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Toxic Torts

The Threshold Limit Values Controversy

By Philip E. Karmel

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The establishment of safe thresholds for human exposure to toxic substances has proved to be among the most controversial issues in the environmental and occupational safety and health arena.

It is therefore of no surprise that the Threshold Limit Values (TLVs(r)) published by the American Conference of Governmental Industrial Hygienists (ACGIH(r)) have been subject to considerable controversy for at least 20 years.

This article will discuss how the TLVs are typically used in toxic tort litigation, explore the dimensions of the controversy surrounding their use, and discuss a recent industry lawsuit against ACGIH that sought an injunction prohibiting its publication of TLVs and money damages for alleged product disparagement under state law.

Setting Exposure Guidelines

From one perspective, the easiest approach to setting exposure guidelines for a toxic substance is the most draconian: ban the product containing the substance altogether. Yet even common foods such as coffee, carrots, apples, tea, peanut butter, celery, lettuce, and orange juice contain carcinogens, albeit at concentration levels that may be below any level of

practical concern.[1] Thus, even when the product is asbestos, which the U.S. Environmental Protection Agency (EPA) has determined to be a "potential carcinogen at all levels of exposure, regardless of the type of asbestos or the size of the fiber,"[2] the approach of banning the substance altogether has been criticized on the ground that "few indeed are the products that are so safe that a complete ban of them would not make the world still safer."[3]

Thus, the general approach in the United States has been to allow toxic products to be manufactured and distributed in commerce, but to establish regulations that seek to prevent risks deemed to be significant. This effort to draw a fine line between significant and insignificant risks - in combination with the inherent complexity and uncertainty of toxicology, the high cost of reducing human exposure to some substances, and the moral imperative of protecting human health - creates a potent brew of controversy under many regulatory programs over what risk should be deemed to be too small to be of public concern.

In recent years, virtually every rulemaking by the EPA, the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) regulating toxic substances has been challenged by one or more industry, environmental, labor or consumer groups on the ground that the regulation is either too stringent, or not stringent enough.

Threshold Limit Values

Against this background, it is hardly surprising that controversy has beset the effort by ACGIH, a nonprofit, private organization, to publish exposure guidelines for toxic substances encountered in the workplace. For more than 50 years, ACGIH has published these guidelines, which it calls Threshold Limit Values, in a book that it updates periodically.[4] According to the organization, the TLVs "represent conditions under which ACGIH(r) believes that nearly all workers may be repeatedly exposed without adverse health effects."[5] The controversy over the TLVs has been fueled by OSHA's efforts to incorporate the TLVs in their rulemakings.

In 1971, OSHA relied heavily on the TLVs for the year 1968 in establishing permissible exposure limits (PELs) under the Occupational Safety and Health Act of 1970.[6] Although ACGIH has updated (and generally made more stringent) many of the TLVs during the last four decades, OSHA has been slow to update its PELs on a case-by-case basis. Although OSHA sought to adopt the generally more stringent 1988 TLVs as PELs, wholesale without individualized risk and feasibility findings for each substance, the courts struck down this rulemaking as a violation of the act's substance-by-substance evaluation criteria.[7]

Nevertheless, in 1983, the TLVs found their way into the Code of Federal Regulations through a different means. In that year, OSHA promulgated the Hazard Communication Standard, which imposes requirements on employers to inform their employees of potential chemical hazards in their workplace. The regulation requires chemical manufacturers and importers to provide employees and customers with safety information, via material safety data sheets (MSDSs), about the hazardous chemicals they make or import.[8] The regulation requires that an MSDS be provided if one or more of certain criteria are met, one of which is the substance's inclusion in the "latest edition" of the TLV list published by ACGIH.[9]

The regulation contains other references to ACGIH's most recent TLVs. The rule provides that the MSDS include the "OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet, where available."[10] Finally, a chemical mixture is subject to the rule if a component could be released in a concentration that would exceed a TLV.[11]

Industry did not challenge these provisions after their promulgation by OSHA in the 1980s. Indeed, the criticism of the TLVs that began to be leveled in earnest in the late 1980s was put forward by those who claimed that many TLVs were insufficiently protective of human health and, as a result of influence by business interests, had been set at levels intended to preclude any need to spend money on new controls or product substitutes.[12]

In tort cases, attorneys for plaintiffs and defendants sought (and continue to seek) to take refuge in or repudiate the TLVs, depending on the facts of the individual dispute. If the product at issue has resulted in exposure to the plaintiff in excess of the relevant TLV, the plaintiff may argue that this is evidence of negligence and a product defect, and that punitive damages may be awarded because the TLV's publication should have put the manufacturer on notice that the product is a menace. The attorney for the product supplier may seek to shift blame to the employer on the ground that it should have provided protective equipment or used better housekeeping to reduce product exposures below the TLV. If the plaintiff's exposure to the chemical was below the TLV, the defense will seek to use this as evidence that the product at issue is not defective, any exposure was de minimis and not a proximate cause of the plaintiff's alleged injuries and, in any event, did not constitute willful, reckless conduct that should give rise to an award of punitive damages.

