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Mary Van Nimwegen

HOUSE LABOR & COMMERCE

November 30, 1989

9:30 AM

AB284

POSITION PAPER  
A.G.C. OF ALASKA  
PRESENTED TO THE  
HOUSE LABOR AND COMMERCE COMMITTEE  
ON  
HB 286

AN ACT RELATING TO PENALTIES FOR VIOLATIONS OF WORK PLACE  
SAFETY LAWS.



THANK YOU MR. CHAIRMAN. FOR THE RECORD, MY NAME IS RESA JERREL AND I AM THE DIRECTOR OF GOVERNMENTAL RELATIONS FOR THE ASSOCIATED GENERAL CONTRACTORS OF ALASKA (A.G.C.). ON BEHALF OF OUR OVER 600 MEMBER FIRMS WE APPRECIATE THE OPPORTUNITY TO TESTIFY ON HB 286 - PENALTIES FOR VIOLATIONS OF WORK PLACE SAFETY LAWS.

WHILE A.G.C. OF ALASKA IS A STRONG ADVOCATE FOR SAFETY IN THE WORK PLACE, WE DO HAVE SOME SERIOUS CONCERNS REGARDING THIS LEGISLATION. THERE IS NO EVIDENCE INDICATING THAT HIGHER OSHA FINES BRINGS ABOUT BETTER WORK PLACE SAFETY OR FEWER ON THE JOB INJURIES.

A.G.C. WOULD SUGGEST TWO WAYS TO IMPROVE WORK PLACE SAFETY: FINDING WAYS TO AVOID EMPLOYEE INADVERTENT OR CARELESS ACCIDENTS AND ASSIGNING THE PENALTY FOR A VIOLATION TO THE RESPONSIBLE PARTY.

FIRS A 1986 NATIONAL SURVEY OF EMPLOYEE ATTITUDES BY SIROTA AND ALPER ASSOCIATED, INC. OF NEW YORK FOUND THAT:

"ONE IN FIVE EMPLOYEES SAY WORKPLACE DRUG USE SERIOUSLY AFFECTS THEIR ORGANIZATIONS ABILITY TO GET THE JOB DONE . . . MORE THAN TWO-THIRDS OF THOSE SURVEYED SUPPORT DRUG TESTING FOR NEW JOB APPLICANTS AND FOR SUSPECTED USERS."

IN RESPONSE TO THE INCREASED CONCERN REGARDING THE ISSUES OF POTENTIAL SAFETY HAZARDS, INCREASING ABSENTEEISM, LOWER PRODUCTIVITY, RISING HEALTH CARE COSTS AND DECLINING EMPLOYEE MORALE THE FEDERAL GOVERNMENT AND STATES HAVE PASSED LEGISLATION TO MINIMIZE THE NEGATIVE EFFECTS OF DRUG AND ALCOHOL ABUSE IN THE WORK PLACE. THE STATUTES VARY BUT SOME OF THE PROVISIONS REQUIRE WRITTEN ALCOHOL AND DRUG TESTING POLICY, NOTIFICATION OF COMPANY'S DRUG POLICY, JOB APPLICANT

TESTING, RANDOM TESTING, REASONABLE SUSPICION TESTING,  
DISCIPLINE AND DRUG AWARENESS PROGRAMS.

SECONDLY: IN BRITISH COLUMBIA THE PERSON THAT CAUSES A  
VIOLATION IS ASSIGNED THE PENALTY. THE EMPLOYER, SUPERVISOR,  
WORKER OR PERSON THAT IS NEITHER AN EMPLOYER NOR A WORKER IS  
LIABLE FOR THE PENALTY. A COPY OF THE BRITISH COLUMBIA  
STATUTE HAS BEEN GIVEN TO STAFF FOR YOUR REVIEW.

IN CONCLUSION, MR. CHAIRMAN, A.G.C. OF ALASKA WOULD URGE  
THIS COMMITTEE TO TAKE INTO ACCOUNT THAT THERE ARE NUMEROUS  
VARIABLES ON A CONSTRUCTION JOB SITE AND CONSIDER SOME OF THE  
ALTERNATIVES WE SUGGESTED IN INSTEAD OF RAISING THE PENALTIES  
IMPOSED UPON THE EMPLOYER.

## INDUSTRIAL HEALTH & SAFETY REGULATIONS

(3) No appeal in itself shall operate as a stay in respect of any order or directive or penalty assessment.

### INSPECTION REPORTS

#### Posting of inspection reports

2.14. (1) Where an inspection report is given or sent to an employer for posting at a place of employment, it shall be posted forthwith by the employer at the place of employment covered by the report in a location conspicuous to workers engaged at that place.

#### Period of posting

(2) An inspection report shall remain posted for a minimum of 7 days.

#### Transient operations

(3) Where, as in transient operations, the posting of an inspection report is not feasible, the employer shall adopt other measures, appropriate to the circumstances, to bring the contents of the report to the attention of the affected workers.

#### Distribution of inspection reports

(4) Where an Industrial Health & Safety Committee is required at the place of employment, the employer shall produce for the committee the inspection report or a copy thereof at or before the next meeting of the Committee.

### CONTRAVENTION OF REGULATIONS

#### Contravention by persons subject to regulations

2.16 (1) Contravention of a regulation shall be deemed to be a contravention by the employer and shall make that employer liable for the penalty prescribed by the Workers' Compensation Act, but nothing in this clause shall relieve the supervisor or worker.

(2) Contravention of a regulation by a supervisor or a worker shall be deemed to be a contravention by the supervisor and shall make that supervisor liable for the penalty prescribed, but nothing in this clause shall relieve the worker.

(3) Contravention of a regulation by a worker shall make that worker liable for the penalty prescribed.

(4) Contravention of a regulation by a person working in or contributing to the production of an industry within the scope of Part I of the Workers' Compensation Act, being neither an employer nor a worker, shall make that person liable for the penalty prescribed.

## INDUSTRIAL HEALTH & SAFETY

### "NOTICE TO WORKERS"

Posting of "Notice to Workers" placards  
2.18. Every employer shall cause conspicuous placards at each place of employment and or notice issued by the Board in the words "Notice to Workers".

### PUBLISHED REGULATIONS

#### Availability to employees

2.20. Every employer shall keep published regulations readily available at each place of employment by all employees.

*Workers  
Compensation  
Board of British  
Columbia  
Industrial Health &  
Safety Regulations*

**ONE IN FIVE WORKERS SAY DRUGS  
ARE SERIOUS WORKPLACE PROBLEM**

One in five employees say workplace drug use seriously affects their organizations' ability to get the job done, according to the 1986 National Survey of Employee Attitudes by Sirota and Alper Associates Inc. of New York.

David Sirota, chairman, said his firm's survey also shows that more than two-thirds of those surveyed support drug testing for new job applicants and for suspected users. The only form of testing the majority opposes is random testing, and only by a slim margin.

"The data show that employees for the most part share the concern of management to rid the workplace of drugs," he said.

The annual telephone survey measures employee attitudes toward 25 key dimensions of work life satisfaction which relate to performance and a variety of issues of current interest. It is conducted primarily for subscribers to compare their own employees' attitudes against the norm.

*(For more information, write Sirota and Alper Associates, Inc., 1641 Third Ave., New York, NY 10128.)*

# Alaska State Legislature

Legislative Research Agency



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December 15, 1989

## MEMORANDUM

TO: Representative Dave Donley

FROM: Patricia Young *PM*  
Legislative Analyst

RE: Criminal Prosecution of Employers for Workplace Safety Violations  
Research Request 90.085

You asked this agency for information on criminal prosecution of executives of California companies in which safety violations have occurred. You also wished to know why companies in Scandinavian countries consistently have fewer workplace deaths and serious injuries than their American counterparts. Lastly, you requested copies of model workplace safety programs recognized by any states or by the federal government which could be adapted for use by Alaska companies.

### Background Information

The Occupational Safety and Health Act (OSH Act, 29 U.S.C. 651-668), passed by Congress in 1970, was thought to be a landmark measure which would ensure safe working conditions throughout the United States.<sup>1</sup> To this end, the Occupational Safety and Health Administration (OSHA) was given broad authority and responsibility to establish appropriate standards and to enforce them through civil and criminal penalties.<sup>2</sup>

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<sup>1</sup>Although the OSH Act covers most workplace situations, mining operations, nuclear plants, and railroads are covered by other regulatory measures.

<sup>2</sup>States have the option of being governed by federal OSHA regulations or developing their own. State plans must be as or more effective and must provide workers with at least the same rights and protections as does the federal program.

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According to John Hynan, OSHA counsel of general legal advice, criminal penalties were originally thought to be less effective than civil penalties (i.e., fines) in abating workplace hazards. Therefore, fines have generally been levied for violations. OSHA has authority to seek criminal prosecutions only in cases of willful violation of a standard resulting in a death, falsification of records, or giving advance notice of an OSHA inspection. Criminal penalties are not available to OSHA in cases of injuries or illnesses which do not result in fatalities.

In general, OSHA may assess maximum civil and criminal fines of no more than \$10,000 and maximum jail sentences of no more than six months. Penalties are doubled for second convictions. Since passage of the Comprehensive Crime Control Act of 1984 (18 U.S.C 3571), under limited circumstances the maximum fine for a misdemeanor resulting in a fatality may be increased to \$250,000 for an individual defendant and \$500,000 for an organization which is a defendant. However, union representatives, among others, contend that the penalties are inadequate to deter violations. They point out that, unlike jail time, fines are easily passed on as business expenses, and they note that other regulatory acts provide for substantial fines as well as substantial terms of imprisonment for knowingly putting a person in imminent danger of death. For example, in such cases, the Resource Conservation and Recovery Act, which deals with hazardous waste, provides for up to \$250,000 in fines or 15 years' imprisonment<sup>3</sup>

Statistics of job-related fatalities and illnesses tend to support union arguments. A recent special report, *Occupational Safety and Health: 7 Critical Issues for the 1990s*, published by the Bureau of National Affairs (a leading publisher of information on government and public policy issues), quotes studies showing that between 7,000 and 20,000 people die each year in the U.S. in job-related accidents, and that job-related diseases may account for as many as 50,000 to 70,000 deaths annually.<sup>4</sup> However, from 1970 through February of 1988, only 42 cases had been referred by OSHA to the Department of Justice for possible criminal action. Of those, 14 were prosecuted, resulting in ten convictions. Until this year, no one had ever been incarcerated for a criminal violation of the OSH Act. According to Mr. Hynan, this year, one person went to jail.

Believing that current OSHA regulations do not adequately protect workers, state and local prosecutors in many parts of the country are resorting to their

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<sup>3</sup>House Committee on Government Operations, *Getting Away With Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations*, 100th Congress, 2d session, 1988, House Report 100-1051, (Attachment A).

<sup>4</sup>*Occupational Safety and Health: 7 Critical Issues for the 1990s* (Washington D.C.: BNA, 1989), p. 2. Copies of this report are available for inspection in this agency's library and in the Legislative Library.

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own police powers to criminally prosecute employers for serious OSHA violations and for willful conduct resulting in death or serious injury. The Los Angeles County District Attorney's Office, for example, has a unit which focuses specifically on criminal prosecutions for occupational violations. Several states, including Illinois, Michigan, New York, North Carolina, Texas and Wisconsin, have filed criminal suits in particularly egregious cases.

A critical question in these cases has been whether federal workplace safety laws preempt states and local jurisdictions from using states' historic police powers to prosecute employers for acts which are crimes under state laws. According to Jan Chatten-Brown, assistant district attorney in Los Angeles, although state convictions have been challenged on issues of preemption, supreme court rulings in Illinois, Michigan Texas, and Wisconsin have upheld states' rights to prosecute employers with criminal laws of general application, such as those against murder, manslaughter, and assault. The Illinois Supreme Court ruling in *State of Illinois v. Chicago Magnet Wire Corporation* was appealed to the U.S. Supreme Court, which denied a hearing of the case and, thus, upheld the lower court's decision that the state is not preempted from prosecuting. In addition, it is the opinion of the U.S. Department of Justice that

. . . nothing in the OSH Act or its legislative history . . . indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State criminal laws of general applicability.<sup>5</sup>

Although OSHA has taken no stand on whether state and local actions are appropriate, such actions appear to be an increasingly accepted trend. Attachment B includes a list of prosecution contacts in 17 states--Appendix D of the BNA report--as well as various articles related to this issue.

#### Workplace Safety in Scandinavian Countries

The Occupational Safety and Health Law Center, a public interest firm, monitors workplace legislation in the U.S. and abroad. According to J. Davitt McAteer, executive director, Scandinavian countries--which have labor governments of long standing--are highly unionized. As a whole, these governments have taken workplace health and safety very seriously and have adopted preventive approaches to industrial accidents and illnesses. Many

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<sup>5</sup>Letter from Thomas M. Boyd, U.S. assistant attorney general, Office of Legislative and Intergovernmental Affairs, to Tom Lantos, Chairman, Subcommittee on Employment and Housing, U.S. House Committee on Government Operations, published in *Occupational Safety and Health: 7 Critical Issues for the 1990s*, BNA, appendix B.

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potential problems have been systematically eliminated through careful workplace design. For example, the Volvo company is noted for its person-oriented assembly process. Machinery, equipment, and work environments are designed to fit and complement workers. By comparison, in the U.S., workers generally accommodate and adjust to machinery.

#### Model Workplace Safety Programs

None of the sources contacted for this memorandum were aware of any recognized model programs which include both penalties for violations and specific incentives for compliance with workplace standards. However, according to Bruce Hillenbrand, OSHA director of Federal and State Operations, OSHA's Voluntary Protection Programs (VPPs)--in effect since 1982--have been relatively successful in raising corporate concern for safety and health standards closer to the level of concern for quality control and production. Inclusion in these programs depends, among other things, on a company's safety record within the previous three years. Random OSHA inspections are eliminated under these programs because joint labor and management committees help to create self-policing situations. Detailed information on OSHA's VPPs will be forwarded to you upon its arrival.

According to Mr. McAteer, California's scheme is widely recognized as being one of the more well-developed, having gone substantially beyond the federal standards. Ms. Chatten-Brown is forwarding copies of California's enabling legislation, articles from a number of law journals, and a District Attorney white paper report on OSHA standards which includes recommendations for both increased penalties and incentives. This information will also be forwarded to you upon its arrival.

I hope this information is useful to you. Please call if you have any questions or need further information.

Attachments

Attachment A

U.S. House Committee on Government Operations,  
*Getting Away With Murder in the Workplace:*  
*OSHA's Nonuse of Criminal Penalties for Safety Violations,*  
100th Congress, 2d session, 1988, House Report 100-1051

**Union Calendar No. 619**

100th Congress, 2d Session - - - - - House Report 100-1651

**GETTING AWAY WITH MURDER IN THE  
WORKPLACE: OSHA'S NONUSE OF CRIMINAL  
PENALTIES FOR SAFETY VIOLATIONS**

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**SIXTY-SIXTH REPORT**

**BY THE  
COMMITTEE ON GOVERNMENT  
OPERATIONS**



OCTOBER 4, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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(11)

## LETTER OF TRANSMITTAL

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HOUSE OF REPRESENTATIVES,  
Washington, DC, October 4, 1988.

Hon. JIM WRIGHT,  
*Speaker of the House of Representatives,*  
*Washington, DC.*

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's sixty-sixth report to the 100th Congress. The committee's report is based on a study made by its Employment and Housing Subcommittee.

JACK BROOKS, *Chairman.*

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## Union Calendar No. 619

100TH CONGRESS  
2d Session

HOUSE OF REPRESENTATIVES

REPORT  
100-1051GETTING AWAY WITH MURDER IN THE WORKPLACE:  
OSHA'S NONUSE OF CRIMINAL PENALTIES FOR SAFETY  
VIOLATIONS

OCTOBER 4, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations,  
submitted the following

## SIXTY-SIXTH REPORT

BASED ON A STUDY BY THE EMPLOYMENT AND HOUSING SUBCOMMITTEE

On September 27, 1988, the Committee on Government Operations approved and adopted a report entitled "Getting Away With Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations." The chairman was directed to transmit a copy to the Speaker of the House.

## I: INTRODUCTION

At a March 19, 1987, hearing on the Occupational Safety and Health Administration's (OSHA) policy of exempting companies from inspections based on injury records, the Employment and Housing Subcommittee heard testimony about the tragedy of Stefan Golab, a 61-year-old immigrant worker who in 1983 died from inhaling cyanide fumes while working at the Film Recovery Systems plant in suburban Chicago.

Two months prior to Mr. Golab's death, an OSHA inspector visited the Film Recovery plant where the company was engaged in the business of reclaiming silver from used x-ray film, reviewed the company's injury records in the plant's front office, determined that the company's injury rate was below the national average, and left. Had the OSHA inspector come in and observed the conditions on the plant floor, he would have seen 70 boiling vats full of used film from which lethal cyanide vapors were being released, the floor covered with cyanide-contaminated solutions, warning

(1)

labels on cyanide containers painted over, and immigrant workers, many unable to speak English, unaware of the unsafe conditions. Had the OSHA inspector conducted a wall-to-wall inspection of the plant, the deadly cyanide exposure would easily have been detected.<sup>1</sup>

However, the story does not end there. Upon investigating Mr. Golab's death, OSHA inspected the plant and discovered numerous health and safety violations. OSHA issued a citation and fined the company \$4,855, which was subsequently bargained down to less than \$2,400.

By comparison, the Cook County State's attorney charged the company and its officials with criminal conduct. Company officials were convicted of murder and 14 counts of reckless conduct and were sentenced to 25 years in prison. The company was convicted of manslaughter and reckless conduct and fined \$24,000.

During the May 1986 Senate confirmation hearings on John Pendergrass to be Assistant Secretary of Labor for OSHA, Senator Paul Simon referred to a worker's death at the Film Recovery Systems plant and stated that in a precedent-shattering case the four owners of that plant had been found guilty of murder. Mr. Pendergrass commented:

You bring up a case that brings forth a passion, I think, in many people, it certainly does in me. . . . It was an inexcusable set of circumstances that would allow people to be exposed to things that would damage their health, such as happened there. As a personal opinion, I think the owners and managers got what they deserved.<sup>2</sup>

The criminal convictions of Film Recovery officers are now under appeal in the Illinois courts on the issue of whether State criminal prosecutions for workplace safety violations are preempted by Federal OSHA law.

The *Film Recovery* case, and others like it, prompted the Employment and Housing Subcommittee to hold a hearing on February 4, 1988, to examine OSHA's apparent nonuse of criminal sanctions for workplace safety violations and efforts by State and local prosecutors to fill the vacuum by utilizing historic police powers and enforcing State criminal laws against employers who knowingly and recklessly expose workers to toxic substances and dangerous working conditions, causing them serious injury or death.

## II. BACKGROUND

The Federal Government has been involved in worksite safety since the first Congress. In 1790, Congress passed legislation which allowed merchant seamen to refuse to serve on unsafe ships.

<sup>1</sup> In response in part to this committee's report, "Here's the Beef: Underreporting of Injuries, OSHA's Policy of Exempting Companies From Programmed Inspections Based on Injury Records, and Unsafe Conditions in the Meatpacking Industry," H. Rept. 100-542, Mar. 30, 1988, Forty-second report by the Committee on Government Operations, OSHA has changed its inspection policy. OSHA investigators are now required to inspect "high hazard" areas of the workplace even though an examination of the employer's injury and illness records shows a below average rate.

<sup>2</sup> Hearing on Nomination of John A. Pendergrass to be Assistant Secretary of Labor for Occupational Safety and Health before the Senate Committee on Labor and Human Resources, 99th Cong., 2d sess., S. Hrg. 99-864 at 27-28 (1986).

Through the decades, Federal laws evolved to address workplace safety issues, often targeting particular groups such as child labor, occupations such as railway workers, and industries such as mining.

In 1970, Congress passed the Occupational Safety and Health Act (OSH Act, 29 U.S.C. 651-668) to bring Federal interests in worksite safety standards and their enforcement within one new agency at the Department of Labor. The Occupational Safety and Health Administration [OSHA] was charged with assuring, ". . . so far as possible, every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." [OSH Act, Sec. 2(b).] To accomplish this goal, OSHA was given broad authority and responsibility to establish health and safety standards, and to enforce them through civil and criminal penalties.

Since the establishment of OSHA, more than 100,000 workers have lost their lives because of unsafe working conditions. It is estimated that annually 7,000-11,000 workers are killed on the job<sup>3</sup> and thousands more die from the long-term effects of occupational illnesses.

OSHA is charged with inspecting worksites and identifying unsafe practices and equipment to ensure that they meet industry-specific and general health and safety standards. OSHA has the authority to issue citations for violations and assess penalties. In addition, the Secretary of Labor is authorized to seek an injunction in U.S. district court when a condition of immediate danger is clear to OSHA inspectors.

OSHA may assess civil penalties of \$1,000 for a serious violation (defined as one where there is a substantial probability that death or serious physical harm could result and the employer knew or should have known of the hazard) and up to \$10,000 for a willful violation (defined as one where an employer knew that a hazardous condition or violation existed and made no reasonable effort to correct it).

OSHA has authority to seek criminal prosecution for workplace violations in three situations:

- (1) a willful violation of a specific OSHA standard that results in death to an employee (maximum penalty is a \$10,000 fine plus 6 months imprisonment); [OSH Act, Sec. 17(e).<sup>4</sup>
- (2) giving advance notice of an OSHA inspection (maximum penalty is a \$1,000 fine plus 6 months imprisonment); [OSH Act, Sec. 17(f)].
- (3) knowingly making a false statement or supplying false documents to OSHA (maximum penalty is a \$10,000 fine plus 6 months imprisonment). [OSH Act, Sec. 17(g).]

