Developments in Victim Compensation Legislation: A Look Beyond the Superfund Act of 1980

INTRODUCTION

The absence of an effective system of victim compensation for injuries caused by exposure to toxic chemicals is a problem which has received increasing attention in recent years.[1] This increased attention stems, in part, from major disasters caused by the release of toxic substances in Love Canal, New York, and Bhopal, India.[2] Increased awareness of the problem also stems from numerous incidents of property damage and personal injury caused by the release of toxic substances.[3] Recent attention has focused on the problem of hazardous waste injury compenstion because of the availability of reports indicating the problem is much greater than had been previously believed. While Congress has grappled with the problem of compensating victims of toxic

1. *See, e.g.*, Ginsberg and Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L.REV. 859 (1981); Comment, *Pursuing a Cause of Action in Hazardous Waste Pollution Cases*, 29 BUFFALO L. REV. 533 (1980); Zazzali and Grad, HAZARDOUS WASTES: NEW RIGHTS AND REMEDIES? The Report and Recommendations of the Superfund Study Group, 13 SETON HALL L. REV. 446 (1983); Garrett, *Compensating Victims of Toxic Substances: Issues Concerning Proposed Federal Legislation*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,172 (1983).

2. The extent of the damage at Love Canal and the legal quagmire that followed the incident is exhaustively considered in Ginsberg and Weiss, *supra*, note 1. *See also* Brown, *Love Canal U.S.A.*, N.Y. Times, Jan. 21, 1979, §5 (Magazine), at 23. Over 2000 people died and about 200,000 people were injured on December 3, 1984 when a cloud of methye isocyanate gas leaked from a Union Carbide pesticide plant in Bhopal, India. N.Y. Times, Jan. 3, 1985, at 5, col. 3.

3. *See Toxic Waste Threat Termed Far Greater Than U.S. Estimates*, N.Y. Times, Mar. 10, 1985, at A1, col 1. The latest report of the Office of Technology Assessment notes that there are more than 10,000 disposal sites around the country that will require cleanup on a priority basis to protect the public health. It estimated that the cost of cleaning up these sites could be as much as $100 billion instead of the $16 billion to $22 billion the Environmental Protection Agency had previously estimated. *Id.*

Toxic substances enter the environment in the form of wastes composed of pesticides, fertilizers, and household and industrial chemicals or, accidentally, in spills, leaks, and emissions. *See, e.g.*, CEQ Environmental Quality 1980 at 83-100; Grad, *Treatise on Environmental Law* at §4.01, 4-4 (1985 Supp.).

torts,[4] it has yet to enact a legislative scheme addressed, specifically, at victim compensation.[5]

Absent federal victim compensation legislation, plaintiffs in toxic tort suits face several well-recognized, major obstacles to recovery in state courts.[6] These obstacles include statutes of limitation which begin to run on exposure to a toxin rather than on discovery of the illness caused by such exposure;[7] problems in identifying and locating defendants who caused the release of toxic substances at some point in (what may be) the distant past; difficulties in allocating responsibility among all defendants who have owned or operated a site during the latency period after a plaintiff's exposure; procedural difficulties for plaintiffs seeking to join their cases in order to reduce litigation costs and reduce delays which the proliferation of individual suits stemming from a

4. *See infra* text accompanying notes 117-33.

5. Congress has passed several statutes in recent years to regulate the manufacture, distribution, storage and disposal of toxic substances. To date, none of these have contained provisions for victim compensation. *See* Toxic Substances Control Act (TOSCA), 15 U.S.C. § 2601- 2629 (1982); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601-9657 (1982); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 3005(a) - 6925 (1982).

Section 311 of CERCLA, 42 U.S.C. § 9607, provides for federal and state recovery of cleanup costs for spills of hazardous substances, and for damage to natural resources, but does not allow recovery for damage to private property. CERCLA was originally drafted with a provision for victim compensation, but this provision was deleted in a compromise which legislators perceived as necessary to secure Congress' approval of the Act. *See* Grad, *A Legislative History of the CERCLA Act of 1980*, 8 Colum. J. Envtl. L. 1, 19-21 (1982).

The Supreme Court's decision in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1983), denying plaintiffs a private right of action under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251(a)-1376 (1982), and Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401-1445 (1982), suggests that it is unlikely courts will find an implied private right of action under any other federal environmental statute.

The Court's holding in Milwaukee v. Illinois, 451 U.S. 304 (1981), that plaintiffs cannot invoke federal common law in the water pollution area because of federal preemption by the FWPCA, will likely be similarly applied to foreclose suits based on federal common law in areas covered by federal statutes dealing with toxic wastes.

6. Existing government programs such as social security, veterans benefits, welfare, and workers' compensation provide only limited relief for injuries caused by exposure to hazardous wastes. *See* NATIONAL SCIENCE FOUNDATION, COMPENSATION FOR VICTIMS OF TOXIC POLLUTION - ASSESSING THE SCIENTIFIC KNOWLEDGE BASES (March 1983).

7. Many injuries caused by exposure to toxic wastes do not readily manifest themselves and, therefore, are not discovered by plaintiffs until long after a statute of limitations period which begins on exposure has already expired. Thiry-nine states have adopted some version of a discovery rule either by statute or by judicial interpretation. New York retains the exposure rule. *See* Zazzali & Grad, *supra* note 1 at 454-58; *Changing Statute of Limitations - A Case of Simple Justice*, N.Y.L.J. Mar. 11, 1985 at 1.

single event may engender;[8] and the traditional burden plaintiffs have to prove causation.[9]

What kind of compensation scheme is necessary to address the increasing health and property damage caused by toxic chemicals? Is an administrative fund preferable to common law tort actions modified by legislative design? What burden of proof should plaintiffs have to meet in order to successfully recover under either a fund or court suit? These issues must be resolved through the legislative process. The purpose of this Note is to summarize and compare proposed federal legislation and existing state statutory schemes designed to compensate hazardous waste victims. Part I analyzes findings contained in the report of a "Study Group" established pursuant to section 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[10] to assess available common law and statutory remedies for victims suffering from exposure to hazardous substances and to devise a federal statutory system of victim compensation.[11] Part I also describes a model federal victim compensation scheme proposed by the Environmental Law Institute (ELI). Part II describes California and Minnesota state legislative approaches to the problem of compensating hazardous waste victims. Part III discusses victim compensation schemes envisioned in several current and past Congressional bills.

8. "Several procedural devices may be employed for joinder of plaintiffs, but these devices are not uniformly available." Zazzali and Grad, *supra* note 1 at 457 (citations omitted).

9. During the long latency period after exposure and before the injury is discovered, a waste site may be used to store many different toxins and a plaintiff may be exposed to several different potential toxic waste and non-waste sources of his or her injury. In these cases, it is difficult to identify how much a particular toxin or exposure contributed to a plaintiff's injury. Furthermore, proof of the nexus between exposure and injury requires the use of complex medical and statistical evidence. Zazzali and Grad suggest that the costs of presenting such evidence are "prohibitive" and present "an almost overwhelming barrier to recovery." *Id.* at 457-58.

