involved be abused." Id § 2680(a).

At least one court has found that the discretionary function clause did not shield the United States Navy from liability under state law for failure to warn the families of shipyard workers of hazards caused by asbestos dust, in violation of state law. The First Circuit has held that, in a case by a woman who died from mesothelioma allegedly caused by exposure to asbestos dust on her father’s work clothes, the Navy, as owner and operator of the shipyard where the decedent’s father worked, had a duty to exercise due care toward those foreseeably harmed by its activities. The court reasoned that the Navy’s failure to warn was not of the nature and quality of action that Congress intended to protect from tort liability. The government consequently was ordered to contribute one-third of the manufacturers’ settlement of the claim. Dube v. Pittsburgh Corning, 870 F.2d 790 (1st Cir. 1989). But see In Re All Maine Asbestos Litigation, 655 F. Supp. 1169 (D. Me. 1987) (United States entitled to summary judgment under discretionary function exception to Federal Tort Claims Act in contribution and indemnification actions where employees at private shipyard who worked on Navy ships sought recovery for asbestos-related injuries; government made discretionary decision not to become involved in reduction of occupational hazards to private shipyard workers); In re Joint Eastern & Southern Districts Asbestos Litigation, 891 F.2d 31 (2d Cir. 1989) (government’s failure to adopt safety program to warn workers on merchant ships of asbestos-related dangers covered by discretionary function exemption).

The provisions of the Walsh-Healey Act apply to contracts for the construction or alteration of naval vessels. See 10 U.S.C. § 7299.

3. Captain Ernest Brown’s Study

Captain Ernest Brown, of the Medical Corps of the United States Navy, presented a paper to the Fifth Annual Meeting of the Air Hygiene Foundation of America on November 13, 1940, entitled "Industrial Hygiene and the Navy in National Defense." One section of the paper addressed occupational health hazards in Navy shipyards, including asbestosis. Captain Brown had conducted a medical survey of workers in the pipe-insulating shop at the New York Navy Yard. Even though the maximum period of exposure was seventeen years, no cases of asbestosis were found. Captain Brown further reported that "[s]imilar findings have been reported from two other yards, but the study should be extended to all men in this trade." Brown, Industrial Hygiene and the Navy in National Defense, 1 War Medicine 3, 12 (1941). The officer also examined the industrial hygiene methods employed, and noted that "[m]edical control consists of taking a roentgenogram of the lungs annually. The material is moistened, and localized exhaust ventilation is installed over the work area. A respirator is worn during the dustiest aspect of the process." Id.

4. The Fleischer-Drinker Study

In 1946, Fleischer, Viles, Gade, and Drinker published an article with the permission of the United States Navy which was based on a survey of two government Navy yards and two Navy
contract yards. Fleischer, et al., *A Health Survey of Pipe Covering Operations in Constructing Naval Vessels*, 28 J. Indus. Hygiene & Toxicology 9 (1946). The survey included examination of chest X-rays of pipe coverers and the taking of dust counts, with microscopic and chemical analysis of the dust. Of note are the authors' observations that the exposure of pipe coverers to asbestos differed widely from the exposure of textile plant workers, and that the materials used by pipe coverers had a wider range of asbestos content as compared to the textile workers' materials. The authors concluded that dust levels below five million particles per cubic foot represented good dust control, and that, based on their findings of only three doubtful cases of asbestosis among 1,074 pipe coverers, pipe covering was not a dangerous occupation.

5. The United States Maritime Commission

Both the United States Navy and the United States Maritime Commission approved certain minimum standards for shipyards in 1943. The "Minimum Standards for Safety and Industrial Health" were concerned with exposure to asbestos, whether such exposure occurred in handling, sawing, cutting, molding, fabricating, or other use of asbestos-containing products, and recommended certain work practices, such as ventilation, the use of respirators, and isolation of operations which generated dust. Regular medical examinations were also suggested. Each contractor was required to comply with the minimum standards. See Minimum Standards for

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4The tables appearing in the Fleischer-Drinker report categorize dust counts not only by total dust, but by asbestos dust as well.

C. THE LONGSHORE AND HARBOR WORKERS’ COMPENSATION ACT

In 1958, a provision was added to the Longshore and Harbor Workers’ Compensation Act requiring employers to "install, furnish, maintain and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary [of Labor] may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees." 33 U.S.C. § 941(a). Two years later, health and safety regulations for ship repairing and shipbuilding were promulgated, which adopted the threshold limit value of the American Conference of Governmental Industrial Hygienists, five million particles of asbestos dust per cubic foot. 25 Fed. Reg. 1543-63 (1960); see also 29 C.F.R. 1915.1 (occupational safety and health standards for shipyard employment); 29 C.F.R. 1918.1 (safety and health regulations for longshoring).

