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THE NEED FOR FEDERAL PRODUCT LIABILITY AND
TOXIC TORT LEGISLATION: A CURRENT
ASSESSMENT*

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I. INTRODUCTION

SINCE the founding of the Nation, tort law has traditionally been the "province of the states." Only when a serious social problem has been suffused with a national interest and not been susceptible to resolution by the states have federal incursions into this state law domain been permitted.¹ There are, however, a number of proposals currently pending before Congress that call for federal legislative initiatives in the field of tort law. These proposals are particularly surprising in light of the general trend of federal retrenchment and the new federalist regulatory deferral to the states.² Most of these propos-

* The authors note that the views expressed in this article are not necessarily those of their clients and are offered for the purpose of furthering public discussion of the issues.

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1. See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 (1982) (uniform safety standards for consumer products necessary to minimize conflicting state and local regulations which were inadequate and burdensome to manufacturers); Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976 & Supp. V 1981) (facilitating compensation for persons engaged in maritime employment upon the "navigable waters" of the United States); Price-Anderson Act, 42 U.S.C. §§ 2210-2222 (1976 & Supp. V 1981) (government indemnification and liability limitation imposed in the context of licensing provisions for the nuclear industry for the purpose of encouraging the growth of the industry by protecting against unlimited liability in the event of a catastrophic nuclear accident); Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1976) (facilitating the compensation of occupational injuries suffered by railroad employees engaged in interstate or foreign commerce). For a more detailed analysis of these and other federal statutes, see Trauberman, *Compensating Victims of Toxic Substances Pollution: An Analysis of Existing Federal Statutes*, 5 HARV. ENVTL. L. REV. 1 (1981).

2. See *New Federalism*, 14 NAT'L J. 356, (Feb. 27, 1982). "New Federalism" represents President Reagan's program for overhauling the way the nation provides public services and putting an end to decades of concentrating power in Washington. *Id.* In theory, the plan would simplify government at all levels by consolidating re-

als may be grouped into two rough classes, those providing for 1) federal product liability tort reform; or 2) federal compensation systems for "toxic torts," that is, injuries caused by toxic substances.³

As explained below, these proposals, despite their common product liability tort connection, are responsive to very different public problems. Furthermore, the case for federal legislation is of a very different nature as between the two classes of proposals. As a general matter, federal product liability tort reform is necessary and appropriate. The toxic tort problem, on the other hand, is so multi-dimensional that it is impossible to appraise proposals for federal legislation on a blanket basis. Instead, we suggest below an analytic framework for determining which aspects of the toxic tort problem are appropriate for federal treatment. We conclude that at least one certain type of toxic tort appears not only ripe for federal legislative intervention but also may well require it. However, we believe that a need for federal legislation addressing other toxic tort modalities has not been established.

II. THE NEED FOR FEDERAL PRODUCT LIABILITY TORT REFORM

Several bills introduced in recent sessions of Congress would establish uniform federal standards of product liability law throughout the United States.⁴ These bills have differed in their scope,⁵ in the

sponsibility for operating programs. *Id.* The executive branch's desire to shift the locus of power from Washington to the states diminishes the likelihood of imminent broad-sweeping federal toxic torts legislation.

For a discussion of the relationship between New Federalism and federal products liability legislation, see generally, Florio, *Product Liability, Insurance, and the New Federalism*, 2 J. PRODUCTS L. 1 (1983).

3. "Toxic substances" have been defined by statute to include those substances whose "manufacture, processing, distribution in commerce, use, or disposal . . . presents or will present an unreasonable risk of injury to health or environment. . . ." Toxic Substances Control Act of 1976, 15 U.S.C. § 2604(f)(3)(B) (1976 & Supp. V 1981).

4. S. 44, 98th Cong., 1st Sess., 129 CONG. REC. S283 (daily ed. Jan. 26, 1983); S. 2631, 97th Cong., 2d Sess., 128 CONG. REC. S6846 (daily ed. June 16, 1982); H.R. 5261, 97th Cong., 1st Sess., 127 CONG. REC. E5924 (daily ed. Dec. 16, 1981); H.R. 5214, 97th Cong., 1st Sess., 127 CONG. REC. H9529 (daily ed. Dec. 14, 1981); H.R. 1675, 96th Cong., 1st Sess., 125 CONG. REC. 1572 (1979); H.R. 7000, 96th Cong., 2d Sess., 126 CONG. REC. 7428 (1980). See Hollenshead, *Historical Perspective on Product Liability Reform*, 1 J. PRODUCTS L. 75, 97-98 (1982); Note, *Proposed Federal Products Liability Legislation—A Summary and Analysis*, 1 J. PRODUCTS L. 103 (1982).

5. For an illustration of the major differences in the scope of the various product liability reform bills, compare S. 44, 98th Cong., 1st Sess., 129 CONG. REC. S283 (daily ed. Jan. 26, 1983) with H.R. 5261, 97th Cong., 1st Sess., 127 CONG. REC. E5924 (daily ed. Dec. 16, 1981). S. 44, for example, prohibits the offensive use of nonmutual collateral estoppel, makes inadmissible evidence of subsequent remedial measures even in strict liability, and provides a procedure for the assessment of punitive damages. See S. 44, 98th Cong., 1st Sess., 129 CONG. REC. S283 (daily ed. Jan.

particular standards they would create,⁶ and in their mechanisms for implementation.⁷ Yet, they spring from a common determination that uniform rules of product liability law have become indispensable to interstate commerce and that state action cannot provide the necessary uniformity. As will become apparent, both the underlying problem associated with product liability law, and the reason federal legislation is necessary to solve it, are of a wholly different nature than the problems surrounding the toxic tort situation.

A. *The Product Liability Problem*

Product liability law is the set of rules governing a product seller's⁸ legal responsibility for harms caused by his products.⁹ These

26, 1983). H.R. 5261 does not address any of these issues. *See* H.R. 5261, 97th Cong., 1st Sess., 127 CONG. REC. E5924 (daily ed. Dec. 16, 1981).

6. S. 44, for example, would prohibit offensive use of nonmutual collateral estoppel. S. 44, 98th Cong., 1st Sess. § 4(c)(1)-(2), 129 CONG. REC. S284 (daily ed. Jan. 26, 1983). In contrast, H.R. 5214 precludes both offensive and defensive uses of non-mutual collateral estoppel. H.R. 5214, 97th Cong., 1st Sess. § 6(e), 127 CONG. REC. H 9529 (daily ed. Dec. 14, 1981). Furthermore, H.R. 5214 would limit punitive damages to twice the amount of actual damages or \$1 million, whichever is less, with further limitations based on a defendant's cumulative exposure to punitive damages. *Id.* § 11(d). S. 44, however, does not limit the amount of punitive damages which may be assessed, but provides that punitive damages must be supported by "clear and convincing" evidence. S. 44 § 13. It also provides that the court, rather than the jury, is to determine the amount to be awarded. *Id.* Furthermore, it requires the court to consider a defendant's past or potential cumulative exposure, and permits a defendant to introduce evidence of post-manufacturing improvements as a defense to liability for punitive damages. *Id.* *See* Note, *supra* note 4, at 106-29.

7. S. 44, for example, is self-executing; it provides that it "supercedes any state law regarding matters governed by this Act." S. 44, 98th Cong., 1st Sess. § 3(c), 129 CONG. REC. S284 (daily ed. Jan. 26, 1983). In contrast, H.R. 5261 does not necessarily preempt state laws. H.R. 5261, 97th Cong., 1st Sess., 127 CONG. REC. E5924 (daily ed. Dec. 16, 1981). Rather, it would permit states to adopt their own product liability laws, provided these laws conform to the bill's basic standards. Conformity would be determined by the Standards for Products Liability Tort Law Review Panel of the Department of Commerce, a panel whose establishment the bill authorizes. *Id.* §§ 101, 201. Only if a state's law were found not to conform would it be preempted and an alternative federal plan then put into effect in that state. *Id.* §§ 202-204.

8. A "product seller" is anyone in the chain of commercial distribution of a product, from the manufacturer to the lessor of a product. *See* U.S. DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT I-1 (1977) [hereinafter cited as TASK FORCE REPORT]; Leete, *Products Liability for Nonmanufacturer Product Sellers: Is It Time To Draw The Line?*, 17 FORUM 1250, 1250-51 (1982).

9. *See* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 737 (7th ed. 1982). *See also* W. KEETON, D. OWEN & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS 18 (1980). Product liability law governs the private litigation of product accidents. W. KEETON, D. OWEN & J. MONTGOMERY, *supra* at 18. In a typical product liability case, a plaintiff injured while using a product, brings an action for damages against the manufacturer or the retailer of the product. *Id.* at 19.

rules are established almost exclusively by state judges in cases arising out of an accident which has already occurred. As a result, these rules not only vary widely from state to state but are also applied retroactively, making the law unpredictable even within a single state.¹⁰

Although this characterization applies equally to the law of property, contract, and other branches of the common law, it poses a unique problem in the field of product liability law. Because product liability law is a hybrid of tort and contract law principles,¹¹ it has been an area of law which is exceedingly difficult conceptually, and, therefore, hard for courts to apply.¹² Consequently, when a manufacturer or consumer attempts to determine how a court will rule in applying product liability law to the facts of a case before it,¹³ it is faced with incomparably low levels of predictability. Furthermore, due to its relatively recent doctrinal emergence, product liability law wears its competing policy considerations on its substantive sleeve, without their firm embodiment in an integrated body of long-established rules and venerable precedents to guide case dispositions along more consistent and gradualist paths.¹⁴ Thus, product liability decisions on similar facts may tend to vary widely from court to court and state to state as different judicial philosophies are brought to bear in making what are essentially case-by-case social policy judgments.¹⁵

Finally, the common law approach to lawmaking (state by state and retroactive) has created a particularly intolerable problem with regard to product liability because products are manufactured, sold, used, and insured on a national basis.¹⁶ Manufacturers face the im-

10. S. REP. No. 670, 97th Cong., 2d Sess. 4 (1982) (reporting S. 2631) [hereinafter cited as SENATE REPORT].

11. W. KEETON, D. OWEN & J. MONTGOMERY, *supra* note 9, at 18. *See also* W. PROSSER, J. WADE & V. SCHWARTZ, *supra* note 9, at 743 (warranty theory of liability "born of the illicit intercourse of tort and contract").

