37 ELR 10230

ELR
NEWS & ANALYSIS

3-2007

Critical Developments in Toxic Torts: Are There Synergistic Effects Between Toxic Tort Suits and Environmental Regulations?

Editors' Summary: On May 25, 2006, the Environmental Law Institute hosted the first seminar in a series exploring critical developments in toxic torts. After the moderator provided an overview of the relationship between toxic tort lawsuits and environmental regulations, the panelists shared their expertise on a range of topics surrounding this issue, including: agency action as the impetus for toxic tort litigation; strategies used by plaintiff and defense lawyers in litigating toxic tort suits; the role of regulatory compliance as a defense in litigation; and the challenges in introducing regulatory reports and risk assessments into evidence during trial. Below is a transcript of the event.

[Transcribed by HBR Inc. of Washington, D.C. The transcript has been lightly edited, and citations have been added, for ease of reading.]

Moderator:
Robert M. Sussman, Latham & Watkins L.L.P.

Panelists:
Carla M. Burke, Baron & Budd
Richard O. Faulk, Gardere Wynne Sewell L.L.P.
Bruce A. Finzen, Robins, Kaplan, Miller & Ciresi L.L.P.
Clifton J. McFarland, Downey Brand L.L.P.

Robert Sussman: I'm going to kick off the discussion with some brief remarks, turn it over to our panel for presentations, and then we're going to save some time for discussion, interaction, and questions at the end. First let me introduce Richard Faulk, an old colleague. Richard is the leader of the Environmental Practice Group at Gardere Wynne Sewell in Houston. He concentrates his practice in complex tort and environmental litigation. For the last few years he served as National Coordinating Counsel for Alcoa's asbestos litigation, and I just learned that among his many accomplishments, Richard is a leading methyl tertiary butyl ether (MTBE) maven and his chronicle on the saga of MTBE is very interesting history of the MTBE litigation,[1] which I'm dying to read. Richard has also published over 30 scholarly articles in a book which is intriguingly titled, *Stopping the Speeding Locomotive: Perspectives on Toxic Tort and Environmental Litigation*.[2]

Our second speaker is Carla Burke. Carla is with Baron & Budd in Dallas and is part of the Water Contamination Practice Group. She joined the firm in 1999 and is now involved in a variety of tort cases representing municipalities, water providers, and individuals who have sustained contamination of their water supplies by chemicals. And she's heading up complex MTBE litigation in which her firm is counsel for the plaintiffs, so she has some front line experience with the issues that we're going to be discussing today.

Bruce Finzen is also a good colleague and a friend. Bruce is a partner at Robins, Kaplan, Miller & Ciresi, practicing in their business trial, litigation, mass tort, and personal injury groups. Bruce has some remarkable, cutting edge plaintiff's experience, having been heavily involved in tobacco litigation where the Robins firm was, I think, lead counsel for the state cleanup, at least counsel for the study case which merged, probably the most important of all of the tobacco cases and the one that precipitated the global tobacco settlement. Bruce also, interestingly, had represented the government of India in the litigation arising out of the Bhopal gas leak disaster, which must have been a very interesting experience.

And our fourth speaker is Clifton McFarland. Cliff practices environmental law with the firm of Downey Brand [at the time of this seminar, Clifton McFarland was part of the Los Angeles office for the firm of Gibson, Dunn & Crutcher]. Cliff does a lot of work on toxic exposure litigation and related issues. Cliff actually has a degree from the Massachusetts Institute of Technology, which I'm always impressed by. He's a graduate of Columbia and was an environmental engineer.

Let me now introduce our subject today. Most major toxic tort suits overlap with agency investigations, enforcement actions, or other proceedings. There are many examples that we're all familiar with. One is the Anniston, Alabama, polychlorinated biphenyls cases, where a difficult and high-profile Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[3] issue morphed into mas-

1. Richard O. Faulk & John S. Gray, *Reunion in Salem: Updating the MTBE Controversy*, 36 ELR 10667 (Sept. 2006).

2. Richard O. Faulk, Stopping the Speeding Locomotive: Perspectives on Toxic Tort and Environmental Litigation (2000).

3. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.

sive property damage claims that were ultimately settled for hundreds of millions of dollars. We see the interplay between tort litigation and regulations taking a variety of forms. Sometimes the agency action is the impetus for toxic tort litigation; in other cases the litigation may itself be the catalyst for agency involvement. Frequently, the litigation and agency action proceed on parallel tracks with developments on each track impacting the others.

Why are we seeing a nexus between tort litigation and agency action? I think there are a number of reasons for that. One is the spotlighting effect of agency action on environmental discharges, site contamination, adverse health effects data, or product risk issues. The agency has the effect of casting a light on these issues. That, in turn, often leads to media attention and, in some cases, the attention in agency action then activates plant neighbors, local officials, or individual citizens who become concerned about the environmental problem and mobilize to do something about it. The coalescence of these forces can create what you might call a litigation-ready environment, where cleanup attorneys can find a receptive audience, particularly if there is frustration within the community with the responsiveness of the company and an agency. So, one role of agency action is to create the coalescence of forces which in turn lead to an environment that is receptive to toxic tort litigation.

Agency involvement also offers the promise of ready-made risk assessments, large dockets of company documents and other materials, and expert reports that plaintiffs' attorneys may feel make it a lot easier to develop a case that a company was negligent or that actions have created conditions harmful to property or human health. From a plaintiff's standpoint, building a case may seem a lot easier where a government agency has created a record and, for example, determined that environment levels of the chemical exceed regulatory values or, to use another example, the company violated permit limits, emission or discharge standards, or reporting requirements.

The questions for our panelists today are, what strategic and legal issues arise in these situations, and how can plaintiff and defense lawyers try to use them to their advantage? From the plaintiff's perspective, the goal is obviously to leverage agency action to create the strongest possible case. For example, can plaintiffs use agencies' determinations to establish negligence or harmful behavior, can they use risk assessment as authoritative evidence of adverse health or environmental effects? If the company has resisted agency demand for information or has been slow to the mark in addressing contamination, can this be used to portray the company in an unfavorable light? And what if evidence surfaces in discovery that should have been reported to the government or could heighten the concerns of government regulators or investigators, should this evidence be used to try to influence agency decisionmaking? Can or should plaintiff lawyers and their representatives actually participate in agency proceedings or communicate with regulators?