Cases are referred by OSHA to the Department of Justice for possible criminal action. The criminal prosecution of cases requires the recommendation of the Justice Department and the agreement

<sup>3</sup> Preventing Illness and Injury in the Workplace, Office of Technology Assessment, Washington, D.C. (1985); Report of the National Safety Workplace Institute, Chicago, Illinois (1987).

<sup>4</sup> For a second conviction the maximum fine and term of imprisonment are doubled.

of the local U.S. attorney's office who is responsible for prosecuting the case.

Since the establishment of OSHA some 18 years ago, only 42 cases have been referred by OSHA for criminal prosecution.<sup>5</sup> Only 14 of those cases were prosecuted, resulting in 10 convictions, with fines or suspended sentences. Tr. 75, 83-88.<sup>6</sup> In the 18-year history of OSHA, no one has ever spent one day in jail for a criminal violation of the OSH Act.

During the 1980's, State and local law enforcement officials have with increasing frequency used the historic police powers of the State to prosecute company officials for knowingly and recklessly exposing employees to toxic substances, causing death and serious injuries. This stems from the State's interest in controlling conduct which endangers the lives of its citizens, whether it be recklessly operating an automobile or an automobile plant. In some cases where State and local prosecutors have obtained convictions against company officials and managers for acts against their employees that constitute crimes under State law, the convictions have been overturned on the ground that Federal worksite health and safety laws preempt a State from pursuing criminal actions.

### III. FINDINGS AND CONCLUSIONS

1. OSHA's record with respect to seeking criminal penalties for workplace safety violations and fatalities is dismal. Since its creation by Congress in 1970, OSHA has referred only 42 cases to the Justice Department for possible criminal action. Only 14 of those cases were prosecuted, resulting in 10 convictions, but no jail sentences. No one has ever spent a day in jail for violating the OSH Act. OSHA's record of criminal referrals is even bleaker when compared to the growing number of State and local prosecutions for workplace related fatalities and serious injuries. For example, since 1973 the State of California has prosecuted over 250 cases involving workplace related deaths, injuries, and illnesses, and in the past 8 years there have been 112 successful prosecutions.

2. The criminal penalty provisions of the OSH Act, as presently written and as enforced by OSHA, provides no deterrent to employers violating the statute. A company official who willfully and recklessly violates Federal OSHA laws stands a greater chance of winning a State lottery than being criminally charged by the Federal Government for workplace safety violations. The current system, which relies primarily on citations, abatement, fines, and education and training, is insufficient to ensure that every workplace is safe and healthful. The weak criminal sanctions in the Federal OSH Act are outdated and need to be strengthened and utilized more by OSHA to be a deterrent. In most areas of the law, the prospect of criminal prosecution and imprisonment has a substantial deterrent effect whereas civil fines can often be passed on as part of the cost of doing business.

3. While much of the failure by the Federal Government to seek criminal sanctions for violating Federal OSH laws stems from re-

<sup>5</sup> These figures are as of February 1, 1988.

<sup>6</sup> Tr. refers to the printed record of the February 4, 1988, subcommittee hearing on "Criminal Penalties for OSHA Violations."

luctance by OSHA to proceed, part of the blame rests with the Justice Department. The Justice Department has been slow to act on cases referred by OSHA. Some cases have been pending at the Justice Department, without a response, since 1985. With a few exceptions the Justice Department and the U.S. Attorney's Office have consistently declined to prosecute these types of cases. Since 1981, of the 17 cases referred by OSHA for criminal action, there has been one guilty plea, one indictment, and in two cases action is pending by the U.S. Attorney. In seven cases prosecution was declined by either the Justice Department or the U.S. Attorney. In the remaining six cases there has been no response from the Justice Department or the U.S. Attorney.

4. By "backing off" in the *Film Recovery* case because there was an ongoing criminal investigation by the State of Illinois, by inaction and silence, and by sending mixed signals, OSHA hasn't helped to resolve the issue of whether the Federal OSH Act preempts the traditional police power of the State to prosecute criminal acts that occur in the workplace. This confusion surrounding the preemption question has discouraged some State and local prosecutors from bringing criminal charges in egregious cases, and may have had the effect of shielding employers from responsibility for criminal conduct.

#### IV. RECOMMENDATIONS

1. OSHA should take an official position on the preemption question and should issue a policy statement. That position should be that the Federal OSH Act, as written, does not preempt the use of historic police powers by the States to prosecute employers for acts against their employees that constitute crimes under State law.

2. There is a need for a real partnership between the Federal Government and the States in pursuing criminal action in workplace safety cases, similar to the partnership that exists in prosecuting drug dealers. This partnership should be premised on cooperation, sharing information and coordinating investigations of workplace accidents and fatalities.

3. Congress should increase the criminal penalties provided by the OSH Act and expand the application of criminal sanctions to include violations which result in serious injuries. Criminal penalties do not now apply to willful safety violations unless there is a resulting fatality. Thus, an employer who willfully and recklessly exposes workers to mercury poisoning, causing permanent brain damage and other serious injury, is not criminally liable under the OSH Act unless a worker dies. Permanent brain damage is not enough to trigger criminal penalties.

4. There is no real program in place at OSHA to handle criminal investigations. OSHA should establish a special criminal investigation unit in its regional offices. Modeled after programs set up in some State and local prosecutors' offices, this new OSHA unit should have necessary expertise in criminal investigations and be available to respond to workplace fatalities 24 hours a day. A prompt response to a workplace fatality or serious injury and a thorough investigation are key elements in building a successful criminal case.

## V. DISCUSSION

## A. PYMM THERMOMETER

The *Pymm Thermometer* case dramatically illustrates the inadequacies of the present Federal regulatory scheme for dealing with workplace safety violations.

In January 1981, a worker at the Pymm Thermometer plant in Brooklyn, NY, wrote to OSHA:

Mercury is being used, gas and ovens. Please, we don't know how to describe any more violations, but we are sure there are more. Please send an inspector down to see for himself. We only make the minimum wage, so at least we will know our health is okay.

In March 1981, OSHA inspected the Pymm plant and found serious violations. No protective gear was being used to reduce workers' exposure to mercury—no respirator masks, no aprons, and no gloves. Work surfaces were covered with mercury, and even the areas where workers ate their lunch were contaminated with mercury. OSHA issued a citation, assessed a fine of \$1,400, and set a deadline of October 1981 for the company to clean up the factory. However, over the next few years, OSHA regularly extended the compliance deadline.

In 1984, the New York City Department of Health was alerted by a local doctor to elevated levels of mercury in the body of a Pymm worker. The NYC Health Department went to the Pymm factory, inspected it, conducted tests, found violations of the health code and discovered elevated levels of mercury in the workers.

In October 1985, tipped off by a former Pymm worker, an OSHA inspector discovered a hidden cellar operation at the Pymm plant—a cellar virtually without ventilation, filled with broken thermometers, with pools of mercury on the floor, and noxious vapors in the air, which produced permanent brain damage in one employee, Vidal Rodriguez, and exposed many others to serious health risks.

In 1986, OSHA issued citations against Pymm for exposing workers to dangerous levels of mercury and assessed fines of over \$100,000. To date, the company has paid just \$22,410 in fines, contesting the remainder.

Two months later, the Kings County (Brooklyn) district attorney, in cooperation with the New York State attorney general, brought a criminal prosecution, charging Pymm Thermometer, its owners and officers, William and Edward Pymm, with criminal assault and reckless endangerment for knowingly and continually exposing workers to a toxic substance, mercury.

Kings County District Attorney Elizabeth Holtzman explained:

The theory of the Pymm prosecution was that assaulting a worker with a toxic substance, such as mercury, is as serious and criminal as assaulting a person with a knife or gun. (Tr. 11.)

New York State Attorney General Robert Abrams told the subcommittee:

I can assure you, however, that the injured workers in these cases are fully aware that they have been the victims of violent crimes. People sometimes recover from the most terrible of beatings. People never recover from mercury poisoning. (Tr. 18.)

In November 1987, after a 4-week trial, the jury in the New York criminal prosecution returned a guilty verdict, finding the company and two of its executives guilty of assault and reckless endangerment by exposing workers to mercury. Under New York law these crimes are punishable by up to 15 years in prison. However, the guilty verdict was subsequently overturned by the trial judge on the ground that State prosecution was preempted by the Federal OSH Act. That decision is under appeal in the New York courts.

#### B. THE NEED TO BEEF UP CRIMINAL PROVISIONS OF THE FEDERAL OSH ACT

The criminal provisions of the OSH Act are limited to a willful violation of a standard that results in a fatality, falsification of records, and giving advance notice of an OSHA inspection. Criminal sanctions are not applicable to cases of injuries or illnesses that do not result in a death. Thus, in the case of *Pymm Thermometer* where a worker suffered permanent brain damage from mercury, OSHA could not statutorily pursue criminal prosecution. It is simply unacceptable to have death as the trigger point. In comparison, under the Mine Safety and Health Act [MSHA], death is not required for there to be criminal action.

Even in workplace safety violation cases where there is a fatality, under the OSH Act the maximum penalty is only a \$10,000 fine and 6 months' imprisonment. This "slap on the wrist" penalty is so low that motivation is taken from the Justice Department to pursue criminal prosecution in workplace safety cases. By contrast, the Resource Conservation and Recovery Act [RCRA], which deals with hazardous waste provides for a penalty of up to \$250,000 or up to 15 years' imprisonment for knowingly putting a person in imminent danger of death.

While the primary emphasis of the OSH Act is on civil not criminal penalties, there is a need to beef up and strengthen the criminal provisions of the statute.

The threat or imposition of jail time can have a substantial deterrent effect not achieved through other mechanisms. Jan Chaten-Brown, a special assistant for occupational safety and health protection in the Los Angeles district attorney's office, testified:

Civil penalties can simply be passed on as part of the cost of doing business. For a corporate officer to face even a few days of jail time is generally of greater consequence than long prison sentences for most criminals. (Tr. 43.)

Cook County State's Attorney Richard Daley told the subcommittee:

The fines being levied against corporations have not been enough to deter serious neglect and abuse. Corporations such as Film Recovery have protected themselves from fines by filing for bankruptcy. . . . Instead, we need

to deter corporate officers, such as the *Film Recovery* executives, with criminal sanctions. Imprisonment is one penalty that cannot be passed on to others. (Tr. 87.)

The criminal provisions of the 18-year-old OSH statute are outdated and need to be strengthened so that the Federal Government can effectively and meaningfully prosecute cases of murder and serious injury that result from willful disregard for worker safety.

#### C. OSHA AND THE PREEMPTION QUESTION

While OSHA has failed to seek criminal penalties for workplace safety violations, State and local prosecutors in dozens of jurisdictions across the country have used the States' historic police powers to prosecute employers for willful conduct that has caused workers to be killed or injured on the job.

In the past 2 years the Los Angeles district attorney's office has prosecuted 18 such cases. Los Angeles Assistant District Attorney Jan Chatten-Brown describes one such prosecution:

Our first involuntary manslaughter prosecution was against the president of a small drilling company who sent a worker down a 33-foot hole—if you can envision this—that was only 16 to 18 inches in diameter.

The worker was lowered into the hole that was being drilled for an elevator shaft with his foot through a sling. He had no safety harness. The air was not tested. And the sides of the well were not encased.

When the worker went into seizures and the rescue personnel responded, they were told that they could not pump oxygen into the hole because the sides of the wall might collapse. Therefore, by the time they were able to remove the victim, he was dead. (Tr. 41.)

Many of the resulting State court convictions have been challenged or appealed on the ground that the Federal OSH Act preempts State prosecution for workplace injuries and fatalities. The preemption claim has been raised in State courts by defendant employers who seek to use the Federal OSHA law as a shield against criminal prosecution. While an enormous amount of time and money is being spent on appeals on the preemption issue, OSHA and the Department of Labor have not taken an official position on the preemption question.

By its inaction and silence in some cases, and mixed signals in others, OSHA is only adding to the confusion. This confusion and uncertainty have had the effect of thwarting criminal prosecutions in some jurisdictions.

In the *Film Recovery* case, OSHA investigators backed off and deferred to the State of Illinois. As Jerry Thorn, Deputy Solicitor of Labor for National Operations, explained to the subcommittee:

[The investigation that went on in *Film Recovery*, as I understand it, we were there—OSHA's inspectors were there either simultaneously with Mr. Daley's people, but when our OSHA inspectors found out that there was clear interest on the part of the State of Illinois and the county prosecutor's office with respect to the death, they some-

what backed off their investigation and simply let them, as I understand it, take over. (Tr. 89.)

By "backing off" in *Film Recovery* because the State of Illinois was involved in the case, OSHA tacitly acknowledged the State's right to act in terms of criminal prosecutions.

OSHA is not a disinterested bystander in this matter. OSHA should take an official position on the preemption question and should issue a policy statement. In addition, OSHA should not wait for a particular case to work its way up to the U.S. Supreme Court, but rather should file *amicus* briefs in various cases pending on appeal in State courts, including the *Chicago Magnet Wire Corp* case, which is pending before the Illinois Supreme Court.

OSHA should take the position that the States have clear authority under the Federal OSH Act, as it is written, to prosecute employers for acts against their employees which constitute crimes under State law.

Nothing in the OSH Act or its legislative history suggests that Congress intended to shield employers from criminal liability in the workplace or to preempt enforcement of State criminal laws of general application, such as murder, manslaughter, and assault.

Generally speaking, preemption is not read into a statute, and must be unmistakable. It would be most unusual for Congress to displace ordinary criminal laws. Further, the OSH Act is basically an antipreemption statute. Section 8(b)(4) provides:

Nothing in this act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, disease, or death of employees arising out of, or in the course of employment.

It would have been most illogical for Congress specifically to authorize a private right to employees to pursue claims under State tort law for injuries incurred in the course of employment while at the same time prohibiting States from using their police power and criminal laws to punish the intentional acts that caused these same injuries.

Section 18 of the OSH Act, however, provides that "[n]othing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6" and that "Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards . . . with respect to which a Federal standard has been promulgated . . . shall submit a State plan. . . ." In this provision forbidding States without an approved plan from setting or enforcing occupational safety and health standards, Congress' focus was on administrative regulation of standards and was not meant to apply to or to deprive employees of the longstanding protection provided by State criminal laws.

As Cook County State's Attorney Richard Daley stated:

We are not enforcing Government standards, as OSHA does. Rather, we are enforcing our criminal code to protect the people of Cook County from gross misconduct. I submit to you that there is no conflict of jurisdiction on the issue. On the contrary, the responsibilities and objectives of OSHA and local prosecutors can complement each other quite effectively. (Tr. 32)

Daley cited an example of how absurd and detrimental to public safety it would be if Congress had intended to preempt State criminal prosecutions of employers acts against their employees:

For example, if there was an explosion in a factory stemming from hazardous conditions and dozens of workers died, local prosecutors would be preempted from prosecution.

Yet if the explosion resulted in the deaths of residents in the surrounding area, or a passerby, or a delivery person, we would not be preempted from prosecution.

All these deaths would occur due to the same reckless or negligent conduct. But we could prosecute only for the deaths of those who were not employed by the factory. (Tr. 32.)

Further, the imbalance of criminal penalties would mean that in the above example, the employer, under State law, could face up to 25 years in prison for the death of a nonemployee, but under the OSH Act, could receive only 6 months in prison for a worker's death. We cannot imagine that Congress intended such a result.

The States have an interest in controlling conduct that endangers the lives of their citizens whether it be at home, at work, or on the road. State and local prosecutors should be commended and encouraged to continue their efforts to protect people in their workplaces by utilizing the historic police power of the State to prosecute workplace injuries and fatalities as criminal acts.

#### D. COOPERATION WITH THE STATES

OSHA's record with respect to cooperation with State and local prosecutors has been spotty. Cook County State's Attorney Richard Daley told the subcommittee:

Unfortunately, cooperation is not the current norm. OSHA has been reluctant, at best, to cooperate in our State prosecution of these cases. (Tr. 32.)

It is absurd that local OSHA offices do not routinely fully cooperate with local law enforcement officials who seek to prosecute crimes that occur at the workplace. There is a need for a real partnership between the Federal Government and State and local prosecutors in the area of worker safety, similar to the partnership that exists in prosecuting drug dealers and environmental polluters.

At the urging of subcommittee members, on June 15, 1988, OSHA belatedly issued a memorandum to its field offices concerning cooperation with State and local prosecutors in cases where employees have been killed or injured on the job. While the memoran-

dum encourages cooperation in State or local prosecutions "to the fullest extent appropriate" and is a step in the right direction, more coordination is needed to achieve a real partnership.

#### VI. SUMMARY

OSHA's record in referring cases for criminal action is dismal. Part of the problem is that OSHA "cannot" and part is it "will not." Deficiencies in the Federal OSH statute preclude OSHA from seeking criminal sanctions in cases such as *Pym Thermometer*, where there was no fatality. In cases such as *Film Recovery*, where there was a fatality, OSHA has regularly and consistently chosen not to seek criminal penalties. There is an institutional reluctance by OSHA, the Justice Department, and the U.S. Attorney's Office to pursue criminal prosecutions in workplace safety cases.

There is a need for OSHA to be more aggressive and timely in using available criminal sanctions. Unless the OSH statute is beefed up and vigorously enforced by OSHA to punish criminally those who show willful disregard for worker safety, some employers will continue "to get away with murder."

○

Attachment B

List of State Prosecution Contacts  
and  
various articles relating to state prosecution for  
OSHA violations

2910 strawberries

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## THIS SAFETY RULING COULD BE HAZARDOUS TO EMPLOYERS' HEALTH

Illinois' OSHA decision opens business up to more criminal charges

**M**ercury is certainly lethal enough. To Brooklyn District Attorney Elizabeth Holtzman, it looked like a deadly weapon. In 1987 her prosecutors convinced a New York jury that two Pymm Thermometer Co. executives were guilty of assault and reckless endangerment for exposing their workers to the poisonous metal. One employee suffered permanent brain damage. But the judge had a last-minute change of heart. He set aside the verdict, ruling that job safety could be regulated only by the federal Occupational Safety & Health Act.

Holtzman is hardly the only D. A. to be rebuffed on this issue. But as she pursues her appeal of the decision, she and other prosecutors who want to crack down on unsafe work conditions have some new ammunition. On Feb. 2 the Illinois Supreme Court ruled that OSHA does not bar states from prosecuting corporate officials for work-related injuries and deaths. The decision gives the state the go-ahead to prosecute five executives of Chicago Magnet Wire Co. While the Illinois decision doesn't apply outside that state, other state courts where appeals of such cases are pending could be influenced by the ruling and by a December Justice Dept. opinion that reached the same conclusion (table).

**FILLING A GAP.** The Illinois ruling buoyed prosecutors who have had little success in appeals of overturned convictions for workplace offenses. In Chicago, State's Attorney Richard M. Daley says he will use the decision to seek extradition from Utah of a defendant in a murder case the state has brought against Film Recovery Systems Inc. Utah had balked at extraditing company President Michael

MacKay until the state supreme court ruling clarified that Illinois had the right to prosecute him. Daley has already won convictions and 25-year prison sentences against three other FRS executives who exposed their employees to cyanide fumes, resulting in one death.

In Milwaukee, County District Attorney E. Michael McCann is weighing criminal charges against a contractor and others in the deaths of three workers who died in a methane explosion on Nov. 10. "My message to business," he warns, "is you better care about safety or be prepared to go to jail."

Business is worried. Employer groups contend that it's unfair for companies

that comply with OSHA regulations to be prosecuted for criminal conduct. They assert that the whole point of OSHA was to codify an explicit set of regulations to guide employers. "The issue here is whether we have a clear standard for employers to follow or whether we are going to be at the mercy of the whims and caprices of every county state attorney in the U.S.," says Thomas L. Reid, vice-president of the Illinois Manufacturers Assn. The IMA filed a brief in the Illinois case supporting Chicago Magnet, a unit of North American Philips Inc.

**MORE CLOUT.** Local prosecutors, for their part, claim they're filling a void. Since 1970 the Occupational Safety & Health Administration has referred 44 cases to Justice for criminal prosecution, and charges have been filed in only a few of them. Prosecutors complain that criminal penalties of up to six months in jail are so weak that Justice is reluctant to go to court. And OSHA rarely gets prosecutions because it can pursue criminal cases only when a worker has died. "I have to face families of victims and tell them I have a legal problem—that an OSHA fine of several hundred dollars may stand in the way of holding these people truly accountable," says Austin (Tex.) D. A. Kenneth Oden.

Local prosecutors dismiss OSHA's civil penalties as a toothless deterrent. They "are just passed on to the consumer as a cost of business," says Jan E. Chatten-Brown, a D. A. in Los Angeles County's occupational safety and health unit.

Congress may give OSHA more clout. Representative Tom Lantos (D-Calif.) plans to introduce legislation that would strengthen criminal penalties for worker safety violations. And at some point, the U. S. Supreme Court is likely to rule on the state-federal dispute. In the meantime, prosecutors say that managers should be able to figure out when they are committing potentially criminal acts in the workplace. "If mercury can put holes in someone's brain," says Holtzman, "that's not much different from a gun putting a hole in someone's brain."

