

KIRKLAND & ELLIS

THE PUBLIC HEALTH COMPENSATION ISSUE

An important issue facing the chemical industry is the compensation of injury allegedly resulting from exposure to hazardous substances. From several different directions we are hearing that the existing tort law system is inadequate when dealing with such substances and that new approaches are needed to compensate injured persons.

Manville Corporation's recent bankruptcy filing under Chapter XI dramatizes the reality that the very existence of a major corporation may be threatened by tort litigation over diseases arising out of exposure to toxic substances many years ago. The experiences of Manville and her sister companies in the asbestos industry may turn out to be unique. Nonetheless, they serve to focus attention on environmental and occupational diseases, lend credence to arguments that such diseases are reaching epidemic proportions, and prompt calls for a federal legislative solution.

The most frequently discussed legislative approach is the establishment of a fund financed by industry (usually the oil and chemical industries) to compensate environmental and occupational disease victims. This idea is not new -- the petrochemical industries narrowly escaped inclusion of a personal injury compensation formula in the Superfund

legislation passed in 1980.^{1/} But the pressures today for Congressional adoption of such a measure remain very strong.

For example, in July 1982, a twelve-member committee of distinguished attorneys and legal scholars, appointed by the Attorney General under Section 301 of Superfund, recommended legislation establishing an oil and chemical industry-financed fund to compensate persons exposed to hazardous substances from waste sites around the country.^{2/} Meanwhile, influential senators and representatives, as well as the asbestos industry, are developing bills for introduction in the 98th Congress to establish a framework to compensate not only victims of asbestos disease but also persons claiming to suffer illness from occupational exposure to any toxic substance.^{3/}

Unless affected companies and industry groups organize soon, it will be too late to influence effectively the course of such legislation. Accordingly, the purpose of this paper is to examine in somewhat greater detail the

1/ Compensation for personal injuries was provided in Section 4 of S.1480 (the original Senate bill) but was dropped in the compromise legislation enacted in December 1980.

2/ Superfund § 301(e) Study Group, "Injuries and Damages from Hazardous Wastes -- Analysis and Improvement of Legal Remedies: A Report to Congress in Compliance with § 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510, December 11, 1980)," (July 1, 1982).

3/ Asbestos Compensation Coalition, Draft of "Occupational Disease Compensation Act," (July 1982); "Occupational Health Hazards Compensation Act of 1982," H.R. 5735, 97th Cong., 2d Sess. (introduced March 4, 1982).

various currents that may merge into a river of support for federal compensation legislation in the next Congress.

The Impetus for Compensation Legislation

Two driving forces are behind efforts to enact federal compensation legislation. The first is the vast proliferation of toxic substances litigation in recent years. The second is the widespread perception that thousands, even millions, of persons are being harmed annually by toxic substances. Because these two forces strike a responsive chord among a wide variety of diverse interest groups, it is possible, even likely, that a broad coalition in favor of a federal solution may develop during the next Congress.

No one doubts the magnitude of the recent explosion in toxic substances litigation. Approximately 20,000 plaintiffs have filed (and an additional 32,000 are expected to file) suit against Manville Corporation alone.^{4/} Nearly as many plaintiffs are in the class action pending against manufacturers of Agent Orange used in the Viet Nam War.^{5/} In less than two years, more than 400 cases have been filed against

^{4/} Wall Street Journal, Aug. 27, 1982, at 1. See also, "Asbestos Legal 'Tidal Wave' Is Closing In," 68 ABA J. 397 (1982).

^{5/} In re "Agent Orange" Product Liability Litigation, 635 F.2d 987 (2d Cir. 1980), rev'g 506 F. Supp. 737 (E.D.N.Y. 1979).

manufacturers of super-absorbent tampons.^{6/} Additional, as yet less extensive, litigation has been initiated by persons exposed to benzene, formaldehyde, dioxin, PCBs, DBCP, and vinyl chloride.^{7/} These lawsuits often are premised on principles derived from the extensive litigation over DES, which, although a prescription drug, nonetheless raises many of the same legal and policy issues.^{8/}

This explosion of toxic substance products liability litigation is unlikely to abate anytime soon. The plaintiffs personal injury bar has moved heavily into toxic substance litigation following the passage of "no fault" automobile injury legislation, which deprived it of some of its previous caseload. Expecting the wave of asbestos litigation to crest soon, leaders of the plaintiffs bar are already predicting new litigation waves involving other substances.^{9/} With traditional tort law principles continuing to deteriorate,

6/ "Toxic Shock Syndrome: The First Test," National Law Journal, March 29, 1982, at 6.

