

WHAT CORPORATE COUNSEL NEEDS TO KNOW ABOUT BUYING AND RENOVATING PROPERTIES WITH ASBESTOS: PRACTICAL STRATEGIES

BY JOHN E. OSBORN, ESQ.

John E. Osborn is a Partner of the New York City construction contract litigation and environmental law firm of John E. Osborn, P.C.

When legislation passed Congress 15 years ago, [1] requiring schools to be inspected for asbestos, a new industry was born. Surveying the nation's schools was a big task, performed in the public eye. This article looks at the evolution of trends and public perception relating to asbestos abatement in management, abatement methods, pricing, competition, health risk, legal liability, and court precedent. Before a property is purchased or renovated, an evaluation of asbestos risk is essential. With advance planning and practical strategies,[2] the asbestos detriment can be turned into a benefit: discounts in the purchase price of commercial real estate is common when asbestos is present, if you know when to ask for those discounts. The same theory applies to the long term lease. Significant real estate tax roll-backs through use of the tax certiorari process can be worth millions when asbestos is present.[3]

WHERE HAVE WE BEEN: WHY HAS ASBESTOS MANAGEMENT BEEN SUCH A BIG PROBLEM?

In the mid 1980s, it was a widely held view that by 1990, asbestos would be yesterday's news. Instead, as we approach the new millennium, the asbestos industry is still healthy, an estimated 1.3 million employees in construction and general industry face significant asbestos exposure on the job, asbestos is well recognized as a health hazard, is highly regulated and OSHA and EPA asbestos rules are intertwined. Much of the strategy involves managing asbestos in place (O&M). [4]

LENDER CONCERNS ABOUT IN PLACE ASBESTOS

For the most part, asbestos is not a factor until the property owner sells, leases long term 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 a 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.

THE PRESENCE OF ASBESTOS IN A PROPERTY HAS AFFECTED THE LAW SURROUNDING 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. [5] The case called into question whether “as is” would still be the rule when a seller kept a purchaser in the dark about known asbestos issues. To be protected, the purchaser must conduct due diligence as to the presence of asbestos. Asbestos management has shown an impact on long term leases as well. In the early 1990s New York case of *Wolf v. 2539 Realty*, [6] the court made it clear that in a long term lease entered in the 1960s, the landlord would be responsible for asbestos and that in later leases, the tenant may have assumed the responsibility by failing to check for asbestos prior to leasing..

ASBESTOS REGULATIONS REVISED IN 1995

OSHA, quietly, in 1995, passed a revised asbestos regulation which did, in large part, what the “In Place Laws” would have done if they were passed. 29 CFR 1926.58 [7] has far reaching consequences for building owners, contractors and professionals involved with any building containing asbestos. The standard requires building owners to determine the presence, location and quantity of asbestos in buildings before any work covered by the standards is done. To make sure that the inspections get done, the OSHA regulation creates a presumption that any thermal insulation, floor tile and any surfacing material in any building built before 1981 to be considered asbestos-containing. A pre-renovation environmental inspection may be a pro-active enough step to relieve and owner of burdensome requirements.[8]

THE TEN ASBESTOS COMMANDMENTS

The “asbestos buck” stops with the building owner, the following 10 rules create the cornerstone for a proactive asbestos management strategy.

Rule 1

Take a detailed inventory of all asbestos in the building, of its condition and what is being done about it; keep this inventory updated and make sure that it is reviewed before any renovation is undertaken.

Rule 2

Once an inventory shows the presence of asbestos, prepare a written operations and maintenance (O&M) plan and make sure that all relevant personnel are familiar with it. Make sure that the O&M plan is kept up-to-date.

Rule 3

Hire and require formal asbestos training of the facilities management staff.

Rule 4

Set up a consistent and well-organized record keeping system relating to asbestos management and monitor it to assure that it is being followed.

Rule 5

Formulate a written plan for addressing emergencies relating to in-place asbestos (for example: a burst heating pipe or a water leak) and make sure that facilities management personnel are fully trained in these procedures.

Rule 6

Develop a hands-on program; know first-hand the quality of the asbestos management program. Don't rely on the advice of others. If you are an owner or an executive of the owner, know all of the facts and ask questions.

Rule 7

Don't rely on insurance. Expense, policy limits, sunset clauses, exclusions, the claims made nature of some coverage, the long delayed manifestation of asbestos related liability, and questionable long-term stability of insurance companies preclude your reliance.

Rule 8

Don't rely on contract clauses which purport to give you protection. Indemnity clauses or other assurances provided by prior owners, abatement contractors, transporters or others are only as good as their future solvency.

Rule 9

Worry about where removed asbestos is being disposed. If the asbestos is removed and improperly disposed, the owner may be sued to clean up the dump site years later.

Rule 10

Be candid about the presence of asbestos with tenants, potential purchasers, regulatory authorities and the public. Formulate an "enlightened" public relations plan and follow it. The worst legal exposure is often due not to the presence of asbestos but to the lengths that are taken to conceal its presence. Be careful: perceptions, especially in the case of

an emergency, may govern; a panicky response leads to improper handling. Instruct the team to be calm, and to avoid guessing or speculating about the facts.

1. The Asbestos Hazard Emergency Response Act (AHERA); 40 CFR Part 763
2. Knowing pitfalls in advance and preparing a well thought-out agreement tailored to asbestos abatement contributes to eliminating problems and solving claims if unexpected conditions are encountered during the project, "The Owner-Contractor Asbestos Abatement Agreement Guide," *National Insulation and Abatement Contractors' Association Outlook Magazine*, October 1989, co-authored by John E. Osborn; "Asbestos Abatement Contractor Agreements," *National Insulation and Abatement Contractors' Association Outlook Magazine*, July 1989, p. 2, co-authored by John E. Osborn; "Dealing with Environmental Risks In Construction Contracts," *The Construction Specifier*, July 1988, co-authored by John E. Osborn; "Alternate Dispute Resolution and Asbestos," *National Insulation and Abatement Contractors' Association*, April 1990, page 48, by John E. Osborn; and "Litigation Pertaining to Asbestos Contracting," by John E. Osborn, chapter in *Differing Site Condition Claims*, John Wiley & Sons, 1992. For insight into the role of the environmental consultant, see "The Owner-Environmental Consultant Agreement," by John E. Osborn, chapter in *The Construction Renovation Formbook*, John Wiley & Sons, 1991.
3. Bass v. Tax Commission of the City of New York, 179 A.D.2d 387, 578 N.Y.S.2d 158, lv. denied 80 N.Y.2d 751, 599 N.E.2d 691, 587 N.Y.S.2d 287 (1st Dept. 1992)
4. "Perspectives On O &M," *National Insulation and Abatement Contractors' Outlook Magazine*, July 1991, p. 34, by John E. Osborn.
5. 195 Broadway Co. v. 195 Broadway Corp., *New York Law Journal*, April 4, 1988, p. 6, col. 4.
6. J. Wolf v. 2539 Realty Associates, 161 A.D.2d 11, 560 N.Y.S.2d 24 (1st Dept. 1988)
7. The Revised OSHA Asbestos Standard, 29 CFR 1926.58
8. See "Managing Environmental Liability," *Corporations*, by John E. Osborn, Parts I and II, Vol. LXIII, Nos. 14 and 15, Sec. 14.1 and 15.1, July 15 and August 1, 1992, Prentice-Hall Newsletter; "Revised OSHA Asbestos Standard Can Mean More Environmental Property Assessments," by John E. Osborn, *New York Construction News*, January 22, 1996.