

3-15-1986

Administrative Remedies in the Field of Toxic Torts

Janet L. Heller

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/naalj>

 Part of the [Administrative Law Commons](#), [Environmental Law Commons](#), [Health Law Commons](#), [Products Liability Commons](#), and the [Remedies Commons](#)

Recommended Citation

Janet L. Heller, *Administrative Remedies in the Field of Toxic Torts*, 6 J. Nat'l Ass'n Admin. L. Judges. (1986)
available at <http://digitalcommons.pepperdine.edu/naalj/vol6/iss1/3>

This Comment is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

ADMINISTRATIVE REMEDIES IN THE FIELD OF TOXIC TORTS

--
Janet L. Heller */
--

Honorable Mention
1985 Law Student Essay Contest

Our technological society has, simply, grown hazardous to our health. As a public, we are exposed on a given day to any number of thousands of untested and potentially dangerous man-made and natural chemicals. We breathe toxic fumes trapped in energy-efficient offices, eat breakfast cereals laced with traces of poison sprays, and send our children to classrooms dusted with crumbling deadly asbestos . . . 1/

Traditional standards of the law have not functioned properly in today's environment created by toxicity. Toxic injuries, caused decades before they became apparent, challenge our fundamental ideas of causation, statutes of limitations and ultimately, the fairness of our legal system. 2/ As in the words of Albert Einstein, "We shall require a substantially new manner of thinking if mankind is to survive." Administrative remedies, I believe, are our best solution.

Traditional tort law fails to provide a legal means to achieve justice in this area. The problem with resorting to the courts is that discovery often takes years, numerous parties complicate and retard any actions taken towards a possible resolution, and the latency of injury makes it difficult to establish causation and/or stay within

*/ The author wishes to acknowledge the assistance given by Professor Phillip Weinberg of St. John's University School of Law.

1/ "Toxic America" Student Lawyer, March 1985, p. 14.

2/ Id. at 15.

the statute of limitations. It is for these and other reasons that several administrative programs have been developed which simulate tort recovery by eliminating or modifying common law liability rules that currently inhibit tort recovery yet seeking to maintain the three traditional tort goals: compensation, deterrence and retributive justice. 3/ Some examples are the Workers' Compensation Board, the Board of Arbitration of Claims in the Department of the Auditor General, and the Commission against Discrimination.

Administrative agencies are created to deal with current crises or to redress serious social problems. Often the government's response to a public demand for action has been to establish a new agency, or to grant new powers to an existing bureaucracy. As our awareness of the risks to public health and safety grew, along with the increase in serious irreparable threats to our natural environment, new regulatory programs emerged in the field of toxic torts. Advantages of this approach or manner towards a viable solution were seen immediately. These new-founded agencies provided needed expertise, autonomy, and flexibility which are essential when dealing with an unknown area of regulation. They are, however, not without problems or shortcomings. This paper analyzes the viability of certain toxic tort regulatory statutes and agencies and provides suggestions for their expansion and improvement.

RESOURCE CONSERVATION RECOVERY ACT OF 1976

Growing awareness of the severe problems posed by hazardous and solid wastes prompted Congress to enact the Resource Conservation Recovery Act (RCRA) in 1976. 4/ This act directs the Environmental Protection Agency (EPA) to establish regulations for a national "cradle to grave" 5/

3/ Stand, "The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation", 35 Stan. L. Rev. 575 (1983).

4/ 42 U.S.C.A. §§ 6901-6987 (West 1977 & Supp. 1981).

5/ 45 Fed. Reg. 33,066 (1980).

hazardous waste management system. 6/ Specifically this provides the procedures for the transfer, storage and disposal (TSD) of hazardous waste. The act also contains major provisions governing the research and development of resource conservation, management, inspection, enforcement and authorization of assistance to states and citizens.

RCRA became the first major statute in the area of toxic waste. Its rulemaking power was delegated to EPA, and 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. 7/ 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. 8/ Today one can find literally hundreds of amendments to these regulations in the Federal Register.

