#268

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

RECEIVED
OFFICE OF THE SECRETARY
SEP 5 4 32 PM '78
CONSUMER PRODUCT SAFETY COMMISSION

August 23, 1978

6(b) CLEARED:
✓ No Mfrs Identified
Excepted
Mfrs Notified
Comments Processed

Richard Denney, Esq.
Associate General Counsel (A-132)
Environmental Protection Agency
Room 515, West Tower
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Denney:

This letter concerns the question of the ability of the Consumer Product Safey Commission (CPSC) to take action under the statutes it administers to prevent or reduce the potential risk of injury presented by asbestos-containing sprayed-on ceiling material. In a telephone conversatiion with David Melnick of this office, Gail Cooper of your staff requested our opinion concerning this question in order to assist EPA in making the discretionary determination under section 9(a)(1) of the Toxic Substances Control Act (15 U.S.C. 2608(a)(1)). As described to us, the potential risk of injury involves asbestos-containing material in homes, schools and other buildings which was previously applied to ceilings and which is deteriorating, exposing individuals in such buildings to respirable asbestos fibers. Our understanding is that use of this material was banned under the Clean Air Act as of 1971, and the material is no longer being sold or distributed in commerce. However, the material had been used for approximately twenty years prior to 1971, and it is believed that substantial amounts of the material may still exist on ceilings of buildings, thus presenting a potential health and environmental hazard.

Two statutes potentially empower the Consumer Product Safety Commission to regulate any hazards that might be associated with products containing asbestos, the Consumer Product Safety Act (CPSA, 15 U.S.C. 2051, et. seq.) and the Federal

ADMINISTRATION

#268

Hazardous Substances Act (FHSA) 15 U.S.C. 1261. et. seq.).

The threshold question which must be resolved in determining whether action may be taken under the CPSA is whether the product in question is a consumer product. In the instant case, the material exists in consumers' homes and in schools, as well as other buildings. Under the definition contained in section 3(a)(1) of the CPSA, a consumer product is

> "any article or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent, or temporary household or residence, a school, in recreation or otherwise;" 15 U.S.C. 2052(a)(1).

While there is no information available to us regarding whether the product, when originally sold or distributed, was available to consumers or was available solely to contractors or other commercial applicators, Congress intended the CPSA's application to a given product to "depend less on how the product changes hands than on the degree to which it affects or endangers the safety of individuals in their capacity as consumers." Consumer Product Safety Commission v. Chance Mfg. Co., 441 F.Supp 228 (D.D.C., 1977). Accordingly, our view is that the product in question would be within the scope of the term "consumer product" under the CPSA.

Sections 8, 12, and 15 of the CPSA could be applicable to regulation of the potential hazard associated with asbestos containing sprayed-on ceiling material. Section 8 (15 U.S.C. 2057) authorizes the Commission to propose a rule declaring a product a banned hazardous product if it finds that such product "is being, or will be" distributed in commerce and presents an unreasonable risk of injury, and that no feasible consumer product safety standard would adequately protect the public. Before promulgating a banning rule under section 8, the Commission must make findings with respect to the degree and nature of the risk of injury, the approximate number of products or classes of products involved, the need of the public for such products, the probable economic effect of the rule, and any alternative means of achieving the purposes of the rule. The effect of such a rule when promulgated

is to prevent the manufacture for sale, offering for sale or distribution of a hazardous product. Section 8 rules may be written to have retrospective effect as to products in the chain of distribution, but generally cannot reach products which have, as of the effective date of the rule, been sold or distributed to consumers.

Section 12 (15 U.S.C. 2061) authorizes the Commission to file in a United States district court an action against an "imminently hazardous consumer product" for seizure of such product or against the manufacturer, distributor, or retailer of such product to compel such person to give notice of the hazard and/or to recall, repair or replace the product or refund the purchase price. In order to maintain a section 12 civil action, the Commission must, in the case of a seizure action, identify a distinct product in commerce against which to proceed or, in the alternative, identify the manufacturers, distributors or retailers upon whom it will seek to have the court impose notification, repair, replacement, recall or refund responsibilities.

The nature of the product in question, specifically the fact that it is no longer being sold or distributed to consumers and is, in most cases, already installed or applied to consumers' ceilings creates serious practical problems in applyin the remedial provisions of section 12. It is unlikely the Commission could identify a distinct product in commerce against which to proceed in a seizure action. Because the product, after application to a ceiling, is in a different form than when sold or distributed, recall of the product does not appear feasible. An order requiring manufacturers, distributors, or retailers to notify the public, repair, or replace the product and/or refund the purchase price would appear to be potentially effective in removing the product from consumers' homes or from other buildings only to the extent that it would be possible to identify a manufacturer, distributor, or retailer on whom such legal obligations could be imposed by the court. If this and other practical problems involved in such litigation could be overcome, an order under section 12 requiring the defendants to repair or replace asbestos ceilings so as to prevent further exposure to asbestos fibers could, theoretically at least, address the risk of injury. However, the nature of litigation, as you know, is such that a remedy that would effectively and efficiently address the problem posed throughout the country by the product in question would likely be obtained only after the

expenditure of considerable time and resources.

Section 15 (15 U.S.C. 2064) authorizes the Commission to determine, after an opportunity for a formal evidentiary hearing under 5 U.S.C. 554, that a product distributed in commerce presents a substantial product hazard. The available remedies to address substantial product hazards are comparable to those available to address imminent hazards in section 12. For essentially the same reasons stated above in connection with section 12, obtaining an effective solution through adjudicative proceedings under section 15 would require overcoming serious practical problems involved in the case-by-case approach.

Under the Federal Hazardous Substances Act (FHSA) the Commission may, by regulation, classify a product a banned hazardous substance if the product is intended, or packaged in a form suitable, for use in the household, and the hazard is such that cautionary labeling under the act would not adequately protect the public health and safety. A regulation classifying a substance a banned hazardous substance automatically triggers repurchase through the distribution chain (15 U.S.C. 1274). Under the FHSA, the Commission lacks jurisdiction to address risks of injury from substances not intended for use in households. Therefore, to the extent the asbestos-containing product in question is used in buildings other than homes, action under the FHSA would not prevent or reduce to a sufficient extent the risk of injury. If the substance is subject to the Commission's jurisdiction under the FHSA, a determination as to whether action under the Act would prevent or reduce to a sufficient extent the risk of injury presented by the product requires an examination of whether banning and repurchase under the FHSA is an appropriate and effective remedy. The same practical problems involved in applying the recall and refund remedies under the CPSA, as discussed above, would be present under the FHSA. First, once the product is applied to a ceiling it loses its distinct identity and no longer can be readily removed and returned to the place of purchase for a refund. Second, once the product is applied to a ceiling, it is no longer packaged and identification of the manufacturer, distributor, or dealer on whom repurchase and refund obligations would be imposed would be difficult. Third, removal of the product and transportation to the place of purchase, if possible, could create additional risks of injury from accidental exposure of the public to asbestos fibers.

Please note that this letter is based solely on the preliminary information made available to us orally and represents the views of the General Counsel, which could be changed or superseded by the Commission.

If we may be of further assistance to EPA in this matter, please let us know.

Sincerely,

Margaret A. Freeston

Margaret A. Freeston
Acting General Counsel