

MORRISON, MAHONEY & MILLER

COUNSELLORS AT LAW
250 SUMMER STREET
BOSTON, MASSACHUSETTS 02210

617-439-7500
FACSIMILE 617-439-7590 OR 617-737-0090
TELEX 94-0878

POST OFFICE BOX 829
3180 MAIN STREET
BARNSTABLE, MASSACHUSETTS 02630
508-362-5595
FACSIMILE 508-362-5178

700 PLEASANT STREET
NEW BEDFORD, MASSACHUSETTS 02740
508-999-0014
FACSIMILE 508-990-0316

ONE OLD STONE SQUARE
PROVIDENCE, RHODE ISLAND 02903
401-331-4660
FACSIMILE 401-351-4420

1130 MECHANICS BANK TOWER
100 FRONT STREET
WORCESTER, MASSACHUSETTS 01608
508-757-7777
FACSIMILE 508-752-6224

145 MAIN STREET
SPRINGFIELD, MASSACHUSETTS 01103
413-737-4373
FACSIMILE 413-739-3125

SIX LLOYDS AVENUE
LONDON, EC3N 3AX ENGLAND
01-44-71-4882984

TELEX 8811764 FACSIMILE 01-44-71-4806158

WRITER'S DIRECT DIAL NUMBER:

ALAN S. MILLER
STEPHEN J. FARR
ALAN P. ROBINSON
DAVID A. BARKST
PAUL W. GOODRICH
EDWARD F. CROSSER
RICHARD R. BURICH
STEPHEN J. ANDRICK
MICHAEL DANE
JOEL F. PHRICE
RICHARD H. PETTINGELL
PETER C. KNIGHT
MARK P. HARTY

JAMES W. GRAHAM
JOANNE P. KEATING***
CAROL A. GRUFFIN
LAWRENCE A. DUGAN
PAMA J. MUELLO
JEFFREY D. PETHICK
JOHN P. BURKE, JR.
MARGARET L. COSTA
HARTEY O'HANIAN
NANCY REGAN
WILLIAM BOGAERT
FAITH A. LASALLE
JOSEPH E. RENDINE
JOHN A. BAKAREENT
THOMAS C. FEDERICO
CAREY H. SMITH
THOMAS S. FIORE***
DAVID J. HUMMELBERGER
LAURIE E. DEMONESTRO
THOMAS M. ELCOCK
GARY W. HARVEY
KIMBLEY M. SAILANT
LINDA W. WILCOX
KATHRYN M. WINN
DAVID E. MAGLIOZZA
KEVIN S. WREGE
BARRY PAT. RIELY***
JOSEPH F. STRUMSKI, JR.
MARK P. BALEY
JANET MACNAB
JOSEPH A. BECKLER
CYNTHIA R. KOEHLER**
LAUREN B. PILLSBURY

* ALSO MEMBER OF FLORIDA BAR
* ALSO MEMBER OF NEW YORK BAR
* ALSO MEMBER OF NEW MEXICO BAR
* ALSO MEMBER OF ALASKA BAR
* ALSO MEMBER OF MARYLAND BAR
* ALSO MEMBER OF ARKANSAS BAR
* ALSO MEMBER OF NEW HAMPSHIRE BAR
** ALSO MEMBER OF MAINE BAR

JEAN M. KELLEY
MARK S. GRANDER
ALAN M. REISCH
RICHARD E. BROOK
D. ALICE OLSEN
LAWRENCE F. BOYLE
MARK R. SEGALIM
PAUL S. GRANDA
ALAN S. RINDLER**
MICHAEL A. PIZZIA, JR.
LEE STEPHEN MACPHEE**
JOSEPH S. BUCKLEY, JR.
SAMUEL PERKINS

