strictive means available to implement this policy in order to maximize diversity of ideas.

The nondiscrimination requirement, although manifest in past congressional actions, is formally adopted in this Act. This will prevent the IRS from misinterpreting Congress' established commitment to racial nondiscrimination in the granting of tax exemptions.

The present procedure requires formal adoption of a racial nondiscrimination policy by the school, provision of specified related information to the IRS, and publication of the school's racial nondiscrimination policy in an area newspaper. Religious schools may satisfy their publication responsibilities through a religiously affiliated magazine. These standards originated with the IRS, not Congress. The new procedure will formally incorporate these requirements into the tax-exemption provision of the Internal Revenue Code to ensure that they are neither greatly expanded nor greatly contracted.

Present procedures are insufficient, as a private school adjudicated as racially discriminatory may retain its tax-exempt status if it qualifies under current IRS rulings. Under the newly enacted provisions, the constitutional standards that govern the grants of government aid to private schools will be applicable to the governmental granting of tax exemptions to private schools.

Adequate enforcement of the racial nondiscrimination requirement demands more than a set of established procedures. It requires proper execution of these standards. Private parties dissatisfied with the IRS's decision concerning the tax-exempt status of a particular institution should be permitted to obtain relief in the courts. Congressional enactment of a statutory right to sue will provide such recourse.

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COMMENT

RELIEF FOR ASBESTOS VICTIMS: A LEGISLATIVE ANALYSIS

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Over the next thirty to thirty-five years, an estimated 1.6 million[1] to 2.15 million[2] American workers will die from cancers caused by exposure to asbestos dust in the workplace. In addition, as many as three million more may suffer asbestosis,[3] a noncancerous asbestos-related disease.[4] While the lives of many of these millions of workers cannot be reconstructed, nor their diseases cured,[5] the affected workers, their dependents, and their survivors can be compensated.

Section I of this Comment describes the current asbestos problems: the extensive use of this toxic substance has created thousands of pending and potential lawsuits which total billions of dollars. This flood of litigation threatens to swamp the courts and to bankrupt defendants. Section II analyzes the similarities and differences among the three proposals for asbestos victims' relief that were before the Ninety-seventh Congress. None of these bills provided a comprehensive solution to the problems of providing relief to victims of asbestos exposure, but together the bills did contain all the elements necessary for such a solution. Section III selects the best approach from the three bills on the issues of who should be eligible to receive benefits, who should contribute to the benefit fund, who should administer the payments, what should happen to pending litigation, and what disease-causing substances should be covered. Finally, this Comment urges the Ninety-eighth Congress to adopt a comprehensive legislative proposal incorporating various provisions

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[1] 127 CONG. REC. S10,033–34 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

[2] NATIONAL CANCER INSTITUTE & NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, ESTIMATES OF THE FRACTION OF CANCER INCIDENCE IN THE UNITED STATES ATTRIBUTABLE TO OCCUPATIONAL FACTORS 1–2 (Draft Summary 1978) [hereinafter cited as NATIONAL CANCER INSTITUTE].

[3] *See* Comment, *An Examination of Recurring Issues in Asbestos Litigation*, 46 ALB. L. REV. 1307, 1307 n.4 (1982).

[4] *See infra* note 12 and accompanying text.

[5] *See infra* notes 12–14.

from each of the three asbestos bills. This proposal is far stronger than any of the bills that failed in the Ninety-seventh Congress.

I. Asbestos: The Onset of the Problem

"Asbestos," the generic name given to a group of hydrated silicate minerals that can be separated into soft, silky fibers with great tensile strength, is derived from a Greek word meaning "inextinguishable, unquenchable or inconsumable."[6] Its chief characteristics include heat resistance, chemical resistance, and favorable frictional properties.[7] Asbestos has been used as an insulator against heat since at least 1866,[8] and today it is used in more than three thousand products, from fireproofing material to brake shoes.[9]

We now know that asbestos is one of the most dangerous of all natural materials. Before this fact became well-established, more than twenty-seven million Americans may have been exposed to asbestos in one form or another,[10] including between eight and eleven million exposed in the workplace.[11] The diseases which result from exposure to asbestos dust include asbestosis, a non-malignant scarring of the lungs;[12] lung cancer (bronchogenic carcinoma);[13] mesothelioma, a malignant tumor

[6] Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 Forum 860 (1980).

[7] Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 Fordham Urb. L. Rev. 55, 57 (1978).

[8] *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

[9] *See* Legal Times Wash., Aug. 18, 1980, at 1, col. 1. Asbestos is also frequently used in shoes, electrical insulation, wall and ceiling boards, potholders, and pipes. 127 Cong. Rec. S10,033 (daily ed. Sept. 18, 1981) (statement of Sen. Hart). Although the percentage of asbestos in certain products may be small, the unique properties of asbestos are often the critical factor in the product's proper functioning, as with brake shoes. *See* Mansfield, *supra* note 6, at 860.

[10] *See* N.Y. Times, Aug. 31, 1982, at A13, col. 6; Wall St. J., Aug. 30, 1982, at 15, col. 3.

[11] *See* National Cancer Institute, *supra* note 2, at 1–2.

[12] Asbestosis is an irreversible disease of the lung characterized by clubbing of fingers, cyanosis, and basal rales in the chest. Comment, *supra* note 7, at 58 n.21. Although asbestosis is difficult to diagnose, awareness of its presence is important, as "most deaths of asbestosis are due to intercurrent respiratory infections, rather than pulmonary fibrosis. Pulmonary infections can be well treated, and experience has shown that many lives can be saved" by early diagnosis. Selikoff & Hammond, *Asbestos-associated Disease in United States Shipyards*, 28 Ca-A Cancer J. for Clinicians 87, 95 (1978).

[13] This is the same type of lung cancer warned of by the Surgeon General on cigarette packages. *See* Mehaffy, *Asbestos-Related Lung Disease*, 16 Forum 341, 343 (1980).

of the lungs or of the abdomen;[14] and cancer of the gastrointestinal tract.[15]

The first recognized case of asbestosis, afflicting an asbestos textile worker, was reported in 1906.[16] There were numerous medical and scientific studies of asbestos done in the first half of the twentieth century,[17] but the causal relationship between asbestos and these diseases did not receive wide public attention until 1965, when Dr. Irving J. Selikoff, head of the Mt. Sinai Hospital Environmental Sciences Laboratory in New York and the leading expert on asbestos-related diseases, published, together with his colleagues, a well-documented study that concluded that "asbestosis and its complications are significant hazards among insulation workers."[18]

Most exposure to asbestos has occurred since the beginning of World War II, during which an estimated 4.5 million workers were exposed in naval shipyards.[19] Because of the long latency period between exposure to asbestos and manifestation of an asbestos-related disease,[20] asbestos workers have begun to manifest these diseases only within the past ten years or so. The first products liability lawsuit against a manufacturer of asbestos products was filed in 1968.[21] Although that case and a second

[14] *See* Selikoff & Hammond, *supra* note 12, at 95. Effective therapy for mesothelioma is not currently available and early diagnosis does not significantly increase the likelihood of survival. *Id.*

[15] *See id.* at 88 (table 1), 90 (table 3).

[16] Cooke, *Asbestos Dust and the Carious Bodies Found in Pulmonary Asbestosis*, [1929] 2 Brit. Med. J. at 578.

[17] *E.g.*, E. Merewether & C. Price, Report on Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry (1930); Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, [1924] 2 Brit. Med. J. at 147; Lynch & Smith, *Pulmonary Asbestosis III: Carcinoma of the Lungs in Asbestos-Silicosis*, 24 Am. J. Cancer 56 (1935).

[18] Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Industrial Insulation Workers*, 132 Annals N.Y. Acad. Sci. 139, 152 (1965).

[19] *See* Comment, *supra* note 7, at 55 n.2. Secretary of Health, Education and Welfare Joseph A. Califano estimated that from 500,000 to 1.4 million additional workers have been exposed to asbestos in American shipyards since the end of World War II. 124 Cong. Rec. 12,023 (1978); *see also Occupational Diseases and Their Compensation, Part 1: Hearings on H.R. 2740 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 395–402 (1979) (statement of Capt. D.F. Hoeffler, M.D.) [hereinafter cited as *1979 House Hearings*].

[20] *National Workers' Compensation Standards Act, 1974: Hearings on S. 1029, S. 1772, and S. 2587, Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 2282 (1974) (statement of Dr. Irving J. Selikoff) [hereinafter cited as *1974 Senate Hearings*].

[21] *See* Mehaffy, *supra* note 13, at 345.

were settled for relatively small amounts,[22] the third suit, *Borel v. Fibreboard Paper Products Corp.*,[23] filed in 1969, was tried to verdict and affirmed for the plaintiff. In *Borel*, the court found that the manufacturer of asbestos products had violated his duty to warn the plaintiff, an insulation worker who died from asbestosis, about the dangers of working with asbestos, and hence the manufacturer was liable for damages.

This decision opened the floodgates to thousands of similar cases, all patterned after *Borel*. Today, more than thirty thousand products liability suits are pending against 260 asbestos concerns.[24] The present litigation has been called a "legal tidal wave"[25] and "the tip of the iceberg"[26] by commentators anticipating possible claims to be made through the 1980's and 1990's. Along with this huge volume of cases come staggering estimates of total liability, ranging anywhere from $40 billion to $150 billion.[27] In fact, asbestos litigation is already the largest single product tort litigation in history—the "mother lode" of products liability cases.[28]

One primary cause of this explosion of litigation has been the failure of state workers' compensation laws properly to compensate victims of asbestos-related diseases and of occupational diseases in general. Two major problems with workers' compensation systems arise in this context. First, workers or their surviving dependents simply do not know that workers' compensation benefits are available to them.[29] Second, those who

[22] *Id.*

[23] 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

[24] Wall St. J., Aug. 27, 1982, at 1, col. 6.

[25] Winter, *Asbestos Legal "Tidal Wave" Is Closing In*, 68 A.B.A. J. 397 (1982).

[26] Podgers, *Toxic Time Bombs*, 67 A.B.A. J. 139 (1981).

[27] Dr. Irving J. Selikoff has estimated that total liability could reach $40 billion to $80 billion. N.Y. Times, Aug. 31, 1982, at A13, col. 6. William Bailey, Senior Vice President of the Commercial Union Insurance Co. and Chairman of the Task Force on Cumulative Trauma and Latent Injuries of the American Insurance Association, calculates that, under the "worst scenario," damages could be anywhere from $120 billion to $150 billion, exclusive of any "indirect costs" that might result from the bankruptcies of some businesses. N.Y. Times, July 3, 1981, at D4, col. 1; *see also* Podgers, *supra* note 26, at 139.

[28] Nat'l L.J., Aug. 18, 1980, at 1, col. 1. In terms of the number of claims filed, asbestos has become the largest products liability area, surpassing litigation over Agent Orange, DES, and the Dalkon Shield, *id.*, and even automobile injury litigation. Nat'l L.J., Oct. 19, 1981, at 1, col. 1.

[29] *See Occupational Disease Compensation and Social Security: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 1st Sess. 68 (1981) (statement of Peter S. Barth, Univ. of Conn.) [hereinafter cited as *1981 House Hearings*]. Only 29% of the 995 diseased asbestos workers who were surveyed had filed workers' compensation claims for their asbestos-related diseases. *Id.*

do file for benefits often find state statutes blocking them.[30] Many state compensation laws specifically prevent such victims from recovering damages.[31] Others may provide benefits for partial disability but will not permit a claimant to reapply for further benefits when his disability worsens, as is often the case with a progressive disease such as asbestosis.[32] In short, the state workers' compensation statutes are not meeting the problems involved with asbestos-related and other occupational diseases.

Reliance on the courts to resolve these cases has caused many problems. Time consuming asbestos litigation severely burdens the already heavy caseloads of both federal and state courts.[33] In addition, a large part of the resulting awards, from both settlements and judgments, goes to attorneys and to insurance

[30] "The Department of Labor estimates that in general only 5% of those disabled by occupational disease [including asbestos victims] actually receive compensation from the states." *Asbestos Health Hazards Compensation Act of 1980: Hearings on S. 2847 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 239 (1980) (statement of Andrew T. Haas, General President of the Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers) [hereinafter cited as *1980 Senate Hearings*].

A startling example is the case of workers disabled by mesothelioma, which is caused only by asbestos exposure and is always fatal. Although state workers' compensation agencies know that mesothelioma is an occupational disease and that the claimants will soon die, only 38% of these claimants ever receive any state benefits. The percentages are certainly much lower for other asbestos-related diseases. *Id.* at 239–40.

[31] For example, eight states—Arkansas, Illinois, Kansas, Montana, Nevada, North Carolina, Ohio, and Vermont—place special restrictions on payments for asbestos-related and other dust-related diseases. Some states, including Arizona, Minnesota, and Pennsylvania, require that disability occur within a specified time of last exposure. One state, Louisiana, bases compensation payments on claimant's income when he was last employed by an asbestos concern, leading to the absurd result of a widow collecting only $15 per week (her deceased husband worked for Johns-Manville in 1924). *Id.* at 240–42.

[32] *Id.* at 242.

[33] For example, as of February, 1982, a backlog of 1400 asbestos cases in the Philadelphia Court of Common Pleas represented nearly 10% of that court's total caseload. *See* Winter, *supra* note 25, at 398. There are over 3000 asbestos plaintiffs in the Eastern District of Texas alone, severely straining the federal district court there. *See* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1354, *appeal docketed*, No. 81-2204 (5th Cir. May 29, 1981).

Former Congressman Robert E. Sweeney, now an asbestos plaintiffs' lawyer, testified at a House hearing that "the level of litigation presently pending . . . is so high that the judicial system has literally no means to accommodate all the suits that are anticipated to be filed." *1979 House Hearings*, *supra* note 19, at 555; *see also* Winter, *supra* note 25, at 398.

companies, not to victims.[34] Finally, victims who litigate have been treated substantially differently by the courts: some have come away with huge damage awards while others have been left with nothing.[35] Even those victims who eventually win in court do so only after extensive preparation for trial and litigation; it takes years from the time of filing a claim until damages are collected.[36]

These problems were compounded in August 1982, by the bankruptcy filing of Manville Corporation,[37] the largest asbestos manufacturer in the United States and a defendant in 16,500 cases at that time.[38] The filing automatically froze all court proceedings involving Manville,[39] and the corporation stopped all settlement payments.[40] While the propriety of Manville's apparent use of the bankruptcy laws as a shield against litigation

[34] The Manville Corp. (formerly Johns-Manville Corp.) bankruptcy filing, *see infra* text accompanying notes 37–42, revealed that the company had spent more on lawyers than on health injury claims. Legal fees had totaled $24.5 million, as opposed to $24 million for injuries and $7.5 million for property damage. Wall St. J., Aug. 30, 1982, at 3, col. 1.

Glen W. Bailey, Chairman of the Keene Corp., an asbestos manufacturer, estimates that 75% of settlement funds go to lawyers (defense lawyers included), 15% to insurance companies, and 10% to victims. "A plaintiff lawyer might represent 2,000 such claimants [having asbestos-related diseases]. Using the $1,000 per claim average settlement as has often been our experience, each claimant would receive $500—but the lawyer stands to gain $1 million (2,000 claims times $500 per claim)." N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3.

[35] *See 1980 Senate Hearings*, *supra* note 30, at 244 (statement of Andrew T. Haas).

[36] *See id.*

[37] *Fortune* ranked Manville Corp. (formerly Johns-Manville Corp.) number 181 on its "*Fortune* 500" list of the largest industrial corporations in the United States in May, 1982. *Fortune's Directory of the 500 Largest Industrial Corporations*, FORTUNE, May 3, 1982, at 266. The corporation has a net worth of $1.1 billion. Wall St. J., Aug. 27, 1982, at 1, col. 1. Except for asbestos claims, it was considered financially healthy before the filing. *See id.*

[38] Wall St. J., Aug. 27, 1982, at 1, col. 1.

UNR Industries of Chicago, a steel fabricator swamped with asbestos suits, filed for bankruptcy on July 29, 1982, almost one month before Manville did so. *Id.* Although it had not engaged in the manufacture of asbestos products since 1962, at the time of filing UNR had over 17,000 asbestos-related claims against it. D. Leavitt, Chief Executive Officer, UNR Industries, Testimony Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor (Sept. 9, 1982) (available from the subcommittee).

[39] *See* 11 U.S.C. § 362(a)(1) (1979).

