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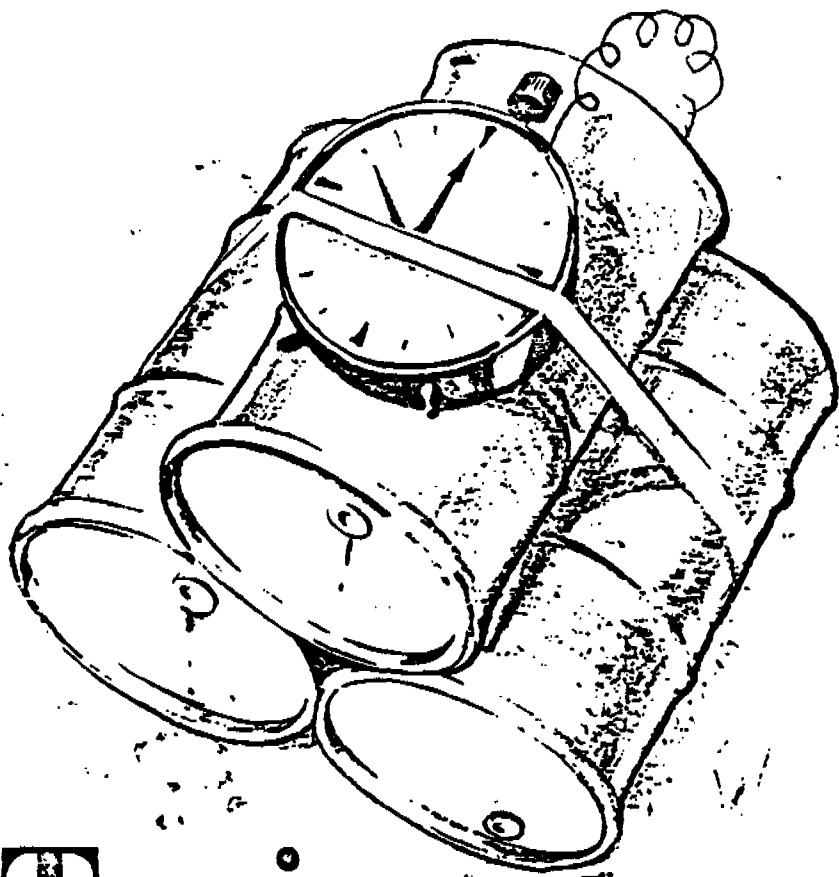
Lawsuits relating to "latent" diseases—those appearing several years after initial exposure to toxic substances—will dominate tort law in the 1980s, lawyers say.

"We are just in the legal infancy of answering the questions" of who should pay for the growing number of medical problems of persons exposed to the chemical by-products of industrialized society, said Professor Sheila Birnbaum of the New York University School of Law. "It is impossible to predict the future."

Some lawyers and insurance industry representatives predict that latent disease suits may shake the foundations of U.S. tort law, threaten the financial health of insurance companies and some industries, and contribute to the nation's economic problems. "The goose that lays the golden egg may be killed because there is just not enough money to go around," warned William Bailey, chairman of the Task Force on Cumulative Trauma and Latent Injury. The task force was formed recently by the American Insurance Association in New York City. "The [tort] system could well grind to a halt by 1984; we had better start thinking about alternatives," said Bailey, senior vice president of Commercial Union Assurance Companies in Boston.

Lawyers cite a combination of factors bringing the problem to a head. Medical science only in recent years has identified links between toxic substances and diseases that give plaintiff lawyers the grounds to bring suits, said Del Haralson, a Tucson plaintiff lawyer who has brought suits relating to radiation injuries. Others share Bailey's view that plaintiff lawyers also have succeeded in pushing for judicial acceptance of strict liability theories in latent disease suits. Also, courts often have adopted a "deep pockets" policy of basing liability not on who caused injuries but on who is best able to pay for them, Bailey added.

Another factor, lawyers said, is the sheer size of the problem. For example, Bailey said, about 25,000 suits seeking damages for exposure to asbestos had