12. SENATE REPORT, *supra* note 10, at 4.

13. *See id.* at 5.

14. *See id.* The following competing public policy interests may be implicated in any product liability tort case: punishment of tortfeasors, deterrence of potentially harmful conduct without discouraging innovation and other socially useful conduct, compensation of the injured and spreading the loss according to financial capacity to bear that loss, and the furthering of convenient administration and predictability. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 14-27 (4th ed. 1971).

15. *See* SENATE REPORT, *supra* note 10, at 4-5. *Compare* Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539, 549 (1982) (cost of illness from a dangerous product should be placed on those who profit from its production; this position serves "the salutary goals of increasing product safety research and simplifying tort trials") with Woodill v. Parke Davis & Co., 79 Ill. 2d. 26, 36-38, 402 N.E.2d 194, 199-200 (1980) (despite social desirability of encouraging research and the development of beneficial drugs, a manufacturer will not be deemed the insurer of its products).

16. SENATE REPORT, *supra* note 10, at 6. Data reveals that most products man-

possible task of complying with various, and often conflicting, legal standards formulated by fifty-one different jurisdictions, whose standards are in a state of perpetual flux. The havoc this lack of uniformity wreaks on product manufacturers is illustrated by the example of the disparate standards states apply in determining when a manufacturer is liable for harm caused by a defectively designed product.¹⁷ A 1982 review of the case law by the Senate Commerce Committee revealed that, from one state to another

a product may be defective in design if: (1) [it] fails to perform as safely as an ordinary consumer would expect when used in a reasonably foreseeable manner, or the defendant fails to prove that the benefits of the product outweigh its risks; (2) it is unreasonably dangerous taking into consideration the utility of the product and the risk involved in its use; (3) it would not have been put into commerce by a reasonable person aware of the harmful nature of the product; (4) it left the supplier's control lacking any element to make it safe for intended uses or possessing any feature that renders it unsafe for intended uses. Some States require proof that the design defect rendered the product "unreasonably dangerous," while others do not. A manufacturer seeking to avoid design defect liability faces the difficult task of meeting the design standard in each State in which it does business.¹⁸

Such disparate standards create a serious impediment to interstate commerce.¹⁹ The only way to end this chaotic and costly state of affairs is through the creation of a uniform product liability law.²⁰

B. *The Inadequacy of Reform at the State Level*

In 1977, the Federal Interagency Task Force on Product Liabil-

ufactured in a given state are used or consumed outside that state. *Id.* As a consequence, "manufacturers and product sellers may be involved in product liability actions governed by the law of any state in which they do business." *Id.* at 6-7. Thus, any attempt by one state to resolve the uncertainties in the product liability tort litigation system will be ineffective. *Id.* at 7.

17. See generally, *Hearings on S. 2631 Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess., 276-80 (1982) (statement of Charles Babcock, Esq. on behalf of National Association of Manufacturers).

18. SENATE REPORT, *supra* note 10, at 4-5.

19. *Id.* at 10.

20. *Id.* A federal product liability law will act to reduce burdens on interstate commerce by achieving uniformity since it will be applied by all courts in all products liability actions. *Id.*

ity²¹ concluded that a principal cause of the product liability problem was the uncertainty inherent in the existing product liability tort litigation system. Accepting this conclusion, the United States Department of Commerce in 1979 drafted a Uniform Product Liability Act ("UPLA").²² The Carter Administration chose to offer the UPLA as a model state law rather than as a federal law because 1) tort law had traditionally been left to the states; 2) it believed states should be given the opportunity to adopt uniform product liability law reform legislation; and 3) it believed the federal government should first address the problem of overly subjective product liability insurance ratemaking procedures, a problem which the Task Force had identified as also contributing to the product liability problem.²³

The insurance ratemaking problem was later resolved by the federal government through Congress' enactment of the Risk Retention Act of 1981.²⁴ Yet, in the meantime, not a single state has adopted the complete UPLA. Product liability tort reform measures have been enacted in some form in at least thirty states. However, these measures must be deemed incapable of affording the uniformity and stability needed to resolve the product liability problem because 1) most fail to address critical product liability issues; 2) they inevitably vary in what issues they treat and how they treat them; and

21. In April, 1976, a Federal Interagency Task Force was established by the Economic Policy Board of the White House to study various problems in the field of product liability. TASK FORCE REPORT, *supra* note 8, at I-1. The Federal Interagency Task Force was chaired by the Department of Commerce and was composed of representatives from the Departments of Health, Education and Welfare; Housing and Urban Development; Labor; Transportation; Treasury; the Council of Economic Advisors; the Office of Management and Budget; and the Small Business Administration. The Consumer Product Safety Commission provided advice and assistance. *Id.* at I-5. The Task Force study culminated in a final report in May of 1977. *Id.* at I-1 to I-11.

22. 44 Fed. Reg. 62714 (1979). As a result of the Task Force Report, the Department of Commerce was asked to prepare an options paper regarding "what action, if any, the Federal Government should take to address the product liability problem." 43 Fed. Reg. 14612 (1978).

Subsequently, the Department of Commerce in its options paper recommended that a uniform product liability law be prepared. 44 Fed. Reg. at 62714. On January 12, 1979, the "Draft Uniform Product Liability Law" was published in the *Federal Register*. *Id.* Following extensive commentary on the draft law, the UPLA was offered to the states as a model on October 31, 1979. *Id.*

23. SENATE REPORT, *supra* note 10, at 2. For a discussion of the Task Force's conclusions regarding problems with products liability insurance ratemaking procedures, see TASK FORCE REPORT, *supra* note 8, at V-1 to V-50, VI-1 to VI-56, VII-114 to VII-172.

24. Risk Retention Act of 1981, 15 U.S.C. § 3901 (1982). Under this Act, manufacturers can self-insure or they can band together, thereby obtaining lower group insurance premiums. SENATE REPORT, *supra* note 10, at 3. The Act thus encourages commercial insurers to offer product liability insurance at competitive rates and to set premiums accurately. *Id.*

3) none are comprehensive, state efforts at tort reform.²⁵ Federal legislation is thus necessary and appropriate in this area. However, as the next section of this article will detail, the toxic tort problem is quite different.

III. THE TOXIC TORT PROBLEM

The term "toxic tort" is not a pure legal term. It has a variety of different meanings. To focus the issue for an evaluation of the need for federal toxic tort legislation we suggest the following definition of a toxic tort: a harm to a person that arises out of a non-traumatic injury or, in other words, any injury attributable to exposure to a toxic substance where injury is not immediately manifest. It is this latency period between exposure to a toxic substance and the manifestation of injury which is inherent in the toxic tort problem and which has created difficulties for the legal system.

So defined, the toxic tort problem still remains too broad for the purposes of developing a meaningful analytic framework. Although impact-type injuries such as those caused by machine tools or by direct and caustic contact with acid are excluded by this definition, the universe of toxic torts requires further classification. Toxic torts can be further classified into three functional groups that can be defined according to the predominant circumstances of exposure to toxic substances:²⁶ occupational exposures, environmental or bystander exposures, and consumer product exposures.

A. Occupational Exposures

Occupational exposures occur in the workplace and may involve exposure in the course of mining, manufacturing, or processing the toxic substance itself. They also can occur during the fabrication of products which incorporate the substance, in other operations in which the substance is a by-product or waste, or in a variety of construction or servicing jobs which entail working with, or in proximity to, the toxic substance.²⁷ Harms resulting from occupational expo-

25. See Hollenshead, *supra* note 4, at 86-87.

26. It should be noted that, although the classes of toxic torts are distinguished according to the nature of the exposure, the same toxic substance may engender toxic tort claims in all three classes. For example, asbestos has been involved in claims based upon 1) occupational exposures, such as those involving insulation workers; 2) environmental exposures, such as those involving persons residing near abandoned asbestos processing facilities; and 3) consumer product exposures, such as those involving hair dryers. See Ingram, *Insurance Coverage Problems in Latent Disease and Injury Cases*, 12 ENVTL. L. 317, 319-20 (1982); Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?*, 48 FORDHAM L. REV. 657 (1980).

27. See, e.g., I. SELIKOFF, *DISABILITY COMPENSATION FOR ASBESTOS ASSOCI-*

asures are usually compensable under existing federal and state workers' compensation programs²⁸ without any requirement of proving employer fault and without any barriers to recovery based on employee negligence or misconduct.²⁹ Although historically there have been certain impediments to effective occupational disease compensation in some of these programs³⁰—such as statutes of limitation which did not accommodate the long latency periods typical of so many occupational diseases³¹—gradual reforms have substantially reduced these barriers.³²

Many workers, however, do not pursue their compensation rights under worker compensation programs.³³ Instead, they prefer to go directly after third party manufacturers or other product sellers in tort litigation.³⁴ Although workers' compensation laws generally bar tort suits against the victim's employer,³⁵ occupational disease tort

ATED DISEASE IN THE UNITED STATES 51-85 (U.S. Department of Labor Contract Report 1982) [hereinafter cited as SELIKOFF REPORT] (discussing the occupations of primary asbestos-disease risk).

28. Federal employees are covered under the Federal Employees Compensation Act, 5 U.S.C. §§ 8101-8193 (1982). Each state, Puerto Rico, Guam, and the District of Columbia covers occupational diseases under its worker compensation laws. 1B A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 41.10 (1982).

29. See A. LARSON, *supra* note 28, § 1.10. Negligence or willful misconduct on the part of an employee is immaterial in compensation law, unless "it takes the form of a deviation from the course of employment" or it is of a kind specifically made a defense by state statute. *Id.* § 30.00.