From the defense side, the challenges are very different ones. How do you rebut the argument that violations of regulatory standards or agency compelled cleanups or product withdrawals establish liability? Conversely, is it possible to use compliance with government requirements affirmatively, as evidence of corporate diligence where there is lack of an unacceptable risk, and what about arguments like federal preemption that seek to rely on government involvement to preclude private tort claims? These are some of the concrete questions that lawyers practicing in this area struggle with in the course of cases and we'd like to hear the perspective of our panelists on those issues. We're going to start with Richard Faulk.

Richard Faulk: The topic of the synergy between litigation and regulation and vice versa almost presumes that the two are different things. I think if we've learned anything from the last session of the U.S. Supreme Court last year, in the *Bates v. Dow Agrosciences, Ltd. Liability Co.*[4] case, which dealt with Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[5] preemption, we've learned that under certain circumstances the U.S. Supreme Court is going to say that litigation *is* regulation, and that state litigation involving the question of warnings and labels can, under the right circumstances, qualify as regulation, and as such can be preempted by federal activity.

Now, that particular case did not result in a total preemption finding under FIFRA, but it seems to be pretty clear that the regulation side and the litigation side, if you view them as a continuum, are indeed things that interact together. They are often times addressed to the same purposes, they are often times given opportunities to feed off one another, and they often provide opportunities for defendants to respond by relying on those regulations. I think it's very clear that litigation can spawn regulation. I don't think there's any doubt that in the history of tort litigation in this country, a lot of tort litigation has preceded frank regulatory involvement.

The regulatory involvement, for example, of the Occupational Safety and Health Administration (OSHA)[6] in setting forth permissible exposure limits and safe work practices, was preceded by a substantial amount of toxic tort litigation, both in the asbestos and the silicosis side, as early as the early decades of this century. Not only that, but the regulations themselves can spawn litigation. I'll use MTBE as an example of that—although it's a bit of an abortive example. One of the things raised as a problem with MTBE is that the regulations governing the cleanup of underground storage tanks were passed, and some companies went in and forced those regulations and complied with regulations, but there was a significantly lax enforcement of those regulations by the enforcing authorities. As a result, those companies that did not take an aggressive posture with respect to cleaning up leaking underground storage tanks and monitoring their compliance with those regulations found themselves in situations where leaks might have been impacting water supplies, etc. So the mere existence of a regulation doesn't necessarily mean compliance. The enforcement of a regulation is essential to give people an opportunity to avoid what might spawn, as it has here, into a significant mass tort problem.

I don't think there's any doubt that litigation and regulation can feed on each other. Whether one has generated the other or not, once the two exist side by side, to use the toxicology term, it's not just synergy that takes place, it's actually potentiation. Those of you who work with toxicologists know that when two substances work together and one potentiates the effect of another, it not only enhances

4. 544 U.S. 431, 35 ELR 20087 (2005).

5. 7 U.S.C. §§136-136y, ELR STAT. FIFRA §§2-34.

6. *See* Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

the toxic impact of the substance, but it exponentially increases the toxicity of the substance. And that's certainly true when you're looking at the interaction between regulation and litigation.

Let's take a classic example. A number of us have dealt with suits involving neighborhoods near manufacturing sites, such as refineries and chemical plants. Under those circumstances, it's very common to find situations where the plaintiffs will use the data from fugitive emissions from the facility, as well as data from other sorts of emissions from the facility to develop regulatory models which then forecast the dispersion of pollutants across the fence line and into the community. Then they use the largely prophylactic standards—preventive standards, in the agency viewpoint—to establish the existence of a risk. So you end up facing the prospect of not only an agency-developed model to support plaintiffs' claims, but also an agency-developed risk assessment being used to establish the existence of risk.

And plaintiffs' next step is to say: "Since there is definitely an exposure and since there is definitely a risk, we should have medical monitoring to see if anything is going to happen to us." Often these cases are set forth as class actions seeking large programs which are used to protect the public health without necessarily showing that any particular individual in the group suffers from any particular harm at all. As a matter of fact, there are a number of cases across the country that are now holding that the existence of a specific injury to anyone is not necessary to establish a medical monitoring cause of action.

This scenario is all too common and it obviously needs to be dealt with. The way that I think that most defense firms have been dealing with this issue is to set forth the differences between the regulatory process and the litigation process. They try to distinguish the types of factors that go into establishing risk in the terms of a risk assessment by insisting on causation proof that satisfies the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[7] and the various other scientific evidence standards that are applicable in the various states.

For example, agencies place large reliance on things like animal studies or *in vitro* analyses, and they also rely upon epidemiology studies that may be inadmissible under the terms of *Daubert*, in order to reach a standard of risk. In turn, this preventive standard is then used instead of a causation standard to establish liability. There are cases that are cited in the paper that I'll be giving everyone[8] that establish that the agencies' standards are not standards for purposes of causation in a toxic lawsuit. They are exactly that: they are rulemaking standards designed to protect the public health in a looking-forward way, rather than a looking-back way.

The last thing I'd like to mention here are the ways that these standards can be used to establish liability or nonliability in cases.

One of the biggest problems that most defendants in toxic tort cases face is that they're living in a highly regulated environment. They're regulated by OSHA, they're regulated by the U.S. Environmental Protection Agency (EPA), they may be regulated by state OSHA and state EPA, and it literally takes hundreds of people and thousands of man-hours each year simply to comply with the regulations. And yet the courts continually say that compliance with regulatory standards does not prove that you're not negligent. As a matter of fact, many of the courts will say that compliance with regulations is a minimal approach to the issue. That allows the plaintiff's counsel in arguing a case to a jury to say: "Well, they may have done all that was required, but they may not have done all that was necessary." The difference between requirement and necessity is a theme that I've heard over and over in jury cases and also a theme that I see over and over in appellate situations, and it's a serious problem. Obviously, compliance is step one, but in developing a story to tell a jury to persuade them that your client has, in fact, been cautious and nonnegligent, you have to have more than a regulatory compliance history, although proof of the regulatory compliance can be compelling if it is, in fact, exhaustive.