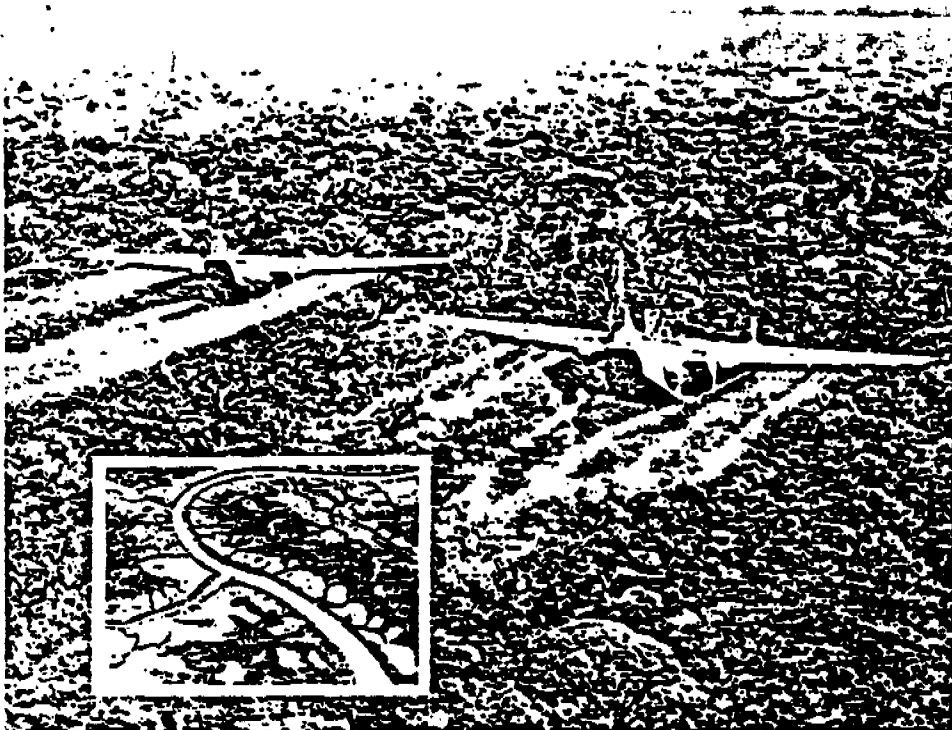
Toxic Time Bombs

Say Latent Disease Suits Will Be Key Battleground in '80s

been filed through 1980. Those damages could exceed \$100 billion. Those suits may be "just the tip of the iceberg compared with the people who may make claims in the 1980s and '90s," Bailey added.

In *In re "Agent Orange" Product Liability Litigation* (MDL 381), the U.S. District Court for the Eastern District of

New York, recently certified all Vietnam War veterans, their families and survivors as potential plaintiffs in the class action suit against manufacturers of the herbicide used as a defoliant in the war. The number of plaintiffs could reach 50,000, Victor Yannacone of Patchogue, New York, the lead plaintiff attorney estimated. More than 1,000



Two C-123s of the 12th Air Commando Squadron fly low over a South Vietnam jungle in 1966 spraying defoliation liquid. The spray, sometimes called Agent Orange or dioxin, was used as a tactical weapon to defoliate Viet Cong base areas, crops and communications routes. A class-action suit has been filed on behalf of the thousands of Vietnam veterans who claim injury caused by exposure to the spray. (Inset) 1970 photo of forest sprayed in 1965.

suits have been filed concerning DES, a drug that many women took in the 1950s. DES allegedly causes cancer in their daughters. More suits are being filed against the federal government for injuries allegedly caused by atomic testing in the 1950s.

Diseases allegedly related to exposure to toxic materials in industrial waste dumps, reflected in the experience of residents of the Love Canal area in Niagara Falls, New York, may be the basis of the next major round of suits, lawyers predict. Pointing to growing evidence that toxic wastes dumped throughout the nation may be injurious to nearby residents, lawyers suggest that the flood of latent disease suits is just starting. "Certain toxicants in widespread use since World War II are potential ticking toxic time bombs," said Yannacone.

Lawyers also agree that the tort system is being forced to develop new ways to deal with illnesses that are not diagnosed until years after exposure to the substances that allegedly caused them. Latent disease cases differ from traditional torts in which "people always know the party that injured them and when the injury occurred," said Paul Rheingold of New York City, who has

lectured widely on product liability matters. The legal problems are further complicated, said professor Thomas Lambert of Suffolk Law School in Boston, by Federal Tort Claims Act prohibitions against suing the federal government and workmen's compensation law prohibitions against suing employers. These factors cause plaintiffs to focus on product manufacturers, which often results in problems in identifying defendants. "The tort system is going to expand in ways that were not indicated a few years ago," said Dennis Connolly, senior counsel for the American Insurance Association.

A landmark example of this expansion is the California Supreme Court's recent ruling in *Sindell v. Abbott et al* (607 P. 2d 924). The court applied the new theory of "market share liability," under which several firms producing the same product are liable in proportion to their share of a product market when the manufacturer whose product caused injury cannot be identified. (See "DES Ruling Shakes Products Liability Field," *LawScope*, July 1980, p. 827.)

The U.S. Supreme Court has denied certiorari in *Sindell*, and similarly, an attempt by the California General Assem-



Chris James, 33, of Wichita Falls, Texas, with his wife Terry, is convinced that his life has been permanently scarred by the effects of a defoliant with which he was sprayed in South Vietnam in 1968. His wife has had two miscarriages, and three children were born prematurely. Only two survived, and they have birth defects.

bly to overturn it also failed. Sheila Birnbaum of New York University predicts that it will take several years to resolve the issues raised by *Sindell* as similar suits wind through other courts. The *Sindell* theory already has been raised in suits in New Jersey and Texas, Bailey said. In *Abel v. Eli Lilly and Company* (289 N.W. 2d 20), the Michigan Court of Appeals last year ruled, in a DES case, that firms marketing the same product are jointly liable. Charles Nichols of Detroit, a plaintiff co-counsel, suggested that *Abel* shows that such suits can be based successfully on existing law.