10. 42 U.S.C. § 9601-9657 (1982).

11. 42 U.S.C. § 9601(e) (1982). The Study Group subsequently published its Report to the Congress. INJURIES AND DAMAGES FROM HAZARDOUS WASTES — ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (P.L. 96-510) BY THE "SUPERFUND SECTION 301(E) STUDY GROUP," (1982) [*hereinafter* cited as STUDY GROUP PROPOSAL].

I. PROPOSED MODELS

A. *Superfund Section 301(e) Study Group*

A study group comprised of twelve members selected from the American Bar Association, American Law Institute, Association of American Trial Lawyers, and the National Association of Attorneys General was established by Congress under Section 301(e) of CELCLA.[12] Its task was to assess available common law and statutory remedies for victims of hazardous wastes and to make recommendations regarding victim compensation.[13]

Findings

After reviewing existing causes of action for toxic waste victims, and obstacles to recovery which victims commonly faced in those actions,[14] the Study Group concluded that such actions are inadequate to handle "mass torts, or multiple exposure . . . with claims by hundreds of victims, each of whom suffered a few thou-

12. 42 U.S.C. § 9601(e)(1), (2) (1982). The Study Group confined its survey and proposals to injuries stemming from the production, transportation and disposal of hazardous substances. *Id.*

13. STUDY GROUP PROPOSAL at 1. Although the STUDY GROUP PROPOSAL must have resulted from many compromises among the differing views of its members, it is questionable whether the views of the Group's twelve lawyers represented those of the community at large. Representatives from other fields have not been silent, however, in the discussion on victim compensation for hazardous waste injuries.

That the STUDY GROUP PROPOSAL was a less-than definitive exigesis [sic] of the state of victim compensation was not denied. As one member commented, "The final Report, like the product of most committees, is incomplete, sometimes inconsistent, and sometimes deliberately silent or obscure. These flaws are usually unavoidable in the elusive quest for consensus." STUDY GROUP PROPOSAL, Comments of George Clemon Freeman, Jr., at 1. Whatever the flaws, the STUDY GROUP PROPOSAL is a valuable document, both as a source of legal experts' combined and individual thoughts on possible victim compensation schemes, and as a thorough review of the nature of existing remedies for victims of exposure to toxic waste.

14. STUDY GROUP PROPOSAL at 57-146. At common law, an action for hazardous waste damage may be brought on the theory of trespass, nuisance, strict liability or negligence. A description of the various elements that comprise each cause of action is beyond the scope of this Note. *See* Ginsberg and Weiss, *supra* note 1, 880-920; Comment, *Pursuing a Cause of Action on Hazardous Waste Pollution Cases*, 29 BUFFALO L. REV. 533 (1980). Numerous cases have applied common law principles. *See, e.g.* New York v. Shore Realty, 759 F.2d 1032 (2d. Cir. 1985)(strict liability); Miller v. Cadahy Co., 21 ERC 1549 (D.C. KS 1984); State v. Charpentier, 489 A.2d 594 (N.H. 1985)(nuisance); New York v. Schenectady Chemical, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984)(nuisance); Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954)(trespass); Cities Services Gas Co. v. Egge's, 186 Okla 1466, 98 P.2d 1114 (1940)(negligence); Wood v. Picillo, 443 A.2d 1244 (R.I. 1982)(nuisance); Neal v. Darby, 318 S.E.2d 18 (S.C. App. 1984); Branch v. Western Petroleum, 657 P.2d 267 (Utah 1982)(strict liability or nuisance *per se*).

sand dollars in damages. . . ."[15] The Group explained that as opposed to the plaintiffs in mass tort claims, only plaintiffs in the smaller number of large claims, who would likely be represented on a contingent fee basis, would be able to sustain the large litigation costs that characterized the common law suits. The Study Group also noted that the obstacles encountered in individual tort actions brought by many plaintiffs who are exposed to a particular hazard, or in future suits arising from diseases which have been latent for a long time, will put a "substantial, unwarranted strain" on the courts and "delay if not defeat the victims' right to recover for their injuries."[16]

Proposals

The Study Group proposed a compensation system comprised of two tiers. The first tier consists of an administrative fund created by federal legislation, administered by the states pursuant to federal requirements, and designed to reduce the burdensome costs and delays faced by plaintiffs with relatively small tort claims. The second tier recommends improving tort systems which exist under state law.[17]

Recovery under Tier One would be limited to damages caused by exposure to hazardous waste sites as covered by CERCLA, or which stem from the transportation of hazardous wastes or from spills of hazardous substances. Tier One remedies would not be available for injuries arising from other kinds of environmental pollution or from occupational sources.[18]

Claims under the fund would have to be filed within three years after the disease or injury and its cause were discovered or reasonably should have been discovered.[19] Claimants would have to

15. STUDY GROUP PROPOSAL at 178.

16. *Id.* at 178-80. The Study Group noted that the "evidence of personal injury from exposure to hazardous waste dumps or disposal sites . . . is sketchy and difficult to quantify," but that "the available evidence points to a potential for the emergence of many cases. . . [which] may create the kinds of evidentiary problems of mass litigation and consequent overloading and congestion of the courts which would be unacceptable to the persons injured and to the society as a whole." *Id.* at 184-85.

17. *Id.* at 181-82.

18. *Id.* at 191-92. "[T]he compensation plan is not intended to deal with injury from exposure to hazardous substances generally, which are not addressed by CERCLA. The purpose of the compensation plan is to compensate for the adverse consequences of improper disposal, improper transportation, spills, and improperly maintained or closed disposal sites." *Id.* at 193.

19. *Id.* at 194-95.

prove exposure, disease or injury, causation between the exposure and injury and compensable damages.[20]

Proof of causation, considered one of the major obstacles to recovery under tort law,[21] would be facilitated by two sets of rebuttable presumptions in Tier One. The first set would presume a claimant to have established the source responsible for his or her injury if the claimant proved (1) that the source produced, transported or disposed of the hazardous waste at the time of exposure; (2) that the claimant was exposed; and (3) that the claimant's injury was "known to result" from such exposure.[22] The second set of presumptions would ease a claimant's burden of proving the third requirement mentioned above, if the claimant's type of injury and the toxic substance to which he or she was exposed were linked in a "Toxic Substances Document" prepared by a federal agency.[23]

As mentioned earlier, the *Study Group Proposal* envisions a fund administered by states in accordance with federal requirements. State participation in the program would be induced with federal funds intended to help states defray costs for administrative and technical assistance. To insure uniform administration of the program, the federal agency would oversee the participating

20. *Id.* at 194-96. Compensable damages would include full recovery of all reasonable medical expenses, two thirds of lost earnings up to two thousand dollars per month for as long as the disability continues, and death benefits. *Id.* at 219. A majority of the Study Group recommended that the claimants reward be reduced by the amount of collateral public sources such as Medicare of Medicaid. *Id.*

21. *See supra* note 14 and accompanying text.