30. U.S. DEPARTMENT OF LABOR, *AN INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASES* 67-69 (1980) [hereinafter cited as INTERIM REPORT].

31. For example, New Jersey, known as one of the most liberal states with respect to liability and compensation programs, until 1974 barred any occupational disease claim not filed within five years of the last employment-related exposure. Occupational diseases may not become manifest, however, for decades following the injurious exposure. See SELIKOFF REPORT, *supra* note 27, at 481, 511.

32. See 1B A. LARSON, *supra* note 29, §§ 41.10, .31, .71. For example, there has been an increase in the number of occupational diseases covered by state workers' compensation statutes. See *id.* § 41.71. But see INTERIM REPORT, *supra* note 30, at 67 (as of 1980 statutory barriers "severely limit such coverage in practice").

33. Shor, *Workers' Compensation: Subsidies for Occupational Disease*, J. PUB. HEALTH POL'Y, Dec. 1980, reprinted in, *Occupational Disease Compensation and Social Security: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 1st Sess. 38 (1981). See also SELIKOFF REPORT, *supra* note 30, at 374.

34. See Comment, *Relief for Asbestos Victims: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 179, 182-83 (1983). The volume of litigation involving asbestos has recently surpassed that concerning Agent Orange, DES, the Dalkon Shield, and even automobile injuries. Nat'l L.J., Aug. 18, 1980, at 1, col. 1; Nat'l L.J., Oct. 19, 1981, at 1, col. 1.

35. 2A A. LARSON, *supra* note 29, §§ 65.00-67.30. However, it should be noted that in instances where occupational diseases are omitted from the coverage of a compensation act because they are not within the concept of accidental injury, the compensation act will not disturb any existing remedy. *Id.* § 65.00. Recently, the employer's immunity from suit for work-related injuries covered under workers' compensation has been somewhat eroded. Direct actions by employees against employers

litigation is currently flooding the courts with third-party suits.³⁶ Commonly, the fact that the exposure occurred was known at the time of the exposure, but the fact of its harmfulness was not then known. Cases brought by asbestos workers against the manufacturers of asbestos products are the best known and, by the sheer force of their numbers, currently present the most extreme example of this variety of toxic tort.³⁷

B. *Environmental Exposures*

Environmental or bystander exposures involve the exposure of members of the public-at-large to toxic substances through the contamination of air, water, or land. These exposures occur outside the employment relationship and without any privity or other transactional connection between the tortfeasor and the victim. In fact, unlike the occupational exposure, usually both the tortfeasor and the victim in an environmental exposure to a toxic substance are unaware of the exposure and its harmfulness.³⁸ The environmental toxic tort has received a great deal of political and media attention of late,³⁹

have been permitted in some jurisdictions on several theories. *See, e.g.*, *Johns-Manville Prods. Corp. v. Superior Court*, 27 Cal. 3d 465, 478, 165 Cal. Rptr. 858, 866, 612 P.2d 948, 956 (1980) (fraudulent concealment of hazards from employees); *Mercer v. Uniroyal, Inc.*, 49 Ohio App. 2d 279, 283-86, 361 N.E.2d 492, 495-96 (1976) (injuries resulting from obligations arising out of employer's second or "dual" capacity); *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 919 (W. Va. 1978) ("intentional injury" shown by violation of safety laws, rules and regulations). *See generally Marks, Erosion of the Exclusive Workers' Compensation Remedy: Suits Against Employers and Compensation Carriers*, 17 FORUM 395 (1981). Furthermore, employer immunity has also been undercut by indirect actions in which the employer is sued for contribution or indemnity by a manufacturer against which an employee has recovered for an occupational injury. *See Larson, Third-Party Action Over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483, 487.

36. *See, e.g.*, Levy, *Toxic Tort Litigation: A Plaintiff's Perspective*, in ASBESTOS LITIGATION 75-76 (1982); Lublin, *Occupational Diseases Receive More Scrutiny Since the Manville Case*, Wall St. J., Dec. 20, 1982, at 1, col. 6.

37. *See Oversight Hearing on the Effect of the Manville and UNR Bankruptcies on Compensation of Asbestos Victims: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. *passim* (1983) [hereinafter cited as *Oversight Hearing*].

38. *See 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"*, Senate Comm. on Environmental and Public Works, 97th Cong., 2d Sess. Vol. I at 21-33, 43 (Comm. Print 1982) [hereinafter cited as *Superfund Report*]. Furthermore, since most of these types of injuries have long latency periods—sometimes 20 years or longer—a plaintiff who is not aware of the exposure may not connect symptoms of a related disease to that exposure. *See id.* at 43.

39. *E.g.*, Sinclair, *A Chemical Harvest*, Wash. Post, Jan. 30, 1983, at 1, col. 1; Jan. 31, 1983, at 1, col. 4; Feb. 1, 1983, at 1, col. 3. Sinclair has pointed out that birth

largely due to anxiety caused by the extreme uncertainty over the potential breadth of the problem. Relatively few claims, however, have been brought, and fewer still have been decided.⁴⁰ The Love Canal-Hooker Chemical Company incident, in which the public was exposed to toxic substances through contamination of the environment, is the best known example of this type of toxic tort problem.⁴¹

C. Consumer Product Exposures

Consumer product exposures involve harms caused by products introduced into commerce for consumer use or consumption. Generally, in consumer product exposures, exposure to the product which contains the toxic substance is intentional but the toxicity of the substance in its product form and concentration are unknown at the time of exposure.⁴² Although the initial consumer knows the product seller at the time of the sale, the long latency period before manifestation of the harm may impair identification of the alleged tortfeasor.⁴³ Injuries from pharmaceutical products such as those alleged in DES (diethylstilbestrol) litigation illustrate the consumer product exposure variety of toxic torts.⁴⁴

D. Determining the Need for Federal Legislation

The toxic tort problem thus consists of at least these three different classes of harmful exposures. Each class poses very different claims phenomena which, in turn, make very different demands on the tort system. In assessing the case for federal legislation, we do not

defects, miscarriages, nerve and brain disorders, cancer, and other maladies may be caused by common pesticides and herbicides, *Id.*, Jan. 30, 1983, at 1, col. 1.

40. *Superfund Report*, *supra* note 38, at 32. The paucity of claims for injuries from hazardous wastes may stem from three factors. First, the problem of injury from exposures to hazardous wastes is a relatively new one. Second, only recently has there been awareness of a causal link between injury and exposure to hazardous waste disposal. Third, most industrial defendants who have been implicated in such litigation have preferred to settle rather than to litigate. *Id.*

41. *See, e.g.*, A. LEVINE, LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE (1982); Bauer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133 (1980).

42. The drug Bendectin is an example of a product giving rise to consumer exposure problems. This drug was ingested by thousands of women to relieve morning sickness and neither consumers nor the manufacturer were aware of its apparent toxicity until recently. *See* Lauter, *Bendectin Trial Disintegrates*, 5 Nat'l L.J., Feb. 21, 1983, at 1, col. 1. Bendectin, which has been marketed since 1956, is the only drug approved for the treatment of morning sickness. *Id.* at 10, col. 3. The company which manufactured this drug is currently faced with more than 150 federal suits in which plaintiffs alleged birth defects as a result of ingestion of Bendectin. *Id.*

43. *See* Burch, *Generic Products and the Problem of Identifying the Party Whose Product Caused the Plaintiff's Injury*, 17 FORUM 784 (1982).

44. *See id.*

find that toxic torts meet the criteria which are found to justify federal tort reform legislation: the need for uniformity of legal standards and the clear incapacity of the states to address the problem effectively. Yet, that does not necessarily rule out a proper role for federal legislation. We suggest that there are four additional factors relevant in determining whether federal legislation may justifiably supplant the existing state tort system as a mechanism for compensating toxic tort victims:

1. A multiplicity of claims;
2. A long period of time between exposure and the manifestation of physical harm;
3. Difficulty in associating the victim's harm with a particular defendant; and
4. Significant federal responsibility for the problem.

None of these factors alone justifies a federal remedy, nor does the absence of one obviate it. Rather, the greater the confluence of these factors, the stronger the case for federal legislation. Conversely, the less these factors characterize a branch of the toxic torts problem, the stronger the case for leaving the problem to traditional tort remedies.

1. Multiplicity of Claims

A substance may have been in widespread use for a very long period of time before its toxicity became known.⁴⁵ As a result, there may have been so many persons exposed to it by that time that the proverbial "flood of litigation" occurs. This flood of claims can so overwhelm the deliberate institutional processes of the tort litigation system that just claims cannot be adjudicated within an acceptable time frame.⁴⁶ Both the sheer volume of the claims and the legal de-

45. For example, DES was prescribed between 1947 and 1971 to more than one million American women for the purpose of preventing miscarriages. Then, in 1971, a link between exposure to DES *in utero* and the development of cancer and pre-cancerous conditions was reported. See Barsky, *Abandoning Federal Sovereign Immunity: Public Compensation for Victims of Latently Defective Therapeutic Drugs*, 2 J. PRODUCTS L. 20, 25-26 (1983).

46. The situation in the Philadelphia Court of Common Pleas exemplifies the problems posed by a flood of toxic tort litigation. As of 1982, 1,850 asbestos-related cases were pending in Philadelphia and approximately 75 new cases were being filed each month. See *Pittsburgh Corning Corp. v. Bradley*, 499 Pa. 291, 294, 453 A.2d 314, 315 (1982). Furthermore, since asbestos-related diseases often have a latency period of 20 to 30 years, it is likely that asbestos cases will continue to be filed in substantial numbers for years to come. See *id.*

Although as of 1982 six judges in the Philadelphia Court of Common Pleas were assigned to hear asbestos cases, fewer than 25 cases had reached a verdict. *Id.* Each case was tried before a jury and lasted an average period of two and one-half weeks.

fense and claims administration costs they would engender could be sufficient to overwhelm the available financial resources of the responsible business defendants.⁴⁷ Furthermore, the defendants' product liability insurance coverage may also be exhausted. As a result, claimants may be left without an effective remedy under the tort system. A federally legislated compensation system could be the only answer to the paralysis which such a multiplicity of claims could inflict on the tort system.