D. UNDER STATE LAW

Many of the states had threshold limit values, or maximum allowable concentrations, for total dust and/or for asbestos dust. The states either passed their own limit values, or adopted those of the ACGIH. Nearly every state also had statutes requiring the employer (or, in some cases, the party in charge of the worksite) to maintain a safe work place. A catalog of state law on threshold limit values and the duty to provide a safe work place follows.
Counsel should of course be careful to consult the relevant law in their jurisdictions, as well as the various states' departments of industrial relations or workers' compensation.

ALABAMA

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK


*Gentry v. Swann Chemical Co.*, 234 Ala. 313, 318, 174 So. 530 (1937)


ALASKA

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Alaska Stat. § 18.60.075(a) (1976)

*Allen v. Knight's Island Consolidated Copper Co.*, 3 Alaska 651, 655 (D. Alaska 1909)


ARIZONA


II. DUTY TO PROVIDE SAFE PLACE TO WORK


*Consolidated Arizona Smelting Co. v. Egich*, 22 Ariz. 543, 199 P. 132 (1920)

Morrell v. City of Phoenix, 16 Ariz. 511, 147 P. 732 (1915)


ARKANSAS

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Arkansas Statutes Annotated, Title 81, Chapter 4
Arkansas Department of Labor, Safety Code No. 6

Barksdale v. Silica Products Co., 200 Ark. 32, 137 S.W.2d 901 (1940)

CALIFORNIA

Cal. Admin. Code title 8, Appendix A, Table 1 (1965)
Fifth Annual Meeting of the National Conference of Governmental Hygienists, pp. 163-70 (1942)

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Devens v. Goldberg, 33 Cal. 2d 173, 199 P. 2d 943 (1948)
Hughes v. Warman Steel Casting Co., 174 Cal. 556, 163 P. 885 (1917)

COLORADO

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

**Burnside v. Peterson**, 43 Colo. 382, 96 P. 256 (1908)


**CONNECTICUT**

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Conn. Gen. Stat. § 31-49

**Vacca v. Camera**, 149 Conn. 277, 179 A.2d 616 (1962)

**DELAWARE**

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

**FLORIDA**

I. TLV: Fla. Stat. § 440.152(1)

Florida Safety and Health Standards Chapter 38F-43.03 (1979), revised by Chapter 38F-43.003 (1990)

II. DUTY TO PROVIDE SAFE PLACE TO WORK


**Camp v. Hall**, 39 Fla. 535, 22 So. 792 (Fla. 1897)

**Colton v. Great Atlantic & Pacific Tea Co.**, 136 So.2d 361 (Fla. App. 1962)


**GEORGIA**

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Georgia Code 1895, § 2611 (presently codified at O.C.G.A. § 34-7-20)
Georgia Railroad & Banking Co. v. Nelms, 83 Ga. 70, 9 S.E. 1049 (1889)

Beard v. Georgian Manufacturing Co., 8 Ga. App. 618, 70 S.E. 57 (1911)


GUAM

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

HAWAII

I. TLV: Public Health Regulations Chapter 24 § 12 Part B

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Hawaii Rev. Stat. § 396-6 (1972)

Asaeda v. Haraguchi, 37 Hawaii 556 (1947)


IDAHO

I. TLV: Idaho Safety Code 1, Chapter EE § 3102

II. DUTY TO PROVIDE SAFE PLACE TO WORK


Riley v. Larson, 91 Idaho 831, 432 P.2d 775 (1967)


ILLINOIS

I. TLV: Stanislawski v. Industrial Commissioner, 99 Ill. 36, 75 Ill. Dec. 405, 457 N.E.2d 399 (1983); et seq. (OSHA)

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Ill. Rev. Stat. ch. 48 § 137.1 et seq.
Starck v. Chicago & North Western Railway Company, 4 Ill.2d 616, 123 N.E.2d 826 (1954)

Coselman v. Schleifer, 97 Ill. App.2d 123, 239 N.E.2d 687 (1968)


INDIANA

I. TLV: See Burns Administrative Rules and Regulations (22-1-1-10)-G7 (1967) (Repealed 1988)

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Ind. Code Ann. § 40-2111 (Burns 1940)

Ind. Code Ann. § 40-2139 (Burns 1952)

Ind. Code Ann. § 22-1-1-10 (Burns 1988)

Rowe v. Gatke Corp., 126 F.2d 61 (7th Cir. 1942); Cert. dismissed, Gatke Corp. v. Rowe, 317 U.W. 702 (1942)

IOWA

I. TLV: The Iowa Departmental Rules, July 1968 Supplement

II. DUTY TO PROVIDE SAFE PLACE TO WORK

KANSAS

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

KENTUCKY

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK


Ellis v. Louisville & N.R. Co., 251 S.W.2d 577 (Ky. 1952)