[40] N.Y. Times, Oct. 7, 1982, at D1, col. 3. Suits against many other asbestos defendants, however, are continuing, *id.*, in the face of considerable doubt as to whether a defendant's bankruptcy also stays proceedings against codefendants. Winter, *Bankruptcies Create Asbestos Case Turmoil*, 68 A.B.A. J. 1361 (1982); *see also In re* White Motor Credit Corp., 11 Bankr. 294, 295 (Bankr. N.D. Ohio 1981) (products liability plaintiffs cannot dismiss a bankrupt debtor and proceed only against the codefendants).

has been questioned,[41] Manville hopes the reorganization proceedings will settle all existing claims and all claims by persons who discover during the reorganization that they have asbestos-related diseases. However, even if these claims are settled, future claims of those who discover that they are diseased following the reorganization may not be affected.[42]

Judges, plaintiffs, and defendants all agree that a better mechanism must be found to handle the problems caused by asbestos-related diseases and the resulting litigation.[43] Some proposals seek limited solutions through judicial and quasi-judicial methods, such as class actions,[44] arbitration,[45] and liberalized use of collateral estoppel.[46] Proposals for more comprehensive solutions rely on some form of federal legislation that would set up a fund to compensate victims of asbestos-related diseases. The

[41] For example, one plaintiffs' attorney called the filing "a fraud on the bankruptcy laws." Wall St. J., Aug. 27, 1982, at 1, col. 1; *see also Dole Says Manville Filing to Affect Review of U.S. Bankruptcy Code by Senate Panel*, Wall St. J., Aug. 30, 1982, at 3, col. 2.

Manville claims that it was forced to file for bankruptcy after a study done by Epidermiology Resources, Inc., concluded that there eventually could be 52,000 suits filed against Manville and that its liability could reach two billion dollars. R. Jerry Falkner, an analyst with Underwood, Neuhause & Co. of Houston, explained that "[u]nder accounting rules, once you have an estimate of a liability, you have to set up a reserve, so [Manville's] net worth of $1.1 billion would have been wiped out [by the $2 billion reserve]." Wall St. J., Aug. 27, 1982, at 1, col. 1.

Plaintiffs' lawyers have asked the bankruptcy court to set aside Manville's bankruptcy filing on the grounds that it was filed in bad faith and that it is an abuse of the bankruptcy procedure. N.Y. Times, Nov. 9, 1982, at D1, col. 4.

[42] A bankruptcy court judgment denying future recovery to plaintiffs who have not yet discovered their claims might be a taking of these choses in action without due process. *See generally* U.S. CONST. amend. V; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8 (1978).

[43] "Whether through judge-made common law or legislative enactment, there is an urgent need for new approaches to the national tragedy of asbestos-related diseases." Migues v. Fibreboard Paper Prods. Corp., 662 F.2d 1182, 1189 (5th Cir. 1981).

William C. McLaughlin, President of the Asbestos Compensation Coalition, a manufacturers' lobbying group, has stated: "In short, the present system is an outrageous mess and Federal legislation should be enacted which would provide a better way to get prompt and adequate compensation into the hands of the victims." N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3; *see also* statement of Robert E. Sweeney, a plaintiffs' attorney, *supra* note 33.

[44] *See* Winter, *supra* note 25, at 397–98.

[45] *See id.* at 398; *see also 1979 House Hearings*, *supra* note 19, at 555 (statement of Robert E. Sweeney).

[46] *See, e.g.*, Bertrand v. Johns-Manville Corp., 529 F. Supp. 539 (D. Minn. 1982); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *appeal docketed*, No. 81-2204 (5th Cir. May 29, 1981). *But see, e.g.*, Migues v. Fibreboard Paper Prods. Corp., 662 F.2d 1182 (5th Cir. 1981); McCarty v. Johns-Manville Sales Corp., 502 F. Supp. 335 (S.D. Miss. 1980). *See generally* Baldwin, *Asbestos Litigation and Collateral Estoppel*, 17 FORUM 772, 783 (1982); Comment, *supra* note 3.

next section of this Comment will explore the different legislation put forth in the Ninety-seventh Congress to meet this problem.

II. Legislative Proposals for Relief

Senator Gary Hart (D-Colo.), Representative Millicent Fenwick (R-N.J.), and Representative George Miller (D-Cal.) all introduced bills in the Ninety-seventh Congress that attempted to deal with the problems of asbestos-related diseases. Each bill would have set up a fund to pay benefits to victims of asbestos-related disease and would have established a procedure for collecting and for distributing these payments. However, the bills also contained significant differences on five basic questions: (1) who should be eligible to receive benefits, (2) who should contribute to the benefit fund, (3) who should administer the payments, (4) what should happen to litigation pending at the time of enactment of the bill, and (5) what disease-causing substances should the bill cover?

A. *The Hart Bill*

Senator Hart's bill[47] would define those eligible for compensation payments as "persons disabled" by diseases resulting from occupational exposure to asbestos,[48] "a member of such person's household" who was disabled,[49] and dependents of those who died of asbestos-related diseases caused by the occupational exposure of the decedent or a member of his or her household.[50] Unlike the other two proposals, however, Senator Hart's bill would use federal and state workers' compensation boards, supplemented by the Benefits Review Board and an appeals procedure, to determine whose disability or death would be ruled asbestos-related and occupational and who therefore would be eligible for compensation.[51]

[47] Asbestos Health Hazards Compensation Act, S. 1643, 97th Cong., 1st Sess., 127 Cong. Rec. S10,034–38 (daily ed. Sept. 18, 1981).
[48] *Id.* § 1(b)(1)(A).
[49] *Id.* § 1(b)(1)(B).
[50] *Id.* § 1(b)(1)(C).
[51] *Id.* §§ 5, 6, 8, 9.

The initial contributor to the victim's compensation fund would be the worker's last employer who exposed him to asbestos. If the employer were unknown or could not be located, one of the other "responsible parties"[52] would pay. The initial contributor could bring other responsible parties, including federal and state governments and agencies, into the payment plan.[53] Unlike other parties, which would have had to have sold asbestos or used it in employment to be held responsible,[54] government contributors could be held responsible whenever they are "determined to have contributed" to the worker's disability or death.[55]

The Hart bill also would establish federal "minimum standards" to judge whether state and federal workers' compensation laws provided "prompt, adequate, exclusive and equitable compensation" to asbestos victims.[56] If the Secretary of Labor were to find that such legislation failed to meet one of these standards, the "responsible parties" would pay "supplemental compensation" over and above that required by the law. This would bring payments to the level of compensation required by the bill.[57] All victims would receive compensation according to the same standard despite the different standards of each state's workers' compensation laws.[58]

Litigation pending at the time of the passage of the bill would be stopped,[59] and the victim would be entitled to proceed under the provisions of the bill.[60] The bill would compensate only asbestos-related diseases.

[52] *Id.* § 7(2)(a). The term "responsible parties" includes employers, miners of asbestos, manufacturers or importers of asbestos products, and possibly federal or state governments. *See id.* § 2(10).
[53] *Id.* § 7.
[54] *Id.* § 2(10)(A).
[55] *Id.* § 2(10).
[56] *Id.* § 1(b)(1). The "minimum standards" are outlined in § 4.
[57] *Id.* § 5(b).
[58] "These standards are designed to eliminate the artificial barriers in most States' statutes which prevent compensation for asbestos diseases, and to insure such compensation is meaningful." 127 Cong. Rec. S10,033–34 (daily ed. Sept. 18, 1981) (statement of Sen. Hart); *see supra* notes 29–32 and accompanying text.
[59] "No person . . . entitled to file a claim for benefits pursuant to . . . this Act . . . shall be allowed to recover [damages] against" any responsible party, their insurers, or a union. S. 1643, § 10(b).
[60] *Id.* § 3.

B. *The Fenwick Bill*

Under Representative Fenwick's proposal,[61] any "affected person"[62] who was disabled due to an asbestos-related disease,[63] or any dependent of a person who had died from an asbestos-related disease,[64] would be eligible for benefits. The bill would establish an Asbestos Health Hazard Compensation Fund, to be administered by the Department of Labor.[65] The Department would prescribe regulations to determine whether an affected person either died or became disabled due to an asbestos-related disease.[66] Such protected persons would be identified on the basis of medical evidence.[67] No presumption that the disease was asbestos-related would be allowed.[68]

Contributors to the Asbestos Health Hazards Compensation Fund[69] would comprise three classes of "responsible parties."[70] One class would include manufacturers and importers of asbestos products that are likely to produce asbestos dust.[71] Members of this class would contribute two percent of their net domestic sales of asbestos products for the fifteen years preceding the year of payment.[72] A second class would include manufacturers and importers of products in which asbestos is "locked into the . . . product in such a fashion so that . . . there is little likelihood" that asbestos dust will be produced.[73] They would contribute one percent of their net domestic sales of asbestos products for the fifteen years preceding the year of payment.[74] The third class would consist of manufacturers of cigarettes or cigarette tobacco,[75] who would contribute 0.3% of their net domestic sales of these products during the fifteen years preceding the year of payment.[76]

[61] Asbestos Health Hazards Compensation Act, H.R. 5224, 97th Cong., 1st Sess. (1981).

[62] "The term 'affected person' means a person whose occupation involves exposure to asbestos or any member of such person's household." *Id.* § 102(2).

[63] *Id.* § 201(a)(1)(A). For the level of benefits, *see id.* § 206(b).

[64] *Id.* § 201(a)(1)(B).

[65] *Id.* § 203.

[66] *Id.* § 205(a)(1).

[67] *Id.* § 205(a)(3).

[68] *Id.* § 205(b)(3).

[69] *Id.* § 203(a).

[70] *Id.* § 204.

[71] *Id.* § 102(11)(A)(i).

[72] *Id.* § 204(b)(1).

[73] *Id.* § 102(11)(A)(ii).

[74] *Id.* § 204(b)(2).

Upon passage of the Fenwick bill, any protected person with a pending action for damages could elect either to withdraw the complaint and proceed under the terms of the bill, or to continue litigation.[77] Otherwise, the bill would provide a protected person's exclusive remedy.[78] The bill would not affect claims by victims of non-asbestos-related diseases.

C. *The Miller Bill*

Representative Miller's bill[79] would define those persons eligible for payments to include the surviving spouse or children of any employee who had been exposed to asbestos and had died from an asbestos-related disease,[80] and any employee who was disabled as a result of an asbestos-related disease.[81] Any disability due to an asbestos-related disease would be presumed to be occupational if the employee had been occupationally exposed.[82]

The last employer[83] who had employed the victim for a minimum of two years and who had exposed him to asbestos would be primarily responsible for payment of compensation.[84] If no employer were to qualify, then responsibility for payment would be assigned to an Asbestos Compensation Excess Liability Fund.[85] Fifty percent of the Fund would come from manufacturers and from importers of products containing asbestos as a

[75] *Id.* § 102(11)(A)(iii).

[76] *Id.* § 204(b)(3).

[77] *Id.* § 302.

[78] *Id.* § 301.

[79] Occupational Health Hazards Compensation Act, H.R. 5735, 97th Cong., 2d Sess. (1982).

[80] *Id.* § 4(a)–(c).

[81] *Id.* § 4(a), (d).

[82] *Id.* § 5(b).

[83] "The term 'employer' . . . shall not include the United States or any State or political subdivision thereof." *Id.* § 2(5).

[84] *Id.* § 11(b).

[85] *Id.*

"significant constituent element,"[86] thirty percent from manufacturers and importers of products containing asbestos, but not as a "significant constituent element,"[87] and twenty percent from employers[88] who exposed employees to asbestos in the course of employment.[89] These contributions would be based on the sales of asbestos products during the previous fifteen years.[90]

The Department of Labor would administer the Fund;[91] a surcharge of ten percent on each contribution would pay for its costs.[92] In addition, the bill would set up an Occupational Disease Surveillance and Medical Treatment Research Advisory Committee[93] to survey workers exposed to occupational health hazards and to conduct research into improved means of medical treatment for exposed workers.[94] A one percent surcharge on contributions to the Excess Liability Fund would finance this committee.[95]

After passage of the bill, its compensation would be claimants' exclusive remedy against all third parties, including manufacturers and importers.[96] Litigation pending against manufacturers and importers of asbestos products at the time of the bill's passage, however, would continue.[97]

Unlike the other two bills, the Miller proposal was not aimed exclusively at victims of asbestos-related diseases. As proposed, it would establish one fund for compensating victims of diseases associated with asbestos and another fund for compensating victims of diseases associated with the mining of uranium ore.[98] Uranium miners, like asbestos victims, contracted cancer as a result of exposure to a hazardous substance in the workplace.[99] In addition, a trigger mechanism would permit the bill to be

[86] *Id.* § 12(b)(2)(A)(i)(I).
[87] *Id.* § 12(b)(2)(A)(i)(II).
[88] *Id.* § 2(5).
[89] *Id.* § 12(b)(2)(A)(ii).
[90] *Id.* § 12(b)(3)(A).
[91] *Id.* §§ 2(10), 12(b)(1)(B).
[92] *Id.* § 12(d)(1).
[93] *Id.* § 16(c).
[94] *Id.* § 16(a).
[95] *Id.* § 12(d)(2).
[96] *Id.* § 9(c).
[97] *Id.* § 9(b)(1).
[98] *See* 127 CONG. REC. S1694 (daily ed. Mar. 4, 1982) (statement of Rep. Miller).
[99] *See generally 1980 Senate Hearings*, *supra* note 30, at 178–87 (statement of Sen. Domenici).

amended upon the recommendation of the Secretary of Health and Human Services to cover other occupational diseases.[100]

III. An Analysis of the Proposals

The three bills had similarities and differences in their answers to the five basic questions they addressed. None of these bills provided the best answer to all of the problems that need to be resolved. The bills did, however, contain all of the elements necessary to formulate a comprehensive proposal. This Section identifies each major issue, points out all arguments, and concludes which bill's position is the strongest on each issue.

A. *Eligibility for Benefits*

The Fenwick bill would provide the best definition of exactly which persons would be eligible to obtain benefits. All three proposals would offer coverage to asbestos victims who were exposed in the workplace. The Fenwick bill, however, would not permit the use of presumptions to determine eligibility for benefits;[101] it would rely instead upon direct medical evidence.[102] The advantage of this approach is that it avoids a major problem that plagued the Black Lung Benefits Act of 1972,[103] which provided compensation for miners with black lung disease. Under that program, "presumptions" of disease frequently led to payments of benefits to some who were not entitled to them.[104] Because of the certainty in diagnosing asbestos-related dis-

[100] H.R. 5735, § 17.
[101] *See supra* note 68 and accompanying text.
[102] *See supra* note 67 and accompanying text.
[103] 30 U.S.C. §§ 901–45 (1976 & Supp. IV 1980).
[104] In describing this problem, Representative John N. Erlenhorn explained:
> The man who has a broken back through a roof fall and is a quadraplegic is getting less compensation [from workers' compensation] than someone who may have emphysema from smoking who, because of assumptions, or presumptions in the act, is getting black lung benefits; and social security disability [payments]; and state workers' compensation.

1979 House Hearings, *supra* note 19, at 548 (statement of Rep. Erlenhorn). *See generally* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues*, 83 W. VA. L. REV. 869 (1981).

eases,[105] the direct medical evidence approach of the Fenwick bill still would ensure that the true victims of these diseases would receive benefits.[106]

The Fenwick bill, like the Hart bill, also would allow persons who contract an asbestos-related disease through the occupational exposure of a family member to receive benefits.[107] A recent study in southern California examined 305 wives of exposed shipyard workers, who themselves were never in the shipyards, and discovered that ten percent of them had contracted asbestos-related diseases.[108] Even the leading spokesmen for the asbestos industry readily admit that family members do contract such diseases and therefore should be compensated.[109]

B. *Proper Contributors*

Of all the issues involved in the asbestos debate, the question of which parties should contribute to a compensation fund is the most hotly debated and the most serious in its consequences.[110] The central question is whether the federal government should supplement industry contributions to the fund. The Hart bill would provide for federal participation in the compensation payments;[111] the Fenwick and Miller bills do not.[112] The most persuasive arguments on this issue favor government contributions.

Opponents of federal contributions argue that American taxpayers should not be called upon to "bail out" industry from a

[105] *See, e.g., 1979 House Hearings*, *supra* note 19, at 43 (statement of Rep. Fenwick); *id.* at 549 (statement of John A. McKinney, Chairman of the Board and Chief Executive Officer, Johns-Manville Corp.).

[106] *See* 127 CONG. REC. E5860 (daily ed. Dec. 15, 1981) (statement of Rep. Fenwick).

[107] *See supra* notes 49 & 62 and accompanying text.

[108] The study, conducted by the American Lung Association of Southern California, was reported in Nat'l L.J., Oct. 19, 1981, at 1, col. 1.

[109] *See, e.g., 1979 House Hearings*, *supra* note 19, at 549 (statement of John A. McKinney).

[110] *See* N.Y. Times, Mar. 14, 1982, § 3, at 21, col. 1 (letter of Rep. Millicent Fenwick); N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3 (letters of Glen W. Bailey & William C. McLaughlin); N.Y. Times, Feb. 21, 1982, § 3, at 2, col. 5 (letter of Robert E. Sweeney); N.Y. Times, Dec. 27, 1981, § 11, at 12, col. 5.