On the other side, it's not uncommon to see the plaintiff's counsel use regulatory noncompliance as a basis for negligence per se. In other words, if you violated the statute, you're negligent as a matter of law, saying: "We don't have to put on any more proof of that, you're obviously negligent and all we have to do is to establish that the violation that resulted is causing damages to our client." Depending on the regulation, depending upon whether the particular plaintiff is within the class of persons who's going to be protected by the regulation, that may or may not be found to be negligence per se.

But let me tell you this: I don't think that as a practical matter it makes a bit of difference whether you win the argument that it's negligence per se or not, because a jury that sees that you haven't complied with a regulation is going to hear that as evidence of negligence, whether the judge instructs them that it's negligence as a matter or law or not. And the practicalities of that situation are quite serious. The more pervasive the occurrence of the violations, the more likely there'll be findings of liability.

Lastly, there is a move in the states, most notably in Texas, to say that regulatory compliance—while not a defense to negligence in itself—can in fact be a defense to the imposition of punitive damages. Under most states' laws, the existence of the right to punitive damages is determined upon an entire want of care by the defendant. That's gross negligence, meaning you knew about the hazard, but you did absolutely nothing to protect people from it. Certainly, regulatory compliance in a pervasively regulated area is significant evidence of care. Properly presented, there have been a growing number of courts which recognize that compliance can be a defense to punitive damages.

I don't know that I have even come close to scratching the surface of the vast area that we're talking about here today but I think I have come close to exceeding my time. So, I'm going to yield the floor back to Bob.

Robert Sussman: Why don't we go to Carla Burke.

Carla Burke: There was one thing that Richard just said that I could not agree more with, and that is that tort cases are a completely different animal from regulatory proceedings. In my practice, I handle water contamination cases, with a couple exceptions. My firm represents about 160 public water providers—cities, municipalities, and a state—who have MTBE problems. So, I have a completely tort-based perspective of the MTBE problem. There are regulatory issues

7. 509 U.S. 579, 25 ELR 20856 (1993).

8. Faulk & Gray, *supra* note 1.

that are raised, but we have chosen to frame it in a slightly different way. We go and look through boxes and boxes and boxes of discovery and what we've found over the years, in these cases, is not a history of station owners who were negligent or station owners who maybe didn't keep up with the underground storage tank compliance regulation. We found evidence of refiner knowledge that if MTBE was put out into the distribution system as it was, not into the distribution system as it could have been in an ideal world, but into the distribution system as it is, that MTBE would leak into groundwater and that MTBE would leak into our drinking water. As early as 1980, there were incidences that some of the majors, Shell and Exxon, to name two, were involved in a spill, one in 1980, another in 1986. So, this is an awareness growing, maybe even before regulatory awareness, but an awareness on the part of the people who were adding this stuff to gasoline.

We're not looking at the regulations that apply to underground storage tanks, we're looking at how it got into the storage tanks in the first place, and the knowledge that once it was in those tanks, it was coming right back out—out of what? Although certainly the tank upgrades in 1998 may have helped a little bit, the story is one that we really see in terms of culpability, but it goes to the refiner who blended it into that gasoline. So, we don't really think in terms of where regulations failed. From a plaintiff's perspective overall, we would say that the regulations provide an opportunity that is often missed. It's often late to protect an individual, it's often behind the times.

Richard mentioned OSHA, which was created to address the exposure of employees to asbestos products. Well, here we are, 30 years later, and there are still quite a few employees being exposed to asbestos products. Regulations have certainly helped and they make us all feel a little better knowing that they're out there. But on a personal level, if you're one of the 10,000 that is deemed to be an acceptable risk, that's too much risk for you or your family, from a plaintiff's perspective.

As a practical matter, we deal with regulations all the time. Regulations play a huge part in the litigation of our cases. The first way is in the preemption model. For those of you who don't know the intimate ins and outs of the MTBE litigation, let me try to do it in 30 seconds. In 1990, there were amendments to the Clean Air Act (CAA) that required the use of oxygenates in gasoline to hopefully reduce air emissions. Congress provided a list of seven possible oxygenates including MTBE and for whatever reasons, refiners opted for MTBE. The oxygenate requirement is often claimed to be a federal requirement that preempts tort claims, so we have litigated that in every case we have been involved in. The cases that are all consolidated in the federal MDL [multi-district litigation] right now just had oral argument on the preemption issue, and there has been no ruling yet, so it's still very heavily litigated in those cases. The cases in the MDL, I believe, are from 17 or 18 states including, say 150-160 plaintiffs. That's just a huge issue for those cases, the idea of preemption.

The other issue that comes up in every one of our cases, whether MTBE or any other water contaminant or soil contaminant, for that matter, is kind of unique to our plaintiffs. Most of our plaintiffs are public water providers, public utilities, and maybe cities, it's whomever you get your water bill from. Those public water providers are subject to some regulation on the state level about what can be in the water, as well as some federal regulation. They cannot sell water that contains contaminants above a certain level, the maximum contaminant level (MCL). The plaintiffs can't sell water above a certain level. Our plaintiffs have contaminants in their water at certain levels. If, for example, the MTBE level in the water is below the state standard for MTBE, one of the defense arguments is that they are not injured, as a matter of law, because the water provider could sell the product. MTBE is a little tricky because it has this very low taste and odor threshold, but from a plaintiff's perspective, my water contamination level can be next to nothing, but if I can't use the water, I'm harmed.

It's a little different for a public water provider than it is for a private well owner. A lot of our plaintiffs are private well owners who may live in rural areas and not be connected to a municipal water supply, so they rely on a private well, and if their water is tested, it may be below the MCL, what a water provider could serve, but remember, with a private well owner, they're not going to be governed by that standard. You ask, is the private well owner injured at a level below the MCL? Our position is if they can't use the water, if they can't drink the water, then, yes, they are injured. That's one way that regulations play a part, and we've argued that back and forth. We haven't lost that issue; most courts see clearly that if someone can't use their water, if they're deprived of their water or if they can't sell the water to their customers, they've suffered some injury.

Plaintiffs can find very interesting legislative findings that go into developing standards and regulations. We look at what studies EPA relies upon. If there's an EPA standard, we want to know what the science is. We will go look for it, too. So, these things all work together. Our cases are all product liability claims, negligence claims. There are some nuisance and trespass claims in there, also. These are mostly focused on the conduct at a refiner level and not on a spiller level. And so that's one of the battles we have too, is the conception of, is it a spill case that would be governed by environmental regulations, or is it a product/liability case that would have straight tort principles that apply to it. Whoever comes to an MDL hearing in the MTBE cases, which are fascinating, you'll hear both sides talking about what seems like two different cases. The plaintiff's counsel table is talking about product liability and tort and duties and strict liability and the defense table is often talking about who spilled it, released it, was the tank secure, what is the station owner's fault in it.

