

A legal time bomb for corporations

In California on May 27, Richard J. Hogard won a \$12 million jury verdict against Johns-Manville Corp. and Raybestos-Manhattan Inc. And he may get more in punitive damages. Hogard retired in 1975 from Long Beach Naval Shipyard after contracting asbestosis. What is more, 1,000 similar cases are pending in the Los Angeles area.

Another 1,000 claimants—including some in a class action on behalf of 2.4 million veterans—seek what could

alongside it. (In May evidence came to light suggesting that the federal government itself may have dumped poisonous chemicals in and around the canal in the mid-1940s.) The asbestos cases also trace back as far as the 1940s, when shipyard workers now developing cancer and asbestosis began to work openly with the toxic insulating material. Users of DES were not the current plaintiffs but their mothers, who took the drug beginning in 1947 to prevent miscarriages. And it has

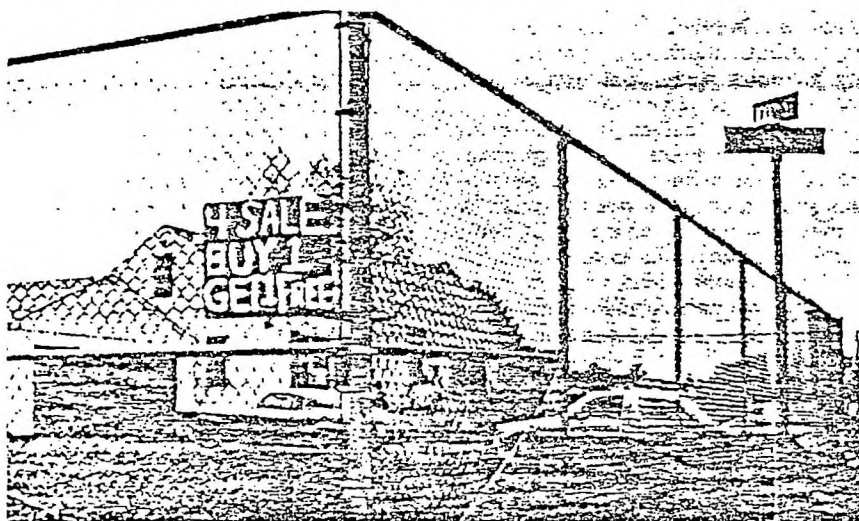
the deed that the land was filled with chemical wastes and assigning "all risk and liability incident to the [canal's] use" to the board. Not until the mid-1970s did it become clear that the wastes had leached into adjacent homes.

Hooker denies all liability. Says Hooker President Donald L. Baeder: "It's quite simple. We have not owned or had any control of Love Canal for 27 years. It was a very responsible closure that would have passed modern standards. What happened was that the site was breached by the city, state, and county. Two roads were cut through. We have ample records that we tried to discourage them from using that site as a school."

Murky legality. Whether Hooker can pin the ultimate liability on the school board and city is problematic. "Shifting responsibility is a murky legal area," says Victor E. Schwartz, chairman of the U. S. Commerce Dept. task force on product liability. "If there's a hazard and a company fails to warn, then it is liable; it can't contract out of its liability to third parties," he says. What is an adequate warning under the circumstances, and whether Hooker had an obligation to monitor the leaching, remain to be tested.

The thorny problem of transferring liability from industry to government crops up in the Agent Orange and asbestos cases also. Some herbicide manufacturers argue that they sold the government what it wanted and that liability for its use should be charged to the Pentagon. But the government is immune from suits by soldiers for war-related injury or illness.

Johns-Manville and others have also tried to shift the blame for asbestosis onto the government, which bought the company's product for use by government workers, mainly in shipyards. So far, these efforts have been singularly unsuccessful. Last December a federal court refused to order the Norfolk Naval Shipyard to reimburse JM for a settlement of \$69,000. The Navy had reacted lazily to news in 1964 that asbestos was carcinogenic to insulation workers, but its negligence, the court ruled, was "secondary to the negligence involved in setting loose dangerous products upon a vulnerable work force." A provision in the model product liability law that Schwartz drafted last year would absolve manufacturers like Monsanto Co. and JM that respond to a mandatory provision in a government contract, but Schwartz's draft, although introduced in



A Love Canal home: Hooker Chemical says it has had no control of the area in 27 years.

amount to \$40 billion in damages from Dow Chemical Co. and four other manufacturers. More than a decade ago those companies made an essential ingredient in Agent Orange, a defoliant used by the U. S. military in Vietnam. The veterans contend that the substance caused cancer, liver abnormalities, nervous disorders, and birth defects in offspring.

Last March the California Supreme Court said that women suffering from adenocarcinoma, a virulent form of vaginal cancer, can sue all manufacturers of DES (diethylstilbestrol), even though the drug was taken by their mothers up to 30 years ago, and no one knows which particular company sold it to them.

Legal fallout. These and other situations, such as the increasingly convoluted skein of events at Love Canal, are industrial time bombs. Their causes lie deep in the past and are the outcome of actions that at the outset no one anticipated would lead to such injury. And the legal fallout is beginning to get thick.

Hooker Chemicals & Plastics Corp. began dumping toxic wastes in Love Canal in the early 1940s and stopped by 1953, well before homes were built

now been 18 years since veterans first came into contact with Agent Orange.

Statutes of limitation, designed to force lawsuits to be started within one to six years after an injury occurs, do not apply in most states to cases involving latent diseases. And from the mid-1960s on, most state courts washed away an old legal doctrine that prevented suits against manufacturers if the plaintiffs did not buy the defective products directly from them. Consequently, increased litigation is stretching legal principles to the breaking point.

