CMA INTEROFFICE MEMORANDUM

To : All CMA Staff

Date: October 6, 1980

From: Edmund B. Frost

Re : Procedures for handling requests for:
(1) information on chemical disposal procedures;
(2) the names of manufacturers of chemicals or for other commercial information;
(3) discontinued CMA publications

Please follow the procedures detailed below if you receive written or telephone inquiries of the type described.

1. Requests for information on the procedures to be used for the disposal of chemicals or chemical wastes.

Please refer all such inquiries to one of the appropriate Regional Coordinators of the EPA Office of Hazardous Materials identified on the attached list. EPA has been advised to anticipate our referral of such inquiries.

2. Requests for the names of the manufacturers of particular chemicals and other commercial information.

It is important that CMA not become engaged, in fact or appearance, in activities directly related to commercial or competitive efforts of industry. It is not our function to facilitate sales, purchases or related activities.

Recently, we have received a number of requests for the names of manufacturers of particular chemical products, apparently from potential vendors to our members. A number of publicly available directories attempt to publish manufacturers lists and inquirers should be so advised. Ms. Jane Rasmussen (extension 229) can be of assistance in identifying the names of such publications for you.

3. Requests for discontinued CMA publications.

The CMA Executive Committee has directed that CMA cease publication and distribution of the documents identified in the attached list. To prevent reliance on or use of these publications -- some of them may be out of date -- our archives are being destroyed (except for official file copies). Former recipients are being asked to destroy their copies and, in general, requests for copies or for access to copies are being

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CONFIDENTIAL -- FOR USE OF LEGAL COUNSEL ONLY

MEMORANDUM TO THE LEGAL ADVISORY COMMITTEE OF THE MANUFACTURING CHEMISTS ASSOCIATION

We have been asked (1) to assess the degree of legal liability to which the Manufacturing Chemists Association ("MCA") may be exposed by its publication and distribution of information concerning hazards and recommendations on labeling and safe handling of various chemicals, and (2) to suggest possible modifications in the operation of the MCA publication program which would minimize any legal risk without jeopardizing the essential purpose of the publications. This letter sets forth our conclusions and the reasons therefor.

I. MCA Structure and Publication Program

On the basis of facts and material furnished us on a confidential basis by MCA staff and member companies, we gather that the relevant facts are as follows:

MCA is a nonprofit trade association incorporated in New York. Each of its approximately 200 corporate members is a manufacturer of chemicals in the United

States or Canada which sells to others a substantial portion of the chemicals it produces. According to the Bylaws, the purpose of MCA is the promotion of the interests of the chemical manufacturing industry of the United States and Canada. Included among the four objectives of MCA adopted March 12, 1963 and amended January 13, 1970, is the following:

> To provide leadership and guidance and to undertake programs to improve the chemical industry's service to the public by developing and promoting safe and clean practices in the manufacture, transportation, handling, and use of chemicals and chemical products. (Emphasis added.)1/

1/ The other three objectives are as follows:

> To provide leadership to its members, and to represent them in presenting industry interests, views, and recommendations to the legislative and executive branches of the federal government (and to state and local governments when appropriate) on those matters which affect the industry's health, vigor, and well-being.
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> To aid in developing and maintaining a clear understanding by the public of the chemical industry and its contributions to the public welfare and to the advancement of our national, state, and local economies; and by appropriate, timely, and effective means to make known the contributions, accomplishments, and changing needs of the industry to the public broadly, and particularly to those initiators of thought and action outside the industry whose opinions, decisions, and actions affect the industry.

MCA, with headquarters in Washington, D.C., has a permanent staff of approximately 75 persons, headed by a full-time president. It is governed by a Board of Directors made up of ranking executives from member corporations. The Association's basic organization consists of four operational departments: Technical, Government Relations, Public Relations, and Staff Services. Activities covered by these major areas are handled by 24 technical and functional standing committees which operate under guidelines approved by the Board.[2/]

Nominees for committee membership are generally submitted by MCA's "Executive Contact"[3/] within the respective companies. Committee members are appointed by the MCA Board on recommendation by the respective

[Footnote continued]

To conduct or sponsor legitimate activities designed to achieve worthwhile benefit or savings to the Association members where individual company efforts cannot effectively accomplish the desired result. Id.