Of the three classes of toxic torts, only in the realm of occupational exposures has there been such a multiplicity of claims phenomenon. For example, workers alleging that their workplace exposure to asbestos gave them cancer, asbestosis, or other asbestos-related diseases have clogged court dockets around the country.⁴⁸ The judicial backlogs have not only intolerably deferred compensation of asbestos claimants—all too often until after their death⁴⁹—but they have also impaired access to justice for all members of society. To date, three asbestos companies have filed for reorganization in bankruptcy⁵⁰

Id. at 315, 316. The Pennsylvania Supreme Court has calculated that if the six judges were to try all asbestos-related cases before juries, they could hear only 125 cases a year. As the court pointed out, "Even if no new asbestos cases were to be filed, it would take nearly *fifteen years* to dispose of the current inventory." *Id.* at 316 (emphasis added). Furthermore, the court noted that even if all 57 judges in the trial division did nothing but hear asbestos jury trials, it would take almost two years to dispose of cases currently on the docket, and by that time another 1500 asbestos cases would have been filed. *Id.* at 316-17.

47. For a discussion of the impact that asbestos-related disease litigation has had on the financial resources of asbestos manufacturers, see notes 51-52 and accompanying text *infra*.

48. Some 20,000 such cases were pending against asbestos products manufacturers by the end of 1982. Lublin, *supra* note 36. During 1982, workers filed new cases at the rate of more than 450 per month. Hertzberg, *Asbestos Lawsuits Spur War Among Insurers, with Billions at Stake*, Wall St. J., June 14, 1982, at 1, col. 6. The backlog is particularly extreme in cities where shipbuilding industries employed substantial numbers of workers who were exposed to asbestos during the installation of insulation in ships under construction. *See id.* For example, in Philadelphia six judges were assigned to hear asbestos cases on a full-time basis during 1982. *Pittsburgh Corning Corp. v. Bradley*, 499 Pa. 291, 294, 453 A.2d 314, 315 (1982). In another attempt to cope with the flood of asbestos litigation, the Philadelphia Court of Common Pleas promulgated a regulation which requires all asbestos-related litigation to be conducted initially in a non-jury trial format. *Id.* at 294-95, 453 A.2d at 315. Following the completion of this non-jury trial, a party may demand a *de novo* trial by jury. *Id.* The Supreme Court of Pennsylvania recently approved this rule, finding that it did not unduly burden the parties' right to a jury trial, but instead was designed to avoid intolerable delay in the litigation of asbestos suits. *Id.* at 297-98, 453 A.2d at 317. For a more detailed discussion of the burden asbestos litigation has placed upon the Philadelphia Court of Common Pleas, see note 46 *supra*.

49. SELIKOFF REPORT, *supra* note 27, at 541.

50. The three major asbestos companies which have filed under Chapter 11 of the Bankruptcy Code are UNR Industries, the Manville Corporation, and Amatec Corporation. *See Tarnoff, Asbestos Broker Says Suits Forcing It Out of Business*, Bus. Ins.,

under the weight of present and anticipated claims, and other asbestos companies are experiencing financial difficulties as a result of the flood of asbestos claims against them.⁵¹ Insofar as the multiplicity of claims factor is concerned then, there is at present a strong case for federal intervention only for the compensation of injuries from occupational exposures to asbestos.

2. Long Latency Periods

When long periods of time elapse from a person's exposure to a toxic substance until the manifestation of his injury as a result of that exposure, several things happen which make it difficult for the tort system to function in its traditional remedial manner. The temporal attenuation of the connection between the exposure and the discovery of the injury can create substantial uncertainty about causation. Causation issues such as whether the claimant was in fact exposed to the toxic substance years before, what the circumstances of that exposure were, whether there were other exposures to the substance for which different persons bear responsibility, or whether there were exposures to other substances which contribute to the injury, are fraught with uncertainties.⁵² In an area of forensic medicine where even the simplest causation questions are matters of statistical probability,⁵³ the long latency periods for harms associated with exposures to certain substances severely confound the tort system's mechanisms for determining causation. Such toxic tort cases are difficult to evaluate from a claims administration standpoint and are expensive to litigate.⁵⁴

The problem of long latency periods also helps precipitate the multiplicity of claims problem. Because of long latency periods, it

Feb. 21, 1983, at 2, col. 3. Each of these companies has alleged that its assets are, or soon will be, outweighed by its liabilities from asbestos-related injury claims against them. *Id.* A fourth asbestos company has filed for liquidation under Chapter 7 of the Bankruptcy Code. *Id.*

51. Companies not involved in the mining or selling of asbestos, such as a small insulation contractor and a distributor of building products, are also being named as defendants in a growing number of lawsuits. See Joseph, *Firms That Didn't Mine or Sell Asbestos are Also Caught in the Tide of Litigation*, Wall St. J., Dec. 14, 1982, at 56, col. 1.

52. See Smith & Channon, *The Rising Storm*, 17 FORUM 139, 155-56 (1981). For example, factors such as the effect of cigarette smoking may complicate the issue of whether there is a causal link between a plaintiff's injury and his exposure to a toxic substance. See Selikoff, *Asbestos-Associated Disease*, in ASBESTOS LITIGATION 29-30 (1982).

53. See e.g., Earley, *Dioxin Is Still a Mystery*, Wash. Post, Feb. 27, 1983, at B5, col. 1. Scientists, for instance, are deeply divided over the issue of whether dioxin is toxic to humans. *Id.*

54. See Nat'l Underwriter, Feb. 4, 1983, at 16. See also *Oversight Hearing*, *supra* note 37 at 102 (testimony of M. Gaynor).

was not until many years after exposures to various substances began that modern epidemiological studies disclosed the toxic nature of those substances.⁵⁵ Consequently, normal loss reduction mechanisms did not operate to cut off these problems before they got out of hand.

In surveying the three exposure modes, it appears that the long latency factor is common to them all. Although not all toxic torts are characterized by long latency periods, this phenomenon gives all three exposure classes their most difficult cases.

3. Difficulty in Identifying the Tortfeasor

Some toxic tort cases are complicated by difficulty in identifying the tortfeasor. Because of the passage of time between exposure and injury, or because of the more or less generic nature of the substance involved, claimants may be unable to identify the party responsible for the exposure.⁵⁶

Yet, the tort system as we know it, even after the advent of strict liability, allocates responsibility for the cost of harm to the person or persons that caused the harm.⁵⁷ In addition to the public policy in favor of compensating persons for injuries caused by others, this fundamental principle of the tort system is also designed to serve the public interest in punishing the tortfeasor and deterring similar conduct by others.⁵⁸ Historically there have only been rare exceptions to the rule that liability may be imposed only on the person that caused the harm.⁵⁹ Lately, though, several courts confronted with toxic tort

55. DES, for example, was prescribed as early as 1947, but its harmful potential was not established until 1971. Barsky, *supra* note 45, at 25-26. See also note 48 and accompanying text *supra*.

56. LEVY, *supra* note 36, at 81-82.

57. See W. PROSSER, *supra* note 14, at 236. Consequently, a fundamental principle of product liability law is that a plaintiff must prove that the defendant manufacturer made the product which caused the injury. Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1007-08 (D.S.C. 1981).

58. W. PROSSER, *supra* note 14, at 23.

59. A paradigmatic exception to the requirement that liability may only be imposed on the person who caused the harm is set forth in the case of *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948). In *Summers*, the plaintiff was shot by one of two hunters who had each negligently fired his gun in the plaintiff's direction. *Id.* at 82, 199 P.2d at 2. Since the plaintiff was innocent and both defendants were culpable, the court held that the defendants should bear the burden of uncertainty as to which defendant actually caused the injury. *Id.* at 88, 199 P.2d at 5. Consequently, if one of the defendants could not prove that his shot was not the one that struck the plaintiff, then he would be held liable. *Id.*, 199 P.2d at 5. The principle of *Summers* has been codified in the Restatement of Torts. RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965). For a more detailed discussion of *Summers* and other cases which are exceptions to the requirement that tort liability be imposed only upon the party who caused the harm, see Comment, *Coping with the Particularized Problems of Toxic Tort Litigation*, 28 VILL. L. REV. 1298 (1983).

cases have refused to adhere to this key axiom of tort law.⁶⁰

In two recent toxic tort cases, the highest courts of California and New York have held that liability for injuries allegedly caused by DES can be imposed upon defendant-manufacturers without proof that those defendants made the DES which caused the plaintiffs' injury.⁶¹ In *Sindell v. Abbott Laboratories*,⁶² the California Supreme Court accomplished this result by fashioning a "market share" theory of liability.⁶³ Under this theory, each defendant was liable for the proportion of the judgment represented by its share of the DES market unless the defendant could demonstrate that it could not have made the product which injured the plaintiff.⁶⁴ Subsequently, in *Bichler v. Eli Lilly & Co.*,⁶⁵ the New York Court of Appeals affirmed a jury

60. For a detailed discussion of the development of legal theories which circumvent the requirement that tort liability only be imposed upon the party who actually caused the harm, see Comment, *supra* note 59.

61. See *Sindell v. Abbott Laboratories, Inc.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

62. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980). The plaintiff in *Sindell*, on behalf of herself and 100 other similarly situated women, brought an action against 11 drug companies. She alleged that ingestion of the defendants' DES had resulted in cancerous vaginal or cervical growths in the daughters of women who had taken the drug. *Id.* at 594-95, 607 P.2d at 925-26, 163 Cal. Rptr. at 133-34.