22. STUDY GROUP PROPOSAL at 198-99.

23. *Id.* at 199. The Toxic Substances Documents will be based on scientific research on hazardous substances or wastes and will contain data linking exposures to a particular hazardous waste with illnesses. *Id.* at 199-202. For each hazardous substance or waste, the applicable document will set forth the following: (1) elements of exposure — (a) nature of exposure such as skin contact, ingestion, inhalation, (b) level of exposure, (c) duration of exposure; (2) the disease resulting from exposure — (a) etiology, (b) symptoms of disease, methods for its diagnosis, (c) latency period, (d) prognosis for disease, (e) other impacts; and (3) other parameters relating to exposure, variables such as age and sex. *Id.* at 200-01; *See* Grad, *Study Group Proposal For Use of Rebuttable Presumptions in the Proof of Causation In Administrative Compensation Proceedings to Compensate for Injuries or Disease Resulting from Exposure to Hazardous Wastes*, STUDY GROUP PROPOSAL, PART II, Appendix M at M 4- 5. The scheme for rebuttable presumptions was a source of some contention among members of the Study Group. See STUDY GROUP PROPOSAL at 202-04, for a discussion of members' concerns.

states and would administer the fund in non-participating states.[24]

The fund for victim compensation awards would be composed of contributions from, or taxes levied on, the production of hazardous substances and crude oil and the deposit of hazardous wastes.[25] The award of claims would not be dependent on the availability of a responsible party against whom a tort claim or subrogation claim could be made. Instead, the fund would be entitled to a claim of contribution or subrogation from the allegedly responsible parties only if the claimant's exposure occured after the federal implementing statute was created.[26]

Agency decisions regarding a compensation award would be subject to judicial review in state courts and, subsequently, by the federal agency if the state's decision is alleged to be based on a misinterpretation of the federal agency's regulations. Federal agency review is intended to insure uniform application of the fund. A decision of the federal agency which opposed the decision of the state would be reviewable in a federal Circuit Court of Appeals.[27]

Tier Two of the STUDY GROUP PROPOSAL consists of tort actions (as defined in the Study Group's recommendations) in state courts. The Group recommends that states (1) incorporate a discovery rule into their statute of limitations; (2) adopt liberal joinder rules for plaintiffs to minimize the cost and delay of trying similar issues in separate suits; (3) hold defendants who have contributed to the risk or injury jointly and severally liable because of the impossibility of allocating responsibilities with accuracy in hazardous waste cases and examine alternative approaches to apportionment; (4) clarify the substantive law of landowner's liabil-

24. *Id.* at 225-29. For a discussion of the propriety of dual state and federal efforts in the area of hazardous waste cleanup cost recovery, *see* State Hazardous Waste Superfunds and CERCLA: Conflict or Complement? 13 ENVTL L. REP. (ENVTL. L. INST.) 10,348 (1983).

25. STUDY GROUP PROPOSAL at 230. Several alternative sources for subsidizing a fund have been suggested such as a tax on the general public, a tax on industry or use of insurance pools. Industry opposes the proposed tax on the ground that it will adversely effect its ability to compete in domestic and international markets. *See* STUDY GROUP PROPOSAL at 233. One possible response to the argument is that the tax is one of the costs of production which must be borne by the manufacturer. Furthermore, reduced profits are unlikely since industry will probably pass on these costs to the consumer in the way of higher prices.

26. *Id.* at 230-31.

27. *Id.* at 237-38.

ity so that past and present owners cannot exonerate themselves from liability by selling or buying their property knowing, or with reason to know of, the presence of hazardous wastes; (5) adopt liberal joinder rules for defendants to ease procedural obstacles to the apportionment of responsibility; and (6) adopt a standard of strict liability for actions arising out of the generation, transportation or disposal of hazardous wastes.[28] Finally, the Study Group recommends that state actions in Tier Two provide recovery for environmental damage and economic injury caused by hazardous waste activities and that states use CERCLA to finance remedial efforts when more appropriate to repair property damage than separate suits by private owners for monetary judgments.[29]

The Study Group did not recommend specific changes in state law on proof of causation, but the Group did agree that the rebuttable presumptions in Tier One should not be available in Tier Two. The Group noted that state courts would be able to admit Toxic Substances Documents as evidence like other scientific authority, but that such documents should not serve to establish a minimum burden of proof. Some members of the Group felt that, regardless of the Group's recommendation, state law would eventually incorporate the statutory presumptions for Tier One.[30]

The relationship of claims brought in both tiers was also a source of some dispute among Study Group members. The entire Group did agree that if both tiers are available, compensation awarded under the first should be deducted from, and paid back out of, a Tier Two award. Nine of the twelve Study Group members, however, recommended that both tiers be available and that plaintiffs whose award in Tier Two did not exceed that in Tier One by at least 25% should, at the Judge's discretion, bear the costs of the Tier Two action.[31]

28. STUDY GROUP PROPOSAL at 240-45. The Group rejected formulations of strict liability which balance the hazard against its utility, as implicitly incorporating a negligence standard which would pose a major obstacle to recovery. A majority of the Group recommended, instead, that strict liability be imposed on the basis of the hazardous nature of the defendant's activity. *Id.* at 250-1. The STUDY GROUP PROPOSAL contains a detailed assessment of the strict liability doctrine. *See* STUDY GROUP PROPOSAL, PART II, Appendix K at 263.

29. STUDY GROUP PROPOSAL at 252-56.

30. *Id.* at 248-50.

31. *Id.* at 182-83. The justification for allowing a claimant free access to both tiers, rather than requiring him or her to elect one or the other, is to enable the claimant to obtain the more expedited recovery under the first tier in order to reduce the immediate

A Critique

As the above description of the STUDY GROUP PROPOSAL suggests, the Group's findings and proposals resulted from compromises among, and enjoyed varying degrees of support from, its members. The following is a summary of the views of one member, Judge Breitel, which were submitted as one of several separate "Comments" in the STUDY GROUP PROPOSAL. From his comments, Judge Breitel appears to be the Study Group member most critical of the Group's product. His views are summarized here, not to highlight the inevitable disagreement in a group of this nature, but to present a somewhat different perspective on the subject of victim compensation.

On the whole, Judge Breitel praised the STUDY GROUP PROPOSAL as a good *first* step,[32] but one whose "limited recommendations are neither practical, desirable, nor reliable."[33] Generally, Judge Breitel criticized the Group for limiting its focus to injuries caused by hazardous wastes, rather than by hazardous substances in all contexts because, in Judge Breitel's view, the problems of the former were inextricably tied to problems of the latter. Both needed to be analyzed from the broader view of the role and risks presented by particular hazardous substances in today's society.[34] Judge Breitel's point, that "[m]ost rules applied to hazardous waste sites and spills should and will, sooner or later, inevitably apply to toxic substances in general,"[35] seems more a vindication than criticism of the Study Group's efforts. Given the Group's limited resources and time, their focus on a piece of the toxic

financial pressures resulting from the claimant's injury, but without having to forego the potentially larger recovery under Tier Two.

