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Who's Liable for Asbestos Removal Costs: Landlord or Tenant?

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COMMENT

WHO'S LIABLE FOR ASBESTOS REMOVAL COSTS: LANDLORD OR TENANT?

I. INTRODUCTION

Because asbestos has been used extensively in the United States, numerous legal questions have been raised concerning its use and the damage it may have caused. The initial wave of asbestos litigation is largely comprised of personal injury claims brought by individuals who have been involved in the manufacture, installation or service of products containing asbestos.[1] The second wave of litigation, including numerous theories of recovery, in the broadest sense involves injury posed by the continued presence of asbestos.[2] Second wave litigation may involve actions to force removal,[3] claims for abatement costs,[4] diminution

1. *See* Borel v. Fiberboard Paper Prods. Corp., 493 F.2d 1076, 1106 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (products liability suit involving insulation worker). Between the *Borel* decision in 1973, in which the Johns-Manville Corporation was also a defendant, and August of 1982, the Johns-Manville Corporation was either defendant or co-defendant in over 11,000 asbestos-related suits including over 15,500 plaintiffs from 46 states. *In re* Johns-Manville Corp., 26 Bankr. 420 (Bankr. S.D.N.Y. 1983). In *Hardy v. Johns-Manville Sales Corp.*, Judge Robert Parker notes that since the *Borel* decision, "the Eastern District of Texas has become inundated with asbestos-related litigation. . . [including] over three thousand plaintiffs within the Eastern District alone." 509 F. Supp. 1353, 1354 (E.D. Tex. 1981) (case represents the consolidation of claims by factory workers, insulation installers, pipefitters and carpenters).

2. Although the second wave of asbestos litigation is already well under way, first wave personal injury litigation is far from over. Given the long latency periods of the diseases associated with asbestos exposure and the increasing ability of the science and medical communities to establish disease causation, the first wave may far outlast the second. The major difficulty faced by future personal injury claimants may be an industry-wide inability to pay judgments which are rendered. Several of the asbestos manufacturers who have been named defendants in personal injury litigation have filed for bankruptcy. *See, e.g., In re* Johns-Manville Corp., 66 Bankr. 517 (Bankr. S.D.N.Y. 1986).

3. *See* Sun Ins. Services Inc. v. 260 Peachtree St. Inc., 192 Ga. App. 482, 385 S.E.2d 127 (1989) (suit to force removal of asbestos from twelve floors of an office building).

4. *See* St. Joseph Hosp. v. Celotex Corp., 854 F.2d 426 (11th Cir. 1988) (hospital sought to recover its costs of removing asbestos); Drayton Pub. Sch. Dist. No. 19 v. W.R. Grace & Co., 728 F. Supp. 1410 (E.D.N.D. 1989) (plaintiff's actions included strict liability); Pinole Pointe Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283 (N.D. Cal. 1984) (court, in dicta, said that strict liability was not available to recover clean-up costs); District of Columbia v. Owens-Corning

of property value,[5] contract rescission,[6] breach of warranty,[7] restitution,[8] fraud and misrepresentation.[9] In the second wave of asbestos litigation the landlord-tenant relationship provides its own subset of questions to be considered. Here too, personal injury and property damage claims need to be considered.

This article discusses whether a landlord or his tenant should bear the costs of asbestos removal. Given the extent to which asbestos has been used in building structures,[10] ranging from single-family dwellings to multistory commercial buildings, this question potentially concerns a broad spectrum of landlords and tenants. Considering the enormous costs of asbestos abatement,[11] the question of liability becomes econom-

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Fiberglass Corp., 572 A.2d 394 (D.C. 1989) (local government brought a tort action to recover the costs of removing asbestos from 2400 public buildings).

5. *See* Mercer Univ. v. National Gypsum Co., 877 F.2d 35 (11th Cir. 1989) (sought recovery for property damage); Pinole Pointe Properties, 596 F. Supp. 283 (N.D. Cal. 1984) (strict liability not applicable for reduction in value, dicta); REAL ESTATE WEEKLY, Jan. 17, 1990, at 1, col. 3 (diminution in value taken into account in settlement).

6. *See* Garb-Ko, Inc. v. Lansing-Lewis Servs., Inc., 167 Mich. App. 779, 423 N.W.2d 355 (1988) (court rescinded the contract on the basis of mutual mistake).

7. *See* Drayton Pub. Sch. Dist. No. 19 v. W.R. Grace & Co., 728 F. Supp 1410 (E.D.N.D. 1989). Plaintiffs sought damages under numerous theories for the "assessment, management, removal and replacement of [defendant's] asbestos-containing [acoustic] ceiling plaster." *Id.* at 1411.

8. *See* City of N.Y. v. Keene Corp., 132 Misc. 2d 745, 505 N.Y.S.2d 782 (1986) (city brought an action for indemnity and restitution); House Committee on Education and Labor, 97th Cong., 1st Sess., 118 (Comm. Print 1981) [hereinafter Attorney General's Report]. Writing in reference to the school asbestos problem, the Attorney General suggested that "[r]estitution appears to be the most desirable remedy from the prospective plaintiff's standpoint, because [this theory] most closely fits the problem and also may offer the most appropriate and favorable treatment in terms of statutes of limitation." *Id.*

9. *See* Drayton Pub. Sch. Dist. No. 19 v. W.R. Grace & Co., 728 F. Supp. 1410 (E.D.N.D. 1989) (at trial plaintiff will commonly claim that the defendant insulation manufacturer promoted its product for use in schools even though it had actual knowledge that the insulation would release carcinogenic asbestos fibers).

10. ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE FOR CONTROLLING ASBESTOS-CONTAINING MATERIALS IN BUILDINGS, S-1 (June 1985) [hereinafter Controlling ACMs]. "Surveys conducted by the Environmental Protection Agency (EPA) estimate that asbestos containing materials can be found in approximately 31,000 schools and 733,000 other public and commercial buildings in this country." *Id.*

11. *See* ASBESTOS ABATEMENT: RISKS AND RESPONSIBILITIES, SPECIAL REPORT (BNA), 5 (1987) [hereinafter ASBESTOS ABATEMENT].

> The cost of asbestos abatement in U.S. schools to comply with the [Asbestos Hazard Emergency Response Act of 1986] could be more than $3 billion. If legislation were enacted to mandate similar actions in public and commercial buildings, the cost of asbestos abatement in the United States could exceed $30 billion.

Id. Moreover, asbestos litigation may prove as expensive as abatement costs. *See* J. KAKALIK, P. EBENER, W. FELSTINER & M. SHANLEY, COSTS OF ASBESTOS LITIGATION v (1983) [hereinafter LITIGATION COSTS].

> About $1 billion in compensation and litigation expenses was spent on asbestos product liability litigation from the early 1970s, when the first claims were closed, through the end of 1982; of that total, about one-third has been provided by defendants and two-thirds by

ically important to landlord and tenant. In seeking an answer to the question of primary liability, this article examines both statutory and common law authority governing the landlord-tenant relationship and statutory authority specifically addressing asbestos or hazardous substances. Because a landlord's or tenant's interest goes beyond the initial determination of who is liable for removal costs, this article also explores secondary liability, discussing how a landlord or tenant might pass on the cost of asbestos removal to a third party.