2/ See MCA Directory, July 1975, for a complete list of MCA committees and headquarters personnel and for the "General Principles Applicable to the Structure and Operations of Committees."

3/ The Executive Contact is a senior executive in a member company who serves as a liaison with MCA.

committee, and serve without compensation. An attempt is made to select a diverse committee from companies representing many different size corporations, geographical locations and products. Usually, a company can secure membership on any committee; however, the size of each committee is limited and some nominees on occasion must be assigned to a waiting list. Waiting list members can attend committee meetings, join in discussion and receive correspondence, but are not entitled to vote. A policy of rotation provides that up to a certain number of committee members will be replaced each year to permit the addition of company representatives from the waiting list.[4/]

Voting members of MCA committees must be employees of member companies. Although a company may be represented on many MCA committees, a single corporate representative in most instances serves on only one committee since it is unusual for individuals to have the requisite degree of experience, knowledge and responsibility in more than one of the substantive areas covered by the MCA technical committees. The Board's statement of "General Principles Applicable to the

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4/ The number varies with different committees.

Structure and Operations of Committees" provides for nonvoting "associate members representing governmental bodies or trade associations;" apparently, however, few committees have sought Board appointment of such "outside" members.[5/]

One of MCA's most widely known activities is its program of publication and distribution of product information cards, pamphlets and manuals concerning the safe use and handling of hazardous chemicals.[6/] While there are many MCA publications that could present problems of potential liability,[7/] one set is of

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5/ The Transportation Equipment Committee has had associate members from transportation industries.

6/ For a complete list of publications available from MCA see its Publications List, July 1975.

7/ For example, "Safety Guides" recommend safe practices and procedures of general usefulness to those operating a chemical plant. Sample guide titles include "Training of Process Operators," "Safety Inspection Committee for a Small Plant," and "Electrical Lockout Procedure."

For many years MCA published the "Guide to Precautionary Labeling of Hazardous Chemicals," produced by the Labeling and Precautionary Information (LAPI) Committee. This is a manual composed of illustrative labels and precautionary statements corresponding to specific hazards rather than to specific chemicals, suggested antidote statements, and instructions for dealing with situations involving fire, spills or leaks. The manual was adopted as a standard by the American National Standards Institute (ANSI) earlier this year, and is now being published directly by ANSI. The MCA Labeling and Precautionary Information Committee continues, however, to have input on the Manual through submissions of recommendations to ANSI.

particular relevance for purposes of this letter and presents all of the legally significant circumstances. These are the pamphlets known as "Chemical Safety Data Sheets" (hereinafter "Safety Sheets") that provide essential information for the handling of hazardous chemicals.

There are currently issued and outstanding approximately one hundred Safety Sheets, each between fifteen and thirty pages in length. Most follow the same general format: The front cover carries the name of the chemical, the date the Safety Sheet was adopted, and a statement that "[c]hemicals in any form can be safely stored, handled or used if the physical, chemical and hazardous properties are fully understood and the necessary precautions, including the use of proper safeguards and personal protective equipment, are observed." On the inside cover is a short disclaimer of any responsibility for correctness and sufficiency of any information.[8/] The main text of the Safety Sheet

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8/ All Safety Sheets adopted or reprinted after February, 1976 contain the revised disclaimer:

> "The information and recommendations contained in this Chemical Safety Data Sheet were prepared for the guidance of plant engineering, operations and management, and for persons working with

consists of the names and properties of the particular chemical; a description of the hazards associated with the chemical and how they can be prevented or counteracted; and guidelines for employee safety, handling and storage, equipment cleaning and repairs, waste disposal and precautionary labeling.

MCA currently has liability insurance coverage, which includes the publication program, in the amount of $10 million. We understand that consideration is being given to increasing this coverage to $20 or $50 million.