Though the statutory framework may seem straightforward on the surface, its implementation by EPA has proven to be an extremely complicated and problematic undertaking. 9/ Probably no statutory delegation of authority to any administrative agency has spawned more regulatory issues and sub-issues than RCRA. 10/

In U.S. v. Midwest Solvent Recovery, 484 F. Supp. 138 (N.D. Ind. 1980), the court found it difficult to apply the broad language of § 7003 of RCRA in order to grant a preliminary injunction after it was found that the defendants' activities "presented an imminent and substantial endangerment to health and environment". Besides problems with interpretation of the drafter's intent with respect to RCRA's rules and regulation, there has also been litigation

6/ 42 U.S.C.A. § 6902.

7/ 40 C.F.R. §§ 260-265 (1982).

8/ 40 C.F.R. §§ 122-124 (1981).

9/ Hall, "The Problem of Unending Liability for Hazardous Waste Management", 38 Bus. Law 598 (1983).

10/ Id.

concerning its retroactive nature as well. See U.S. v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980) and U.S. v. Diamond Shamrock Corp. No. C80-1857 (N.D. Ohio, May 29, 1981), 12 E.L.R. 20819.

The extent to which the Environmental Protection Agency regulates has also presented various problems. If EPA regulates too leniently, its goals of regulation and deterrence are not fulfilled. An even greater problem results, however, when EPA regulates too strictly and that being the increase in what's commonly known as "midnight dumping". Midnight dumping occurs when a transporter, in order to escape the cost of compliance with the regulatory statute, merely dumps toxic waste at any dumpsite with inadequate, if any, protection from infiltration and contamination.

Other criticisms of RCRA include its failure to include certain wastes such as: Domestic sewage and irrigation return flows. 11/ RCRA is also not retroactive in its application.

The Federal Water Pollution Control Act (FWPCA) 12/ required wastewater treatment to be more thorough than it had in the past, and this higher treatment caused the production of sludge in growing quantities. In effect, a portion of the total national water pollution load disappeared only to turn up in inadequate containers as solid waste. 13/ Years later, the open loop created by the FWPCA was closed with the passage of RCRA. 14/ Now the open loops created by RCRA must be closed.

While the EPA admits that the statute and regulations it promulgated are not perfect, the Agency believes that it did its best "to lay the groundwork for a hazardous waste management system which is workable and under-

11/ 40 C.F.R. § 261.4(a) (1980).

12/ 33 U.S.C. § 1251 (1976 & Supp. III 1979).

13/ McCaffery, "Hazardous Waste Regulation: An Evaluation from a Historical Perspective" 7 J. Env'tl. L. 272 (1982).

14/ Id.

standable". 15/ While the Agency may be laying the groundwork for a comprehensive system, the promise of future regulation cannot provide short-term relief from the problem of improper disposal of hazardous wastes. 16/

TOXIC SUBSTANCES CONTROL ACT OF 1976

Designed to prevent manufacture and misuse of dangerous chemicals, "Front end" laws like the Toxic Substances Control Act of 1976 17/ were enacted. "TSCA authorizes the EPA to obtain from industry data on the production, use, health effects, and other matters concerning chemical substances and mixtures. If warranted, EPA may regulate the manufacture, processing, distribution in commerce, use, and disposal of a chemical substance or mixture. Pesticides, tobacco, nuclear material, firearms and ammunition, food, food additives, drugs and cosmetics are exempted from the Act." 18/

The regulation of toxic and of pesticide substances, and the testing of chemical substances required under TSCA, when soundly managed, should provide a substantial advance in the control of toxic wastes at the point of their creation or manufacture. TSCA and laws like it were intended to provide the regulator with sufficient information relating to the nature and capabilities of toxic substances to enable them to set proper standards for safe regulation. In reality, though, this task became one of enormous proportions, but this realization has not been matched by the effort. For example, ". . . 58,000 chemicals currently are listed in the inventory compiled under the TSCA. Of these, scarcely fifty have been fully tested for their biological

15/ 45 Fed. Reg. 33,088 (1980).

16/ Friedland, "The New Hazardous Waste Management System: Regulation of Wastes or Wasted Regulation?" 5 Harv. Envtl. L. Rev. 129 (1981).

17/ 15 U.S.C. §§ 2601-2629 (1976 & Supp. I 1977).

18/ R. Druley & G. Ordway, The Toxic Substances Control Act, Bureau of National Affairs, Inc., Wash. D.C., 1977, p. 390.

effects . . . " 19/ This is due to the fact that it costs an enormous amount of money to complete all tests necessary to show the health and safety for a single chemical. The degree of adequate testing on a hazardous substance is debatable as well. The now familiar phrase "How clean is clean?", coupled with an uncertain level of risk, have left EPA in a very precarious situation.

