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* OHIO BAR ONLY

March 26, 1981

Reg. Aff. - Wash., HS&ES
Washington, D.C. Office
Rec'd
MAR 30 1981
MH 2
ELH 3
File:

To: SPI-Public Affairs Committee
SPI-Food, Drug & Cosmetic Packaging Materials Committee
SPI-PVC Safety Committee
SPI-RP/C Institute Executive Committee
SPI-AN Polymers Group

Re: Review of Proposed and Existing Regulations

Ladies and Gentlemen:

Yesterday afternoon, Vice President Bush, as head of the Presidential Task Force on Regulatory Relief, identified proposed and existing regulations that would be reviewed under the provisions of a Presidential Order issued last month. A list of the regulations of greatest concern to us, and a brief explanation of the analysis that a regulation faces under the new Executive Order follow.

The Occupational Safety and Health Administration's (OSHA) Cancer Policy will be reevaluated because it rejected cost/benefit analysis. Amendments to the Cancer Policy published in January, 1981, will be withdrawn on March 27, 1981. OSHA's Occupational Noise Standard, published on January 16, 1981, will be reviewed. The Agency will withdraw the walk-around pay proposal, on the basis that a rule is unnecessary because most employers already compensate employees for accompanying OSHA officials during inspections, and, in those instances where employees are not compensated, the problem would be best settled through collective bargaining. I might also mention that the previously withdrawn OSHA labeling regulation is undergoing similar reevaluation at this time.

SCC
5-1588

Regulation of hazardous waste under the Resource Conservation and Recovery Act (RCRA) by the Environmental Protection Agency (EPA) will be reviewed because EPA has never completed a thorough regulatory and economic analysis of the program. Major issues identified for reconsideration include the comprehensive definition of hazardous waste, and the limited extent that the rules vary program requirements based on the degree of hazard presented by the waste. A more certain estimate of the financial resources required of the private sector to meet the requirements imposed by the program will also be developed.

Proposed amendments to EPA's general pretreatment standards for controlling industrial discharges into municipal waste systems issued in January, 1981, will be postponed pending further examination. EPA's effluent guidelines under the 1977 amendments to the Clean Water Act will also be subject to critical evaluation. Recent analysis indicates that the methodology EPA employed to determine the economic reasonableness of more stringent controls for industrial discharges may be incorrect. EPA is reexamining its benchmark cost determination to ascertain whether a lower cost figure would meet the requirements of law, and, thus, result in substantial savings to industrial dischargers of conventional (non-toxic) pollutants.

Another postponed rule that may be of interest is the Department of Commerce rules for federal interaction with voluntary standard setting organizations, with whom you may participate through SPI. The Commerce Department proposals were published at 46 Fed. Reg. 1574.

We have only attempted to list the regulations we thought would be of the most interest to you, but the rules designated for review range from cost sharing on university research to listing the Hawaiian Tree Snail and Todsens Pennyroyal plant as endangered species. Unfortunately, some of the rules or proposals that we would like to see on the list were not present. Nonetheless, we are hopeful that after this group of regulations is considered, other regulations will be subjected to the same analysis.

It is quite important that these regulations will all be reviewed under the standards set forth in Executive Order 12291 issued by President Reagan on February 17, 1981. The Executive Order, which is outlined below, is significant because any new regulation or proposal, must be evaluated under the terms of the Executive Order, whether it is the Food and Drug Administration's constituent policy, new EPA regulations for acrylonitrile, or revisions to EPA's vinyl chloride standard.

In general, Executive Order 12291 (46 Fed. Reg. 13193) requires that regulatory action not be taken unless the potential benefits outweigh potential costs to society. Regulatory objectives must be chosen to maximize the net benefits, and the agency must select the proposal involving the least net cost. For each major rule that an agency considers, it must prepare a Regulatory Impact Analysis (RIA) addressing these subjects. The RIA, along with a draft notice of proposed rulemaking, must be submitted to the Office of Management and Budget (OMB) at least 60 days prior to publication. A final RIA and draft rule is to be delivered to OMB at least 30 days prior to publication as a final rule.

