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February 13, 1991
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BY TELECOPY and U.S. MAIL

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

Re: Alice L. Warren, Administratrix
v. The Dow Chemical Company, Union Carbide, et al
Your File No. D-16183

Dear Mr. Tourtelotte:

On behalf of Conoco Inc. ("Conoco"), I am responding to your letter dated January 9, 1991 and received on January 14, 1991 regarding John L. Warren and Alice L. Warren. In that letter you make a claim pursuant to M.G.L. c. 93A, and demand payment in the amount of $2,000,000.

As Conoco understands the facts underlying your claims, John Warren allegedly died of angiosarcoma of the liver resulting from his exposure to "vinyl chloride monomer and vinyl chloride related products" which you allege Conoco sold or supplied to John Warren's employer in Springfield, Massachusetts, Monsanto Chemical Company ("Monsanto"). However, your letter does not define or describe what "vinyl chloride related products" are or which, if any, were ever sold or supplied by Conoco to Monsanto. Conoco has no information about such "related products." Your letter also does not state when Conoco allegedly sold or supplied vinyl chloride monomer to Monsanto, nor does it describe how or when John Warren was exposed to Conoco's vinyl chloride monomer. In short, there is

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no factual information in your letter which supports a conclusion that Mr. Warren was exposed to Conoco's vinyl chloride monomer.

As you know, Conoco has been trying to obtain information about the identification of its vinyl chloride monomer at Monsanto through discovery in the pending civil action: Alice L. Warren, Administratrix v. The Dow Chemical Company, et al, Civil Action No. 89-30201-F. Conoco does not yet know whether you have any information which shows that John Warren, personally, was exposed to Conoco's vinyl chloride monomer. Conoco's internal investigation of this issue reveals no present basis to conclude there was any such identifiable exposure. Conoco, which began producing vinyl chloride monomer for commercial use in 1968, has no records which indicate that it ever sold vinyl chloride monomer to Monsanto. Neither can Conoco locate any present or former employee of Conoco who has any memory of Conoco selling or otherwise furnishing its vinyl chloride monomer to Monsanto at any time. Conoco therefore concludes Mr. Warren was not exposed to Conoco's vinyl chloride monomer.

Your letter specifies, at pages 2 and 3, six paragraphs of alleged "unfair acts and deceptive practices." Your letter does not provide any factual information to support your conclusional claims of negligence (paragraphs 1-5) or breach of warranties (paragraph 6), however. In paragraph 2, for example, you allege that Conoco "was negligent in processing, testing, designing, [and] manufacturing . . ." vinyl chloride monomer, but you have not explained what it is Conoco all gedly did wrong, or what it should have done differently in these respects, thus not permitting Conoco fully to understand your claims. This same lack of specificity applies to the other allegations of wrongdoing. Nevertheless, Conoco believes it exercised all the due care necessary under the circumstances of its commercial production of vinyl chloride monomer and that its vinyl chloride monomer was, at all relevant times, merchantable and fit for its intended purposes.

Conoco specifically and vigorously denies the very serious allegations made in your letter at pages 4 and 5, that:

> Conoco, along with other vinyl chloride manufacturers, knew as early as 1970 of the cancer-causing effects of vinyl chloride exposure and intentionally withheld this information from governmental regulatory agencies such as NIOSH and from chemical workers such as Mr. Warren who were regularly exposed to vinyl chloride supplied by Conoco.
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> * * *
>
> Conoco, along with the other members of MCA, 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.

These allegations are unfounded. Conoco, over a period of years, sponsored research on the effects of vinyl chloride exposure, including sponsorship of Manufacturing Chemists Association ("MCA") studies on this subject. Conoco acted reasonably and responsibly upon acquiring any knowledge of potential health hazards to humans from exposure to vinyl chloride monomer.

In sum, Conoco believes it has a full and complete defense to all of your claims of negligence, breach of warranty and Chapter 93A liability. Among its defenses, and without waiving others, Conoco highlights the defense of no product identification. That is, Conoco stresses that there are no facts currently know to it which show that Conoco supplied any vinyl chloride monomer to Monsanto at any time. The Commonwealth of Massachusetts does not expect Conoco to be an insurer of other producers' vinyl chloride monomer.