The U. S. vs. Hooker. The federal government has brought four suits against Hooker for \$124 million. Compensatory and punitive damages totaling \$12 billion to \$15 billion are being sought by 1,200 residents in Niagara Falls. Several bills have been introduced in Congress to create a "superfund" to clean up abandoned dumps such as Love Canal, thus passing the cost on to the American taxpayer. But precisely where liability will or ought to be placed, nobody knows.

In 1953, under pressure of condemnation, Hooker deeded the property to the Niagara Falls School Board, noting in

the House, has virtually no chance of enactment.

The lack of clear precedent and a complex statute of limitations in New York mean that the Love Canal litigation will linger for a long time. This is why the most likely outcome will be a negotiated settlement, although Richard J. Lippes, of Buffalo, attorney for the 1,200 residents, says that no talks are going on. But informed speculation is that if Hooker were to offer \$200 million, the suits could be ended.

Potential liability in the asbestos cases rivals the claims at Love Canal. Some 11 million workers have been exposed to asbestos since World War II; add an aggressive and growing network of lawyers seeking potential "bystander" plaintiffs (hair-dryer users, school children), and settlements, understandably, are becoming the norm. Some are large; in 1977, 445 workers settled with the government, PPG Industries Inc., Corning Glass Works, and various South African suppliers, for \$20 million. Johns-Manville alone has about 3,200 open litigation files involving 5,000 claimants. It has disposed of 500 others, only 19 of which went to trial.

Duty to warn. Since state and federal laws bar employees from suing their employers, most asbestos workers with cancer or asbestosis have sued manufacturers for failure to warn of the danger in inhaling the deadly fibers. In most states, a manufacturer that fails to warn of hazards that it knew or should have known about is liable to consumers for ensuing injuries.

In a key test in 1973, a federal appellate court ruled that companies must warn not only their customers but also



Handling asbestos: A shipyard workman who got asbestosis has won \$1.2 million in damages.

their customers' workers. The same legal duty to warn applies to makers of DES. Most suits against the 200-odd manufacturers, of which Eli Lilly & Co. had the largest market share, have been defeated on the unique contention that the plaintiffs cannot tell from which companies their mothers bought DES. Under conventional legal theory, when the plaintiff cannot prove who produced the injury-causing product, the case is at an end. But the California Supreme Court ruling means that plaintiffs will be given a chance to go to trial (as other plaintiffs have in lower courts in New York and Michigan). They will have to prove that

DES caused their cancer, but it is possible that their burden of proving the state of the manufacturer's knowledge will be eased. Three states—Pennsylvania, Colorado, and Washington—have adopted a rule of absolute liability: If a company markets an inherently dangerous product, it is assumed to know of any hazards associated with its use, even if those hazards were unknown at the time of sale. Failure to warn thus automatically establishes liability. The California court hinted in 1978 that it, too, might adopt such a rule. And if the plaintiffs win, the court's unique March ruling would require that damages be apportioned among the industry by market share. **Search for a solution.** This reshaping of legal doctrines to fit cases has prompted many to look beyond the judicial system for a solution. Business "can continue to try lawsuits, but does that resolve the problem?" asks Dennis J. Marknsson, Johns-Manville associate counsel. "All of these things, one way or another, add up to a bigger question: How do we handle occupational or paraoccupational disease claims in this country?"

Congress took one approach in 1976 with the Toxic Substances Control Act, which gives the Environmental Protection Agency clear authority to keep tabs on company testing of substances before marketing. Another approach is to set up compensation plans for specific diseases. One bill would have set up a government-industry fund of \$30 million a year and would annually pay asbestosis victims \$13,000. That bill has died for now, but it and others are certain to be resurrected.

In the long run, however, no one solution is likely to suffice. As Dr. Sidney M. Wolfe, director of the Health Research Group in Washington, D.C., puts it, society's solution to long-term risk must be "multifaceted: government regulation, litigation, and insurance."

The Catch-22 risks In health data banks

For Standard Oil Co. of Indiana, keeping tabs on employee health is important business. From eight terminals at company offices around the country, medical data based on periodic examinations, including annual physicals for all high-risk workers, are fed to a computer at Chicago headquarters. Another computer collects data on 125 hazardous substances.

With epidemiologists at Rush-Presbyterian-St. Luke's Medical Center in Chicago, Dr. Peter Wolkonsky, Standard's medical and environmental health service director, is building a data base to

permit correlations between workplace environment and the workers' physical conditions.

Risks. But companies such as Indiana Standard, Monsanto, Du Pont, Allied Chemical, and others that have built monitoring systems may find themselves victims of a legal Catch 22, says Professor Alan F. Westin, Columbia University professor of political science and a lawyer, who is currently studying the legal rights of employees. Westin says no one knows when a company is required to act on data it collects. A lawyer could subpoena the data to convict a company of "willfully" allowing a hazard to continue. A monitoring system established to comply with the law's demands that executives not stick their heads in sand

might thus wind up as evidence against them.

Lawrence C. Hedeem, assistant general claims attorney for Standard, doubts that data his company is amassing could be used to such effect. He sees the system as an aid in rebutting claims that exposure of a worker to an environmental hazard caused a specific ailment. Wolkonsky agrees and denies that the company developed the computer program out of any concern for legal liability. "We're just interested in expanding scientific knowledge," he says. He predicts that industrial monitoring systems could disprove findings of the Occupational Safety & Health Administration or other agencies that a particular substance is harmful.