*By Susan B. Garland in Washington*

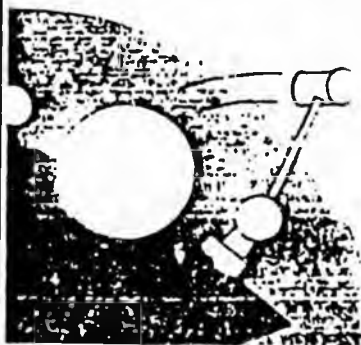
### COURTROOM CONFLICT OVER WORKER SAFETY

**CHICAGO MAGNET WIRE CO.** Elk Grove Village, Ill. On Feb. 2 the Illinois Supreme Court upheld Cook County's criminal prosecution of five senior executives for allegedly allowing workers to become ill from exposure to hazardous chemicals. A lower appeals court, ruling that OSHA preempted the state criminal code, supported a trial judge's dismissal of the case.



**FILM RECOVERY SYSTEMS INC.** Elk Grove Village, Ill. The Cook County state's attorney successfully prosecuted three senior officials of murder and reckless conduct charges in 1985 after a worker died from inhaling cyanide fumes. The officials have appealed, arguing in part that OSHA preempted state law.

**PYMM THERMOMETER** Brooklyn, N.Y. In 1987 the Kings County district attorney won convictions against the company's two owners on charges of assault and reckless endangerment by exposing workers to mercury. The trial judge overturned the verdict on the ground that OSHA preempted state prosecution. The decision is on appeal.



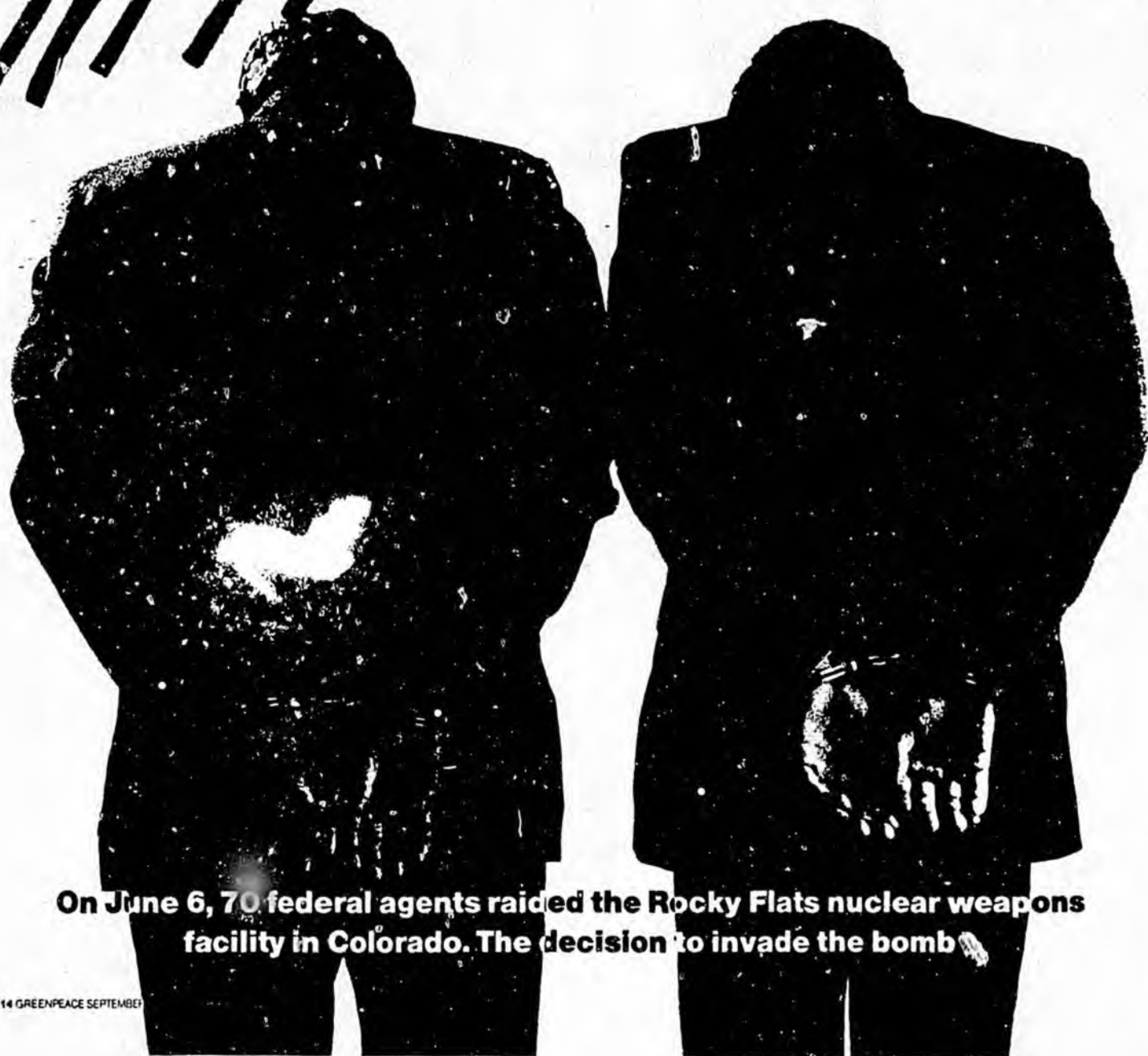
**SABINE CONSOLIDATED INC.** Austin, Tex. The state prosecutor won a conviction of criminally negligent homicide against the company president in connection with the death of two employees in a trench collapse. An appeals court said the state had no jurisdiction. The state has taken its case to the Texas Court of Criminal Appeals.

DATA INC.

# CRIME

*in the shadows*

BY RUSSELL MOKHIBER



**On June 6, 70 federal agents raided the Rocky Flats nuclear weapons facility in Colorado. The decision to invade the bomb**

plant came on the heels of a lengthy investigation described in FBI agent Jon S. Lipsky's 116-page affidavit, which convinced a federal judge to unleash the agents. In his report, Lipsky accused Rockwell International and the U.S. Department of Energy (DOE) of "knowingly and falsely" stating that the plutonium-processing plant complied with this country's environmental laws. In doing so, the contractor and its government client concealed "serious contamination" at the site. Lipsky charged that Rockwell and DOE secretly dumped hazardous waste into public drinking water and surreptitiously operated an incinerator they said had been shut down.

While scandal at nuclear weapons plants seems almost a regular news feature of late, the capacity demonstrated by the Justice Department in Colorado to deploy an environmental police force—replete with FBI agents, investigators, prosecutors, wiretaps and aerial surveillance—is in fact an unusual thing. The government rarely flexes its legal muscle to prosecute major environmental crimes or, for that matter, corporate crimes generally. For every Rocky Flats, there are dozens of corporate environmental crimes that go undetected, unprosecuted and unpunished.

"CRIME IS A SOCIOPOLITICAL ARTIFACT, NOT a natural phenomenon," writes legal scholar Herbert Packer in *The Limits of the Criminal Law*. "We can have as much or as little crime as we please, depending on what we choose to count as criminal." In this country, we have chosen to have very little corporate crime. Most corporate wrongs against humans and the environment are not considered criminal in the traditional sense—that is, activity that

is prohibited by the state and prosecuted to conviction. While corporations like Rockwell International can be criminally prosecuted for serious violations of environmental laws, they usually face less demanding and less visible civil procedures.

On the face of it, this leniency is grossly out of proportion to the effects of the corporate crime wave. Every year, roughly 28,000 deaths and 130,000 serious injuries are caused by dangerous products. At least 100,000 workers die from exposure to deadly chemicals and other safety hazards. Workplace carcinogens are estimated to cause between 23 and 38 percent of all cancer deaths. More than 45,000 Americans die in automobile crashes every year. Many of those deaths either are caused by defects or are easily preventable by a simple redesign.

The financial cost to society is staggering. The National Association of Attorneys General reports that fraud costs the nation's businesses and individuals upwards of \$100 billion each year. The Senate Judiciary Committee has estimated that faulty goods, monopolistic practices and other such violations annually cost consumers \$174 to \$231 billion. Added to this is the \$10 to \$20 billion a year the Justice Department says taxpayers lose when corporations violate federal regulations. As a rule of thumb, the Bureau of National Affairs estimates that the dollar cost of corporate crime in the United States is more than 10 times greater than the combined total from larcenies, robberies, burglaries and auto thefts committed by individuals.

The full extent of the corporate crime wave is hidden. Although the federal government tracks street crime month by month, city by city through the FBI's Uniform Crime Reports, it does not track corporate crime. So

the government can tell the public whether burglary is up or down in Los Angeles for any given month, but it cannot say the same about insider trading, midnight dumping, consumer defrauding or illegal polluting.

Still, we do know that corporate crime is pervasive. A 1979 Justice Department study, "Illegal Corporate Behavior," found that 582 corporations surveyed racked up a total of 1,554 law violations in just two years. A 1980 *Fortune* magazine survey revealed that 11 percent of 1,043 large companies had been convicted on criminal charges or consent decrees for five offenses: bribery, criminal fraud, illegal political contributions, tax evasion and criminal antitrust. A *U.S. News & World Report* study of the 500 largest corporations found that "115 have been convicted in the last decade of at least one major crime or have paid civil penalties for serious misbehavior" in excess of \$50,000. And in 1985, George Washington University Professor Amitai Etzioni found that roughly two-thirds of America's 500 largest companies were involved to some extent in illegal behavior over the preceding 10 years.

BY THE MID-1930s, EVIDENCE WAS MOUNTING that exposure to asbestos was a threat to human health. In 1982, the Manville Corporation (previously Johns Manville), the nation's largest manufacturer of asbestos, filed for bankruptcy to shelter its assets from 16,500 personal injury lawsuits. In the intervening 50 years, the corporation actively suppressed asbestos studies and hid information from its employees on the dangers of working with asbestos. They even cut workers off from their own health records. "As long as [the employee] is not disabled," rationalized the company's medical director in 1963, "it is felt that he should not be told of his condition so that he can live and work in peace, and the company can benefit from his many years of experience."

Over the next 30 years, 240,000 people—8,000 per year, almost one every hour on average—will die from asbestos-related cancer. The company will pay some \$2.5 billion to its victims, a hefty civil penalty. But no asbestos executive has ever been prosecuted for reckless homicide.

Likewise, it was not a "crime," in the traditional sense of the word, for Union Carbide's Bhopal, India, subsidiary to operate a pesticide manufacturing plant so incompetently that in 1984, clouds of deadly methyl isocyanate gas escaped, killing 2,000 to 5,000 persons and injuring 200,000.

And it is not a "crime" for the tobacco companies knowingly to market a highly addictive drug that kills more than 365,000 Americans a year, 1,000 every day. This toll is higher than the number of Americans killed annually by AIDS, heroin, crack, alcohol, car accidents, fire and murder combined.

And it is not a "crime" to market known cancer-causing pesticides such as Alar. Nor



## CORPORATE CRIME-BUSTING: SOME LEGAL AND SOCIAL REMEDIES

X Congress should pass an executive responsibility statute making it a criminal offense for a corporate supervisor willfully or recklessly to fail to oversee an assigned activity that results in criminal conduct. The globe-trotting chief executive, like Exxon's Lawrence G. Rawl, would have a new incentive to monitor the safe conduct of his corporation.

X Corporate managers should be required to report to federal authorities a product or process that may cause death or serious injury. This would ensure that R&D departments keep worker health and safety in mind. A bill to this effect, introduced by Representative George Miller (D-CA) in 1979, was defeated thanks in part to corporate lobbying.

X Congress should require publicly held corporations to report their litigation records—indictments, convictions, sentences, fines and product-liability lawsuits—to the FBI. This corporate crime database could then be used by communities and prosecutors to inform their fights against criminally inclined companies.

X At the local level, corporate crime-watch committees should be formed to keep an eye on the activities of neighboring corporations and to keep police and prosecutors on their toes. Victims of corporate crime, such as those who have been injured by the Dalkon Shield, Agent Orange and asbestos, have formed organizations to lobby for just compensation, strong laws and, where applicable, effective prosecution and strict sentences.

X Creative penalties should be devised, such as court-ordered adverse publicity. As a condition of probation, for example, a judge could order a company to take out network television advertisements telling viewers about its long criminal record.

X More than anything else, corporate criminals should do time. They should be jailed alongside the mugger and drug dealer, not in the posh "Club Feds" usually reserved for white-collar crooks.

is it a "crime" to dump toxins into the air and water. General Motors (GM), among others, has been campaigning actively against public health for decades. In 1949, the company was convicted of conspiracy to destroy the nation's mass transit systems by buying up and then dismantling electrical transit systems in urban areas around the country.

The environmental consequences of this crime are still felt today. Los Angeles, which in the 1930s boasted an efficient system of electrified public transit that served 56 cities, saw the system destroyed and replaced with diesel buses and a freeway network for GM's cars. The city now has one of the worst air pollution problems in the country, and the Bush administration has proposed exempting it from some provisions of the Clean Air Act.

"What is good for General Motors is not necessarily good for the country," former San Francisco Mayor Joe Alioto told senators in a hearing about the destruction of the electric transit system in the Bay Area. "In the field of transportation, what has been good for General Motors has, in fact, been very, very bad for the country."

With the enormous resources available to them, companies like General Motors can ensure that the laws protecting us from them remain weak. During the last decade, for example, General Motors has successfully opposed amendments that would strengthen federal clean air and federal fuel-efficiency standards. GM has spent more than \$1.8 billion lobbying Congress against clean air amendments since 1981, the year the Clean Air Act came due for reauthorization. In addition, GM's political action committee made more than \$750,000 in campaign contributions, much of it to legislators who sit on com-

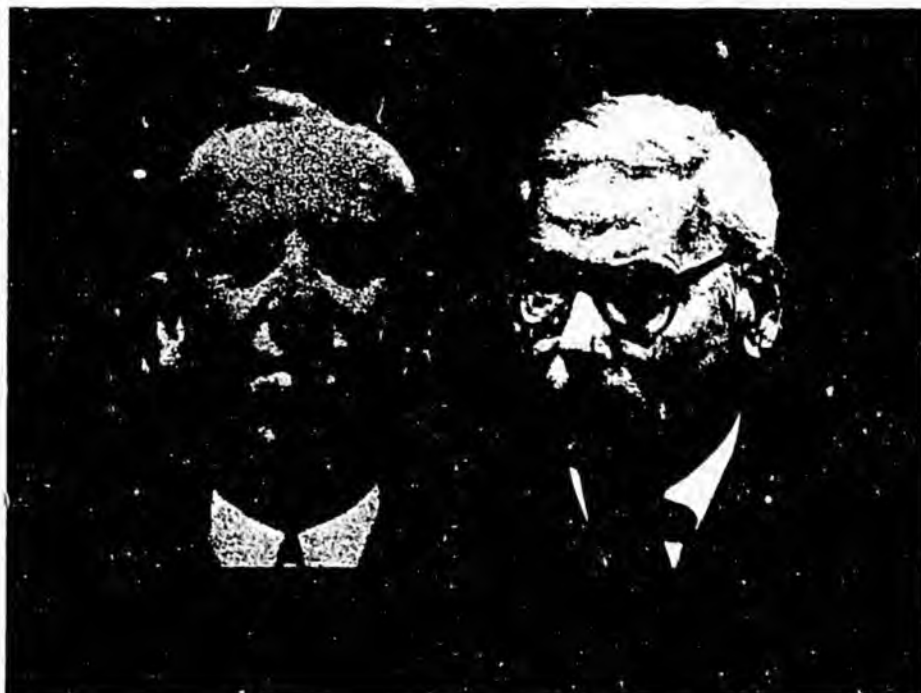
mittees with jurisdiction over clean air issues.

LACK OF ACCOUNTABILITY IS DEEPLY EMBEDDED in the concept of the corporation. Shareholders' liability is limited to the amount of money they invest. Managers' liability is limited to what they choose to know about the operations of the company. And the corporation's liability is limited by Congress (the Price-Anderson Act, for example, caps the liability of nuclear power companies in the aftermath of a nuclear disaster), by insurance and by laws allowing corporations to duck liability by altering their corporate structure (the Manville bankruptcy dodge, for example).

In addition, since the turn of the century, most laws governing corporate behavior give regulators the option of avoiding criminal charges and proceeding with less burdensome and less noticeable civil enforcement. In this way, corporations avoid either admitting or denying that they violated the law and are let off with slap-on-the- wrist fines and consent decrees. For environmental, labor, securities, energy, and food and drug violations, the civil injunction is today the primary method of enforcing the law against big business.

Fines, dismissed by criminologists as "license fees to violate the law," are the customary civil penalty for corporate wrongdoing. "One jail sentence is worth 100 consent decrees," said one federal judge. "Fines are meaningless because the defendant in the end is always reimbursed by the proceeds of his wrongdoing or by his company."

Under civil enforcement, the executives of criminal corporations are freed from the stigma of prosecution and possible jail sentences. "The violations of these laws are



crimes," wrote Edwin Sutherland in his 1949 classic, *White-Collar Crime*, "but they are treated as though they are not crimes, with the effect and probably the intention of eliminating the stigma of crime."

Sanctions for egregious corporate crimes rarely match the gravity of the offense, nor do they compare well with the punishment meted out for common street crimes. Not one corporate executive went to jail for marketing thalidomide, a drug that caused severe birth defects in 8,000 babies during the 1960s, but Wallace Richard Stewart of Kentucky was sentenced in July 1983 to 10 years in prison for stealing a pizza. Not one Hooker Chemical manager went to jail, nor was Hooker charged with a criminal offense after the company exposed its workers and Love Canal neighbors to toxics, but under a Texas habitual offenders statute, William Rummel was sentenced to life in prison for stealing a total of \$229.11 over a period of nine years. And General Motors was fined a mere \$5,000 for its mass transit conspiracy, which set back the country's environmental standards for decades.

"No amount of money paid out of corporate assets can address the wrongful acts of the individuals responsible within the organization," says Kenneth Oden, a District Attorney in Austin who has prosecuted a number of occupational homicide cases. "Sometimes the boss needs to be placed in handcuffs and taken to jail." While incarceration of street criminals may have a limited deterrent effect, jail time for corporate executives has a markedly different impact. "I would starve before I would do it again," said one General Electric official, convicted and jailed in a price-fixing scandal.

IN FEBRUARY 1983, A WORKER AT FILM RECOVERY Systems' silver extraction plant became nauseated while working in a room with open vats of hydrogen cyanide. He staggered outside the plant, collapsed and died. The medical examiner reported that he died of "acute cyanide toxicity." A month later the state attorney for Cook County, Chicago, charged three executives of Film Recovery Systems with homicide.

Prosecutors argued that plant employees were forced to work in the equivalent of a huge gas chamber, that the company hired mostly illegal aliens who spoke little English, that the company had scraped skull and crossbones warnings off the side of the cyanide drums, and that ventilation was so inadequate that a thick yellow haze hung inside the plant.

After a two-month trial, each of the three executives was found guilty of murder and reckless conduct, fined \$10,000 and sentenced to 25 years in prison for murder and 364 days for reckless conduct. Two operating corporations were found guilty of reckless conduct and involuntary manslaughter and fined \$11,000 each.



The Film Recovery Systems case represents the first time a corporate executive has been found guilty of murder in an occupational death case, and public sentiment seems to be calling for more such legal actions. Earlier this year in Torrance, California, the city attorney, citing the fear of a "disaster of Bhopal-like proportions," filed an unusual lawsuit against Mobil Oil. He sought to have Mobil's giant Torrance refinery declared a public nuisance, thus giving the city the authority to regulate it. The lawsuit cites the plant's appalling safety record—127 accidents at the refinery since December 1979, including the fiery deaths of three persons, among them a passing motorist, in an explosion and fire at the tank farm.

The district attorney (DA) for Los Angeles County requires prosecutors to investigate the circumstances of every occupational death or serious injury on the job. In the past four years, the DA has investigated more than 100 such cases and has brought criminal charges in more than two dozen cases. And in Austin, Milwaukee and New York City, activist prosecutors are hitting employers with homicide charges for death on the job.

In early 1989, the Commonwealth of Massachusetts announced the creation of a statewide Environmental Crimes Task Force that will use prosecutors, scientists, investigators and police officers to target high-priority threats to public health and natural resources. The 34-member strike force will specialize in major cases involving threats to drinking water supplies, harm to wetlands, illegal dumping and toxic discharges into sewage systems.

"This should send a clear message to everyone across the state: If you pollute, we're

going to catch you and you'll pay the price," said Massachusetts Environmental Affairs Secretary John DeVillars. "Poisoning someone's water supply or illegally dumping material isn't a victimless crime. It's a costly crime that has a major impact on individuals whose health may suffer. It damages our quality of life."

At the federal level, the Justice Department's Environmental Crimes Section, which was created in 1983, has recorded 520 indictments and more than 400 convictions, bringing in \$22 million in fines and more than 240 years of actual jail time. Earlier this year, Ashland Oil was found guilty of violating federal environmental laws in connection with the collapse of an Ashland storage tank that spilled more than 500,000 gallons of oil into the Monongahela River outside of Pittsburgh on January 2, 1988.

The developments described above point to a new willingness on the part of the public and the judicial system to see corporate crime punished fairly. Until now, the law has taught that if you are strong, rich and corporate, you can inflict the most egregious wrongs on society and continue business as usual. There is no reason why this cannot change. In a just society, the criminal law should also teach that those who poison the air, water and land, injure and kill others, or inflict cancer and birth defects are criminals and should be justly punished. □

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# Deterring Death in the Workplace: The Prosecutor's Perspective

Ira Reiner and Jan Chatten-Brown

## Introduction

In 1970, when Congress was debating the Occupational Safety and Health Act, it was argued that:

The problem of assuring safe and healthful workplaces for our working men and women ranks in importance with any that engages the national attention today . . .

Congress cited some grim statistics necessitating vigorous action:

. . . 14,500 persons are killed annually as a result of industrial accidents . . . more than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 215 million man days of work . . .