While the Executive Order does not give OMB direct authority to alter the substance of a rule or preclude its publication, it is plain that OMB's position as a regulatory clearinghouse has been firmly established. Moreover, this newly explicit OMB authority also creates another forum in which to present our views concerning the propriety of various regulatory proposals. Given the present orientation of OMB personnel, we anticipate that they will be receptive to arguments dealing with the technological and economic feasibility of regulations, and will be willing to limit the federal presence to situations where it is warranted if agency personnel prove unreceptive.

During his press conference yesterday, Vice President Bush asked for public comment on the regulations or proposals now under review. If you wish to comment, a suggested format is described in the attached letter by Vice President Bush. While this particular letter was addressed to small business groups, it should serve as a guide for all of us. It is our understanding that the Administration was particularly interested in comments addressing the costs and benefits involved, and suggestions for regulatory alternatives. We would be happy to assist in preparing or submitting comments if you deem it appropriate.

If you have any questions or comments, please feel free to contact us.

Cordially yours,

Jerome H. Heckman

Jerome H. Heckman

Enclosure

cc: Mr. Thomas J. McGrath

SCC
5-1590

THE VICE PRESIDENT

WASHINGTON

March 25, 1981

SPECIMEN OF LETTER SENT TO SMALL BUSINESS GROUPS

Dear

As you may know, President Reagan has asked me to chair his Cabinet-level Task Force on Regulatory Relief. Unlike many efforts in the past, the Task Force's job is not to study regulation, but to reform regulation.

We need your participation in this effort. Secretary of Commerce Malcolm Baldrige is a member of our Task Force and will serve as the Task Force's principal contact with the small business community. I hope you will work with Mr. Baldrige to provide us with much-needed information.

Your organization is comprised of many people who have direct experience with the effects of government regulation. Therefore, would you please send us documentation of instances in which specific regulations could be changed in order to increase benefits or decrease costs, thereby generating greater net benefits overall.

We would like to have your first ten priority issues listed first. In the interest of time, it would be especially useful to us if you would be specific in the ways you wish these changed -- whether legislation would be required; whether agencies could make the change on their own initiative and how; and any other staff work that would speed up the process, such as proposed language. It is also important that you include with this report a one-page summary of each regulation issue in the format indicated on the enclosed sheet. (We know that some groups have already submitted similar reports to the Task Force and the agencies. For such reports, it would be sufficient simply to prepare the one-page summaries, including reference to the recipient of the underlying material so that we can ensure coordination.)

SCC
5-1591

We'd like your input by May 1, 1981. You should send this summary, together with supporting documentation, to the agency head responsible for enforcement of the regulation. To help us coordinate, we'd like you to send a copy of the one-page summaries to Mr. Baldrige, to the Executive Director of the Task Force and to my office.

I appreciate your consideration on this matter. Together we can provide the regulatory relief our economy desperately needs.

Sincerely,

George Bush

Enclosure

SCC
5-1592

Suggested Format of One-Page Summary of Review Requests

| | |
|---|---|
| Source of Rule: | (Agency enforcing the regulation |
| Citation: | (Precise legal reference) |
| Description of Problems: | (Adverse impact) |
| Estimated Cost: | (Defensible estimate) |
| Estimated Benefit: | (Defensible estimate) |
| Other Impact: | (Nonquantifiable impacts) |
| Originator: | (Name, title, address and telephone number of the person to contact with questions) |

Routing:

Original, with supporting documentation, to the Secretary or head of the enforcing agency.

A copy of the summary page to each of the following:

The Honorable Malcolm Baldrige
Secretary of Commerce
Washington, D.C. 20230
Attn: Regulatory Relief

Dr. James C. Miller III
Executive Director, Presidential Task Force on Regulatory Relief
Old Executive Office Building
Washington, D.C. 20503
Attn: Regulatory Relief

C. Boyden Gray, Esquire
Office of the Vice President
Washington, D.C. 20501
Attn: Regulatory Relief

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 79-2194 and 79-2567

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HOOKER CHEMICAL COMPANY, RUCO DIVISION,
*Petitioner* in 79-2194

*v.*

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION II,
*Respondent* in 79-2194

TENNECO CHEMICALS, INC.,
Park 80 Plaza West-1,
Saddle Brook, New Jersey 07662,
*Petitioner* in 79-2567