RHONDA L. RITTENBERG
MARY M. PERRY
MICHAEL READY
JOHN C. WHITE
SEAN J. MELANCOZZA
LAURIE J. CONDOE
JOCELYN M. SEDNEY
THOMAS A. MONTMINY
JAMES E. MCCAMBRIDGE, III
LAUREN MOTOLA-DAVIS**
KEVIN P. LOHAN
DANIEL E. BAKER, JR.
MICHAEL A. FAGER
PAUL E. MITCHELL
ROBERT M. MACK
CAROLE A. BAKOWSKI
MARIA S. DELUZO
JUDITH A. PERRITANO
DANIEL R. BURKE
STEPHEN P. HARTENAZ
KATHY T. HIGGS
GEORGE J. VOORINK, JR.
DAVID W. MEINLEIN
AUSTIN T. POWELL
RITA S. GYLTSBO
ROBERT PELLEGRAN
JOYCE E. DAVIS
FRANCIS K. TOTO
SHERRI M. ROZANSKY**
CAROL A. C'NIEL
CHARLES M. TELEN
JAMES M. FAY**
JOHN W. HAVERTY

*** ALSO MEMBER OF RHODE ISLAND BAR
** ALSO MEMBER OF WASHINGTON D.C. BAR
AND NEW YORK BAR
** ALSO MEMBER OF NORTH CAROLINA BAR
** MEMBER OF NEW YORK BAR ONLY
*** ALSO MEMBER OF WASHINGTON D.C. BAR
*** ALSO MEMBER OF CONNECTICUT BAR
*** ALSO MEMBER OF GEORGIA BAR

JOHN J. DAVIS
MICHAEL F. ATYLAND**
B. SMITH M. FANEY**
JAMES J. MORAN, JR.
V. W. F. BARRY
MICHAEL S. RIND
SERGIO FABIANO
BRUCE R. HENRY
JAMES A. REGAN
ALEXANDER MOEL CHARD
EDWARD M. HESTER
DAVID C. SULLIVAN

SPENCER W. COLBY
SCOTT D. BURKE
ROBERT F. FEENEY
BRIAN E. BERNSTEIN
WILLIE J. BEVING
WILLIAM S. CLARK
ROBERT P. COOK
CYNTHIA STONE PHELAN
CATHERINE J. CHANDLER
BRIAN S. MACLEOD
WILLIAM L. HAYSON, JR.
SCOTT L. SYKES
ELIZABETH M. WATERFIELD
PAUL D. GROARK
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RONNIE M. GILLESPIE PERRY
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MICHAEL STRADER
MARY F. PROULX
MICHAEL R. O'MALLEY
W. JOSEPH FLANAGAN
BRIAN P. ROSE
BRIAN M. BORN
ROSANNE D'PIETRO
ROBERT E. KELLY
AMY E. SYLVESTER
ARTHUR R. FANTACI, JR.
CHRISTOPHER A. KENNEY
DAVID A. NIOBE

February 12, 1991

FEDERAL EXPRESS

James H. Tourtelotte, Esq.
Robinson, Donovan, Madden & Barry
1500 Main Street - Suite 1400
P.O. Box 15609
Springfield, MA 01115

Re: Warren v. B.F. Goodrich, et al.
C.A. No. 89-30201-F
Our file no.: D-16183

Dear Mr. Tourtelotte:

We acknowledge receipt of your letter dated January 9, 1991 ("the demand letter"), which purports to be a written demand for relief on behalf of your client, Alice L. Warren, pursuant to the provisions of G.L.c. 93A, §9. The B.F. Goodrich Company ("Goodrich") believes the demand letter fails to "reasonably [describe] the unfair or deceptive act or practice relied upon and the injury suffered", as required by the statute. Further, based upon the information currently available to us, each of the rather conclusory factual allegations contained in the demand letter is subject to dispute.

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The purpose of a demand letter under c. 93a, §9 is two-fold: (1) "to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct" and (2) "to operate as a control on the amount of damages which the complainant can ultimately recover." Spring v. Geriatric Authority of Holyoke, 394 Mass. 274, 288, 475 N.E.2d 727, 736 (1985), quoting Slaney v. Westwood Auto, Inc., 366 Mass. at 704, 322 N.E.2d 768. To accomplish these purposes, it is essential that the complainant define the injury suffered and the relief demanded in a manner that provides the prospective defendant with an "opportunity to review the facts and law involved to see if the requested relief should be granted or denied" and enables him to make "a reasonable tender of settlement." Spring v. Geriatric Authority of Holyoke, 394 Mass. at 288, 475 N.E.2d at 736, quoting Slaney v. Westwood Auto, Inc., 366 Mass. at 704-705, 322 N.E.2d 768 and York v. Sullivan, 369 Mass. 157, 162-163, 338 N.E.2d 341 (1975).