63. See *id.* at 611-13, 607 P.2d at 637-38, 163 Cal. Rptr. at 145-46. In *Sindell*, the plaintiff was unable to prove which one of the defendants had produced the DES that her mother had taken. *Id.* at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136. Consequently, the plaintiff relied upon three theories of liability—alternative liability, concert of action, and enterprise liability. *Id.* at 597-610, 607 P.2d at 928-35, 163 Cal. Rptr. at 136-43. Each of these theories is designed to allow a plaintiff to recover without identifying the defendant who had manufactured the DES ingested by her mother. See *id.* at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136. For a detailed discussion of these three theories, see Comment, *supra* note 59. Concluding that none of these three theories would allow the plaintiff to recover on the facts before the court, the California Supreme Court opted instead to apply a "market share" theory of liability. *Id.* at 610-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46. The market share theory of liability is a hybrid of the alternative and enterprise theories of liability. See *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580 n.5, 436 N.E.2d 182, 185-86 n.5, 430 N.Y.S.2d 776, 779-80 n.5 (1982).

64. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. According to the *Sindell* court, under the market share theory, a DES plaintiff only needs to join in the action the manufacturers of a substantial share of the DES which her mother *might* have taken. *Id.* (emphasis added). A defendant can avoid liability by proving that it could not have manufactured the product which caused the plaintiff's injury. *Id.* If a manufacturer fails to establish such a defense, it will be liable for that percentage of the plaintiff's injuries which corresponds to its share of the market, but not for the entire damages resulting from the plaintiff's injuries. *Id.*

65. 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). The plaintiff in *Bichler* was a DES daughter who brought suit against Lilly for damages sustained from cervical and vaginal cancer. The plaintiff alleged that the cancer was caused by her mother's ingestion of DES while pregnant. *Id.* at 578, 436 N.E.2d at 184, 450 N.Y.S.2d at 778.

verdict against a manufacturer of DES which was based upon the plaintiff's theory that Lilly, in concert with other DES manufacturers, had wrongfully marketed this drug without proper testing.⁶⁶ Under this so-called "concert of action" theory, the court in *Bichler* had found the defendant liable for the plaintiff's injuries even though the plaintiff had failed to prove that Lilly—the only defendant named in the suit—was the manufacturer of the DES that the plaintiff's mother had ingested.⁶⁷

In both *Sindell* and *Bichler*, the rationale underlying the courts' decisions was the same. In each case, the court was confronted with what it deemed to be an innocent victim unable to prove which manufacturer harmed her⁶⁸ because of the long latency of the injury coupled with the similarity among the products of the different manufacturers.⁶⁹ Faced with a choice between not compensating the victim and holding liable a company which may not have caused the

66. *Id.* at 578, 436 N.E.2d at 184-85, 450 N.Y.S.2d at 778-79. The concert of action theory of liability "rests upon the principle that '[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.'" *Id.* at 580, 436 N.E.2d at 186, 450 N.Y.S.2d at 780 (citing RESTATEMENT (SECOND) OF TORTS § 876 (1965)).

67. *See id.* at 578, 436 N.E.2d at 185, 450 N.Y.S.2d at 779. The defendants in *Bichler* had requested a bifurcated trial. *Id.*, 436 N.E.2d at 184, 450 N.Y.S.2d at 778. The first stage of this trial concerned the identity of the manufacturer of the DES actually consumed by the plaintiff's mother. The *Bichler* jury concluded that the plaintiff had not established that the defendant was the manufacturer. *Id.* at 578, 436 N.E.2d at 184, 450 N.Y.S.2d at 778-79. In the second stage of the trial, the jury determined that Lilly and other DES manufacturers had wrongfully marketed the drug for use in preventing miscarriages because they had not performed proper laboratory testing prior to sale to the public. *Id.* at 578, 436 N.E.2d at 185, 450 N.Y.S.2d at 779.

The trial court had instructed the jury that Lilly could be liable if the jury found either that there was a conscious parallel agreement between Lilly and other DES manufacturers to market DES without proper testing, or that Lilly's failure to test the drug properly prior to marketing substantially encouraged or assisted other DES manufacturers to do likewise. *Id.* at 581-82, 436 N.E.2d at 186-87, 450 N.Y.S.2d at 780-81. On appeal, the defendant argued that the trial court's instructions on concerted action were erroneous and that the evidence before the jury had been legally insufficient to support a verdict for the plaintiff under the concert of action theory. *Id.* at 579, 436 N.E.2d at 184, 450 N.Y.S.2d at 779. The New York Court of Appeals rejected both of these contentions and concluded that the evidence was sufficient to support recovery under either the conscious parallel action or the substantial assistance branches of the concert of action theory. *Id.* at 579, 585, 436 N.E.2d at 185, 188, 450 N.Y.S.2d at 779, 782.

68. *See Sindell*, 26 Cal. 3d at 610-11, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45; *Bichler*, 55 N.Y.2d at 579, 436 N.E.2d at 185, 450 N.Y.S.2d at 779.

69. *Sindell*, 26 Cal. 3d at 600-01, 607 P.2d at 929-30, 163 Cal. Rptr. at 137-38; *Bichler*, 55 N.Y.2d at 579, 436 N.E.2d at 185, 450 N.Y.S.2d at 779.

harm, each court chose a theory which would permit compensation of the victim.

Rulings of this type dispense with a fundamental element of the tort system—proof that the defendant was responsible for the plaintiff's harm. Such rulings disrupt the reasonable expectations of both manufacturers and insurers concerning the limits of their liability. They also have an adverse effect on a manufacturer's incentive to produce safe products, which a fault-based tort system otherwise promotes.⁷⁰ Furthermore, the greatly increased potential liability which such rulings impose upon defendants might even discourage manufacturers from undertaking socially desirable manufacturing activities altogether.⁷¹

To the extent that the difficulties toxic tort victims experience in identifying the responsible tortfeasor cause judges to abandon traditional tort principles, federal legislative alternatives become more attractive. Notably, difficulty in identifying the responsible tortfeasors seem to characterize all three toxic tort modes.

4. Federal Responsibility

A final factor which would militate in favor of a federal legislative solution to all or part of the toxic torts problem would be whether the federal government bears a significant share of responsibility for the harms involved. The federal government may be responsible for injuries to individuals caused by exposure to toxic substances. However, because of its sovereign immunity defenses⁷²

70. Theories of liability like those adopted in *Sindell* and *Bichler* allow "Peter to be blamed for the harm caused by Paul." This practice of attributing liability to a defendant who did not actually cause the injury badly distorts incentives to provide better warnings, extra testing, or quality control.

71. See Fischer, *Product Liability: An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1661 (1981). A reduction in the marketing of potentially utilitarian products could result "if potential defendants fear that their losses will be too prohibitive for them to pass on to the public." *Id.*

72. The United States, as sovereign, may be sued only in those situations in which it has expressly consented to be sued. See *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The United States has, subject to certain restrictions, consented to certain limited types of suits. The Tucker Act, for example, waives immunity with respect to claims arising out of express or implied contracts between private parties and the federal government. See 28 U.S.C. § 1346(a)(2) (1976 & Supp. IV 1980). The Federal Tort Claims Act also waives sovereign immunity with respect to claims for damages which allege negligence by a federal employee acting within the scope of his office "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." See 28 U.S.C. § 1346(b) (1976). The Federal Tort Claims Act has been further restricted in scope through judicial interpretation. See, e.g., *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 668-74 (1977) (Act precludes claims brought by third-party

and its protection under various federal exclusive remedy compensation systems,⁷³ many of these injuries will go uncompensated, or private companies will have to bear the federal government's share of the liability, with a potentially disastrous impact upon such companies.⁷⁴ Remedial federal legislation is therefore needed under these circumstances to at least mitigate the unfairness of the federal government's immunity from its own tort liability.⁷⁵

private citizens for injuries to military personnel); *Laird v. Nelms*, 406 U.S. 797, 802-03 (1972) (Act precludes claim based on strict liability in tort for ultrahazardous activity); *United States v. Muniz*, 374 U.S. 150, 163 (1963) (Act precludes claim based on intentional tort); *United States v. Neustadt*, 366 U.S. 696, 710-11 (1961) (Act precludes claims for negligent or willful misrepresentation); *Feres v. United States*, 340 U.S. 135, 146 (1950) (Act precludes action for injuries to servicemen where injuries arise in course of activity incident to military service).

73. For example, the Veterans' Benefits Act is the exclusive remedy against the government that is available to a member of the military who is injured while on active duty. See 38 U.S.C. §§ 301-362 (1976 & Supp. V 1981). Consequently, a serviceman may not bring an action against the federal government under the Federal Tort Claims Act even if he could show that his injury was caused by the negligence of the government. *Feres v. United States*, 340 U.S. 135 (1950).

Similarly, the Federal Employees' Compensation Act is the exclusive remedy for civilian government employees. See 5 U.S.C. §§ 8101-8193 (1982). See, e.g., *Granade v. United States*, 356 F.2d 837, 840 (2d Cir. 1966), *cert. denied*, 385 U.S. 1012 (1967) (Federal Employees' Compensation Act is the exclusive remedy for employees who come within its coverage and no concurrent remedy exists under the Federal Tort Claims Act). *But cf.*, *Lockheed Aircraft Corp. v. United States*, 103 S. Ct. 1033 (1983) (the exclusive liability provision of the Federal Employees' Compensation Act does not preclude a third-party from bringing an indemnity action against the federal government under the Federal Tort Claims Act).