[111] *See supra* note 53 and accompanying text.

[112] *See supra* notes 69–76 & 83 and accompanying text.

financially disasterous situation of its own making.[113] They point to evidence that the asbestos industry concealed its knowledge, obtained as early as the 1930's, of the harm caused by exposure to asbestos in the workplace.[114] Because industry leaders failed to warn workers of the hazards, industry alone should be financially liable.[115] Moreover, opponents argue that even if the fed-

[113] *See, e.g., 1979 House Hearings*, *supra* note 19, at 147 (statement of Rep. Miller); *id.* at 554 (statement of Robert E. Sweeney).

[114] It is believed that asbestos industry leaders were or should have been aware as early as the 1930's that many studies had concluded that inhalation of asbestos dust is dangerous for humans. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1092 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). The number of pre-World War II studies is significant (*see supra* note 17 for a partial list), and the data collected were so conclusive that in 1933 the British government severely limited the allowable level of asbestos dust in the workplace, which has resulted in a much lower rate of asbestos-related disease in Britain than in the United States. *See* Comment, *supra* note 7, at 64.

Nevertheless, the industry intentionally ignored the available data and even took steps to keep the information from becoming widely known. For example, in 1935 the editor of the trade journal *Asbestos* wrote to the president of Raybestos-Manhattan, requesting permission to publish the conclusions of a British study of 1932 that had connected asbestos-related diseases to asbestos in the workplace. The editor even suggested that a "discussion . . . along the right lines would serve to combat the rather undesirable publicity given to it in current newspapers." Letter from *Asbestos* to Sumner Simpson (Sept. 25, 1935), *quoted in* Motley, *The Lid Comes Off*, TRIAL, Apr. 1980, at 21, 21.

Mr. Simpson was unpersuaded. In a letter to the secretary of Johns-Manville, he praised the magazine for "not reprinting the English articles," and observed that "the less said about asbestos the better off we are." Letter from Sumner Simpson to Vandiver Brown (Oct. 1, 1935), *reprinted in 1979 House Hearings*, *supra* note 19, at 152. Brown agreed and responded that any article on asbestos should reflect "American data rather than English." Letter from Vandiver Brown to Sumner Simpson (Oct. 3, 1935), *reprinted in 1979 House Hearings*, *supra* note 19, at 152.

The "American data" referred to were the conclusions of a study sponsored by industry from which industry leaders and lawyers edited out the finding that 53% of the workers examined were diagnosed as having asbestosis. As a Johns-Manville lawyer explained:

> It would be very helpful to have an official report to show that there is a substantial difference between asbestosis and silicosis; and by the same token, would be troublesome if an official report should appear from which the conclusion might be drawn that there is very little, if any, difference between the two diseases.

Letter from Hobart to V. Brown (Dec. 15, 1934), *quoted in* Motley, *supra*, at 22); *see also 1979 House Hearings*, *supra* note 19, at 152–60.

[115] Representative Miller stated:

> Under the terms of this legislation [an earlier bill on asbestos compensation, H.R. 2740, 96th Cong., 2d Sess. (1980), which provided for contributions by the federal govenment] the obligation for paying for decades of neglect, negligence, coverup and lies would be largely foisted upon the American taxpayer. The bill can, and will, run into the hundreds and millions of dollars, if not billions.
>
> It is not sufficient to merely add up the toll and have the Federal Government assume the burden. Ours is the responsibility to care for the sick and the

eral government somehow were responsible for asbestos-related diseases, in this era of falling tax revenues and tight budget constraints the federal government cannot afford to contribute to compensation payments for victims.[116]

These arguments are not persuasive. Government responsibility for asbestos-related disease stems from its complete control over the sale and use of asbestos for shipbuilding in World War II. An estimated 4.5 million workers were exposed to asbestos dust during the war[117] in both United States Navy and private shipyards. Even in the private shipyards, the government maintained significant control over how asbestos was used.[118] The government also stockpiled asbestos as a strategic material and, shortly after Pearl Harbor, restricted its use to fulfilling Navy and other maritime requirements.[119] Every ship built for the Navy had to conform to specifications, including the requirement that asbestos be used as an insulator.[120]

It is also clear that the government knew at least as much as industry about the health hazards caused by asbestos.[121] As

disabled, but ours is also the responsibility to establish firmly that the taxpayer will not pick up the bill for decades of corporate neglect.

1979 House Hearings, *supra* note 19, at 147–48 (statement of Rep. Miller).

[116] *See* N.Y. Times, Feb. 21, 1982, § 3, at 2, col. 5 (letter of Robert E. Sweeney).

[117] *See supra* note 19 and accompanying text. An estimated four million of these workers received "heavy exposure" to asbestos. *See* NATIONAL CANCER INSTITUTE, *supra* note 2, at 1–2.

[118] The government specified how the ships were to be built and often provided asbestos from its own stockpiles. *See infra* text accompanying note 119. For example, the federal government provided $491.3 million of the total $498 million spent on shipyard expansion in 1943. Letter from Edward W. Warren, P.C., Kirkland & Ellis, to Earl Parker, Manville Corp., Sept. 8, 1982, at 3 n.4 (copy available from Subcommittee on Labor Standards of the House Committee on Education and Labor) [hereinafter cited as Warren Letter]. Moreover, the government intervened directly into shipyard labor negotiations, and monitored all aspects of a shipyard's performance to ensure quick production. F. LANE, SHIPS FOR VICTORY: SHIPBUILDING UNDER THE U.S. MARITIME COMMISSION IN WORLD WAR II 268–75, 457–71, 482–87 (1951).

[119] *See* Warren Letter, *supra* note 118, at 2 n.3.

[120] *See, e.g.*, *1979 House Hearings*, *supra* note 19, at 230 (statement of Allen B. Coats, Gen. Rep., Metal Trades Dept., AFL-CIO); N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3 (letter of Glen W. Bailey).

[121] In 1938, the United States Public Health Service recommended that a threshold limit of five million particles per cubic foot be placed on occupational exposure to asbestos dust. Comment, *supra* note 7, at 65. Even this "tragically incorrect" standard never was enforced. *1979 House Hearings*, *supra* note 19, at 512 (statement of John A. McKinney). A federal protective regulation was not enacted until 1968, when the standard of 12 fibers per cubic centimeter was made legally enforceable against those

early as 1943, the Navy disregarded its own "Minimum Requirements for Safety and Industrial Health in Contract Shipyards,"[122] and Navy experts stated that "we expect [asbestosis] to occur in shipyards, because we have seen asbestos being handled in insulation work with little or no precautions."[123] The government's only explanation for its failure to adhere to even its own "Minimum Requirements" appears to be that the Navy did not "want to put through any restrictions that will slow up the shipbuilding program."[124] Government, and particularly Navy, opposition to standards for asbestos exposure continued long after the war.[125]

These facts demonstrate that the federal government is responsible for such diseases of workers exposed to asbestos in shipyards.[126] Requiring federal contributions to compensatory

industries that sold more than ten thousand dollars' worth of material to the government and thus to whom the Walsh-Healy Act, 41 U.S.C. §§ 35–45 (1976) applied. Comment, *supra* note 7, at 65.

In 1971, a five fibers per cubic centimeter standard was promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (1976); *see* 29 C.F.R. § 1910.1001(b)(2) (1980). Even lower standards have been proposed, including 0.5 fibers per cubic centimeter by the Occupational Safety and Health Administration, 40 Fed. Reg. 47,652 (1975), and 0.1 fibers per cubic centimeter by the National Institute of Occupational Safety and Health. Comment, *supra* note 7, at 67. A nearly complete ban of asbestos products also has been suggested. *1979 House Hearings*, *supra* note 19, at 559 (statement of Robert E. Sweeney).

[122] These requirements, established by the Navy and Maritime Commission, called for "special ventilation," "special respirators," and "periodic medical examinations" for workers engaged in "any job in which asbestos dust is breathed." *See* Warren Letter, *supra* note 118, at 5; *see also 1979 House Hearings*, *supra* note 19, at 377 (statement of Joseph Guggieri).

[123] Warren Letter, *supra* note 118, at 4.

[124] *Id.* at 5.

[125] The Navy did not adopt any standard for exposure to asbestos in shipyards until 1973, *id.* at 6, a full eight years after Dr. Selikoff's widely publicized study was published. *See supra* note 18 and accompanying text. As recently as 1978, the Navy considered having government personnel strip asbestos from old ships because, "although it is somewhat crass to consider in reaching the ultimate conclusion, under the Fair Labor Standards Act, federal employees claims against the Government are limited, while under the Federal Tort Claims Act there is no such limitation on liability against non-federal employees." Warren Letter, *supra* note 118, at 7. This suggestion was rejected, partially on the grounds that the government could not continue to make "asbestos fodder" of its own employees. *Id.*

[126] To date shipyard workers have brought relatively few tort cases directly against the government, Warren Letter, *supra* note 118, at 7, probably because financially viable asbestos companies have been available as defendants. However, companies are beginning to bring third-party actions against the federal government. *Id.* at 8 & n.20.

In addition, the government has agreed to pay a reported $5.7 million as part of a $20

payments made to these workers is only fair. These payments would not be a "bailout" of industry; rather, they would represent the government's share of responsibility to compensate victims of asbestos-related diseases.[127] The argument that "Reaganomics" will not permit the government to meet its responsibilities leads to the conclusion that "the government needs a bailout, from a moral point of view."[128] "In many ways, asbestos disease is a hidden cost of World War II for which many Americans are still paying,"[129] but for which the government should be paying its fair share.

Another potential contributor to the compensation fund is the tobacco industry, which is partially responsible for the occurrence of lung cancer in asbestos workers. The Fenwick bill would require payments by the tobacco industry,[130] based upon findings in medical studies that asbestos workers who smoke have a strikingly greater risk of lung cancer than nonsmoking asbestos workers.[131] The Miller and Hart bills would not require such payments. In view of this increased danger to smoking workers, it would be equitable and proper to require contributions by the cigarette industry to the fund from which benefits are paid to asbestos workers with lung cancer.

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million settlement benefiting 445 workers at an asbestos plant in Texas. N.Y. Times, Dec. 20, 1977, at 30, col. 1. In other cases, juries have reduced damage awards or have rendered verdicts for defendants because government actions were deemed at least partially responsible for the plaintiffs' diseases. Warren Letter, *supra* note 118, at 9.

In the future, defendants may be relieved of liability based upon the "government contract" defense. *See, e.g., In re* Agent Orange Prods. Liab. Litig., 506 F. Supp. 762, 792–96 (E.D.N.Y. 1980) (ordering the government specifications defense tried first as potentially dispositive); Rivkin, *The Government Contract Defense: A Proposal for the Expeditious Resolution of Asbestos Litigation*, 17 FORUM 1225 (1982); Winter, *U.S. Contracts Asserted in Asbestos Defense*, 68 A.B.A. J. 790 (1982).

[127] The former Chairman of the Subcommittee on Labor Standards of the House Committee on Education and Labor, Edward P. Beard (D-R.I.), has declared:

> Who is to blame? I honestly believe it is a combination of industry and Government . . . . If I had to make a judgment, I would say simply, "Mr. McKinney [President of Manville Corp.], your company is guilty. The Navy, you are guilty. The shipyards, you are guilty. All the Government agencies, OSHA and everyone that still allows that product to be used all over the country, are very much guilty."

1979 House Hearings, *supra* note 19, at 531 (statement of Rep. Beard).

[128] *McKinney Asserts U.S. Must Share Cost of Asbestos Damage Claims*, N.Y. Times, Aug. 28, 1982, at 1, col. 5.

[129] *See* 127 CONG. REC. S10,033 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

[130] *See supra* notes 75–76 and accompanying text.

[131] *See* I. SELIKOFF & D. LEE, ASBESTOS AND DISEASE 327 (1978).

C. *Program Administration*

The best way to ensure uniformity[132] and to collect administrative costs from the responsible parties[133] would be to combine provisions from the Hart and Miller bills. The Hart bill would establish minimum standards for workers' compensation laws throughout the country. Federal standards for minimum compensation to workers with asbestos-related diseases would eliminate the "artificial barriers in most States' statutes which prevent compensation for asbestos disease."[134] Federal standards also would ensure that victims of asbestos-related diseases uniformly receive prompt, adequate compensation: prompt, because it would create no new bureaucracy,[135] and adequate, because it would ensure that all asbestos victims actually receive substantial benefits.[136] A formula that calculates benefits by disability, former salary, and family size would achieve uniformity.[137]

It seems equitable that those parties responsible for the payment of compensation also should be responsible for the administrative costs of the compensation program, as the Miller bill would require.[138] However, that bill excludes the federal government from the category of "employers,"[139] which means that the government would not pay any compensation or administrative costs. Each responsible party, including the federal government, should pay administrative costs based upon its percentage of responsibility. If, for example, industry pays sixty-five percent of all compensation payments, it should pay sixty-five percent of all administrative costs. It makes no sense to impose the entire administrative cost on only one of the parties, whether

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[132] *See supra* note 56 and accompanying text.

[133] *See supra* notes 91–92 and accompanying text.

[134] 127 CONG. REC. S10,033–34 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

[135] *1979 House Hearings*, *supra* note 19, at 393 (statement of Rep. Mendel J. Davis).

[136] Unfortunately, this is not true today. *See supra* notes 29–36 and accompanying text.

[137] S. 1643, 97th Cong., 1st Sess. § 4, 127 CONG. REC. S10,035–36 (daily ed. Sept. 18, 1981); *see also* 127 CONG. REC. S10,034 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

[138] *See supra* notes 91–92 and accompanying text.

[139] *See supra* note 83.

on industry, as with the Miller bill,[140] or on government, as with the Hart and Fenwick bills.[141]

D. *Pending Claims*

The status of litigation pending at the time of enactment also has been hotly debated, and the three bills differ on whether such pending litigation should be halted. The Fenwick and Miller bills say no;[142] the Hart bill says yes.[143]

Some people feel very strongly that victims must have a right to litigate pending third-party claims.[144] Their argument is that "[t]he product liability suit . . . is the only vehicle by which manufacturers of products which contain toxic substances such as asbestos are going to continue to monitor and find out whether or not their product caused cancer and other occupational diseases."[145] As one union official put it: "Do not take away our American right to seek damages which the law allows us!"[146]

The industry's response is that "[t]here is a lot of money being wasted today in litigation which could be used for benefits."[147] In view of the enormous cost of asbestos litigation in recent years, it seems logical to eliminate litigation in order to preserve resources for injury claims. For example, Manville Corporation actually had spent more on legal fees than on health injury claims at the time of its bankruptcy filing.[148] Halting pending litigation also is consistent with the statutory purpose of relieving the court systems of the huge overload of asbestos cases.[149] Finally, the Miller and Fenwick bills are unfair because they deny judicial relief to victims who have not been "fortuitous" enough to have their asbestos-related diseases manifest themselves before passage of the bill. For these reasons, the soundest and fairest approach is to halt pending litigation, as proposed by the Hart bill.

[140] *See supra* notes 86–92 and accompanying text.
[141] *See supra* notes 56–57 & 65 and accompanying text.
[142] *See supra* notes 77 & 97 and accompanying text.
[143] *See supra* note 59 and accompanying text.
[144] This group includes, of course, defendants' lawyers in the asbestos litigation. *See, e.g., 1979 House Hearings*, *supra* note 19, at 552–57 (statements of Robert E. Sweeney and Ronald L. Motley).
[145] *Id.* at 556–57 (statement of Ronald L. Motley).
[146] *Id.* at 202 (statement of Charles Ballato, Pipefitters Local 620, Groton, Conn.).
[147] *Id.* at 550 (statement of John A. McKinney).
[148] The figures are $24.5 million as opposed to $24 million. *See supra* note 34.
[149] *See supra* note 33.

E. *Other Toxic Substances*

The Hart and Fenwick bills are limited to asbestos-related diseases, while the Miller bill also includes cancer from the mining of uranium ore as a compensable occupational disease[150] and establishes a separate compensation fund for its victims. The bill has a trigger mechanism to bring other occupational diseases within its scope upon a finding by the medical community that a particular workplace substance actually causes the disease.[151]

Two arguments traditionally are offered for limiting compensation to asbestos-related diseases. First, although the effects of asbestos are known, those of other occupational diseases are not, so it would not be practical to include those diseases within present legislation. Second, the problems associated with asbestos are unique, from the point of view of both industry and government, and the number of asbestos victims is greater than the number of victims of other occupational diseases.[152]

These arguments are not convincing. The first argument does not apply to uranium miners, for the effects of exposure to uranium ore also are well known.[153] The bill would not be applied to other occupational diseases until their effects are fully known.[154] Second, the problems posed by asbestos are not unique. Asbestos, like other substances, harms workers who are exposed in the workplace. Although it is a good idea to apportion responsibility for payments differently for each disease, so that industry might bear the entire burden where government has no responsibility for a particular occupational disease, this objection does not demand that each occupational disease be given its own legislation. One bill should be flexible

[150] *See supra* notes 98–99 and accompanying text; *see also* 127 CONG. REC. S1694 (daily ed. Mar. 4, 1982) (statement of Rep. Miller).
[151] H.R. 5735, 97th Cong., 2d Sess. § 17 (1982).
[152] *See 1979 House Hearings*, *supra* note 19, at 547 (statement of John A. McKinney).
[153] *See supra* notes 98–99 and accompanying text.
[154] H.R. 5735, § 17.

enough to include other occupational diseases in the future. Thus, the approach of the Miller bill is sound, and its provision for compensating persons with occupational diseases caused by toxic substances other than asbestos should be included in final legislation.