William Ruckelshaus, former administrator of the EPA, has said there just aren't enough resources to tackle every problem of toxicity facing the nation. 'In a number of cases, we must decide whether the fear of risk is sufficient cause to act or whether we must await more certain evidence that the risk is real.' he said last summer. 'In these and other cases, we lack both certainty as to the degree of risk and proven technology to remove it. In nearly every case, the cost of protection gives pause to any public servant who must weigh the investment of public or private funds against the value of the protection to be purchased. We must make judgments with whatever information we have and expect to learn more as we go.' 20/

The regulation of toxic substances involves the problem of balancing the risks and benefits of manufacture, dissemination and use of the substance. This is by no means an easy task. See U.S. v. Vertac Chemical Corporation, et ano., 489 F. Supp. 870 (1980), which involved dioxin, the most acutely toxic substance yet synthesized by man. Even in the absence of any proof of actual harm caused by the escape of dioxin, evidence of its presence was sufficient to warrant an injunctive decree.

It will take years for EPA to meet its statutory requirements simply set forth with respect to promulgation of adequate regulations and effective control of hazardous substances in the environment. While EPA has been more aggressive and has received an increase in its federal

19/ Yates, "Torts of Last Resort", Student Lawyer, April 1985 at 18.

20/ Douglas, "Fear in Unknown Quantities", Student Lawyer, March 1985 at 24.

budget in recent years, it lacks the resources to do much more than tend to emergencies.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (CERCLA) OF 1980

Recent developments in the law have, however, substantially broadened the scope of potential liability of generators, owners and transporters of hazardous waste. One of the principal statutes in this area is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980. 21/ Informally known as Superfund, the Act provides for liability, compensation, clean-up and emergency response for hazardous substances released into the environment and the clean-up of inactive hazardous waste disposal sites. 22/ Federal funding is the method chosen to finance clean-up and facilitate remedial action where the responsible parties are unavailable or unwilling to do so.

The Hazardous Substance Response Trust Fund was established to finance the costs of clean-up and remedial action by the government or other persons to the extent that such work is not performed by the responsible parties. 23/ The Post-Closure Liability Fund is financed by a tax on hazardous wastes disposed of by landfill at an authorized RCRA facility to the extent those wastes will remain there after closure. 24/ Superfund(s) are said to complete federal efforts to regulate hazardous waste transportation, disposal and treatment begun with RCRA and its regulations promulgated thereunder. 25/

Specifically, Superfund imposes new reporting requirements for spills of hazardous waste into the environment in excess of "reportable quantities" and for existing and abandoned hazardous waste disposal facilities that are not regulated under the RCRA hazardous waste permit

21/ 42 U.S.C.A. §§ 9601-9657 (Supp. 1981).

22/ CERCLA, preamble.

23/ 42 U.S.C.A §§ 9611(a), 9631 (1977 & Supp. 1978-81).

24/ 42 U.S.C.A. § 9641 (1977 & Supp. 1978-81).

25/ 40 C.F.R. § 260 (1981).

programs. In addition, Superfund imposes an excise tax on certain oil importers, refineries, chemical manufacturers and producers as well as upon recipients of hazardous waste at disposal facilities to finance the bulk of Superfund, which then appropriates the money collected as needed.

In U.S. v. Wade, 546 F. Supp. 785, (E.D. Pa. 1982), the court held that non-negligent off-site generators of hazardous waste who are not currently dumping cannot be sued under CERCLA § 106 (emergency injunctive provision against "actual or threatened release of a hazardous substance from a facility and who did not operate to confer liability or past generators") or RCRA § 7007. Later, however, in U.S. v. Nepacco, 579 F. Supp. 823 (W.D. Mo. 1984), the court found both § 107 (which confers liability upon "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . .") and § 106 applicable to inactive sites by looking at Congressional intent along with the desire to effectuate the fundamental purposes of CERCLA.