LOUISIANA

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK


Canter v. Koehring Co., 283 So.2d 716 (La. 1973)

MAINE


II. DUTY TO PROVIDE SAFE PLACE TO WORK

Millett v. Maine Central Railroad Co., 128 Me. 314, 146 A. 903 (1929)

Kimball v. Clark, 133 Me. 263, 177 A. 183 (1935)

Snowdale v. United Box Board & Paper Co., 100 Me. 300, 61 A. 633 (1905)

MARYLAND

I. TLV: COMAR: 26.02.02.02

II. DUTY TO PROVIDE SAFE PLACE TO WORK


See also Maryland Occupational Safety & Health Act

MASSACHUSETTS

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK


MICHIGAN


II. DUTY TO PROVIDE SAFE PLACE TO WORK

Mich. Comp. Laws §§ 408.77-80 (1948)


MINNESOTA


Minn. Stat. § 182.65 (1973) incorporated federal OSHA standards

II. DUTY TO PROVIDE SAFE PLACE TO WORK

1895 Minn. Laws, Ch. 173

Golden v. Lerch Brothers, 203 Minn. 211, 281 N.W. 249 (1938)

Benson v. Lehigh Valley Coal Co., 124 Minn. 222, 144 N.W. 774 (1914)

MISSISSIPPI

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Cherry v. Hawkins, 283 Miss. 392, 137 So.2d 815 (1962)

Heckford v. International Paper Co., 242 So.2d 415, 135 So.2d 415 (1961)

MISSOURI

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

MONTANA

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK


D’Hoodge v. McCann, 151 Mont. 353, 443 P.2d 747 (1968)

Cummings v. Reins Copper Co., 40 Mont. 599, 107 P. 904 (1910)
NEBRASKA

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK


NEVADA

I. TLV: Safety Standards for The Prevention and Control of Occupational Diseases (1955)

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Basic Safety Orders Department of Industrial Safety § 618.230 (1964)

NEW HAMPSHIRE


II. DUTY TO PROVIDE SAFE PLACE TO WORK

Moore v. Morse & Malloy Shoe Co., 89 N.H. 332, 197 A. 707 (1938)

NEW JERSEY

I. TLV: "Safety Regulation No. 3 establishing threshold limit values for dusts, vapors, fumes, gases and mists." (1967)

See also New Jersey Administrative Code

II. DUTY TO PROVIDE SAFE PLACE TO WORK


Clayton v. Ainsworth, 122 N.J.L. 160, 4 A.2d 274 (1939)


NEW MEXICO

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK
NEW YORK


II. DUTY TO PROVIDE SAFE PLACE TO WORK


§ 12.3, Responsibility of Employers, 1958 Amendment, at 877


Galeota v. United States Gypsum Co., 123 F.2d 947 (2nd Cir. 1941); cert. denied, 315 U.S. 813 (1942)

NORTH CAROLINA

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

NORTH DAKOTA

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

North Dakota Industrial Safety Code Rule A.1.5.

Abelstad v. Johnson, 41 N.D. 399, 170 N.W. 619 (1919)

OHIO

I. TLV: Legal Requirements for the Prevention and Control of Industrial Public Health Hazards (1946), Ohio Admin. Code § 3701-19

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Ohio General Code § 871-15 (1913)

OKLAHOMA


II. DUTY TO PROVIDE SAFE PLACE TO WORK

OREGON

I. TLV: Oregon Administrative Rules, Chapter 333-22-002, et. seq. adopted pursuant to ORS 431.035 et seq; see also Oregon OSHA regulations for post 1970 standards in effect

II. DUTY TO PROVIDE SAFE PLACE TO WORK

PENNSYLVANIA


II. DUTY TO PROVIDE SAFE PLACE TO WORK

Pennsylvania Occupational Disease Act, 77 P.S. § 1201, et seq.


Weldon V. Celotex Corp., 695 F.2d 67 (3rd Cir. 1982)


RHODE ISLAND


II. DUTY TO PROVIDE SAFE PLACE TO WORK

Dawes v. McKenna, 100 R.I. 317, 215 A.2d 235 (1965)

SOUTH CAROLINA

I. TLV: Rules and Regulations Governing Industries, § 6

II. DUTY TO PROVIDE SAFE PLACE TO WORK

SOUTH DAKOTA

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

TENNESSEE

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Nashville Bridge Co. v. Hudgins, 23 Tenn. App. 677, 137 S.W.2d 327 (1938)

TEXAS

I. TLV: Texas State Department of Health Occupational Health Regulation No. 3, "Threshold Limit Values of Airborne Contaminants"

II. DUTY TO PROVIDE SAFE PLACE TO WORK

UTAH

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK


Bingham v. Lagoon Corp., 707 P.2d 678 (Utah 1985)