II. BACKGROUND

In America, the word asbestos[12] conjures up visions of an unseen, yet deadly substance. Still, with all of the attention focused on asbestos during the past several decades, few people are aware of its properties, beyond its capacity to insulate, or its numerous applications. Asbestos use can be traced as far back as the ancient Egyptians, who used it as embalming cloth,[13] and the Greeks and Romans, who wove it into cloth and "perpetual" wicks.[14] Its use has continued into the twentieth century.[15] Asbestos has been used to insulate homes and buildings, to protect firemen and others exposed to extreme heat, to improve the safety and energy efficiency of heating systems, to allow brakes to last longer, to absorb noise, to separate the heating coils in hair dryers, to create sturdier water pipes, and to produce tobacco products, dish towels, table salt, and intravenous drugs.[16] The numerous uses for asbestos and the varied products containing some form of asbestos have made this wonder substance practically omnipresent.[17]

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insurers. Of total compensation paid by defendants and insurers, 41 percent was used by plaintiffs for their legal fees and other litigation expenses.

Id.

12. The word asbestos is derived "from [the] Greek adjective meaning inextinguishable . . . [and is actually] a broad term embracing a number of silicate minerals, whose delicate fibers not only can withstand the fiercest heat but also are so soft and flexible that they can be spun and woven as easily as fibers of cotton or flax." P. BRODEUR, OUTRAGEOUS MISCONDUCT 10 (1985).

13. ASBESTOS ABATEMENT, *supra* note 11, at 2.

14. P. BRODEUR, *supra* note 12, at 10.

15. *See* Brodeur, *Annals of Law - The Asbestos Industry on Trial — A Failure to Warn*, THE NEW YORKER, June 10, 1985, at 49, 58 [hereinafter *Failure to Warn*].

16. *See* Environmental Protection Agency, *Proceedings of the National Workshop on Substitutes for Asbestos, July 14-16, 1980* (1981).

17. Attorney General's Report, *supra* note 8, at 8-9 (citing U.S. Environmental Protection Agency, *Asbestos-Containing Materials in School Buildings: A Guidance Document, Part 2*, I-1-1 to I-1-2 (1979)). The report concludes that asbestos fibers "share the characteristics of durability, flexibility, strength and resistance to wear, making asbestos a well suited element for approximately 3,000 separate commercial, public and industrial applications." *Id.* The report includes a table showing the primary, secondary, and consumer industries for asbestos. *Id.* at 18 (citing U.S. Environmental Protection Agency, *Chemical Market Input/Output Analysis of Selected Chemical Substances to Assess Sources of Environmental Contamination: Task III Asbestos*, 21 (1978)).

Illness and disease have been associated with asbestos, in varying degree, for almost as long as the substance has been in use.[18] The Greeks noted that slaves who wove asbestos into fabric suffered a "sickness of the lungs."[19] In 1900, H. Montague Murray, an English physician, linked the factory environment of an asbestos-textile worker to the lung disease which killed him.[20] In 1906, M. Auribault, an inspector for France's Department of Labor, linked the deaths of 50 mill workers to their exposure to the dust from the asbestos they wove.[21] In 1924 the disease "asbestosis" received its name when Dr. W. E. Cooke, another English physician, published an article announcing the correlation between death among workers in England's asbestos mills and the asbestos present in the work environment.[22] In the decade that followed, many publications in the United States suggested that asbestos could pose a danger to the health of those who came in contact with it.[23] "Knowledge of the danger can be attributed to the [asbestos manufacturing] industry as early as the mid-1930s,[24] and the conduct throughout the industry despite the danger has been summarized as one of indifferent silence."[25] In 1935, the American Journal of Cancer published the first article proposing a causal link between asbestos and malignant disease.[26] An early opportunity to fully litigate the asbestos causation issue was averted when Johns-Manville authorized $30,000

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18. *See* P. BRODEUR, *supra* note 12, at 10. *See generally Asbestos Litigation Reporter*, Feb. 7, 1979, reproduced in *Oversight Hearings on Asbestos Health Hazards to Schoolchildren: Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the Comm. on Educ. and Labor*, House of Representatives, 96th Cong., 1st Sess. on H.R. 1435 and H.R. 1524, 484, 492-521 (1979) [hereinafter *Asbestos Litigation Reporter*] (report contains a chronological listing of asbestos highlights, spanning the years 1898 to 1978, including numerous reports which discuss the health risks of asbestos).

19. P. BRODEUR, *supra* note 12, at 10.

20. *Id.* at 11; *Asbestos Litigation Reporter*, *supra* note 18, at 485 (notes Dr. Murray's conclusion as following that of M. Auribault in 1906).

21. P. BRODEUR, *supra* note 12, at 12; *Asbestos Litigation Reporter*, *supra* note 18, at 485 (notes M. Auribault's conclusion as occurring one year prior to Dr. Murray's).

22. P. BRODEUR, *supra* note 12, at 13; *See* Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, BRIT. MED. J., July 26, 1924, at 147.

23. *See* Note, *Asbestos Abatement: The Allocation of Liability*, 40 S.C.L. REV. 1043, 1044 n.6 (1989).

24. Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1355 (E.D. Tex. 1981) (citing Lanza, *Effects of the Inhalation of Asbestos Dust on the Lungs of Asbestos Workers*, 50 PUBLIC HEALTH REPORTS 6, 7 (1935)).

25. *Id.* (citing Borel v. Fiberboard Paper Products Corp., 493 F.2d 1076, 1106 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974)). "The industry was also silent with respect to the dangerous relationship between asbestos and cancer." *Id.* (citing Selikoff & Hammond, *Asbestos-associated Disease in the United States Shipyards*, 28 CA — A CANCER J. FOR CLIN. 87 (1978)).

26. *See* Lynch & Smith, *Pulmonary Asbestosis III: Carcinoma of Lung in Asbestos Silicosis*, 24 AM. J. CANCER 56 (1935).

in settlement payments for eleven former employees with asbestosis.[27] In the mid-1960s, Dr. Irving Selikoff of Mt. Sinai School of Medicine published reports clearly establishing the health risks of exposure to asbestos.[28] Today, the potentially deadly nature of asbestos and asbestos products is common knowledge.[29]

III. ANALYSIS

The history of the relationship between landlords and tenants has produced a great body of landlord-tenant law. As with any landlord-tenant question, this body is the logical starting point from which to seek answers. Although landlord-tenant law, either judicial or legislative, has not had much occasion to address the specific question of liability for asbestos removal costs, it has made efforts to define the relationship between landlord and tenant in terms of the duties they owe each other.

If landlord-tenant law fails to answer the liability question completely or satisfactorily, the next logical reference point is the body of law dealing specifically with asbestos. Considering that public awareness of the dangers posed by asbestos is a relatively recent development, compared to either the number of years that asbestos has been in use or that landlords and tenants have been resolving disputes, the body of law dealing with asbestos is not likely to be nearly so extensive as that dealing with the landlord-tenant relationship. The following sections survey those bodies of law dealing with the landlord-tenant relationship and the regulation of asbestos.

A. Landlord-Tenant Relationship

Historically, the duties and obligations of landlords and tenants have been determined by common law principles recognized in the ju-

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27. *See Failure to Warn*, *supra* note 15, at 64. Obviously, the fact that Johns-Manville was willing to settle personal injury cases with eleven former employees does not establish that the work environment was wholly responsible for the employees' contracting asbestosis, or even that Johns-Manville acknowledged the correlation. Rather, this information is included to show that eleven former employees thought that there was a connection and that Johns-Manville took their claims seriously enough to authorize the settlement fund.

28. *See* Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANNALS N.Y. ACAD. SCI. 139 (1965); Selikoff, Churg & Hammond, *Asbestos Exposure and Neoplasia*, 188 J. AM. MED. A. 22 (1964).

