

# 15 years of Asbestos Abatement

by John E. Osborn, Esq.

**T**he asbestos abatement industry started in the mid-1980s by Congress passing the Asbestos Hazard Emergency Response Act (AHERA) and President Reagan signing it into law (40 CFR Part 763). Commentators widely believed that Congress would follow suit with passage of analogous "in-place" asbestos laws which would require all buildings throughout the country to conduct AHERA-like surveys and adopt management plans. In fact, then Congressman Florio of New Jersey introduced an "in-place" asbestos law which would, if passed, have required hospitals, hotels, office buildings and all other public buildings to inspect and set management plans for asbestos. Similar legislation was introduced in states and municipalities throughout the country. This legislation did not pass and the reasons behind the decision have set the pace of asbestos work for the past 10 years.

## WHY THE IN-PLACE LAWS DID NOT PASS

During the 1980s, public and industry perception changed to caution and questioning once AHERA was passed. There was a school of thought that asbestos could be maintained or encapsulated so that fibers would not become airborne. In fact, during that period the U.S. EPA issued a new manual entitled "Managing Asbestos In Place"

An article in the *New York Times*

magazine on Sunday, November 25, 1990 may have put it best. The article is headlined: "The Asbestos Mess: Now Some Scientists Say Removing the Fiber Can Be Worse than Leaving It." The article refers to developments which brought about questioning of the burgeoning abatement industry. One of these developments was the December 1988 symposium at Harvard University's Energy and Environmental Policy Center called the "International Symposium on the Health Aspects of Exposure to Asbestos in Buildings." Notably, the event was co-sponsored by the Institute of Real Estate Management, the National Association of Realtors, the Safe Buildings Alliance, and the Urban Land Institute. The symposium brought together health experts from several countries and led to a report released in August 1989 branding the public's concern with asbestos as "fiber phobia." The symposium report concluded that risks posed by in-place asbestos are low.

On June 29, 1989, the prestigious *New England Journal of Medicine* printed an article by participants in the Harvard study which concluded that the risks posed by non-occupational

When AHERA legislation went into effect

15 years ago,  
a new and controversial industry was born.

exposure to in-place asbestos did not warrant the expenditure of what they termed "unprecedented expenses on the order of \$100 billion to \$150 billion that could result from asbestos abatement."

As the *New York Times* article points out, mainstream publications found this theory irresistible and spin-off articles appeared in magazines from *Forbes* to *Reader's Digest*, and eventually worked its way into the supermarket tabloid, the *National Examiner*, which announced its interpretation of the findings as follows: "After spending billions taking it out of the schools, experts discover... ASBESTOS IS SAFE!"

With such a wide web of publicity favoring downplaying the asbestos issue, it is easy to understand why the in-place laws did not pass.

To round out the picture, on August

16, 1998, Jane Brody in her *New York Times* column, "Personal Health," page F7, column 4 observed: "The 1980s produced two Congressional acts requiring schools to inspect for asbestos hazards and clean them up. Despite the fact that in most schools asbestos levels were extremely low (less than the amount that in 10 years of exposure might cause one additional death in 100,000 over a lifetime — one-third the risk of being struck by lightning), by 1990 some \$6 billion had been spent on asbestos abatement in schools"

As the column continues: "Many experts believe that asbestos removal, which increased airborne asbestos, created a far greater hazard to the children, who might have benefited far more had this money been spent on enhancing their education."

#### **ASBESTOS IS NOT SAFE**

The debate is about two types of health risks — mesothelioma and asbestosis.

Mesothelioma is the more dramatic of the two and results in a fatal tumor that can crush the lungs or push its way out of the torso. It appears to have struck significant numbers of people who may have had only low level exposures to asbestos.

Asbestosis, on the other hand, requires intensive exposure. Asbestosis is a chronic, progressive lung disease caused by prolonged inhalation of asbestos particles.

The most common cancer among asbestos workers is lung cancer, and it is thought that asbestos may induce lung cancer in industrial workers. The question remains whether asbestos at low levels can cause lung cancer.

As the November 1990 *New York Times* article puts it: "The public has good reason to be confused. Does a single asbestos fiber floating in the basement air mean cancer 20 years down the road — and a \$30,000 abatement job next week? Or does it pose less of a threat than cigarette smoke drifting over from the next table?

Government officials, too, are perplexed. Will tough inspection laws protect the public or simply make matters worse by promoting unnecessary removals?"

The counterpoint is also stated well in the article:

American public-health scientists usually insist that the jury is still out on chrysotile's ability to cause mesothelioma. Dr. Stephen Levin, a Mount Sinai researcher, points out that the asbestos installed in the schools in the 50s and 60s did not begin to deteriorate until a decade later. Since mesothelioma has a 40-year latency period, the epidemiological bad news could still be on its way. "It's like the joke about the man falling out [of] the building," Levin says. "He passes the 15th floor and says, 'So far so good.'"

#### **LENDER CONCERNS**

Other than in the schools covered by AHERA, asbestos is not a factor until the property owner sells (or presumably when the property is leased for an extended period) or renovates. With Congress and local legislatures having taken a pass on regulating in place asbestos, the lender has emerged as the leader in caring about asbestos in place. Although certain scenarios can hook the lender into paying for a clean-up, the basic reason for lender concern is that the presence of asbestos devalues the collateral. Therefore, the presence of asbestos in a building can hold up loan approval.

Lender sophistication has increased and questions about asbestos are now a pro forma part of the loan application.