VERMONT

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK


VIRGINIA

I. TLV:

II. DUTY TO PROVIDE SAFE PLACE TO WORK

Keith v. Clinchfield Coal Corp., 189 Va. 592, 54 S.E.2d 126 (1949)

Bowles v. Virginia Soapstone Co., 115 Va. 690, 80 S.E. 799 (1914)

Edwards v. Laurel Branch Coal Co., 133 Va. 534, 114 S.E. 108 (1922)

Lane Bros. & Co. v. Bauserman, 103 Va. 146, 48 S.E. 857 (1904)

WASHINGTON

I. TLV: Dept. of Labor & Industries Occupational Health Standards
   Chapter 62, WAC 296

II. DUTY TO PROVIDE SAFE PLACE TO WORK

   Rev. Code of Wash. § 49.16.030

WASHINGTON D.C.

I. TLV: Occupational Safety Standards Relating to Asbestos

   National Emission Standards for Asbestos, 40 C.F.R. §§
   61.140 - 61.156 (1988)

II. DUTY TO PROVIDE SAFE PLACE TO WORK

WEST VIRGINIA

I. TLV: Chapter 5, Article I, § 1 Industrial Hygiene Regulations

II. DUTY TO PROVIDE SAFE PLACE TO WORK

   W. Va. Code § 21-3-1

   Jones v. Rinehart & Dennis Co., 113 W. Va. 414, 168 S.E.
   482 (1933)


   Blatt v. United Zinc Smelting Corp., 117 W. Va. 733, 188 S.E.
   491 (1936)

WISCONSIN

I. TLV: W. A. C. I. § 20.02 (1964)

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In addition, the following states have adopted their own OSHA-approved occupational health and safety plans, and adopt a standard comparable to that of the OSHA within six months of the effective date of the federal rule: Alaska, Arizona, California, Connecticut (for state and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. See 53 Fed. Reg. 35,625 (1988).

E. GENERAL HOUSEKEEPING PROCEDURES

In 1946, the ACGIH, which, although not an official governmental body,5 nevertheless had as its members industrial hygienists from the federal, state, and local levels, adopted a standard for asbestos dust, five million particles per cubic foot. This standard was re-adopted each year until 1970, when it was changed to two million particles per cubic foot (notice of the intended change was issued in 1968). See LaNier, Ed., Threshold Limit Values -- Discussion and Thirty-five Year Index, 9 Annals of

the American Conference of Governmental Industrial Hygienists (July 1984).

These standards were available to employers, as was information on work practices that would hold down the levels of dust. In fact, as early as about 1918, the United States Bureau of Labor Standards issued recommendations on safe work practices for working with asbestos, such as wetting the material, ventilation and exhaust systems, isolation, and use of respirators. See K. Antman & J. Aisner, Asbestos-Related Malignancy 101 (1987) (citing Dublin, et al., 17 United States Medical Bulletin 883 (1932)). In 1930, Dr. Merewether discussed the area of industrial hygiene and specific work practices relating to asbestos in his epidemiological report presented to the English king (A version of Dr. Merewether’s article was published in the Journal of Industrial Hygiene. See The Occurrence of Pulmonary Fibrosis and Other Pulmonary Affections in Asbestos Workers, 12 J. Ind. Hygiene 198 (1930)). Likewise, Dr. Dreessen’s report in 1938 and the Fleischer-Drinker study in 1946 addressed the issue of housekeeping procedures. Other articles, employer records, regulatory records, dust count analyses, and state law should also be reviewed for information on housekeeping practices that could be introduced at trial. These issues should be the object of discovery, where possible, and evidence relating to plant conditions should also be pursued where appropriate.

II. DUTIES AND RESPONSIBILITIES OF THE UNIONS

As the effects of asbestos on health gradually became known, many of the unions of employees who worked with asbestos-containing
products implemented programs for the conducting of medical screenings, retaining of physician consultants, and/or education of the workers. For example, the International Association of Heat and Frost Insulators and Asbestos Workers (hereinafter the International) regularly published a magazine entitled "The Asbestos Worker" which was sent to all union members and featured articles referencing or discussing asbestos-related health conditions. Thus, in the September 1930 issue, "The Asbestos Worker" gave a rather detailed analysis of Dr. Merewether's report presented to His Majesty of England, including a summary of Dr. Merewether's recommendations concerning industrial hygiene in asbestos-textile factories. See The Pulmonary Asbestosis Menace, 9 Asbestos Worker 9 (1930).