29. *See, e.g.*, Hardy v. Johns-Manville, 509 F. Supp. 1353 (E.D. Tex. 1981). Judge Robert Parker wrote that "it cannot be seriously argued [against] that asbestos exposure causes disease. So comfortable are we with that assertion, that a former Secretary of Health, Education and Welfare estimated that more than 67,000 human lives are taken each year by asbestos-related cancers." *Id.* at 1354 (citing Joseph Califano, Hartford Courant, Sept. 12, 1978, as quoted in Comment, *Asbestos Litigation: The Dust has Yet to Settle*, 7 FORDHAM URBAN L.J. 55, 55 n.1 (1978)).

risdiction where the real property is situated. The question of who should bear the responsibility for removing asbestos from a leased structure depends upon the answer to two questions: (1) Is the landlord obliged to provide the leasehold to the tenant in any particular condition? and (2) Which party has the duty to make repairs to the leasehold? The answer to these questions, as applied to the issue of asbestos removal, may vary depending upon the status of the landlord and tenant, the nature of the lease, and the set of events which make it necessary to remove the asbestos.

1. Warranty of Habitability

The general rule at common law was that a lease contained no warranty or covenant that the premises were in habitable condition or were suitable for a particular purpose when the lease began.[30] Because the lessee was actually purchasing an estate in land, he was held to the doctrine of *caveat emptor*: let the buyer beware.[31] If a tenant intended to use leased property for a particular purpose, it was his responsibility to ensure that the property was suitable for that purpose, either through inspection or the inclusion of an express warranty in the lease contract.[32] Even at early common law, though, there was an exception to the general rule for a lease of a furnished dwelling.[33] The first such case, *Smith v. Marrable*,[34] was an English case involving a short-term lease of a furnished vacation house.[35] In this setting, the general rule made little sense: the vacationing tenant would have little opportunity to inspect his accommodations or bargain over their conditions prior to his arrival. The exception recognized that furnished houses, in general, were normally leased on short notice and for short terms, making it difficult for the tenant to inspect or get the house into livable condition.[36] Most cases applying the "furnished house" exception involved short-term leases for immediate occupation of furnished dwellings.[37]

The general common law rule that a lease contained no warranty that the premises were suitable for a particular purpose applied to the

30. AMERICAN LAW OF PROPERTY 267 (A. Casner ed. 1952) [hereinafter PROPERTY 1952] (citing Little Rock Ice Co. v. Consumers' Ice Co., 114 Ark. 532, 170 S.W. 241 (1914); Arbuckle Realty Trust v. Rosson, 180 Okla. 20, 67 P.2d 444 (1937)).

31. *Id.*

32. *Id.*

33. *Id.* (citing Smith v. Marrable, 11 M. & W. 5, 152 Eng. Rep. 693 (Ex. 1843)).

34. 11 M. & W. 5, 152 Eng. Rep. 693 (Ex. 1843).

35. PROPERTY 1952, *supra* note 30, at 267.

36. *Id.* at 268.

37. *Id.* (citing Young v. Povich, 121 Me. 141, 116 A. 26 (1922); Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942)).

commercial lease as well.[38] In *Anderson Drive-in Theatre v. Kirkpatrick*,[39] the Indiana Supreme Court heard claims regarding property leased for the construction of a drive-in theater and refused to imply a warranty as to the suitability of the soil for that purpose.[40] In similar fashion, the Massachusetts high court rejected a claim that a covenant of fitness should be implied where the tenant rents a business building for immediate occupancy.[41]

In the late 1960s and early 1970s, courts in a dozen jurisdictions dropped the common law rule as applied to residential leases and recognized an implied warranty of habitability.[42] The doctrine of implied warranty rejects the idea that a lease is merely the purchase of an estate in land to be governed by property laws, and instead treats the transfer more like the sale of goods, and attempts to protect the expectations of the parties.[43] A warranty of habitability places some obligation on the residential landlord to make repairs; however, the landlord is not obliged to repair defects created by the tenant.[44] This warranty has been applied to conditions which existed at the time the lease commenced and to conditions which arose during the term of the lease.[45] Because the landlord, in most of the cases, was violating a statute or ordinance, the implied warranty of habitability added contractual remedies to the relief the tenant could seek.[46]

"The covenant of habitability is that the premises are suitable as living quarters. It is breached if they are unsafe or unsanitary or otherwise unfit for that purpose."[47] In *Glyco v. Schultz*[48] the landlord had

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38. AMERICAN LAW OF PROPERTY 36 (A. Casner ed., Supp. 1977) [hereinafter PROPERTY (Supp. 1977)].

39. 123 Ind. 388, 110 N.E.2d 506 (1953).

40. *Id.*

41. Gade v. National Creamery Co., 324 Mass. 515, 87 N.E.2d 180 (1949).

42. PROPERTY (Supp. 1977), *supra* note 38, at 35 (citing Javins v. First Nat'l Realty Corp. 428 F.2d 1071 (D.C. Cir. 1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Jack Spring Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Boston Housing Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Glyco v. Schultz, 35 Ohio Misc. 25 (Mun. Ct. 1972); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973)).

43. R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 123-24 (1980).

44. PROPERTY (Supp. 1977), *supra* note 38, at 35 (citing RESTATEMENT (SECOND) OF PROPERTY, T.D. No. 2, § 5.5 and particularly comment f (1974)).

45. *Id.* (citing Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Gillette v. Anderson, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972); Glyco v. Schultz, 35 Ohio Misc. 25 (Mun. Ct. 1972)).

46. *Id.* (citing Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971)).

47. Id. (citing Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Boston Housing Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 83 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971)).

rented her house while there were numerous, substantial violations of the local housing code.[49] The court stated that the laws of the jurisdiction which were in effect when the lease was executed would enter into the lease as though they had been expressly referenced.[50] In jurisdictions which recognize the warranty of habitability, the landlord is required to deliver the property in a habitable condition and maintain it that way throughout the term of the lease.[51] The warranty is only applicable if the tenant has notified the landlord of the defective conditions and given him a reasonable opportunity to correct them.[52] In a case where the residential landlord has clearly violated the housing code, or some other legislative enactment, the tenant may use the code requirements, along with the warranty of habitability, in a claim for recovery[53] or as an affirmative defense.[54] Even where the landlord has conformed to the local code, the tenant may claim that the warranty calls for "conformance with general community standards of suitability for occupancy."[55]

As applied to the residential tenant who wants to force his landlord to remove asbestos from the premises, or to rescind or terminate the lease,[56] the tenant should follow the same course. The tenant should notify the landlord that there is asbestos that needs to be removed. If the landlord fails or refuses to act on this notification within a reasonable amount of time, the tenant can bring a complaint against the landlord to force removal. The tenant will need evidence sufficient to meet the factual burden of proof that the presence of asbestos in the premises makes the residence uninhabitable. The landlord will likely assert

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48. 35 Ohio Misc. 25 (Mun. Ct. 1972).

49. *Id.* at 26.

50. *Id.* at 28.

51. R. SCHOSHINSKI, *supra* note 43, at 127 (citing Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973)).

52. *Id.* at 127-28.

53. *See* Gillette v. Anderson, 4 Ill. App. 3d 838, 282 N.E.2d 149 (1972).

54. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Glyco v. Schultz, 35 Ohio Misc. 25 (Mun. Ct. 1972).

55. R. SCHOSHINSKI, *supra* note 43, at 128 (citing Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Boston Housing Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973)).

