

KELLER AND HECKMAN

MEMORANDUM

TO: Peter L. de la Cruz  
FROM: S. Craig Tautfest  
DATE: February 25, 1991  
RE: Vinyl Institute Proposed Transportation Mutual Aid Network

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We were asked to research the various legal issues which should be addressed by the Vinyl Institute in determining whether to implement its transportation mutual aid network. My research on this issue was based upon the assumptions that the proposed mutual aid network would function much the same as the CHEMNET system which is managed by the Chemical Manufacturers Association (CMA), but that participation would be limited to companies involved in the vinyl industry, and that responses would be limited to incidents involving vinyl chloride monomer. The findings of my research and a discussion of ways to minimize the potential liability of member companies follows.

POTENTIAL LIABILITY FOR  
VOLUNTARY RESPONSE ACTIONS

In evaluating whether participation in such a mutual aid network would expose the member companies to liability, it is necessary to look at two distinct classes of potential claimants - innocent third party victims, and the company or companies whose materials and/or equipment are the focus of the response effort. An exhaustive review of case law and legal publications confirmed that neither of the issues presented here have been ruled upon by any court or advisory body. Fortunately, however, there is a clear and long-standing body of case law addressing the liability of volunteers which appears to be easily transferable to this type of situation.

A. Liability to Third Parties

The case law governing the liability of volunteers or "good samaritans" to third parties is quite well settled.<sup>1/</sup> Although there are no cases applying the so-called "Good Samaritan Doctrine" to intra-company mutual aid societies, there are a few cases which have applied the doctrine to voluntary response groups such as volunteer fire departments. Because the basic legal principles raised by the voluntary

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<sup>1/</sup> There is no federal Good Samaritan law, and not all states have codified the doctrine. However, the case law almost universally supports the recognition of such a doctrine. Therefore, it is quite reasonable to assume that the doctrine would be applied by state courts in every U.S. jurisdiction.

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response to a transportation disaster are not dissimilar to those raised by a voluntary response to any other type of emergency, it is quite likely that a court would apply the Good Samaritan Doctrine in assessing the liability of a company participating in the cleanup or containment of a vinyl chloride release by members of the proposed voluntary mutual aid network.

Basically, the Good Samaritan Doctrine holds that any person<sup>2/</sup> who voluntarily undertakes the assistance of another with no expectation of remunerative benefit shall be insulated from liability for any injury or harm resulting from that assistance unless such harm is caused or contributed to by the gross negligence, misconduct or intentional wrong-doing of the actors involved. With respect to the proposed mutual aid network, this would mean that participating members would most likely be insulated from liability for any incidental personal harm or property damage caused in attempting to render responsible and good faith assistance in an emergency. As an example of this consider the following:

ABC Company voluntarily responds to a reported derailment of a tank car owned by Z Company. The derailment occurs near a residential area and the tank car is reported to contain vinyl chloride.

If ABC Company exercises reasonable care in (1) notifying the residents and the authorities of the surrounding area of the potential danger, (2) attempting to control or cleanup the discharge, and (3) cooperating with designated public safety and environmental protection authorities, ABC Company should be shielded from liability for any personal or environmental harm which may occur. This would be true even if the actions of ABC Company cause or worsen the harm so long as ABC does not act negligently, illegally or with wanton disregard for the consequences of its actions.

The key to maintaining the protection afforded by the Good Samaritan Doctrine is that the response must be reasonable. Reasonableness is a subjective standard which takes into consideration: (1) any specialized knowledge, training, or experience which the Samaritan possesses; (2) the urgency of the situation; and (3) the expectations of innocent third parties. The first and third considerations will have special applicability in assessing the reasonableness of the response of members of the proposed mutual aid network.

For example, because of the potential physical and health hazards posed by vinyl chloride, companies which are regularly involved in its handling or use will

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<sup>2/</sup> For the purposes of the Good Samaritan Doctrine, the term person should be considered to include corporations, partnerships, and other business organizations.

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be held to a much higher standard of care than an ordinary citizen, or even a manufacturer of a more innocuous chemical substance. Thus, participants in a mutual aid network would be well advised to conduct comprehensive hazard response training classes and drills to ensure that the individuals responding to a vinyl chloride incident are well-prepared to handle the task.

In addition, companies responding to a vinyl chloride incident must be extremely careful not to create a sense of false or unrealistic security in the minds of the community members or of the local fire and hazard response personnel. A company responding to a vinyl chloride incident may be tempted to downplay the seriousness of the incident, or to tout its own virtues by proclaiming that it is in control of the situation. This type of action can engender unrealistic expectations in the minds of the local citizenry and local emergency response personnel which, in turn, can effectively remove the company's insulation of protection from liability.

Finally, once a company has responded to a vinyl chloride incident it will most likely be under an obligation to continue to assist in the containment of the release until the situation is under control, or until relieved of this obligation by a designated public safety entity such as the local fire department.

#### B. Potential Liability to Member Companies

The second area of concern to participants in a mutual aid network involves the questions of potential liability to and reimbursement from other member companies. By virtue of banding together to develop a program for the response to and containment of vinyl chloride incidents, members of the proposed mutual aid society will, in effect, be entering into mutual contracts for the performance of services -- whether or not a written document detailing this commitment exists. Therefore, it is important for participants in any such network to have a formal written agreement which outlines the obligations, limitations and indemnifications of all participants.

For example, it will be extremely important that any agreement between the program participants clearly state the limits of liability of a company responding to a vinyl chloride incident. As discussed, the Good Samaritan Doctrine should shield companies against liability to third-parties for most harms caused or contributed to by virtue of a member's emergency actions. However, you will recall that the protection from liability offered by the Good Samaritan Doctrine only applies to voluntary assistance. Although a member of a mutual aid network responding to a vinyl chloride incident will most likely be considered to be a volunteer vis-a-vis third parties, this status will likely not apply vis-a-vis fellow members with whom the responding company will be deemed to have a contractual relationship. Absent any language defining the duties and liabilities of the parties in a written cooperative action

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agreement, a company would probably owe a much higher standard of care to fellow members.

Another issue which should be considered in the formation of such a group is the desire of the members to create a duty to assist. In general, a person is under no obligation to offer assistance unless the actions of the person have somehow contributed to the situation at hand. However, where a group of companies have entered into an agreement to form an emergency response network, there is probably an implied obligation to provide assistance. Thus, any agreement between the participants in the proposed mutual aid network should define the extent to which a member company is obligated to provide assistance in the event of a vinyl chloride incident.

As discussed above, any agreement between participants in a mutual aid network should, at a minimum, describe the obligations which the members have to one another. It would also be advisable for any such agreement to include cross-indemnification clauses so that a company responding to a vinyl chloride incident would not be held liable for cleanup and remediation costs which might be attributable to the company's emergency response efforts.

Finally, the prospective members of the mutual aid network should decide whether and how the costs incurred by members responding to vinyl chloride incidents should be borne. In a truly voluntary response situation, the responding parties are not compensated for the costs of their efforts. In the case of response to a vinyl chloride incident, the costs of an emergency response are likely to be quite considerable, and the responding parties will most certainly want to recover all or some of their losses and expenditures. To avoid disputes concerning whether and how such parties are to be compensated, it would be advisable to negotiate a method to be included in the mutual aid participation agreement.

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I hope that this has been responsive to your inquiry. If you would like more detailed information on any of the issues discussed in this memo, I would be happy to oblige.

CMA 111663