7/ See generally, Rheingold and Jacobson, "The Toxic Tort Cause of Action," 1, in Rheingold, et al., Toxic Torts (1977); see also, "Formaldehyde Suits Erupt," National Law Journal, May 10, 1982, at 1.

8/ See, e.g., "Market Share Liability: An Answer to the DES Causation Problem," 94 Harv. L. Rev. 668 (1981); Bichler v. Eli Lilly and Co., N.Y. Ct. of Appeals No. 244 (May 11, 1982).

9/ See, e.g., S.J. Levy, "Toxic Tort Litigation -- A Plaintiff's Perspective," in ALI-ABA Course of Study Occupational Disease Litigation: Problems and Proposed Solutions (Feb. 5-6, 1982).

such litigation can produce enormous verdicts for little or no injury as evidenced by the \$58 million award recently given to 47 workers exposed to dioxin during a chemical spill in Sturgeon, Missouri.^{10/}

The new "growth" area for the plaintiffs bar is the environmental tort for which the plaintiff group extends beyond the workplace to the general public and in which damages may be sought, not for present injuries, but for expected future injuries and the costs of abatement actions to mitigate such injuries. The success of this new trend will depend upon diluting traditional causation requirements and substituting instead the looser concepts of association between exposure and disease (including the no-threshold theory) that underlay federal environmental and occupational health standards. The plaintiffs bar is already providing financial support to experienced, former government environmental attorneys to establish favorable precedents in this area.^{11/}

^{10/} Washington Post, Sept. 10, 1982, at A8.

^{11/} The American Trial Lawyers Association has funded the initiation of a group called "Trial Lawyers for Public Justice," headed by Anthony Z. Roisman, former chief litigator for the hazardous waste task force at the Department of Justice. Among the group's first actions was a complaint filed May 18, 1982, in state court in Massachusetts seeking compensation and other relief on behalf of families of childhood leukemia victims whose disease was allegedly caused by toxic substance groundwater contamination in Woburn, Massachusetts.

The other driving force toward a federal solution, ironically, comes from those persons who are concerned that the product liability trend will not go far enough in the direction of compensating victims of toxic substance exposures. Environmental groups, labor unions, and a significant portion of academia believe that a large number of persons will be diseased, but are unlikely to obtain compensation under current legal schemes including product liability suits.^{12/} The Superfund section 301 Report is premised on just such a belief.^{13/} The premise that there are millions of persons being injured by toxic substance exposures cannot withstand serious scientific scrutiny.^{14/} Nonetheless, the prevalence and intensity of belief in this premise is a force to be reckoned with in upcoming Congressional debates.

Under these circumstances, the interests of a variety of widely diverse groups may converge in support of federal compensation legislation during the 98th Congress. Environmentalists and their allies, spurned in the original Superfund

^{12/} See, e.g., Congressional Research Service, "Six Case Studies of Compensation for Toxic Substances Pollution," (June 1980); G. Milhollin, "Long-Term Liability for Environmental Harm," 41 U. Pitt. L. Rev. 1 (1979); S.M. Soble, "A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act." 14 Harv. J. Leg. 682 (1977); Note, "Compensating Victims of Occupational Disease," 98 Harv. L. Rev. 916 (1980).

^{13/} § 301(e) Study Group, supra note 2, at 115-17.

^{14/} See, e.g., R. Doll and R. Peto, "The Causes of Cancer Quantitative Estimates of Avoidable Risks of Cancer in the United States Today," 66 J. NCI 1191 (1981).

legislation, still wish to expand Superfund's coverage to include personal injury and disease.^{15/} The asbestos industry desperately needs an alternative to financially debilitating tort litigation. Labor leaders and their Congressional supporters hope to open the door to a federal workers' compensation scheme. Promoters of federal health care programs envision a federal compensation formula complementary to their long-run objectives. And, influential voices in the media, academia and elsewhere deplore the inefficiencies and high transaction costs of the present system where less than one dollar in three goes to compensate diseased persons.^{16/}

The various compensation bills introduced in the last three Congressional sessions have been haunted by the runaway costs experienced by the Black Lung Act and the specter of increased federal budget deficits.^{17/} But, with the exception of the bill in preparation by the Asbestos Coalition (which would provide 50% funding from the federal government to

^{15/} See, e.g., "Toxic Ills 'No-Fault' Plan Urged," Washington Post, August 13, 1982, at C9.