56. *Cf.* Garb-Ko, Inc. v. Lansing-Lewis Services, Inc., 167 Mich. App. 779, 423 N.W.2d 355 (1988). After contracting to sell an automotive parts store, the seller discovered that fuel storage tanks on the property may have been leaking, contaminating both the ground and groundwater. *Id.* at 781, 423 N.W.2d at 356. The seller informed the buyer of the situation and gave the buyer the option to terminate the contract or to agree to indemnify the seller for all costs or penalties associated with this problem. *Id.* The buyer sued for specific performance, possibly hoping to force the seller to bear any costs or penalties arising after the sale. *Id.* The court rescinded the sale, concluding that a mutual mistake affecting a basic, material assumption of the contract had occurred and that it would be unreasonable and unjust to enforce the terms of the buy-sell agreement. *Id.* at 783-86, 423 N.W.2d at 357-58.

either that (1) the asbestos presents no appreciable danger to the tenant,[57] and thus the dwelling remains habitable, or (2) the dangerous condition of the asbestos is the result of interference by the tenant, making the tenant liable for its repair or removal.[58] Given the potential harm posed by asbestos and the vitality of the warranty of habitability doctrine, courts are likely to decide in favor of the residential tenant and order the residential landlord to remove asbestos which poses risk to his tenants.

Because the implied warranty cases and statutes have been limited almost exclusively to the residential lease setting, it is not clear whether the policy reasons which led to that doctrine will be extended to overturn the common law rule in the commercial lease context.[59] The policy reasons underlying the erosion of the common law rule, as it had previously been applied to residential leases, include the "expectations and demands of the contemporary landlord-tenant relationship, the scarcity of adequate low cost housing in many urban areas, the widespread enactment of comprehensive housing codes reflecting a legislative policy to realign the obligations of repair and maintenance, and the unequal bargaining power of landlords and tenants."[60] In *Javins v. First National Realty Corp.*,[61] the Court of Appeals for the District of Columbia states, in dicta, that although the old common law view that a lease conveyed an interest in land is inapplicable to the residential lease, it may retain its vitality in the commercial land lease.[62] In *E. P. Hinkle & Co. v. Manhattan Co.*,[63] another case before the Court of Appeals for the District of Columbia, a commercial tenant sought to force the landlord to replace machinery which had become defective, but the court rejected the tenant's warranty of habitability claim, noting that

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57. *See* Block, *Asbestos Litigation Reaches Commercial Building Doors*, N.Y.L.J., Sep. 23, 1987, at 25, col. 5 (noting that several authors and studies have concluded that intact asbestos poses no hazard to building occupants).

58. *See infra* note 71.

59. PROPERTY (Supp. 1977), *supra* note 38, at 36. Courts have refused to recognize a warranty of suitability in commercial leases. E. P. Hinkel & Co., Inc. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974); Service Oil v. White, 218 Kan. 87, 542 P.2d 652 (1975); Cameron v. Calhoun-Smith Distrib. Co., 442 S.W.2d 815 (Tex. Civ. App. 1969). *Contra* Dravillas v. Vega, 294 A.2d 363 (D.C. Cir. 1972); Earl Milliken, Inc. v. Allen, 21 Wis. 2d 497, 124 N.W.2d 651 (1963). "The primary application of the implied warranty theory has been in the context of residential leases [footnote omitted] and the doctrine has not been extended to commercial leases." R. SCHOSHINSKI, *supra* note 43, at 147-48 (citing Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975)).

60. R. SCHOSHINSKI, *supra* note 41, at 123 (citations omitted); *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

61. 428 F.2d 1071 (D.C. Cir. 1970).

62. *Id.*

63. 506 F.2d 201 (D.C. Cir. 1974).

the doctrine is restricted to residential leases where there generally is a difference in bargaining positions.[64] When an Illinois commercial landlord brought a forcible entry and detainer action in *Yuan Kane Ing v. Levy*,[65] the tenant raised the landlord's contract breaches as an affirmative defense.[66] Here also the court, noting that the parties were not in an unequal bargaining position, did not permit the tenant to extend the implied warranty doctrine to the commercial lease.

While the residential tenant seeking to force his landlord to address an asbestos problem may rely upon the doctrine of implied warranty of habitability, courts have been reluctant to extend the doctrine to commercial leases.

2. Duty to Repair

Under common law, the tenant generally bore the responsibility for minor repairs required to maintain the value of leased property.[67] The object of the property repair requirement was two-fold: to keep the property in a condition suitable for the tenant's purpose and to protect the landlord's interest in the property.[68] The rationale for this rule stemmed from a belief that the tenant would likely possess the ability and means for making minor repairs, and because he occupied the leasehold, could potentially save the property from great damage at minimal inconvenience.[69] While this presumption may continue to play a role in commercial lease negotiations, today's residential tenant does not normally expect to bear the responsibility of keeping the leased property in a habitable condition.[70]

A tenant's common law obligation did not extend to major repairs or to parts of the property which were common areas or were under the control of the landlord.[71] Where an alteration was required because of the specific nature of the tenant's business, however, the tenant might have been required to bear the costs.[72] The fact that a lease was long-term also weighed against the tenant in allocating alteration costs.[73] On

64. *Id.*

65. 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975).

66. *Id.*

67. R. SCHOSHINSKI, *supra* note 43, at 269 (citing New York v. United States, 97 F. Supp. 808, 818 (Ct. Cl. 1951); Thomas v. Roper, 162 Conn. 343, 348, 294 A.2d 321, 324 (1972)).

68. *Id.* at 269-71.

69. *Id.* at 269.

70. *Id.* (citing Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)).

71. *Id.* at 271. A tenant, however, may be required to make extensive repairs, even of a structural nature, whether or not he controls the damaged areas if he is responsible for the damage to the property. R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 131 (Supp. 1990) [hereinafter R. SCHOSHINSKI (Supp. 1990)].

72. PROPERTY 1952, *supra* note 30, at 353.

73. *Id.*

the other hand, the landlord might have to bear some of the alteration costs if the changes provide lasting or appreciable benefit to the landlord.[74]

Over two-thirds of the state legislatures have enacted laws substantially shifting obligations for repairs and maintenance from the tenant to the landlord.[75] Although these statutes vary greatly, some providing an array of tenant remedies and others providing very little relief, the enactments are almost entirely concerned with residential leases.[76] Judicial and legislative developments have practically abrogated the residential tenant's common law duty to make even minor repairs.[77] Even though the tenant's duty to repair has practically vanished, the tenant is still responsible to notify the landlord when repair is needed.[78]

Considering the factors used to determine the duty to repair, a residential tenant will not normally be liable for the costs of removing asbestos unless he has in some way interfered with the asbestos in the

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74. *Id.*; *see also* Sun Ins. Servs., Inc. v. 260 Peachtree St., Inc., 192 Ga. App. 482, 483, 385 S.E.2d 127, 128 (1989).