*v.*

ECKARDT C. BECK, Regional Administrator, United States Environmental Protection Agency, Region II, 26 Federal Plaza, New York, New York 10007; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 401 M Street S.W., Washington, D.C. 20450,
*Respondent* in 79-2567

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ON PETITION FOR REVIEW OF ADMINISTRATIVE ORDERS
ISSUED BY THE ENVIRONMENTAL PROTECTION AGENCY
ON JULY 2, 1979

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Argued November 3, 1980

Before: GIBBONS and WEIS, *Circuit Judges* and
BECHTLE, *District Judge*.*

(Opinion Filed February 23, 1981)

---

* Honorable Louis Charles Bechtle, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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## *OPINION OF THE COURT*

WEIS, *Circuit Judge.*

The EPA issued orders against several chemical companies stating that they had discharged vinyl chloride in violation of regulations and directing compliance in the future. After the Hooker Chemical Company and Tenneco Chemicals, Inc. filed petitions for review, the agency withdrew the orders against those two companies, but reserved the right to take further enforcement action with respect to the emissions. The EPA then contended that the case had become moot. We reject that contention, but decline review because the matter is not ripe for adjudication.

Over a period of time beginning in January 1977 and extending through May 16, 1979, a number of relief valve discharges of vinyl chloride occurred at the Hooker Chemical Company plant in Burlington, New Jersey. This information was reported to the appropriate regional office of the EPA in accordance with the relevant regulation, 40 C.F.R. §61.65(a) (1979). Finding that the discharges had violated §112 of the Clean Air Act, 42 U.S.C. §7412 (Supp. I 1977), Region II of the EPA issued an "order" on July 2, 1979. The order directed Hooker to take steps necessary to prevent further violations, and to comply with the provisions of 40 C.F.R. §61.65(a), which prohibit vinyl chloride emissions in nonemergency situations.[1]

Accompanying the order was a letter signed by the Acting Director of the Enforcement Division in Region

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1. *The regulation provides, in pertinent part:*

(a) Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any *equipment in vinyl chloride service. An emergency relief* discharge means a discharge which could not have been avoided by taking measures to prevent the discharge.

40 C.F.R. §61.65(a).

II based in New York City. After quoting the regulation, the letter stated in part:

> "EPA construes the exception for emergency relief discharges narrowly. . . . [T]o be considered an emergency, a source must demonstrate that it could not reasonably have been expected to anticipate the discharge and then to prevent it or contain it. As a *minimum*, the source must demonstrate that the discharge could not have been prevented by implementing any of the following procedures."

The letter then listed such matters as employee training programs, proper inspections and maintenance, proper design and operation of process and control equipment, and installation and operation of all control equipment, which should be utilized to ensure compliance with the vinyl chloride standard.

The letter went on to advise: "The preamble to the proposed vinyl chloride standard [also] lists several measures a [facility] can reasonably be expected to take to prevent relief valve discharge. *See* 40 Fed. Reg. 59539 (December 24, 1975). These measures include, but are not limited to, venting vinyl chloride discharges to a gas holder during upset conditions and ultimately to a recovery system."

On August 30, 1979, Hooker petitioned this court for review of the EPA's order, and on October 5, the Acting Regional Administrator, referring to the order of July 2, 1976, notified Hooker that "[t]he above referenced order is hereby withdrawn." The withdrawal was accompanied by a letter from the Regional Director of the Enforcement Division, stating in part:

> "EPA has no intention to seek judicial relief against Hooker for possible violations of this Order prior to the time of its withdrawal. However, in no event should this withdrawal be construed to relieve Hooker of liability for violations of the underlying

SCC
5-1600



> regulatory provisions set forth at 40 CFR §61.65(a). In fact, it is EPA's continuing belief that Hooker has violated the requirements of 40 CFR §61.65(a). EPA will take appropriate enforcement measures necessary to remedy any such violations which have occurred at the referenced polyvinyl chloride plant."

Tenneco Chemicals received two similar orders and later withdrawals from the same regional office of the EPA. Tenneco filed a petition for review with the United States Court of Appeals for the Second Circuit, which then transferred the matter here. Other chemical firms received letters identical to that of July 2, 1979, but did not petition for review. These companies did not receive withdrawal notices.