^{16/} See, e.g., editorials in the Washington Post, "The Manville Bankruptcy," Aug. 29, 1982, at C6; New York Times, "Two Tales of Poison, How to End the Asbestos Nightmare," Aug. 27, 1982, at A22.

^{17/} The General Accounting Office's, "Black Lung Report," (July 28, 1980), found that 88.5% of randomly selected medical claim approvals were not based on adequate evidence. "Legislation Allows Black Living Benefits to be Awarded without Adequate Evidence of Disability," GAO Report No. H.R.D. 80-81.

reflect its responsibility for asbestos disease victims),^{18/} other compensation bills likely to be introduced in the next Congress would be funded entirely by industry. For example, the Superfund section 301 report envisions legislation providing up to \$2,000 per month from an industry-financed fund to persons whose disease is associated with hazardous waste exposure according to presumptions established in "toxic substance information documents" to be issued by EPA.^{19/} Essentially the same sort of scheme is contemplated for the victims of occupational disease in legislation slated to be reintroduced by Congressman Miller and others next year.^{20/}

To be sure, even before the recent explosion of toxic substance products liability litigation, defense attorneys and legal scholars identified erosion of traditional tort law principles as the cause of liberal verdicts and a proliferation of new cases in the product safety area. This recognition led to a products liability tort reform movement exemplified on the federal level by the bill developed by Senator Kasten.^{21/} The Kasten Bill contains a number of

^{18/} See footnote 3; see also New York Times, Sept. 18, 1982, Business Page 1.

^{19/} § 301(e) Study Group, supra note 2, at 191-240.

^{20/} See n.3, supra.

^{21/} S.2631, 97th Cong., 2d Sess. (introduced June 16, 1982).

provisions that would be of benefit to the chemical industry. However, supporters of the Kasten bill are not organized to address, nor have they tried to address, the special problems posed by toxic substance litigation or the various compensation bills likely to be considered by Congress.

Toxic substance cases often involve issues which differ significantly from the product safety issues that initially gave rise to the tort reform movement. Causation, for example, is a far more critical issue in occupational disease cases (where exposures occurred long ago and the scientific evidence is uncertain) than in the typical defective or unsafe product case. Similarly, long latency periods between exposure and disease make "state-of-the-art" defenses much more difficult to develop and prove. Moreover, defenses such as compliance with government standards, while potentially of great utility in pharmaceutical and auto and other safety cases, may be of limited value for years to come in toxic substance cases where exposures typically cannot be quantified and, in any event, occurred long before the advent of federal health standards.

Furthermore, although tort reform may be of significance on issues such as punitive damages, the asbestos industry is committed to replacing rather than repairing the tort system. Neither labor nor health care advocates will advance their cause through tort reform legislation. And if anything, tort reform favorable to industry would exacerbate environmentalists'

concerns that tort remedies are inadequate and that there exists a large pool of uncompensated victims awaiting redress for their injuries.^{22/} Finally, given the emotion and political pressures surrounding toxic substance issues, it is entirely possible that concessions will be made in areas most directly affecting toxic torts in order to enhance the chances of passage of a bill that would provide relief in less controversial, safety-related product liability cases.

For all of these reasons, CMA can best assist the chemical industry by providing at an early date a unified and authoritative response to the various legal and other issues posed by toxic compensation legislative proposals.

This project will require time, the application of careful judgment and the devotion of considerable industry resources. But unless it is begun soon, the chemical industry will be able to do nothing but react -- and eventually be overtaken by events beyond their control. For inevitably, some time during the next Congressional session, the disparate interest groups favoring compensation legislation will settle most of their differences, and begin working toward a compromise position that may be highly adverse to oil, chemical and other affected industries.

^{22/} This concern is symbolized by the Section 301 report which suggests both an elaborate compensation mechanism and various changes in tort law rules applicable to environmental disease cases.