IV. Conclusion

The problems caused by asbestos will not disappear. Over the next two decades alone, an estimated 200,000 Americans will die from asbestos-related diseases.[155] The judicial system cannot adequately respond to the explosion of claims in this area. Congressional action must be taken to solve the problem. Of the three bills introduced in the Ninety-seventh Congress, the Hart bill was the best, because of its approach on the key issues of federal responsibility and third-party litigation. This Comment, however, argues for legislation incorporating various provisions from each of the three asbestos bills, forming a bill stronger even than the Hart bill.

The Ninety-seventh Congress made little progress on the three bills before it. With the soaring number of claims by diseased workers and the added problem of bankruptcy filings by asbestos manufacturers, the Ninety-eighth Congress should give asbestos legislation the attention it deserves and should grant much needed relief to American workers who suffer from asbestos-related diseases.

[155] N.Y. Times, July 3, 1981, at A1, col. 1.

COMMENT

JUSTICE STEVENS' PROPOSAL TO ESTABLISH A SUB-SUPREME COURT

Jeffrey J. Jones*

Concerned that an overburdened Supreme Court has become less able to perform its job adequately, Justice John Paul Stevens recently proposed the creation of a new court designed to reduce the Supreme Court's caseload and to improve the quality of its output.[1] Justice Stevens' proposal differs significantly from one developed ten years ago by the Freund Commission[2] because it would give a newly created "Sub-Supreme Court"[3] just one function: to review all certiorari petitions and make final decisions on whether to grant or deny the request for review. The Supreme Court thus would have its docket fully selected by an independent court.[4] The Freund Commission would have restricted its proposed National Court of Appeals to recommending an assortment of cases from which the Supreme Court would select its final docket.[5]

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[1] Address by Justice John Paul Stevens, Annual Banquet of the American Judicature Society (Aug. 6, 1982) (available from the Public Information Office, U.S. Supreme Court) [hereinafter cited as Stevens Address].

[2] For a brief discussion of the Freund Commission, see *infra* note 5.

[3] This term was created for use in this Comment; Justice Stevens did not attach a name to his proposal.

[4] This feature has generated a great deal of discussion, not only by the other Justices, *see infra* note 18, but also in the media. *See, e.g.*, *Supreme Court Blues*, N.Y. Times, Oct. 4, 1982, at A18, col. 1; Kester, *An Un-Supreme Court*, N.Y. Times, Sept. 30, 1982, at A31, col. 3 (Mr. Kester is a former Supreme Court law clerk); *Our Tired Justice(s)*, Sacramento Union, Sept. 17, 1982, at A10, col. 6; Greenhouse, *No Sign of Relief for an Overloaded Court*, N.Y. Times, Aug. 15, 1982, at E9, col. 1.

[5] Known formally as the Study Group on the Caseload of the Supreme Court, the Freund Commission was named for its chairman, Harvard Professor Emeritus Paul A. Freund. The group began its work in 1971 as part of the Federal Judicial Center, which Congress established in 1968 to study the problems of the federal courts. In its report, issued in December of 1972, the Freund Commission recommended legislative establishment of a new Article III court to be called the National Court of Appeals. That tribunal's principal responsibilities would have been to decide cases which involved inter-circuit conflicts and to pre-screen the Supreme Court's certiorari docket. As a result of this process, it was believed the Court would be forwarded just 400 to 500 deserving certiorari petitions, rather than the 4,000 or more now seen by the Court, and that the Court would be relieved of having to hear and decide cases which otherwise might have been reviewed to resolve inter-circuit conflict. *See* Report of the Study

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The Problem of Unending Liability for Hazardous Waste Management

*By Ridgway M. Hall, Jr.**

INTRODUCTION

Recent developments in the law have substantially broadened the scope of potential liability of those who generate or handle hazardous substances. The principal statutes in this area are the Resource Conservation and Recovery Act of 1976 (RCRA)[1] and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund).[2] There are, in addition, a number of other federal statutes[3] and state statutes that regulate to some degree the handling of hazardous substances, or wastes, and carry severe penalties for their violation. Many states, for example, have statutory programs that substantially adopt the basic elements of a federal program like that for hazardous waste management under section 3006 of RCRA.[4] Some of these statutes go

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Editor's note: Robert P. Vogel of the Colorado and Pennsylvania bars and Ronald R. Janke and Theodore Klupinski of the Ohio bar served as reviewers for this article.

1. 42 U.S.C.A. §§ 6901-6987. (1977 & Supp. 1978-1981). For federal statutes, the U.S. Code cite is given initially, and subsequent references are to sections of the Act itself.

2. 42 U.S.C.A. §§ 9601-9657 (Supp. 1981).

3. These include, for example, the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (1976 & Supp. IV 1980), implemented by the Department of Transportation; the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980), under which the U.S. Environmental Protection Agency (EPA) regulates the discharge of pollutants to the navigable waters; the Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. IV 1980), which provides for comprehensive regulation of emissions to the air; the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1976 & Supp. IV 1980), which authorizes comprehensive regulation of toxic substances; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 (1977 & Supp. 1978-1981), under which pesticides and biocides are broadly regulated; the Safe Drinking Water Act, 42 U.S.C.A. §§ 300f-300j (1977 & Supp. 1978-1981), under which EPA has established national primary and secondary drinking water standards and tight controls on disposal of wastes by underground injection; and the Marine Protection, Research, and Sanctuaries Act (Ocean Dumping Act), 16 U.S.C. §§ 1431-1434 (1976) and 33 U.S.C. §§ 1401-1444 (1976 & Supp. IV 1980), under which the disposal of pollutants into the ocean is regulated. Since 1976, EPA has been placing high priority on regulating the handling or discharge of toxic substances under these authorities. The laws authorize substantial civil and criminal penalties for violation, which can run to responsible individuals as well as to corporations. They also authorize injunctive relief, which can substantially constrain the business operations of a company.

4. 42 U.S.C.A. § 6926 (1977 & Supp. 1978-1981). As of August 1, 1982, 33 states had enacted hazardous waste management programs that had been granted interim authorization by EPA under this provision.

well beyond the scope of federal programs.[5] Corporate managers must be aware of these state statutes for each state in which they do business, or in which their products or wastes may be found.

Beyond these statutory authorities, the courts are both expanding the scope of common law liability for injuries caused by hazardous substances and lowering some of the traditional procedural barriers, which in the past have limited the ability of a plaintiff to obtain relief. This, too, is occurring largely at the state level, with considerable disparity in the law from one state to the next.

This combination of statutory expansion of cleanup liability and judicial expansion of potential civil liability to injured third parties is having a high impact on how companies do business. It is also placing fresh demands on corporation counsel to identify areas of potential liability early and help the company minimize its exposure. This article examines the nature and extent of this expanding liability and addresses the implications for business conduct and risk management, including the response of the insurance community.

A hypothetical case will illustrate the problem. The production processes used at plant *X* generate a waste that is hazardous within the meaning of applicable regulations issued by the U.S. Environmental Protection Agency (EPA) under RCRA.[6] As a hazardous waste generator, its operator stores the waste in tanks and drums in accordance with all applicable RCRA regulations.[7] He prepares a manifest (the required shipping document), places the waste in properly labeled 55-gallon drums, and gives it to a transporter, who takes it to an authorized disposal facility for final disposal. He has previously ascertained that the disposer is fully in compliance with the EPA standards for treatment, storage, and disposal facilities.[8] The disposer receives the waste, returns a copy of the manifest to the generator, and then disposes of the waste in his landfill in full compliance with applicable regulations. The generator has done everything that the law requires of him in his management of those wastes. Indeed, he has done everything in his power to ensure that those wastes have been handled and disposed of in an environmentally sound manner.

Fifteen years later, the landfill has developed a leak and hazardous wastes have leached through the ground into the drinking water supply for a nearby town. The disposal facility is no longer active, and its former owner has gone out of business. When he closed the disposal facility six years ago, he failed to follow all of the closure and postclosure requirements prescribed in the RCRA regulations. As a result he did not qualify for transfer of cleanup liability to the Superfund Post-Closure Liability Fund.[9] Consequently federal funding is not available from that source for the substantial and costly cleanup and remedial program that must be undertaken at once to detoxify and restore the drinking water supply.

Investigation reveals that plant *X* was one of forty contributors of wastes to the site, and proportionally his contribution was modest. However, the three generators who contributed most of the wastes, including the most hazardous substances, have either disappeared or are insolvent. The government therefore demands that plant *X* not only pay its proportionate share of the multi-million-dollar cleanup, but that it bear virtually the entire cost of cleanup on the theory that cleanup liability under Superfund is strict, joint, and several.[10] If this interpretation of the law is upheld, such costs could bankrupt all but the wealthiest corporations. Even if liability is limited to costs reasonably attributed to plant *X*'s involvement, the liability of its owners and operators can still involve millions of dollars in cleanup costs, before even considering possible civil liability for injuries to third parties.[11] This liability, moreover, can extend into the past and future virtually without limitation.

THE SOURCES OF LIABILITY

STATUTORY LIABILITY

Because the comprehensive national scheme of hazardous waste management and liability is set forth in RCRA and Superfund, those laws will be considered in some detail.[12]

The Resource Conservation and Recovery Act

RCRA imposes what is often described as a "cradle to grave" regulatory program for the handling of hazardous waste. Liability for a violation is as

5. For example, California's hazardous waste program establishes a universe of hazardous wastes that is much broader than the current federal list under RCRA. *See* Cal. Health & Safety Code, § 25140 (Deering 1975 & Supp. 1982), and implementing regulations at Cal. Admin. Code tit. 22, Div. 4, Ch. 30 (1982). For a commentary on problems posed by a state hazardous waste management program which is significantly different from and broader than the federal RCRA program, *see* Matthews, *The Washington State Hazardous Waste Program*, 3 Environmental Analyst No. 9, at 14 (Aug. 1982).

6. *See* 40 C.F.R. 261 (1982) for what constitutes a hazardous waste.

7. The RCRA standards for generators are set forth at 40 C.F.R. § 262 (1982).

8. 40 C.F.R. §§ 264, 265 (1982).

9. Section 107(k) of Superfund, 42 U.S.C.A. § 9607(k) (1977 & Supp. 1978-1981), discussed below, provides that cleanup liability from a release from a hazardous waste disposal facility may be transferred to that fund, established under Superfund § 232, 42 U.S.C.A. § 9641 (1977 & Supp. 1978-1981), if the facility has been closed down in accordance with RCRA regulations, and if the required postclosure monitoring has been performed for a period not to exceed five years so as to demonstrate that there is "no substantial likelihood" of off-site migration or other risk to the public health or welfare.

10. While this legal issue has not yet been decided by the courts, EPA and the Justice Department currently take the position that liability for cleanup costs and remedial action under Superfund § 107, 42 U.S.C.A. § 9607 (1977 & Supp. 1978-1981), is strict, joint, and several. This point is discussed below, see note 62 and related text.

11. Hooker Chemicals and Plastics Corp., for example, has been sued by the government for cleanup and remedial costs at Love Canal and other sites in Niagara Falls, New York, exceeding $100 million. The damage claims filed by private landowners in the vicinity for personal and property damage exceed $1 billion.

12. For a more extensive discussion of these laws and their implementing regulations, see T. Watson, R. Hall, D. Case & J. Davidson, The Hazardous Wastes Handbook (Government Institutes, Rockville, Md., 4th ed. 1982).

extensive as the regulatory requirements themselves, and the civil penalties can add up quickly to very substantial amounts.

RCRA was passed in October 1976, in response to widespread public concern over damage to the environment and public health arising out of the disposal of hazardous wastes. While sites like Love Canal and the Valley of the Drums have resulted in extensive publicity about this problem, this publicity does not exaggerate the gravity of the situation. EPA has estimated that during recent years approximately fifty-seven million tons of hazardous wastes have been generated annually in this country, and only ten percent of it has been disposed in an environmentally sound manner.[13]

The statutory scheme is fairly straightforward. Its broad scope is indicated in the statutory definitions of solid waste and hazardous waste. Solid waste includes "solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations" with very limited exclusions.[14] Hazardous waste includes any solid waste which may cause or contribute to increased mortality or serious illness, or "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."[15]

The basic provisions of the hazardous waste management program are set forth in subtitle C, sections 3001-3013.[16] Under section 3001, EPA is to define by regulation what wastes are hazardous. Section 3002 requires EPA to establish regulatory standards for generators of hazardous wastes, and section 3003 requires standards for transporters of those wastes. Section 3004 requires comprehensive standards for owners and operators of facilities where hazardous wastes are treated, stored, or disposed of (TSD facilities). Section 3005 requires that each TSD facility have a permit issued by EPA or a state that has established a program equivalent to the federal program, and that the facility comply with certain "interim status" standards pending the issuance of permits. Section 3006 contains the authorization for states to assume responsibility for administering this comprehensive hazardous waste management program.

Section 3010 requires that any person generating or handling a hazardous waste must notify EPA of that fact within ninety days of the date when EPA promulgates a regulation under which such waste is hazardous. This effectively brings the person into the hazardous waste regulatory system, and results in his being issued an EPA identification number which he will use on all reporting forms and manifests.[17]

The statute also contains the usual broad authorization for inspections of facilities and records.[18] EPA is also authorized to require monitoring, testing, analysis, and reporting by any present or past owner or operator of a facility where hazardous waste is or has been treated, stored, or disposed of, when the release of such waste "may present a substantial hazard to human health or the environment".[19] The 1980 amendments added a provision requiring each state to develop an inventory of sites within its borders where hazardous wastes have been stored or disposed of prior to the effective date of TSD facility permitting under RCRA section 3005.[20]

With respect to enforcement, EPA may issue administrative compliance orders, assess civil penalties based on the seriousness of the violation and any good faith compliance efforts, and commence proceedings to suspend or revoke a permit.[21] Alternatively, EPA may proceed in a federal district court to seek injunctive relief or a civil penalty of up to $25,000 per day of violation, or both,[22] as well as criminal penalties.[23]

Section 7003 allows EPA to commence an action for injunctive relief to restrain any handling, storage, treatment, transportation, or disposal of any hazardous waste which "may present an imminent and substantial endangerment to health or the environment." Of the initial seventy "imminent hazard" actions commenced by the Justice Department, most included allegations of occurrences or threats of fire, explosion, or contamination of drinking water supplies. Courts construing this authority have held that actual harm need not

13. U.S. Environmental Protection Agency, *Everybody's Problem: Hazardous Waste* at 1 (1980).

14. RCRA § 1004(27), 42 U.S.C.A. § 6903 (27) (1977 & Supp. 1978-1981). The statutory exclusions are domestic sewage, irrigation return flows, industrial discharges which are permitted under the Clean Water Act, and "source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954."*Id.*

15. RCRA § 1004(5), 42 U.S.C.A. § 6903(5) (1977 & Supp. 1978-1981).

16. 42 U.S.C.A. §§ 6921-6934 (1977 & Supp. 1978-1981).

17. 40 C.F.R. § 262.12 (1982). Notification may be given on EPA Form 8700-12 to the EPA regional office where the site is located, or to a state which is authorized to administer the program. 45 Fed. Reg. 12746 (Feb. 26, 1980).

18. Section 3007, 42 U.S.C.A. § 6927 (1977 & Supp. 1978-1981).

19. This is done by administrative order, under which the person to whom it is directed may within 30 days prepare a plan for such monitoring, testing, and analysis. Section 3013, 42 U.S.C.A. § 6934 (1977 & Supp. 1978-1981). The order may be enforced in a federal district court, and EPA may conduct the monitoring and analysis itself if no owner or operator is available, or if the owner or operator refuses to cooperate. In the latter event, the government can seek reimbursement of its costs, and collect a penalty of up to $5000 for each day of noncompliance. *Id.* On September 11, 1981, EPA issued a guidance memorandum to its regional offices, prepared by Douglas MacMillan, then acting director of Waste Programs Enforcement, on the implementation and use of this authority. 12 Envir. Rep. (BNA) 662 (1981).

20. Section 3012, Act of Oct. 21, 1980, Pub. L. No. 96-482, § 17(a), 94 Stat. 2342 (codified as amended at 42 U.S.C.A. § 6933 (1977 & Supp. 1978-1981)).