On the other hand, it was argued that the availability of cumulative remedies would be a great expense and burden on the entire compensation system. Proponents of this argument doubted that the reduction of costs awarded in Tier One from Tier Two awards would discourage plaintiffs from bringing claims under both tiers. The discretionary litigation cost provision, and another requiring plaintiffs who pursued a Tier Two remedy to waive their right to judicial review of a Tier One award, were attempted compromises to satisfy both arguments. *Id.* at 185-88.

See Id. at 188-90, for further proposals on the availability of remedies under both tiers.

For further discussion of the STUDY GROUP PROPOSAL, *see* Zazzali and Grad, *supra* note 1; Note, *Amending Superfund to include a "Discovery" Rule for Personal Injury Caused by Hazardous Substance Exposure*, 4 VIRG. J. NAT. RES. L. 131, 141 (1984).

32. STUDY GROUP PROPOSAL, Comments of Charles D. Breitel at 9.

33. *Id.* at 1.

34. *Id.* at 1-4.

35. *Id.* at 2.

chemical pie was a pragmatic one, but one which will surely bear on more than the single piece.[36]

Judge Breitel supported the Group's recommendation of the Tier One, administrative remedy, but felt that the Group's recommendations to prevent plaintiffs from using both tiers freely to obtain the maximum recovery were not sufficient.[37] Judge Breitel also objected to what he considered the justification for use of the presumption documents: "the more difficult it is to prove causation, then the stronger must be the presumption."[38] Judge Breitel insisted that presumptions are justified only when they can be shown to have a "high probability," not just when they are more likely than not to represent a true fact.[39]

Judge Breitel's criticism seems somewhat unfair. First of all, some of the toxic substance-exposure-disease linkages which the federal agency assigned to prepare the documents finds, may in fact be based on a high probability. In the other cases, high probabilities may be difficult to prove because the appropriate scientific techniques provide only rough pictures of the risk.[40] It is unreasonable to base recovery on proof of high probabilities when contemporary science simply cannot marshall such proof. In authorizing the Environmental Protection Agency and the Occupational Safety and Health Administration to protect human health from chemical pollutants, Congress does not require proof of a "high probability" as the threshold for regulatory action.[41] Judge Breitel's call for adherence to rigid standards of proof seems to conflict with his recognition, in the context of his discussion on standards of fault, that "toxic substances . . . present a

36. Judge Breitel's criticism of the Group's "narrow" focus raises an interesting question of how to analyze environmental problems. The ecologists' view of phenomena as being inextricably interconnected has gained increasing acceptance in both scientific and social science circles. As Judge Breitel warns, "Without a global assessment, presumed remedies may be destructive of the benefits and may not alleviate or eliminate the costs, as a matter of technology or economics." *Id.* at 3. How or when does this view, however, collide with a piecemeal problem-solving approach necessitated by resource limitations of groups like the Study group, or — on a larger scale — by political constraints of organizations like the U.S. Congress?

37. *Id.* at 5. *See, Id.*, STUDY GROUP PROPOSAL, Joint Statement of Messrs. Anderson, Breitel, Freeman, and O'Connell at 1 (alternative proposal to prevent "gambling" on recovery between tiers).

38. STUDY GROUP PROPOSAL, Comments of Charles D. Breitel at 5-6.

39. *Id.* at 6.

40. *See, e.g.*, Davis, *The Shotgun Wedding of Science and Law: Risk Assessment and Judicial Review*, 10 COL. J. ENV. L. 67, 68 (1985).

41. *Id.* at 87.

new and unprecendented kind of tort liability . . . call[ing] for a new design."[42]

Judge Breitel argues that the Group's analysis of fault is "flawed,"[43] and that the Group's proposals rely on an "oversimplified analogy" to no-fault concepts in tort law, but the Judge offers no alternative analysis or proposed fault standard. The Judge's call for a broad cost-benefit analysis of the chemical industry,[44] however, suggests that he feels statutory adoption of any fault standard and method of financing the compensation fund are simply premature.[45] Judge Breitel's point also suggests the impropriety of assigning to a group of lawyers the task of proposing new compensation schemes, when economic and other social factors need to be assessed first. In summary, the amount of controversy over the Study Group report indicates its proposed model may not be a politically palatable resolution of the victim compensation problem.

The next section of this Note analyzes another proposal. The Environmental Law Institute [46] has prepared its own report on statutory reform of "toxic torts" which is accompanied by a Model Statute.[47] Although the Model Statute encompases all forms of toxic torts, it specifically includes within its coverage persons injured by hazardous pollution.[48] It was drafted as a model statute for states but could easily be modified for federal enactment.[49]

42. STUDY GROUP PROPOSAL, Comments of Charles D. Breitel at 7.

43. *Id.* at 4.

44. *Id.* at 7.

45. "Because a legislature would be irresponsible if it enacted proposals which would destroy or seriously impair enterprise activities which our society as a matter of legislative policy determines must be retained at all or even high costs, no program for their approval should be recommended unless this consideration is factored into the analysis to support the program." *Id.*

46. The Environmental Law Institute is an organization actively engaged in environmental affairs.

47. *See* Report Summary by J. TRAUBERMAN, STATUTORY REFORM OF "TOXIC TORTS" RELIEVING LEGAL, SCIENTIFIC, AND ECONOMIC BURDENS ON THE CHEMICAL VICTIM (ENVIRONMENTAL LAW INSTITUTE 1983) [*hereinafter* cited as TRAUBERMAN] (on file in the office of the *Columbia Journal of Environmental Law*). Copies of the complete report as well as the Model Statute are available from the Environmental Law Institute, 1346 Connecticut Avenue, N.W., Washington, D.C. 20036; *see also* Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim*, 7 HAR. ENVTL. L. REV. 177 (1983).

48. TRAUBERMAN at 3.

49. *Id.* at 2.

Like the STUDY GROUP PROPOSAL,[50] the ELI Model Statute would establish a fund against which injured individuals could make claims.[51] An injured person would be able to choose between filing a claim against the fund or bringing a direct action against the party who may have caused the hazardous substance harm.[52] If the victim filed against the fund, the fund would be subrogated to any direct action rights the victim had.[53]

The ELI Model Statute incorporates procedures aimed at easing the burden on victims of toxic torts. The statute mandates a two year statute of limitations that begins to run only after manifestation of the disease and after the victim could have reasonably established that a person was a substantial factor in causing the disease.[54] The model contains several provisions aimed at reducing the plaintiffs burden of proving causation. The statute applies a rebuttable presumption that shifts the burden of proof of causation only for claims against the fund.[55] In normal state court direct actions, the Model Statute eases the plaintiff's burden by allowing risk-based causation.[56] The model also provides for expansive evidentiary rules and recognizes that the statute should cover a wide range of substances.[57] The statute strives to reduce needless litigation by employing generic efforts to establish previously determined issues.[58]

Although the ELI statute is weighed more heavily in favor of the victim than the STUDY GROUP PROPOSAL, it would most likely be subject to the same criticisms. The model retains the two tiered approach and would appear to offer the polluter very little advantage in exchange for a greatly increased liability exposure.