74. For example, the extensive use of asbestos has led to "thousands of pending and potential lawsuits." Comment, *supra* note 34, at 179. This deluge of claims threatens to bankrupt defendants who may have to pay billions of dollars for defense and idemnification costs. See *id.*

75. See, e.g., *Oversight Hearing*, *supra* note 37, at 18-19 (letter from Assistant Attorney General McConnell). A case which illustrates the need for legislation to mitigate the unfairness of governmental immunity from liability is *Stencel Aero Eng'g Corp. v. United States*. See 431 U.S. 666 (1977). In *Stencel*, a military officer brought suit for personal injuries he suffered when his emergency eject system malfunctioned. *Id.* at 667-68. Named as defendants were Stencel, who manufactured the system, and the United States. *Id.* Stencel filed a cross-claim against the United States, charging that any malfunction in the system was due to faulty specifications, requirements, and components which the government had supplied to Stencel for use in the eject system. *Id.* at 668. Stencel also claimed that the malfunctioning system had been in the exclusive control and custody of the United States government since its manufacture. Thus, Stencel maintained that if it were negligent at all, its negligence was passive, whereas the negligence of the United States government was active. Accordingly, Stencel sought indemnification from the government for any sums it would be required to pay the injured officer. *Id.*

The officer's suit against the federal government was dismissed because the *Feres* doctrine bars military personnel from suing the United States under the Federal Tort Claims Act for injuries sustained "incident to military service." *Id.* at 669 (quoting *Feres v. United States*, 340 U.S. at 135,142 (1950)). The district court also dismissed Stencel's cross-claim against the United States. *Id.* at 674. On appeal this dismissal was upheld by the Supreme Court. *Id.* The Court reasoned that the policy consider-

Although the federal government has not yet acknowledged any legal liability for claims involving toxic torts, the government should shoulder some of the responsibility for the victims' injuries in at least three types of occupational toxic tort cases.⁷⁶ First, the government should assume responsibility for the thousands of claims which military employees have brought for injuries allegedly caused by dioxin, commonly known as "Agent Orange," a chemical defoliant used widely by the military in Vietnam.⁷⁷ Secondly, the government should bear responsibility for the claims alleging occupational exposure to dangerous levels of radiation which civilian and military personnel have filed against the United States and private contractors

ations underlying the *Feres* doctrine also served to bar a claim for indemnity by a government contractor who has been named as defendant by injured military personnel. *Id.* at 673.

As a result of the *Stencel* decision, a government contractor will often be left "holding the bag" for compensation of injured military personnel, even though the government was equally, or even entirely, at fault. Because the decision allows the federal government to externalize the costs of its own negligent conduct, the policies underlying the tort system are frustrated. Not only is the result unjust, but there is also little incentive for the government to exercise due care since it will bear no responsibility for the consequences. See Lee & Chierichella, *Product Liability Problems for Government Contractors*, CONT. MGMT. 18 (July, 1981); Tobak, *A Case of Mistaken Liability: The Government Contractor's Liability for Injuries Incurred by Members of the Armed Forces*, 13 PUB. CONT. L.J. 74 (1982); Comment, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. REV. 601 (1980).

76. For a discussion of the three types of occupational toxic tort cases where federal responsibility is particularly warranted, see notes 77-83 and accompanying text *infra*. Cf. *Lockheed Aircraft Corp. v. United States*, 103 S. Ct. 1033 (1983) (reflecting the Court's recent recognition of this problem and apparently making an inroad against it by allowing third-party indemnity action under the Federal Tort Claims Act); *Keene Corp. v. United States*, No. 57979C (Ct. Cl., Dec. 21, 1979) (seeking implied indemnity in contract from United States government for asbestos judgments against Keene).

77. See Yannacone, Kavenagh & Searcy, *Agent Orange Litigation: Cooperation for Victory*, TRIAL, Feb. 1982, at 44; Banham, *Claims Against Orange May Involve Billions of Dollars*, J. of Comm., Oct. 4, 1982, at 7C, col. 1. See also *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980).

The plaintiffs in these Agent Orange actions are Vietnam veterans and members of their families. *In re Agent Orange*, 506 F. Supp. at 768. They seek to recover for personal injuries suffered as a result of exposure to a number of herbicides including Agents Orange, Pink, Purple, and Green. *Id.* at 768 n.1. Furthermore, family members of the exposed military personnel allege that exposure of their husbands or parents to these agents caused miscarriages, genetic injuries and birth defects. *Id.* at 769. At least 19 different chemical companies who contracted with the federal government are named as defendants in these lawsuits. *Id.* at 768 n.2. These defendants have initiated third-party complaints against the federal government which allege, *inter alia*, misuse of product, post-discharge failure to warn, and implied indemnity. *Id.* at 769.

The potential number of persons afflicted with disease caused by Agent Orange could be in the thousands. See Yannacone, Kavenagh & Searcy, *supra*, at 46. The enormity of the problem is illustrated by a class action suit filed in New York in which at least 400 plaintiffs had joined by 1982. *Id.* at 48.

working for, or supplying uranium to, the government's atomic energy programs.⁷⁸

The third group of cases in which federal responsibility is justified involves claims that public and private employees have filed against asbestos suppliers, asbestos product manufacturers and private contractors. There are thousands of these claims in which plaintiffs allege that they contracted an asbestos-related disease after being exposed to asbestos, usually in the course of this nation's shipbuilding program during the 1940's and 1950's.⁷⁹ By requiring the use of asbestos in its shipbuilding program,⁸⁰ by selling asbestos to private contractors from its own stockpile,⁸¹ and by failing to promulgate, adhere to, or enforce adequate health and safety requirements,⁸² the

78. See generally *Radiation Exposure Compensation Act of 1981—Part 2: Hearing Before the Senate Comm. on Labor and Human Resources on S. 1483*, 97th Cong., 2d Sess. (1982). Senate Bill 1483 was introduced after substantial evidence revealed that the U.S. government did not adequately protect citizens who lived or worked in the vicinity of radioactive fallout from the Nevada nuclear bomb tests conducted from 1951 to 1963. *Id.* at 1. Recent scientific studies have concluded that residents of communities downwind of the Nevada test site suffered higher incidences of radiation-related cancers than would otherwise have been expected. *Id.* See also *Begay v. United States*, No. C 80-92 (D. Ariz.) (pending claim by uranium miners against the federal government), noted in *Toxic Chemicals Litigation Reporter* 511 (Sept. 5, 1983).

79. See *Oversight Hearing*, *supra* note 37, at 4 (statement of Assistant Attorney General McGrath). See also *Pittsburgh Corning Corp. v. Bradley*, 499 Pa. 291, 294, 453 A.2d 314, 315 (1982); *Wall St. J.*, Dec. 14, 1982 at 56, col. 1.

Most occupational exposure to asbestos has occurred since the beginning of World War II, with an estimated 4.5 million workers having been exposed to asbestos dust in public or private shipyards. Comment, *supra* note 37, at 181, 194.

80. *Oversight Hearing*, *supra* note 37, at 56-59 (letter to Manville Corp. from Kirkland & Ellis). See *Keene Corp. v. United States*, 700 F.2d 836, 838-39 (2d Cir.), *cert. denied*, 104 S.Ct. 195 (1983).

Government specifications required that each ship built for the Navy in public or private shipyards have asbestos for insulation. See, e.g., *Occupational Diseases and Their Compensation, Part 1: Asbestosis-Related Disease. Hearings on H.R. 2740 Before Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 230 [hereinafter cited as *1979 House Hearings*] (statement of Allen B. Coates, Gen. Rep., Metal Trades Dept., AFL-CIO); *N.Y. Times*, Mar. 7, 1982, § 3, at 16, col. 3 (letter of Glen W. Bailey).

81. See *Keene Corp. v. United States*, 700 F.2d 836, 838-39 (2d Cir.), *cert. denied*, 104 S.Ct. 195 (1983). *Oversight Hearing*, *supra* note 37, at 57 (letter to Manville Corp. from Kirkland & Ellis), 4 (statement of Assistant Attorney General McGrath), 71 (testimony of Earl Parker, Senior Vice President, Manville Corp.)

The government began to stockpile asbestos as a strategic material prior to World War II. After Pearl Harbor, the government restricted its use to fulfill Navy and other maritime requirements. See Letter from Edward W. Warren, Kirkland & Ellis to Earl Parker, Vice President, Manville Corp. (Sept. 8, 1982) [hereinafter cited as *Warren-Parker letter*] (copy available from Subcommittee on Labor Standards of the House Committee on Education and Labor).

82. See *Keene Corp. v. United States*, 700 F.2d 836, 838-39 (2d Cir.), *cert. denied*, 104 S. Ct. 195 (1983); *Oversight Hearing*, *supra* note 37, at 56-59 (letter to Manville Corp. from Kirkland & Ellis). The Navy set its own minimum requirements for safety and health in government contractor shipyards. See *Oversight Hearing*, *supra*

federal government bears responsibility for approximately one-half of the claims brought to date.⁸³ However, private companies have borne the full burden of claims brought by asbestos disease victims⁸⁴ because of the inability of asbestos victims to sue the federal government⁸⁵ and the existence of workers' compensation laws that permit workers stricken with asbestos-related disease to sue the companies which supplied asbestos to the government.⁸⁶

For these three types of occupational toxic tort cases, in which there has been significant involvement by the federal government,

note 37, at 56-59; U.S. NAVY DEPT. AND U.S. MARITIME COMM'N, MINIMUM REQUIREMENTS FOR SAFETY AND INDUSTRIAL HEALTH IN CONTRACT SHIPYARDS § 137 (1943). The Navy and Maritime Commission called for "special ventilation," "special respirators," and "periodic medical examinations" as part of its safety and health requirements for contracting shipyards. Warren-Parker Letter, *supra* note 81, at 3 n.4. The Navy experts even opined that the absence of precautionary devices for handling asbestos might result in shipyard employees contracting asbestos-related disease. *See id.* at 4. The time pressures resulting from wartime necessity appear to be the only explanation for the government's failure to adhere to its own health and safety regulations. *See id.*

83. *See* Class Action Complaint for Estimation of Contingent Unliquidated Asbestos-Related Health Claims at 26, *Johns-Manville Corp. v. Ward*, (filed Dec. 15, 1982) in *In re Johns-Manville Corp.*, Nos. 82-B-1156 to 82-B-1176 (Bankr. S.D.N.Y. filed Aug. 26, 1982); *Oversight Hearing*, *supra* note 37, at 68 (testimony of Earl Parker, Senior Vice President, Manville Corp.).