[Footnote continued]

or handling [name of chemical]. The information was compiled from experience and information provided by various manufacturers of [name of chemical] and from material on [name of chemical] appearing in scientific publications. While the Manufacturing Chemists Association believes these sources are reliable and represent the best opinions available on the subject as of [date of publication], the Association makes no warranty, guaranty or representation as to the correctness or sufficiency of any information or recommendation herein, and the Association assumes no responsibility in connection therewith; nor can it be assumed that all necessary warnings and precautionary measures are contained in this Chemical Safety Data Sheet, or that other or additional information or measures may not be required or desirable because of particular or exceptional conditions or circumstances, or because of applicable federal, state, or local law."

A. The Current Process of Publication

The Safety Sheets are drafted under the general auspices of the Safety and Fire Protection Committee (the "Committee"), which has as its official function:

> To advise the Board of Directors concerning plant safety in chemical manufacturing, and in accord with Association policies and procedures, develop programs to assist producers, handlers, and users of chemicals to prevent personal injuries, fires and other accidental losses.9/

The Committee has about twenty members who serve as representatives of MCA member companies. The typical Committee member is an official with major responsibility for safety and/or fire protection at his or her company. Currently, the Safety and Fire Protection Committee meets four times a year. It is assisted at those times and between meetings by a Secretary --an MCA staff representative with technical background -- who schedules meetings, prepares agenda, takes minutes and performs other coordinating functions. The Secretary, who is the Board's representative on the Committee, has the responsiblity of ensuring that Committee activities and decisions are consistent with MCA policies and

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9/ MCA Directory, supra at 21.

procedures. All Committee agenda and minutes are reviewed by MCA's Staff Counsel.

The impetus for the initial publication or revision of a Safety Sheet can emanate from any source, including the MCA staff or persons outside the industry. The bulk of suggestions, however, come from Committee members themselves. The expectation and experience are that the Committee, which has among its members some of the most experienced industry personnel, will be alerted as to the need for establishing or revising a Safety Sheet pertaining to a particular chemical by its own members. A suggestion that a Safety Sheet be established for a specific chemical is accepted only after discussion of its frequency of use, the volume used and the degree of hazard presented.

Once a chemical is chosen, the Committee requests one or more of its members to produce the initial draft. Typically, the Committee member whose company has the most experience with the particular chemical volunteers for the assignment. Using his company's resources and his own judgment as to what reference materials and sources to consult, the volunteer casts the first draft in the standardized format of a Safety Sheet. Except where information is generally known and available, specific standards, threshold levels, etc. mentioned in the Sheet are referenced by source.[10/]

The draft Safety Sheet usually is circulated first to members of the Safety and Fire Protection, Occupational Health, and Labeling and Precautionary Information Committees, to the officers of several other committees, and to MCA companies who manufacture the chemical in question (regardless of whether such companies are represented on the committees). After their written comments are received the Committee Secretary or the original authors revise the draft in light of these comments and resubmit it for review to those who commented on the initial draft. At no point in the process is the draft reviewed by any "outside" consultants or authorities.

Some sections of the Safety Sheet are actually drafted by other MCA committees, while other sections are only reviewed by them. Where, for example, a Safety Sheet is to include a recommended precautionary label for

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10/ In many early Safety Sheets, the practice of citing specific sources for such figures and other data was not always followed. It is our understanding that an effort is made to supply such citations when Safety Sheets are revised.

a certain chemical, the Labels and Precautionary Information Committee typically supplies the text of the label. Similarly, the Occupational Health Committee may cooperate by writing or reviewing that portion of a Safety Sheet dealing with health management, while the Air Quality, Water Resources, and Solid Waste Management Committees review for environmental controls. Shipping and transportation consideration are reviewed by the Chemical Packaging and Transportation Equipment Committees. On the inside cover of most Safety Sheets is a list of those committees which usually cooperate with the Safety and Fire Protection Committtee in the preparation of Safety Sheets.