50. See *supra* text accompanying notes 17-27.

51. TRAUBERMAN at 3.

52. *Id.*

53. *Id.*

54. *Id.* at 4. Trauberman notes this is an objective standard requiring the trier of fact to determine when it was reasonable to have discovered a relationship between the harm and the exposure.

55. *Id.* at 8.

56. *Id.* at 6, 8. The theory of risk based causation is that exposure to a particular substance may increase the risk of a disease. Trauberman notes that approach has merit where the plaintiff would not be able to meet the traditional "substantial factor" test. *Id.* at 7.

57. *Id.* at 4, 5.

58. *Id.* at 6.

II. State Statutes

While Congress has yet to adopt legislation providing compensations for injuries from hazardous substances, several states have done so. In many states the statute merely codifies preexisting common law liability.[59] Other states have gone farther and have enhanced the availability of compensation for hazardous substance injuries by creating an administrative fund against which victims may claim relief or by modifying common law procedures.

Thirty-six states have established funds or fee systems to respond to or prevent the release of hazardous substances.[60] Of these, only a few allow claims to be made against the fund for personal injuries. New Jersey's fund may be used to compensate all direct and indirect damage,[61] which includes personal damages. Florida allows recovery for "all provable property damages which are the proximate results of hazardous waste released . . . ."[62] South Carolina allows payments of victims injured by pre-existing abandoned sites where an enforceable judgment cannot be obtained.[63] Perhaps the most expansive of the victim compensation funds is found in California.[64] The California scheme may serve as a model scheme for other states and is discussed in greater detail in the next section of this note.[65]

A few states have attempted to deal with the personal injury compensation problem by creating a statutory cause of action or by modifying procedural rules. For example, Alaska has adopted legislation which holds a party controlling a hazardous substance strictly liable for damages caused by the substance entering another's property.[66] North Carolina allows private damage claims

59. *See, e.g.*, Alaska Stat. § 46.03.828 (1982); Hawaii Rev. Stat. § 342-16 (1976); Idaho Code § 39-108(8) (1985); Ill. Ann. Stat. ch. 111-1/2 §1022.3 (Smith-Hurd Supp. 1985); Ky. Rev. Stat. § 224.995(3) (1982); La. Rev. Stat. Ann. §30:1074(4) (West Supp. 1985); Me. Rev. Stat. Ann. tit. 38, §1306-C-5 (Supp. 1984); Md. Nat. Res. Code Ann. §8-1403 (1983); Mo. Ann. Stat. § 260.425.7 (Vernon Supp. 1985); Nev. Rev. Stat. §445.321 (1979); N.M. Stat. Ann. § 74-6-13 (1983); N.D. Cent. Code §32-40-04 (1976); Pa. Stat. Ann. tit. 35, §6018.607 (Purdon Supp. 1981); Tex. Rev. Civ. Stat. Ann. art. 4477-7 §10 (Vernon Supp. 1985).

60. *State Hazardous Waste Superfunds and CERCLA: Conflict or Complement?*, 13 Envtl. L. Rep. (Envtl. Law. Inst.) 10,348, 10,352 (1983).

61. N.J. Stat. Ann. § 58:10-23.11g(a) (West 1982).

62. Fla. Stat. Ann. § 403.725 (Harrison Supp. 1984).

63. S.C. Code Ann. § 61-79.5(2)(e)(iii) (Law. Co-op. 1976).

64. Cal. Health & Safety Code, (Rpt 6.8, §§ 25300-25395 (West 1984).

65. See *infra* text accompanying notes 72-95.

66. Alaska Stat. § 46.03.822 (1982).

for personal injuries when a substance enters the water.[67] North Dakota and Rhode Island have adopted negligence per se approaches to imposing liability for hazardous substance damage,[68] while Pennsylvania law eases the plaintiff's burden of causation.[69] Minnesota has perhaps the most elaborate scheme for providing private damage liability schemes.[70] The Minnesota scheme may serve as a model for states choosing the statutory private action avenue to deal with hazardous victim compensation and is analyzed further in the next section of this note.[71] The following is a description of the California and Minnesota statutes.

A. *California*

California's "Hazardous Substance Account Act,"[72] enacted in 1981 and amended in 1984, establishes a state program to clean up and compensate persons injured from exposure to releases of hazardous substances.[73] The Act creates a special account in the general fund called the "Hazardous Substance Account"[74] which provides up to two million dollars annually for the payment of compensation awards.[75]

The Act provides recovery for losses caused by the "release" of a "hazardous substance" where no liability can be placed on any party.[76] Although the California Act appears to provide compen-

67. N.C. GEN. STAT. § 143-215.93 (1983).

68. N.D. CENT. CODE §32-40-06 (1976); R.I. GEN. LAWS § 23-19.1-22 (Supp. 1984).

69. PA. STAT. ANN. tit. 35, § 6018.611 (Purdon Supp. 1982).

70. MINN. STAT. § 115 B.05 (Supp. 1985).

71. *See infra* text accompanying notes 96-116. Despite repeated attempts, the Minnesota legislature has to date refused to enact hazardous substance victim compensation fund legislation. Minneapolis Tribune, March 12, 1985.

72. CAL. HEALTH & SAFETY CODE, §§ 25300-25395 (West 1984 & Supp. 1985).

73. *Id.* § 25301(a)(b). The statute also contains reporting requirements for disposers of hazardous wastes. *See id.* §§ 25341-43.

74. *Id.* § 25330.

75. *Id.* § 25381(b), *amended by*, Fiscal Affairs-Implementation of Budget Act, ch. 268, § 27.69, 1984 Cal. Legis. Serv. 19, 87 (West) (effective June 30, 1984).

76. *Id.* § 25372. "Release" is broadly defined in section 25320 of the Act, but is limited by section 25321 to exclude, *inter alia*, workplace exposures, engine exhausts, releases of certain materials from nuclear reactors, and normal applications of fertilizers and pesticides. Section 25375 of the Act further limits the scope of recoverable injuries by prohibiting compensation for claims resulting from "long-term exposure to ambient concentrations of air pollutants." Even with these limitations, the California Act appears to cover a broader range of injuries than those covered by the Study Group's proposed Tier One scheme. *See supra* note 18 and accompanying text.

"Hazardous substance" includes — with some exceptions — those substances regulated under federal pollution statutes. *Id.*, §§ 25316-17.

sation for injuries caused by a broader range of exposures than the Study Group's proposal, the compensation fund created by the California Act is financed by a tax on a narrower range of sources than the fund in Tier One of the Study Group's plan. The Study Group's fund would be subsidized by a tax on producers of hazardous chemicals and oil, and on hazardous waste disposers; California's Hazardous Substance Account is financed by a tax strictly on generators of hazardous waste.[77]

The California Act does not explicitly provide the kinds of rebuttable presumptions available in the Study Group's proposal to ease claimants' burden of proving causation.[78] Presumptions may ultimately be provided by the State Board of Control, which administers the compensation fund, and which has the authority to promulgate regulations that "specify the proof necessary to establish a loss compensable pursuant to this article."[79] To recover under the fund, claimants must show "by the weight of the evidence" that their loss was "proximately caused" by a designated release.[80] Depending on what regulations the State Board of Control adopts regarding causation, the Act may not change claimants' common law burden of proving causation, which the Study Group viewed as a substantial obstacle to recovery.[81]

The Act's statute of limitations, like that in the Study Group's Tier One scheme, runs for three years after the date of discovery.[82] Section 25372 of the Act adds a requirement not present in the Study Group's model. Under this section, claimants can only recover from the fund when either (1) the source of the release, or party "liable" for damages caused by the release or "responsible" for the removal costs, is "unknown" or cannot be identified

77. *Id.* §§ 25342, 25345, *amended by*, Fiscal Affairs-Implementation of Budget Act, ch. 268, § 27.66, 1984 Cal. Legis. Serv. 19, 84 (West) (effective June 30, 1984). *See also, supra* note 25 and accompanying text.