The purposes of the letter are not accomplished if it fails to set forth the acts which constitute the unfair or deceptive practice claimed, see Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 813, 333 N.E.2d 202, 204 (1975), or if its demand for relief is exorbitant. See Spring v. Geriatric Authority of Holyoke, 394 Mass. at 288, 475 N.E.2d at 736 (An exorbitant demand for relief "is hardly likely to promote negotiation and settlement or to operate as a control on damages.")

The numbered paragraphs nos. 1-6 on pages 2-3 of the demand letter, which purport to describe the "unfair acts and deceptive practices" in which you allege Goodrich engaged, fail to set forth said acts or practices with any particularity. The language of the numbered paragraphs is more in the nature of the general allegations of wrongdoing made in plaintiff's complaint in the captioned action. The paragraphs identify no individuals, define no specific acts or omissions, and set forth no dates. The paragraphs do not even refer to any specific testimony taken or documents produced in the course of the ongoing discovery in the captioned matter. Given the generality of the allegations and the absence of any factual support therefor, Goodrich is unable to evaluate its potential liability. The demand letter is therefore insufficient.

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The letter's insufficiency is not cured by the allegations contained in the second and third paragraphs of page 4. We would be most interested in learning the factual foundation for your most serious allegation, i.e., that:

B.F. Goodrich, along with the other members of the [Manufacturing Chemists' Association], engaged in a deliberate cover-up of Dr. Viola's findings and agreed among themselves to withhold this information from NIOSH and from the general public for fear that it would have serious economic consequences for the vinyl chloride industry.

However, without more particular information as mentioned above, page 4's allegation remains merely an allegation.

Furthermore, referring to page 3 of the demand letter, the description of the damages suffered by the decedent, Alice Warren (his wife and administratrix) and their two sons, Daniel and John (whose right to recover is not at all clear), lacks any of the specificity envisioned by the statute. While the letter alleges that Mr. Warren:

was permanently disabled and suffered conscious physical and emotional pain and suffering ..., that [he] died as a result [of the actions complained of], and that [he] suffered loss of earnings and earnings capacity ...,

it blatantly fails to specify the amount of his damages. Even should you argue that it is difficult to assign a specific value to his alleged pain and suffering, it is beyond dispute that "loss of earnings and earnings capacity" is quantifiable. But the demand letter offers no quantification.

Similarly, while the demand letter contends that Mrs. Warren and her sons have suffered damages including "loss of reasonably expected net income, services, protection, care," etc., and "funeral and burial expenses and other incidental and consequential damages", it does not set forth the amount of these damages. While not all of the damages alleged are subject to precise quantification, most of them are and the remainder are subject to reasonable estimation.

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Lacking any itemization or enumeration of the damages alleged, the demand letter fails to accomplish its purpose: Goodrich cannot estimate the value of any potential liability and therefore has no foundation on which to base negotiations.

Finally, the demand letter is inadequate in that, given its failure to set forth facts and its lack of any itemized damages, its demand for relief is exorbitant. Mr. Warren was in his sixties when he passed away and his only dependent was Mrs. Warren, herself well into middle age. Without extensive, well-defined special damages, it is hard to understand how the demand letter arrives at its two million dollar demand. Without much more factual support than is offered in the demand letter, such a demand is hardly likely to promote negotiation and settlement or to operate as a control on damages.

Beyond the deficiencies of the demand letter, we feel that Goodrich will prevail on the merits. Discovery has thus far revealed no evidence establishing that Goodrich's VCM was delivered to the Indian Orchard plant, that John Warren was ever exposed to any Goodrich VCM at the plant, or that any such exposure caused his illness. Indeed, given the results of the only biopsy ever performed on Mr. Warren, even the diagnosis of angiosarcoma of the liver is very doubtful, especially in light of the unusually high incidence of other types of cancer in Mr. Warren's immediate family. The demand letter addresses none of these issues.