Various locals of the International also retained doctors as consultants for the study of workers' medical conditions. Local No. 1, in St. Louis, associated Dr. Walter J. Siebert to analyze the health-related effects of fiberglass products. In his report to the local, Dr. Siebert referenced Dr. Dreessen's study, published in 1938, "A Study of Asbestosis in the Asbestos Textile Industry" (Public Health Bulletin No. 241), and the article by Lanza, et al., "Effects of the Inhalation of Asbestos Dust on the Lungs of Asbestos Workers" (United States Public Health Reports, Vol. 50, No. 1 (1935)). See Report of Dr. Siebert to St. Louis Local No.1, International Association of Heat and Frost Insulators and Asbestos Workers (June 28, 1941); see also Siebert, Fiberglass Health Hazard Investigation, Industrial Medicine (1942). Likewise, the local in Miami retained Dr. Charles Tate, and, as shown below,
several other locals had their own doctors and their own screening programs.

The International also featured a "Health Hazards Committee," sponsored a research program to study health problems related to asbestos which began in 1962, headed by Dr. Irving J. Selikoff, and also sponsored a presentation to the American Medical Association in 1963. "The Asbestos Worker" magazine (AWM) provides a wealth of information regarding union efforts in this connection. The following are illustrative examples of union activities as presented in the AWM, categorized by local number and region.

Local No. 2 (Pittsburgh)

Asbestos screening, September 1965, Dr. Harry J. Pistawka, Division of Occupational Health; Dr. Eugene Prendergrass [sic], University of Pennsylvania; Dr. Selikoff recommends Dr. Thomas Mancuso to conduct further study; readership advised that the International will help any local contact Dr. Selikoff (AWM, February 1966).

Local No. 4 (Buffalo)

"Health Hazards Survey & Examination Program," conducted by New York Department of Labor & Dr. Albert Rosso; outline of program enclosed in letter to the editor (AWM, November 1965, p. 6-7, 14; p. 8).

Local No. 12 (New York)

Asbestos Screening, October 1962, Dr. Selikoff (AWM, February 1963, p. 25).


Selikoff research results in asbestosis, lung cancer, mesothelioma, and colon cancer being classified as compensable diseases (apparently first award for colon cancer which developed in an insulation worker) (AWM, May 1966, p. 13).

Local No. 32 (Newark)

Asbestos Screening, October 1962, Dr. Selikoff (AWM, February 1963, p. 25).
Regional Conferences:

New York—New England States

Efforts noted in New York to have asbestosis classified as compensable illness under workers' compensation law; Local 4's (Buffalo) health survey outlined (AWM, February 1966, p. 25).

Dr. Selikoff's address on health hazards of asbestos taped; to be distributed to all interested locals, employer groups, school boards, etc.; annual chest X-ray, housekeeping procedures by insulation manufacturer and contractor, smoking cessation, proper use of existing safety equipment, safer handling procedures, periodic health check-ups, and increased education recommended. (AWM, August 1966, pp. 15-17).

Middle Atlantic States

Health studies discussed regarding conditions of the lungs, liver, nerve problems; recommendation made that entire membership should participate in these studies whenever possible; report of Drs. Selikoff and Hammond will be re-printed and forwarded to all locals (AWM, February 1966, p. 23).

Dr. Selikoff addressed the delegates and distributed copies of "The Occurrence of Asbestosis among Insulation Workers in the United States," Annals of the New York Academy of Sciences, Volume 32, Article 1, pp. 139-55, December 31, 1965, "with a reminder that these booklets will soon be available for distribution to our entire International membership." (AWM, May 1966, p. 24).

Central States

Asbestos screenings reported by several delegates; advice on safeguarding health by use of respirators given; report on Dr. Selikoff's research given (AWM, November 1964, p. 25).

Recommendation made that delegates check the workers' compensation laws of their state to see if asbestosis is recognized as an occupational disease, and, if not, to work for such recognition (AWM, November 1965, p. 25).

6"The Asbestos Worker" magazine notes that the secretaries of the various conferences forwarded to each affiliated union a complete and detailed report of each conference meeting. (AWM, November 1964, p. 25).
Southeast States

Health Hazard Program and Dr. Selikoff's study discussed; pamphlets and tape of speech by Dr. Selikoff to be made available to local unions (AWM, May 1966, p. 28).

Midwest States

Talk given on work being done by Dr. Selikoff on health problems of "Asbestos Workers". (AWM, May 1966, p. 29).

Southwest States

President of the International (C. W. Sickles) informed delegates that booklets on health hazards, specifically describing lung diseases, would be mailed to all locals (AWM, May 1966, p. 27).

Western States

Discussion held on the "results of Asbestosis and related respiratory diseases;" President Sickles noted good possibility of obtaining Dr. Selikoff's tapes and slides for all locals (AWM, August 1966, p. 23).

Conference agrees to hire three doctors to study health hazards; noted that an article in the September 1930 AWM stressed need for study of health hazards of industry; nothing had been done. (AWM, August 1968, p. 9).

Eastern Canadian

President Sickles reported on health hazards in other conferences; noted that Dr. Selikoff recommended regular chest X-ray. (AWM, August 1966, p. 24).