75. R. SCHOSHINSKI, *supra* note 43, at 150; R. SCHOSHINSKI (Supp. 1990), *supra* note 71, at 77 (citing ALASKA STAT. §§ 34.03.100, .160, .180 (1990); ARIZ. REV. STAT. ANN. §§ 33-1324, 33-1361 (1990); CAL CIV. CODE §§ 1941, 1941.1, 1942 (Deering 1985); CONN. GEN. STAT. §§ 47a-7, 47a-8, 47a-12 to 14a (1978 & Supp. 1990); DEL. CODE ANN. tit. 25, §§ 5303-5308 (1989); FLA. STAT. §§ 83.51, 83.56 (1987 & Supp. 1991); GA. CODE ANN. § 44-7-13 (1982); HAW. REV. STAT. §§ 521-42, 521-61 to 66 (1985 & Supp. 1990); IDAHO CODE § 6-320 (1990); IOWA CODE ANN. §§ 562A.15, .21, .23 to .26 (Supp. 1990); KAN. STAT. ANN. §§ 58-2540 to 2572 (1983); KY. REV. STAT. ANN. §§ 383.595, 383.625, 383.635, 383.640, 383.645 (Baldwin 1989); LA. CIV. CODE ANN. arts. 2693-2695 (West 1952); ME. REV. STAT. ANN. tit. 14, § 6021 (1964 & Supp. 1990); MD. REAL PROP. CODE ANN. § 8-211 (1988 & Supp. 1990); MASS. GEN. L. ch. 239, § 8A (1988); MICH. COMP. LAWS § 554.139 (1988); MINN. STAT. § 504.18 (1990); MONT. CODE ANN. § 70-24-303 (1989); NEB. REV. STAT. §§ 76-1419, -1425, -1427 (1990); NEV. REV. STAT. ANN. § 118A.290 (Michie 1986); N.M. STAT. ANN. § 47-8-20 (1978 & Supp. 1990); N.Y. REAL PROP. LAW § 235-b (McKinney 1989); N.C. GEN. STAT §§ 42-38 to 42-56 (1990); N.D. CENT. CODE § 47-16-13.1 (1978); OHIO REV. CODE ANN. §§ 5321.04, .07 (Anderson 1989); OKLA. STAT. TIT. 41, § 118 (1986); OR. REV. STAT. §§ 90.320, 90.360-385 (1990); PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977); R.I. GEN. LAWS § 34-18-16 (1984); TENN. CODE ANN. §§ 66-28-304 to -401 (1982); VT. STAT. ANN. tit. 12, § 4859 (1973) (repealed 1985, No. 175 (Adj. Sess.), §7 (Supp. 1990)); VA. CODE ANN. §§ 55-248.13, .25 (1986); WASH. REV. CODE ANN. § 59.18.060 (1990); W. VA. CODE § 37-6-30 (1985); WIS. STAT. § 704.07 (1981 & Supp. 1990)).

76. R. SCHOSHINSKI, *supra* note 43, at 151.

77. *Id.* at 275. Maine has legislated a covenant into every residential lease that the "dwelling is fit for human habitation." *Id.* (quoting ME. REV. STAT. ANN. tit. 14, § 6021 (Supp. 1990)); *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970) (court implied a warranty of habitability in the residential leases). *But see* Thomas v. Roper, 162 Conn. 343, 294 A.2d 321 (1972).

> In the absence of a statute or covenant to the contrary, the lessor does not have a duty to keep in repair any portion of the premises leased to and in the exclusive possession and control of the lessee. . . . Rather, the duty to make ordinary repairs rests on the lessee.

Id. at 348, 294 A.2d at 324.

78. R. SCHOSHINSKI, *supra* note 43, at 276.

leasehold. If the asbestos is in such a condition that it poses a health risk, a warranty of habitability may be invoked in those jurisdictions which recognize that doctrine. For those jurisdictions which do not yet recognize the doctrine, the tenant can assert that the location of the asbestos is under the landlord's exclusive control, or that removing the asbestos would be a major, rather than minor, repair.

The changes in regard to the residential landlord's liability have not reached commercial leases.[79] The policy considerations favoring the typical residential tenant—unequal bargaining position, limited capability to make repairs, and limited ability to inspect property before entering into a lease--may not be applicable to the commercial tenant.[80] "Those courts which have based their implied warranty holdings on factors applicable to both residential and commercial leases are more likely to imply a warranty of fitness for intended use in commercial leases."[81]

There may be, however, other considerations in determining whether the commercial tenant should bear repair costs. One of the few landlord-tenant decisions rendered on the issue of liability for asbestos removal costs involved a commercial lease.[82] The dispute in *Sun Insurance Services, Inc. v. 260 Peachtree Street, Inc.*[83] involved a 25-year lease wherein the tenant-insurance company wanted to renovate twelve and one-half floors of office space (approximately half of the building) it occupied under the lease.[84] Because the renovations would make it necessary to remove asbestos, the landlord approved the request on condition that the tenant pay removal costs.[85] The Court of Appeals of Georgia found that because the renovations were "necessary to increase the efficiency of [the tenant's] business . . . and were contemplated by the parties in the lease," the landlord could not refuse the tenant's request.[86] Furthermore, the court noted that asbestos removal was in the nature of a capital improvement and, as such, would ultimately benefit the landlord rather than the tenant who occupied the building only for a period of years.[87] Based upon this reasoning, the court held that al-

79. *Id.* at 148 (citing E. P. Hinkel & Co., Inc. v. Manhattan Co., 506 F.2d 201 (D.C. Cir. 1974); Yuan Kane Ing v. Levy, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1975)).

80. *Id.*

81. *Id.* at 149. "[T]he implied warranty is founded not on fairness or public policy but on the intent of the parties." *Id.* (discussing Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970)).

82. *See* Sun Ins. Servs., Inc. v. 260 Peachtree St., Inc., 192 Ga. App. 482, 385 S.E.2d 127 (1989).

83. 192 Ga. App. 482, 385 S.E.2d 127 (1989).

84. *Id.* at 482, 385 S.E.2d at 128.

85. *Id.*

86. *Id.* at 484, 385 S.E.2d at 129.

87. *Id.* at 483, 385 S.E.2d at 129.

though the asbestos removal was made necessary by the tenant's renovations, the landlord must bear the removal costs.[88]

A tenant's express covenant to make repairs normally anticipates performing the maintenance and repairs necessary to keep the property in good condition.[89] Absent an express covenant, a tenant will not generally be required to make repairs necessary to comply with local health and safety standards.[90] Where a tenant has expressly covenanted to make repairs, his obligation to make changes required by local authority will normally depend on the nature of the alteration.[91] Ordinary and minor repairs will almost certainly fall within the tenant's obligations under such an agreement, while major repairs, alterations or improvements, or structural changes will not.[92] This holds true for both the commercial and residential tenant.[93]

Separate from any express or implied warranty, the landlord has a duty to inform the tenant of any dangerous condition or defect that would not be apparent upon routine inspection of the property.[94] To the degree that the presence of asbestos in a structure may be characterized as a dangerous condition, a landlord has the common law duty to disclose that condition to a tenant. If, however, the landlord is not aware of the asbestos, or the tenant is aware of it, no special duty to disclose exists.[95] The landlord could also be liable for fraud if he purposely misleads the tenant regarding the condition of the property.[96]

The same distinction between residential and commercial leases, regarding the application of the warranty of habitability, also applies to the duty to repair. Except where there is an express covenant, the residential tenant is not likely to be liable for repairs necessary to abate an asbestos problem. Although the decision in *Sun Insurance Services,*

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88. *Id.* at 484, 385 S.E.2d at 129.

89. PROPERTY 1952, *supra* note 30, at 349.

90. *Id.* at 353.

91. *Id.*

92. *Id.* at 353-54.