The human tragedy associated with the loss of lives, adverse health impacts, and serious injuries were the focus of legislative hearings, but Congress also addressed the economic impact of industrial deaths and disability.

Over \$1.5 billion is wasted in loss of wages, and the annual loss to the gross national product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. And this grim, 'current scene' . . . represents a worsening trend . . .

These deaths and injuries were the catalyst for adoption of OSHA, despite strong opposition from industry. The Act was heralded as providing a legal and institutional framework for achieving greater safety in the workplace. Unfortunately, expectations have not been fulfilled.

Although the exact numbers are subject to debate, it is clear that enforcement of federal and state laws has failed to turn the tide, and workplace deaths, serious injuries, and occupational illnesses are on the rise. In response, there is a growing national trend to use criminal prosecutions as one weapon in the battle to achieve safe workplaces for all Americans. This article will explore the scope of the problem created by unsafe working conditions, contrast the federal and state responses, describe the specialized prosecution program within the Los Angeles District Attorney's Office, discuss some of the obstacles to effective local enforcement, and articulate the reasons we believe such prosecutions are an essential element of any plan to reduce the rash of untimely and unnecessary workplace deaths.

## The Widespread Failure to Provide Safe Workplaces

The purpose of the Occupational Safety and Health Act adopted in 1970<sup>2</sup> was to "assure so far as possible every working man and woman in the nation safe and healthful working conditions."<sup>3</sup> Despite this lofty objective, the tragic toll taken in the workplace in lives, safety and health continues.

There have been no comprehensive national surveys of occupational fatalities. As a result, figures range widely. For example, the Bureau of Labor Statistics estimated the number of occupational fatalities in 1984 at 3,750, while the National Safety Council calculated the figure at 11,500. In a report entitled *National Traumatic Occupational Fatalities, 1980-1984*, the National Institute for Occupational Safety and Health estimates that approximately 7,000 traumatic occupational fatalities occurred each year during 1980-1984. This figure,

which represents 8.8 persons per 100,000 workers, excludes deaths from asbestos exposure and other occupationally related diseases which do not result in traumatic or immediate death. The National Safe Workplace Institute, in a 1987 report entitled *Safety at Bay—The Failure of the Department of Justice to Enforce Federal Occupational Safety and Health Laws*, estimated that 120,000 men and women had died in American workplaces since July of 1971, when the Occupational Safety and Health Act was signed into law.

While a wide range of estimates of occupational fatalities exists at the national level, the Los Angeles County Coroner's Office tracks deaths with considerable care. Each year there have been over 100 such deaths in Los Angeles County.

For every one death, there are hundreds, and perhaps thousands, of serious injuries each year, including amputations, blindings, hearing losses, disfiguring burns, and disabling injuries such as back pain. The illnesses and deaths attributable to workplace exposures to carcinogens, and the birth defects, still-births, and cases of sterility resulting from exposure to chemicals that cause reproductive hazards remain unquantified.

While quantification is difficult, what is clear is that the regulatory structure and penalties provided in the Federal Occupational Safety and Health Act have not achieved an acceptable level of deterrence of unsafe working conditions. As a result, since the early 1980s, there has been a national trend toward imposing corporate and individual liability for deaths resulting from unsafe working conditions.

### The National Trend toward Imposing Criminal Liability on Corporations and Individual Managers

Since three corporate officers were sentenced to twenty-five years in state prison in the Film Recovery Systems case, there has been a national trend toward local prosecutions for OSHA violations. This recent surge in the number of cases against corporations and their managers for occupational fatalities has not taken place in a vacuum. Prosecutions for occupational safety and health violations increase as society focuses more attention on white collar, business, and corporate crime.

The use of civil, and sometimes criminal sanctions to maintain minimal standards of business ethics was first accepted to protect the integrity of the stock market. Increasingly, violations of anti-trust laws and insider trading laws, among others, have been prosecuted. Health and Safety Code violations prosecuted as part of consumer protection efforts emerged in the 1970s. In 1975, the U.S. Supreme Court held that the president of a company could be liable for Health Code violations, even though he has no specific knowledge of such vio-

lations, if he exercised responsibility, management, and control over the company's operation.<sup>4</sup> Such health and safety violations were held punishable, even without criminal intent, because of society's need for protection. Persons with responsibility over such operations could be held "strictly liable" if the violation were in that class of crimes sometimes referred to as "*malum prohibitum*."

It was a significant development in the effort to achieve responsible corporate conduct when a local prosecutor attempted to hold Ford Motor Co. liable for deaths resulting from the explosion of the gas tanks of Pintos, but that prosecution proved unsuccessful.<sup>5</sup> In the 1980s, in the areas of environmental crimes, and particularly hazardous waste disposal, the public's demand for aggressive enforcement has led to an explosion in criminal prosecutions for violations of environmental laws. The Los Angeles District Attorney's Office, and the Los Angeles City Attorney's Office before it, have been the most active in the country in terms of the number and scope of such crimes prosecuted. Prosecutions for occupational safety and health violations should be viewed in the context of other efforts to deter irresponsible corporate conduct.

### Criminal Enforcement under the Federal Occupational Safety and Health Act

When Congress passed the Federal Occupational Safety and Health Act in 1970, the primary enforcement mechanism was civil penalties. The Secretary of Labor may impose a civil penalty of up to \$1,000 for each serious violation.<sup>6</sup> Willful or repeat violations of the general duty on employers to provide a place of employment free from hazards which are likely to cause death or serious physical harm, or for any specific safety standards, can result in imposition of a civil penalty of not more than \$10,000.<sup>7</sup> Failure to abate a hazard for which the employer has been cited may result in a civil penalty of up to \$1,000 for each day the hazard continues.<sup>8</sup> With the exception of criminal penalties for giving advance notice of a safety inspection, or for falsification of documents, criminal penalties were reserved for willful violations of a specific standard which results in death. A fine of up to \$10,000, and/or not more than 6 months imprisonment could be imposed after a first offense. A second offense could result in a fine of not more than \$20,000, and/or not more than one year's imprisonment.<sup>9</sup>

Since enactment of the criminal penalties in the Federal Occupational Safety and Health Act, many commentators have questioned the efficacy of utilizing criminal sanctions. In fact, the experience with such prosecutions has been disappointing. According to the Labor Department, between 1970 and 1988 there were only

41 referrals from the Department of Labor to the Department of Justice.<sup>10</sup> An additional 3 cases were requested of the Department of Labor by the U.S. Attorney. Of those 44 cases, not a single case resulted in the imposition of jail time. In at least two cases, individual defendants were dismissed. In 4 cases, the action was unsuccessful in that the Grand Jury did not return an indictment, there was an acquittal, or there was a hung jury. Seven cases were declined by the Department of Justice, and 15 by the U.S. Attorney. Seven cases resulted in fines, and in an additional 3 cases, the corporation was convicted, but the Department of Labor does not report that a fine was imposed. In one case, an indictment was returned, and as of February 1988, the action was still pending. In 8 cases, either the Department of Justice or the U.S. Attorney has not yet acted. Some of those cases go back to 1985. The likelihood of obtaining a successful prosecution, even if the U.S. Attorney decided to go forward, becomes more remote with the passage of time.

To some extent, the Department of Justice's reluctance to commit the necessary resources for successful criminal prosecutions may be explained by reviewing its early experiences with such actions. A summary of such prosecutions follows.

In 1974, the U.S. Attorney prosecuted the first criminal action under the OSHA Act.<sup>11</sup> The case involved a death resulting from failure to shore a trench. The corporation had been cited by state inspectors for lack of trench shoring 11 times, and had trench jobs closed down as imminent hazards six times in the nine months preceding the fatal incident. Immediately after the worker's death, the president of Dye Construction Co. informed an OSHA inspector that compliance with trenching requirements would be too expensive. The fact that he had knowledge of such requirements was never denied. In fact, he had signed several of the earlier state citations. Despite this terrible history, the U.S. District Court dismissed all counts against the president of Dye Construction Co. The court further dismissed two of the three counts against the corporation, and imposed a fine of only \$3,500 on the remaining count.

An industrial cleaning company and its two operating officers were charged with two counts of having willfully failed to provide necessary air supplies and related safety equipment to employees who died after entering confined spaces containing poisonous gases in *United States v. Crosby and Overton*.<sup>12</sup> The officers of the corporation were personally aware of the assignment and the fact that the air compressor they provided was unreliable and inadequate because it tended to draw carbon monoxide from its own engine exhaust. The officers were aware of the death of employees of some of their competitors, and yet they decided not to provide standby rescue equipment. An attempt was made to

cover up the violation after the deaths. When the violations were discovered, the individuals and the corporation pled *nolo contendere*. At sentencing, the U.S. Attorney argued for jail terms and fines as a "signal" to industry. The district court declined to impose either, but simply placed the individual defendants on four years parole on condition that they implement a safety program.

Early experiences with jury trials were as disappointing as those with the courts. In *United States v. Pinkston-Hollar*, employees under the direct supervision of the corporate vice president were installing roofing insulation 35 feet above a concrete floor. Winds were so high that one of the employees fell through an opening, catching himself moments before he would have dropped 35 feet. He then warned the vice president that continued work without protection from falling would be deadly. The vice president was aware that the company twice had been cited for failure to provide fall protection. Nevertheless, he ordered work to proceed. A short time later, a worker fell through an opening to his death. Despite all of this evidence, the jury acquitted both the individual and the corporation.<sup>13</sup>

*United States v. Turcon Co.* resulted in the acquittal of the president of a corporation for a death from a violation which had been cited before the fatal incident. Although the corporation was fined \$5,000, the money was never collected since the corporation filed for bankruptcy.<sup>14</sup>

*U.S. v. Jones* was decided in 1978.<sup>15</sup> A large grain elevator in Galveston, Texas, exploded, killing eighteen and injuring twenty-two. Two on-site managers were indicted for willfully violating OSHA requirements to keep the grain elevators clean and safe. A 3½ week trial resulted in a hung jury.

Perhaps as a result of adverse experiences in litigating these cases, a number of less than satisfactory plea bargains were negotiated. For example, in *U.S. v. Huey Construction Corporation*, a plea bargain resulted in a guilty plea by the corporation for a death from a trenching collapse in exchange for dismissal of charges against two individuals.<sup>16</sup>

In 1980, a plea bargain resulted in the dismissal of charges against the president of *Port Allen Marine Services* in exchange for a plea from the corporation. That prosecution was for improperly erected guardrails, and the president previously had been informed that such rails constituted a safety violation.

Of the cases which have been "successfully completed," only three resulted in imposition of the maximum fine of \$10,000. In a number of cases, the fines imposed have been less than would, in all likelihood, be imposed through civil penalties.

More importantly, there appears to be a reluctance to prosecute fatality cases. Three of the cases considered

by the Department of Justice since 1985 have been for violations of record keeping requirements," and one for interference with an OSHA inspection."<sup>19</sup>

As a result of the failure to use the criminal enforcement provisions of the Federal OSHA Act effectively, commentators question the efficacy of these criminal sanctions. Many attribute the lack of successful prosecution to the fact that jurors were unwilling to attach the moral stigma of a conviction to individuals who are often leaders in the community. A related concern, which Stephen Redin refers to as a "spillover problem," is the concern that a corporate fine would penalize shareholders, creditors, employees, and consumers.<sup>20</sup> As to whether the reliance the OSHA Act places upon criminal sanctions is appropriate, at least one commentator concludes the jury is still out.<sup>21</sup>

Recent prosecutions in state courts, however, support the conclusion that criminal prosecutions of corporations and managing officials and supervisors can play an important role in efforts to achieve safer work places.

### The Focus Shifts to Local Prosecutions

An active field presence by the regulatory agencies, actions to abate, and civil penalties are all critical elements of an effective regulatory scheme. However, most prosecutors believe criminal prosecution is a substantially more effective deterrent than civil penalties for altering conduct that normally is dependent upon economic considerations. Far more than with street criminals, plant managers may radically change their behavior if they believe failure to do so may result in imposition of even a short period of jail time.

The generally accepted objectives of criminal prosecution are punishment, incapacitation, rehabilitation, and deterrence. Rehabilitation and incapacitation are objectives rarely applicable to criminal conduct by corporate managers. Punishment in some cases is clearly appropriate. Normally, however, the most important objective is to deter unsafe conduct by other industries which may otherwise treat the possibility of the civil penalty or a fine as a cost of doing business.

Increasingly, prosecutors are convincing juries that a homicide can be committed by a manager wielding nothing more deadly than a pen. However, major legal obstacles to successful prosecutions still remain in many parts of the country.

The first reported homicide prosecution against an employer for the death of employees resulted in dismissal of the grand jury's indictment in *People v. Warner-Lambert Co.* (1980) 434 New York Supplement 2nd Series, p. 159. Defendants in the *Warner-Lambert* case were a chewing gum manufacturer and several of its officers and employees. They were charged

with manslaughter and criminally negligent homicide for the death of six employees in an explosion and fire in the corporate defendant's manufacturing plant. The grand jury indicted defendants after the People presented evidence that Warner-Lambert's insurance carrier had advised defendants that the use of magnesium stearate and liquid nitrogen could result in a dust explosion hazard. The insurance carrier recommended installation of a dust exhaust system and modification of certain electrical equipment. Although some work was done, defendants declined to shut down the operation pending modifications. The evidence showed that the cause of the explosion was related to the dust hazard, but the exact catalyst was the subject of considerable speculation. As a result, the Court of Appeal held that the corporation and individual defendants could not be held criminally liable, because the triggering mechanism was not identified. The Court said that despite the defendant's awareness of the risk of explosion from the use of magnesium stearates, the risk was "undifferentiated," and therefore the explosion was "neither foreseen or foreseeable." (*People v. Warner-Lambert Co.* (1980) 434 NYS 2d 159 at 160.)

The *Warner-Lambert* decision constituted a regrettable setback in the effort to achieve more responsible corporate conduct. It appears to misconstrue legal principles relating to foreseeability.<sup>22</sup>

In California in 1983, the State Court of Appeal specifically held that a corporation could be charged with manslaughter for the workplace deaths of its employees (*Granite v. Superior Court* (1983) 149 Cal. App. 3d 465). More importantly, in a prosecution by the Los Angeles District Attorney's Office, the superintendent of the City of Burbank's water reclamation system was found guilty of involuntary manslaughter for the deaths of two workers who were allowed to enter confined spaces as part of the plant's maintenance. The defendant repeatedly had been warned of the inadequacy of the plant's safety procedures.<sup>23</sup>

While a few successful prosecutions were taking place, national attention did not focus on the viability of criminal prosecutions for OSHA violations until June of 1985. Then, three management officials from Film Recovery Systems were found guilty of murder for the cyanide poisoning of one of their employees, 39-year-old Polish immigrant Stephen Golab.<sup>24</sup> The evidence showed that the managers knew of the hazards of cyanide and the appropriate antidote. A ventilation system had been recommended. Numerous employees suffered nausea, vomiting, and bleeding from the nostrils before Stephen Golab's death. When office workers became ill, they were protected by moving the office to a building next door. More large vats utilized in the recovery of silver from used film were crammed into the plant area. Ironically, Federal OSHA inspectors had come to in-

spect the facility several months before the death. Unfortunately, they only conducted a review of the records, which were not properly maintained, and did not go into the plant.<sup>45</sup>

On February 10, 1984, Steven Golab went into convulsions as a result of exposure to cyanide fumes. He was one of many employees who physically entered the vats to remove residue. No antidote was administered and Golab died. According to Jay Magnuson, the lead prosecutor on the case, the turning point in the trial was when another former employee raised his pants leg during trial to expose the scar tissue where cyanide had eaten the flesh down to the bone.

Defense counsel waived jury in the Film Recovery Systems Case. The court found defendants guilty, sentenced the three individuals to 25 years in state prison, and fined the company \$24,000. At last, corporate managers were on notice that they may be held criminally liable for unsafe working conditions. The consequences might no longer be a mere slap on the wrist.

The Film Recovery Systems prosecution quickly was followed by several other newsworthy cases. The Milwaukee District Attorney obtained a jury verdict finding defendants guilty of homicide after an employee was crushed to death when a bulldozer he was driving fell off a cliff. The employer had prior notice that the young driver had a history of epilepsy. In *People v. Pymm Thermometer*, the jury likewise reached a quick verdict that defendants were guilty of assault for the mercury poisoning of employees.<sup>46</sup> In *Pymm Thermometer*, employees worked in an unventilated basement which was closed off and hidden from view when health officials conducted inspections. Unfortunately, the judge set aside the verdict, holding that state prosecution violations were preempted by the Federal OSHA Act, a subject discussed below.

Despite some reversals, prosecutors around the country are expressing a heightened interest in investigating and prosecuting the more egregious violations of occupational safety and health laws. Nowhere has the effort been institutionalized as completely as in the County of Los Angeles.

### The Los Angeles District Attorney's OSHA Prosecution Program

In December of 1983, Ira Reiner, a co-author of this article, took office as Los Angeles District Attorney. At that time, the first occupational safety and health section in a local prosecutor's office in the country was established.

After several months of relying upon referrals from Cal/OSHA, the state agency with responsibility for occupational safety and health, the District Attorney concluded that a more aggressive program was needed to

identify and investigate cases potentially appropriate for criminal prosecution. Letters were sent to all police chiefs and the County Sheriff, asking that all occupational fatalities be investigated as potential homicides. A one-day occupational fatality investigation seminar was conducted for approximately eighty homicide investigators. Subsequently, OSHA fatality investigation training videotapes were prepared and distributed county-wide to law enforcement.

In September of 1983 the District Attorney initiated a program in which a deputy District Attorney and an investigator are on call 24 hours a day, 7 days a week, to respond to the scene of traumatic occupational fatalities in Los Angeles County. District Attorney personnel are notified by law enforcement, the fire department, or the Coroner's Office. They in turn notify the appropriate state or federal occupational safety and health agency. The program is known as the "roll-out" program, and is the linchpin of the District Attorney's OSHA prosecution efforts.

Upon arrival at the scene, the responsibility of the deputy district attorney and district attorney investigator is to obtain the necessary physical and testimonial evidence to determine whether the fatality was due to employee negligence, was an accident, or was the result of a criminal act of the employer. Without prompt investigation, important physical evidence can be lost. Of even greater concern is the fact that, in most cases, key witnesses continue working for the employer. If statements are not promptly obtained from such witnesses, their concern over the death of a worker may be superseded by their own concern for job security.

Since establishment of the OSHA Section, District Attorney personnel have responded to over 100 workplaces. At several of the locations there were multiple deaths. Twenty-two cases have been filed thus far. All but two of those cases involve fatalities. Of the nonfatal cases, one concerned a chlorine leak which sent over 80 people to the hospital. Approximately half of those hospitalized were students and teachers from a nearby school. The other nonfatality was due to safety violations at an oil refinery which resulted in third degree burns over approximately 90 percent of the body of a plant worker.

The first involuntary manslaughter case filed by the OSHA Section was against Michael Maggio.<sup>47</sup> Mr. Maggio was president of a small drilling company, and was personally present when a shaft for an elevator was being drilled. At approximately 15 feet in depth, an obstruction was hit. Maggio directed the victim to go to the bottom of the shaft and remove the obstruction. After doing so, the victim was lifted out of the shaft. Drilling continued with a 16 inch diameter drill bit. At about 33 feet, another obstruction was hit. Maggio again sent the victim down to remove the obstruction.

The victim was lowered by cable to the bottom of the hole with his foot inserted in a sling. The air was not tested, the walls or sides of the hole were not encased or shored, and the victim was not placed in a safety harness. Almost immediately the victim went into convulsions. The fire department was called. When they arrived, they sought to blow fresh air into the hole. Maggio told them they could not do so, since the walls of the well were not encased and might collapse, burying the victim. By the time the victim was removed, he was dead.

After the defendant was held to answer at a preliminary hearing, he pled *nolo contendere* to the charge of involuntary manslaughter. He was sentenced to 60 days in county jail and was required as a condition of probation to adopt and implement a comprehensive accident prevention plan for his company.

Two other involuntary manslaughter cases involved deaths caused by unshored excavations. In *People v. Gonterman*,<sup>28</sup> Gonterman, who was the manager of the trenching company, was personally present when the excavation was being made. A cave-like undercut was made under a street, with no shoring. A series of small cave-ins refilled the excavation. Shoring materials were present, but were not of adequate size. Gonterman directed the workers to continue to dig. The entire embankment collapsed, burying the victim. After Gonterman was held to answer at a preliminary hearing, he pled guilty. He was sentenced to 90 days in county jail and was required as a condition of probation to adopt and implement a comprehensive accident prevention plan.

In the third excavation case, charges were filed against five defendants, including the soils engineer on the project. This case is believed to be the first time in the United States that a professional consultant was charged with involuntary manslaughter for the death of a worker based upon gross negligence in the exercise of his professional responsibilities.<sup>29</sup> Also charged were the owner and foreman of the construction firm employing the victim, the construction company, and the corporate general contractor. In this case, the victim was removing dirt from a trench where footings were to be poured. The dirt apparently was in the trench as a result of a slide that had occurred the night before. While he was working in the trench, a 14-foot embankment collapsed and buried the victim. The investigation showed that the soils report was grossly inadequate because it failed to recommend shoring for a vertical cut when exposed planes of rock angled toward the excavation area into the hillside at almost a 45 degree angle. There is substantial evidence of the personal knowledge of the soils engineer regarding the conditions and warnings from the excavation contractor who did the work. In addition, G.A.L. Concrete Construction Company, the em-

ployer, had received 40 citations from Cal/OSHA for violations at 10 different construction sites. At least three of the citations were for the same type of hazards which led to the victim's death.

