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*ADMITTED IN NEW YORK AND VIRGINIA ONLY

June 14, 1985

Mr. Lewis Freeman
Vice President
The Society of the Plastics Industry, Inc.
605 - 14th Street, N.W.
Washington, D.C. 20005

Re: Ruling on OSHA Warning Standard

Dear Lew:

As you know, the U.S. Court of Appeals for the Third Circuit recently issued its ruling in the challenge to the Hazard Communication Standard promulgated by the Occupational Safety and Health Administration ("OSHA"). This letter briefly summarizes the court's ruling, and provides our perspective on the impact of the decision, particularly with respect to enforcement of worker right-to-know laws outside of the Third Circuit. The OSHA proceeding was distinct from the appeal of the preemption ruling of U.S. District Judge Dickinson Debevoise concerning the New Jersey Worker and Community Right-to-Know Law. That case is scheduled for oral argument later this month, and -- as described below -- many of the issues raised in that proceeding were not resolved by the Third Circuit in the OSHA case.

The Hazard Communication Standard, 29 C.F.R. § 1910.1200 ("the Standard"), was promulgated in November, 1983, and requires communication concerning chemical hazards and training of workers in the manufacturing sector who are exposed to hazardous chemicals in the course of employment. After its promulgation, it was immediately challenged in the Third Circuit by the United Steelworkers of America and Public Citizen Litigation Group pursuant to the judicial review provisions of the Occupational Safety and Health Act, 29 U.S.C. §§ 651, 655(f) ("OSH Act"). Shortly thereafter, several states and a number of trade associations filed petitions for review in other federal appellate courts; these actions were consoli-

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dated in the Third Circuit with the appeals initially filed by the Steelworkers and Public Citizen.

The critics of the Standard voiced objection to OSHA's actions in several areas: 1) the limitation of the Standard to workers in the manufacturing sector; 2) the hazard determination process adopted by OSHA, through which chemical manufacturers and suppliers are to evaluate whether their products are subject to the Standard; 3) the definition of protectable "trade secrets", as well as the restrictions on employee and union access to such information, and 4) the Standard's purported preemption of inconsistent state legislation covering workers in the manufacturing sector.

Substantive Provisions of OSHA Standard

In its recent ruling, the Third Circuit panel comprised of Judge Gibbons and District Judges Fisher and Kelly (sitting by designation) examined the arguments of the union petitioners concerning the substantive provisions of the Standard and found several deficiencies. First, it considered OSHA's exclusion of non-manufacturing workers from the protection of the Standard. The agency had argued that this action was based upon evidence that manufacturing workers were at the greatest risk of suffering chemical injuries, and that OSHA had merely exercised its regulatory discretion by first extending coverage to that sector.

The court found this rationale thoroughly unpersuasive, and adopted the petitioners' critical observations concerning the fact that workers performing exactly the same tasks, with the same degree of chemical exposure, were accorded different treatment. It directed OSHA to reexamine the exclusion of non-manufacturing employees from the Standard's protections, and extend coverage unless the agency can demonstrate why such application would not be feasible. In light of the fact that OSHA has already been moving in this direction (e.g., by seeking guidance on this question from its National Advisory Committee on Occupational Safety and Health), it would appear that the result of this administrative reappraisal will be that all workers will be covered by the Standard at some point in the future.

The second issue addressed by the court was OSHA's refusal to promulgate a list of chemical substances covered by

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the Standard. While this decision was attacked generally by several petitioners, the Third Circuit focused upon the suggestion that OSHA erred in failing to adopt the Registry of Toxic Effects of Chemical Substances ("RTECS"), developed by the National Institute for Occupational Safety and Health, as the substance list for purposes of the Standard. This argument, advanced principally by Public Citizen, was based upon the utilization of RTECS in OSHA's "Records Access" rule, 29 C.F.R. § 1910.20. The Third Circuit rejected this contention, correctly noting that the value of RTECS is limited, since it encompasses "potential" as well as "identifiable" hazards. The court also found the burdens imposed by the Standard to be sufficiently distinguishable from the lighter demands of the Records Access rule, justifying its differing approach to the RTECS listing.

The final substantive portion of the Standard addressed by the court was OSHA's treatment of trade secrets. The appellate court accepted the union argument that OSHA's definition of protectable trade secrets was too expansive, in that it would insulate chemical identity information. The Third Circuit stated that the OSH Act does not authorize the agency to create trade secret protection which goes beyond state law; it determined, however, that the Standard would protect chemical identity information which is determinable by reverse engineering, and thus exceeds the definition found in the Restatement of Torts.