It can be very difficult to bring everybody back to the issues, back to "what is in the complaint," "what is before the judge," "how did we frame our case." And regulations are certainly a part of that, although the plaintiffs we represent are faced with the problem that is immediate. It is today, they can't wait around to get on the national priorities list (NPL), or wait on Superfund or CERCLA to come in and save them. They need action and they need it now. They need someone who can do that, and they feel the court procedure is the best way to accomplish that, regulation or not. I'm going to turn it over from there.

Clifton McFarland: When I spoke to Scott Schang at the Environmental Law Institute (ELI) about participating in a seminar on the synergistic effects between toxic tort law and regulation, it occurred to both of us that probably most of the

other panelists would focus on the regulatory world's effect on toxic tort suits, and what I agreed to do at the time was to try to look at the opposite question of how the toxic tort world affects regulatory law. I'm going to try to answer two questions: should tort law influence regulation, and does tort law influence regulations. They are different questions. I think the answers are different, too.

Before getting to the questions, I'd like to cover a little bit of background and make some observations to set up the answers. The first is that tort law predates regulatory law, I'd say by a millennium or so. Tort law is part of the ancient common-law system of private law. The start of tort law, so the story goes, probably apocryphal, is that back in the mists of time, the kings of places like Essex and North Umbria were disturbed that so many fighting-aged citizens were unable to participate in the army because of the injuries they had sustained settling scores in duels. The kings needed a better dispute resolution system, and they came up with a system where the complainant and the accused would come to the king's court, tell their stories, and the king would decided who was right and whether compensation should be paid. This is an individual rights-based system and the bodies of law that spring from that are tort law, contract law, and property law, all of which then become part of the market system that grew up in Britain, and was exported from there. The system is compensation-based, and I would argue that the deterrent in that system is simply an afterthought.

As part of the economic system, I think, we've come to the point where most commentators take the point of view that to have a well-functioning, market-based economic system you need a well-functioning tort-law system, a well-functioning property-law system, and a well-functioning contract-law system. Without those you can't have a good, functioning market system. The regulatory state comes along much later in time, around the time of the New Deal. Prof. Bruce Ackerman of Yale Law School is fond of saying that the New Deal constitutes the third American Revolution, following the one we're familiar with, and the Civil War as the second one. It's important to remember that the New Deal revolution that spawned the regulatory state came about because of the massive market failure that led to the Great Depression.

With the advent of the regulatory state, we now have a dual system of law, a system of regulatory law and a system of tort law co-existing side by side. We've had that system for over 70 years in the United States. In the environmental area, we've lived with this dual system for about 30 years. Environmental law, like the New Deal regulatory law, arose because of a market failure, and Professor Ackerman contends that the preexisting economic system—including tort law—was inadequate to the task of protecting against environmental harm. The seminal article on that topic that we all read in law school or thereafter was the *Tragedy of the Commons*[9] article written by the late Garret Hardin, and most of us are familiar with lessons of that article, that externalities need to be reinternalized to fix the market failure that occurs in the area of environmental harm. So, now we have a dual system, we have a regulatory system and we have a tort system existing side by side. It's important to remember, I think, that the regulatory system is the superior of the two in addressing environmental risks. This observation flows from what I just said—that the entire body of environmental regulatory law was created because the preexisting economic system, including the tort-law system, didn't function well in this area.

Notwithstanding that, the tort-law system still has a major role to play in resolving environmental issues. Prof. Kenneth Abraham of the University of Virginia School of Law has a clever way of saying this. He calls the tort-law system a "hedge fund." What he means by this, I think, is that it's a backstop to the regulatory system, in that things that fall between the cracks in the regulatory system can be addressed in the tort-law system. Whether that's due to, as suggested earlier by Richard Faulk, a lack of enforcement of the underground storage tank regulations that led to MTBE contamination, whether it's due to oversight, whether it's due to agency capture, or perhaps—if you will—due to legislative capture, like we might have seen in the tobacco area. It's interesting that there have been so many articles on agency capture when the bigger problem actually appears to be legislative capture.

Before answering the questions, I want to spend a few minutes talking about what I'm going to call "regulatory world," which is distinct from "tort world." In the interest of full disclosure I should say that I've spent half my career, a little more, as a regulatory lawyer and half my career, a little less, as a litigator. I find my heart strings tugged by regulatory law and my purse strings tugged by litigation. Regulatory world is a well-ordered world of codified regulations, and regulatory lawyers like it a lot better than they like the free-wheeling, swashbuckling, uncivilized tort world that most of the people around the table live in.

Interestingly, business also appears to like regulatory world better than tort world. I want to take you back to Psychology 101, and grainy black-and-white footage of little white rodents in steel cages, where we learned that small rewards and small punishments can be quite effective in modifying behavior, whereas large jolts, capriciously applied, lead to anger, psychosis, and in a worst-case scenario, bankruptcy. But I'm cautious of drawing conclusions on human behavior from rodent behavior, just as I'm cautious in drawing conclusions on human toxicology from animal toxicology.

It's important also, I think, to remember where regulatory world comes from, because despite the fact that we think of it as a well-ordered world, it actually gets its genesis from these bolts from the blue that are called "legislation," and legislation is not well-ordered. Most of the environmental legislation that we're familiar with has been the result of catalyzing events, the inversion layer at Donora, Pennsylvania, had a lot to do with the CAA, the near death of Lake Erie had a lot to do with the Clean Water Act, Love Canal had something to do with the Superfund law being passed, and the incident at Bhopol had quite a bit to do with the Emergency Planning and Community Right-To-Know Act. What regulators do is take what the legislatures think they wanted and try to break it down into bite-size pieces and make it implementable. This strikes me as being similar to what we might see in a civil-law country where everything ends up being codified. The difference in environmental law is that there are gaps. Environmental legislation is not comprehensive; it's piecemeal, and it is not an integrated, unified whole.

9. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243-48 (1968).