21. Sections 3008(a)-3008(c), 42 U.S.C.A. §§ 6928(a)-(c) (1977 & Supp. 1978-1981).

22. Section 3008(a), 42 U.S.C.A. § 6928(a) (1977 & Supp. 1978-1981).

23. For knowing violations, RCRA provides criminal penalties of up to $25,000 per day of violation and one year of imprisonment ($50,000 and two years for permit-related violations or repeat offenses). "Knowing endangerment," which involves a violation which "places another person in imminent danger of death or serious bodily injury" and manifests an "inexcusable disregard for human life," is punishable by a fine of up to $250,000 and imprisonment of up to two years (five years in some cases), and a corporate fine of up to $1 million. Sections 3008(d), (e), 42 U.S.C. §§ 6928(d), (e) (1977 & Supp. 1978-1981).

be shown (an imminent threat is sufficient),[24] and that liability may be imposed for activity prior to the effective date of RCRA, if the threat occurs after that date.[25]

Though the statutory framework may seem straightforward on the surface, its implementation by EPA has proven to be an extremely complicated and problematic undertaking. Probably no statutory delegation of authority to any administrative agency has spawned more regulatory issues and subissues than RCRA. The first substantial wave of implementing regulations was promulgated on May 19, 1980, in which EPA established general definitions, hazardous waste identification regulations, plus standards for generators, transporters, and owners and operators of treatment, storage, and disposal facilities.[26] On the same day, EPA established the permitting requirements and the essential elements of approvable state permit programs, as part of its consolidated permit regulations.[27] Since that time, there have been literally hundreds of amendments to these regulations appearing with considerable frequency in the *Federal Register*.

It is not the purpose of this article to set forth the complex details of this regulatory program. Nevertheless, a brief look at the scope of the program is necessary background to an appreciation of the liability issues which are the main focus of this article.

In the section 261 regulations for hazardous waste identification, EPA has established lists of specific and nonspecific sources of wastes, as well as discarded chemical products and residues, that are deemed hazardous because of their known toxicity or that of their constituents.[28] EPA has also provided four criteria which, if met, will also render the waste hazardous. These are ignitibility, corrosivity, reactivity, and "EP toxicity" (the latter attempts to measure the propensity of a waste to percolate through a medium and still retain toxic properties).[29] This group of criteria may be expanded in the future. The agency has also provided a mechanism for site-specific "delisting" of a listed hazardous waste in the event that it does not, at a specific plant or site, possess the hazardous characteristics or constituents which caused it to be categorically listed.[30]

24. *E.g.*, United States v. Vertac Chemical Corp., 489 F. Supp. 870, 880-84 (E.D. Ark. 1980); United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138, 142-43 (N.D. Ind. 1980).

25. United States v. Solvents Recovery Serv., 496 F. Supp. 1127, 1142 (D. Conn. 1980); United States v. Diamond Shamrock Corp., Civ. No. C80-1857, 1 Hazardous Waste Lit. Rep. 988 (M.D. Ohio 1981).

26. 40 C.F.R. §§ 260-265 (1982), 45 Fed. Reg. 33,066 *et seq.* (1980).

27. 40 C.F.R. §§ 122-124 (1981), 45 Fed. Reg. 33,418 *et seq.* (1980). In addition to RCRA permits for TSD facilities, the consolidated permit regulations apply to Clean Water Act permits for direct discharges (the NPDES program), Clean Water Act § 404 permits to dredge or fill, underground injection control permits under the Safe Drinking Water Act, and EPA-issued permits under the Clean Air Act prevention of significant deterioration program.

28. 40 C.F.R. §§ 261.31-.33 (1982).

29. *Id.* §§ 261.21-.24 (1982).

30. *Id.* §§ 260.20-.22 (1982).

The generator standards in section 262 require each generator to analyze its waste to determine whether it is hazardous and to notify EPA if it is in fact generating hazardous waste. The definitions of solid waste and hazardous waste and the statutory and regulatory exclusions for specific categories of wastes, as well as for reuse and recycle of wastes, are critical to this determination.[31] The generator must either manage and dispose of his wastes on-site, or ship them off-site to an authorized TSD facility. A generator may store the wastes on-site temporarily for ninety days prior to disposal or shipment off-site without becoming a storer or treater.[32] In addition, there is an exclusion from the system for those who generate less than 1000 kg of waste per month.[33] Even temporary on-site storage must be in approved containers, and when wastes are shipped off-site they must be properly packaged, labeled, and placarded, and accompanied by a shipping document known as a manifest.[34] Transporters in turn must follow these shipping requirements, including use of the manifest, under the standards issued for them in section 263.

The most extensive set of regulations relates to the TSD facilities. All such facilities currently in existence must have secured interim status by notifying EPA of their hazardous waste activity, filing part A of the two-part permit application, and complying with all applicable interim status facility standards set forth in section 265.[35] These standards include provisions for such matters as contingency plans and emergency procedures, record keeping and reporting, groundwater monitoring, closure and postclosure plans, and financial responsibility, including third-party liability insurance. There are also design and operating standards applicable to specific types of facilities, such as tanks, surface impoundments, and incinerators.

The TSD regulations about permanent status in section 264 are similar in scope and content, but are generally more detailed and exacting than the

31. *See* notes 14 and 15 *supra* and related text. Regulatory definitions and exclusions appear at 40 C.F.R. §§ 261.2-.4 (1982). These definitions, including the scope of the exemption for reuse and recycle, are subjects of continuing controversy among EPA, the regulated community, states, and environmental groups. These definitions were among the issues raised in a broad challenge to the RCRA regulations brought in the U.S. Court of Appeals for the District of Columbia Circuit in 1980, Shell Oil Co. v. EPA (No. 80-1532), and further regulatory amendments can be expected.

32. 40 C.F.R. § 262.34 (1982).

33. *Id.* § 261.5. Note that for certain acutely hazardous wastes, the exclusion is one kg per month. *Id.* § 261.5(a)(1). Note also that if a generator accumulates on-site more than 1000 kg, he loses the exemption. *Id.* § 261.5(f). Certain states have established lower exemption levels (e.g., 100 kg per month). As of this writing, there is legislation pending that would reduce this exemption to 100 kg per month. H.R. 6307 and H. R. Rep. No. 97-570, 97th Cong., 2d Sess. (May 18, 1982).

34. 40 C.F.R. §§ 262.30-.33, 262.34 (accumulation time); 262.20-.23 (contents and use of manifest) (1982). EPA has substantially incorporated by reference regulations issued by the Department of Transportation for the shipment of hazardous substances under the Hazardous Materials Transportation Act. Those regulations appear at 49 C.F.R. §§ 171-179 (1981). The two agencies have coordinated both the implementation and the enforcement of these regulations and the RCRA requirements.

35. RCRA § 3005(e), 42 U.S.C.A. § 6925(e) (1977 & Supp. 1978-1981). *See also* 40 C.F.R. § 122.23 (1981).

corresponding interim status standards.[36] These standards are now being incorporated in site-specific permits issued to TSD facilities by EPA and states with approved programs.[37]

EPA has encouraged states to take over responsibility for managing the hazardous waste program. The statute allows, but does not require, the states to assume this responsibility. When a state does take over the program, which must be "equivalent to" and "consistent with" the federal program, that state's laws will prescribe the RCRA requirements for hazardous waste in that state in lieu of the federal program.[38] When the state is not implementing the program, an affected company will have to look to both the federal rules and any applicable state laws and regulations relating to hazardous waste in determining its obligations and potential liabilities. Some states have adopted programs whose scope is significantly broader than the federal requirements in RCRA.[39]

Thus, RCRA imposes a comprehensive set of regulatory requirements governing the management of hazardous waste, including provisions for civil and criminal liability on the part of corporations and individuals for violations.

Superfund

Superfund was enacted in December 1980, primarily to deal with releases of hazardous substances to the environment, whether past or present, and to create a federal fund to finance cleanup and remedial action where the responsible parties are unavailable or are unwilling or unable to do so.[40] Actually, two funds were created. The Hazardous Substance Response Trust Fund was established to finance the costs of cleanup and remedial action by the government or other persons to the extent that such work is not performed by the responsible parties.[41] The Post-Closure Liability Fund is financed by a tax on hazardous

36. While some of these were issued in May 1980, more detailed standards were issued in three waves: standards for containers, tanks, surface impoundments, and waste piles, and requirements for financial responsibility and third-party liability insurance on January 12, 1981 (46 Fed. Reg. 2802); incinerator standards on January 23, 1981 (46 Fed. Reg. 7666); and land treatment, storage, and disposal standards on July 26, 1982 (47 Fed. Reg. 32,274). *See also* 40 C.F.R. § 267 (1982) (interim standards for new land disposal facilities).

37. The requirements for part B of the permit application appear at 40 C.F.R. § 122.25 (1981). For EPA's procedures on the sequence of permit issuance, and approval of state programs to issue such permits as each wave of TSD regulations went into effect, see 40 C.F.R. § 123.121-.137 (1981), and notices at 47 Fed. Reg. 8010 (Feb. 24, 1982) and 47 Fed. Reg. 32,378 (July 26, 1982).

38. The state programs are approved in two stages: interim authorization for up to two years for a state program which is "substantially equivalent" to the federal program, and final authorization when the state program is equivalent to the federal program. Section 3006. For EPA guidance on this, see 40 C.F.R. § 123 (1981), and authorities cited at note 37, *supra*.

39. *See* note 5, *supra*.

40. The following discussion, as with RCRA, is a summary of the key provisions, with major emphasis on the liability provisions. For a more detailed discussion of the Superfund law and its implementation, see Watson, et al., note 12, *supra*, Ch. 10.

41. *See* Superfund §§ 211, 221, 42 U.S.C.A. §§ 9621, 9631 (1977 & Supp. 1978-1981). It is funded for $1.6 billion, of which 87½% is raised by a tax on crude oil, petroleum products, and

wastes disposed of by landfill at an authorized RCRA facility to the extent those wastes will remain there after closure.[42] If the site is then properly closed under RCRA and during a post-closure period not to exceed five years there appears "no substantial likelihood" of off-site release, then liability for any subsequent cleanup costs are borne by this fund rather than the responsible party.[43]

The act requires the owner or operator of any facility or vessel to report to the National Response Center the release to the air, land or water of any hazardous substance in a reportable quantity.[44] A hazardous substance is defined to include any substance designated as hazardous under section 311 of the Clean Water Act,[45] any toxic pollutant under section 307(a) of that Act,[46] or which is hazardous under RCRA as a result of listing or characteristics,[47] or listed as hazardous under section 112 of the Clean Air Act,[48] or has been declared imminently hazardous by EPA under section 7 of the Toxic Substances Control Act,[49] or has been added to this list by EPA under Superfund.[50] An exemption is allowed for any "federally permitted release," which is a discharge authorized by the federal, state, or local government either by permit, regulation, or order under any of the following laws: Clean Water Act (NPDES permit, pretreatment standard, or dredge or fill permit), RCRA (TSD permit), Safe Drinking Water Act (underground injection control permit), Ocean Dumping Act, Clean Air Act, or Atomic Energy Act.[51] EPA is to prescribe by regulation the reportable quantities of these substances.[52]

Once there is a release of a hazardous substance, it is the responsibility of the owner or operator of the facility or vessel from which it came to report it and to clean it up. When this is not done, EPA is authorized to take administrative action to clean up and remedy the release and seek reimbursement of the costs

specified chemicals, and the balance is raised from treasury appropriations. Uses of the fund are set forth in Superfund § 111, 42 U.S.C.A. § 9611 (1977 & Supp. 1978-1981), and the procedure for asserting claims for reimbursement appears in § 112, 42 U.S.C.A. § 9612 (1977 & Supp. 1978-1981).

42. *Id.* § 232, 42 U.S.C.A. § 9641 (1977 & Supp. 1978-1981).

43. *Id.* §§ 107(k), 111(j), 42 U.S.C.A. §§ 9607(k), 9611(j) (1977 & Supp. 1978-1981). The tax thus functions somewhat like a premium on an insurance policy for the future.

44. *Id.* § 103(a), 42 U.S.C.A. § 9603(a) (1977 & Supp. 1978-1981).

45. 33 U.S.C. § 1321 (1976 & Supp. IV 1980).

46. *Id.* § 1317(a).

47. 42 U.S.C.A. § 6921 (1977 & Supp. 1978-1981).

48. 42 U.S.C. § 7412 (Supp. IV 1980).

49. 15 U.S.C. § 2606 (1976 & Supp. IV 1980).

50. Superfund §§ 101(14), 102(a), 42 U.S.C. §§ 9601(14), 9602(a) (1977 & Supp. 1978-1981).

51. *Id.* §§ 101(10), 103(b)(3), 42 U.S.C. §§ 9601(10), 9603(b)(3) (1977 & Supp. 1978-1981).

52. *Id.* § 102(a), 42 U.S.C. § 9602(a) (1977 & Supp. 1978-1981). Until superseded by regulation, the reportable quantities for hazardous substances listed under § 311 of the Clean Water Act are those prescribed in the EPA regulations issued under that section (*see* 40 C.F.R. §§ 116-117 (1981)), and for all other substances, the quantity is one pound. EPA currently uses a 24-hour accumulation time for releases under § 311, and may well do the same under Superfund.

from any responsible party or parties.[53] The blueprint for cleanup and remedial action is the National Contingency Plan, authorized under section 105 and promulgated by EPA on July 16, 1982.[54] This contingency plan expands the preexisting version developed by EPA under section 311 of the Clean Water Act to deal with oil spills,[55] so as to include provisions for cleanup and remedial action for any release of any hazardous substance or other pollutant (not limited to those which must be reported under section 103) to any part of the environment. This plan allocates responsibilities among federal, state, and local agencies and private parties. Once the containment effort goes beyond the control of the owner or operator of the facility or vessel, lead responsibility is with an on-scene coordinator, normally designated in advance by EPA or the U.S. Coast Guard.

The plan distinguishes among emergency responses, long-term cleanup, and planned remedial action to restore damaged natural resources. EPA is developing, in conjunction with the states, a list of 400 high-priority hazardous waste sites for cleanup, using a hazard ranking system which takes into account the magnitude and seriousness of the threat, as well as the likelihood and imminence of its occurrence.[56] In the meantime, EPA has developed an interim priority list of 160 (initially 115) sites, and has sent letters to hundreds of present and past owners, operators, and generators whose actions may have contributed to the present hazard, seeking voluntary abatement action. When such abatement action has been unsuccessful, EPA has proceeded with litigation or cleanup action on its own, or both.

Under section 106 of Superfund, EPA may bring an action to enjoin or abate any "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility". EPA may take further action, including the issuance of administrative orders, to abate such a problem. Violation of such an order carries a fine of up to $5000 per day of noncompliance.[57]

Liability under Superfund is far-reaching. Under section 107, the following persons may be liable for cleanup and remedial action:

(1) the owner and operator of any vessel or facility;
(2) anyone who at the time of disposal of any hazardous substance owned or operated the facility;

53. Superfund §§ 104, 107(a), 42 U.S.C. §§ 9604, 9607(a). Though the act grants this authority to the president, he has redelegated this and other Superfund implementation authorities to EPA, the Coast Guard, and various other agencies. Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (Aug. 14, 1981).

54. 47 Fed. Reg. 31,180 (1982) (to be codified at 40 C.F.R. § 300).

55. Formerly codified at 40 C.F.R. § 1510 (1981).

56. For a discussion of this ranking system, see the preamble to the National Contingency Plan, 47 Fed. Reg. 31,186-193 (July 16, 1981).

57. Superfund § 106(a)(b), 42 U.S.C.A. § 9606(a), (b) (1977 & Supp. 1978-1981).

(3) anyone who by contract or otherwise arranged for disposal or treatment, or transportation for disposal or treatment, of hazardous substances, at a facility owned or operated by someone else; and
(4) anyone who accepted a hazardous substance for transportation to a disposal or treatment facility or site selected by that transporter.

Any member of these classes of people is liable for the following response costs:

(A) all costs of removal or remedial action incurred by the United States or a state "not inconsistent with the national contingency plan,"
(B) any other "necessary costs of response" by any other person consistent with the national contingency plan, and
(C) damages for injury to natural resources.[58]

Liability for these costs is strict, in the sense that no showing of fault or negligence is required. There are three statutory defenses, modeled on section 311 of the Clean Water Act, if the release was caused *solely* by (1) act of God, (2) act of war, or (3) act or omission of a third party, other than an employee or agent of the responsible party or one under contract to him, which could not have been reasonably foreseen and prevented.[59] Certain very high dollar limits on liability are provided.[60] For most facilities, the limit is "the total of all costs of response plus $50,000,000 for any damages under this title". Not even these limits apply if "willful misconduct or willful negligence" is shown.