Besides retroactivity, another important feature of CERCLA is that its defenses are construed very narrowly and in some instances are becoming nonexistent. They are: an act of God, an act of war, or the act of a third party who is not an employee or contractor of the generator. ^{26/} The courts have held that Superfund provides for joint and several liability as well as strict liability. Strict liability means that liability is established without regard to fault and has even been called "absolute". See U.S. v. Reilly Tar and Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982) in which a previous owner was not able to avoid liability. It is interesting to note that in 42 U.S.C. § 9607(e), if a purchaser wants to purchase property on a Superfund list, a hold harmless or indemnification agreement from the seller is valueless in avoiding Superfund liability. This has a serious and broad impact on property purchase, sale, mortgage and ownership.

Superfund represents the nation's first attempt at prospective planning in this area. The "National Contingency Plan" is a blueprint for remedial actions necessitated by

^{26/} 24.7 Superfund § 107(b), 42, U.S.C.A. § 9607(b) (1977 & Supp. 1978-81).

the release of hazardous substances into the environment. 27/
Why then have only six of some 17,000 designated Superfund sites been cleaned up by government? 28/

The basic consensus seems to be that there is too much toxic waste about which little is known and for which there are too few safe disposal methods. In passing CERCLA in 1980, the Congress acted on the basis of limited information and evidence of substantial risk. Today more evidence of hazardous waste has been discovered. This has prompted the need for a new system that is more inclusive. We desperately need to close the open loops created by barriers to recovery in the court system as well as broaden the compensation offered by the various federal statutes and agencies. The risks and dangers of toxic wastes are indeed growing, with recurring reminders of hazardous releases that have in recent years escalated in quantity and intensity (e.g., Bhopal, India incident occurring this past December which took approximately 2,500 lives as a result of a poisonous gas leak from a Union Carbide Plant). Future resolutions have already been conceived from existing laws, agencies and industry. Their birth has been one of necessity. Their feasibility in future years, although premature, deserves discussion.

In concert, TSCA, RCRA and Superfund form the trident of hazardous waste environmental planning. There are, in addition, a number of other federal statutes and state statutes that regulate to some degree the handling of hazardous substances such as the Hazardous Materials Transportation Act, 49 U.S.C., §§ 1801-1812 (1976 & Supp. IV 1980), Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980), Clean Air Act 42 U.S.C. §§ 7401-7642 (Supp. IV 1980) and others. In all, 16 federal laws now deal with toxic or hazardous chemicals. These statutes all, however, deal with narrowly defined substances and occurrences.

27/ McCaffery, supra p. 287.

28/ Douglas, supra p. 23.

For example, RCRA, in creating the starting point and backbone of hazardous waste management, defines hazardous waste as:

solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may . . . cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, 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. 29/

Other statutes seem to accept this definition as a basic premise and merely vary or delete parts to enhance their specific duties or goals. In Dow Chemical Co. v. EPA, 605 F.2d 673 (3rd Cir. 1979), the plaintiffs tried unsuccessfully to exceed the controls of TSCA by contending that they were chemicals produced during research and not manufactured for "commercial purposes".

Besides the question of whether a substance falls within the definition of one or more of these existing laws, all claims, including third-party damages, for personal injury or property damages must be filed under existing tort law, or other statutory remedies. 30/ The Agent Orange settlement discussed in In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (1984) provides an additional type of remedy and that being one of compromise and settlement with approval by the court. This decision was reasonable in the public's as well as the parties' interest due to the difficulties of procedure along with the tremendous burdens placed upon counsel and their clients.

SUPERFUND STUDY GROUP

Earlier bills of CERCLA had included a federal personal injury compensation system which worked very much

29/ 42 U.S.C. § 6903(5) (1976 & Supp. III 1979).

30/ Superfund - Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 3rd ed., Government Institute Rockville, MD., MD., 1982, p. I-39.

like today's Workers' Compensation system. Congress, during the closing part of the 96th Congress, the "lame duck" session following the November 1980 election, decided not to include this provision and had instead, in § 301 of CERCLA, provided for the creation of a Study Group to deal with this continuing issue. 31/