The fourth involuntary manslaughter case was filed against the owner of an unreinforced brick building and the contractor who was doing remodeling work on the building.<sup>30</sup> Representatives from the concrete coring company who made the cuts in the walls of the building repeatedly warned defendants that bricks should not be removed without the bricks above the cut being shored. After a portion of the bricks were so removed, the brick wall collapsed, burying the victim, who was an undocumented day laborer.

All of the other cases prosecuted by the section have been filed under either Labor Code Section 6425, which makes it a misdemeanor to willfully violate an OSHA regulation when such violation results in death or permanent or prolonged impairment;<sup>31</sup> Labor Code Section 6423(a), which makes it a misdemeanor to knowingly or negligently violate a Cal/OSHA regulation when that violation is serious;<sup>32</sup> or Penal Code Section 385, which makes it a misdemeanor to work within six feet of a high voltage line.<sup>33</sup> Under all of these sections, a supervisor or management official who exercises responsibility, management, custody or control of the place of employment can be charged. As a result, all of the cases except one have resulted in the naming of an individual as well as the corporation. The only case which was filed solely against a company was for an electrocution of an employee of Southern California Gas Co.<sup>34</sup> The death occurred before the District Attorney instituted the roll-out program. The referral from Cal OSHA came so late that it was impossible to investigate the case adequately to determine which individuals were responsible prior to the running of the statute of limitations.

A major concern of critics considering the effectiveness of occupational safety and health prosecutions has been the ability of prosecutors to determine the culpability of higher level corporate officials in large companies. Although a number of the defendants in those cases have been small employers and supervisors from those companies, several have been large employers. These include Golden State Foods Co., which is the nationwide distributor of meat for McDonalds restaurants, and one of its general managers;<sup>35</sup> Reliance Steel and Aluminum Co., which is one of the largest metal processing companies in the Southwest United States and its president;<sup>36</sup> and GTE, a large electrical supplier.<sup>37</sup>

OSHA prosecutions include several for violation of California requirements for a lock-out device or some means of preventing inadvertent movement of equipment during cleaning and operation. Those deaths include situations where an individual was literally

ground up in a meat blender,<sup>14</sup> crushed to death in a poultry blender,<sup>15</sup> and cut in half in a steel scrapping machine.<sup>16</sup> Federal OSHA has no equivalent standard mandating equipment lock-out.

Two cases have been filed based upon electrocutions where an individual was allowed to work too close to a high voltage line. In one of those cases, the evidence showed that the tree trimmers employed by defendants were not trained regarding the dangers of touching anything that fell on high voltage lines. Moments before the victim was electrocuted, a fellow employee removed a palm frond from the line. The supervisor was present, but took no action. When the victim attempted to remove a similar palm frond, he was electrocuted.<sup>17</sup> The supervising partner of the tree trimming company was sentenced to 30 days in county jail. The other partner was required to institute a comprehensive safety program and pay a fine of \$8,500 as a condition of probation.

On April 5, 1988, a jury found Reliance Steel and Aluminum Co. and two corporate managers guilty of failing to train employees on the unique hazards of their job. The case arose after an employee was killed when caught in the recoiler of a steel slitter. A recoiler acts like a large spindle to rewind the steel after it is slit on a steel slitting machine. The standard practice of the company had been to have the employees insert pieces of cardboard at the pinchpoint where the steel was rewound. The slitter had the capacity to run at over 1,100 feet per minute, although the actual speed at which the steel was normally running was substantially less.

There had been no policy against wearing gloves when inserting cardboard. The victim apparently was pulled into the machine when his gloves became caught. In *Reliance Steel*, evidence obtained during execution of a search warrant showed repeated prior recommendations from Reliance's insurance company regarding the need for more safety training, and prior injuries of a nature that should have put the company on notice of safety hazards. What was more shocking was that normally 30 days of training was provided to a new operator on the machine. In this case, the victim was given only three to four hours of training, and was then left to operate the machine with a Spanish speaking helper. The victim did not speak Spanish.<sup>18</sup>

Thus far only one of the cases, against Dial Corporation,<sup>19</sup> involved health issues. However, the District Attorney's Office anticipates that there will be a substantial number of prosecutions for illegal exposure of workers to asbestos, in violation of various asbestos business practice requirements set forth in the California Labor Code and California Business and Professions Code. Further, the provisions of California's Proposition 65, which prohibits discharges of known carcinogens and reproductive hazards into drinking water and

also requires all persons to warn individuals exposed to such hazards, went into effect at the end of February, 1988. This law will be very useful as applied to chemicals in the workplace.

In addition to the 22 cases the District Attorney's Office has filed, a substantial number of cases are referred to local city attorneys for misdemeanor prosecutions. Approximately one dozen of these cases have been filed, including a second death of a tree trimmer, utilizing the investigation conducted by the District Attorney's Office.

The Los Angeles District Attorney's Occupational Safety and Health enforcement program has made a substantial difference in convincing corporate managers and supervisors that safety in the workplace should be given high priority. This conclusion has been confirmed by the comment of numerous safety engineers and industrial hygienists located throughout the County of Los Angeles.

#### Defendants Attempt to Use the OSHA Act as a Shield from Criminal Prosecution

Despite encouraging signs regarding the potential for using criminal prosecutions to deter unsafe work practices, prosecutions in a number of jurisdictions have been thwarted by arguments of federal preemption.

In 1970, business interests opposed enactment of the Federal OSHA Act, arguing that it provided an unnecessary federal sword for forcing changes in the workplace. State regulation was preferable, according to many of these interests. Ironically, it is largely these same interests which now argue the Federal OSHA law provides a shield against state prosecutions, except in those states with federally approved State OSHA plans.

Although the District Attorney believes the argument is unfounded, thus far it has achieved considerable success in the courts, prompting a recent Harvard Law Review article entitled "Getting Away With Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents."<sup>20</sup>

Essentially, defendants argue that section 18 of the Act precludes states from exercising jurisdiction over occupational safety and health, unless Federal OSHA has approved a state plan. Such a plan must be at least as effective as the federal plan to be approved by Federal OSHA. Section 18 provides:

- a. Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6.
- b. Any State which, at any time, desires to assume responsibility for development and enforcement

therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement. 29. USCS Section 667.

This preemption argument was rejected by a trial court in Texas but accepted by a Texas court of appeals in *State v. Sabine Consolidated, Inc.*<sup>45</sup> Shortly thereafter, however, an appellate court in Illinois, in *People v. Chicago Magnet Wire Corporation*,<sup>46</sup> held that the Act preempted a state prosecution for aggravated battery and reckless conduct. The People appealed, and the Los Angeles District Attorney, Brooklyn, New York District Attorney; and Middlesex, Massachusetts District Attorney filed an amicus curiae brief in support of the Illinois prosecutor. The U.S. Chamber of Commerce, and others, filed an amicus curiae brief supporting the preemption arguments of the defendants. A decision is currently pending.

Another decision adverse to the interest of the People was handed down by a New York trial court when it set aside a jury verdict that defendants were guilty of assault, conspiracy, and reckless endangerment for the mercury poisoning of their employees at a thermometer plant.<sup>47</sup>

The sole appellate court decision rejecting preemption came on April 21, 1988, when the Wisconsin Court of Appeals, District 4, ruled that the Federal Occupational Safety and Health Act does not preempt a homicide by reckless conduct prosecution against an officer of a fireworks company for the death of an employee.<sup>48</sup>

Our position, and that of other prosecutors, is that the Act neither expressly nor implicitly preempts criminal prosecutions for safety and health violations through applicable state criminal laws. Rather, Section 18 of the Act is designed to preclude adoption of weaker state regulatory standards. This same position is fully articulated in the Harvard Law Review article, "Getting Away With Murder."<sup>49</sup>

On February 4, 1988, before the U.S. House of Representatives, Housing and Labor Subcommittee of the Government Organizations Committee, regarding use of criminal prosecutions for safety and health violations, we recommended that Congress attempt to determine whether President Reagan would sign legislation making it absolutely clear that the Act does not preclude state prosecutors from using criminal laws of general applicability to pursue cases involving employee illnesses, injuries, and death. It is believed Congress would quickly pass such legislation, but a Presidential veto would only muddy the legal waters. Absent enactment of such legislation, the issue undoubtedly will not be

resolved until it is ultimately decided by the U.S. Supreme Court.

## Conclusion

Legal and practical hurdles impede the more extensive use of criminal prosecutions to achieve safety in the workplace. Small prosecution offices often lack the resources to file and try this type of case, which is often technically complex and generally requires expert witnesses. Most offices will await resolution of the preemption issue before proceeding. However, the Los Angeles District Attorney's Office, and a few others, are committed to pursuing these cases. We hope to make the path easier for those prosecutions yet to come.

## References

1. S. Rep. No. 1282, 91st Congress, Second Sess. (1970), Leg. Hist. Note 6, at 142-144.
2. 29 USC Section 651-678.
3. 29 USC Section 651(b).
4. *U.S. v. Park* (1973) 421 U.S. 658.
5. *State v. Ford Motor Co.* (filed February 2, 1979) 5324 Indiana Superior Court.
6. 29 USC Section 666(j).
7. 29 USC Section 666(a).
8. 29 USC Section 666(d).
9. 29 USC Section 666(e).
10. *Criminal Referrals by OSHA to the Department Justice and Cases Initiated by U.S. Attorneys* (as of February 2, 1988), attached to testimony of Jerry G. Thorn, Deputy Solicitor of Labor, before the subcommittee on Employment and Housing, Committee on Government Operations, U.S. House of Representatives, February 4, 1988.
11. *United States v. Dye Construction Co.* No. 77-CR-417 (Denver, Colorado, February 6, 1974), aff'd. 510 F.2 78 (10th Cir. 1975).
12. Cr. No. 74-1832 F. (C.D. Cal. Jan 14, 1975).
13. *United States v. Pinkston-Hollar, Inc.*, No. 77-33-CR6 (D. Kan., February 26, 1976, verdict entered October 12, 1976).
14. Cr. No. 72-0-239 (D. Neb., January 27, 1974).
15. Cr. No. G-80-11 (S.D., Tex., November 13, 1981).
16. Cr. No. 81-16 D (W.D., Oklahoma, February 27, 1982).
17. Cr. No. 81-71A (M.D., Louisiana, October 26, 1981).
18. 29 USC Section 666(g).
19. 18 USC Section 1001 and 1505.
20. Stephen Redin, "Corporate Criminal Liability for Employee Endangering Activities," 18 *Columbia Journal of Law and Social Problems* (1983), 39, at 52-54.
21. Michael H. Levin, "Crimes Against Employees: Substantive Criminal Sanctions Under the Occupational Safety and Health Act," *American Criminal Law Review*, 1977, Vol. 14: 717.
22. The *Warner-Lambert* decision was strongly, and we believe properly, criticized by Stephen Redin in "Corporate Criminal Liability for Employee Endangering Activities," *supra*. Perhaps as a result of the *Warner-Lambert* decision, criminal sanctions were not sought to be imposed upon employers due to unsafe working conditions with any regularity until the

mid 1980s. An exception to this was prosecution under specific laws applicable to employers in California.

23. *People v. Gaglione* 1982: 138 CA4d52.
24. *People v. Film Recovery Systems Inc., et al.*, Nos. 84 C.5064 and 84C11091. Cir. Ct. of Cook County, Ill., June 14, 1985. This case, and criminal prosecutions of OSHA violations in general, is discussed at length in "Policy Considerations in Corporate Criminal Prosecutions After *People v. Film Recovery Systems, Inc.*," *Notre Dame Law Review* Vol. 62:609.
25. Over the past several years, Federal OSHA has adopted a policy favoring "records inspections." Under that policy, where records show that the employer has fewer than average injuries and illnesses, inspections of that operation are waived. As a result, there is an increased incentive for employers to under-report. In fact, the largest fines imposed by Federal OSHA of late have been for such recordkeeping violations, rather than substantive safety and health violations.
26. *People v. Pymm Thermometer*, No. 930-86. Appeal filed March 21, 1988.
27. *People v. Michael Charles Maggio*, #A780779, filed March 26, 1986.
28. *People v. Jeffrey Gonterman*, #A919972, filed July 21, 1987.
29. *People v. Dr. Richard Hu, Benjamin Lowe, Michael Berry, G.A.L. Concrete Construction Co., and Panda Development and Construction Company*, #A962219, filed January 6, 1988. A preliminary hearing was scheduled for May 31, 1988.
30. *People v. Charles Wilson and James Lee*, #A954496, filed July 21, 1987.
31. Labor Code Section 6425—Any employer, and every employee having direction, management, control, or custody of any employment, place of employment, or other employee, who willfully violates any occupational safety or health standards, order, or special order, or Section 25910 of the Health and Safety Code, and that violation caused death of any employee, or caused permanent or prolonged impairment of the body of any employee, shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000), or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than twenty thousand dollars (\$20,000) or by imprisonment for not more than one year, or by both.
32. Labor Code Section 6423(a)—Except where another penalty is specifically provided, every employer, and every of-

ficer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or other employee, who does any of the following shall be guilty of a misdemeanor:

3. Knowingly or negligently violates any standard, order, or special order, or any provision of this division, or of any part thereof in, or authorized by, this part the violation of which is deemed to be a serious violation pursuant to Section 6432.
33. Penal Code Section 385.b—Any person who either personally or through an employee or agent, or as an employee or agent of another, operates, places, erects or moves any tools, machinery, equipment, material, building or structure within six feet of a high voltage overhead conductor is guilty of a misdemeanor.
34. *People v. Southern California Gas Company*, #M864456, filed July 18, 1985.
35. *People v. Golden State Foods, Jack Reily, Stan Harris, and Armando Hernandez* #31386211, filed June 11, 1985.
36. *People v. Reliance Steel and Aluminum Company Inc., Joseph D. Crider, Mark Dehl, Ed Kiewski, and Dennis Conway*, #S34359, filed July 22, 1985.
37. *People v. GTE Products Corporation, John Wayne Lanford, and Dale Niezgocki*, #M270690, filed November 13, 1985.
38. *People v. Golden State Foods*, supra.
39. *People v. California Pacific Poultry Inc., Robert Ferro, Larry Posik, and Armando Velasquez*, #M139709, filed January 27, 1986.
40. *People v. Star Scrap Metal Co. Inc., Allen Richard Stein, and Rose Starow Stein*, #M96482, filed January 31, 1986.
41. *People v. Steve Lymon and Robert L. Henderson*, #M48042, filed October 24, 1985.
42. Sentencing in *Reliance Steel* has been delayed pending a ruling on a motion for a new trial.
43. *People v. Dial Corporation, Skip Foster, Daniel J. King, and Nelson Landman*, #87-M00849, filed February 21, 1986.
44. *Harvard Law Review* 1987: Vol. 101: 535.
45. *Lovelace v. Sabine Consolidated* 1988, 756 S.W. 2d 865.
46. 147 Ill. App. 3d 797, 510 NE2d 1173 1987.
47. *People v. Pymm Thermometer*, N.Y. Sup. Ct. November 13, 1987.
48. *State of Wisconsin ex rel. Cornellier v. Black* No. 87-1120-W.
49. *Supra*, note 41.

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WHEN IT IS NOT AN ACCIDENT, BUT A CRIME:  
PROSECUTORS GET TOUGH WITH OSHA  
VIOLATIONS

Ira Reiner\* and Jan Chatten-Brown\*\*

20

I. INTRODUCTION

21

In 1911, more than 100 workers, all women, were killed in the Triangle Shirt Waist fire. All exit doors to the factory were bolted closed, preventing the employees escape. Some jumped to their death. Others burned in the fire or died from the smoke. The inhumane conditions in which the women worked caused public outcry. The New York District Attorney charged the owners of the factory with manslaughter. Despite the fact that the defendants were eventually acquitted, employers were put on notice that their white-collar status was not a shield of immunity from criminal prosecution for failure to eliminate workplace hazards.

22

Since the Triangle Shirt Waist fire, public interest in seriously attacking the causes of occupational deaths, injuries, and disease has waxed and waned. Measured by legislative activity and media coverage, it currently has reached a new high.

23

In 1970, unions achieved a long-term objective by persuading Congress to pass the Occupational Safety and Health Act. Optimism regarding OSHA's potential slowly turned to disappointment, however, as the agency's staff was cut, new standards delayed, civil penalties compromised, and criminal prosecutions of the most egregious offenders thwarted.

24

By the mid-1980s, much of the battle to deter unsafe working conditions moved to another arena — the state courts. Though but one of the tools for improving working conditions, criminal prosecution is an important option, and is the focus of this article.

25

Before turning to the emerging area of criminal prosecutions, however, it is useful to have some sense of the scope of the problem.

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## II. SCOPE OF THE PROBLEM

Workplace-related deaths, injuries, and disease are far more pervasive than often perceived. There is no comprehensive national survey of occupational fatalities, nor is there a standardized state reporting system. As a result, estimates of deaths range widely. The Bureau of Labor Statistics, which relies solely on employer surveys, estimated the number of occupational fatalities in 1984 at 3,750. The National Safety Council, on the other hand, calculated the figure for the same year at 11,500. In a report entitled *National Traumatic Occupational Fatalities, 1980-1984*, the National Institute for Occupational Safety and Health estimates that approximately 7,000 traumatic occupational fatalities occurred each year during 1980-1984. This figure, which represents 8.8 persons per 100,000 workers, excludes deaths from asbestos exposure and other occupationally related diseases which do not result in traumatic or immediate death. The National Safe Workplace Institute, in a 1987 report,<sup>1</sup> estimated 120,000 men and women died traumatic deaths in American workplaces since July 1971, when the OSH Act was signed into law. The Bureau of National Affairs concludes that more than 100,000 workers may have died nationally in job-related accidents since 1984.<sup>2</sup>

Occupational disease estimates are higher, and at least as uncertain. A recent congressional report found that occupational health surveillance is "fragmented, unreliable, and 70 years behind communicable disease surveillance."<sup>3</sup> Despite the statistical uncertainties, there is no question that the magnitude of the problem of occupational disease is great. Many experts believe that 50,000 to 70,000 workers die each year from occupational diseases.<sup>4</sup>

According to John Moran, former Director of Safety Research at the National Institute of Occupational Safety and Health:

1. J. HOLZHAUER & J. KINNEY, *SAFETY AT BAY — THE FAILURE OF THE DEPARTMENT OF JUSTICE TO PROSECUTE CRIMINAL OSHA CASES* (National Safe Workplace Institute 1987).

2. BUREAU OF NATIONAL AFFAIRS, *OCCUPATIONAL SAFETY AND HEALTH: SEVEN CRITICAL ISSUES FOR THE 1990s* at 9 (July 1989) (hereinafter *SEVEN CRITICAL ISSUES*).

3. COMMITTEE ON GOVERNMENT OPERATIONS, *OCCUPATIONAL ILLNESS DATA COLLECTION: FRAGMENTED, UNRELIABLE, AND SEVENTY YEARS BEHIND COMMUNICABLE DISEASE SURVEILLANCE* (1984).

4. Statement of Dr. Phillip Landrigan, Mount Sinai School of Medicine, to the Senate Comm. on Labor and Human Relations (Apr. 1988).

80 [D]eaths caused by work-related injuries result in more years of  
81 human life lost than those caused by cancer and heart disease  
82 combined. In fact, from ages 1 through 44, injury is the leading  
83 cause of death in the nation. The cost to our nation exceeds \$100  
84 billion annually.

85 Every day of the year an average of 32 workers die on the job,  
86 and 5,500 suffer a disabling injury. In addition, an average of 165  
87 workers die of illness that is work-related while another 1,000 new  
88 cases of work-related illness develop. The cost to our nation ex-  
89 ceeds \$50 billion annually.<sup>5</sup>

90 Behind each statistic there is a face and a family. There is more  
91 than economic loss; there is human suffering. *Faces — The Toll*  
92 *of Workplace Deaths On American Families*<sup>6</sup> tells the story of a  
93 few of those deaths, but most go untold. They are deaths Con-  
94 gress had hoped to prevent when enacting the OSH Act in 1970.  
95

### 96 III. THE CRIMINAL SANCTIONS IN THE OSH 97 ACT ARE RARELY APPLIED

98 The purpose of the OSH Act was to "assure so far as possible  
99 every man and woman in the nation safe and healthful working  
100 conditions."<sup>7</sup> To do so, the Act established a standard setting and  
101 regulatory process intended to be prophylactic. Punitive meas-  
102 ures for failure to comply were primarily contained in the civil  
103 penalty provisions of the Act.<sup>8</sup> However, the Act also included  
104 limited provision for criminal prosecution: willful violations of the  
105 Act can be prosecuted if the violation results in death.<sup>9</sup>

106 Unfortunately, even this limited tool has been extremely under-  
107 utilized. As a congressional committee recently concluded:

108 The criminal penalty provisions of the OSH Act, as presently  
109 written and as enforced by OSHA, provides no deterrent to em-  
110 ployers violating the statute. A company official who willfully and  
111 recklessly violates Federal OSHA laws stands a greater chance of  
112

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694 5. NATIONAL SAFE WORKPLACES INSTITUTE, *FACES — THE TOLL OF WORKPLACE DEATHS*  
695 *ON AMERICAN FAMILIES* 21 (April 1989).

696 6. *FACES*, *supra* note 5, was released contemporaneously with the AFL-CIO-sponsored  
697 first national day of mourning for workers killed on their jobs. The National Day of  
698 Mourning, held April 23, 1989, marked the anniversary of Congress' passage of the  
699 Occupational Safety and Health Act.

700 7. 29 U.S.C. § 6511(b) (1982).

701 8. 29 U.S.C. § 666(a)(4).

702 9. 29 U.S.C. § 666(e).