Four further points must be made. First, the actions or omissions of which the demand letter complains took place no later than 1974. The applicable statute of limitations has run. Any claims plaintiff may attempt to assert pursuant to the provisions of c. 93A are time-barred. Also, to the extent that plaintiff complains of actions which occurred before the time of c. 93A's enactment in 1967, the statute is obviously inapplicable.

Second, to the extent that plaintiff complains of actions that occurred during the effective period of c. 93A, § 3(1)(b) [Repealed], Goodrich is exempt from liability under c. 93A. Section 3(1)(b), which was repealed on October 6, 1983, exempted a defendant from liability for transactions which occurred in interstate commerce if it derived at least twenty percent of its gross revenues from transactions in

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interstate commerce and the transactions or actions complained of did not occur "primarily or substantially" in the Commonwealth. The statute's repeal in 1983 did not have retroactive effect. Goldstein Oil Company v. C.K. Smith Company, Inc., 20 Mass. App. Ct. 243 (1985).

Third, the Supreme Judicial Court has expressly declined to rule on the validity of 940 Code Mass. Regs. § 3.08(2) (1986), i.e., the Attorney General's regulation imposing liability under c. 93A solely on the basis of breach of warranty. Maillet v. ATF-Davidson, Inc., 407 Mass. 185 (1990). Therefore, the validity of the regulation is still open to question; Goodrich does not believe the regulation is appropriate and would challenge it, should a claim thereunder be made in the captioned action.

Fourth, even if Goodrich furnished any VCM to which Mr. Warren was exposed, it did not furnish the VCM directly to Mr. Warren, but to his employer, Monsanto. Monsanto was a sophisticated user of VCM, produced the vast majority of the VCM used at Mr. Warren's workplace, had knowledge of the hazards of working with VCM as great or greater than Goodrich's, was responsible for Mr. Warren's working conditions and was in the best position to provide Mr. Warren with warnings, protective equipment, etc. Under these circumstances, if Monsanto failed to provide Mr. Warren a safe workplace, that failure cannot be imputed to Goodrich. It was reasonable and appropriate for Goodrich to rely upon Monsanto to care for the safety of its own employees.

As a final note, we point out that we are in the first phases of discovery in the captioned action. It is simply too early in the process to be able to evaluate Goodrich's potential exposure. Should facts be developed through discovery which support the allegations contained in the demand letter and which indicate that the vital issues of product identification, exposure and causation will be determined in plaintiff's favor, we will be willing to reconsider the position set out herein.

In sum, the demand letter does not comport with the requirements of c. 93A, §9; the information available to date does not establish or even indicate that Mr. Warren's condition was caused by exposure to Goodrich's VCM, which strongly suggests that Goodrich has a good defense on the merits; any claims plaintiff may attempt to assert under c.

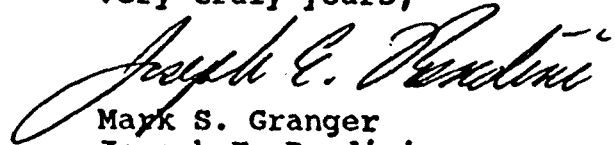
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93A are time-barred; the actions of which the demand letter complains are exempt from the strictures of c. 93A pursuant to c. 93A, §3(1)(b) [Repealed]; 940 Code Mass. Regs. § 3.08(2) (1986) is of questionable validity; Goodrich has a "sophisticated user" defense available to it; and discovery is at a very early stage such that Goodrich's potential liability and plaintiff's damages cannot currently be assessed with any accuracy.

Under these conditions, Goodrich cannot make any settlement offer. However, Goodrich is willing to reconsider its position if and when further facts are discovered.

Very truly yours,



Mark S. Granger
Joseph E. Rendini

bcc: Ms. Jill Bryan
Woodrow W. Ban, Esq.

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