The final product is reviewed by MCA's Staff Counsel to ensure compliance with relevant laws and MCA policies. When a new Safety Sheet finally goes to press, typically about two years have elapsed. Drafts of Safety Sheets and relevant correspondence and memoranda are ordinarily retained in MCA files for two to three years.[11/]

Safety Sheets are revised and updated from time to time. However, there is no formalized mechanism for monitoring and evaluating new data and no formal requirement that publications be updated or reviewed at any particular time.[12/] As in the case of new publications, suggestions for revisions are expected to come from individual members of the respective committees whose companies use the various chemicals every day and who can be counted on to keep up with the latest developments relevant to their products. We understand, though, that a proposal for regular review of Safety Sheets by the Safety and Fire Protection Committee is under consideration by the Committee. Under the proposed procedure, each sheet would be reviewed as often as necessary, but in any event not less than every five years.[13/]

11/ Nonetheless, there is a possibility that individual committee members maintain reasonably complete personal files regarding certain publications for longer periods.

12/ Presently, the latest versions of at least 28 of the approximately 100 Safety Sheets currently issued and outstanding were adopted in the 1940's or 1950's; 39 bear adoption dates in the 1960's.

13/ As an interim measure, the Secretary of the Safety and Fire Protection Committee has recently sent a questionnaire to selected individuals -- both on and off the Committee --

B. Distribution

The MCA publications program is operated as a public service and not for profit. MCA does not solicit sales of its publications, but responds to requests for such publications, virtually always on a prepaid basis. The charge for all publications is nominal (e.g., 75¢ for a Safety Sheet). Requests for publications are accepted, processed and shipped by mail from the Washington office. At present there exist no tabulations of how many publications are sent out and no general profile of publication users.[14/] Nor is any master list of purchasers kept or employed when particular publications are updated. (Revisions are noted, however, in MCA's Publications List, which is regularly revised.) Indeed, since many orders of individual publications are in bulk (100 or 500 copies) the Association currently has no way

[Footnote continued]
designed to determine in a short period of time whether any Safety Sheets should be revised in minor respects or withdrawn from distribution pending major revision.

14/ MCA has on file invoices from publication requests received over the last several years, including over 32,000 invoices for the combined two year period 1973-74. A sample of the most recent invoices from 1975 indicates that up to one third of all Safety Sheets are sent to non-members -- primarily industrial companies but also schools, hospitals, book stores, foreign agencies and others. MCA's "Guide" for the Preparation of Chemical Safety Data Sneets" (Revised 1975) notes that while Safety Sheets are written for industrial users, "extensive use" is also made of the sheets by educational institutions.

of knowing to whom they are eventually distributed. Some MCA members distribute them to their own industrial customers, though not always with every separate purchase. Other companies reserve them exclusively for internal use. Still others use them as a primary source in designing their own safety publications, or as a resource to respond to questions from customers.

II. Risks of Legal Liability Arising Out of MCA's Publication Program

Any claim of liability against MCA will most likely stem from a products liability suit based on one of several basic fact patterns distinguishable either by the nature of the product causing the injury or by the identity of the injured party and his relationship to the manufacturer or MCA. The injury causing chemical may be: (a) an imperfect chemical, either adulterated or wrongly made; (b) a perfectly manufactured chemical whose known dangerous properties present a risk of harm in case of inadequate instructions or warnings or (c) a perfectly manufactured chemical whose latent toxic propensities were unknown at the time of manufacture.[15/] The injured

15/ As discussed *infra*, court decisions sometimes label as legally "defective" perfectly manufactured products where the warnings of dangerous properties were misleading or inadequate.

party may be: (1) an employee in an MCA member corporation; (2) a worker in the chemical industry with many years of service with several manufacturers of chemicals, some of which were MCA members and some of which were not; (3) an employee of a company that purchases chemicals from an MCA member for use in the production of other products; (4) a private party who has purchased and used a chemical manufactured by an MCA member company; (5) a private party who has purchased a safety publication directly from MCA; or (6) a private party who has acquired chemicals or safety information in an indirect manner such as by finding an abandoned supply.