The federal government appears to have had *at least* as much knowledge about the potential health hazards of asbestos as the asbestos industry did. *See* Comment, *supra* note 34, at 194 (footnote omitted). Furthermore, the Navy failed to adopt any standard for worker exposure to asbestos in its shipyards until 1973. Warren-Parker Letter, *supra* note 81, at 6. The Navy's standards were therefore instituted eight years after the publication of Dr. Selikoff's report which linked exposure to asbestos with disease of the lung in asbestos workers. *See* Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Industrial Insulation Workers*, 132 ANNALS N.Y. ACAD. SCI. 139, 152 (1965).

84. *See* Warren-Parker Letter, *supra* note 81, at 7. Currently, there are more than 30,000 product liability suits pending against 260 asbestos concerns. *See* Wall St. J., Aug. 27, 1982, at 1, col. 6. This litigation is probably just the beginning of an even greater onslaught of cases. Podgers, *Toxic Time Bombs*, 67 A.B.A. J. 139 (1981). According to one commentator, a minimum of 200,000 asbestos-related deaths can be anticipated by the year 2000. Winter, 68 A.B.A. J. 398 (1982) (quoting Dr. Irving Selikoff, Director of the Environmental Sciences Laboratory at New York City's Mt. Sinai School of Medicine).

85. For a discussion of the government's immunity from tort liability, see notes 72-75 and accompanying text *supra*.

86. *See* Comment, *supra* note 34, at 182-83. In addition, in the asbestos context two major problems sometimes preclude a workers' compensation system remedy. *Id.* at 182. First, workers or their surviving dependents often do not know that compensation benefits are available to them. *Id.* Secondly, some injured workers who file for benefits may be barred from recovery since some states require that disability occur within a specified time from exposure to a hazardous condition. *See id.* at 183 n.31. *See also* *Asbestos Health Hazards Compensation Act of 1980: Hearings on S. 2847 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 239 (1980) [hereinafter referred to as *1980 Hearings*] (statement of Andrew T. Haas, General President of the Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers).

one option which deserves serious consideration is federal legislation establishing a compensation system.⁸⁷ Under such a national compensation plan, the federal government would be required to make a contribution reflecting its proportionate share of responsibility. By enacting legislation providing for such federal "contributions," the federal government would be equitably providing for the victims of asbestos-related disease without exposing itself to full tort liability.⁸⁸

IV. THE NEED FOR A FEDERAL COMPENSATION SYSTEM IN THE AREA OF TOXIC TORTS

The more the four factors described above⁸⁹ characterize a class of toxic torts, the more the capability of the tort system to function

87. Several compensation fund proposals have been submitted to Congress but none have received Congressional approval. *See, e.g.*, Occupational Health Hazards Compensation Act, H.R. 5735, 97th Cong., 2d Sess., 128 CONG. REC. H715 (daily ed. Mar. 4, 1982); Asbestos Health Hazards Compensation Act, H.R. 5224, 97th Cong., 1st Sess., 127 CONG. REC. H9670 (daily ed. Dec. 15, 1981); Asbestos Health Hazards Compensation Act, S. 1643, 97th Cong., 1st Sess., 127 CONG. REC. S10033 (daily ed. Sept. 18, 1981). These bills—known as the Miller, Fenwick, and Hart bills—contained significant points of disagreement as to 1) who should be eligible to receive benefits; 2) who should contribute to the fund; 3) who should administer the payments; 4) what should happen to litigation pending at the time of enactment of the bill, and 5) what disease-causing substances should a proposed compensation plan cover. *See* Comment, *supra* note 34, at 186. Congress has not yet found an acceptable solution to the problems associated with affording relief to victims of asbestos exposure. *See id.* The questions of which parties should contribute to a proposed compensation fund, and whether the federal government should be a participant, have generated heated debate. *See, e.g.*, N.Y. Times, Mar. 14, 1982, § 3, at 21, col. 1 (letter of Former Rep. Millicent Fenwick); N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3 (letters of Glen W. Bailey & William C. McLaughlin).

88. *See 1979 House Hearings, supra* note 80, at 531 (statement of Rep. Beard). With regard to who is responsible for asbestos-related disease, Rhode Island Democrat Edward Beard, the former Chairman of the Subcommittee on Labor Standards of the House Committee on Education and Labor, has stated as follows:

I honestly believe that it is a combination of industry and Government If I had to make a judgment, I would say simply, "Mr. McKinney [President of the Manville Corp.], your company is guilty. The Navy, you are guilty. . . . All the government agencies, OSHA and everyone that still allows that product to be used all over the country, are very much guilty."

Id.

Although such universal culpability may not be found in each individual case, Representative Beard's remarks reflect the fairness of requiring the federal government to contribute to a fund for compensating victims of a disease which is a "hidden cost of World War II for which many Americans are still paying." *See* 127 CONG. REC. S10,033 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

89. These four factors are as follows: 1) multiplicity of claims; 2) long latency periods between exposure to the toxic substance and manifestation of disease; 3) difficulty in identifying the tortfeasor; and 4) significant federal responsibility for the problem. For a more detailed discussion of these four factors, see notes 45-88 and accompanying text *supra*.

effectively in the fulfillment of its social policy objectives⁹⁰ is impaired. Consequently, the greater the implication of these four factors in a particular class of toxic tort claims, the stronger the case is for federal intervention. Indeed, where all of these factors operate to frustrate the objectives of the tort system, they may so overstress and corrode it that even its general social utility in other areas is undermined and perverted. This stress on the tort system has manifested itself in overcrowding the court docket,⁹¹ in the courts' resort to unwieldy and unfair legal doctrines,⁹² and in the generation of extraordinary litigation costs.⁹³

We can see these dangers at work as the tort system struggles to cope with asbestos claims resulting from occupational exposure. All four factors which militate in favor of a federal compensation system strongly characterize the asbestos claims problem. Yet, the lack of an alternative compensation mechanism has forced the courts to improvise.⁹⁴ Faced with impossible demands on their resources, the courts have increasingly required defendants in asbestos cases to compensate plaintiffs without regard to established principles of tort liability.⁹⁵ Seeking only to compensate asbestos victims and ignoring the other public policies which underlie tort law, the courts are turning the tort system into a bastardized, quasi-compensation system.

This mistake of forcing the square peg of the asbestos claims

90. For a discussion of the social policy objectives underlying the tort system, see notes 57-58 & 71 and accompanying text *supra*.

91. For a discussion of the impact that asbestos litigation alone has had upon the judicial system, see notes 46 & 48 and accompanying text *supra*.

92. For a discussion of some legal theories state courts have recently developed which assign liability to a defendant who may not have actually caused a plaintiff's injury, see notes 62-68 and accompanying text *supra*.

93. The length and complexity of asbestos litigation has led to enormous legal costs. See *1980 Hearings, supra* note 86, at 244 (statement of Andrew T. Haas). As a result, a large percentage of the damage and settlement awards in asbestos-related disease cases goes to attorneys and insurance companies. See Comment, *supra*, note 37, at 183-84. For example, when Manville filed for bankruptcy, its legal fees totaled \$24.5 million, while the amount the corporation had dispensed for asbestos-related injuries was less—\$24 million. Wall St. J., Aug. 30, 1982, at 3, col. 1. A similar picture is painted by the Chairman of the Board of Directors of Keene Corporation, another manufacturer of asbestos, who has estimated that 73% of settlement funds goes toward legal fees, 15% to insurance companies, and only 10% to victims. N.Y. Times, Mar. 7, 1982, § 3, at 16, col. 3.

The "costs involved in investigating, pursuing, and defending a claim are a drain" on the productivity of manufacturers and product sellers. SENATE REPORT, *supra* note 10, at 7. Legal costs are, in turn, "generally passed on to consumers in the form of higher product prices." *Id.*

94. Several asbestos compensation fund proposals have failed to receive serious consideration in previous sessions of Congress. For a discussion of these proposals, see note 87 *supra*.

95. See notes 60-69 and accompanying text *supra*.

problem into the formerly round hole of the tort system can be seen in the decision of the New Jersey Supreme Court in *Beshada v. Johns-Manville Products Corp.*⁹⁶ Totally departing from established principles and precedents to sustain a cause of action for a group of asbestos victims against asbestos manufacturers, the *Beshada* court held that a state-of-the-art defense⁹⁷ is not available in a product liability case brought under a strict liability theory for failure to warn.⁹⁸ The effect of this decision is to make a manufacturer liable for failure to warn of a danger of which it was impossible for the manufacturer to have known at the time.⁹⁹ In an unbridled desire to compensate the *Beshada* plaintiffs,¹⁰⁰ the court thus summarily transformed the law of

96. 90 N.J. 191, 447 A.2d 539 (1982). In *Beshada*, the plaintiffs were workers, or survivors of deceased workers, who claimed to have been exposed to asbestos for varying periods of time. *Id.* at 196, 447 A.2d 542. The plaintiffs alleged that as the result of being exposed to asbestos, they contracted various asbestos-related diseases. *Id.*, 447 A.2d at 542. They sought recovery under the theory of strict liability for failure to warn of the hazards of working with asbestos. *See id.* at 197, 447 A.2d at 542.

The plaintiffs in *Beshada* had been exposed to asbestos as far back as the 1930's. The defendants, however, had not provided warnings relating to the hazards of asbestos until the 1960's, because it was not until then that the medical profession discovered that a potential health hazard arose from the use of insulation products containing asbestos. *Id.* at 196-97, 447 A.2d at 542.

The defendants, asbestos manufacturers and distributors of asbestos products, asserted the state-of-the-art defense, and alleged that nobody in the asbestos industry knew or could have known that asbestos was dangerous when it was marketed. *Id.* at 197, 447 A.2d at 542. The trial court denied the plaintiffs' motion to strike this state-of-the-art defense. In the appeal to the New Jersey Supreme Court, the sole issue was whether defendants in a product liability case based upon strict liability to warn may raise the state-of-the-art defense. *Id.* at 196, 447 A.2d at 542.