Okay, so now the questions. Should tort law influence regulation? I think based on everything that I tried to squeeze in over the last 10 minutes, the answer is absolutely yes it should. If you take the goal of regulatory law as the creation of a comprehensive civil-law style codification, the regulators are going to want to fix the holes where things have fallen through the cracks and then been resolved by the tort system. There's going to be a natural inclination of the regulator to fix those holes in the net. Where better to go for the solution than to the initial analysis that the tort-law system has provided to the problem. The assumption is that's what the regulators want to do and I believe that is the goal. And indeed there is a lot that's been written about creating a unified environmental law to achieve just that goal.

As to the second question—does tort law actually influence regulation—I'm not sure that one has such a clear answer. I've been thinking about this question for the past month or so at Scott Schang's urging. I'd like to have some feedback from the people in attendance on the second question.

One of the panelists noted in one of our earlier phone calls that in 1992, the Food and Drug Administration (FDA) moved rather rapidly to ban silicone breast implants, which no doubt was a result of the tort litigation from the early 1990s. Many now view this as a regulatory error, which points to a distinction, and there are many ways to phrase this distinction since this is an informal talk. What I'll say is that tort lawyers are from Las Vegas and regulatory lawyers are from Brussels, or some similarly exciting place. And we have a problem when people get outside their realm and don't play their own game. The regulatory system is slow, deliberative, cautious, and it can take decades to promulgate and survive judicial challenges to get a regulation finalized. There are other examples of regulations that have undoubtedly flowed from tort world—most if not all of the asbestos regulations are a direct result of tort actions. It's been mentioned earlier today that many OSHA regulations have been a response. I think the hazardous air pollutants regulations or NESHAP [national emissions standards for hazardous air pollutants] if we can use a regulatory acronym today, flow from tort litigation. Indeed, a lot of the facts and data developed in litigation find their way into regulatory dockets where they're considered in the regulatory process. All in all though, surveying the field, what I was struck by was that there's not as much influence as I would have expected on the regulatory system coming from the tort system, and I'd like to hear other points of view on that. I think that the reason is that not all the gaps in the net exist through inadvertence. A lot of the gaps in the net are simply due to jurisdictional gaps that have been left by the legislature and are a result of patchwork legislation, and it's not always possible for the regulators to fix those gaps due to jurisdictional limitations.

Bruce Finzen: Let me first just give my comment to Cliff's statement that he believes industry likes regulatory world better than tort world. As a plaintiff's lawyer over the years, the only thing you need to know to answer that question to say that he's absolutely right is to look at the federal preemption motions that are brought. The preemptions in every single tort case, over time, show that industry clearly likes regulatory world better than tort world. There are a lot of other reasons, I suspect, why that's true as well, and it probably has a lot to do with the bottom line and dollar amounts that are fixed to one versus the other for being found to have been in violation of a particular regulatory standard.

I wanted to address today a little bit of the question about the practical effects of agency findings, regulatory reports, and that sort of thing on litigation. And the first place to start with that is, at the end of the day, if the case is going to go to trial, you've got to be able to, as a plaintiff lawyer, put that regulatory report or risk assessment into evidence or it's of very little value to you in the courtroom. That brings us to the rules of evidence, and I thought we'd spend a little time talking about what the rules say and what the courts say about admitting these kinds of regulatory assessments. The answer is that they have to be found to be an exception to the hearsay rule, and that brings us to rule 803(8)(c), which says that "such reports are admissible in some circumstances."[10] The rule says, "factual findings resulting from an investigation made pursuant to authority granted by law are admissible unless the sources of information or other circumstances indicate a lack of trustworthiness."[11]

Now that really leaves a lot of discretion to the trial court and I would submit that in my experience, and I think, from reading the cases over the years, far more of these regulatory reports and agency actions are excluded from evidence than are admitted. The rule is based upon the assumption that public officers will, in fact, perform their duties, that they lack any motive to falsify, and that the public inspection to which many of the records are subject will disclose inaccuracies if they exist. The findings of these reports are not only factual in terms of the investigation as to what happened, but how it happened, why it happened, and who caused it to happen. And frequently, all of those are significant issues for both parties in the case.

The court has said the rule makes it presumptively admissible, and not merely for the factual determination that the agency makes, but also for conclusions or opinions that the agency draws from those facts and the investigation itself. There is where the rub usually comes, and where the issue of trustworthiness really comes into play. In evaluating trustworthiness, the courts say that they have to look at the timeliness of the investigation, specific skills or experience of the investigator or the official conducting the investigation, whether there was a hearing held and evidence taken or whether it was strictly a fact-finding kind of investigation, and any possible motivational problems that might exist. And I submit that those are probably about as broad as you can imagine them to be.

If you look at the kinds of reports and you read some of the cases, you see that there are fairly significant kinds of reports from individual OSHA reports of an accident investigation that can go both ways, either for the plaintiff or for the defendant, to much broader investigations of the kind that we've been talking about. I'll get to one in a moment here, the quick reference dealing with breast implants and the FDA regulatory report that came out in the early 1990s and had, at least in the early breast implant litigation, an enormous impact on a couple of the early tried cases. But in terms of what plaintiffs or defendants do, obviously if the report is favorable for you, you try very hard to get it into evidence to support your claim. If it's against you, you find all

10. Fed. R. Evid. 803(8)(c).

11. *Id.*

sorts of reasons why, in fact, it isn't trustworthy, and imaginative lawyers are very good at doing that. I use the example of the FDA report on breast implants as an example of what can happen. This was from one of the early cases tried in the MDL, long before the U.S. Supreme Court ruled that the MDL judge could not latch on to cases after discovery was done. In the report, the FDA referenced human carcinogenicity and autoimmune diseases to be among significant risks of the implants. That report was admitted into evidence in the first trial, and on direct examination, the plaintiff's counsel in that case was able to ask their expert to review the report and to comment upon it for the jury. Of course, the plaintiff's expert reviewed it and testified that he agreed with it fully, and he said that it was supportive of his opinion that breast implant recipients faced risks including cancer and autoimmune disease.