Hooker and Tenneco assert that not until after the 1977 amendments to the Act was the agency given the power to establish design, equipment, work practice, and operational requirements. *See* Clean Air Act Amendments of 1977, *Pub. L. No.* 95-95, §110, 91 *Stat.* 703 (*codified at* 42 U.S.C. §7412(e) (Supp. I 1977)). Before these amendments became effective, the EPA lacked authority to direct adherence to work practices as part of emission standards. *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). Imposition of such requirements, although within the agency's power since 1977, requires notice and hearing procedures that the agency has not yet undertaken. *Id.*

As ground for appeal, Hooker and Tenneco contend that the EPA transmittal letter of July 2, 1979 requires the kind of equipment, design, and operational changes that could be imposed only after formal rule making proceedings. In effect, petitioners say the enforcement division of EPA is amending the regulations without following proper procedures. Moreover, Hooker asserts that as to the bulk polymerization process it utilizes, there is no known technology available to implement several of the required changes.

The EPA does not address these contentions, arguing instead that this litigation became moot when the orders were withdrawn and, therefore, the petitioners are asking for an advisory opinion. The agency concedes that the record does not provide an adequate basis to adjudicate whether violations of the relief valve standard occurred, and that this deficiency prompted the withdrawal of the orders. Hooker and Tenneco insist that the cases are not moot and point to our opinion in *Dow Chemical Co. v. EPA*, 605 F.2d 673 (3d Cir. 1979). We begin with an examination of the order that the EPA issued.

The Clean Air Act, 42 U.S.C. §§7401-7642 (Supp. I 1977) (formerly codified at 42 U.S.C. §§1857-1858a (1976)), authorizes the administrator to issue an order requiring a person who has violated an emission standard under 42 U.S.C. §7412(c)(1)(B) to comply. 42 U.S.C. §7413(a)(3). The statute does not provide for self-enforcement. If the order is not obeyed, the administrator is required to file a civil action for an injunction, a civil penalty, or both. 42 U.S.C. §7413(b).

The Act also provides that up to $25,000 per day may be levied, as well as a year's imprisonment, for a knowing violation of an administrator's order authorized by §7413(a). 42 U.S.C. §7413(c)(1)(B). Once an order issued under §7413(a) is violated, proceedings appear to be mandatory. These consequences are strong arguments for the finality of such orders for review purposes, a proposition we need not and do not reach here. *See Harrison v. P.P.G. Industries*, 446 U.S. 578 (1980).

The EPA has withdrawn the challenged orders, has "abandoned any cause of action under section 113(b)(1) [42 U.S.C. §7413(b)(1)], for violations of the orders and has rendered the orders null and void." Brief for EPA at 10. The agency, however, continued its investigation of the facts surrounding the reported emissions, reserving the right to take action with respect to Hooker and

SCC
5-1601



Tenneco in the future, although it "does not intend to re-issue the orders." Brief for EPA at 10. Specifically, the administrator remained free to bring an enforcement action in the district court for an injunction or a civil penalty, §7413(b)(3), for violation of the regulation, 40 C.F.R. §61.65(a), rather than for violation of the order.[2] Similarly, resort to a criminal proceeding is available. 42 U.S.C. §7413(c)(1)(C).

The seeds of controversy thus remain, according to Hooker and Tenneco, and they argue that *Dow Chemical* requires that we entertain their appeals. We find significant differences, however, between that case and the one at hand.

In *Dow*, the EPA issued a regulation requiring the submission of studies on testing of certain chemicals. After Dow filed a petition for review, the EPA withdrew the challenged rule because of procedural irregularities. Contending that the appeal had become moot, the agency nevertheless stated that it did not intend "to change its interpretation of the scope of its statutory authority." *Id.* at 678. In fact, it renewed the rule making process by proposing another regulation that would take the same substantive position as that adopted in the withdrawn rule. This adherence to its prior position was a factor that counseled against a finding of mootness, since the controversy thus maintained its adversarial, non-hypothetical character. We were also troubled by the withdrawal and repromulgation of the regulation, actions of the agency that attempted to control the timing

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2. After oral argument in this case, the EPA instituted enforcement proceedings pursuant to 42 U.S.C. §7413(b) in the district court against Tenneco. *United States v. Tenneco Chemicals, Inc.*, No. 80-4141 (D.N.J., filed Dec. 30, 1980). We have been informed that some of the discharges which were the subject of the withdrawn orders here are included in that action, along with other emissions not previously included.

and venue of judicial review — a concern which petitioners have raised here as well.

