THE LEGAL FRAMEWORK FOR RISK MANAGEMENT

This paper discusses certain developments in the psychological and decision sciences which have influenced the legal framework for the management of technological risks in the United States.

We have defined the legal framework as consisting of two parts, a public law system or framework for managing technological risks, and a private law framework.

The public law framework for risk management (1) has developed rapidly and unsystematically over the last two decades. It includes several decision processes:

- Congressional Legislation--such as the Atomic Energy Act or the Toxic Substances Control Act--which provides agencies with mandates to regulate specific problems, along with diverse requirements and guidance for use in decisionmaking.

- Agency Regulation--such as the Environmental Protection Agency's regulatory program on toxic substances--which may include ad hoc "adjudicatory" decisions (e.g., a permit decision); generically applicable regulations (e.g., information disclosure requirements for manufacturers of chemicals); numerical standards which apply to a specific risk (e.g., a chemical exposure or emissions standard); and inspection and enforcement decisions.
o Judicial Review of agency regulations, which employs statutory criteria provided by the Administrative Procedure Act and by the statute which authorized the agency regulatory action being reviewed.

The private law framework for risk management (2) provides the principles for governing private activities, many of which involve technological risks:

- **Tort Law**—which is applied in state courts and involves the judicial application of traditional concepts of rights and duties for resolving conflicts between private parties—such as the various duties imposed by the courts on a chemical company to remedy or prevent harm to the consumers of its products, to its workers, and to the general environment.

- **Contract Law**—which provides concepts for the judicial resolution of private conflicts growing out of contractual relationships which have a bearing on risk management—such as that branch of contract law which applies to insurance contracts and coverage for liability arising from product, consumer, and environmental risks.

Any private firm whose activities generate technological risks is usually subject to both public and private law requirements; with the former often being of a preventive nature and of considerable specificity, and the latter consisting of a vague set of principles whose applicability and remedial actions can only be conclusively determined by judicial decision after the adverse impacts have occurred.

Although these two frameworks differ in many respects, and considerable diversity in decisionmaking exists within each framework, both frameworks provide for decisionmaking processes on risks which involve several similar functions by each decisionmaking body:

- **Determination of which risk problems are to be dealt with or are cognizable** (e.g., what types of actual or prospective injury will be dealt with)

- **Collection of evidence or factual information, and its analysis, to reach key findings of fact as to the sources of the hazards, causal**