Now when this got booted up to the court of appeals, the court had a lot of problems with it, and they went into great detail talking about why it wasn't reliable and should not have been reliable in that case. They referred to the fact that it didn't address the specific implants or the specific product at all, and that the report was issued in the early 1990s and these implants had been implanted in the 1980s. The report referenced lots of materials that had developed between the 1980s and the time of the report and therefore made it impossible for the manufacturer in that case to have had real knowledge of these kinds of things that were relied upon. The court said that the report was more like findings of "proposed" causal effects. It invited further public comment and the court answered the issuance of another document somewhere further down the road. It also relied upon medical journals and this is where the line gets really muddled and fuzzy, because the question always was whether or not can you prove causation without epidemiological evidence. Usually there won't be any and defendants will argue there has to be when there is, and its adverse defendants will argue that you can't prove individual causation from an epidemiological study, and so it goes. But in this case, whether there was no epidemiological study, the court said the FDA relied upon some of these medical articles that were anecdotal reports or not logical in nature per their evidence, that it was unreliable or untrustworthy. I submit that's a good example of the kinds of issues that you face every single time you want to deal with an agency assessment or report in your case.

But I also would submit that the larger issue with regard to agency actions may not be whether they are ever admissible at all, but how those reports are used outside of the litigation. Newspapers pick up on these reports and they are widely reported and widely circulated. The effect of that is, first of all, to bring lots of new plaintiffs into the lawsuits. Second, it brings a lot more plaintiffs' lawyers into the lawsuits and if there isn't already an MDL, you can bet if not the farm, at least the main house, that there will one real soon after that. They also have an enormous impact on the jury pool and, in fact, that may be the biggest impact that these agency actions ultimately have, both from a plaintiff's and a defendant's standpoint.

Lawyers have got to, therefore, deal and react to these reports outside of the courtroom. For the plaintiffs, for example, if the report is positive in nature, you want to encourage as much media reporting of that as possible. You want to comment on and stress the independence of the agency investigation, you want to stress how thorough the investigation was if you're the defendant. If the report is not favorable, if it's negative, then if you're the plaintiff, by that time you should have had experts that dispute the findings of the agency. You want to be able to stress to the media the dispute that your experts have with the report in the agency findings. You want to particularly stress any documents that you may have discovered in discovery that would conflict with that report. And lastly, you want to make every effort you can to try to get such conflicting evidence and documents into the agency and to see if you can either alter or in some way amend the agency action or the agency report.

Now, this raises another major issue that Bob touched on at the beginning and that is, what is the impact of plaintiff lawyers interacting with regulatory agencies? The first answer to that is it always lies in the pre-discovery negotiations over confidentiality orders in document discovery. Defendants will always insist that there be a very, very narrow and limited scope of people who can access documents that are marked as "confidential." As a plaintiff lawyer, you want that universe to be as broad as possible and to always include the applicable regulatory agency. You want to be able to share documents that you think are important from the regulatory perspective with that agency and particularly, as I mentioned, if you're dealing with a report that looks to be adverse to you, if you can find documents to either undercut that report if it gets admitted in court, or better yet, turn the agency around, that's certainly to your advantage and you want to try to do that. You also want, I think, at the outset to try to develop a contact at the relevant agency as a focal point for those kinds of contacts down the road and also perhaps for cutting the red tape and cutting down the time for being able to get Freedom of Information Act requests responded to. I've had litigation end before I got a letter coming back saying: "We now have located the documents you asked for and do you still want them?" And I always find that amusing. So I think it's important to have that kind of open channel and line of communication with the agency that is going to be responsible for issuing a report or that is going to be monitoring the situation as you go forward down the road.

The issue of whether or not the regulatory standards are requirements or a necessity—the code word for that in my lexicon has always been "whether they are a floor or a ceiling." That's true in preemption, it's true in duty-to-warn kinds of contacts where there may not be preemption but the question is, if a defendant has warned or written a warning that has been approved by a regulatory agency, does that mean that there is now no negligence, or do you have the ability to argue that that merely creates a minimal standard, a floor and not a ceiling, and state tort law can, in fact, trump that. Those are all significant issues in virtually every one of the cases that we face.

Audience member: I was actually intrigued that one of the issues that I thought would come up today didn't. To borrow another biological term, this is the symbiosis between the plaintiff bar and NGOs, nongovernmental organizations. I'll just draw two examples, the project on scientific knowledge and public policy (SKAP), which is an organization run out of George Washington University School of Public Health and funded by part of the trust fund that has been established by the breast implant litigation. Part of its princi-

pal function is to throw intellectual armament against *Daubert*, but it also has a project, essentially, to try to thread it or undermine the legitimacy of scientific work conducted by industry, just to tilt the regulatory playing field. Another example of industry is the Environmental Working Group (EWG), which set all sorts of documents from tort litigation in West Virginia against Dupont, which they then gave to EPA and that led to an administrative enforcement action under TSCA [Toxic Substances Control Act][12] and may yet lead to further regulatory action.

Robert Sussman: Do any of the panelists have experience working with environmental groups and any thoughts on their role in the process?

Bruce Finzen: I have not really worked with environmental groups, but I could make an argument both pro and con as to why I would want to or would not want to work with them. I have, in fact, worked with other plaintiffs' groups, usually victims' groups that organize themselves and do get involved in the regulatory disputes. I will say, not infrequently, from a plaintiff's perspective they're not terribly helpful. They sometimes are out there really advocating for things that are not helpful in the litigation and are not particularly helpful for their own cases, either. And they can be disruptive, and I don't know that the agencies pay all that much attention to them.

I think the kind of more organized groups like EWG and that sort of thing have, perhaps, a lot more clout and may be a lot more effective and tend to, I think, operate much more on their own agenda and without regard to litigation that's ongoing. There certainly can be a working relationship between plaintiff's lawyers and those kinds of environmental organizations. I think we've probably clearly seen it with regard to PFOS [perfluorooctane sulfonate] and the EWG and so I think they may be potentially more effective than more loosely organized victims' groups. But again, from a plaintiffs' perspective, I would want to be very, very careful before getting too heavily involved with one of those organizations.

Audience member: I have a question about what the panelists' observations are and whether they see the Information Quality Act[13] and the pending risk assessment bulletin in tort litigation, in terms of examining how that would play into *Daubert* reviews of data and studies and so on? Largely, where they're talking about wanting to have more probabilistic risk assessment, more evaluation of the full range of statistically possible outcomes, central tendencies, that kind of thing?