According to the court, prior case law -- including the Supreme Court's holding in Ruckelshaus v. Monsanto Co., 104 S.Ct. 2862 (1984) -- suggests that even a requirement that formula or process information be disclosed would pass constitutional muster. Since the OSH Act cannot support the expanded trade secret protection which the Standard would provide, the agency was directed to reconsider its definition of trade secrets, and to exclude from protection chemical identity information which is readily discoverable through reverse engineering. On an additional point, the Third Circuit also stated that the Standard's restriction of access to trade secrets to health professionals was not supported by substantial evidence in the rulemaking record. It ordered OSHA to revise its rule to permit access by employees and their collective bargaining representatives.

Finally, with respect to the important issue of the OSHA Standard's preemptive effect on inconsistent state

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legislation, the court adopted the view urged by OSHA: the Standard preempts inconsistent workplace right-to-know schemes, in the manufacturing sector. The Third Circuit refused to decide any remaining preemption issues, including the Standard's effect on workplace right-to-know schemes in the non-manufacturing sector, as well as its possible impact on community right-to-know legislation. As you know, both of those questions were decided by Judge Dickinson Debevoise with respect to New Jersey's right-to-know law; they will be presented to the same Third Circuit panel in the appeal of Judge Debevoise's ruling. New Jersey State Chamber of Commerce, et al. v. Hughey, et al., Nos. 84-3255, 84-3892 (D.N.J. 1985), appeal pending, Nos. 85-5087, 85-5095 (3rd Cir.).

Impact of Ruling

As noted above, the Third Circuit has directed that the Standard shall go into effect as scheduled in the manufacturing sector. Interestingly enough, its resolution of the various legal issues involved in the case enabled all sides to claim "victory". Unions and worker health advocates celebrated the decision because the court ordered OSHA to reconsider its regulatory action in two important areas, industries covered by the Standard and its treatment of trade secrets. Industry was pleased with the endorsement of preemption of workplace right-to-know schemes in the manufacturing sector, while the states were relieved that their community right-to-know measures remain intact (at least for the time being). OSHA had its view of preemption accepted by the court, and the Standard's hazard determination process emerged intact, along with certain challenged aspects of its trade secret procedures (i.e., the use of confidentiality agreements and the requirement of written requests).

Given this range of reaction, it is difficult to predict if any party will request a rehearing before the full Third Circuit^{1/} or review by the Supreme Court. Our informal contacts with OSHA, several state governments, and certain

^{1/} Such a request for a rehearing en banc may pose an unusual problem for that appellate court: all judges sitting on the Third Circuit, with the exception of Judge Gibbons, previously recused themselves from the OSHA case, apparently because of stock ownership in companies represented by the trade associations participating in the case.

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participating trade associations indicate that no party has -- as yet -- made a decision to appeal or seek further review of the appellate panel's ruling. We have been told that OSHA has requested an extension of time in which to file a motion for rehearing, and that the Chemical Manufacturers' Association ("CMA") is at least contemplating a challenge to the trade secrets holding.

Of greatest interest to SPI is likely to be the effect of the Third Circuit's ruling on the preemption issue, assuming that decision is not reversed by the full Third Circuit or the Supreme Court. Obviously, its conclusion -- displacing state laws governing communication of chemical hazards in the manufacturing workplace -- will be most beneficial if applied on a nation-wide basis. The ruling of the Third Circuit is, however, the holding of only one appellate court, whose decisions would ordinarily be binding only within that judicial circuit.

The judicial review provisions of the OSH Act, 29 U.S.C. § 655(f), together with other provisions of Federal law, see 28 U.S.C. § 2112(a), establish that the appellate courts will entertain only one "pre-enforcement" challenge to occupational safety and health standards promulgated under the OSH Act, and that venue will lie in the court of first filing. At the same time, the OSH Act does not foreclose an employer from challenging the substantive validity of a standard during an enforcement proceeding. S. Rep. No. 91-1282, 91st Cong., 2d Sess., p.8, reprinted in 1970 U.S. Code Cong. & Ad. News, 5177, 5184. See also Deering Milliken, Inc. v. OSHRC, 630 F.2d 1094 (5th Cir. 1980); Marshall v. Union Oil Co. of California, 616 F.2d 1113 (9th Cir. 1980); National Industrial Constructors, Inc. v. OSHRC, 583 F.2d 1048 (8th Cir. 1978). Thus, the statute does not mandate that only one appellate court review the substantive validity of an OSHA Standard.