In addition, Conoco highlights the fact that John Warren's employer, Monsanto, was itself a producer of vinyl chlorid monomer. It is Conoco's understanding that Monsanto supplied itself with the vast majority of any vinyl chloride monomer to which John Warren may have been exposed. As a sophisticat d user of vinyl chloride monomer -- indeed, as a producer of the product -- Monsanto, as John Warren's employer, would have been in the best if not the only position to protect John Warren, through warnings or otherwise, from the alleged injury due to exposure to vinyl chloride monomer. Monsanto, like Conoco, was a member of the MCA which studied the effects of vinyl chloride monomer on humans, and Conoco would have been reasonable in relying upon Monsanto to warn Monsanto's employees about th known risks associated with exposure to vinyl chloride monomer, whether that product was produced by Monsanto or Conoco.

More specifically, your letter does not provide sufficient factual detail to support a conclusion that Conoco engaged in any unfair or deceptive act or practice proscribed by Chapter 93A. Conoco believes that Chapter 93A does not apply to Conoco under the circumstances of this case, as they are presently understood.

First, the interstate commerce exemption to Chapter 93A, M.G.L. c. 93A, § 3(1)(b) [Repealed], exempts Conoco from liability for transactions which occurred in interstate commerce. This exemption, which was repealed on October 6, 1983, exempted a defendant from Chapter 93A liability if it derived at least 20 percent of its gross revenue from transactions in interstate commerce, and the transactions or actions complained of in the Chapter 93A action did not "occur primarily or substantially within the Commonwealth." M.G.L. c. 93A, § 3(1)(b)[Repealed]. The 1983 repeal of this statute was not given retroactive effect. Goldstein Oil Company v. C. K. Smith Company, Inc., 20 Mass. App. Ct. 243 (1985). Conoco believes it meets all of the factual criteria of this exemption.

Second, Conoco would challenge the Attorney General's regulation which imposes liability under Chapter 93A based solely on a breach of any warranty. 940 Code Mass. Regs. § 3.08(2)(1986). As you probably know, the court expressly refused to rule on a challenge to the Attorney General's regulation in Maillett v. ATF-Davidson Co., Inc., 407 Mass. 185 (1990) because the jury had found negligent conduct as well as a breach of warranty. Whether the Attorney General's regulation can stand alone is still an open question, therefore.

Your letter is also problematic because you do not itemize or explain the damages aspect of your claim. Conoco cannot reasonably evaluate the $2,000,000 demand. It is not even clear on whose behalf a Chapter 93A claim is being made.

On page 1 of your letter, you state the demand is "on behalf of Mrs. Warren, both individually and as Administratrix of the Estate of John H. Warren." Then, at page 3 of your letter, you refer to damages sustained by Mrs. Warren "and her two sons, Daniel and John" for "loss of reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice, pain and suffering and mental anguish, funeral and burial expenses and other incidental and consequential damages." Conoco does not understand the legal basis upon which Daniel Warren or John Warren, neither of whom were minors at the time of their father's death, might recover. Moreover, you have not specified any dollar amount or amounts attributable to any of the categories of damages referenced in your letter. Conoco understands the difficulty in assigning a dollar amount to such intangibles as "pain and suffering," yet other categories are easily itemized. Without reasonable specificity, Conoco is not in a position to evaluate your demand other than to note at this time that it appears extraordinarily high.

Based upon discovery in the pending civil action, Conoco understands that John Warren was in his sixties at the time of diagnosis and death, that he was nearing the end of his work life, and that he then had no minor children who were dependent upon him. These facts do not suggest a recovery, even assuming liability, in the $2,000,000 range, and provide Conoco with little upon which to estimate a more realistic potential liability upon which fruitful negotiations could be predicated.

In conclusion, your letter does not provide sufficient information to establish Conoco's liability in negligence, breach of warranty or under Chapter 93A. Most significant is the absence of information showing that Mr. Warren was exposed to Conoco's vinyl chloride monomer at any time or place. Neither does your letter provide facts about your claim of damages sufficient to analyze your $2,000,000 demand.

Under these circumstances, Conoco does not make any settlement offer at this time. However, as discovery in the pending civil action progresses, Conoco will reconsider its position if facts reveal any basis for liability or a more detailed picture of recoverable damages.

Very truly yours,

Sharon R. Burger

Sharon R. Burger

SRB/jlf

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bcc: John R. Downey, Esq.
Mary Sundt, Esq.
Judith Elledge, Esq.

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