In *Dow*, moreover, there was a continuing impact on the company even in the absence of the rule, because the EPA remained steadfast in its position. This created a continuing threat of agency action that affected the company's research and development programs. Additionally, the issue raised there was purely one of statutory interpretation, capable of resolution without further factual development.

The case at hand, by contrast, does not include an adamant stance by the EPA on its interpretation of the regulation. The uncertainty as to the agency's position after the withdrawal of the orders makes the issue more speculative than in *Dow*. The continuing effect of the interpretation is also questionable, because in withdrawing the orders the EPA conceded that it had an insufficient basis in fact. That acknowledgement to some extent is a repudiation of the enforcement staff's construction of the regulation, which purported to require no additional factual predicate. As to the lingering effects of the accompanying letters, the EPA correctly states, "This correspondence obviously has no mandatory effect." Brief for EPA at 42. Moreover, the interpretation in the letters is of a lower order than a regulation and would be given less weight by a court in any event. *See Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 664 (D.C. Cir. 1978).

Although the factors that avoided a finding of mootness in *Dow* distinguish it from the matter before us, it does not follow that this case is moot. A controversy still smoulders when the defendant has voluntarily, but not necessarily permanently, ceased to engage in the allegedly wrongful conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). We have held that an appeal will not be deemed moot if there is a reasonable likelihood that the parties will contest the same issues in a

SCC
5-1602



subsequent proceeding. *Klein v. Califano*, 586 F.2d 250, 255-56 (3d Cir. 1978) (in banc); *American Bible Society v. Blount*, 446 F.2d 588, 595 (3d Cir. 1971).

Although there is no statement from the agency that it does not intend to deviate from the position taken in its July 2, 1979 letter, EPA did not jettison its contention that violations of the regulation did occur. An enforcement proceeding has been instituted against Tenneco as a result of the vinyl chloride discharges, and it is not unreasonable to assume that some, if not all, of the same issues will be contested in that litigation. Since we find that the EPA is at least "free to return to [its] old ways," *United States v. W.T. Grant*, *supra* at 632, we decline to say that the withdrawal of the order was sufficient to moot the controversy.

Despite the fact that the action should not be dismissed as moot, we are persuaded that review of the agency action should be declined at this time. In *Wearly v. FTC*, 616 F.2d 662 (3d Cir.), *cert. denied*, 49 U.S.L.W. 3245 (U.S. Oct. 16, 1980), we reviewed the ripeness doctrine as expounded in the trilogy of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158 (1967); and *Gardner v. Toilet Goods Association, Inc.*, 387 U.S. 167 (1967). Those cases explain that agency action must be scrutinized to determine the fitness of the issues for judicial resolution. *Wearly v. FTC*, *supra* at 666. In this connection, there must be an inquiry into whether the controversy generated is essentially legal in nature or whether further factual amplification is necessary. In addition, potential hardship to the parties must be assessed in the event review is denied. *Id.*

In withdrawing its orders, the EPA admitted that further investigation was necessary before it could properly act. As the litigation has developed, whether there is sufficient justification for sanctions will be determined in the district court proceedings against Tenneco. It remains to be seen whether similar action will be taken against Hooker. Because of the factual gap that exists, a strictly legal issue is not presented to us. *See Wearly v. FTC, supra* at 667; *Exxon Corp. v. FTC*, 588 F.2d 895 (3d Cir. 1978). This is not a case where the sole issue is the authority of the agency to promulgate a regulation and where further delineation of the circumstances is not needed to shape the issues. *A. O. Smith Corp. v. FTC*, 530 F.2d 515, 521 (3d Cir. 1976).

Absent an application of the emergency relief valve provisions, there is no definitive exposition of the EPA's construction of the regulation before us. As in *Wearly*, the agency has yet to take a position with respect to an interpretation of the regulation that can be deemed as "final" in the present posture of this case. *Id.* at 667; *Dresser Industries v. United States*, 596 F.2d 1231, 1235 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980). The informal demands in the transmittal letters impose no legal obligation to comply, and are not final agency action. In view of the continuing investigation after withdrawal of the orders, review of the agency's conduct at this time would be an interference with an active administrative proceeding. *Bethlehem Steel Corp. v. EPA*, 536 F.2d 156, 161 (7th Cir. 1976).