111 winning a State lottery than being criminally charged by the  
112 Federal Government for workplace safety violations.<sup>10</sup>

113 For good reasons this congressional committee concluded the  
114 likelihood of federal prosecution is slight. Between 1970 and 1988,  
115 a mere 42 cases were referred by OSHA to federal prosecutors.  
116 Of those, only 14 were prosecuted. The reasons for the scant  
117 number of prosecutions are several. First, early efforts to pros-  
118 ecute under the OSH Act were often unsuccessful. In four fed-  
119 erally prosecuted cases, either the grand jury did not return an  
120 indictment, or there was an acquittal or a hung jury. In at least  
121 two cases, the individual defendants were dismissed so that only  
122 the corporate defendant remained charged.<sup>11</sup>

123 Second, the deterrent value of a successful prosecution under  
124 the federal Act is perceived as small. The maximum penalty  
125 under the Act is a fine of \$10,000 and up to six months impris-  
126 onment. A second conviction could result in a fine of up to \$20,000  
127 and not more than one year in jail.<sup>12</sup> More important than the  
128 amount of the maximum fine available is the limited jail time  
129 that can be imposed. To federal prosecutors accustomed to seek-  
130 ing and obtaining long prison terms, six months in jail must seem  
131 short indeed. Nevertheless, while jail time is provided as an  
132 option at sentencing, the reality is, no one has ever spent a day  
133 in jail for a criminal violation of the OSH Act.<sup>13</sup> It is unclear  
134 whether a U.S. Justice Department Official has ever sought the  
135 sanction of jail time.

136 Third, federal case law defining "willful" places a heavy burden  
137 on prosecutors. Essentially, the employer's action must exhibit  
138 an intentional disregard of a standard, or a "knowing, conscious,  
139 and deliberate flaunting of the Act."<sup>14</sup> According to outgoing  
140 OSHA Assistant Secretary, John Pendergrass, before making a  
141 referral the agency reviews their records to determine whether  
142 the employer:

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703 10. HOUSE COMMITTEE ON GOV'T OPERATIONS, GETTING AWAY WITH MURDER IN THE  
704 WORKPLACE: OSHA'S NONUSE OF CRIMINAL PENALTIES FOR SAFETY VIOLATIONS at 4 (Oct.  
705 4, 1988) [hereinafter GETTING AWAY WITH MURDER].

706 11. *Id.*

707 12. However, it is the opinion of some Department of Justice officials that higher fines  
708 for violations of OSHA standards resulting in death would be available under the 1984  
709 statute, increasing the maximum fine for misdemeanors to \$200,000 for individuals and  
710 \$500,000 for corporations. 18 U.S.C. § 3623. However, that theory has yet to be tested.

711 13. GETTING AWAY WITH MURDER, *supra* note 10.

712 14. Frank Ireg, Jr., Inc. v. OSHRC, 519 F.2d 1200, 1207 (3d Cir. 1974).

143 a) had a prior history of similar violations; b) was responsible for  
 144 other injuries and/or deaths in connection with similar conduct; c)  
 145 was apprised of the hazardous conditions by recent events or some  
 146 other person; and d) lacked a safety program designed to inform  
 147 employees of hazards and methods by which those hazards could  
 148 be eliminated.<sup>15</sup>

149 Fourth, a federal OSHA inspector in the field focuses his or  
 150 her attention on whether an employer violated a standard, rather  
 151 than garnering evidence of an individual's willful misconduct.  
 152 While OSHA has a staff of industrial hygienists and safety  
 153 compliance officers, the federal government has not committed  
 154 any resources specifically to the investigation of safety crimes.  
 155 In contrast, the federal government in 1988 had 50 criminal  
 156 investigators, 20 FBI agents, and eight Department of Justice  
 157 attorneys assigned to investigate and prosecute environmental  
 158 crimes.<sup>16</sup> Unlike federal OSHA, California law provides for a  
 159 criminal bureau of investigations within California OSHA.<sup>17</sup>

160

#### IV. STATE PROSECUTORS FILL THE VOID

161

162 After a decade of federal inaction under the criminal provisions  
 163 of the Act, state prosecutors nationwide began to pursue work-  
 164 place deaths.<sup>18</sup> In 1980, prosecutors in New York charged an  
 165 employer, Warner-Lambert, and its managers with manslaughter  
 166 for the death of six employees in an explosion and fire in a  
 167 chewing-gum manufacturing plant. The grand jury indicted de-  
 168 fendants after the state presented evidence that Warner-Lam-  
 169 bert's insurance carrier had advised defendants that the use of  
 170 magnesium stearate and liquid nitrogen could result in a dust  
 171 explosion hazard. The insurance carrier recommended installation  
 172 of a dust exhaust system and modification of certain electrical  
 173 equipment. Although some work was done, defendants declined  
 174 to shut down the operation pending modifications. The evidence  
 175 showed that the cause of the explosion was related to a dust

176

177

178 15. Statement of John Pendergrass to the House Comm. on Government Operations,  
 179 Subcomm. on Employment and Housing (Feb. 4, 1988).

180 16. NATIONAL SAFE WORKPLACE INSTITUTE, ENDING LEGALIZED WORKPLACE HOMICIDE,  
 181 BARRIERS TO JOB SAFETY PROSECUTIONS IN THE U.S. (July 1988).

182 17. CAL. LAB. CODE § 6315 (West 1984).

183 18. As will be discussed *infra* in Section VI, California has been unique in its approach  
 184 to OSHA violations, with prosecutions since the early 1970s.

185

175 hazard, but the exact catalyst was the subject of considerable  
 176 speculation. As a result, the New York Court of Appeals held  
 177 that the corporation and individual defendants could not be held  
 178 criminally liable, because the triggering mechanism was not iden-  
 179 tified. The court said that despite the defendants' awareness of  
 180 the risk of explosion from the use of magnesium stearates, the  
 181 risk was "undifferentiated," and therefore the explosion was  
 182 "neither foreseen or foreseeable."<sup>19</sup>

183 In our opinion, the court in Warner-Lambert misconstrued  
 184 principles relating to foreseeability. Nationally, the decision had  
 185 a chilling effect on prosecutors contemplating use of criminal  
 186 sanctions to redress deaths caused by employer negligence.

187 Things changed drastically in June 1985, when three manage-  
 188 ment officials from Film Recovery Systems were found guilty of  
 189 murder for the cyanide poisoning of one of their employees, a  
 190 59-year-old Polish immigrant, Stefan Golab.<sup>20</sup> Film Recovery was  
 191 a processing firm that used cyanide to recover silver from film  
 192 put into large vats. The evidence showed that the managers  
 193 knew of the hazards of cyanide and were aware of the appropriate  
 194 antidote. A ventilation system had been recommended. Numerous  
 195 employees suffered nausea, vomiting, and bleeding from the nos-  
 196 trils before Stefan Golab's death. When office workers became  
 197 ill, they were protected by moving the office to a building next  
 198 door. More large vats utilized in silver recovery were crammed  
 199 into the plant area. Ironically, federal OSHA came to inspect the  
 200 facility several months before the death. Unfortunately, they  
 201 conducted only a review of the records, which were not properly  
 202 maintained, and did not inspect the plant.<sup>21</sup>

203 On February 20, 1983, Stefan Golab went into convulsions as  
 204 a result of the exposure to cyanide fumes after repeatedly going  
 12

720 19. *People v. Warner-Lambert Co.*, 51 N.Y.2d 295, 414 N.E.2d 749, 431 N.Y.S.2d 159  
 721 (1980), *cert. denied*, 450 U.S. 1031 (1981).

722 20. *People v. Film Recovery Systems*, Nos. 84-5064, 83-11001 (Cir. Ct. Cook County,  
 723 Ill., June 14, 1985), *appealed andcketed*, Nos. 85-1853, 85-1854, 85-1952, 85-1953 (1st Dist.  
 724 July 1, 1985). This case, and criminal prosecutions of OSHA violations in general, is  
 725 discussed at length in Magnuson & Leviton, *Policy Considerations in Corporate Criminal*  
 726 *Prosecutions After People v. Film Recovery Systems, Inc.*, 62 NOTRE DAME L. REV. 913  
 727 (1987).

728 21. For several years, federal OSHA had a policy favoring "records inspections." Under  
 729 that policy, where records show that the employer has fewer than average injuries and  
 730 illnesses, inspections of that operation are waived. As a result, there was an increased  
 731 incentive for employers to under-report. Fortunately, the policy was reversed in 1987.

205 into vats to remove residue. No antidote was administered. After  
206 being convicted of murder, the three managers were sentenced  
207 to 25 years in state prison. With extensive national coverage of  
208 the convictions, notice of the potential criminal prosecutions  
209 spread from courtrooms to boardrooms.

210 A number of other newsworthy prosecutions soon followed the  
211 Film Recovery case. One of the most egregious set of facts  
212 involved Pymm Thermometer. The situation at Pymm Thermom-  
213 eter was well described in the congressional report *Getting Away*  
214 *with Murder*:

215 In January 1981, a worker at the Pymm Thermometer plant in  
216 Brooklyn, New York, wrote to OSHA:

217 "Mercury is being used, gas and ovens. Please, we don't know how  
218 to describe any violations, but we are sure there are more. Please  
219 send an inspector down to see for himself. We only make the  
220 minimum wage, so at least we will know our health is okay."

221 In March 1981, OSHA inspected the Pymm plant and found serious  
222 violations. No protective gear was being used to reduce workers'  
223 exposure to mercury — no respirator masks, no aprons, and no  
224 gloves. Work surfaces were covered with mercury, and even the  
225 area where workers ate their lunch was contaminated with mer-  
226 cury. OSHA issued a citation, assessed a fine of \$1,400, and set a  
227 deadline of October 1981 for the company to clean up the factory.  
228 However, over the next few years, OSHA regularly extended the  
229 compliance deadline.

230 In 1984, the New York City Department of Health was alerted by  
231 a local doctor to elevated levels of mercury in the body of a Pymm  
232 worker. The New York City Health Department went to the Pymm  
233 factory, inspected it, conducted tests, found violations of the health  
234 code and discovered elevated levels of mercury in the workers.

235 In October 1985, tipped off by a former Pymm worker, an OSHA  
236 inspector discovered a hidden cellar operation at the Pymm plant  
237 — a cellar virtually without ventilation, filled with broken ther-  
238 mometers, with pools of mercury on the floor, and noxious vapors  
239 in the air, which produced permanent brain damage in one em-  
240 ployee, Vidal Rodriguez, and exposed many others to serious health  
241 risks.<sup>22</sup>

242 Based upon these facts, the Brooklyn District Attorney and  
243 New York Attorney General prosecuted Pymm Thermometer and  
244 its owners and managers for criminal assault and reckless en-

245 dangerment for exposing employees to mercury.<sup>23</sup> After a four-  
246 week trial, the jury was quick to convict, but the trial judge set  
247 aside the conviction, on grounds of preemption.<sup>24</sup>

248 *Chicago Magnet Wire*,<sup>25</sup> like *Film Recovery*, was prosecuted by  
249 the Cook County, Ill., District Attorney. The charge involved not  
250 a death but, rather, exposure of 42 employees to various hazard-  
251 ous substances during the coating of wire. Charges filed included  
252 aggravated battery, reckless conduct, and conspiracy.

253 Aside from the prosecutions in California, which are based on  
254 unique criminal provisions for OSHA violations, perhaps a dozen  
255 other prosecutions for workplace safety violations have occurred  
256 across the country since 1985.<sup>26</sup> However, the momentum for  
257 criminal prosecutions has been delayed, if not derailed, by the  
258 contention that the existence of the federal OSHA law preempts  
259 state criminal prosecutions.  
260

V THE PARADOX OF APPELLATE DEFERENTIAL

261 The Appellate Division of the New  
262 York Supreme Court subsequently  
263 overturned the trial judge's ruling and  
264 re-instated the jury verdict.  
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266 *People v. Pyram Thermostat Corp.*  
267 App. Div. N.Y. Sup. Ct. 2d Dep. 25 1989,  
268 N.Y. Law Journal 25 10 1989.

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735 24. *Id.*  
736 25. *People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 534 N.E.2d 962, cert. denied  
737 sub nom. *ASTA v. Illinois*, 53 U.S.L.W. 3202 (U.S. Oct. 3, 1989).  
738 26. Reported cases include *Wisconsin ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 425  
739 N.W.2d 21 (Wis. Ct. App. 1988) (prosecution of a fireworks manufacturer for reckless  
740 homicide, based upon knowledge of numerous fire hazards); *People v. Hegedus*, 169 Mich.  
741 App. 62, 425 N.W. 2d 729 (1988), rev'd, 432 Mich. 598, 443 N.W.2d 129 (1989) (cable TV  
742 splicer's supervisor was charged with involuntary manslaughter for the carbon monoxide  
743 poisoning of the slicer in a defective truck); and *Sabine Consol., Inc. v. Texas*, 756 S.W.2d  
744 865 (1988) (company and its managers charged with negligent homicide for two trenching  
745 deaths).

273 employees of the longstanding protections provided by state crim-  
274 inal law.<sup>27</sup>

275 Yet, so some courts have ruled.<sup>28</sup>

276 The basic argument of the defendants is that § 18 of the OSH  
277 Act<sup>29</sup> expressly preempts state prosecution under a general crim-  
278 inal statute for a death arising out of a working condition over  
279 which federal OSHA has jurisdiction, unless the state has a  
280 federally approved plan that allows such prosecution. Section 18  
281 states, in pertinent part:

282 (a) Nothing in this Act shall prevent any State agency or court  
283 from asserting jurisdiction under State law over any occupational  
284 safety or health issue with respect to which no standard is in  
285 effect under section 6.

286 (b) Any State which, at any time, desires to assume responsibility  
287 for development and enforcement therein of occupational safety  
288 and health standards relating to any occupational safety or health  
289 issue with respect to which a Federal standard has been promul-  
290 gated under section 6 shall submit a State plan for the development  
291 of such standards and their enforcement.

292 Proponents of preemption argue § 18(a) precludes states, in-  
293 cluding local prosecutors, from exercising authority over any  
294 subject for which federal OSHA has adopted a standard, unless  
295 the state has submitted, and gained approval for, a state plan.<sup>30</sup>  
296 Prosecutors believe that § 18 refers only to the process of  
297 standard-setting.<sup>31</sup> Furthermore, the savings clause found in the  
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746 27. Cohen, *Preemption: A Union Lawyer's View*, SEVEN CRITICAL ISSUES, *supra* note 2,  
747 at 43. Mr. Cohen's article is reprinted in its entirety in this volume, 17 N. KY. L. REV.  
748 149, (Fall 1989).

749 28. *Sabine Consol., Inc., v. Texas*, 756 S.W.2d 865 (1988); *People v. Hegedus*, 169 Mich.  
750 App. 62, 425 N.W. 2d 729 (1988) *rev'd*, 432 Mich. 598, 443 N.W.2d 127 (1989); *Colorado v.*  
751 *Kehran Constr. Inc.*, 13 O.S.C. 1398 (Colo. Dist. Ct. 1988); and the intermediate appellate  
752 court in *People v. Chicago Magnet Wire*, 157 Ill. App. 3d 797, 510 N.E.2d 1173, *rev'd*, 126  
753 Ill. 2d 356, 534 N.E.2d 962 (1989), *cert. denied sub nom. ASTA v. Illinois*, 58 U.S.L.W.  
754 3202 (U.S. Oct. 3, 1989).

755 29. 29 U.S.C. § 667.

756 30. Approximately half the states have their own plans.

757 31. 29 U.S.C. § (emphasis added). The Illinois Supreme Court, in *Chicago Magnet Wire*  
758 *agreed*:

759 [W]e cannot say that the language of section 19 of OSHA can reasonably be  
760 construed as explicitly preempting the enforcement of the criminal law of the  
761 States as to conduct governed by OSHA occupational health and safety standards.  
762 The language of section 19 refers only to a State's development and enforcement  
763 of "occupational health and safety standards." (29 U.S.C. § 667(a) (1982)). Nowhere

298 Act precludes an interpretation of § 18(a) that would result in  
299 express preemption. Section 4(b)(4) of the Act provides:

300 *Nothing in (the Act) shall be construed to supersede or in any*  
301 *manner affect workmen's compensation law or to enlarge or di-*  
302 *minish or affect in any manner the common law or statutory rights,*  
303 *duties, or liabilities of employers with respect to injuries, diseases,*  
304 *or death of employees arising out of, or in the course of, employ-*  
305 *ment.<sup>32</sup>*

306 We believe the right to prosecute an employer for murder,  
307 manslaughter, battery, or any similar crimes found at common  
308 law would be retained under § 4(b)(4), while defendants argue  
309 this section should be construed only as saving tort and worker  
310 compensation laws. In reconciling and interpreting these sections,  
311 an important principle is the presumption against preemption.<sup>33</sup>  
312 This presumption is particularly strong when the historic police  
313 powers of the states are at issue, where preemption is allowed  
314 only if it was the "clear and manifest purpose of Congress."<sup>34</sup>  
315 Further, the U.S. Supreme Court rejected a similar preemption  
316 argument like that made by defendants in a case regarding state  
317 action for injuries in areas regulated under the Federal Atomic  
318 Energy Act of 1954.<sup>35</sup> In light of these presumptions against  
319 preemption, and the language of §§ 18(a) and 4(b)(4), it is difficult  
320 to see how the argument of express preemption can prevail.

321 However, proponents of preemption are not limited to argu-  
322 ments regarding express preemption pursuant to § 18(a). There  
323 are three other theories under which courts may preclude state  
324 action.<sup>36</sup> Courts imply preemption, even in the absence of express  
325 legislative language, when the Congress intended to occupy the  
326 field,<sup>37</sup> when state regulation conflicts with federal law by making  
327 compliance with both laws impossible,<sup>38</sup> or when preemption can  
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764 in section 18 is there a statement or suggestion that the enforcement of State  
765 criminal law as to federally regulated workplace matters is preempted unless  
766 approval is obtained from OSHA officials.

767 126 Ill. 2d at 534 N.E.2d at 955.

768 32. 29 U.S.C. § 653(b)(4) (emphasis added).

769 33. *Roy v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).

770 34. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946).

771 35. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

772 36. The rationale applies with equal force when state legislation preempts local regu-  
773 lation.

774 37. *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1992).

775 38. *Hillsborough County, Fla. v. Automated Medical Laboratories*, 471 U.S. 707, 712-13  
776 (1985).

328 be inferred by the legislative history of the act.<sup>39</sup> None of these  
329 theories apply to the OSH Act.

330 By maintaining state authority under § 18(a), providing for  
331 submission and adoption of more stringent state plans under  
332 §§ 18(b) and 6,<sup>40</sup> and enacting the savings clause under § 4(b),  
333 Congress made it clear that it did not intend to occupy the field.

334 [T]he purpose underlying section 18 was to ensure that OSHA  
335 would create a nationwide floor of effective safety and health  
336 standards and provide for the enforcement of those standards. (See  
337 *United Airlines, Inc. v. Occupational Safety & Health Appeals*  
338 *Board*, 82 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982)). It  
339 was not fear that the States would apply more stringent standards  
340 or penalties than OSHA that concerned Congress but that the  
341 States would apply lesser ones which would not provide the nec-  
342 essary level of safety.<sup>41</sup>

343 Likewise, criminal prosecution of workplace safety violations  
344 support and complement, rather than conflict with the federal  
345 Act.

346 [P]rosecutions of employers who violate State criminal law by  
347 failing to maintain safe working conditions for their employees will  
348 surely further OSHA's stated goal of assuring) so far as possible  
349 every working man and woman in the Nation safe and healthful  
350 working conditions. (29 U.S.C. Section 651(b)(1982)).<sup>42</sup>

351 Finally, there is no legislative history to support the conclusion  
352 that Congress intended to preempt the field. Indeed, in light of  
353 the dearth of earlier prosecutions, it is unlikely that state pro-  
354 secutors were a matter of concern, and discussion of such pro-  
355 secutions is absent from the Act's legislative history.

356 We agree with the Illinois Supreme Court in *Chicago Magnet*  
357 *Wire*:

358 To adopt the defendants' interpretation of OSHA would, in effect,  
359 convert the statute, which was enacted to create a safe work  
360 environment for the nation's workers, into a grant or immunity  
361 for employers responsible for serious injuries or deaths of employ-

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777 39. *Malone v. White Motor Corp.*, 435 U.S. 497, 534-505 (1978).

778 40. 29 U.S.C. § 655.

779 41. *People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d at 73, 534 N.E.2d at 967. (The  
780 Los Angeles District Attorney joined the Brooklyn and Middlesex District Attorneys as  
781 *amicus curiae* in support of the People.)

782 42. *Id.* at 73, 534 N.E.2d at 969.

362 ees. We are sure that that would be a consequence unforeseen by  
363 Congress.<sup>43</sup>

364 We believe the decisions in *Chicago Magnet Wire* and *Wisconsin*  
365 *ex rel. Cornellier v. Black*<sup>44</sup> bode well for a successful resolution  
366 of the preemption question.<sup>45</sup>

367 Fortunately, prosecutions under California law do not need to  
368 await resolution of the preemption issue.

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#### VI. THE LOS ANGELES DISTRICT ATTORNEY'S OSHA PROSECUTION PROGRAM

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43. *Id.*

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44. 144 Wis. 2d 745, 425 N.W.2d 21 (Wis. Ct. App. 1988)

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45. We note that the U.S. Department of Justice in a letter to Congressman Tom Lantos dated December 9, 1988, opined that they, "see nothing in the OSH Act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by State criminal laws of general applicability." The letter is reproduced in SEVEN CRITICAL ISSUES, *supra* note 2, at B3-B6 (1989). See also the well-reasoned analysis of this preemption question in Note, *Getting Away With Murder: Federal OSHA Preemption of State Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535 (1987).