Tape of Dr. Selikoff still not available, but "what has appeared in previous Journals covered pretty well the general idea on health hazards of the trade and any new facts will be printed in the Journal." (AWM, May 1967, p. 29).

General

Ad, "Carelessness Can Be Deadly Observe All Safety Rules" (AWM, February 1966, last page).

Questionnaire regarding coughing, smoking, dustiness of job, use of respirators, etc., to be mailed back in to Dr. Selikoff (AWM, May 1967, p. 20).

Dr. Selikoff testified before the House Committed on Education and Labor on the House bill proposing the Occupational Safety and Health Act on March 7, 1968. (AWM, May 1968, p. 1, p.5).
Activities of Dr. Selikoff on behalf of Health Hazards program detailed. (AWM, August 1968, p. 1).

"The Asbestos Worker" also featured for a period of time a series of reports known as "green sheets," which distributed information about industrial hygiene and health. The following lists the issues of "The Asbestos Worker" which contained the "green sheets:

**ISSUES OF THE ASBESTOS WORKER MAGAZINE CONTAINING GREEN SHEETS**

- **February 1969**: XVII 6
- **May 1969**: XVII 7
- **August 1969**: XVII 8
- **February 1970**: XVII 10
- **May 1970**: XVII 11
- **August 1970**: XVII 12
- **November 1970**: XVII 13
- **February 1971**: XVII 14
- **May 1971**: XVII 15
- **August 1971**: XVII 16
- **November 1971**: XVII 17
- **February 1972**: XVII 18
- **May 1972**: XVII 19
- **August 1972**: XVII 20
- **November 1972**: XVIII 1
- **February 1973**: XVIII 2
- **May 1973**: XVIII 3
- **August 1973**: XVIII 4

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III. DUTIES AND RESPONSIBILITIES OF THE PLAINTIFF/EMPLOYEE

A. DUTY TO OBSERVE AND PRACTICE SAFE PROCEDURES IN THE WORKPLACE

Just as the employer has a duty to comply with the standards promulgated by the OSHA, so, too, does the employee: "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct." 29 U.S.C. § 654(b) (general duty clause). Further, many states have similar requirements, both general and specific, that the employee practice safe work habits.

B. CONSTRUCTIVE KNOWLEDGE OF STATUTES

All persons are presumed to be on notice as to the content of the federal Statutes at Large and rules and regulations in the Federal Register. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947). Therefore, it may be argued that the plaintiff is legally held to be cognizant of, for example, the
specific housekeeping practices prescribed in the OSHA standard for asbestos. This issue is further addressed under Section IV, infra.

C. SMOKING -- NEGLIGENCE ON THE PART OF THE PLAINTIFF

Asbestos plaintiffs who smoke cigarettes may be found negligent in so doing. Thus, in an action by the widow of a pipe coverer against the manufacturer of asbestos cloth, the damage award was reduced by seventy-five percent due to the decedent having continued to smoke cigarettes after having been diagnosed with asbestosis. Champagne v. Raybestos-Manhattan, Inc., 212 Conn. 509, 562 A.2d 1100 (1989). Likewise, in Brisbov v. Fibreboard Corp., 429 Mich. 540, 418 N.W.2d 650 (1988), the judgment on the jury’s verdict of $104,500 was subject to reduction because of the plaintiff’s decedent’s smoking of cigarettes, which were a "concurrent" cause of adenocarcinoma, the risk of which was assumed by cigarette smokers regardless of exposure to other substances such as asbestos. But see Martin v. Owens-Corning Fiberglas Corp., 515 Pa. 377, 528 A.2d 947 (1987), reversing Martin v. Johns-Manville Corp., 349 Pa. Super. 46, 502 A.2d 1264 (1985) (evidence held insufficient to support apportionment of damages between asbestosis and emphysema where jury could not assign percentages).

IV. THE RIGHTFULLY RESPONSIBLE PARTY

As outlined above, the responsibilities of parties other than the manufacturers of asbestos-containing products are substantial. The objectives are to get evidence before the jury that will lessen the psychological baggage created by plaintiffs' lawyers eager to portray the manufacturers as the sole repository of information
concerning the hazards of asbestos and safe housekeeping procedures in the workplace, and to get to the jury on the issues of duty to warn and notice.

A. THE PRESUMPTION OF NOTICE

In most jurisdictions, the law requires a warning if a product is found to be a hazard to health. On the other hand, the law does not require the doing of a useless act. See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 367 (1977). The argument may be made that the promulgation of threshold limit values and mandatory industrial hygiene practices is evidence that the subject substance has been found potentially hazardous by the government when exposure occurs above a particular level, that certain practices are prescribed for the safe management of the substance, and that such limits, rules, and regulations are promulgated precisely for the purpose of making the public aware of the potential danger or hazard. If plaintiff\employee, the employer, and the union are legally charged with knowledge of the content of these notifying statutes, then it would seem that any warning by a manufacturer would be redundant, supplemental, and augmentative.

In Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947), the following language is found: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." Id. at 384-85. Plaintiffs, wheat farmers who had planted spring wheat on winter wheat acreage (termed reseeding), sued after their spring
wheat crop was lost to drought, and the defendant federal agency refused to pay the insurance claim. Plaintiffs' cause of action was based on the fact that a local agent told them before they planted the spring wheat that the crop was insurable, and that they had no knowledge of the statute which said that it was not. Although sympathetic to the plaintiffs' plight, the Court held that knowledge of the statute, which of course was enacted for plaintiffs' benefit, was impugned to plaintiffs and was binding upon them, regardless of their "innocent ignorance."

Further, it has been held that "[b]ecause of the policies supporting this rule [that everyone is charged with knowledge of the federal statutes], [the courts] will not lightly infer a duty to provide notice." United States v. Markgraf, 736 F.2d 1179, 1186 (7th Cir. 1984), cert. dismissed, 469 U.S. 1199 (1985). The only exception to this rule appears to be when the statute itself (or regulations promulgated pursuant to the statute) requires that notice be given. See Payne v. Block, 714 F.2d 1510, 1520 n.35 (11th Cir. 1983), rev'd on other grounds sub nom Lyng v. Payne, 476 U.S. 926 (1986).

Applying these holdings to warnings concerning asbestos, plaintiffs, employers, and unions are presumed knowledgeable of the federal statutes, and cannot be heard to say that they were unaware of the statute or were not given notice of it. This serves as the basis for an instruction to the jury, or a ground for avoiding a directed verdict on the issue of a plaintiff's duty to exercise reasonable care for his own safety.
B. THE SOPHISTICATED USER/PURCHASER DEFENSE

The sophisticated user defense, sometimes referred to as the sophisticated purchaser defense, has its roots in section 388 of the Restatement (Second) of Torts:

**CHATTEL KNOWN TO BE DANGEROUS FOR INTENDED USE**

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts § 388 (1965). In other words, when a product causes harm to a user, the product supplier will be liable for that harm where the supplier (a) knows or has reason to know that the product is dangerous; (b) has reason to believe that the user does not know of this danger; and (c) fails to exercise reasonable care to inform the user of the danger.

The appropriateness of the sophisticated user defense turns upon whether the reasonableness requirements of clause (c) have been met. Comment n of section 388 of the Restatement (Second) of Torts sets forth six factors the court must balance in determining whether a product supplier satisfied the clause (c) requirement to use reasonable care in warning an ultimate user of the dangerousness of the product:

1. the dangerous condition of the product;
(2) the purpose for which the product is used;
(3) the form of any warnings given;
(4) the reliability of a third party as a conduit of necessary information about the product;
(5) the magnitude of the risk involved; and
(6) the burdens imposed on the supplier by requiring the supplier to warn all users directly.


It should be noted that comment 1 to section 388 of the Restatement states:

The supplier's duty is to exercise reasonable care to inform those for whose use the article is supplied of dangers which are peculiarly within his knowledge. If he has done so, he is not subject to liability, even though the information never reaches those for whose use the chattel is supplied.

Aside from the fact that the duty to inform is discharged when the supplier uses reasonable care to inform users of dangers of the product, it may also be argued that the potential hazards of asbestos are not "peculiarly within [the manufacturer/supplier's] knowledge." Rather, the information is equally available to the employer and, for that matter, the employee. Nevertheless, when the fact scenario includes an intermediary, there remains the question of whether the supplier exercised reasonable care in giving the information to a third party, the issue addressed in comment n.
The following lists citations of cases which address the sophisticated user defense. The law in each jurisdiction should of course be confirmed.

**Martinez v. Dixie Carriers,** 529 F.2d 457 (5th Cir. 1976) (applying admiralty law) .............. Admiralty


**Cook v. Branick Manufacturing, Inc.,** 736 F.2d 1442 (11th Cir. 1984) .............. Alabama


**Shell Oil Co. v. Gutierrez,** 119 Ariz. 426, 581 F.2d 271 (Ariz. App. 1978) .............. Arizona

**Hopkins v. Chip-In-Saw, Inc.,** 630 F.2d 616 (8th Cir. 1980) .............. Arkansas

**In Re Related Asbestos Cases,** 543 F. Supp. 1142 (N.D. Cal. 1982) .............. California


**In re Asbestos Litigation (Mergenthaler),** 542 A.2d 1205 (Del. Super. 1986) .............. Delaware


**Bryant v. Technical Research Co.,** 654 F.2d 1337 (9th Cir. 1981) .............. Idaho

**Cruz v. Texaco, Inc.,** 589 F. Supp. 777

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*Appreciation is expressed to the law firm of Miles & Stockbridge, Baltimore, Maryland, for their assistance in compiling this information.*
Hammond v. North American Asbestos Corp.,
[S.D.Ill. 1984].............................. Illinois