The Study Group was established in June of 1981 and consisted of 12 members. In general, the Group feels that available remedies are inadequate when viewing the substantial number of claims that may arise, coupled with the factual and legal complexities that will be involved in their litigation. It seems that only very large claims are able to overcome existing barriers of proof of causation, high cost of litigation and delays. Mass torts or multiple exposures to hazardous waste with claims made by hundreds of people, each of whom suffered a few thousand dollars in damages, are often found with no real feasible remedy. See Ayers v. Township of Jackson, 461 A.2d 184 (1983) where the court held that residents could not recover on claim that they suffered from a present condition of enhanced risk of cancer as well as liver and kidney disease. If claimants are forced to wait until the disease or damage manifests, there is a danger in certain states that the statute of limitations will bar recovery. In New York there is currently a Senate bill introduced by Senator Stafford which would "give people exposed to toxic substances more time to file lawsuits seeking damages". 32/ While there are yet few reported decisions involving injuries from hazardous wastes, the available evidence and a future change in the statute of limitations points to a potential for the emergence of many cases. 33/ In the area of DES, where plaintiffs cannot identify the manufacturer of the injury-producing product, he or she may instead join all the manufacturers of DES. This "enterprise liability theory" was first set forth in Hall v. E.I. duPont deNemours & Co., 345 F. Supp. 353, 376-78 (E.D.N.Y. 1972) and is but another example of how the law in this area is changing.

31/ Id. at I-51.

32/ N.Y. Times, May 8, 1985 at B2.

33/ Picciorelli v. Johns-Manville Sales Corp., N.Y.L.J., August 23, 1985 at 13.

The Superfund report instead recommends a nonbinding two-tier system for compensating hazardous waste and injuries. The Tier One remedy is an administrative compensation remedy which is designed to meet the need for an efficient and speedy remedy. 34/ The emergence of mass injuries growing out of simultaneous exposure of numerous persons to a particular hazard which results in diseases that remained latent for many years is one such example of those who would benefit from this proposed system. Specifically, the "Tier One" remedy calls for the establishment of a federal compensation fund financed by taxes on the oil, chemical and waste disposal industries.

The "Tier Two" remedy consists of a continuation of the existing plenary state court actions with some recommended substantive and procedural modifications which would enable it to coexist with Tier One remedies. 35/ It is expected that these established judicial remedies would be used less frequently because of the barriers previously discussed coupled with the high cost of litigation. A person would therefore usually use Tier One when injured by an exposure to hazardous waste because he or she would not have to prove fault and the burden of proof of causation would be greatly reduced.

A claimant who receives compensation award in "Tier One" is free to bring a plenary action in "Tier Two". 36/ As long as the Tier Two award exceeds the Tier One award by 25%, the Tier One award is merely deducted from the Tier Two award. This serves to discourage frivolous suits, because if the 25% more limit is not met, the judge has the discretion to assess costs of the action and of expert witnesses against the plaintiff. 37/

34/ F. Grad, Environmental Law 3rd ed., Matthew Bender, N.Y., 1985, p. 714.

35/ F. Grad, "Part IV of the § 301(e) Superfund Study Group Report to Congress" Treatise on Environmental Law, Vol. 4, 1982, p. SLR-6-7.

36/ Id. at SLR-7.

37/ Id. at SLR-9.

This proposed system would be established by federal law and is to be administered by the several states in accordance with the provisions of federal law. 38/ Federal legislation is recommended to encourage the states to participate in the program by including funding for administrative and technical assistance as well as other federal grants to relieve the financial burden of participation. 39/ This would require the creation of a special federal agency or the authorization of a suitable existing agency to oversee and assume, when needed, states' participation. 40/

The preemption doctrine, which arises from the supremacy clause of the Constitution, 41/ requires that federal law displace state law whenever the latter "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". 42/ So when there exists an irreconcilable conflict between state and federal law 43/ or when Congress has expressed a "clear and manifest purpose" 44/ through statutory language or legislative history, the federal statute is supreme. This concept of supremacy applies to Federal Common Law as well. In United States v. Price, 523 F. Supp. 1055, 1069 (D.N.J. 1980), "The comprehensive nature of the schemes established by RCRA and Superfund require the court to conclude that if federal common law ever governed this type of activity, it has since been preempted by these statutes".

Preemption clauses of existing statutes vary and are sometimes unclear as to the activities that are preempted. Both RCRA and CERCLA, however, explicitly provide for the

38/ Id.

39/ Id. at 15.

40/ Id. at 42.

41/ U.S. CONST. Art. VI § 2, see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

42/ Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

43/ Goldstein v. California, 412 U.S. 546, 533 (1973).