93. A commercial tenant, otherwise obligated to keep the leasehold in compliance with local code standards, might not be held responsible to bring the property into conformance with code changes that post-date the execution of the lease. Herald Square Realty Co. v. Saks & Co., 215 N.Y. 427, 428, 109 N.E. 545, 546 (1915). Although the tenant was obligated by the lease contract to perform all renovation work in accordance with federal, state and local laws, because the laws at issue did not exist when the lease began the tenant did not have the opportunity to allocate the responsibility when negotiating the lease. *Id.* at 433, 109 N.E. at 546-47.

94. PROPERTY 1977, *supra* note 38, at 36 (citing Sunasack v. Morey, 196 Ill. 569, 63 N.E. 1039 (1902); Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (1953)).

95. *Id.* (citing Andonique v. Carmen, 151 Ky. 249, 151 S.W. 921 (1912)).

96. *Id.* (citing Boyer v. Commercial Bldg. Inc. Co., 110 Iowa 491, 81 N.W. 720 (1900) (statement of fact, rather than opinion); Daly v. Wise, 132 N.Y. 306, 30 N.E. 837 (1892) (a knowingly false statement)).

Inc. v. 260 Peachtree Street, Inc.[97] might be viewed as the abolition of the commercial tenant's common law duty to repair, a single state appellate decision is too little upon which to base such a general conclusion.

B. Statutory Liability

1. Federal Law

In 1980, Congress passed the Comprehensive Emergency Response Compensation Liability Act (CERCLA)[98] to "facilitate government cleanup of hazardous waste discharges and [prevent] future releases."[99] Although CERCLA "applies 'primarily to the cleanup of leaking inactive or abandoned sites and to emergency responses to spills,' "[100] several litigants have attempted to use CERCLA as a basis for recovering asbestos removal costs.[101] Although courts have not found CERCLA easy to interpret,[102] "[t]he courts, without apparent exception, have concluded that CERCLA does not provide a remedy for asbestos removal."[103] Partly because of the confusion surrounding CERCLA, Congress passed the Superfund Amendments and Reauthorization Act

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97. 192 Ga. App. 482, 385 S.E.2d 127 (1989).

98. 42 U.S.C. §§ 9601-9607 (1990).

99. Exxon Corp. v. Hunt, 475 U.S. 355, 359-60 (1986). "CERCLA was designed 'to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws.' " New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) (quoting F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984)).

100. New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) (quoting F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984)).

101. Retirement Community Developers, Inc. v. Merine, 713 F. Supp. 153 (D. Md. 1989) (while renovating an apartment building, the plaintiffs chose to remove pre-existing asbestos insulation and fireproofing and subsequently tried to recover damages and various costs from the previous owners); Dayton Indep. Sch. Dist. v. United States Mineral Prods. Co., 906 F.2d 1059 (5th Cir. 1990). This action was the culmination of a procedurally complicated set of cases. *Id.* at 1061-62. The CERCLA claim was probably added only to provide a basis for federal jurisdiction because complete diversity of citizenship was lacking.

102. Artesian Water Co. v. Government of New Castle County, 851 F.2d 643, 648 (3d Cir. 1988) "CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage." *Id.*; *see also Merine*, 713 F. Supp. at 156. "It is undisputed that CERCLA presents difficult questions of interpretation." *Merine*, 713 F. Supp. at 156.

103. *Dayton Indep. Sch. Dist.*, 906 F.2d at 1066; *see also* First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 867 (4th Cir. 1989); 3550 Stevens Creek Assocs. v. Barclays Bank of California, No. CV-87-20672-RPA (N.D. Cal. 1988), *aff'd*, 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2014 (interim ed. 1991); *Merine*, 713 F. Supp. at 159; Prudential Ins. Co. of Am. v. United States Gypsum Co., 711 F. Supp. 1244 (D.N.J. 1989); Corporation of Mercer Univ. v. National Gypsum Co., No. 85-126-3-MAC slip op. at 20 (M.D. Ga. Mar. 9, 1986).

of 1986 (SARA).[104] SARA contained a building materials exception which removed the possibility of imposing liability for the abatement or removal of materials which make up the structure.[105] CERCLA, however, might apply where an asbestos release, perhaps the spilling of a non-building material asbestos product, creates an immediate danger.[106] Typically, the asbestos which would be at issue in a landlord-tenant dispute would be part of the structure and subject to the building materials exception. For this reason, CERCLA and SARA do not provide liability for asbestos abatement.

While Congress has passed legislation specifically addressing the asbestos problem in schools,[107] it has not addressed the removal liability issue generally. The "Asbestos-in-Schools" rule,[108] published in 1983 by the Environmental Protection Agency (EPA), instructed schools to identify any friable[109] asbestos, record their findings, and notify employees and parents of their findings.[110] Congress passed the Asbestos Hazard Emergency Response Act of 1986[111] in an attempt to control the school asbestos problem through the EPA. The Act required the EPA to issue regulations governing school inspections and response actions within 360 days.[112] Further, the Asbestos School Hazard Detection and Control Act of 1990 establishes a loan program to assist schools with asbestos abatement projects.[113] As far as these acts and EPA regulations go towards solving the asbestos problem in schools,

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104. Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986).

105. 42 U.S.C. § 9604(a)(3)(B) (1990). "The president shall not provide for a removal or remedial action under this section in response to a release or threat of release- . . . from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures." *Id.*

106. Berger, *Many Issues Still Uninterpreted In Numerous Commercial Leases*, NAT'L L.J. 18, 20 (1990). "[A] duct that is opened and spills asbestos on the ground may be analogous to piercing a barrel of toxic waste." *Id.*

107. *See* Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §§ 3601-3611 (1982); Asbestos School Hazard Abatement Act of 1984, 20 U.S.C. §§ 4011-4021 (Supp. II 1984).

108. Friable Asbestos-Containing Materials in Schools; Identification and Notification Rule, 40 C.F.R §§ 763.100-763.119 (1991). [hereinafter ACMs in Schools] (deadline for compliance with the Rule was June 28, 1983).

109. " 'Friable' means that the substance, which has a spongy, irregular, or textured appearance, can be crumbled by hand." Attorney General's Report, *supra* note 8, at IX.

110. ACMs in Schools, *supra* note 108, at §§ 763.100-763.119.

111. Pub. L. No. 99-519, 100 Stat. 2970 (1986) (codified at 15 U.S.C. §§ 2641-2654 (Supp. IV 1986)).

112. *Id.*

113. 20 U.S.C. § 3605 (1990). In order to qualify for a loan, generally equal to half the project's cost, the school must have a large enough volume of material containing a sufficiently high quantity of asbestos. The Secretary of Education, who administers the program within the Department of Education, has some discretionary power regarding loan approval and amount. *Id.*

they do not establish liability; therefore, they cannot provide a rationale for liability from which to analogize to the landlord-tenant situation.

The EPA has stated that "[o]wners are ultimately responsible for asbestos-related problems in their buildings,"[114] but has provided neither authority nor a rationale for the statement. It is not clear what the EPA means by "ultimately responsible" and "asbestos-related." Without a clear statement of authority and an explanation of its terms, the claim of owner-responsibility is not helpful. The EPA does regulate asbestos use, identification, and removal,[115] but "[t]here are no exposure standards for nonindustrial settings, and no regulations requiring corrective actions in buildings with [asbestos-contaminated materials]."[116]

2. State Codes

The United States Attorney General has suggested, regarding asbestos abatement in schools, that the states are better suited than the federal government to determine liability.[117] Much of the state law dealing with asbestos establishes standards directed at the removal process, rather than allocating the duty to remove asbestos.[118] These regulations typically limit who may remove asbestos,[119] how the approved

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114. Controlling ACMs, *supra* note 10, at 2-1.