78. Although claimants' may not be able to rely on Toxic Substances Documents like those proposed by the Study Group, claimants' burden of proving causation will be facilitated somewhat by California courts' willingness to rely considerably on circumstantial and statistical evidence, as shown in the areas of products liability, chemical, and drug cases.

79. CAL. HEALTH & SAFETY CODE § 25381 (West 1984 & Supp. 1985), *amended by*, Fiscal Affairs-Implementation of Budget Act, ch. 268, § 27.69, 1984 Cal. Legis. Serv. 19, 86 (West) (effective June 30, 1984).

80. *Id.* at § 25375. Subsections 25373(b), (d) and (e) of the Act require the claimant to provide evidence of the release, injury, medical expenses and lost income.

81. *See supra* note 21 and accompanying text.

82. CAL. HEALTH & SAFETY CODE § 25376. In the alternative, the Act allows claims regardless of the date of discovery, up to four years after January 1, 1982. *Id.*

with "reasonable diligence;" or (2) if the loss is not compensable "pursuant to law" because "there is no liable party or the judgment [can] not be satisfied . . . against the party determined to be liable for the release . . . ."[83] The vagueness of this exhaustion provision is somewhat troubling. Do the "liable" and "responsible" parties in the first alternative have to be determined as such by a prior court action? If so, does "reasonable diligence" include appeals of trial court findings? Similarly, must court suits covered by the second alternative be appealed? How will the State Board of Control and subsequent reviewing courts measure the "diligence" with which a claimant pursued a prior court action?[84]

Compensable losses are limited to 100% of medical expenses for three years of treatment, 80% of uninsured lost wages or income up to $15,000 per year for three years.[85] Claimants are not required to pursue a claim against the fund before pursuing any other kind of remedy, just as claimants are not required to bring a Tier One claim before pursuing a state action under the Study Group's model.[86] However, claimants are not allowed to recover for the same loss from the fund and from another remedy.[87] In addition, the Act provides that no compensation, Board decision or settlement reached pursuant to the Act's chapter on compensation is admissable as evidence in any other legal proceeding.[88]

The 1984 amendments expressly added that the standard of liability in recovery actions is strict liability.[89] Compensation under the Act is subject to the state acquiring, by subrogation, all the claiments' rights to recovery against the tortfeaser.[90] Under this section, "liable" parties are only responsible for the portion of the total costs which they can prove, by a preponderance of evidence, was caused by their actions. If a court finds the evidence inadequate to apportion costs under the first scenario, the court is

83. *Id.* § 25372.

84. As yet, there are no reported cases in which courts have had to interpret the exhaustion provision.

85. CAL. HEALTH & SAFETY CODE, § 25375(a),(b).

86. *Id.* § 25377; *see supra* note 31 and accompanying text.

87. *Id.* § 25378. This appears stricter than the Study Group's requirement that any award under one tier be simply deducted from a larger award under another tier. *See supra*, note 31 and accompanying text.

88. CAL. HEALTH & SAFETY CODE § 25379.

89. *Id.* § 25363.

90. *Id.* § 25380.

authorized to apportion costs among defendants according to "equitable" principles.[91] Board liability decisions are subject to judicial review.[92]

Although the California legislation is a giant leap in the direction of victim compensation, it is not without its problems. Claimants are faced with the obstacle of having to prove proximate cause before they may recover for their injuries. This is the same barrier plaintiffs currently meet in courts of other states.[93] Perhaps the biggest benefit to be derived from the Act will be improved hazardous waste management practices of generators, transporters and ultimate storers who now are strictly liable for their activities in California.[94] Without a doubt this will act to reduce the number of hazardous waste injuries in the future.[95]

B. *Minnesota*

The Minnesota Environmental Response and Liability Act (MERLA)[96] was enacted in 1983 to address problems of future cleanup and liability for the release of hazardous substances.[97] Like the California Act, MERLA establishes a fund to pay for the removal of toxic wastes from selected sites, and provides an action for the recovery of cleanup costs.[98] The five million dollar fund is to be subsidized by a tax on hazardous waste generators based on the volume and destination of the hazardous waste generated.[99] Unlike the California Act or the STUDY GROUP PROPOSAL, MERLA provides no compensation fund for personal injury. Instead, MERLA provides a cause of action which victims must pursue in the state courts. Like the Federal Superfund statute,

91. *Id.* § 25363(a), *amended by*, Hazardous Substances-Cleanup-Funding and Administrating, ch. 376, § 16, 1984 Cal. Legis. Serv. 474, 488 (West) (effective July 10, 1984).

92. *Id.* § 25374.

93. *See supra* note 9.

94. *See supra* note 89.

95. The same observation applies to any scheme that increases the financial obligations.

96. MINN. STAT. ANN. §§ 115B.01-115.24 (West 1984).

97. The bill was originally vetoed by Governor Perpich, who ultimately signed it into law in May, 1983.

The scope of "releases" covered by MERLA is similarly as broad as that covered by the California Act. *Id.* § 115B.02, subd. 15; *supra* note 76. Hazardous substances are defined largely in reference to substances designated under Federal pollution statutes. *Id.* § 115B.02, subd. 8-9.

98. *Id.* § 115B.20; 115B.04, subd. 1(a)-(c).

99. *Id.* § 115B.22.

MERLA also created a "Task Group"[100] whose purpose was to study the personal liability provisions of MERLA, and to make recommendations after one year on whether a compensation fund should be established.[101]

Pursuant to MERLA, persons who are "responsible" for the release of hazardous substances are "strictly liable, jointly and severally," for damages resulting "from the release or to which the release significantly contributes."[102] MERLA affords such persons defenses for releases caused solely by acts of God, war, vandalism or sabotage, third parties or the plaintiff. The latter two defenses are available only if the defendant proves— by a preponderance of the evidence—that he or she "exercised due care with respect to the hazardous substance concerned" and "took precautions against the foreseeable acts or omissions . . . ."[103] The

100. The Group's seventeen members consisted of state governement officials, environmentalists, and representatives of trial lawyers and the business sector. As such, the Task Group seems more representative than the Study Group. *See supra* note 12.