In light of this litigation backdrop and the incorporation of the TLVs by reference in federal regulations (and those of many states and foreign nations, as well), ACGIH-sponsored revisions to its TLVs have, at times, been the occasion of considerable controversy. Perhaps because revisions generally result in greater stringency, the balance appears to be shifting so that, at this point, the principal critics of ACGIH's process for updating its TLVs are industry trade groups.

Two recent litigation efforts are particularly prominent. First, in a case brought in 2006, the National Association of Manufacturers and other trade groups challenged OSHA's hazard communication rule, seeking to use ACGIH's 2006 update to its TLV list as grounds to invalidate the rule. The U.S. Court of Appeals for the District of Columbia Circuit dismissed the suit as barred by the 60-day statute of limitations, holding that the periodic revisions to the TLV list do not change the text of the rule, which has remained unchanged in relevant respects for almost 20 years.[13]

Second, in a case that remains pending in the U.S. District Court for the Middle District of Georgia, two industry trade groups and other business interests have sued ACGIH itself in an effort to prevent the organization from promulgating new or revised TLVs for silica, copper, n-propyl bromide and diesel particulate matter.[14] The court dismissed all federal claims against the organization on the ground that, as a private entity, it was not subject to such statutes as the Federal Advisory Committee Act, the Administrative Procedure Act, and the Occupational Safety and Health Act.[15] The court also held that ACGIH had a First Amendment right to publish its standards, precluding any injunction as an improper prior restraint on speech.[16] The court nevertheless denied ACGIH's motion to dismiss a claim seeking damages under Georgia's Uniform Deceptive Trade Practices Act, holding that plaintiffs had pleaded a valid cause of action under that act by alleging that the TLVs constituted false and misleading product disparagement.[17] The court order allowed the defendants to take discovery on its claim.

Conclusion

The federal standard-setting processing for establishing permissible exposure levels to hazardous substances in the workplace has been interpreted as requiring time-consuming individualized substance-by-substance rulemakings. The extraordinary resources required for each rulemaking effectively precludes any specific regulation of the thousands of chemicals that have been identified as toxic or potentially carcinogenic in the peer-reviewed scientific

literature.[18] As a result of the ossification of the federal rulemaking process,[19] most updates to exposure guidelines occur outside the formal rulemaking process through publications by ACGIH and other private organizations and new standards set by California and other states and even foreign governments, who have begun to surpass the United States in the stringency of their standards for many chemicals.

The controversies over how standards should be set can be expected to intensify with the growth of new information as to the potential toxicity of substances in commerce and the likelihood that the next administration will be under significant pressure from Congress to strengthen regulatory standards.

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Endnotes:

1. Richard J. Pierce Jr., "Causation in Government Regulation and Toxic Torts," 76 Wash. U. L. Q. 1307, 1314-16 (1998).

2. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1207 (5th Cir. 1991).

3. Id. at 1217 (striking down EPA's regulation banning asbestos products, which remain on the market today).

4. The most recent edition is titled "2007 TLVs(r) and BEIs(r)" (ACGIH Publication #0107) and may be purchased on the organization's Web site (www.acgih.org) for $39.95.

5. www.acgih.org/TLV/ (visited Dec. 26, 2007).

6. 29 U.S.C. 655(a).

7. *AFL-CIO v. OSHA,* 965 F.2d 962 (11th Cir. 1992).

8. 29 C.F.R. 1910.1200(d)-(g).

9. 29 C.F.R. 1910.1200(d)(3)(ii).

10. 29 C.F.R. 1910.1200(g)(2)(vi).

11. 29 C.F.R. 1910.1200(d)(5)(iv) and (g)(2)(i)(C)(2).

12. Barry I. Castleman, et al., "Corporate Influence on Threshold Limit Values," Amer. J. of Ind. Med. 13:531-559 (1988); Grace E. Ziem, et al., "Threshold Limit Values: Historical Perspectives and Current Practice," J. of Occ. Med. 31:910-918 (1989); S.A. Roach, et al., "But They Are Not Thresholds: A Critical Analysis of the Documentation of Threshold Limit Values," Amer. J. of Ind. Med. 17:727-753 (1990).

13. *National Ass'n of Manufacturers v. OSHA,* 485 F.3d 1201 (D.C. Cir. 2007).

14. *International Brominated Solvents Assoc. v. ACGIH, Inc.,* 5:04-CV-00394-HL (M.D.Ga), Order at 2 (March 11, 2005).

15. Id. at 8-33.

16. Id. at 38.

17. Id. at 34.

18. John M. Mendeloff, "The Dilemma of Toxic Substance Regulation: How Overregulation Causes Underregulation at OSHA" 115-22 (1988).

19. Thomas O. McGarity, "Response, the Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld," 75 Tex. L. Rev. 525 (1997).