97 Ill.2d 195, 73 Ill. Dec. 350,
454 N.E.2d 210 (1983)..................... Illinois

West v. Broderick & Bascom Rope Co.,
[197 N.W.2d 202 (Iowa 1972)].............. Iowa

Younger v. Dow Corning Corp., 202 Kan. 674,
451 P.2d 177 (1969)........................ Kansas

Bradco Oil & Gas Co. v. Youngstown Sheet
& Tube Co., 532 F.2d 501 (5th Cir.
1976), cert. denied, 429 U.S. 1095
(1977)........................................ Louisiana

Cuthbertson v. Clark Equipment Co., 448 A.2d
315 (Me. 1982)............................... Maine

Higgins v. E.I. DuPont de Nemours & Co.,
671 F. Supp. 1063 (D. Md. 1987),
aff'd, 863 F.2d 1162 (4th Cir. 1988)...

(E.D. Mich. 1987)............................ Michigan

Todalen v. U.S. Chemical Co., 424 N.W.
2d 73 (Minn. App.), review denied
(1988)........................................ Minnesota

Gordon v. Niagara Machine & Tool Works, 574
F.2d 1182 (5th Cir. 1978).................. Mississippi

Griggs v. Firestone Tire & Rubber Co.,
513 F.2d 851 (8th Cir.), cert. denied,
423 U.S. 865 (1975)......................... Missouri

Jacobson v. Colorado Fuel & Iron Corp.,
409 F.2d 1263 (9th Cir. 1969)............. Montana

Strong v. E.I. DuPont de Nemours Co.,
667 F.2d 682 (8th Cir. 1981).............. Nebraska

Whitehead v. St. Joe Lead Co., 729 F.2d
239 (3rd Cir. 1984).......................... New Jersey

Seibel v. Symons Corp., 221 N.W.2d 50 (N.D.
1974)........................................ North Dakota

Adams v. Union Carbide Corp., 737 F.2d
1453 (6th Cir.), cert. denied,
469 U.S. 1062 (1984)....................... Ohio
Finally, it should be noted that in certain jurisdictions, the jury may take into account certain factors, such as the expertise of the plaintiff, the obviousness of the danger, or whether the plaintiff subjectively appreciated a known risk. See, e.g., Rivers v. Stihl, Inc., 434 So. 2d 766 (Ala. 1983); Ford Motor Co. v. Rodgers, 337 So. 2d 736 (Ala. 1976); Andrews v. John E. Smith’s Sons Co., 369 So. 2d 781 (Ala. 1979). While these factors do not relate directly to the sophisticated user defense, they should still be considered in preparing a case for trial.

C. RELIANCE UPON OSHA STANDARDS

The employer is entitled to rely on his compliance with OSHA-promulgated standards to avoid liability for any injury suffered by employees due to the hazard addressed by the standard, where one of two alternative conditions is met: 1) the employer has no knowledge that the standard is inadequate to protect the employees
against the specific danger it purports to address, or 2) the employer has no knowledge that conditions in the work place are such that the standard will not adequately deal with the hazard posed. *International Union v. General Dynamics, Inc.*, 815 F.2d 1570 (D.C. Cir.), *cert. denied*, 484 U.S. 976 (1987). If the employer is so permitted to rely his compliance with OSHA, by logical extension, the manufacturer should likewise be able to rely upon the employer’s duty and actual compliance with the OSHA regulations.

An analogous case is *Lorenz v. Celotex Corp.*, 896 F.2d 148 (5th Cir. 1990) (applying Texas law), discussed above. In *Lorenz*, the defendant introduced evidence that use of its asbestos-containing products yielded dust counts below the threshold limit value. Ensuring that dust counts do not exceed the threshold is of course the responsibility of the employer, rather than the manufacturer, who has no control over work places where its products are used. The appellate court approved the instruction by the trial court that compliance with government safety standards constitutes strong and substantial evidence that a product is not defective, and affirmed the verdict in favor of the defendant.

V. THE NEED FOR A NEW TYPE OF STATE-OF-THE-ART WITNESS

The issue of who has what duty creates the need for a new type of state-of-the-art witness. Just as doctors can come in and testify as to the medical and scientific knowledge available during a particular time and what reasonably should have been known/done, so should a state-of-the-art witness be able to testify as to what
would have been reasonable compliance with the law. Although some witnesses are already testifying to, for example, the adequacy of warnings, this new type of state-of-the-art witness would carry that type of analysis one step further -- whether a manufacturer's conduct was reasonable given the law and knowledge at that time. Although no such witness is currently testifying, locating such a witness is a possible new approach to a thorny problem.