Bhopal aftermath

Legal complications mount

Washington

THE lawsuit filed in New York two weeks ago by the government of India on behalf of victims of last December's disaster at the Bhopal Union Carbide plant has placed on the table a complex series of legal issues that will have to be resolved before even an out-of-court settlement can be reached.

Two of the thorniest questions are whether the US district court will allow the case to proceed in the United States and, if so, whether Union Carbide will be able to countersue the Indian government. To be resolved, too, is the validity of India's claim to be the exclusive representative of the victims and the status of nearly 1,000 lawsuits filed by victims in Indian courts.

In preliminary hearings last week, Judge John Keenan refrained from showing his hand on any of these issues. But, invoking the broad discretionary powers accorded federal judges in the United States, he urged Union Carbide to make an immediate contribution of \$5-10 million for emergency relief; Union Carbide the next day agreed to turn over \$5 million. Both Keenan and the company made clear that this was not an admission of liability (or even of the US court's jurisdiction).

From the start, the Indian government has said it intended to sue Union Carbide in the United States. Although any compensation awarded by US courts for lost wages, for example, would be based on Indian standards, US courts are much more generous in their compensation for less tangible losses, such as pain and suffering, than are their Indian counterparts.

Awards in US courts are set by juries, usually more sympathetic to victims; Indian cases are heard by judges only. And Indian judges have been very reluctant to award punitive damages, except in cases of clear deliberate wrongs. US courts generally allow punitive damages against defendants who have shown reckless disregard for safety, even when not deliberate.

If Keenan agrees to hear the case, the pressure on Union Carbide to settle out of court will increase measurably. The company has already made one offer of settlement, unofficially put at \$200 million, an amount reportedly equal to its insurance coverage. The Indian government has rejected that offer.

If the case is tried in the United States, the company would be facing the real possibility of a judgement of perhaps \$1,000 million, approximately one-tenth Union Carbide's entire net worth. The pressures on the company for a settlement are already considerable in any case.

But meanwhile Union Carbide is applying some legal pressures of its own to urge concessions on the other side. The company's lawyer has made it clear that he will argue that the case should be heard in India as the more appropriate forum. He

has also suggested he may move to have the US law firm retained by the Indian government disqualified because it once represented Union Carbide, though on an unrelated matter. And there is also the threat of a countersuit against the Indian government. Normally, governments enjoy "sovereign immunity", and cannot be sued for their actions. But under US law, a foreign country that brings suit in a US court cannot claim sovereign immunity in defence against counterclaims. Union Carbide would probably argue that by allowing squatters to settle near the Bhopal

plant in defiance of municipal plans, the government shares responsibility for the injuries.

A wild card in any resolution of the claims is who has the right to represent the victims. The Indian government has enacted a law declaring the government the exclusive representative, while allowing victims to hire their own lawyers who could join the government's action. One faction of the US lawyers who signed up victims — a faction that has been hoping to organize the case into a class action — is challenging the Indian law in Indian courts. It is being joined there by Indian lawyers whose suits filed against Union Carbide in India have been frozen by the law.

Stephen Budiansky

Handicapped infants

Physicians win the day

Washington

THE furore that greeted the Reagan administration's regulations for the treatment of handicapped infants seems finally to have been quelled. Last week, the Department of Health and Human Services (HHS) issued new rules that for the most part defer to the physician's judgement in deciding how to treat such infants and that keep the federal government out of the enforcement business.

The new rules, the result of an arduously crafted congressional compromise last fall, require only that each state's child abuse agency should develop procedures for investigating and "responding" to reports of medical neglect of infants and that they have the legal authority to seek a court order to prevent "withholding of medically indicated treatment". The rules do not apply to cases in which the treating physician believes, in his "reasonable medical judgment", that:

- the infant is in an irreversible coma;
- treatment would merely prolong dying, fail to correct all of the infant's life-threatening conditions, or otherwise be futile; or
- treatment would be virtually futile and would itself under the circumstances be inhumane.

Earlier versions of the rules stirred great resentment among paediatricians and hospitals. Under the original rules, issued in the spring of 1983, hospitals were required to post prominent signs warning that "discriminatory failure to feed and care for handicapped infants in this facility is prohibited by federal law".

The rules also established a "Baby Doe hotline" for receiving reports of medical neglect; HHS set up an investigative team that would be sent out on short notice to examine these reports. The hotline received about 400 calls, most of them from cranks; in the four cases examined no violations were found. But critics complained that the parents of the infants and the hospitals had been put through a needless ordeal. The regulations had been in effect for only a

month when they were thrown out by a federal judge acting on a lawsuit brought by the American Academy of Pediatrics and others.

The physicians' organizations also argued that the two well-publicized cases were carefully scrutinized by state authorities, and in both cases local courts refused to intervene. Almost all states include medical neglect in their definition of child abuse; courts have often intervened in cases where parents have refused to allow treatment for their children on religious grounds. The physicians' group thus argues that no federal involvement is necessary.

The new rules indeed go a long way to acknowledging that, and make clear that the federal government is not to establish standards prescribing appropriate treatments. In ordering HHS to issue these rules, Congress in fact seemed chiefly concerned with defusing the issue in such a way that the administration — and the right-to-life groups that the administration had been appealing to in issuing the original rules — could save face. Physicians' organizations remain concerned, however, that even the new rules will put improper pressure upon paediatricians always to choose heroic, aggressive treatment for fear of being accused of withholding treatment.

HHS says it received 116,000 letters commenting upon a draft version of the new rules, published in December. One major change that HHS made from the draft to last week's final version was to remove a set of definitions of terms from the body of the rules into a non-regulatory appendix. Physicians said the definitions of such terms as "life threatening condition" included specific examples and placed the federal government in the position of dictating specific procedures. The six principal Senate sponsors of the compromise bill urged the agency to consider these complaints seriously, noting that there was a danger of undoing the careful balancing that went into the bill.

Stephen Budiansky