There is no limit under the statute to how far back in time an act by a former generator, owner, operator, or transporter which contributes to a current release or threat may have occurred in order for him to be liable. Similarly, there is no guarantee that the treatment or disposal of a substance or waste today will not render the generator, owner, or operator liable many years in the future for extensive cleanup and remedial costs if there is at that late date a release or threat of release.

Compounding this problem is the current uncertainty whether the liability under section 107 is joint and several. Under such a theory, the government could proceed against any one or a group of potentially liable parties for the *total* costs of the cleanup, for which each would be jointly or severally liable. If such liability were established, the only remedy of the defendants would be to seek contribution from other responsible parties, if they can be found and to the extent allowed by state law, as joint tortfeasors.[61] Superfund does not expressly address this issue. Indeed, it is clear from the legislative history that Congress did not intend to address it, but to allow it to be resolved by the courts according to common law principles. Senator Jennings Randolph, then chairman of the

58. For an interesting case on the measure of damages for injury to natural resources, see Commonwealth of Puerto Rico v. S. S. Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980).

59. Superfund § 107(b), 42 U.S.C.A. § 9607(b) (1977 & Supp. 1978-1981).

60. *See Id.* § 107(c)(1), 42 U.S.C.A. § 9607(c)(1) (1977 & Supp. 1978-1981).

61. Although the old rule at common law did not allow contribution among tortfeasors, most states now expressly allow it by statute. *See* Prosser, Handbook of the Law of Torts, § 50 at 307 (1971).

Senate Environment and Public Works Committee and a principal author of the legislation, said during the floor discussion of the final bill:[62]

> We have kept strict liability in the compromise . . . but we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable.
>
> It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. . . . [T]he liability of joint tortfeasors will be determined under common or previous statutory law.

Similar statements were made by the principal authors on the House side.[63]

EPA and the Justice Department have taken the position that liability under section 107, based upon its language and general common law principles, is joint and several.[64] If they are correct, then the potential liability of a generator of a hazardous waste, as well as that of a treater or disposer, is virtually unlimited as to time or amount. That issue has not yet been resolved by the courts, and it is likely to be some years before it is definitively resolved.[65] Perhaps because it is an open issue, and perhaps realizing that the plaintiff who litigates it may be one with an egregiously inequitable fact situation, EPA and the Justice Department have thus far sought to obtain participation by all known contributors in the cleanup of hazardous waste sites on a roughly pro rata basis, taking into account primarily the volume, and also the toxicity, of the wastes for which each party was allegedly responsible.[66]

The government has indicated its willingness to give a release to a company for liability for cleanup costs paid, and may be willing to indicate that the amounts expended were reasonable based on information then available. It is

62. 126 Cong. Rec. (Senate) S14,964 (Nov. 24, 1980). Section 101(32), 42 U.S.C.A. § 9601(32) (1977 & Supp. 1978-1981), of Superfund provides that " 'liable' or 'liability' under this title shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act." While the issue of joint and several liability has not been definitively resolved under that provision either, at least one court has held that a right of contribution against joint tortfeasors exists under § 311. United States v. Bear Marine Serv., 509 F. Supp. 710, 716 (E.D. La. 1980). This only makes sense in the context of joint and several liability, a position which the Justice Department and the Coast Guard espoused during the Congressional deliberations on Superfund. *See* J. Miller, *Superfund: Who Pays? The Elusive Issues of Joint and Several Liability and the Right to Contribution*, 3 Envtl. Analyst No. 10, at 3 (Sept. 1982).

63. *See* 126 Cong. Rec. (House) H11,787 (statement by Congressman Florio, Dec. 3, 1980).

64. Speech by Carol Dinkins, Assistant Attorney General for Land and Natural Resources Division, at the American Bar Association Annual Meeting at a program sponsored by the Section of Corporation, Banking and Business Law, Committee on Environmental Controls, San Francisco, Aug. 9, 1982, 13 Envtl. Rep. (BNA) 528-29 (1982).

65. In United States v. Petro Processors of Louisiana, Inc. (M.D. La. Civ. No. 80-358), the district court held that 11 generators could properly be joined as defendants in a cleanup and remedial action. Other litigation against multiple generators, treaters, and disposers will undoubtedly be brought, and the issue of joint and several liability can be expected to be raised in some of them. See discussion of this issue in Mott, *Liability for Cleanup of Inactive Hazardous Waste Disposal Sites*, 14 Nat. Res. Law. 379, 404-05 (1982).

66. *See supra* text accompanying note 64.

not currently the policy of the government to give either an unconditional release from all future liability or an indemnification against possible subsequent liability for contribution to other joint tortfeasors. These are important considerations in negotiating the terms of any cleanup with the government, as well as in contemplating the defense or prosecution of litigation which could arise out of such hazardous waste problems.

In a case in the fall of 1981 involving Inmont Corporation, both EPA and Inmont expended substantial funds on a hazardous waste site cleanup following a fire and explosion. They executed a settlement agreement in which Inmont agreed to pay $30,000 to the U.S. Hazardous Response Trust Fund and conduct specified cleanup activities. In return, EPA gave Inmont a covenant not to sue, a statement that no further recovery from Inmont by any other party was appropriate or in the public interest, and that the Inmont cleanup commitments "represent a full, fair and equitable commitment by Inmont to fulfill any civil responsibilities it may have" under any statute administered by EPA. EPA also agreed that if anyone else should sue Inmont over the matter, EPA would provide supporting affidavits or testimony to the effect that Inmont has met any obligations upon it for its share of any federal funds expended on the cleanup.[67] EPA has since indicated that it may not be willing to go quite this far in future settlements—particularly as to the commitment to subsequent testimony.

More recently, in a case involving the Chem-Dyne inactive waste facility in Hamilton, Ohio, 289 potentially responsible parties were identified, of which 109 voluntarily agreed to participate in funding the cleanup. Their contributions totalled $2.4 million, or seventy percent of the total surface cleanup and a groundwater assessment. Partial releases were given to the settling companies, and the government filed suit against sixteen other major contributors who refused to settle for all remaining costs plus litigation expenses.[68] Thus, EPA and the Justice Department will engage in partial settlements with firms who wish to do so.

There is another substantial legal issue underlying section 107, namely, whether Congress may after the fact declare a substance hazardous and its method of disposal unsound, and compel the original generator to pay the cleanup costs, given the prohibition in the U.S. Constitution on ex post facto laws.[69] While an extensive analysis of this issue is beyond the scope of this article, it may well be that the government is limited in cases involving pre-Superfund conduct to what it could recover to abate a common law nuisance.

Two other points should be made before we leave the subject of Superfund liability. First, parties to a commercial transaction are free to contract among one another for the performance of certain functions relating to the handling of hazardous substances, and for indemnification if those functions are not properly performed. However, no such contract or arrangement will preclude

67. The text of this settlement agreement was published in the Legal Times of Washington, Nov. 2, 1981, at 17.

68. EPA Press Release (Aug. 26, 1982).

69. U.S. Const. Art. I, § 9.

liability under Superfund or RCRA if something goes wrong. For example, under RCRA, several different people or entities could all be the generator of a hazardous waste: (1) the owner of the facility when it is generated, (2) the operator of that facility, and (3) an independent contractor who removes the waste from the tank when it is generated and thus first makes it subject to the hazardous waste management system.[70] Normally, the parties may agree that one of those statutory "generators" will perform the functions required by the generator standards. But if a standard is violated, EPA may assert liability against any or all of those generators under RCRA or Superfund, or both, depending on the circumstances.[71]

Second, Superfund does not address liability for personal injuries or death, or damage to private property. Those matters are left to private civil actions, which are discussed below.

Citizen Suits and Implied Private Actions

A violation of a RCRA or Superfund requirement can give rise to liability for penalties and costs to the government. Neither law establishes a cause of action for damages in favor of injured private parties.[72] RCRA contains a provision for citizen suits against the government for failure to perform a nondiscretionary duty under the Act, or against a private party for a violation of the Act.[73] That provision states that "the district court shall have jurisdiction . . . to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be." This language strongly suggests that such a suit is limited to declaratory or injunctive relief, and does not afford the basis for a private action for damages. At least one reported decision has so held.[74]

Furthermore, the federal courts are reluctant to imply private rights of action from remedial statutes where Congress has created none.[75] Since existing state common law remedies for private injuries appear to be adequate, as discussed below, there appears no reason why a federal court should imply a separate such cause of action from the statute. Such state causes of action, moreover, have been effectively preserved under both RCRA and Superfund, which allow the

70. For a definition of generator, see 40 C.F.R. § 260.10 (1982).

71. For a discussion of this point, see 45 Fed. Reg. 72,026 (Oct. 30, 1980), in which EPA stated that it would hold anyone who meets the definition of generator jointly and severally liable if any generator standard is violated, regardless of any agreement among the generators allocating functions. To the same effect, see Superfund § 107(e), 42 U.S.C.A. § 9607(e) (1977 & Supp. 1978–1981).

72. One exception is the Superfund liability provisions in § 107, which allow a private party who incurred cleanup or remedial costs to recover them from any responsible party, or from the fund.

73. RCRA § 7002, 42 U.S.C.A. § 6972 (1977 & Supp. 1978-1981).

74. Connecticut v. Long Island Lighting Co., 17 E.R.C. 1145 (E.D.N.Y. 1982).

75. *See* Cort v. Ash, 422 U.S. 66 (1975), and California v. Sierra Club, 451 U.S. 287 (1981).

states to provide whatever remedies they wish so long as they are not in conflict with or less stringent than the federal programs.[76]

COMMON LAW LIABILITY

For many years, the common law has recognized that one who injures another through environmental pollution may be held liable in damages, and for injunctive relief if appropriate. The principal legal theories have been negligence, trespass, and nuisance. Each of these theories is now commonly included in complaints filed by federal and state governments seeking cleanup, remedial action, and damages, and by private parties in civil actions arising out of environmental pollution. These theories will be examined in this part of the article, as well as recent judicial expansions of the traditional common law which are now making it easier for plaintiffs to establish a cause of action in "toxic tort" cases.

The common law is state law and varies considerably from state to state. Federal courts have occasionally recognized a federal common law of nuisance to fill the gaps left by federal regulatory programs where they have felt that national uniformity is desirable.[77] However, the Supreme Court has recently held that no such federal common law remedy exists when Congress has occupied the field with a comprehensive regulatory scheme, as under the Clean Water Act[78] and the Marine Protection, Resource and Sanctuaries Act (also known as the Ocean Dumping Act).[79] At least one court has concluded that RCRA and Superfund have similarly occupied the hazardous waste management field at the federal level, precluding any *federal* common law remedies for injuries arising out of such activities.[80]

Negligence

Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[81] It is often defined with reference to what a reasonable man would do under the circumstances. The law has long recognized that if a person discharges pollutants negligently, and as a result someone else suffers personal injury or property damage, a cause of action may be maintained for the damages caused as a result.[82]

76. RCRA §§ 3009, 7002(f), 42 U.S.C.A. §§ 6929, 6972(f) (1977 & Supp. 1978-1981); Superfund § 114, 42 U.S.C.A. § 9614 (1981). *See also* Superfund §§ 107(i), (j), 42 U.S.C. §§ 9607(i), (j) (1977 & Supp. 1978-1981), specifically preserving common law liability.

77. *E.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980); United States v. Solvents Recovery Serv. 496 F. Supp. 1127, 1138 (D. Conn. 1980).

78. Milwaukee v. Illinois, 451 U.S. 304 (1981).

79. Middlesex County Sewage Auth. v. National Sea Clammers, 453 U.S. 1 (1981).

80. United States v. Price, 523 F. Supp. 1055, 1069-70 (D.N.J. 1981).

81. Restatement (Second) of Torts, § 282 (1977).

82. *See, e.g.*, Knabe v. Nat'l Supply Div. of Armco Steel Corp., 592 F.2d 841 (5th Cir. 1979); Pruitt v. Allied Chemical Corp., 16 E.R.C. 2014 (E.D. Va. 1981); De Feo v. People's Gas Co., 6

Trespass

Trespass traditionally involves interference with a person's possessory interest in land, including his right to exclude others therefrom.[83] Most states recognize that one who pollutes the environment so as to cause physical damage to another's property is liable for the resulting damages in a trespass action.[84]

Somewhat related to the trespass theory is the body of common law rights and obligations associated with the use of water and water rights, including the riparian rights of owners of property adjoining a stream or water course, the infringement of which can give rise to civil liability.[85]

Nuisance

Probably the most frequently used theory for common law liability for environmental pollution is nuisance. It generally comes in two forms, depending on the nature of its impact. A private nuisance is an unreasonable interference with another's use and enjoyment of his land, or related personal or property interest.[86] A public nuisance is one which involves interference with a general public right.[87] A private civil cause of action can be maintained based on either type of nuisance, and the allegations will be based upon the particular facts of the case. An actionable nuisance may include air or water pollution, excessive noise, hazardous waste disposal, or any other form of environmental pollution which interferes with the personal or property rights of others.[88]

If one has created an actionable nuisance, it is no defense that he has acted in compliance with a permit.[89] This is because the gist of the private action is for injury to an individual, whereas the permit constitutes a satisfaction only of the public duty embodied in the statute under which it is issued. Similarly, it is no

N.J. Misc. 790, 142 A. 756 (1928); Cities Service Gas Co. v. Eggers, 186 Okla. 466, P.2d 1114 (1940).

83. Prosser, Handbook on the Law of Torts, § 13 (1971); Restatement (Second) of Torts, § 158 (1977).

84. *See, e.g.*, Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954) (gas and oil flowed underground from defendant's land to plaintiff's land); Martin v. Reynolds Metals Co., 221 Ore. 86, 342 P.2d 790, *cert. denied*, 362 U.S. 918 (1959); City of Philadelphia v. Stepan Chem. Co., CA No. 81-0851 (E.D. Pa. Aug. 4, 1982) (action against approximately 30 chemical companies for improper disposal of hazardous wastes; city could maintain claims under Superfund and common law trespass, nuisance, and negligence).

85. *See* Restatement (Second) of Torts (1977), ch. 41 and cases cited.

86. Restatement (Second) of Torts (1977), ch. 40 and cases cited, including the corresponding Restatement in the Courts; Prosser, *supra* note 83, § 89.

87. Restatement (Second) of Torts, *supra* note 83, § 821B (1977); Prosser, *supra* note 83, § 88.

88. *See* New York v. New Jersey, 256 U.S. 296 (1921); Cook Indus. v. Carlson, 334 F. Supp. 809 (N.D. Miss. 1971); Village of Wilsonville v. SCA Serv., 82 Ill. 2d 1, 426 N.E.2d 824 (1981) (operation of hazardous waste dump); Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

89. Illinois v. City of Milwaukee, 599 F.2d 151, 163 (7th Cir. 1979), *rev'd on other grounds*, 451 U.S. 304 (1981); Brown v. Petrolane, Inc., 102 Cal. App. 3d 720, 162 Cal. Rptr. 551 (1980); Belton v. Wateree Power Co., 123 S.C. 291, 115 S.E. 587 (1922); Village of Wilsonville v. SCA Serv. 82 Ill. 2d 1, 426 N.E. 2d 824 (1981).

defense in such private action that one acted in compliance with an applicable regulation.[90] This principle applies to actions for negligence and trespass as well.

On the other hand, many states regard a violation of a health and safety regulation as evidence of negligence or nuisance, and in some cases may regard it as negligence per se.[91]

Strict Liability; Ultrahazardous or Abnormally Dangerous Activity

Strict liability (i.e., liability without fault) is closely related in concept to nuisance. The leading case imposing strict liability in the environmental area is the 1868 English decision, *Rylands v. Fletcher*.[92] In this law school favorite, mill owners constructed a reservoir, and the water broke through and flooded plaintiff's mine. Strict liability was imposed on the theory that the defendants had engaged in a nonnatural use of their land and therefore should bear the risk and cost if that use injured someone else's property interests.

The doctrine of strict liability has not been applied to environmental torts in all states, nor has its application been uniform among those states where it has been applied. In New Jersey, for example, strict liability for toxic torts evolved by analogy to strict product liability of the type reflected in section 402A of the Restatement (Second) of Torts. The court there reasoned that the social policy that holds a manufacturer strictly liable for injuries caused by a defective product applies with equal force to a generator or handler of hazardous substances if those substances escape and cause injury.[93]

Other states have arrived at strict liability by analogizing the handling of hazardous chemicals to the line of cases relating to "ultrahazardous activity," such as dynamiting, for which strict liability has been imposed.[94] This is also sometimes described as "abnormally dangerous" activity.[95] Some courts have effectively rejected the doctrine.[96]

90. Greater Westchester Homeowners Ass'n v. City of Los Angeles, 26 Cal.3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979); Village of Wilsonville v. SCA Serv., 82 Ill. 2d 1,426 N.E. 2d 824 (1981); Webb v. Town of Rye, 108 N.H. 147, 230 A.2d 223 (1967).