What leads to even further lender concern is the degree to which the presence of asbestos devalues the property. In the early 1990s, a case involving One New York Plaza demonstrated that the presence of asbestos was enough to get the owner an abatement of over \$30 million in real-property tax

assessments. Since that time, the presence of asbestos in a building automatically becomes ground for a tax certiorari challenge. Although this case is one where the rollback helped the owner, the theory operates to knock down the property's market value.

The purchaser needs to know this — with the wide range of sophistication among owners, it is the lender who is left to speak up. It is the lender who is left to insist that the purchaser obtain a Phase I Environmental Assessment before the loan application can be processed. Clearly, the purchaser should be observant when it comes to the impact of the presence of asbestos on the value of the property being purchased. It should not be left to the lender to do this.

#### **ASBESTOS AND PROPERTY TRANSFERS**

The pervasiveness and impact of asbestos in buildings has challenged many doctrines of law. In the early 1990s in a case involving the sale of 195 Broadway, the purchaser sued the seller for fraud when it was discovered that the property contained large quantities of asbestos in bad condition.

The motion for summary judgment which sought dismissal of the fraud suit was denied. Although this did not mean that the purchaser won, it was significant that the purchaser was even allowed to sue. The doctrine of law is called *caveat emptor* — if the property is transferred "as is," the purchaser is responsible to have checked the condition of the property. If this has not been done and a defect in the property, such as the presence of latent asbestos, is found after title has been transferred, the court's answer is "tough luck — it is up to you to have it checked."

The lesson to be learned is that in order to be fully protected, the purchaser needs to check whether asbestos is present. If asbestos is found, it needs to be addressed in connection with the transfer of title — with a concession on

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## NEED FOR PROTOCOLS

Perhaps the biggest problem with asbestos issues is that protocols have not been developed throughout the industry. Probably the biggest issue in a renovation is "How can we help spending a fortune on asbestos on this project?" Very often the asbestos issue is left until after the overall budget has already been developed and, of course, then there is a great incentive to minimize the financial impact or to take it as it comes. Advanced planning and insight into the effects of asbestos on project schedule and budget are most often lacking. This is true in spite of legal requirements, in many jurisdictions, for the filing of a certificate stating whether asbestos is present before a building permit can be issued.

Some architects still lay low on asbestos issues, thereby requiring the owner to bring a whole separate team to address asbestos issues. Most often

the owner, not the design professional, brings in the environmental consultant who inspects for asbestos and sets a project design which will abate or protect asbestos in place during the renovation.

The general contractor on a renovation will often take an analogous position on asbestos — when the asbestos abatement contractor hired by the owner has removed the asbestos, then and only then will the general contractor send in the demolition team to continue with the project.

Confirming the prevalence of this "hands off" approach by construction industry regulars, the American Institute of Architects (AIA) standard contracts for contractors and architects, in both its 1987 and 1997 editions, provide that the architect encountering unanticipated asbestos is entitled to stop and seek direction from the owner. In addition, the contractor, under its

contract with the owner, is allowed to do the same.

## ENVIRONMENTAL BUILDING MANAGEMENT

Good asbestos management is simply a part of good capital planning. Maintaining and scheduling renovation or replacement of the capital plant is a regularized part of asset management, when the asset is a building. Those who manage their buildings and facilities in a highly professional manner and who manage through long-term planning self-assess their properties so that they can budget appropriately. Building owners who resist self-assessment as a part of their overall capital program are left with crisis management and are stunned when friable asbestos necessitates "emergency spending."

Chances are that self-assessment coupled with regularly budgeted expenditures for managing asbestos in

### *The Firm*

John E. Osborn P.C.'s practice concentrates in complex construction and environmental litigation. A thorough, long-term knowledge of real estate, construction, architecture and the environmental industry together with comprehensive experience in dealing with government are critical ingredients in the firm's effectiveness.

### *Clients*

The firm represents owners of commercial and residential real estate such as hospitals, hotels, restaurants, nightclubs, office buildings, auto dealerships, apartment complexes and nursing homes. The firm's clients also include contractors performing environmental clean ups, masonry, scaffolding, carpentry, plumbing, electrical and HVAC as well as environmental consultants, architects, engineers, construction managers, environmental laboratories, banks, pension funds, surety bond and insurance companies.

### *The Practice*

The firm's experience is in jury and bench trials, in state and federal courts, mediation, arbitration and administrative hearings. In addition to trial practice, the firm develops and implements business and financial strategies for clients, drafts and negotiates contracts and resolves disputes during construction projects. The attorneys at John E. Osborn P.C. believe that legal liabilities and regulatory requirements are addressed most effectively when based on a thorough understanding of their relationship to daily business practices and to decision making. Its attorneys are responsive to clients and study each client's business practices and needs so that legal problems can be better anticipated and minimized.

The firm has a well-established network of experts in allied areas who assist in advising and achieving successful results for clients. These advisors include labor relations, estate planning, bankruptcy, real estate and leasing lawyers, private investigators, accountants, engineers, architects and environmental consultants among others.

## OTHER ARTICLES PREVIOUSLY AUTHORED FOR *INSULATION OUTLOOK*

"Perspectives on O&M," *National Insulation and Abatement Contractors' Outlook Magazine*, July 1991, p. 34, authored by John E. Osborn.

"Alternate Dispute Resolution and Asbestos," *National Insulation and Abatement Contractors' Outlook Magazine*, April 1990, p. 48, authored by John E. Osborn.

"Asbestos Abatement Contractor Agreements," *National Insulation and Abatement Contractors' Association Outlook Magazine*, July 1989, p. 29, co-authored by John E. Osborn.

"Voice: The Owner-Contractor Abatement Agreement," *National Insulation and Abatement Contractors' Association Outlook Magazine*, November 1989, p. 84, authored by John E. Osborn.