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ATTORNEY GENERAL OPINION NO. 91- 69

The Honorable Dorothy H. Flottman
State Representative, Seventy-Eighth District
815 East 9th Street
Winfield, Kansas 67156-2941

Re: Public Health and Welfare--Comprehensive
Environment Response, Compensation and Liability;
Hazardous Substances Releases, Liability,
Compensation--Definitions; Response Authorities;
Liability

Synopsis: Pursuant to federal regulation, a unified school district is required to identify friable and nonfriable asbestos containing material (ACM) in buildings the school district leases, owns, or otherwise uses as school buildings. The school district has the option of removing, encapsulating, or enclosing ACM, such election being partially dependent on the condition of the ACM. If ACM has been placed within a school building as building material, the school district is not liable under CERCLA for costs incurred by a future party-in-interest in removing the ACM from the building. Cited herein: 15 U.S.C. § 2601; 33 U.S.C. §§ 1251, 1317; 42 U.S.C. §§ 6901; 7401, 7412, 9601, 9607; 40 C.F.R. §§ 763.80; 763.83; 763.85; 763.90.

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Dear Representative Flottman:

As representative for the seventy-eighth district, you request our opinion regarding the potential liability of a unified school district which owns two school buildings containing asbestos. You ask whether a school district is required to remove asbestos from school buildings before those buildings are sold. You also ask whether a school district would be liable for costs incurred by a future party-in-interest in removing asbestos from the former school buildings.

Central Unified School District No. 462 has developed an asbestos management plan for buildings owned, leased, or otherwise used as school buildings by the school district. Hall-Kimbrell Environmental Management, Asbestos Inspection Report and Management Plan, Report No. 16-0037, August, 1988. Upon receipt of the report of the initial inspection and assessment of the asbestos containing material (ACM) within the buildings, the school district determined that the ACM in two elementary school buildings would be maintained so as to prevent exposure of friable materials. *Id.* at 3-10, 7-16. Because the school district has determined that the elementary school buildings will no longer be necessary for school district purposes and will be closed in 1992 or 1993, the school district has proposed selling the buildings for \$1.00 each to the municipalities in which the buildings are located.

A number of federal acts have the potential of affecting the responsibilities of property owners and impacting property transactions when the property involved contains materials or substances deemed to be hazardous. The primary federal environmental laws affecting property transactions are the comprehensive environmental response, compensation and liability act (CERCLA), 42 U.S.C. § 9601 et seq., and the resources conservation and recovery act (RCRA), 42 U.S.C. § 6901 et seq. Tripp, *Environmental Issues in Real Estate and Other Business Transactions*, 60 J.K.B.A. 23, 24 (1991). Other federal laws and regulations, including the clean air act (42 U.S.C. § 7401 et seq.), the clean water act (33 U.S.C. 1251 et seq.), and the toxic substances control act (15 U.S.C. § 2601 et seq.), may restrict an owner's future use of property or fix liability on a new owner for past uses of the property. Tripp, supra.

Local education agencies are required to identify friable and nonfriable ACM in public and private elementary and

secondary schools and use accredited persons to conduct inspections, develop management plans, and perform response actions. 40 C.F.R. § 763.80. The response actions of the local education agencies must be sufficient to protect human health and the environment. 40 C.F.R. § 763.90. The local education agencies may opt to remove, encapsulate, or enclose ACM, such election being partially dependent on the condition of the ACM. Id. An action to remove, encapsulate, or enclose asbestos-containing building material will be considered complete when the average concentration of asbestos is at the level set forth in 40 C.F.R. § 763.90(i)(3). At least once every three years after a management plan is in effect, the local education agencies must conduct reinspections of all friable and nonfriable known or assumed asbestos-containing building material in buildings the agencies lease, own, or otherwise use as school buildings. 40 C.F.R. § 763.95(b). If a building no longer is included in the definition of school or school building as set forth in 40 C.F.R. § 763.83, the regulations are inapplicable and the obligation to reinspect ceases.

CERCCA was enacted to "provide for liability, compensation, cleanup and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." Pub.L. No. 96-510, 94 Stat. 2767 (1980). It generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed. The promotion of the cleanup of such sites is achieved through use of the hazardous substance superfund established under subchapter A of chapter 98 of Title 26 and the ability of a private party to recover response costs from liable parties as established in 42 U.S.C. § 9607(a). To prevail in a cost recovery action, the plaintiff must establish that: (1) the site on which the hazardous substances are contained is a facility as defined in 42 U.S.C. § 9601(19); (2) a release or threatened release of any hazardous substance from the facility has occurred, 42 U.S.C. § 9607(a); (3) such release or threatened release has caused the plaintiff to incur response costs that were necessary and consistent with the national contingency plan, 42 U.S.C. § 9607; and (4) the defendant is (a) the present owner or operator of a facility where hazardous wastes were released or are in danger of being released; (b) the owner or operator of a facility at the time the hazardous wastes were disposed; (c) the person or entity that arranged for the treatment or disposal of substances at the facility; or (d) the person or entity that transported the substances to the facility, 42 U.S.C.S. 9607(a). 3550 Stevens Creek Association v.

Barclays Bank, 915 F.Supp. 1355, 1358 (9th Cir. 1990).
See U.S. v. Fleet Factors Corp., 901 F.2d 1550, 1553
(11th Cir. 1990).

Asbestos is classified as a toxic pollutant under the clean water act, 33 U.S.C. § 1317, and a hazardous air pollutant under the clean air act, 42 U.S.C. § 7412. It is also designated as a hazardous substance under CERCLA. 42 U.S.C. § 9601(14). However, that fact is insufficient to establish that its placement as part of the structure of a building constitutes disposal of any hazardous substance under CERCLA.

"On its face 'disposal' pertains to 'solid waste or hazardous waste,' not to building materials which are neither. There is no suggestion that Barclays or its predecessors-in-interest discarded asbestos insulation and fire retardants; rather they were used to construct the building. Nor can the construction of a building using these materials fit into 'the discharge, deposit, injection, . . . or placing into or on any land or water' specified in the definition. There is no question that the asbestos materials in this case were built into the structure, not placed 'into or on any land or water.' Finally there is indication that materials containing asbestos installed as part of the structure of a building, as here, are such that asbestos fibers 'may enter the environment or be emitted into the air.' Even when action is taken that makes the asbestos friable, the resulting hazard is within the building."
3550 Stevens Creek Association, supra,
915 F.2d at 1361.

The senate report prior to the adoption of the superfund amendments and reauthorization act (SARA), Pub.L. No. 99-499, 1986 U.S. Code Cong. and Admin. News (100 Stat.) 1613, to CERCLA in 1986 clarified the extent of remedial or removal actions.

"CERCLA response authorities are extremely broad, but there are nevertheless situations, some of which may be life threatening, which are not within

the law's scope. . . . [The Senate Bill] proposes to make more explicit certain areas which the law does not cover.

"Specifically, [the Bill] makes clear the exclusion for remedial or removal action of a release or a threat of a release . . . from products which are part of the structure of, and result in exposure within a facility. . . . The Environmental Protection Agency has received requests to take removal or remedial action in situations where the contamination was from building materials used in the structure and was creating an indoor hazard. This section would clarify that such situations are not subject to remedial or removal action." 3550
Stevens Creek Association, supra, 915 F.2d at 1364.

Therefore, if the asbestos contained within the school buildings is a building material used in the construction of the buildings, the asbestos is not considered to have been disposed of or released, and the school district would not be liable for costs incurred by a future party-in-interest in removing the ACM from the buildings.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
Assistant Attorney General