Robert Sussman: I can take a stab at that. I think if you're a plaintiff's attorney, you want the agency to be as definitive as possible. So the best thing you can get from an agency is a risk assessment with a very clearcut and authoritative determination about a product or a chemical, for example, a determination that a chemical is a probable or known human carcinogen, or a determination that there is a significant risk of adverse effects if exposure exceeds a particular level. To the extent agency risk assessments get mushier or academic, less bottomline-focused, more involved in looking at a range of scenarios in a continuum of risk estimate, I think those assessments are going to be better for defendants and they're going to be harder for plaintiffs to exploit effectively.

Audience member: But I also think it's going to mean an increasing burden all the way around in terms of the completeness of these documents. And there are pros and cons to that too.

Robert Sussman: Well, that's right, to the extent that the agency risk assessment process gets more complicated, the agencies have to do more. The scientific burden on the agency staff is greater. We're going to be seeing agencies issue fewer risk assessments and work on fewer chemicals, which to some extent is occurring because of resource constraints, anyway.

Richard Faulk: Let me just add something to that. One of the things that has been going on in the International Agency for Research on Cancer (IARC) has been a very specific designation for many years. The way that really plays out in the courtroom, with respect to any agency declaration that something is or is not a carcinogen, is that by and large, most judges will let it in. And they'll let it in the process of an expert testifying as what he's researched and reviewed in the course of forming that particular expert's opinion about this stuff. It may or may not go back to the jury for the jury to see, but the jury necessarily hears just about every time. If [the] IARC has classified something as a probable human carcinogen, they're going to hear it and they're going to know about it. That's a very troubling point because there is no way to attack that, except to go underneath IARC's research techniques. Presuming on the patience of the jury as you go through a very complicated process of risk assessment dissection is a bit much. It's always better to get such questions over with and go on to your own experts who can then give their perspectives upon the proper authorities that they're relying upon.

Audience member: When they give the jury the IARC result, do they give them the context of what the full rating system is?

Richard Faulk: Not necessarily. Sometimes that's left simply to cross-examination. As a matter of fact, a good plaintiff's lawyer will leave that to cross-examination, hoping either that the defense lawyer won't pick it up, or that the defense lawyer with limited time won't have time to go into that. So, I would think that any declaration from any agency of any kind that reaches a more definitive statement will probably go, somehow, into the jury room.

I want to talk a little bit about what happens when an agency or a state decides to join in with the plaintiff's lawyer and pursue litigation against various defendants under a public nuisance theory. I think everyone is aware of what's going on in Rhode Island and various other places. There, the state passed its regulations and, for all practical purposes, said:

> Here are the standards we're going to apply, here are the standards we're going to evaluate, and here are our goals. By the way, rather than enforcing the regulations

12. 15 U.S.C. §§2601-2692, ELR STAT. TSCA §§2-412.

13. 44 U.S.C. §3516.

> against the property owners who own the properties that are contaminated with lead, rather than making sure that they go in and remediate the immediate problem you see that is causing lead poisoning in children, we're going to join with the private plaintiff's law firm and we're going to sue a select number of companies to establish a fund, somehow, that the defendants are then going to use, or that we're going to take, to pay for all this remediation process.

Essentially, in my view, that is an abdication of the regulatory process in favor of the litigation process—and that is a trend that is all too present out there now. I invite anybody else to comment on it.

When we're talking about regulation and litigation, it seems to me that many regulatory agencies are too happy to dump it all into the litigation system and perhaps go to Las Vegas and roll the dice as plaintiffs' lawyers often do. And I think that is a very significant problem. It's an emerging trend, it's one that has by no means run its course in the courts, and will not for decades, but it is a very troubling situation.

Audience member: I want to ask about that because the prime movers in the tobacco litigation were the states and the state attorneys general, which in a way is kind of a precedent for the Rhode Island public nuisance cases. Bruce, I would ask for your thoughts on the appropriateness of states, in effect, becoming plaintiffs in a quasi-tort-type litigation. Are there positive aspects of this? Are there potential abuses that can occur?

Bruce Finzen: Well, I would certainly agree that we're going to see a lot more of this and a lot of it is going to be in the environmental area, I think. It's hard for me to really compare that use or that new wave of state-sponsored litigation, if you will, to the tobacco litigation, because I think they're so dramatically different. They're really was no underlying regulatory authority on the part of the states that was at issue or could have been done in a different way in the tobacco litigation problem. You know, what has been described here for lead, and I suspect lots of other potential widespread contaminants, you know, methadone labs and the rest of that come to mind. But, I think it's an issue that really raises a question of what's underlying tort law at its heart, and that is, when you have injury or damages and you've got people who are arguably responsible for it. You know, who should bear the burden. I'm not familiar with the situation that was described in Maine, but if the choice is between the state and enforcing cleanup of private lands by forcing private owners to pay as opposed to perhaps, people more responsible for the deposit of the offending environmental material. Then as a plaintiff lawyer, it's easier for me to come down on the side of saying the state is, in fact, enforcing its regulatory power by going after the person who is responsible for depositing the material as opposed to the landowners, who may not have the financial wherewithal to do that kind of cleanup.

Robert Sussman: Those are good comments. I guess the distinction I would draw is between cases that seek traditional tort-type remedies, which I think of as compensation for defined injuries to individuals in tort cases and cases which seek regulatory-type remedies. And I think that the MTBE cases fall into the latter category . . . . I guess they're looking for damages, but they're also looking for a range of equitable remedies which one could argue would have been achieved through the regulatory process, or should have been achieved through the regulatory process, but weren't. So, I was wondering, Carla, what your perspective is on the use of tort litigation to achieve broad public policy-type purposes?

Carla Burke: We do have some states that are clients, and there's a slight difference in what they're seeking, because states do own property, and states do own the waters of their states. So, they are like public water, public property owners, in a way. I mean, they do have their own interests they're seeking to protect.

One thing we have noticed in a case, we represented a city that had some horrible lead contamination that, what EPA was proposing to do was to remove a foot of soil from virtually an entire neighborhood. And after talking to experts and doctors and environmentalists—just a wide range of opinions that we gathered—everyone agreed that a foot was really not going to do it. They agreed that they needed to remove more than a foot of soil to really address the danger, although that was the standard for EPA for that type of climate and that type of wind pattern, and all of the factors. So, from a working with the agency perspective, our client, the city, was not going to get what it thought it needed. And it thought it needed total cleanup of the flood from this neighborhood. So from that perspective, tort law gave it the only means to get what it wanted. How that affects public policy in general is a much larger question than I wanted to answer. Although, we have to consider, I suppose, if the goals of regulation are to prevent public harm, what can be done on a private level when some private individual is harmed, because it falls through the cracks of regulation. Does that mean that person does not have recourse to the tort system? And if you're looking at an individual plaintiff, the tort system is almost always going to provide much better recovery and give that person all of its damages, all of its relief, provided you get through all the hurdles.