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46. CAL. LAB. CODE § 6425 (West 1977):

Any employer, and every employee having direction, management, control, or custody of any employment, place of employment, or other employee, who willfully violates any occupational safety or health standards, order, or special order, or section 25910 of the Health and Safety Code, and that violation caused death of any employee, or caused permanent or prolonged impairment of the body of any employee, shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000), or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by fine of not more than twenty thousand dollars (\$20,000) or by imprisonment for not more than one year, or both.

47. CAL. LAB. CODE § 6423(a) (1973):

Except where another penalty is specifically provided, every employer, and every officer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or other employee, who does any of the following shall be guilty of a misdemeanor: (a) Knowingly or negligently violates any standard, order, or special order, or any provision of this division, or of any part thereof in, or authorized by, this part of the violation of which is deemed to be a serious violation pursuant to Section 6432.

378 are incorporated in California's state plan. Additionally, Penal  
379 Code § 385 makes it a misdemeanor to work within six feet of a  
380 high-voltage line.<sup>48</sup>

381 Under the Labor Code sections, a supervisor or management  
382 official who exercises responsibility, management, custody, or  
383 control of the place of employment can be charged in addition to  
384 the corporate employer. Pursuant to these sections, California  
385 prosecutors long have charged corporate and individual employ-  
386 ers for OSHA violations. However, nowhere have the prosecu-  
387 tions been as fully institutionalized as in the Los Angeles District  
388 Attorney's Office.

389 In December 1984, Los Angeles District Attorney Ira Reiner  
390 established the first occupational safety and health section in a  
391 local prosecutor's office in the country. Initially, the OSHA Sec-  
392 tion relied upon referrals from Cal-OSHA, the state agency with  
393 responsibility for occupational safety and health. After several  
394 months, the District Attorney concluded a more aggressive pro-  
395 gram was needed to identify and to investigate cases potentially  
396 appropriate for criminal prosecution. Letters were sent to all  
397 police chiefs, and the County Sheriff, asking that all occupational  
398 fatalities be investigated as potential homicides. A one-day oc-  
399 cupational fatality investigation seminar was conducted for ap-  
400 proximately 80 homicide investigators. Subsequently, training  
401 tapes on OSHA fatality investigations were prepared and dis-  
402 tributed county-wide to law enforcement.

403 In September 1985, a program was initiated in which a deputy  
404 district attorney and an investigator are on call 24 hours a day,  
405 seven days a week, to respond to the scene of traumatic occu-  
406 pational fatalities in Los Angeles County. District Attorney per-  
407 sonnel are notified by law enforcement, the fire department, or  
408 the Coroner's Office. We in turn notify Cal-OSHA.<sup>49</sup> The program  
409 is known as the "roll-out" program and is the linchpin of the  
410 District Attorney's OSHA prosecution efforts.

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612 48. CAL. PENAL CODE § 385(b) (West 1988):

613 Any person who either personally or through an employee or agent, or as an  
614 employee or agent of another, operates, places, erects, or moves any tools, machin-  
615 ery, equipment, material, building or structure within six feet of a high-voltage  
616 overhead conductor is guilty of a misdemeanor.

617 49. Between July 1987 and May 1989, while federal OSHA exercised jurisdiction for  
618 private-sector enforcement, we notified federal OSHA.

411 Upon arrival at the scene, the responsibility of the deputy  
412 district attorney and district attorney investigator is to obtain  
413 the necessary physical and testimonial evidence to determine  
414 whether the fatality was due to employee negligence, was an  
415 accident, or was the result of a criminal act of the employer.  
416 Without prompt investigation, important physical evidence can  
417 be lost. Of even greater concern is the fact that in most cases  
418 key witnesses continue working for the employer. If statements  
419 are not promptly obtained from such witnesses, their concern  
420 about the death of a worker may be superseded by their own  
421 concern for job security.

422 Since establishment of the OSHA Section, District Attorney  
423 personnel have responded to more than 140 workplaces. At many  
424 of the locations, there were multiple deaths. Twenty-five criminal  
425 cases had been filed by the Los Angeles District Attorney as of  
426 May 1989. Most of the cases involve multiple defendants. More  
427 than 15 other cases investigated by the Los Angeles District  
428 Attorney have been filed by local city attorneys with authority  
429 for misdemeanor prosecutions in their jurisdiction. All but five  
430 of the cases filed by the Los Angeles District Attorney's Office  
431 involve fatalities. Of the nonfatal cases, one concerned a chlorine  
432 leak that sent more than 80 people to the hospital.<sup>50</sup> Approxi-  
433 mately half of those hospitalized were students and teachers from  
434 a nearby school. Another nonfatality prosecution was due to  
435 safety violations at a refinery<sup>51</sup> and a third at a metal forging  
436 plant.<sup>52</sup> Both resulted in third-degree burns to workers. A fourth  
437 filing was for amputation of fingers on a punch press.<sup>53</sup> A recent  
438 case involved an 18-foot unshored trench cited by OSHA as a  
439 willful violation. We filed even though the trench had not col-  
440 lapsed and no one was injured.<sup>54</sup> Deaths from unshored trenches  
441 are so frequent that it is very important to prosecute whenever  
442 we learn of a violation in order to maximize the deterrent effect.

443 The first involuntary manslaughter case filed by the OSHA  
444 Section was against Michael Maggio.<sup>55</sup> Maggio was president of

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319 50. *People v. Dial Corp.*, No. 87-M00549 (Feb. 21, 1986).

320 51. *People v. American Plant Services*, No. 31296587.

321 52. *People v. Weber Metals*, No. 89M04226 (Apr. 10, 1989).

322 53. *People v. Inwesco*, No. 88M17974 (Dec. 29, 1989).

323 54. *People v. Pagnborn Plumbing Corp.*, No. 89M00594 (June 15, 1989).

324 55. *People v. Maggio*, No. A780779 (Mar. 26, 1986).

445 a small drilling company and was personally present when a shaft  
446 for an elevator was being drilled. At approximately 15 feet in  
447 depth, an obstruction was hit. Maggio directed the victim to go  
448 to the bottom of the shaft and remove the obstruction. After  
449 doing so, the victim was lifted out of the shaft. Drilling continued  
450 with a 16-inch-diameter drill bit. At about 33 feet, another ob-  
451 struction was hit. Maggio again sent the victim down to remove  
452 the obstruction. The victim was lowered by cable to the bottom  
453 of the hole with his foot inserted in a sling. The air was not  
454 tested, the walls or sides of the hole were not encased or shored,  
455 and the victim was not placed in a safety harness. Almost  
456 immediately, the victim went into convulsions. Firefighters were  
457 called. When they arrived, they sought to blow fresh air into the  
458 hole. Maggio told them they could not do so since the walls of  
459 the well were not encased and might collapse, burying the victim.  
460 By the time the victim was removed, he was dead.

461 After the defendant was held to answer at a preliminary  
462 hearing, he pleaded nolo contendere to the charge of involuntary  
463 manslaughter. He was sentenced to 60 days in county jail and  
464 required as a condition of probation to adopt and implement a  
465 comprehensive accident prevention plan for his company.

466 Two other involuntary manslaughter cases involved deaths  
467 caused by unshored excavation. In *People v. Gonterman*,<sup>56</sup> Gon-  
468 terman was the manager of a trenching company and was present  
469 when a cave-like excavation was made under a street with no  
470 shoring. A series of small cave-ins partially refilled the excava-  
471 tion. Shoring materials were present but were not of adequate  
472 size. Gonterman directed the workers to continue to dig. The  
473 entire embankment collapsed, burying the victim. After Gonter-  
474 man was held to answer at a preliminary hearing, he pleaded  
475 nolo contendere to involuntary manslaughter. He was sentenced  
476 to 90 days in county jail and required as a condition of probation  
477 to adopt and implement a comprehensive accident prevention  
478 plan.

479 In a third excavation case,<sup>57</sup> charges were filed against five  
480 defendants, including the owner and foreman of the construction  
481 firm employing the victim, the construction company, the corpo-

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92656. *People v. Gonterman*, No. A91972 (July 21, 1987).57. *People v. Hu*, No. A962219 (Jan. 6, 1988).

482 rate general contractor, and the projects soils engineer. In this  
483 case, the victim was removing dirt from a trench where footings  
484 were to be poured. The dirt apparently was in the trench as a  
485 result of a slide that had occurred the night before. While working  
486 in the trench, a 14-foot embankment immediately above the  
487 worker collapsed and buried the victim. The investigation showed  
488 that the soils report was grossly inadequate because it failed to  
489 recommend shoring for a vertical cut when exposed planes of  
490 bedrock angled toward the excavation area at almost a 45-degree  
491 angle. Despite substantial evidence of the personal knowledge of  
492 the soils engineer regarding the conditions, and warnings from  
493 the excavation contractor who did the work, the soils engineer  
494 was not held to answer to the criminal charge. As of June 1989,  
495 of the remaining defendants, one pleaded nolo contendere to a  
496 violation of Labor Code § 6423 and was sentenced. The rest await  
497 trial.

498 The fourth involuntary manslaughter case was filed against  
499 the owner of an unreinforced brick building and the contractor  
500 who was doing remodeling work on the building.<sup>58</sup> Representa-  
501 tives from the concrete coring company, who made the cuts in  
502 the walls of the building, repeatedly warned defendants that  
503 bricks should not be removed without the bricks above the cut  
504 being shored. After a portion of the bricks were so removed, the  
505 brick wall collapsed, burying the victim, who was an undocu-  
506 mented day laborer. Both defendants pleaded nolo contendere to  
507 involuntary manslaughter, were fined, required to adopt safety  
508 programs, and sentenced to 90 days in jail.

509 All of the cases filed except two, named one or more individuals  
510 as well as the corporation. One of the cases which was filed  
511 solely against a company was for an electrocution of an employee  
512 of Southern California Gas Company.<sup>59</sup> The death occurred before  
513 we instituted our roll-out program. The referral from Cal-OSHA  
514 came so late that it was impossible to adequately investigate the  
515 case to determine which individuals were responsible prior to  
516 the running of the statute of limitations.

517 The other case where no individual was charged was against  
518 eight corporations for violations of the Labor Code and Fire

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58. *People v. Wilson*, No. A954496 (July 1, 1987).

59. *People v. Southern Calif. Gas Co.*, No. M864456 (July 18, 1985).

519 Code, resulting in the death of a maintenance worker during the  
520 First Interstate Bank Building fire in May 1988.<sup>60</sup> At the time,  
521 the First Interstate Bank Building was the tallest building in  
522 Los Angeles. It was completed in 1972, before the Fire Code  
523 required sprinkler systems. Although not legally required to  
524 retrofit, the building management decided to do so, and the  
525 installation of the sprinkler system was proceeding for approxi-  
526 mately a year before the fire. Because the construction work  
527 involving the installation of the sprinkler system generated dust,  
528 between 30 and 40 false alarms occurred a month. In order to  
529 avoid the audible alarms, the electronic alarm system was mod-  
530 ified. The modification allowed lights to show alarms without an  
531 audible signal. The modification also resulted in overriding the  
532 fire safety return of all elevators to the mezzanine level.

533 When the warning alarm was bypassed, communications were  
534 by hand-held radio with engineers working in the building. The  
535 engineers were asked to check the areas in which the alarms  
536 were activated to see if there was actually a fire. It was a routine  
537 practice for the engineers to utilize the elevators in responding  
538 to an alarm.

539 The City Fire Code requires audible alarm and that the alarm  
540 immediately be transmitted from the place at which it occurs to  
541 the Fire Department. Several notices of violation were issued by  
542 the Fire Department. In December 1987, First Interstate man-  
543 agement and the Fire Department agreed on a procedure to  
544 avoid false alarms during construction or repair work by remov-  
545 ing the smoke detectors in the work area and replacing them  
546 when the work was complete. However, the procedure was not  
547 followed.

548 On May 4, 1988, installation of sprinklers was taking place  
549 during the night shift on the fourth, fifth, and 58th floors. The  
550 smoke detectors were not disconnected. Instead, the alarm sys-  
551 tem was overridden. When a series of alarms went off, a security  
552 officer asked for a maintenance person to check the 12th floor  
553 for a possible fire. Alexander Handy responded and was engulfed  
554 in flames when the elevator doors opened on the 12th floor. The  
555 fire doors to the elevator vestibule had been propped open by  
556 the cleaning crews with combustible materials, and the "fire

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557 mode" (where the elevator doors would not automatically open)  
 558 was not operative. Many other workers and tenants were trapped  
 559 for hours in the worst high-rise fire in Los Angeles history. No  
 560 individual was charged because the culpability was so diffused  
 561 amongst the various corporate defendants.

562 A major concern of critics considering the effectiveness of  
 563 occupational safety and health prosecutions has been the ability  
 564 of prosecutors to determine the culpability of higher level cor-  
 565 porate officials in large companies. Although a number of the  
 566 defendants in our cases have been small employers and super-  
 567 visors from those companies, several have been large employers.  
 568 These include Golden State Foods Company, which is the nation-  
 569 wide distributor of meat for McDonald's restaurants, and its vice  
 570 president;<sup>61</sup> GTE, a large electrical supplier;<sup>62</sup> and one of the  
 571 largest metal processors in the Southwest.<sup>63</sup>

572 Deaths resulting in prosecution include several for violation of  
 573 California requirements for a lockout device or some means of  
 574 preventing inadvertent movement of equipment during cleaning  
 575 and operation. Those deaths include situations where an individ-  
 576 ual was literally ground up in a meat blender;<sup>64</sup> crushed to death  
 577 in a poultry blender;<sup>65</sup> and cut in half in a steel scrapping  
 578 machine.<sup>66</sup>

579 Four cases have been filed in Los Angeles County based on  
 580 electrocutions, where an individual was allowed to work too close  
 581 to a high-voltage line. In one of those cases, the evidence showed  
 582 that the tree-trimmers employed by defendants were not trained  
 583 regarding the dangers of touching anything that fell on high  
 584 voltage lines. Moments before the victim was electrocuted, a  
 585 fellow employee removed a palm frond from the line. The super-  
 586 visor was present but took no action. When the victim attempted  
 587 to remove a similar palm frond, he was electrocuted.<sup>67</sup> The su-  
 588 pervising partner of the tree-trimming company was sentenced  
 589 to 30 days in county jail. The other partner was required to  
 590 institute a comprehensive safety program and pay a fine of \$8,500

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830 61. *People v. Golden State Foods*, No. 31386211 (June 11, 1985).

831 62. *People v. GTE Prod. Corp.*, No. M270690 (Feb. 6, 1986).

832 63. *People v. Reliance Steel*, No. S34359 (July 22, 1985).

833 64. *Golden State Foods*, No. 31386211 (T.C. 1985).

834 65. *People v. California Pacific Foultry, Inc.*, No. M139709 (Jan. 27, 1986).

835 66. *People v. Star Scrap Metal Co.*, No. M96482 (Jan. 31, 1986).

836 67. *People v. Lymon*, No. M48042 (Oct. 24, 1985).

629 on guarding and safety training and to develop a model safety  
630 and health program, which includes:

- 631 (a) employment of a full time, qualified safety and health profes-  
632 sional;  
633 (b) designation of a plant safety chairperson;  
634 (c) creation of a comprehensive joint employer-employee health and  
635 safety committee;  
636 (d) a requirement for a safety consultant to conduct a detailed job  
637 safety analysis for each piece of equipment;  
638 (e) daily safety inspections;  
639 (f) a prohibition on the insertion of cardboard in steel slitters; and  
640 (g) detailed training requirements.<sup>69</sup>

641 Thus far, only two prosecutions have been based on health  
642 hazards in the workplace. These were against Dial Corporation,<sup>70</sup>  
643 for a chlorine exposure, and *People v. Federated-Weiner Metals,*  
644 *Inc.*,<sup>71</sup> for lead exposures. However, several State Hazardous  
645 Waste Control Act prosecutions for illegal disposal of asbestos  
646 have involved the exposure of employees to asbestos. In one such  
647 asbestos case,<sup>72</sup> the defendant was sentenced to six months in  
648 jail. We anticipate that over the next several years there will be  
649 a substantial number of prosecutions for illegal exposure of  
650 workers to asbestos (in violation of various asbestos business  
651 practice requirements set forth in the California Labor Code and  
652 California Business and Professions Code) and other hazardous  
653 substances. Further, the provisions of California's Proposition 65,  
654 which prohibits discharges of known carcinogens and reproduc-  
655 tive hazards into drinking water and also requires all persons to  
656 warn individuals exposed to such hazards, went into effect as to  
657 the first group of substances listed in February 1988.<sup>73</sup> It goes  
658 into effect as to the warning requirement for specific substances  
659 12 months after they are identified by the state as known  
660 carcinogens or reproductive toxins. Eighteen months after such  
661 listing, the discharge of such substances is prohibited where it  
662 may contaminate drinking water. We anticipate utilizing the  
663 provisions of Proposition 65 in conjunction with the California  
664 Worker's Right to Know Law.

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69. *Id.*

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70. See *supra* note 50 and accompanying text.

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71. *People v. Federated-Weiner Metals*, (May 23, 1989).

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72. *People v. Industrial Salvage, Inc.*, No. 790399 (Oct. 8, 1989).

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73. CAL. HEALTH & SAFETY CODE § § 25249.5-25249.13 (West 1986.)

## VII. CONCLUSION

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None of the cases prosecuted by the OSHA Section involved intentional deaths. They were all the result of either a reckless or negligent act, or a failure to act. Nonetheless, in each case the defendant violated his duty of care to another human being. Under California law, the acts or omissions were criminal. The deaths or injuries were not accidents.

It is our belief, confirmed by the comments of numerous safety engineers and industrial hygienists throughout the County of Los Angeles, that the Los Angeles District Attorney's Occupational Safety and Health enforcement program has made a substantial difference in convincing corporate managers and supervisors that safety in the workplace should be given high priority. We believe this is true of similar prosecution programs across the country.<sup>74</sup> The number of prosecutions may be small, but, like a barking dog, their very presence may deter thousands of violations.

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74. Strong commitments to OSHA prosecutions also have been made by prosecutors in Cook County, Ill.; Brooklyn, N.Y.; Milwaukee, Wis.; and Austin, Tex.

## The Job Safety and Health Act of 1989

### Title One: Joint Worker/Management Committees

- A. Worker/Management Committees must be authorized to:
  - 1. Stop work until hazardous conditions are abated.
  - 2. Review appointment and employment of safety and health personnel.
  - 3. Conduct monthly inspections.
  - 4. Obtain employer's information concerning safety and health practices.
  - 5. Investigate accidents.
- B. Worker participation must be legitimate.
- C. Committee members must receive sufficient training.
- D. All businesses with eleven or more employees must designate a safety and health officer.

### Title Two: Rights of Victims and Whistleblowers

- A. Victims must have:
  - 1. The right to obtain copies of OSHA investigative files and citations quickly and free of charge.
  - 2. The right to participate in appropriate deliberations and adjudicative processes, personally or through their representatives, as proposed in the Construction Safety and Health Improvement Act, S. 2518.
- B. Whistleblowers must have:
  - 1. The right to disclose hazards which violate federal law or threaten health and safety.
  - 2. The right to participate in a federal agency proceeding relating to the dangerous activities of an employer.
  - 3. The right to refuse to perform dangerous work, as proposed in the Uniform Health and Safety Whistleblower Act, S. 2095.

### Title Three: Civil and Criminal Penalty Structures

- A. Civil penalty changes.
  - 1. Minimum penalty increases should:
    - a. Adjust all civil penalties for inflation (a maximum willful violation penalty would be increased from \$10,000 to \$29,700).
    - b. Tie future penalties to the cost-of-living index, as proposed in the Federal Civil Penalties Inflation Adjustment Act, S. 1014.
  - 2. NSWI recommends penalty increases of:
    - a. \$50,000 (up from \$10,000) for a willful violation.
    - b. \$10,000 (up from \$1,000) for a serious violation.
- B. Penalty settlement guidelines.
  - 1. Penalty reductions must not exceed 30%.
  - 2. Settlement discussions must not occur until after abatement of hazardous conditions.

3. Written rationalizations for any reduction must be made available to all concerned parties.
  4. Settlements over \$100,000 should be entered into U.S. District Court records.
- C. Criminal penalties.
1. Current maximum fine of \$10,000 and a six month prison sentence for an individual or a corporation are too weak.
  2. An increased fine of \$250,000 for an individual and \$500,000 for a corporation (as proposed by former Assistant Attorney General William Weld) should set the new standard.
- D. Willfulness.
1. The current willfulness standard, requiring an employer to have a history of previous citations, and subsequently to have a repeat violation involving a fatality, makes it very difficult to convict serious offenders.
  2. A new definition of willfulness, based on the California penal code, should be adopted.
- E. Reckless endangerment.
1. A new standard for reckless endangerment should be based on the following criteria:
    - a. Any violator with one serious or willful violation during the previous four years would potentially be liable of reckless endangerment.
    - b. Willfulness would not be considered in applying the reckless endangerment test.
    - c. Reckless endangerment would carry a maximum fine of \$100,000 and a prison sentence of one-to-five years.
- F. Fatalities.
1. Increase penalties for violations involving fatalities to a maximum prison sentence of 20 years, as proposed in S. 2518.

#### Title Four: Public Welfare Cost Recovery

- A. In cases where federal funds provide support for victims of job-related injury or illness, the government should litigate to recover costs from employers for standards-related violations.
- B. The Departments of Labor and Justice would litigate under this provision.