We are not convinced, either, that the hardship test has been met. Although Hooker may be apprehensive of the policy stance adopted by EPA's enforcement division, the company is not required to take any action at this time beyond that required by 40 C.F.R. §61.65(a).[3] Tenneco, of course, is free to attack the EPA position in the district court litigation. *Cf. A.O. Smith Corp. v. FTC*, *supra* at 524. The absence of a requirement to comply

3. Hooker invokes *Adamo Wrecking, supra*, in challenging the employment of §61.65(a) to support a §113(a) emission standard violation. Because the §113 order has been withdrawn, and Hooker would be able to raise the alleged infirmity as a defense in enforcement proceedings, we would be rendering an advisory opinion to consider the matter on the merits at this stage.

SCC
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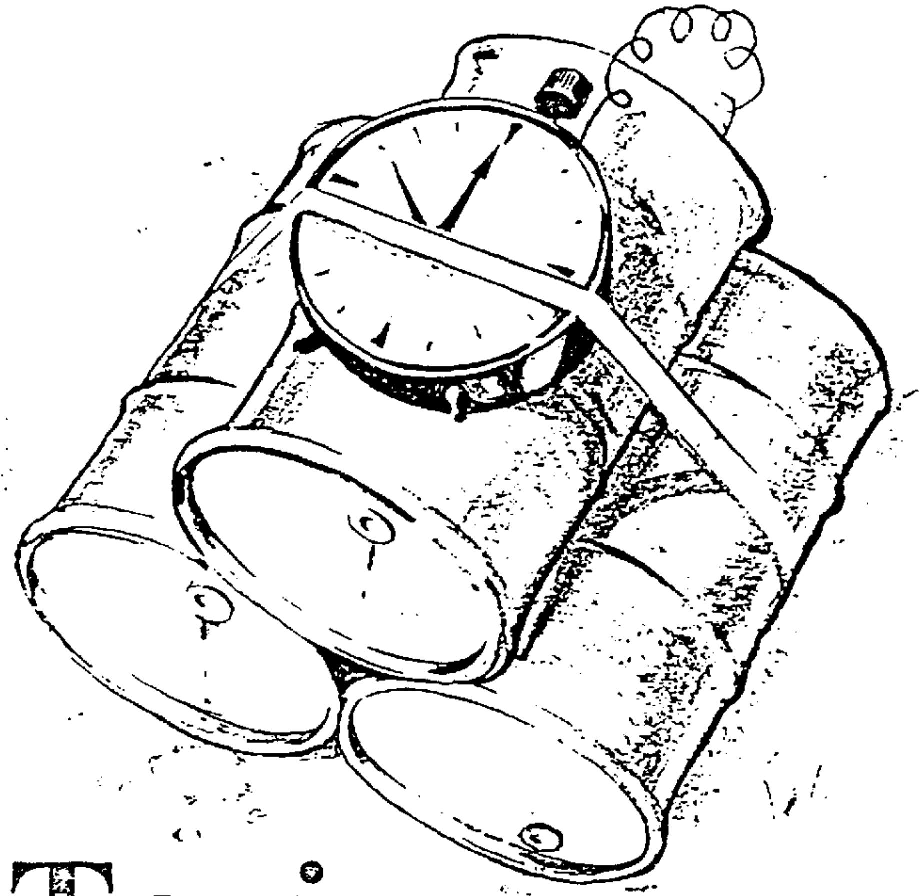
with the orders of the EPA at this time, therefore, mili tates against a finding that the hardship factor has been met. *Wearly v. FTC, supra* at 666. Nor can we say that the governmental activity "by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974).

This case is too dependent upon the presentation of a complete circumstantial background for a satisfactory resolution of the issues at this stage. The petitioners are in no worse position than they would be had we struck down the order because of an insufficient factual record. We decline to review the agency action at this point and, accordingly, the petition for review will be denied.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*



# Toxic Time Bombs

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

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5-1607

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 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

*Bailey: "The goose that lays the golden egg may be killed because there is just not enough money to go around."*

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

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

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 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, adding, "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

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?*


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