Richard Sussman: It's interesting to compare the European experience in MTBE, for example, to the experience of the United States. In Europe, there's been a significantly vigorous enforcement of underground storage tank standards, of standards to control spills, reporting, various other things, to the point where, for example, Germany has decided that there is no risk associated with MTBE or regulation within its borders. And yet here we are in the United States, having a fairly exhaustive system of regulations, and a different tradition of litigation, where these two have, somehow, worked together to create what is I would say is no longer a purported mass tort crisis, but nonetheless something that is consuming a tremendous amount of resources. I think the different traditions between the locally regulated countries such as Germany and the common-law countries such as the United States, as was previously mentioned, are a major factor in deciding what is real sometimes, and what is not real sometimes. And in many situations, perception is reality, what jurors believe is what reality is to everyone who is before them. And I don't want to sound cynical about that but that is undeniably true to anyone who tries jury cases.

Clifton McFarland: One more comment on the situation of the state of Rhode Island becoming involved as the plaintiff in lead contamination. Now I agree with what Bruce said, that we've got a different situation from the tobacco setting, in that in the tobacco setting there really was a lack of any underlying regulation that could be relied upon, whereas in the lead universe we're in a different situation. I think part of what we're seeing is a further reaction by governmental entities to the difficulty and the cost of promulgating regulations in the current environment. It's become increasingly difficult given the way the barricades are manned on all sides in a notice-and-comment rulemaking proceeding. To get regulations promulgated in a timely and cost-effective manner there's been a trend for some time now toward less and less notice-and-comment rulemaking and to agencies trying to address public policy in even less formal ways than what we used to call in law school, informal notice-and-comment rulemaking. And I think what we're seeing is a reaction—an unfortunate one—but a reaction toward the extreme cost and extreme time it takes to get regulations problems promulgated.

Audience member: Something struck me that she said about bringing a case against the compliant defendant in an MTBE case. Here you have somebody who's met their regulatory standard and they're being sued. I'm just curious what the cause of action was and presume it wasn't negligence per se, because they were compliant. And then just generally, how difficult is it to successfully bring a case against someone who thinks they are compliant? Someone who's met the MCL for MTBE for example?

Carla Burke: Oh, well, I mentioned that in two ways. I mentioned one in terms of our client, our plaintiff, who may be a public water provider whose contamination has not exceeded an MCL. Often defendants argue that because that plaintiff's water supply is not contaminated above what the state thinks is the maximum, that client is not injured or lacks standing to sue. That's one way I use that term.

As far as a defendant being compliant, you mean a polluter?

Audience member: That's right. Someone who may have gasoline on site but they've met all their regulations, there's no leak, there's certainly no constituents above the MCL. And then, my question really was about the effectiveness or the difficulty in bringing a lawsuit against someone for injury to a water supply against someone who's compliant, who has met MCL limits and so forth?

Carla Burke: I think you raise two points. One is whether we would sue the operator of a service station who has no leaks on his property. So far we have not, although there is a very complicated factual situation around any service station. A leak is not a catastrophic event that anyone would ever notice. Underground storage tanks have leak detection systems that have certain allowances—I think EPA's is .05 gallons per hour or .01 gallons per hour. And what that means is that gasoline can leak at that rate without being detected. It doesn't set off an alarm. So, to some extent, there are tanks that may be releasing these very, very small quantities of gasoline hour by hour, week by week. So it's difficult to say that a tank is not leaking because quite often, nobody would know if it's leaking unless it leaks hundreds of gallons of gasoline. There are also inventory reconciliation records that you can look at and sometimes see a couple of gallons here or there, but it's very difficult to know, even as a station operator, whether your tank is releasing gasoline. It may be releasing small amounts. Now with MTBE, unfortunately, even a small amount can be very dangerous to the environment. I forget how many tablespoons of MTBE is in a gallon of gas, but the point is, if you release a tablespoon of MTBE out into groundwater, you're going to have a contamination problem. So, even someone who is complying with regulations may be releasing gasoline. But, as a practical matter, we haven't sued any of those people.

In a couple of cases, we do have station owners named as defendants who we have leak reports from or who were associated with particular events. One of the strange things about MTBE is, it is often released in sort of innocuous ways. If you overfill your car when you fuel and a few drops of gasoline falls onto the concrete, those drops of gasoline penetrate through the concrete and into the soil and into the groundwater. If you have ever operated a personal watercraft on a lake, you have contributed quite a bit of MTBE to the surface water. And that's why I began earlier, with sort of a difference of opinion with Richard, it's not all about underground storage tanks. Certainly, a lot of it is and a lot of it is not. A lot of it does come from sort of foreseeable use in the handling of the product. Does that help in any way?

With the water standard, you know, the standard—and please, there's a great map on the EPA website that, even if I had it here, you couldn't see it, but there's a great map that shows all of the state standards and action levels and all these kinds of regulations that apply to MTBE and PBA [polybutene amine] in the water across the United States. You can see, for example, the MCL in New York just became 10. The MCL in California is five. The MCL in Texas, my home state, is of course 240.

[Laughter]

Carla Burke: Yeah, usually somebody from Exxon is here when I do this. And I say, you know Exxon is based in Dallas, maybe that's why . . . but where it can be detected, of course, varies. There are varying studies on what the taste and odor of detection thresholds of MTBE in drinking water are. Lyondell Chemical came forward years ago and said, warned in fact, that it could be detected at levels at or below one part per billion. One part per billion is very, very low. So, again, if I have 240 parts per billion in my home tap water of MTBE, and Lyondell is telling me I can probably taste around one—I haven't had MTBE in my home, thank goodness, but I would suspect that I would taste it long before the 240. And that's what we hear from clients . . . from plaintiffs, especially from private well owners who have had pretty significant hits, because they do taste it at low levels, and they smell it or you know, they shower with it, or they don't want to wash their clothes with it.