In the instant case, the Third Circuit was the appellate court of first filing, and petitions for review filed in five other circuits were consolidated with this proceeding. Moreover, a number of states outside the geographic jurisdiction of the Third Circuit were full participants in the case. Added to these factors is the conclusion by industry groups that the preemption holding of the Third Circuit panel appears to be correct and convincing. These facts have led some (including CMA representatives with whom we have spoken) to assume that all workplace right-to-know measures can be ignored by manufacturers covered by the OSHA Standard.

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It is our view that such a conclusion cannot be stated with legal certainty.^{2/} We believe that another appellate court may properly address the preemptive effect of the OSHA Standard in a de novo fashion, leaving open the possibility that a different conclusion might be reached in a different judicial circuit. Such a case might arise in the following fashion: California, a state which did not participate in the Third Circuit proceeding, might attempt to enforce the provisions of its right-to-know law against an employer within the state. An employer seeking to defend against such prosecution, would attempt to rely on the ruling of the Third Circuit, either in a California state court, or in a federal court if it sought to "remove" the action to that forum. While we have no doubt that the Third Circuit ruling would be persuasive, and while we believe that the argument in favor of federal preemption of state laws in the manufacturing workplace is correct, neither the Ninth Circuit nor the California Supreme Court would be bound by the earlier appellate court ruling. The same conclusion would apply to efforts by a number of other states with right-to-know laws on the books to enforce their statutes.

Additional considerations would apply to enforcement efforts by states such as Illinois and Massachusetts. Since these and other states were full participants in the Third Circuit proceeding, we believe that interests of finality and principles of estoppel would bar those jurisdictions from challenging the preemption effect of the Standard in another judicial setting. In an analogous case, an employer who participated in the administrative proceedings leading to the promulgation of OSHA's lead standard, as well as the pre-enforcement challenge mounted by industry, was precluded from attacking that rule in an enforcement proceeding. RSR Corporation v. Donovan, 747 F.2d 294 (5th Cir. 1984). While collateral estoppel normally prevents the future litigation of an issue previously determined by a valid and final judgment

^{2/} Moreover, the actual relief provided by the recent court decision to many chemical and plastics firms is even less certain, since many of them supply non-manufacturing businesses which remain subject to the state laws. Customer relations and product liability concerns may require such companies to continue providing labels and material safety data sheets which comply with such statutes.

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between the same parties, it can be reasonably anticipated that a court would apply principles of estoppel in any subsequent enforcement proceeding initiated by states such as Illinois and Massachusetts. Such litigation would satisfy the traditional essential requisites for the application of estoppel, since the issue to be concluded would be identical to that which was "actually litigated" in the prior action, and that determination was necessary and essential to the earlier judgement. For this reason, we believe that the states which were full parties in the Third Circuit case would ultimately be precluded from enforcing their statutes against a manufacturing employer.

Finally, we believe that barring reversal by the full Third Circuit or the Supreme Court, the workplace portions of both the New Jersey and Pennsylvania right-to-know laws will no longer be enforceable in the manufacturing sector. Of course, as noted above, the recent court ruling has no impact on the obligation of SPI members to comply with the "community" right-to-know requirements of these measures. We expect that such requirements will be determined through litigation on a state-by-state basis (as in the New Jersey case).

Political Fallout From Ruling

At this early juncture, one can only speculate about the political impact of the Third Circuit ruling on the highly controversial right-to-know "movement". Unions and worker health advocates gained significant victories in the court's decision: OSHA's prior exclusion of non-manufacturing employees and its treatment of trade secrets were significant factors in the proliferation of state right-to-know measures. Now that those shortcomings have been addressed, labor may be more willing to withdraw pressure on political supporters in the state legislatures to take regulatory action.

However, the reaction of the states is even more difficult to predict: some jurisdictions have invested resources in planning, development and enforcement of their legislation, and will not easily relinquish such authority. Since legislation is on the books in these states (rather than mere administrative regulations), and repeal might be necessary to eliminate compliance concerns and liability issues, it appears that the debate will not be quickly concluded. Finally, the ruling may provide further impetus for proposals

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pending in Congress for increased federal regulation of hazardous chemicals at manufacturing sites. The finding of federal preemption may give encouragement to those seeking to enact community "right-to-know" legislation at the Federal level.

We hope that this analysis has been helpful in placing the recent appellate court ruling in proper perspective. Of course, if you have any questions about any of these issues, please give us a call.

Sincerely yours,

A handwritten signature in cursive script that reads "Peter A. Süsser". The signature is written in dark ink and is positioned above the printed name.

Peter A. Süsser