Although *Sindell* generally favors plaintiffs, defendant asbestos manufacturers in several California suits may receive the first major benefits of the ruling, Bailey said. Citing evidence of a link between asbestos injuries and cigarette smoking in asbestos workers, he said that asbestos manufacturers recently filed cross-complaints against the nation's major tobacco companies for a percentage of damages. Under *Sindell*, Bailey said, it must no longer be proved "whether a worker smoked Camels or Luckies. Apply *Sindell* to every potential [asbestos] claimant and the tobacco industry has one big, big problem."

An October ruling by the Sixth Circuit in Cincinnati could have widespread impact on the issue of who should cover



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liability, lawyers said. In *Insurance Co. of North America v. Forty-Eight Insulations, Inc.* (No. 78-1322-26), the Court of Appeals affirmed a ruling by the U.S. District Court in Detroit that applied an "exposure" theory of liability requiring several insurance companies covering the asbestos product manufacturer between 1923 and 1970 to share liability coverage for asbestos-induced diseases in proportion to the length of time that each insurer served the manufacturer. INA had argued for a "manifestation" theory under which only the insurance company at the time employees learned they had contracted asbestosis should provide liability coverage.

The manifestation theory would put manufacturers, virtually uninsured against potentially massive claims filed in the past few years, out of business "and leave plaintiffs without recovery," said defense lawyer Frederick Baron of Dallas. Robert Bissell, an attorney for Celotex Corporation, a Tampa, Florida, asbestos products manufacturer, noted that most insurers already have withdrawn from that area under the onslaught of suits.

Insurers warn that their industry is threatened by *Forty-Eight Insulations*. Bailey said, "There is no way you can underwrite insurance based on an exposure theory." He said, "The only serious proponents of the exposure theory are asbestos manufacturers and insurers who could lose more under the manifestation theory."

Other federal circuits are expected soon to rule on the issue in other suits, said insurance industry representatives



Baron: The *Forty-Eight Insulations* case will benefit both plaintiffs and manufacturers.

and lawyers. If the rulings conflict, the Supreme Court may have to step in, they said.

The federal government's role is a key unsettled factor in latent disease suits. Leonard Rivkin of Garden City, New York, national trial counsel for the Dow Chemical Company in Agent Orange suits, said that while the government is generally protected against suits by the Federal Tort Claims Act, "More and more courts are trying to carve out ways for plaintiffs to cause the government to be a party" in latent disease suits. Rivkin and James Ries, director of asbestos policy for the Johns-Manville Corporation in Denver, the nation's largest asbestos products manufacturer, said that industry also questions whether it should be liable for injuries related to products made and used under government direction, such as Agent Orange and some asbestos products.

In *In re "Agent Orange"*, the court provided some answer to that question, Rivkin said. It dismissed the government and allowed defendant manufacturers to claim, in proceedings expected to start in the fall, a "government contractor's defense" that would free them from liability if they show that they manufactured Agent Orange according to government specifications. The defense could have wide impact in other cases in which manufacturers argue that they met government standards in dealing with toxic substances, Rivkin said. Industry must meet such standards, Rivkin said, add-

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Rheingold: Legislation may check court rulings favoring those who sue.

ing. "For gosh sakes, give us a defense if we complied." But Victor Yannacone said, "The last group claiming that [defense] was hung collectively. They were called the Nuremberg defendants."

Tort lawyers generally agree that recent rulings raise questions about how—and whether—the tort system should be used to deal with latent disease suits. Some lawyers suggested that latent disease suits are pushing the tort system beyond its limits. The system "works well on a one-to-one or even a larger basis," said Dennis Connolly of the American Insurance Association, "but it works badly when there are two million against 300." Bailey warned, "You see a tort system being totally clogged in the courts" and a cost to industry and insurers that is "potentially disastrous." Ries of Johns-Manville predicted that the eventual impact would be an increase in the cost of doing business that "would have an adverse effect on our economy." Others say corporate defendants and their insurers may be financially unable to fully compensate plaintiffs, a problem cited in the Agent Orange litigation.

Suffolk Law School's Lambert, however, questioned whether industry is threatened by latent disease suits. "Who is trying to sell a drug company?" Lambert asked. "How many have become insolvent? Where are all the victims of strict liability?"

Yannacone said there are ways to fully

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compensate the entire class of plaintiffs without draining the resources of defendants. For example, he said, plaintiffs in the Agent Orange litigation are seeking a decree requiring defendants to establish a trust fund out of current earnings as a reserve against claims.

There is general agreement with Paul Rheingold's prediction that efforts will be made to offset, through legislation, recent court decisions favoring plaintiffs. Such efforts are already underway in Congress. A spokesman for Sen. Gary Hart (D-Colorado) said that Hart plans this year to reintroduce the Asbestos Health Hazards Compensation Act, which would establish a pool funded by industry and the federal government to compensate asbestosis victims. The bill would also prohibit damage suits by asbestosis victims. Although insurers and industry generally favor such legislation, there are barriers to passage, warned Bailey, who said that Hart's bill was perceived in the last session "as too much of an effort to bail out Johns-Manville. The real scope of the social problem must be presented to avoid that type of political problem."

—James Podgers

A Love Canal area resident protests. Toxic waste dumping sites: the next lawsuit battleground?