#### Title Five: Rights of Local and State Governments

- A. Current case law discourages a state or local government from pressing criminal charges against an employer in a federally-regulated OSHA state.
- B. Federal preemption of state or local laws, including criminal laws, which provides more stringent job safety and health standards should be prohibited, as proposed in S. 2518.

#### Title Six: State-Plan States

- A. State-Plan States should be encouraged to experiment in developing safer workplaces by providing a grant program for special initiatives.
- B. The Secretary of Labor should develop standard reporting measures for State-Plan States and make reports available to the public.
- C. Workers in State-Plan States should have the right to demand inspections by federal officials when state inspections fail to eliminate hazardous conditions.
- D. The Secretary of Labor should terminate inadequate State-Plan programs.

### Title Seven: Safety and Health Standards

- A. The revision of existing standards and promulgation of new standards lags far behind sound scientific knowledge.
- B. The Secretary of Labor's responsibility to promulgate standards should be strengthened by:
  - 1. Reasserting the right to propose individual standards.
  - 2. Reasserting the right to promulgating consensus standards.

### Title Eight: Licensed Technicians

- A. In oversight of all high-risk activities, the law should:
  - 1. Require licensing of all key supervisory personnel.
  - 2. Provide general definitions of the work functions to be supervised by licensed technicians.
- B. An employer's failure to comply with this provision should constitute a serious violation.

# HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE

P.O. BOX Y, JUNEAU 99811

(907) 465-3892



November 27, 1989

## M E M O R A N D U M

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair  
House Labor and Commerce Committee

Re: Van Biene V. Era Helicopters, Inc.

Attached is a copy of the Van Biene case, an August 18, 1989 Alaska Supreme Court ruling regarding liability for workplace safety programs.

The question before the Supreme court was whether the lower court erred when it held that workers' compensation insurers were covered by the "exclusive remedy" of workers' compensation as far as liability for negligence in performing a safety inspection was concerned.

In Van Biene, the Supreme court ruled that Employers of Wausau, the workers' compensation carrier for Era Helicopters, Inc., did not fall under the "exclusive remedy", and that nothing in Alaska statutes prevents an employee from suing a compensation carrier for negligent performance. The Supreme court reversed the dismissal of the claims against Wausau and remanded them back to the superior court for further proceedings.

In doing so, the court noted that in states where insurers were included in the "exclusive remedy" insurers were specifically included in the workers' compensation statutes, along with employers. That is not the case under Alaska statute where insurers and employers are defined under two different sections of law.

Concern has been expressed that the Van Biene decision will discourage insurers from offering risk management services or workplace safety inspections. Specific concern has been expressed about the adverse effects of the Van Biene decision on safety programs developed by reciprocal insurers such as the Alaska Timber Exchange.

The potential effect of the Van Biene decision on workplace safety programs will be discussed during our November 30, 1989 public hearing.

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## I. INTRODUCTION

This appeal arises out of litigation by the estates of two airline pilots who died in an airplane crash while employed by ERA Helicopters, Inc. (ERA). The estates seek recovery against ERA for the intentional tort of "overworking" the two deceased pilots and against Employers Insurance of WAUSAU (WAUSAU), ERA's workers' compensation carrier, for its negligence in the inspection, certification, authorization, and approval of ERA's working conditions.

For the reasons set forth below, we affirm the trial court's dismissal of the claims against ERA and the claims against the "Doe defendants." We reverse the trial court's dismissal of the claims against WAUSAU.

## II. FACTS AND PROCEEDINGS

Stanley Thomson and Michael Van Biene were pilots employed by ERA. At 2:00 a.m. on August 20, 1985, ERA dispatched them to fly a Learjet to Gulkana, Alaska. By completing this mission, Thomson and Van Biene would necessarily violate the Federal Aviation Administration's (FAA) flight time and duty regulations. The Learjet crashed on approach to the Gulkana airport, killing both pilots. WAUSAU paid compensation for the pilots' deaths.

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argues that the complaint only alleges negligence against it as an employer, and that therefore, the claim is barred by the exclusivity provision of the Alaska workers' Compensation Act, AS 23.30.055.

The estates argue that WAUSAU is a separate legal entity from the employer and thus may be sued for its own negligence as a third party pursuant to AS 23.30.015(a). In response, WAUSAU argues that the exclusivity doctrine also protects it from such a negligence claim and that regardless of any immunity protection, WAUSAU did not owe a duty to the decedents to inspect, certify, authorize or approve ERA's working conditions.

The superior court granted ERA and WAUSAU's motions to dismiss under Civil Rule 12(b)(6) on the ground that the Alaska Workers' Compensation Act provides the workers' exclusive remedy against an employer or its compensation insurer. The estates appeal.

### III. DISCUSSION

#### A. Did the Court Err in Dismissing the Estates' Claims Against ERA under Civil Rule 12(b)(6) Instead of Treating It as One for Summary Judgment Under Civil Rule 56?

The estates argue that the trial judge should have treated ERA's motion to dismiss as one for summary judgment because ERA submitted affidavits and the court did not

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expressly or affirmatively rule that it was not considering this evidence outside the pleadings.

Civil Rule 12(b) states that when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56." When material outside the pleadings is presented to the trial court, a motion to dismiss "is automatically converted into one for summary judgment unless the court 'affirmatively' and 'expressly' rules that it is not considering evidence outside of the pleadings." Adkins v. Nabors Alaska Drilling, Inc., 609 P.2d 15, 21 n.11 (Alaska 1980).

From our review of the remarks of the judge and counsel during oral argument, we conclude that Judge Ripley expressed his intention not to rely on the affidavits when granting the motion to dismiss. Consequently, the court correctly dismissed the claims under Rule 12(b)(6) rather than Rule 56.

B. Did the Court Err in Holding that the Estates' Claim Against ERA Was Barred by the Exclusivity Doctrine of AS 23.30.055?

1) Standard of Review

"A motion to dismiss for failure to state a claim is viewed with disfavor and should rarely be granted." Mattingly v. Sheldon Jackson College, 743 P.2d 356, 359

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(Alaska 1987) (citing Knight v. American Guard & Alert, Inc., 714 P.2d 788, 791 (Alaska 1986)). "In determining the sufficiency of the stated claim it is enough that the complaint set forth allegations of fact consistent with and appropriate to some enforceable cause of action." Linck v. Barokas & Martin, 667 P.2d 171, 173 (Alaska 1983). The court "is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Mattingly, 743 P.2d at 359 (emphasis deleted).

. 2) Application of Exclusivity Doctrine to Intentional Torts of the Employer

Under AS 23.30.055, the liability of an employer under the Workers' Compensation Act "is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee." See Wright v. Action Vending Co., Inc., 544 P.2d 82, 85 (Alaska 1975).

In Elliott v. Brown, 569 P.2d 1323 (Alaska 1977), we recognized an exception to the exclusivity doctrine in cases of intentional torts committed by a fellow employee or employer. We found that the socially beneficial purposes of the workers' compensation law "would not be furthered by allowing a person who commits an intentional tort to use the

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compensation law as a shield against liability." Id. at 1327. The court concluded that the fellow employee's assault on the worker fell outside the purview of the accidental injuries covered by the act. The worker was therefore permitted to pursue a common-law tort action against the fellow employee.<sup>1</sup> Similarly, in Stafford v. Westchester Fire Insurance Co., 526 P.2d 37, 43 n.29 (Alaska 1974), overruled on other grounds, 556 P.2d 525 (Alaska 1976), we noted that:

In suits for other intentional torts committed by the employer, recovery is permitted on the theory that the harm is not accidental and therefore not covered by the act. A stiff burden is placed on the employee to demonstrate intent to harm by the employer, or in some cases by his agents.

The estates argue that the trial court erred in dismissing their claims against ERA since they allege an intentional tort which is not barred by the exclusivity doctrine. ERA argues that the complaint fails to allege an intentional tort by ERA.

The estates' Second Amended Complaint alleges that ERA violated a number of FAA regulations and that "given the

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1. The Elliott court, however, held that the corporate employer was not liable in tort on a theory of respondeat superior for the intentional tort of its supervisor. 569 P.2d at 1325-26.



statute, or other misconduct of the employer short of genuine intentional injury.

. . .

Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.

2A A. Larson, Larson Workmen's Compensation § 68.13, at 13-8 to -26 (1983 & Supp. 1985) (footnotes omitted).

In Stafford we recognized this majority rule. As the court explained, suits for intentional torts have been permitted on the grounds that the harm is not accidental but "[a] stiff burden is placed on the employee to demonstrate intent to harm by the employer, or in some cases by his agents." 526 P.2d at 43 n.29.

Even under a liberal interpretation of the allegations made by the complaint, the estates fail to allege an intent to harm the pilots so as to overcome the exclusivity provision of the act. In conclusion, we affirm the trial court's dismissal of the claims against ERA under Rule 12(b)(6).

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- C. Did the Court Err in Holding that the Exclusivity Doctrine Contained in AS 23.30.055 Bars a Negligence Action Against the Employer's Workers' Compensation Carrier, WAUSAU?

The estates argue that WAUSAU is a separate legal entity from the employer and thus may be sued for its own negligence as a third party pursuant to AS 23.30.015(a). In response, WAUSAU argues that the exclusivity doctrine protects it from such a negligence claim.

~~The issue of whether a workers' compensation carrier can be sued for its own negligence in inspecting the employer's workplace is a question of first impression in Alaska. This court considered a related but distinctly different issue in Stafford. The court considered whether an employee was barred from suing his or her employer's compensation carrier for intentional torts. Stafford had alleged that the carrier wilfully and maliciously withheld compensation benefits resulting in infliction of emotional distress. The court concluded that "[u]nder our compensation act the carrier is considered a separate entity from the employer." 526 P.2d at 42. The court, however, then noted:~~

Stafford recognizes that the principle of subrogation may be utilized to conclude that the carrier derives immunity from the exclusive remedy provisions in a damage action brought by the employee. However, Stafford argues that this immunity should not extend to intentional torts. This is supported by the decision of the Supreme Court of

California in Unruh v. Truck Insurance Exchange, in which suit for an intentional tort by an injured employee against her employer's compensation carrier was allowed.

Id. (footnote omitted). After discussing the reasoning in Unruh v. Truck Insurance Exchange, 498 P.2d 1063 (Cal. 1972), the court concluded:

We believe that AS 23.30.155 was envisioned by Alaska's legislature to cover situations where the employer or carrier negligently, or wilfully, failed to make timely compensation payments, but that this section was not intended to operate as the exclusive remedy for all intentional wrongdoings. In so holding we adopt the reasoning of Unruh. In circumstances where there is tortious conduct that goes beyond the bounds of untimely payments, the immunity from suit provided by the Workmen's Compensation Act is lost. Normally the carrier must investigate claims in order that the compensation scheme of payments for actual injuries will be properly administered. However, intentional torts committed in connection with the investigation of claims and payment thereof are not to be protected. Stafford has alleged that Westchester did more than delay in making benefit payments; he has asserted that it intentionally and maliciously misled him about his right to compensation and discouraged him from exercising his rights, resulting in emotional injury. We conclude that Stafford is not precluded, by virtue of AS 23.30.155, from a trial on the merits of his claims.

526 P.2d at 43-44.

We conclude that the Stafford court did not decide the issue in this case: whether the exclusivity provision

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bars suit against an insurance carrier for negligent inspection of an employer's workplace. First, the court did not expressly hold that the immunity extends to a carrier. Rather, the court accepted arguendo that the doctrine of subrogation might be utilized to conclude that the carrier derives immunity from the exclusive remedy provisions. However, the court held that regardless of whether such immunity existed, intentional torts committed in the investigation of claims and payment thereof were actionable. Id. at 43-44.

While Stafford relied on the reasoning of Unruh, this should not be construed as an acceptance of the California courts' interpretation of its workers' compensation scheme since the Alaska scheme differs significantly from the California scheme.<sup>2</sup> Unlike the Alaska scheme, the California statute explicitly defines "employer" to include "insurer." Cal. Lab. Code § 3850(b) (West Supp. 1987). In Unruh, this identification was held forfeited when the insurer stepped outside the proper bounds of an investigation of the nonmedical facts of the case. 498 P.2d at 1069,

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2. Unruh cites two California Court of Appeal cases holding that a carrier may not be sued for negligence in performing work place inspections. Burns v. State Comp. Ins. Fund, 71 Cal. Rptr. 326 (Cal. App. 1968); State Comp. Ins. Fund v. Superior Court (Breceda), 46 Cal. Rptr. 891 (Cal. App. 1965).

1073. Because the California statute specifically identified the insurer with the employer, the court resorted to a negligence/intentional tort distinction to hold that the insurer no longer was the employer's alter ego when it committed intentional torts.

Other jurisdictions confronting this question of third-party actions against insurers for alleged negligence in either safety inspections or medical services have reached differing results.<sup>3</sup> These decisions are of limited value since each state's statutory scheme differs greatly. We therefore turn to the specific language of the Alaska Act.

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3. For decisions allowing suit against carriers as third-parties in the absence of express statutory language, see Beasley v. MacDonald Eng. Co., 249 So. 2d 844 (Ala. 1971); Nelson v. Union Wire Rope Corp., 199 N.E.2d 769 (Ill. 1964); Fabricius v. Montgomery Elevator Co., 121 N.W.2d 361 (Iowa 1963); Andrews v. Insurance Co. of N. Am., 230 N.W.2d 371, 374 (Mich. App. 1975); Corson v. Liberty Mut. Ins. Co., 265 A.2d 315 (N.H. 1970); Rothfuss v. Bakers Mut. Ins. Co., 257 A.2d 733 (N.J. Super. App. Div. 1969); Derosia v. Duro Metal Products Co., 519 A.2d 601 (Vt. 1986).

For decisions prohibiting suit against an insurer as a third party, see Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325 (8th Cir. 1985) (Arkansas law); Gerace v. Liberty Mut. Ins. Co., 264 F. Supp. 95 (D.D.C. 1966); Mustapha v. Liberty Mut. Ins. Co., 268 F. Supp. 890 (D.R.I. 1967), aff'd, 387 F.2d 631 (1st Cir. 1967); Barrette v. Travelers Ins. Co., 246 A.2d 102 (Conn. Super. 1968); Reid v. Employers Mut. Liab. Ins. Co., 319 N.E.2d 769 (Ill. 1974); Flood v. Merchants Mut. Ins. Co., 187 A.2d 320 (Md. 1963); Matthews v. Liberty Mut. Ins. Co., 238 N.E.2d 348 (Mass. 1968).

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The Alaska Workers' Compensation Act does not mention an insurer in the exclusivity provision of AS 23.30.055, the definition of employer in AS 23.30.265(13), or in the third-party suit provision in AS 23.30.015(a). A "carrier" is defined in AS 23.30.265(5) as "a person authorized to insure under this chapter and includes self-insurers." Thus, as noted in Stafford, the Act defines "employers" and "insurers" as separate, distinct entities. 526 P.2d at 42.

Alaska Statute 23.30.015(i) subrogates an insurer to all the rights of the employer after the carrier has assumed the payment of compensation. WAUSAU argues that this provision provides them with the employers' immunity from a negligence action. Other courts have been hesitant to allow suit against a carrier due to the related problem of a subrogated carrier suing itself.<sup>4</sup> The concern is that since the carrier is subrogated to the injured employee's cause of action against a third-party tortfeasor, "if the carrier can be a third-party tortfeasor, the carrier will end by suing

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4. See Mustapha v. Liberty Mut. Ins. Co., 268 F. Supp. 890 (D.R.I.), aff'd, 387 F.2d 631 (1st Cir. 1967); Kotarski v. Aetna Cas. & Sur. Co., 244 F. Supp. 547 (E.D. Mich. 1965), aff'd, 372 F.2d 95 (6th Cir. 1967); Schultz v. Standard Acc. Ins. Co., 125 F. Supp. 411 (E.D. Wash. 1954) (Idaho law); Flood v. Merchant Mut. Ins. Co., 187 A.2d 320 (Md. 1963).

itself" -- an incongruous result that the legislature could not have intended. 2A A. Larson § 72.95, at 14-321. However, as Larson points out:

This argument has been rejected on several grounds by the courts finding carrier liability. One is that the subrogation provisions are purely procedural and thus cannot be held to modify the definition of "employer." Another is that the subrogation passage "does not deal with the subject matter" in issue, which is the question whether the employee's common-law right is taken away from him. The original Smith case invoked a sort of dual capacity doctrine, saying that the carrier was being sued not as compensation carrier but as an independent third party. All such cases made short work of the spectre of double recovery by pointing out that the carrier would of course be entitled to set off in a judgment against itself as a tortfeasor the amount of compensation paid by it as insurance carrier. And running through all these opinions was the thought that this kind of result was really not all that preposterous. Increasingly common is the spectacle of an insurance carrier acting as compensation subrogation plaintiff and as defendant insurer on a third party's automobile liability risk. Problems of conflict of interest and of public policy may arise; but no one worries much anymore about the conceptual problem whether the carrier can sue itself.

Id. at 14-322 (footnotes omitted). We similarly conclude that the subrogation provision in AS 23.30.015(i) does not bootstrap an insurer into the definition of an employer in subsection (a). We therefore conclude that there is nothing in the statutory language of the Alaska scheme which

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prevents an employee from bringing a negligence action against a carrier for negligent inspection of the employer's workplace.<sup>5</sup>

WAUSAU contends that such a result is contrary to public policy since the threat of potential tort liability will discourage carriers from inspecting employers' workplaces.<sup>6</sup> We decline to judicially amend the Act on the basis of such a policy argument. This type of policy determination is appropriately left for the legislature.

In conclusion, we find that there is nothing in the statutory language of the Alaska scheme which prevents an employee from bringing suit against a compensation carrier for the negligent performance of a safety inspection. Therefore, Judge Ripley erred in dismissing the estates' claims against WAUSAU.

5. In the absence of express legislative intent to the contrary, "[s]tatutes . . . that establish rights . . . in derogation of the common law are construed in a manner that effects the least change possible in the common law." Hugo v. City of Fairbanks, 658 P.2d 155, 161 (Alaska App. 1983) (citing 3 C. Sands, Sutherland Statutory Construction § 59.03, at 6-7 (4th ed. 1973)).

6. Some courts have extended immunity to carriers from third-party suits since they believed imposing liability on carriers would create a great disincentive to their carrying out the socially useful function of independent safety inspections. See Kifer, 777 F.2d at 1335, 1338-39; Nelson, 199 N.E.2d at 796 (Schaefer, J., dissenting); Matthews, 238 N.E.2d at 348; Kotarski, 244 F. Supp. at 558-59 (Michigan law); 2A A. Larson § 72.98.

D. Did WAUSAU Owe a Duty to the Pilots to Inspect ERA's Working Conditions in a Non-negligent Manner?

WAUSAU argues that even if a carrier is not immune from suit for its negligent inspection of an employer's work place, dismissal was proper on the alternative ground that WAUSAU owed no duty to the decedents to inspect ERA's working conditions. The estates contend that, even in the absence of contractual obligation between WAUSAU and ERA, WAUSAU may be held liable for "negligent performance of undertaking to render services" if WAUSAU actually inspected the working conditions of ERA prior to the accident.

The estates' argument is well taken. The Restatement (Second) of Torts § 324A (1965) imposes liability on a defendant to a third party when the defendant negligently performs an undertaking to render services:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

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See Adams v. State, 555 P.2d 235, 240 n.7 (Alaska 1976) (citing § 324A of the Restatement). In Adams, the court held that victims of a hotel fire had a cause of action against the state for failure to take action after fire inspectors discovered extremely dangerous fire conditions. Id. at 240-42. The court noted that "once an inspection has been undertaken the state has a further duty to exercise reasonable care in conducting fire safety inspections, and that liability will attach where there is a negligent failure to discover fire hazards which would be brought to light by an inspection conducted with ordinary care." Id. at 240. The court then cited a number of cases in which employees were allowed to sue workers' compensation carriers for negligent safety inspections.<sup>7</sup>

The second amended complaint alleges that "WAUSAU . . . did inspect, certify, authorize, and approve the working conditions of Defendants Jet Alaska, ERA and Rowan" and that WAUSAU's actions "were accomplished negligently." This language is sufficient to make out a cause of action for negligent performance of an undertaking. As a result, it would be improper to dismiss the allegations against WAUSAU

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7. Beasley, 249 So. 2d at 847; Sims v. American Cas. Co., 206 S.E.2d 121 (Ga. 1974); Nelson, 199 N.E.2d at 779; Fabricius, 121 N.W.2d at 365.

for failure to state a cause of action. We, therefore, reverse the trial court's dismissal of the claims against WAUSAU under Civil Rule 12(b)(6) and remand the issue to the trial court for further proceedings.

E. Did the Court Err in Dismissing the Allegations Against the John Doe Defendants?

We initially note that since all claims against the Doe defendants were dismissed by the trial judge, this question is ripe for review and properly before us.<sup>8</sup>

Judge Ripley dismissed the allegations against the "John Doe" defendants on the grounds that such use of fictitious defendants is not permissible under our rules of civil procedure.

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8. ROWAN contends that the issue is not ripe for review since the superior court had not entered final judgment with respect to the "John Doe" defendants. In Greater Anchorage Area Bor. v. City of Anchorage, 504 P.2d 1027, 1030 (Alaska 1972), this court stated that the "basic thrust of the finality requirement is that the judgment must be one which disposes of the entire case. . . ." "[T]he reviewing court should look to the substance and effect, rather than the form, of the rendering court's judgment, and focus primarily on the operational or 'decretal' language therein."

We conclude that since Judge Ripley's order dismisses the Does from the case, the order disposes of the entire case as to the Does and the finality requirement is thereby satisfied.

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