101. MINN. STAT .ANN. § 116.12, subd. 30. The Task Group's findings are summarized in a letter from Tom Triplett, Director of the Minnesota State Planning Agency, to Bob Dunn, Chairman of the Minnesota Waste Management Board (Feb. 19,1985) (copy on file in the office of the Columbia Journal of Environmental Law) [*hereinafter* referred to as the Task Group Letter].

102. MINN. STAT. ANN. § 115B.05, subd. 1. The MERLA joint and several liability provision changes the common law standard, which requires a plaintiff to show an indivisible injury among defendants and enables a plaintiff to seek damages against any party responsible even if apportionment is possible. *See* Overview of Proposed Changes, Tom Triplett, Director of Minnesota State Planning Agency, Jan. 9, 1985. The provision for joint and several liability in MERLA was a point of controversy among legislators. The Task Group recommended the repeal of joint and several liability provision on the ground that a plaintiff is sufficiently protected by common law and statutes. Task Group Letter, *supra* note 101, at 1-2.

103. *Id.*, § 115B.05, subd. 6, 10. Section 115B.05 sets several other defenses to strict liability. These defenses are for releases authorized by federal or state permits, or otherwise sanctioned by a federal or state statute, *Id.* § 115B.05, subd. 8; and for damages resulting from acts taken in the course of providing assistance in federal or state authorized response actions. *Id.* § 115B.05, subd. 9.

Furthermore, MERLA exempts responsible persons from liability for damages caused by the release of a "pollutant" or "contaminant," *Id.* § 115B.05, subd. 2; for damage to employees who are compensable under the state's workman's compensation statute, *Id.* § 115B.05, subd. 3; and for damages resulting from releases which occur after the appropriate state or federal agency takes over a site to remove the toxins present. *Id.* § 115B.05, subd. 7. Finally, MERLA exempts from liability persons who accept "household refuse" (as defined in the Act) which releases hazardous substances unless they knew or reasonably should have known of the presence of such substances in the refuse. *Id.* § 115B.05, subd. 5.

Task Group did not propose a change to the strict liability provision.[104]

MERLA contains a lengthy definition of "responsible" persons who are subject to strict liability. Such persons consist of (a) owners or operators of the facility—from which the substance was released—when the substance was placed there, or before or at the time of the release; (b) owners of the substance who arranged for its treatment and/or disposal; and (c) transportors of the substance who either selected the releasing facility or who illegally disposed of the substance.[105] "Responsible" persons do not include non-negligent employees acting in the scope of their employment,[106] and owners of real property who, in effect, had no knowledge, or reasonably could not have known, of the existence of hazardous substances on their property.[107]

The causation provisions are applicable in an action brought under MERLA, or brought under any other state law for damages resulting from the release of a hazardous substance. The provisions allow a plaintiff to withstand a directed verdict by showing that the defendant is "responsible" for the release, that the plaintiff was exposed to the hazardous substance, that the release could have "reasonably resulted" in plaintiff's exposure, and that the release "caused" or "significantly contributed" to the plaintiff's injury, disease or death.[108] Plaintiffs do not have to establish with "reasonable medical certainty" that a hazardous substance caused or contributed to the injury in order to get their case to a jury. However, MERLA makes clear that the burden of proving causation is on the plaintiff.[109]

Minnesota's causation provision imposes more of a burden on plaintiffs than does the Study Group's proposal, which provides for rebuttable presumptions based on exposure-injury linkages

104. Task Group Letter, *supra* note 205, at 2; however, the business community urged the repeal of strict liability while state agencies and environmentalists opposed repeal. *See, e.g., Business Proposes "Superfund" Law Changes to Perpich's Staff*, Minneapolis Star and Tribune, Jan. 16, 1985 at 3; *Business Criticizes Minnesota Superfund Law on Shaky Grounds*, St. Paul Pioneer Press, Mar. 18, 1985, at 21.

105. *Id.* § 115B.03, subd. 1.

106. *Id.* § 115B.03, subd. 2.

107. *Id.* § 115B.03, subd. 3.

108. *Id.* § 115B.07(a)-(d).

109. *Id.* § 115B.07.

drawn in Toxic Substances Documents.[110] Moreover, the Task Group concluded that the causation provision in MERLA did not ease, but simply reiterated the plaintiff's existing common law burden of proof. The Group recommended that this provision be replaced by a savings clause.[111]

In contrast with the limitations period of three years after discovery in the STUDY GROUP PROPOSAL and California Act, the statute of limitations under MERLA runs six years after the cause of action "accrues". In determining when an action accrues, courts are to consider factors dealing with the time of discovery of the loss and the link between the loss and release.[112]

Compensable damages under MERLA consist of damages for death, personal injury and disease.[113] Compensation is also available for "actual economic loss" stemming from injury to, lost use of, or lost income derived from injury to or loss of real or personal property.[114] The Act is silent with regard to punitive damages and damages for mental distress.

Whether MERLA was to apply retroactively was hotly debated among Minnesota legislators when the act was adopted[115] and remains a point of significant contention.[116] The compromise adopted by the legislature provides for full retroactive application of the Act to the release of hazardous substances which were placed in facilities after January 1, 1973. For substances placed in a facility before that date, defendants are absolved from liability if they prove that the placement, storage or transportation of that substance was not an abnormally dangerous activity. MERLA

110. *See supra*, notes 21-23 and accompanying text. This is assuming that the federal agency which prepares the Documents is not too conservative in determining such linkages.

111. Task Group Letter, *supra* note 101, at 1-2.

112. MINN. STAT. ANN. § 115B.11.

113. Those damages include medical expenses, rehabilitation costs or burial expenses, loss of past or future income or loss of income earning capacity, and damages for pain and suffering. *Id.* § 115B. 05, subd. 1(b).

114. *Id.*, § 115B.05, subd. 1(a).

115. *Cleaning up Minnesota's Toxic Wastes*, Minneapolis Star and Tribune, Mar. 12, 1983 at 10A, col. 1; *Hazardous Wastes Must be Cleaned Up: The Question is How*, Rep. Dee Long and Sen. Gene Merriam (pro retroactivity); James T. Shields (con), St. Paul Pioneer Press, April 18, 1982; Charles Dayton, *The Superfund Fight: Current System Places Burden of Waste on the Victims*, Minneapolis Star and Tribune, April 15, 1983; *see also* Robert Johnson, *Radical Change in Law Would Hurt Minnesota Business, Id.*

116. *See, e.g.*, Ulen, Hester & Johnson, *Minnesota's Environmental Response and Liability Act: An Economic Justification*, 15 ENVTL. L. REP. (ENVTL. L. INST.) 10,109 (1985).

does not apply at all to the release of hazardous substances placed in a facility before January 1, 1960.[117]

III. Federal Legislative Proposals

The publishing of the Study Group Proposal in August of 1982[118] and increased public awareness of the problems of hazardous waste have led to the introduction in Congress of federal statutory proposals aimed at the problem of hazardous waste victim compensation. In the 97th Congress several victim compensation bills were introduced. Although none of these bills have been enacted at this time, they serve as useful discussion tools with respect to different approaches federal legislation may take. Senator Stafford presented a bill which would amend Superfund to provide compensation to victims from the fund.[119] This particular bill provided a federally imposed statute of limitations, a federal right of action for injured parties, and a "no fault" compensation system; it also imposed new evidentiary rules on state courts, and extended Superfund until 1990.[120] Two other bills were introduced in the Senate during the same session by Senators Mitchell and Randolf. Senate Bill 945[121] would amend Superfund to provide compensation for medical and burial expenses. Senate Bill 946[122] went even farther and would amend Superfund to implement the two-tiered system from the Superfund 301(e) report. On the House side, Representative LaFalce presented H.R. 2330[123] which also was based upon the Superfund Study Group recommendations. The bill proposes an entirely new act that establishes a nonexclusive federal right of action, eases the plaintiff's burden by establishing a rebuttable presumption of guilt, and calls for a new office to be created within the Department of Health and Human Services for the pur-

117. Minn. Stat. Ann. § 115B.06, subd. 1, 2. The Task Group failed to reach a consensus on whether to change the retroactivity provision.