115. Controlling ACMs, *supra* note 10, at 1-1. "Current regulations (1) restrict the use of most asbestos products in new buildings, (2) specify work practices for removal of ACM [asbestos-containing material] from buildings, and (3) require the identification of asbestos in schools." *Id.*

116. *Id.*

117. See Attorney General's Report, *supra* note 8, at XII-XIII.

> Though the problem of friable asbestos in the schools is in one sense a national one, the absence of a federal law assigning liability suggests that the better solution is at the local or state level. The primary goal is to remedy hazardous situations as quickly as possible. Illusory hopes of federal assistance can obstruct rather than aid attainment of this goal.

Id.

118. *See generally* ASBESTOS ABATEMENT, *supra* note 11, at 101-161. The states which have dealt with liability issues have focused on insurance for cleanup companies, state employees, and school personnel. *Id.* at 102-103; *see also* OHIO REV. CODE ANN. § 3710.02 (Anderson 1990) (authorizes the Public Health Council to make appropriate rules to effect the regulation of asbestos abatement); OHIO ADMIN. CODE §§ 3701.4.02 to .07 (1990) (establishes certification requirements for licensing asbestos abatement contractors).

119. ASBESTOS ABATEMENT, *supra* note 11, at 102-03; *see also* ARK. STAT. ANN. §§ 20-27-1004, -1006 to -1007 (Supp. 1989) (only those licensed under regulations and procedures established by the Department of Pollution Control and Ecology are permitted to engage in asbestos abatement activities); MINN. STAT. ANN. §§ 326.73 (West Supp. 1991) (employees with appropriate construction experience and asbestos control and removal training may be certified to perform asbestos-related work); N.J. STAT. ANN. §§ 34:5A-36 to 37 (West 1988) (the Commissioner of Labor must issue a license to an employer and a performance permit to an employee before either may apply, enclose, remove or encapsulate asbestos); N.Y. LAB. LAW § 902 (McKinney 1988 & Supp. 1991) (contractors must be licensed to handle asbestos, and employees must have an asbestos handling permit before either may engage in work on an asbestos project).

contractor may remove it,[120] and how the removed asbestos is to be disposed.[121]

The obligations to meet statutory standards for asbestos removal may arise directly[122] or indirectly,[123] depending upon the event which triggers the applicability of the particular regulation. In New York City, for example, the requirements arise directly because the New York City Administrative Code creates obligations which must be met as prerequisites to receiving a building permit to work on or near asbestos in an asbestos project.[124] A Massachusetts statute requiring the installation of sprinkler systems in certain buildings may indirectly create the duty to remove asbestos where the installation of the fire-suppression system cannot be performed without disturbing or removing asbestos.[125]

New York's Attorney General has attempted to regulate the transfer of property containing asbestos, but has been successfully challenged on two occasions.[126] The Attorney General required sponsors (persons wishing to sell real estate, often condominiums) to meet certain asbestos abatement standards prior to filing plans to offer the par-

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120. ASBESTOS ABATEMENT, *supra* note 11, at 102-03; *see also* ME. REV. STAT. ANN. TIT. 38, §§ 1280(1)(A)-(D) (1989 & Supp. 1990) (work practice standards for license and certificate holders engaged in the removal, encapsulation or enclosure of asbestos); MASS. GEN. LAWS ANN. ch. 149, § 6C (West Supp. 1990) (establishes precautionary measures and protective equipment to be used by those engaged in asbestos work or abatement); OKLA. STAT. ANN. TIT. 40, § 453 (West 1986) (Commissioner of Labor will set standards for asbestos abatement and will oversee all abatement projects, including instructing, examining and inspecting contractors and their projects).

121. ASBESTOS ABATEMENT, *supra* note 11, at 102-03; *see also* ME. REV. STAT. ANN. TIT. 38, § 1280(1)(E) (1989 & Supp. 1990) (work practice standards for license and certificate holders engaged in storing, transporting and disposing materials containing asbestos); TEX. REV. CIV. STAT. ANN. art. 4477-3a §§ 3, 6 (Vernon 1991) (access to a disposal site is a prerequisite to obtaining an asbestos abatement license, and licensees must keep records of the amount of asbestos removed and the site where it was disposed of).

122. *See, e.g.*, Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, 100 Stat. 2970 (1986) (codified at 15 U.S.C. §§ 2641-2654 (Supp. IV 1986)) (although this is a federal statute, it serves as an example of the requirement to remove or abate the asbestos hazard arising directly from the statute).

123. *See, e.g.*, Sun Insurance Services, Inc. v. 260 Peachtree St., Inc., 192 Ga. App. 482, 385 S.E.2d 127 (1989). The tenant's plans to renovate leased office space created the need to remove the asbestos. *Id.* Therefore, the need to remove the asbestos arose indirectly, only because the tenant chose to make renovations which would bring the statute into play.

124. 22 REAL PROPERTY, PROBATE AND TRUST JOURNAL 661, 665 (1987) (citing Admin. Code of the City of New York, Tit. 24, ch. 1, § 146.1 & Tit. 27, ch.1, § 198.1 (Williams 1986), enacted by Local Law No. 76 of 1985).

125. MASS. GEN. L. ch. 148, § 26A½ (1989) (law requires that certain categories of structures be equipped with sprinklers). It is when the building owner or tenant begins to comply with this law that the need to remove asbestos might arise.

126. N.Y.L.J., Nov 15, 1989, at 35, col. 1, (citing Council for Owner Occupied Housing v. Abrams, 72 N.Y.2d 553, 531 N.E.2d 627, 534 N.Y.S.2d 906 (1988)).

ticular property to prospective buyers.[127] The trial court confirmed the Attorney General's authority to require asbestos disclosure in any offerings filed with the state,[128] but held that the Attorney General had exceeded his authority when he sought to require sponsors to either completely remove asbestos or establish an escrow account to guarantee its removal as a prerequisite to filing.[129]

State and federal asbestos legislation demonstrates lawmaker awareness of the asbestos problem. Still, neither federal nor state legislators have established how liability for asbestos removal or abatement costs should be allocated. As such, current statutory law is of little assistance to landlord and tenant as they search for an answer to the liability question.

C. *Liability of Third Parties*

Although there have been very few landlord-tenant suits to allocate asbestos abatement costs, there have, by comparison, been a great number of cases involving parties who have incurred abatement costs and then tried to recover those costs from a third party. Indeed, once primary liability is established between landlord and tenant, the liable party will likely desire to shift liability, or the removal costs, to another party. Potential sources of recovery for abatement or removal costs include asbestos manufacturers, suppliers and installers, as well as real estate brokers and previous owners.[130]

Asbestos manufacturers have already begun defending against claims for property damage and the costs associated with asbestos abatement.[131] Although the majority of asbestos abatement suits have been brought by school districts or city governments,[132] there is nothing

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127. *Id.*

128. Abrams, 72 N.Y.2d 553, 531 N.E.2d 627, 534 N.Y.S.2d 906.

129. *Id.* at 558, 531 N.E.2d at 628-29, 534 N.Y.S.2d at 908.

130. *See infra* text accompanying notes 131-48.

131. Manufacturers, still embroiled in personal injury litigation, have tried to avoid financial ruin by seeking indemnity from their insurance companies. *See generally* W.R. Grace & Co. v. Continental Casualty Co., 896 F.2d 865 (5th Cir. 1990), *reh'g* and *reh'g en banc denied*, Nos. 88-2902, 88-6164 (5th Cir. April 9, 1990) (LEXIS, Genfed library, Courts file); Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981); Insurance Co. of N. Am. v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980); Maryland Casualty Co. v. W.R. Grace & Co., 726 F. Supp. 62 (S.D.N.Y. 1989). *See also* LITIGATION COSTS, *supra* note 11, at v (costs associated with asbestos litigation).