91. *See* Restatement (Second) of Torts, § 288B comment (1964).

92. L.R. 3 H.L. 330, [1861-73] All E.R. 1 (1868).

93. New Jersey v. Ventron Corp., 182 N.J. Super. 210 (App. Div. 1981) (owners of mercury processing plant strictly liable for pollution of adjacent creek); Dep't of Transp. v. PSC Resources, 175 N.J. Super. 447, 419 A.2d 1151 (N.J. Super. Law Div. 1980); City of Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 369 A.2d 49 (N.J. Super. Law Div. 1976).

94. *See generally* Restatement of Torts, §§ 519-520 (1977).

95. Restatement (Second) of Torts, §§ 520, 821B (1977); Ortega Cabrera v. Municipality of Bayamon, 562 F.2d 91, 95 (1st Cir. 1977); Loe v. Lenhard, 227 Ore. 242, 362 P.2d 312 (1961).

96. *See, e.g.*, Wright v. Masmite Corp., 368 F.2d 661 (4th Cir. 1965), *cert. denied*, 386 U.S. 934 (1967) (no liability for unintentional release of formaldehyde fumes).

Expanding Concepts of Toxic Tort Liability

Several problems that confront plaintiffs in toxic tort cases are unique to this type of action. First, there is often a substantial passage of time between the release of a hazardous substance and the eventual exposure of the person. Second, there can also be a substantial latency period between exposure to the pollutant and the emergence of adverse symptoms. This is especially true in the case of carcinogens (cancer-causing substances), for which the latency period may range from ten to forty years.[97]

As a result of these circumstances, plaintiffs often find that by the time symptoms emerge and they can identify the cause, their claim may be barred by applicable statutes of limitation. Many states have adopted "tolling" rules under which the statute does not begin to run until injury occurs, or in some cases until the causal connection with the defendant is or should have been recognized. These formulations vary widely from state to state.[98]

In addition, the passage of time problem also can make it extremely difficult to identify the responsible defendant or defendants and to prove causation. Normally in a civil action, the plaintiff has the burden of proving causation by a preponderance of the evidence. This can be difficult when there are many possible causes or contributing factors to injury or illness, or many possible defendants. In response to this problem, a few courts have begun to ease or shift that burden by the use of presumptions or other mechanisms based upon what they conceive to be "fair." Several theories have been advanced for easing the plaintiff's burdens in this type of case, as in the related area of product liability. These include the doctrines of concert of action, alternative liability, enterprise liability, and market-share liability.

Concert of action involves tortious conduct by a defendant who acts with others or pursuant to a common design. Defendants who are properly joined under this theory are each jointly and severally liable to the plaintiff for all of his injuries.[99]

Alternative liability is a widely recognized theory that applies in a situation in which two or more defendants acted in a way that may have caused injury to the plaintiff, but it is not possible to tell which of their actions in fact was the cause.[100] Normally, the defendants do not act in concert. The classic illustration

97. For an excellent discussion of this and related issues concerning environmental causes of cancer, *see* Council on Environmental Quality, *Carcinogens in the Environment*, in Environmental Quality, ch. 1 (6th Ann. Rep. 1975).

98. These problems are reviewed at length in the Report of the Superfund Section 301(e) Study Group, *Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies*, completed in July, 1982, and published by the U.S. Government Printing Office for the Senate Committee on Environment and Public Works, Serial No. 97-12, 97th Cong., 2d Sess. (Sept. 1982). The report found that 39 states have such "tolling" or "discovery" rules (Report of the Superfund Section 301(e) Study Group at 28, Senate Environment and Public Works Committee reprint at 43). This report is discussed *infra* in the text accompanying note 130.

99. Restatement (Second) of Torts, §§ 876, 878 (1977).

100. *Id.*, § 433(B)(3).

is *Summers v. Tice*,[101] where two hunters negligently shot in the direction of the plaintiff, one bullet struck him, and it was impossible to tell whose. The court held both liable. An example in the environmental area is *Borel v. Fiberboard Paper Products Corp.*,[102] where an industrial worker was exposed to several kinds of asbestos during his employment. He contracted asbestosis and was allowed to join as defendants all manufacturers to whose asbestos he had been exposed. His claim was for negligence in failing to warn him of the dangers of inhaling asbestos dust. The court held each manufacturer jointly and severally liable and, once plaintiff established exposure, shifted the burden to each defendant to prove that his product could not have caused the injury. Pending enforcement actions indicate an intent by the government to apply this approach to hazardous waste disposal situations involving multiple generators.

Enterprise liability is similar in principle to the concert of action theory. It seeks to address the situation where an industrywide practice may be harmful. If it can be established that an entire group breached a duty to the plaintiff, as a result of which he was injured, and through no fault of his own he is unable to identify which member or members of the group actually caused the injury, the entire group may be jointly and severally liable. Not all potential defendants need be joined. This approach has been discussed both by courts[103] and commentators.[104] The practical effect of it is to shift the burden of proof from the plaintiff to the group of defendants, who may each be held strictly, jointly, and severally liable except to the extent that a member of the group proves that he did not cause the injury. Enterprise liability thus represents an approach to risk distribution which is still in an evolving mode.

Market-share liability is a recent concept that received national attention when the California Supreme Court in *Sindell v. Abbott Laboratories*[105] allowed the daughter of a mother who took the drug diethylstilbestrol (DES) during pregnancy, where apparently as a result the daughter later developed cancer, to maintain an action against most of the manufacturers of the drug. The court held that if causation were established as to the drug but not the specific manufacturer, the entire industry would be liable. The court believed that it would be unjust for the plaintiff to go without relief simply because, as a result of the passage of time which was not her fault, it was impossible for her to identify the specific manufacturer of the drug taken by her mother. It thus

101. 33 Cal.2d 80, 199 P.2d (1948).

102. 493 F.2d 1076 (5th Cir. 1973).

103. *See* Hall v. E.I. duPont de Nemours & Co., 345 F. Supp. 353, 376-9 (E.D.N.Y. 1972) (noting that the need for such "risk distribution" can arise in the context of environmental pollution); and Sindell v. Abbott Laboratories, 26 Cal. 2d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

104. *See* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L. Rev. 963, 1002 (1978); Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 Harv. L. Rev. 584, 588 (1981).

shifted the risk of loss to the group of companies which had created the problem and held each member of the industry liable in proportion to its market share.[106]

Obviously, this approach results in liability being imposed on many companies who had nothing to do with the plaintiff. On the other hand, it avoids the harsh result of joint and several liability, which exists under the concert of action and alternative liability theories. Its implications for hazardous waste liability are as yet unclear. However, recognizing that courts are increasingly turning to developments in product liability law in dealing with toxic tort cases, injured plaintiffs are likely to urge this theory in cases with long latency periods that make it difficult to identify precisely the responsible party (but not the class of potentially responsible parties).[107]

Finally, some states have adopted statutes that either codify or supplement common law liability. Examples include the Rhode Island Hazardous Waste Management Act,[108] which imposes liability for "all damages, losses, or injuries" resulting from improper disposal of hazardous waste, and the statutes of North Carolina and Alaska, which provide strict liability for personal injuries in hazardous waste cases.[109]

The key points to remember are: (1) the common law is undergoing considerable expansion in the field of toxic torts; (2) expansion is in the direction of easing the burden of proof for plaintiffs (including the use of presumptions) and imposing broader liability on those who handle hazardous waste; and (3) the nature and pace of these developments differ in each of the fifty states. Clearly, these developments pose added risks and costs of doing business for any company handling hazardous substances. They are affecting the way companies are assessing and managing their risks, and in many cases they are influencing the way companies do business. This includes not only such matters as how they handle their waste, but what product lines they pursue, what raw materials they use, what they consider in buying or selling a plant or site when toxic substances have been handled in the past, and a wide range of similar problems. It is to these impacts that we next turn.

106. *See also* Abel v. Eli Lilly and Co., 94 Mich. App. 59, 289 N.W.2d 20 (Ct. App. 1979) (finding a "concert of action" in the DES context); and Bichler v. Eli Lilly and Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (App. Div. 1981). Other courts have rejected this approach, holding that traditional burden of proof rules should apply. *See, e.g.*, Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1008 (D.S.C. 1981).

107. As noted *supra* notes 64–66 and accompanying text, some multigenerator hazardous waste site cases are being settled under RCRA § 7003 and Superfund on the basis of payments by each generator in proportion to his contribution to the site—a rough analogy to market-share liability reflecting an apportionment approach.

108. R.I. Gen. Laws § 23-19.1 (1979 & Supp. 1982).

109. N.C. Gen. Stat. §§ 143-215.77, 215.93 (1978 & Supp. 1981); Alaska Stat. § 46.03.822 (1981).

THE IMPLICATIONS FOR BUSINESS CONDUCT AND RISK MANAGEMENT

IDENTIFYING THE RISKS

The business manager has the vital job of identifying those business practices that give rise to the risk of exposure to the liabilities discussed above. He must then develop ways to minimize the risk of exposure or to take steps, through insurance or otherwise, to minimize the likelihood of a catastrophic loss as a result of such liability.

Perhaps the most useful and increasingly utilized mechanism for performing this function is the environmental audit. The environmental audit basically involves a broad data-gathering effort concerning any activity of the company that could subject it to liability under environmental laws. At the same time, sources of potential liability, such as statutes, regulations, permits, judicial or administrative orders, and contracts, are identified, and the company's business activity is evaluated in light of those sources of potential liability. The audit then provides a mechanism to identify quickly all applicable environmental requirements, as well as the company's compliance picture.

While an audit can be conducted on a one-time basis for a particular transaction, or to evaluate a particular plant, it can also be done on a company-wide basis. Frequently it is institutionalized and regularly updated so that the resulting information can be quickly used in connection with a variety of corporate activities. It provides an early warning system, so that minor problems can be identified and corrected before they become major. It can be designed to identify current and long-term costs associated with compliance. Finally, an environmental audit can provide a valuable data base for corporate decision making on a variety of possible future activities. These include decisions concerning new facilities, new products or raw materials, assessment of proposed regulatory activity, and litigation support.

CHOOSING SOUND BUSINESS PRACTICES

Typically, a corporate manager faced with the extensive environmental requirements which the law now imposes will want to know at least three things: What are the requirements? Are we in compliance? What is it costing us? In addition, if the company is not in compliance, he will want to know what it will take to get into compliance, in terms of equipment or facilities, time, manpower, and dollars. He may also wish to know if he has more than one option for compliance, and which is the most cost-effective. The answers to these questions will affect how the company conducts its business, and even what that business is.

In the area of hazardous substances, if alternative raw materials for a particular product line are available, and one is considerably more toxic than another, and the costs are approximately equal, the less toxic substance will be the preferred choice. Often the equation is more complicated than this, however,

involving not only comparisons of costs and toxicity, but the type of waste or by-products that are generated, the ease or difficulty of disposal, and the environmental behavior and effects of those wastes after they are disposed. For example, a hazardous waste that can be easily incinerated may be preferable to one that must be landfilled, given the propensity of wastes that are disposed of in a landfill to eventually leach out and pose threats of contamination or other hazard. If a waste must be landfilled, one which biodegrades rapidly will be preferable to one which persists in the environment for many years. Thus, questions of comparative toxicity, persistence, mobility, and the like will all be relevant in assessing the potential costs and liabilities of handling hazardous substances or producing products which generate hazardous wastes, and in disposing of those wastes.

This type of information is increasingly affecting the products and processes chosen by companies. It is affecting the methods of disposal. Increasingly, for example, incineration is a preferred method of disposal rather than landfills. In addition, companies are making major efforts to reduce the volume of their hazardous wastes streams, and to reuse, recycle, and reclaim wastes wherever possible. When a waste can be recycled, it is no longer a waste.[110] In addition, some companies are finding that the reuse and recycling of wastes which were previously thrown out can produce an economic benefit or savings. Where costs of waste treatment or disposal are high, or involve substantial risk, a company may consider increasing the price of the product or getting out of that product line.

If a company is considering expanding an existing product line, or moving into a new field, it may evaluate several options. These include physical expansion of one of its own existing facilities, construction of a new plant, or purchasing an existing facility from someone else. Typically, the corporate manager evaluates the alternative costs and benefits associated with each option. A substantial cost item may be environmental controls. Frequently, these costs are overlooked or seriously underestimated. Environmental compliance costs include not merely the capital and operating costs associated with pollution control technology, but they include a consideration of possible long-term risks.

For example, if a company is considering purchasing an existing facility from another company, this may involve some initial savings in not having to comply with applicable new source performance standards under the Clean Air Act or the Clean Water Act, as well as the production-related benefits of being able to get into the market more rapidly than if one were building a new facility. On the other hand, the purchasing company must ask: What products and chemicals have been handled on that site over the past twenty-five years? What have been the handling and disposal practices? Has there been any history of environmental violation? Have hazardous wastes been disposed of on the site? If so, how have they been disposed of, and what is the potential for a future release to the environment? What type of site inspection and groundwater monitoring should I do? In negotiating the purchase contract, what disclosures, covenants, and warranties should be included on such environmental matters, and would it be helpful to seek indemnification or hold-harmless clauses? Can or should the risks be insured against through commercial insurance or self-insurance?

110. Indeed, EPA has provided an exclusion from the hazardous waste regulatory program under RCRA for wastes which are "beneficially used or reused or legitimately recycled or reclaimed" or which are being treated or stored prior to such reuse. 40 C.F.R. § 261.6 (1982).

ENVIRONMENTAL LIABILITY INSURANCE

Statutory Requirements

Both RCRA and Superfund impose requirements regarding financial responsibility. Specifically, RCRA section 3004 requires EPA to establish performance standards for owners and operators of TSD facilities, which are to include such evidence of "financial responsibility as may be necessary or desirable." Acting under this authority, EPA has issued regulations requiring owners or operators of such facilities to provide evidence of their ability to meet the costs of closure of the facilities and, for disposal facilities, postclosure care and monitoring.[111] In addition, such facilities must maintain liability insurance for injury or damage to third parties. Insurance for "sudden and accidental occurrences" must be maintained in the amount of at least $1 million per occurrence with a $2 million annual aggregate, exclusive of legal defense costs.[112] In addition, owners or operators of surface impoundments, landfills, and treatment facilities must maintain liability insurance for "nonsudden occurrences" in the amount of at least $3 million per occurrence with a $6 million annual aggregate, exclusive of legal defense costs.[113] Facilities may purchase commercial insurance to satisfy these obligations, or they may self-insure by meeting a financial test based upon net worth and assets in the United States.

Superfund imposes additional financial responsibility requirements on owners of vessels and facilities, designed to make sure that those handling hazardous substances will be able to bear the costs of cleaning up any releases for which they are responsible. Section 108 contains these requirements. For vessel owners and operators, financial responsibility may be established by insurance, guarantee, surety bond, or qualification as a self-insurer.[114] Such requirements are not

111. *Id.* § 264.140-.151 (permanent status standards), and § 265.140-.150 (interim status standards). This may be demonstrated by a trust fund, a surety bond, a letter of credit, an insurance policy, or a financial test in the nature of self-insurance.

112. *Id.* §§ 264.147(a) (permanent status standards), § 265.147(a) (interim status standards) (1982). This insurance coverage had to be in effect by July 15, 1982.

113. 40 C.F.R. §§ 264.147(b), 265.147(b) (1982). Compliance with the "nonsudden occurrence" insurance requirements is being phased in according to the size of the company. As of this writing, this is the timetable: (a) facilities with annual sales of $10 million or more must satisfy these requirements by January 15, 1983; (b) facilities with annual sales of $5 million but less than $10 million by January 15, 1984; and (c) all other facilities by January 15, 1985. *Id.* §§ 264.147(b)(4), 265.147(b)(4) (1982).

114. Superfund § 1081(a)(1), 42 U.S.C.A. § 9608(a)(1) (1977 & Supp. 1978–1981). The owner or operator of any vessel over 300 gross tons (except a non-self-propelled barge that does not

a new concept, having existed under section 311(p) of the Clean Water Act for some time.[115]

With respect to facilities, Superfund requires that not earlier than five years after the effective date of the Act (i.e., December 11, 1985), the government must promulgate requirements that classes of facilities maintain and establish evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. Compliance with such regulations is to be phased in over a period of between three and six years after the date of promulgation of the regulations, with the result that facilities will not have to comply before December, 1988, at the earliest. The reason for this substantial delay is apparently twofold: (1) to allow EPA time to get the RCRA financial responsibility requirements in place, to get experience with them, and to avoid inconsistent or unnecessary additional requirements; and (2) to determine the extent to which commercial insurance may be available to satisfy these requirements. The statute specifically requires the government to "cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements."[116]

However, Congress included in section 108 several provisions that make it rather unattractive for a commercial insurer to underwrite these requirements. First, it provides that any claim for cleanup or remedial costs for which the owner or operator may be liable may be asserted "directly against any guarantor providing evidence of financial responsibility," i.e., the insurer.[117] Although the insurer, in response, may invoke any rights and defenses available to the owner or operator, he "may not invoke any other defense that such guarantor [or insurer] might have been entitled to invoke in a proceeding brought by the owner or operator against him."[118] This would appear to prevent him from invoking such standard defenses as noncompliance with conditions of the policy (including possibly nonpayment of the premium), and knowing violations of applicable statutory or regulatory requirements. Superfund further provides that if the guarantor is found not to be acting in good faith in responding to such a claim, it may be liable for amounts in excess of the monetary limits of the policy.[119] Not surprisingly, the insurance industry has expressed serious doubt that insurers will provide coverage under these circumstances.