118. *See supra* text accompanying note 11.

119. S. 917, 98th Cong., 1st Sess., 129 Cong. Rec. S3927-29 (daily ed. Mar. 24, 1983).

120. Garrett, *Compensating Victims of Toxic Substances: Issues Concerning Proposed Federal Legislation*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,172, 10,176 (June 1983).

121. S. 945, 98th Cong., 1st Sess., *summarized in*, 129 Cong. Rec. S3985 (daily ed. Mar. 24, 1983).

122. S. 946, 98th Cong., 1st Sess., *summarized in*, 129 Cong. Rec. S3985 (daily ed. Mar. 24, 1983).

123. H.R. 2330, 98th Cong., 1st Sess., *summarized in*, 129 Cong. Rec. H1713-14 (daily ed. Mar. 24, 1983).

pose of victim compensation.[124] Another bill introduced by Representative Markey[125] would amend the Solid Waste Disposal Act to create a $1 billon dollar victim compensation fund financed by taxes on petrolium and chemicals. The bill also creates a federal cause of action against owners, operators, and transporters of hazardous materials "without regard to fault".[126] All five of the bills introduced in the 98th Congress were referred to committee.

Severe criticism has been leveled at each. One commentator noted any scheme that implements a two-tiered system basically allows easy recovery from a fund to finance a legal battle against a possibly blameless party.[127] Many industries may object to financing victim compensation through taxes when they themselves are without fault.[128] Insurance interests have indicated that they find the liability created by all the schemes introduced to date uninsurable.[129]

On March 1, 1985 the Senate Environmental committee voted re-authorization of the 1980 Superfund law with a new provision, authored by Senator Mitchell, to set up a five-year pilot project

124. Garrett, *supra* note 120 at 10,176-77.

125. H.R. 2582, 98th Cong., 1st Sess., *summarized in*, 129 CONG. REC. H2114 (daily ed. April 18, 1983).

126. Garrett, *supra* note 120 at 10,177.

127. *Id.* at 10,176, 10,177. It should be noted there appears to have been a heated debate about recommending an exclusive or nonexclusive remedy in the Superfund §301(e) Report. Evidently three members of the group dissented on the ground that the remedy should be exclusive. Mr. Garrett appears to agree with the three dissenters. *See* Grad, *supra* note 67, at 10,237.

128. Garrett, *supra* note 120 at 10,176.

129. American Insurance Association, Preliminary Paper on Proposed Hazardous Substance Victim Compensation Legislation, (July 12, 1983) *cited in* Berg, Compensation for Persons Injured by Toxic Substances: Proposed Federal Legislation, at 9, 13 (copy on file in the office of the Columbia Journal of Environmental Law). The arguments of the American Insurance Association against the legislative proposals include the following:

> (1) the creation of rebuttable presumptions would unfairly and substantially increase the likelihood of liability; (2) joint and several liability would reduce the predictability of claims because a company's liability would depend, in part, on the actions of others; (3) most of the proposals would be extremely costly because of strict liability; victims could recover from the responsible parties in court after receiving a fund award, insurance proceeds, government program benefits, and fund awards would not be be deducted from the damages that could be [sic] sought from the responsible parties in court; and the lack of limits on the amount of damages; and (4) retroactive liability is unfair.

Id. at 13 n.14. *See also Insurance Against Pollution is Cut*, N.Y. Times, March 11, 1985, at A1, col. 6.

for compensation for victims of hazardous waste exposure.[130] The proposal consists basically of an insurance plan which would provide secondary coverage for medical expenses from hazardous waste injuries not already compensated by another source, public or private.[131] The project would be implemented on a trial basis in five to ten locations around the country to demonstrate that the mechanism is workable.[132] Although a hopeful sign, a program of this nature would delay further attention to the magnitude of the hazardous substance problem for a significant amount of time.

The future of federal victim compensation legislation remains uncertain at this date. In voting to approve the reauthorization of CERCLA this year, the Senate voted 49 to 45 against the pilot victim compensation program sponsored by Senator Mitchell.[133] No other provision for victim compensation is included. On the House side, the CERCLA reauthorization bill is still in committee. The House Public Works Committee recently approved a bill that would allow individuals to sue for cleanup costs but contained no provision for victim compensation.[134] Given this, it is unlikely a victim compensation bill of any sort will gain support this year.

CONCLUSION

Faced with the problem of compensating victims for hazardous substance injury, none of the proposals would seem to resolve all of the difficulties. Although most commentators believe the existing system is inadequate from the perspective of the injured parties, [135] other industry and insurance interests are concerned that liability may be virtually unlimited. [136] On the other hand,

130. Office of United States Senator George J. Mitchell, Press Release (Mar. 1, 1985) (copy on file in the office of the Columbia Journal of Environmental Law).

131. *Id.*

132. *Id.*

133. *Senate Passes Superfund*, SIERRA CLUB NATIONAL NEWS REPORT 1 (October 11, 1985).

134. *Public Works Committee Reports Improved Superfund*, 17 SIERRA CLUB NAT'L REP. 19, Oct. 11, 1985, at 6. This bill is considered acceptable by many environmental groups, an indication that they do not believe a victim compensation provision is even possible at the present time.

135. *See supra* text accompanying notes 1-11.

136. Industry interests insist they face the prospect of enourmous compensatory awards under the common law. *See* J. Bernstein and W. Powers,*Toward an Improved Compensation System For Persons Exposed to Toxic Waste*, HAZARDOUS WASTE REPORT (March 1983). Consider the effect Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924 (Sup. Ct. Calif.), *cert. denied*, 449 U.S. 912 (1980) had on the potential liability of defendant manufacturers. By giving market share liability legitimacy, a number of plaintiffs who otherwise would have been unable to recover for injuries were awarded relief. A similar judicially

each of the proposals has been subject to major criticisms. Commentators have also been critical of state legislative actions. Given that no adequate solution has yet been posed, it is perhaps time that interested parties meet on neutral territory and reestablish priorities in the hazardous substance injury area.

promoted change in the burden of proof of causation in the toxic tort area would have a similar impact on entities that could be held responsible for a hazardous substance injury.