44/ Rice v. Santa Fe Elevator, 331 U.S. 218, 230 (1970).

states' participation in the regulatory and clean-up programs they establish. 45/ The Superfund Study Group proposal by federal delegation, normally leaves the states free to designate the appropriate agency to assume delegation. This results in a variety of state mechanisms for compensating victims of hazardous substances. The Study Group believes that both the federal and state agencies must be flexible and contain limited rulemaking authority to provide for a workable system. 46/ Municipalities as well become involved under the broad interpretation of the provisions of Federal Superfund. 47/ These broad rulemaking powers at all levels, however, have caused many to become wary of this Study Group proposal.

THE SOBLE-BROADHEAD BILL

The Soble-Broadhead Bill, as it is commonly referred to, is a Model Act set forth by Stephen M. Soble of Harvard Law School. This act, like the findings of the Study Group, creates two independent agencies to administer the Compensation System: The Administrative Board for the Compensation of Victims of Toxic Substances Pollution and the Office of the Ombudsman for Compensation of Victims of Toxic Substances Pollution. 48/ This proposal enacts a pollution charge and the provision that the polluter is to pay the full amount of the administrative compensation award to the victim. This system of compensation entails a form of regulation that will achieve increased public safety without the imposition of unfair costs on either the manufacturers or the victims. Mr. Soble achieves balance between safety and cost allocation by the use of economic deterrence. 49/ In addition, it confers economic benefits

45/ Florini, "Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?" 6 Harv. Envtl. L. Rev. 110 (1982).

46/ Grad, Treatise on Environmental Law, supra at SLR-45.

47/ N.Y. Times, July 25, 1985 at B2.

48/ Soble, "A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act" 14 Harv. J. on Legis. 688 (1977).

49/ Id. at 684.

on those manufacturers who are most successful at avoiding risks. This method is designed to eventually induce greater scientific knowledge of the related health risks to hazardous waste exposure. 50/

The Broadhead bill 51/ was also criticized as overly broad and inadequate in supporting the reasonableness of the presumptions proposed. 52/ Specifically, it uses rebuttable presumptions that the toxic substance did result in the etiology of the disease. The first case used would be a test case which would result, if successful, in a classification as a "designated disease". 53/ Future cases would more or less follow the course of the test case supported by relatively little showing. This method places too much emphasis on the test case and seems to under-evaluate future cases which often may be different in their substance and mechanics.

The Superfund Study Group in a like manner relies on "Toxic Substances Documents" that link the exposure of certain designated hazardous wastes to their known effects in causing injury or disease. 54/ These Documents are based upon scientific information adopted in administrative proceedings to be used along with various rebuttable presumptions. This system's rebuttable presumptions are of two kinds: one dealing with proof of causation, and the other dealing with issues of nature of the resulting disease or injury.

While the use of rebuttable presumptions in these two proposals seem to restore a balance between the two parties and overcome inherent barriers of proof in today's court system, their ultimate use is likely to become widespread, which would result in claimants' choice of Tier Two (court) remedies which are inherently larger, over Tier One

50/ Id. at 768.

51/ H.R. 9616 (95th Cong., 1977).

52/ Grad, Treatise on Environmental Law, supra at 34.

53/ Id. at 36.

54/ Id. at 20.

(administrative) remedies. This would cause an unbalance and ultimately a destruction of this type of system.

WORKERS' COMPENSATION

As previously stated, these systems have often been compared to that of Workers' Compensation. One should, however, be careful of this analogy and keep in mind that the two have different goals in mind. Workers' Compensation provides pay and medical help for injury and illness to workers and pensions to their dependents in cases where death occurs. 55/ It is meant to be a sole remedy and often looked at as a consequence of employment.

The Workers' Compensation system is in recent years in the asbestos industry developing a federal fund to compensate occupational-related asbestos injuries. Elements of this proposal initially included preemption of third-party claims and a dollar cap on the award amount. 56/ This has since changed in cases like those involving asbestos. The Superfund Compensation System, as well as similar systems, have aided in closing loops and allowing a wider range of injured persons to be compensated and in addition, has seemingly influenced other systems and private industry to react.

INSURANCE AND PRIVATE ACTION

The question of insurance coverage for environmental harm is absolutely crucial for countless companies who are defendants in actions brought pursuant to Superfund, CRA and other similar statutes. 57/ For a company faced with potential Superfund liability, a finding that insurance coverage exists may still be only a partial answer. The question of the extent of coverage yet remains.

55/ Id. at 20.