132. *See generally* Dayton Indep. School Dist. v. U.S. Mineral Prods. Co., 906 F.2d 1059 (5th Cir. 1990); Corporation of Mercer Univ. v. National Gypsum Co., 877 F.2d 35 (11th Cir. 1989); School Dist. of Lancaster v. Lake Asbestos of Quebec, Ltd. (*In re* School Asbestos Litigation), 842 F.2d 671 (3d Cir. 1988); Drayton Public Sch. Dist. No. 19 v. W.R. Grace & Co., 728 F. Supp 1410 (E.D.N.D. 1989); District of Columbia v. Owens-Corning Fiberglas Corp., 572 A.2d 394 (D.C. 1989); City of New York v. Keene Corporation, 132 Misc. 2d 745, 505 N.Y.S.2d 782 (1986); Butler St. Joseph Hosp. v. Celotex Corp., 854 F.2d 426 (11th Cir. 1988).

to prevent a landlord with a single rental property, either residential or commercial, from bringing suit against asbestos manufacturers under the same theories of recovery used by the schools and cities.

In *City of New York v. Keene Corp.*,[133] the city brought an action against asbestos manufacturers and installers for the costs of the school asbestos abatement program claiming negligence and strict products liability.[134] The trial court determined that the city had a cause of action in indemnity because the defendants had placed a dangerous product in the school—a product which the school then had to pay to have removed.[135] Furthermore, the court held that the city had a cause of action in restitution because the school had incurred removal costs due to the immediacy of the need to remove the dangerous substance.[136] As a result, the court awarded the city reasonable costs for abatement, rather than reimbursement of the amount spent.[137]

Real estate brokers who sell property containing asbestos might be liable to the purchaser for having failed to disclose asbestos. Purchasers might make such claims under theories of negligence[138] or implied warranty of habitability.[139] In *Holder v. Haskett*,[140] the buyer brought suit against the real estate broker who had negotiated the sale of a residential lot upon which the buyer planned to build.[141] The buyer made his claim under a warranty of habitability theory because the sellers, under a separate contract as home builders, did substandard work and failed to complete the house.[142] The court refused to hold the real estate broker liable because the broker was not a party to the contract for the sale of the house.[143] The court, however, left open the question of

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133. 132 Misc. 2d 745, 505 N.Y.S.2d 782 (N.Y. County 1986).

134. *Id.*

135. *Id.* at 748, 505 N.Y.S.2d at 785.

136. *Id.* at 749, 505 N.Y.S.2d at 786.

137. *Id.* at 750, 505 N.Y.S.2d at 786.

138. *See* Easton v. Strassburger, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984). In describing a home seller's duty to a buyer, a California appellate court held that:

> [T]he duty of a real estate broker, representing the seller, to disclose facts . . . includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.

Id. at 102, 199 Cal. Rptr. at 390. The court qualified its opinion, reserving judgment on whether a broker would be obliged to conduct an inspection for defects to protect the buyer when dealing with commercial real estate, and the court distinguished the residential buyer from the commercial. *Id.* at 102 n.8, 199 Cal. Rptr. at 390 n.8.

139. *Cf.* Holder v. Haskett, 283 S.C. 247, 321 S.E.2d 192 (Ct. App. 1984).

140. 283 S.C. 247, 321 S.E.2d 192 (Ct. App. 1984).

141. *Id.* at 249, 321 S.E.2d at 194.

142. *Id.*

143. *Id.*

whether a real estate agent might be liable under an implied warranty of habitability theory if he were a party to such a contract.

Short of arguing under traditional contract theory,[144] the property buyer does not have any special dispensation under which to claim against the seller (or some other previous owner) for the costs of asbestos abatement or removal. In *Garb-Ko, Inc. v. Lansing-Lewis Services, Inc.*,[145] the seller, rather than the buyer, sought to rescind the contract because it discovered possible contamination on the property after making the contract to sell.[146] Although the seller gave the buyer the option of rescinding the contract or agreeing to indemnify the seller for any contamination on the property (as the seller faced potential liability under CERCLA), the buyer refused both options and sought to enforce the sale contract.[147] The court allowed the seller to rescind the contract due to mutual mistake, not because contaminated land and water were involved.[148]

Success in pursuing a claim for secondary liability will ultimately depend upon the facts of the particular situation. Even in the absence of state or federal statutes authorizing action to recover abatement costs, common law theories of recovery provide remedies if the case has a strong factual basis for recovery.

IV. CONCLUSION

The question as to whether landlord or tenant is liable for the costs of asbestos removal has not been answered. Although both federal and state laws address some of the many asbestos problems, none deal directly with the issue of allocating liability between landlord and tenant. CERCLA, which comes closest to providing rules of liability for asbestos abatement, is inapplicable to the asbestos removal question because of its building materials exception.

The lack of legislation clearly placing the burden of asbestos removal costs on either landlord or tenant is not indicative of legislative inattention, but rather resultant of a legislative conclusion that landlord-tenant law is sufficient to answer the question. Nationwide, there is a large volume of potential asbestos-related claims, and the most likely defendants, asbestos manufacturers, have a nationwide presence. Past and pending litigation has had such economic impact on many asbestos manufacturers that the risk of bankruptcy must now be con-

144. *See* Garb-Ko, Inc. v. Lansing-Lewis Servs., Inc., 167 Mich. App. 779, 423 N.W.2d 355 (1988).

145. 167 Mich. App. 779, 423 N.W.2d 355 (1988).

146. *Id.* at 780, 423 N.W.2d at 356.

147. *Id.* at 781, 423 N.W.2d at 356.

148. *Id.* at 782, 423 N.W.2d at 356.

sidered.[149] Manufacturer bankruptcy could lead to recovery for some litigants and preclude recovery for others. Personal injury litigation involving asbestos victims points to the need to provide uniformity in recoveries, and the need for some uniformity in asbestos liability law generally. All of these factors taken together weigh more strongly for federal, rather than state, legislation.

In the absence of such legislation, landlords and tenants may be able to avoid some uncertainty by addressing the asbestos abatement issue in their bargaining process. Negotiating parties might draft leases which include statements of notice. For example, "this property contains (or may contain) asbestos (or any other hazardous substance)." Where property contains asbestos, the parties may arrange for a pretenancy inspection to assure that the leasehold is safe, and a post-tenancy inspection to detect any change in the asbestos condition. The lease must allocate the liability for any changed conditions if the agreement is to be of any true benefit in removing uncertainty from the lease arrangement. Commercial landlords and tenants may also include asbestos liability costs in their bargaining process. The tenant might agree that if he wishes to make any changes which will require asbestos abatement, either as an integral part of the change or by bringing some statute into force, he will bear the abatement cost. Although it is still possible that a court might refuse to place the cost burden as allocated in the contract, courts would not be able to base such a decision on the presumption that the parties had not considered and bargained over the issue.

In the residential lease context, the tenant will probably prevail, regardless of the contract language, based on common law principles and state statutes restricting the ability to waive habitability requirements. The question of liability in the commercial lease context is, however, far less certain.

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[149] *See, e.g., In re* Johns-Manville Corp., 66 Bankr. 517 (Bankr. S.D.N.Y. 1987).