97. The state-of-the-art defense provides that distributors of products can only be held liable for injuries which result from dangers that were scientifically discoverable at the time the product was distributed. *Id.* at 202, 447 A.2d at 545. The defendants in *Beshada* claimed that because knowledge of the dangers of asbestos was scientifically unavailable at the time of the manufacture or distribution of the product, they could not have known that the product was dangerous and therefore they acted reasonably in marketing it without a warning. *Id.* at 204, 447 A.2d at 546.

98. *Id.* at 209, 447 A.2d at 549. The *Beshada* court decided that in a strict liability warning case, the test is whether the risk from the product has been reduced to the greatest extent possible without hindering the product's utility. *Id.* at 201, 447 A.2d at 545 (citing *Freund v. Cellofilm Products, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981)). To avoid the applicability of the state-of-the-art defense in the case before it, the court characterized it as a negligence defense which had no utility in strict liability cases. *Id.* at 204, 447 A.2d at 546.

99. *See id.* at 204, 447 A.2d at 546. According to the *Beshada* court, when a product is unsafe, it is immaterial that it was unsafe because the defendant could not have been aware of the danger given the state of technology. *Id.*, 447 A.2d at 546.

100. *See id.* at 209, 447 A.2d at 549. The *Beshada* court stated that [t]he burden of illness from dangerous products such as asbestos should be placed upon those who profit from its production and, more generally, upon society at large, which reaps the benefits of the various products our economy manufactures. That burden should not be imposed exclusively on the innocent victim. . . . [The] victims . . . should be spared the burdensome financial consequences of unfit products.

strict liability into absolute liability.¹⁰¹ Contrary to tort law jurisprudence,¹⁰² the court effectively ruled that the manufacturer of a product is in fact an insurer of its product.¹⁰³ The *Beshada* court thus went a long way toward creating a compensation system funded by tort law damages.¹⁰⁴

Beshada, like *Sindell*¹⁰⁵ and *Bichler*,¹⁰⁶ illustrates the problems generated when courts attempt to fashion legislative solutions for special toxic tort problems. On the other hand, a properly designed legislative compensation system could promptly and fairly compensate all deserving claimants, avoid or overcome the four toxic torts problem factors we have identified and not pervert the tort system in the process.

Under the present tort system, the enormous costs of litigation to determine and apportion relative fault among asbestos companies,¹⁰⁷

Id., 447 A.2d at 549.

101. The court's rationale for imposing this unprecedented liability upon manufacturers for failure to warn of dangers which were undiscoverable at the time of manufacture was that such a decision would advance the goals and policies of strict liability. *Id.* at 205, 447 A.2d at 547. In actuality, the court was simply utilizing the general purpose of strict liability—protecting consumers against harm from defective products—to justify emasculating the requirement that the product be defective before liability is imposed. See W. Platt & J. Platt, *Moving From Strict to "Absolute Liability,"* Nat'l L.J., Jan. 17, 1983, at 15, col. 3.

102. *But cf.* *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975) (stating in dicta that state-of-the-art defense may not be a defense in a warning case).

103. The court even pointed out that its decision would force the manufacturer of a particular product to reflect in the price of the product the cost of insuring against the possibility that the product will turn out to be defective. *Beshada*, at 206, 447 A.2d at 547.

Traditional tort law, recognizing that manufacturers are not insurers of their products, states that liability should depend upon whether the manufacturer acted reasonably in taking the action that the claimant alleges caused the harm. SENATE REPORT, *supra* note 10, at 5-6. See also *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980) (noting that holding a manufacturer liable for failure to warn of a danger of which it would be impossible to know based on the present state of knowledge would make the manufacturer the virtual insurer of its products).

104. At present, the effect that *Beshada* will have upon other types of product liability cases is unclear. The *Beshada* court specifically declined to address the availability of the state-of-the-art defense in cases alleging theories other than strict liability for failure to warn. *Id.* at 204 n.6, 447 A.2d at 546 n.6. However, the court noted that there are strong conceptual similarities between warning and safety device cases, which may make the reasoning of *Beshada* equally applicable to cases involving failure to include appropriate safety devices in products. *Id.*, 447 A.2d at 546 n.6.

105. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). For a discussion of *Sindell*, see notes 65-67 & 71-72 and accompanying text *supra*.

106. 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). For a discussion of *Bichler*, see notes 65-72 & 71-72 and accompanying text *supra*.

107. Manville Corp., the nation's largest asbestos producer, was spending some \$2 million per month for defense attorneys before it filed for reorganization under

coupled with the volume of recoveries out of proportion to the victims' real losses,¹⁰⁸ are threatening defendants' financial ability to pay future claimants. In contrast, a federal compensation system would not be plagued by such problems. It would include federal contribution based upon the appropriate share of federal responsibility. The rest of the funds in the federal compensation system would be derived from assessing the asbestos industry in exchange for granting the industry immunity from further liability for occupational exposures to asbestos. Victims of occupational exposure to asbestos would be entitled to compensatory benefits without regard to fault.¹⁰⁹ Compensation for unreimbursed medical expenses and lost earnings¹¹⁰ could be administratively determined with sufficient speed to eliminate the backlog of claims now pending in court, so that victims could receive compensation while alive.¹¹¹

On the other hand, these elements which a federally legislated compensation system should include are much simpler to identify than to apply. Past experience with federal compensation systems such as the Black Lung Benefits Program¹¹² and the Longshoremen's and Harbor Workers' Compensation Act,¹¹³ show that federal compensation systems can themselves be unwieldy and unfair. The principal problems have been how to isolate the true "victim" and

Chapter 11 of the Bankruptcy Reform Act. Granelli, *U.S. Liability for Asbestos Grows*, Nat'l L.J., April 11, 1983, at 1, col. 3. For additional discussion of the enormous sums asbestos manufacturers have had to pay because of asbestos-related litigation, see note 93 and accompanying text *supra*.

108. As of 1982, the Manville Corp. alone had disbursed approximately \$24 million for asbestos-related injury claims. Wall St. J., Aug. 30, 1982, at 3, col. 1.

109. By nature, a compensation system must operate according to no-fault principles if it is to promptly and efficiently compensate injured persons. See TASK FORCE REPORT, *supra* note 8, at VII-204 to VII-205. The no-fault approach is appropriate in the asbestos context because, *inter alia*, the great majority of asbestos companies had no knowledge of the toxic nature of their products in the circumstances to which they exposed persons. See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) (medical profession was unaware until the 1960's that there was a potential health hazard from the use of insulation products containing asbestos); Selikoff, *supra* note 52, at 23-24 (link between asbestos and lung cancer not established until the 1960's).

110. There would be no compensation for pain and suffering. The various rationales justifying the award of damages for pain and suffering under the tort system generally do not apply to a no-fault compensation program. TASK FORCE REPORT, *supra* note 8, at VII-65 to VII-67.

111. See *Hazards of Asbestos Exposure, Hearing Before the Subcomm. on Com., Transp., and Tourism of the House Comm. on Energy and Com.* 47, 97th Cong., 2d Sess. (1982) (statement of Dr. I. Selikoff) (by and large, very few workers receive compensation while they are alive).

112. 30 U.S.C. §§ 901-945 (1976 & Supp. V 1981).

113. 33 U.S.C. §§ 901-950 (1976 & Supp. V 1981).

efficiently provide him or her with adequate compensation.¹¹⁴ Indeed, while not a major isolating factor, whether statutory categories can be defined without being over-inclusive is of great practical importance. All that we are suggesting is that the asbestos problem merits careful and creative thinking regarding the utility and design of a federal compensation system.¹¹⁵

Consumer product and environmental toxic torts do not at this time present a compelling case for federal intervention. The four factors which may justify federal legislation are not so substantially implicated in either consumer product or environmental toxic torts that displacement of state remedies by a federal compensation system should be considered a legitimate alternative.

V. CONCLUSION

Although tort law has been the traditional province of the states, federal intervention may be justified under various circumstances.¹¹⁶ Federal product liability tort reform is justified by the need to provide some uniformity and certainty in product liability tort law.¹¹⁷ The present system has too disruptive an effect on interstate commerce.¹¹⁸ At the same time, there are aspects of the toxic torts problem that deserve exploration with respect to the possible need for a federal compensation system. When, as in the problem of occupational exposure to asbestos, a multiplicity of claims,¹¹⁹ long latency periods before the manifestation of harm,¹²⁰ difficulty in associating the victim's harm with a particular defendant,¹²¹ and significant federal responsibility for the harm¹²² combine to prevent the tort system from properly functioning, Congress should consider the development of a

114. See Comment, *supra* note 34, at 191. As the Black Lung Benefits Act of 1972 has illustrated, legally created presumptions of disease often lead to compensating parties who do not deserve compensation. *Id.*

115. See *Aid for Asbestos Victims*, Wash. Post, Feb. 18, 1983, A20, col. 1.

116. See note 1 and accompanying text *supra*.

117. See TASK FORCE REPORT, *supra* note 8, at VII-28 to VII-29.

118. See note 16 and accompanying text *supra*.

119. For a discussion of this factor in occupational toxic tort cases, see notes 45-51 and accompanying text *supra*.

120. For a discussion of the long latency period between exposure to the toxic substance and the manifestation of physical injury, see notes 52-55 and accompanying text *supra*.

121. For a detailed discussion of the difficulty toxic tort plaintiffs have had proving that a particular defendant caused their injury, see notes 56-71 and accompanying text *supra*.

122. For a discussion of the responsibility the federal government shares for the harm suffered by victims of asbestos-related disease, see notes 72-88 and accompanying text *supra*.

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federal compensation system. Under these circumstances, federal intervention may be necessary not only to resolve the particular toxic tort problem at hand, but also to preserve the basic principles underlying the tort system itself.