56/ World Book Encyclopedia, Vol. 21, Field Enterprises Educational Corp., Chicago, 1975, p. 339.

57/ Chesler, "Emerging Patterns of Insurance Coverage for Superfund Liability", Mealey's Litigation Reports - Insurance, 1984, p. 107.

Courts have now rendered several decisions that directly address the issue of insurance coverage for environmental hazards resulting from the disposal of toxic waste. See: Great Lakes Container Corp. v. National Union Fire Insurance Co. of Pittsburgh, Penn., 727 F.2d 30 (1st Cir. 1984); and American States Insurance Co. v. Maryland Casualty Co., 587 F. Supp. 1549 (E.D. Mich. 1984). However, this does not solve the problem of how to survive a large pro rata contribution in today's competitive society. This often fatal problem has prompted immediate action from industry. In the field of asbestos, an "Agreement" concerning asbestos-related claims (Wellington Agreement III) was created. This Agreement established a Facility composed of Asbestos Producers and their Insurers which is responsible for the evaluation, settlement, payment or defense of all asbestos-related claims against subscribers. Harvard Law Professor David Rosenberg also feels that damages resulting from hazardous waste exposure makes fault irrelevant and the establishment of insurance pools to handle mass tort cases a better solution. 58/ The Superfund Study Group recommends that the court apply an expansion to the theory of strict liability that would focus on the hazardous nature of the activity itself, particularly in view of the potentially far-reaching and long-lasting impact of hazardous waste on health and environment. See: City of Philadelphia v. Stephan Chemical Co., 544 F. Supp. 1135 (D.C. Pa. 1982); U.S. v. Nepacco, supra; U.S. v. Riley Tar & Chemical Co., Inc., supra; and U.S. v. Price, supra.

The magnitude of the hazardous waste problem requires that government action be combined with privately conducted or financed responses. Private action enables a more rapid clean-up than if litigated or fund-financed remedial activities. This is most easily done by "voluntary contribution" by the responsible parties. 59/

EPA's challenge, therefore, is to develop a hazardous waste enforcement policy which permits private initiative to be combined with an aggressive and effective

58/ Krohe, "Lessons in Trade-Offs" Student Lawyer, May 1985 at 22.

59/ Price, "Environmental Protection Agency Settlement Policy" Hazardous Waste Litigation Symposium, Rivkin, Leff, Sherman & Radler, N.Y. 1984.

government program to compel clean-up. 60/ In fact, a recent memorandum for Lee M. Thomas, Assistant Administrator of the Office of Solid Waste and Emergency Response, (EPA5200), posted March 20, 1984, sets forth the policy and procedures governing participation of potentially responsible parties in the development of remedial investigations and feasibility studies under CERCLA.

CONCLUSION

Although toxic substances pollution is a complex subject which is growing in quantity, as well as in intensity as man's technological society develops, its solutions are far from adequate to compensate today's damages and injuries; whether it be personal or property.

It is no secret that very few claims result in final court judgments. Administrative agencies have provided needed organization and have facilitated various systems to deter the creation of or the mishandling of hazardous waste, as well as compensate victims of injury and damage resulting from exposure. Administrative agencies, however, have their share of internal problems and "bugs to be worked out". They also can only be as effective as the current existing technology allows. We are in need of more educated people in these fields of study as well as more proficient testing.

"The uncertainty caused by toxic substances is something that everyone needs to address, not just EPA administrators . . . in a world in which 'everything causes cancer', fear could become a useless emotion, because it will have lost its function of self-protection." 61/

The future of administrative agencies in this area seems to be one of escalation and expansion out as we have currently seen in the area of insurance. Its effectiveness can only be ensured by proper organization which promotes efficiency and effectiveness and which does not allow open loops in compensation systems. Administrative agencies are also in need of an adequate budget which would enable them to carry out their enormous task and finally, they are in

60/ Id.

61/ Krohe, supra at 23.

need of a change in public opinion and an awakening to the realization that catastrophies of inconceivable proportions are not unforeseeable in our future.

* * *

Judge Johnson Honored

Marie C. Bellamy Johnson, Treasurer of NAALJ, has been presented with the Distinguished Service Award of the John Marshall Law School, from which she graduated in 1947. Judge Johnson, who has been active in this Association since its inception, is a Senior Administrative Law Judge with the Illinois Department of Labor.