Congress apparently realized that this could be a problem, and called for a study to determine whether private insurance protection is available on reasonable terms and conditions to the owners and operators of facilities and vessels subject to liability and financial responsibility requirements established under

carry hazardous substances) must establish and maintain evidence of financial responsibility of $300 per gross ton or $5 million, whichever is greater.

115. 33 U.S.C. § 1321(p) (1976 & Supp. IV 1980).

116. Superfund § 108(b)(2), 42 U.S.C.A. § 9608(b)(2) (1977 & Supp. 1978-1981).

117. *Id.* § 108(c), 42 U.S.C.A. § 9608(c) (1977 & Supp. 1978-1981).

118. *Id.*

119. *Id.* § 108(d), 42 U.S.C.A. § 9608(d) (1977 & Supp. 1978-1981).

Superfund.[120] In addition, Congress called for a study by the Treasury Department concerning the feasibility of establishing an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities as an alternative to the Post-Closure Liability Fund described above.[121] The Treasury Department has, in fact, satisfied both these requirements in a single report released in March 1982, entitled *Hazardous Substance Liability Insurance*.[122] This study concluded that the marine insurance market is providing adequate insurance for vessels, and that commercial insurance is available to owners and operators of facilities for sudden accidents, and, to some extent, for nonsudden accidents as well. It found that serious problems exist with respect to insuring pollution risks under Superfund. This problem, the report found, is due to "the particular combination of liability and financial responsibility provisions which tend to render the liability exposure of the insurer too uncertain for traditional underwriting practices."[123] Because of the potential for joint and several liability, the retroactive nature of this liability, and the problems of insurer liability under section 108 described above, it found that commercial insurers were not prepared to write policies in this area. It is difficult to imagine any change in this situation unless the law is amended.

For similar reasons, notably the open-ended time commitment aspects, the report concluded that it was unlikely that private commercial insurers would provide an option to the Post-Closure Liability Fund for inactive hazardous waste facilities. To meet the statutory requirements as they currently exist, a private insurance company would have to accept an uncertain and potentially unlimited exposure to liability in terms of duration. The insurer would have to provide financial assurance for liability and, after the thirty-year postclosure monitoring by the owner or operator of the TSD facility or its designee, the insurer would have to provide monitoring and maintenance forever. This involves assumption of certain managerial responsibilities which, the Treasury report concluded, no private insurance company could be expected to undertake now or in the foreseeable future.[124]

Available Insurance

A variety of insurance policies are available to cover personal and property damage caused by releases of pollutants or hazardous substances to the environment, including at least some cleanup and remedial costs under Superfund.

Traditionally, most companies have carried a Comprehensive General Liability (CGL) Policy, which provides coverage for "sudden and accidental"

120. *Id.* § 301(b), 42 U.S.C.A. § 9651(b) (1977 & Supp. 1978-1981).

121. *Id.* § 107(k)(4)(A), 42 U.S.C.A. § 9607(k)(4)(A) (1977 & Supp. 1978-1981).

122. With respect to the availability of insurance for Superfund § 107 liability for cleanup and remedial activity, the report is designated as "interim," and thus could be followed by a "final" report fairly soon. There is no reason to expect any substantial change in the findings of this first report, however.

123. Department of the Treasury, Hazardous Substance Liability Insurance at v (Mar. 1982).

124. *Id.* at vi-vii and 143-45.

pollution on an occurrence basis. While this type of coverage will apply to liability arising out of a spill or other incident whose effects are known reasonably soon after the occurrence, problems arise where the effects are not known until years after the event, or where there is gradual seeping. Some courts have recently stretched the scope of sudden and accidental to include injuries which, in fact, have not become apparent until long after the occurrence.[125] These cases prompted many insurers to stop writing pollution liability coverage on an occurrence basis.

The problems of occurrence-basis insurance coverage were further demonstrated in *Keene Corporation v. Insurance Company of North America*,[126] where the Court of Appeals for the District of Columbia Circuit held that insurers who had written CGL policies for any period in which an injured party was exposed to asbestos were liable up to the limits of their policies for damages which their insured might have to pay out to claimants who years after that exposure contracted asbestosis, mesothelioma, or other diseases resulting from that exposure. It made no difference that the insurance policies had long since expired. The result of this holding is that an insurance company who writes a CGL policy for a given year could be liable for payments many years later when a disease eventually manifests itself and can be attributed to the exposure to the toxic substance in question.

The result of such decisions is that insurers are moving rapidly in the direction of writing environmental insurance coverage on a claims-made basis rather than an occurrence basis. Under the claims-made basis, the policy covers any claims made for injuries resulting from environmental pollution, where the claims are presented to the insured during the period of coverage (normally one year). Some policies limit the number of years prior to the claim when an occurrence must have happened for the claim to be covered by the policy. The scope of such a clause, as well as such traditional elements as deductibility provisions, face amount, and reinsurance or excess coverage, are matters which are negotiated between the company and its carrier or carriers, and hence will vary from policy to policy.

In the past few years, insurance companies have offered high-limit coverage for "nonsudden or gradual" pollution under the Environmental Impairment Liability form, which is a claim-made policy. This policy is increasingly available and increasingly popular with companies handling hazardous wastes.

Another new policy is available from the Pollution Liability Insurance Association, a group of thirty-seven companies that have formed a reinsurance

125. *See* City of Kimball v. St. Paul Fire & Marine Ins. Co., 190 Neb. 152, 206 N.W.2d 632 (1973) (pollution of irrigation well due to seepage from city's sewer); Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975) (oil seepage into river held "sudden and accidental"); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S. 2d 603 (App. Div. 1980) (gradual discharge of gasoline from storage tank held "sudden and accidental").

126. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, ——— U.S. ———, 102 S. Ct. 1644, *reh'g denied*, 50 U.S.L.W. 3859 (U.S. Apr. 26, 1982).

pool, headquartered in Chicago, for companies offering coverage for both sudden and nonsudden incidents under a single claims-made form developed by the Insurance Services Office. Basic coverage is available up to $5 million per site, and higher excess limits may also be obtained. Other companies outside the Pollution Liability Insurance Association are also considering policies of this type.[127] Such policies would seem to be well suited to satisfy the RCRA liability insurance requirements discussed above.[128]

These policies would also appear to be adequate to deal with common law liability for pollution incidents causing environmental damage, including cleanup costs. This coverage must be carefully reviewed, however, in light of the expanding liability for delayed manifestation injuries, discussed above. Large companies reportedly obtain environmental claims-made insurance coverage of this type in excess of $100 million. Sometimes this is combined with some measure of self-insurance or the creation of reserves. Such insurance will cover much of the liability exposure under section 107 of Superfund for cleanup and remedial action, subject to the qualification that it is generally available only on a claims-made basis and may not extend back in time to cover a release which occurred many years ago.[129] In addition, it does not generally cover costs of such affirmative remedial action as relocating inhabitants or providing alternate drinking water supplies.

A LOOK TO THE FUTURE

From the preceding discussion, it is clear that potential liability arising out of the generation or management of hazardous waste is continuing to expand, and its outer dimensions are not yet clear, if they exist at all. Courts are expanding the scope of common law liability and both they and some state legislatures are making it easier for plaintiffs to establish a cause of action in cases of delayed manifestation disease or injury suits. At the same time, Superfund has substantially expanded potential liabilities to the point where some of the risks which it has imposed cannot be effectively insured against.

Because of the problems created for the insurance community by Superfund, it is reasonable to expect that Congress may amend that statute before the financial responsibility requirements go into effect. Based upon the study conducted by the Treasury Department and comments from both the insurance

127. For a more detailed discussion of these different types of insurance policies, see the Report of the Business Management Liability Insurance Committee of the ABA Section of Corporation, Banking and Business Law, *Liability Insurance Against Environmental Damage: A Status Report*, 38 Bus. Law. 217 (1982).

128. The Insurance Services Office (ISO) policy does not cover fire and explosion which does not result from a discharge; these risks are normally covered in the CGL policy. It should also be mentioned that EPA is considering at this time an expansion to its RCRA financial responsibility regulations which would in some cases require a showing of ability to restore contaminated groundwater on-site. Such coverage is not generally available from insurers at this time.

129. For reasons set forth above, insurance is not available to satisfy the anticipated financial responsibility requirements which § 108 of Superfund demands. Fortunately, Congress and EPA have a few years to reconsider those provisions before they can go into effect.

industry and the regulated community, some effort can be expected to amend section 108 to allow the insured and the insurer to contract freely as to scope of coverage and proper defenses, and to remove the present provisions that would preclude the assertion of those defenses (such as knowing violation of the law). Congress may also consider removing the provisions that allow a claimant to override the policy limits by asserting that the insurer is not acting in "good faith."

Meanwhile, the Treasury Report suggests that EPA should strive in its regulatory programs not to make it difficult for responsibly managed firms to meet the financial responsibility and insurance obligations under RCRA. It also should effectively police irresponsible firms whose sloppy management practices, if not corrected, have the potential not only to drive up insurance rates but to encourage Congress and public opinion to presume that all handlers of hazardous waste are irresponsible and must be subjected to virtually unlimited liability for anything that goes wrong. For this reason, a fair and effective enforcement program by EPA and the Justice Department is very much in the best interests of the business community.

Another important development is the report of the Superfund section 301(e) study group concerning remedies for personal injuries and property damage caused by exposure to hazardous wastes. In section 301(e) of Superfund, Congress called for a study by a committee made up of experts in the legal field "to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment." The members of this study group were appointed by the American Bar Association, the American Law Institute, the American Trial Lawyers Association, and the National Association of State Attorneys General. Their report was released in September 1982 and is titled *Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies.*[130] It contains an exhaustive review of common law and statutory remedies and discusses the litigation problems that are caused by long delays between the act complained of (such as the disposal of a pollutant) and the eventual discovery of a resulting injury.

This report concluded that problems of delayed exposure, discovery, and manifestation of injuries associated with hazardous substances result in substantial obstacles to plaintiffs seeking relief from the responsible parties. These include the statutes of limitations which may run before injury or illness is discovered, proving causation, and identifying the specific responsible parties. While the common law in some states is being expanded to deal with these problems, the study group felt that many states are not moving fast enough. It therefore recommended revisions to the common law to overcome these problems, including the use of rebuttable presumptions in the areas of establishing (1) causation following a showing of exposure and injury "known to result" from such exposure, and (2) responsibility of the source(s) who contributed to the hazardous waste problem.

The study group also recommended federal legislation to establish a no-fault administrative compensation fund for personal and property damages suffered as a result of exposure to hazardous wastes. It would function somewhat the way Workmen's Compensation provides for job-related injuries. The program would be operated largely by the states in partnership with a federal agency under federal law. A claimant who obtains reimbursement from the fund would be allowed to bring a separate court action against the responsible parties, but if he does so, any payment previously received from the compensation fund would have to be paid back out of any recovery in the court action. The study group recommended that the scope of allowable claims be commensurate with the scope of Superfund cleanup liability, namely, those which involve the disposal, transportation, and management of hazardous wastes.

At this point, it would be premature to speculate on the fate of these recommendations. They will undoubtedly be given careful attention by Congress and other public bodies. Whether or not any legislation emerges, the study represents an exhaustive analysis and commentary on the current state of the law, and it can therefore be expected to influence the future development of that law, whether in the courts or the legislatures.

In conclusion, the problem of unending liability for hazardous waste management is a serious one, and one that will be with us for years to come. While future action by Congress, EPA, enforcement agencies, and the courts can ease or complicate that problem, there is much that a company engaged in the generation or handling of hazardous wastes can do to minimize this liability and reduce its risks to manageable levels. This requires preventive maintenance, including the desire and ability to identify potential toxic problems and legal liabilities as early as possible, and to deal with them responsibly.

130. Published by the U.S. Government Printing Office for the Senate Committee on Environment and Public Works, Serial No. 97-12, 97th Cong., 2d Sess. (Sept. 1982).

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

September 3, 1983

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN Bill Baxter for MMU

SUBJECT: Situation Report on Tuition Tax Credits

1. Our plan of action was (1) to let political pressure build on Bradley and on Moynihan over the recess to soften them up; (2) to develop an "alternative" to Bradley's amendments which would be some minimal adjustments to our original proposal; and (3) to get Dole, Packwood,, and Moynihan to offer the alternative, which Bradley would hopefully be receptive to after two weeks of grassroots pressure.

2. During the recess, it was agreed by Dole's staff, Packwood's staff, coalition representatives, and us that, in developing the alternative, we would stick firmly with our basic approach of DOJ enforcement and that we would not bring IRS into it as desired by Bradley. It was the assessment of Dole's staff and Packwood's staff that if we made DOJ enforcement "tough enough" we stood a good chance of getting Bradley to back off his insistence on IRS enforcement. Dole's staff and Packwood's staff have been pressing us very hard to go beyond "window dressing" and to make fundamental changes to our original enforcement scheme. Their position is that if we do not make fundamental changes, we stand no chance of heading off Bradley.

3. Senator Dole wants to have us meet with Moynihan and Bradley no later than this next Wednesday, September 8, to unveil our alternative.

4. The Alternative Approach Under Consideration: Developing a compromise has been difficult, made more so by the fact that many of the principals have been on vacation. Based on our negotiations so far with the coalition, Packwood's staff, and Dole's staff, it looks as if an approach along the following lines could be acceptable. (Discussions have centered on principles rather than actual language; over the weekend we will be drafting language along the lines suggested here.) We are thinking of offering the following alternative:

   a. The Attorney General would be "authorized and directed" to bring declaratory judgment actions against schools that discriminated. Unlike the present bill, no petition would be required to trigger the Attorney General's suit. (For bargaining

purposes, we may start with the position that a petition is still required but can be filed by anybody as long as it is related to a specific victim. But we believe we could trade-off this petition requirement altogether if we get what we want in "b" below.)

b. The existing bill authorizes suits to establish that a specific act of discrimination has occurred pursuant to a discriminatory policy. Dole's and Packwood's staffers would like us to abandon the requirement of a specific act of discrimination altogether and permit suits if a school is "following a discriminatory policy". The approach we are thinking of is to permit the Attorney General to bring suit if he determines either (i) that a person has been discriminated against pursuant to a policy or (ii) that a school has declared or otherwise expressed a discriminatory policy. The Attorney General would be required to show one or the other of these to cut off credits.

c. The current bill cuts-off credits for 3 years if final judgment is against the school. We would like to propose that the penalty period now run indefinitely but that the school could (after a minimum period like 1 or 2 years) file a motion with the court to reestablish eligibility. The school would have to show that it met certain objective criteria (e.g., that it formally rescinded any declared policy; that it undertook remedial advertising of its new non-discriminatory policy; that it has filed an affidavit detailing the steps it has taken to stop the policy). Once the school has made this threshold showing, the court would be required to reestablish eligibility unless the Attorney General came in and showed an actual instance of discrimination within the preceding 1 or 2 years.

d. The present bill would not permit disallowance of credits until after the final appeal. Under the alternative, disallowances would occur as soon as the district court judgment was entered unless the school obtained a stay.

e. We think there is one pro-school change that should be made if we make the above concessions. Under the present bill, after final judgment credits are disallowed retroactively to the year in which the complaint was filed by the Attorney General. This meant that the really decisive event would be the filing of a complaint, because that immediately put credits at risk. In many cases, the mere filing of a

complaint against the school could drive the school out of existence. We felt we could take this severe position because the original bill provided safeguards against DOJ abuse -- namely, the petition requirement, the three-year maximum penalty term, the exhaustion of appeal requirement. Because we would be relinquishing these safeguards, we think the penalty should be prospective from the date of the district court judgment. There are elements in the coalition that would not accept the alternative unless we provided this protection. It is unclear whether Bradley would view this change as a "step backward".

5. Recommended Action:

a. Tuesday (September 7): Complete coordination of alternatives within Administration and with coalition.

b. Wednesday: Meet first with Packwood and Moynihan and, then, with Bradley to see if agreement can be reached on the alternative.

c. Thursday: If Bradley does not agree to our compromise, spend Thursday trying to muster enough votes to beat back Bradley in committee.

d. Friday: If Bradley compromises or we can beat him, go ahead with mark-up.