Of these variables, the most relevant to MCA liability and on which we will focus, are situations (b) and (c), where a chemical product is designed properly for its intended use and perfectly made but nevertheless involves a risk of harm which is not apparent, either because of inadequate warnings or instructions or because the dangerous characteristic was unknown at the time of manufacture. Because of the strong probability that any suit against MCA will arise in conjunction with a suit against a chemical manufacturer for physical harm to persons arising from the use of such chemical products, and because product liability law with regard to manufacturers is fairly well developed, our inquiry will begin with a general discussion of a chemical manufacturer's potential liability.

A. Theories of Manufacturer's Liability

The main legal theories likely to be employed by a plaintiff to secure damages from the manufacturer of an injury-causing chemical are negligence, strict liability and, to a lesser extent, breach of warranty. While distinct, these theories overlap in significant ways. Negligence, for example, focuses more on the manufacturer's behavior than on the quality of the product. But all three theories require proof of breach of some duty, a product "defect" (including but not limited to, improper design, faulty manufacture, inadequate instructions, or deceptive advertising)[16/] and a causal relationship between the breach of duty and the injury.

16/ E. SWARTZ, HAZARDOUS PRODUCTS LITIGATION § 2:1 (1973).

1. Liability Based on Negligence

Negligence is defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.[17/] The standard of conduct for avoiding negligence is that of a reasonable person under similar circumstances.[18/] Under early negligence law this potential liability could extend only to persons in "privity" with the manufacturer -- meaning in the instant situation immediate purchasers of the manufacturer and the manufacturer's employees. But since MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), it has been established beyond question that the duty of care imposed on the manufacturer and others responsible for putting a dangerous product into the channels of commerce runs not just to the immediate purchaser, but to the general public.

Negligent conduct may be either an act which a reasonable person should recognize as involving an unreasonable risk of causing harm to another or a failure

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17/ W. PROSSER, LAW OF TORTS § 31 (4th Ed. 1971); Restatement (Second) of Torts § 282 (1965).

18/ PROSSER, supra at § 32; Restatement (Second) of Torts § 283.

to do an act which is necessary for the protection of another, where there is a duty to so act.[19] Conduct most often cited by plaintiffs as negligence includes not only carelessness in manufacture, but also failure to warn of inherently dangerous characteristics, deceptive promotion or advertising, or lack of adequate instructions as to how safely to use the product.[20] An explicit statement of this duty under negligence principles to warn against hazards from an inherently dangerous product is set forth in Restatement (Second) of Torts § 388 (1965):

> Chattel Known to be Dangerous for Intended Use
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> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
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> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

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19/ Restatement (Second) of Torts § 284 (1965).

20/ E. SWARTZ, supra at § 2:2; see also cases cited therein as examples of each form of negligent conduct.

> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. (Emphasis added.)

2. Liability Based on Breach of Warranty

As an alternative to negligence, plaintiffs may claim liability based on breach of warranty, a theory quite different in many respects from negligence. Historically, the action is linked with a contract sale. The basis of the warranty action is that the plaintiff has been injured as a proximate result of the failure of the defendant's product to conform with defendant's assertions of warranties. Whatever a seller represents to a purchaser by advertising or otherwise may be an *express* warranty, i.e., part of the contract; most, warranties, however, are based on assurances *implied* in law from seller to buyer that the product purchased will do him or her no harm in normal use. The rules of warranty, both express and implied, are codified, at least for commercial situations, by the *Uniform Commercial Code* (U.C.C.)[21/] which has been accepted by

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21/ The U.C.C. itself is applicable only to the sale of goods -- not to contracts for services. Differentiating services from goods, however, is often difficult. The independent certifier of products is a seller of services -- the testing and most jurisdictions. Under Section 2-314 of the U.C.C. the implied warranty of merchantability includes a warranty that the goods are adequately labeled.

Accordingly, warranties apply to transactions between chemical manufacturers and their immediate purchasers and are affected by labeling like that patterned after suggestions in MCA publications.[22/] Moreover, information (such as Safety Sheets) distributed with chemical products may create express or implied warranties. Note in particular the following statement included on the front of every Safety Sheet:

> "Chemicals in any form can be safely stored, handled or used if the physical, chemical and hazardous properties are fully understood and the necessary precautions, including the use of proper safeguards and personal protective equipment, are observed."

[Footnote continued]
certification of products -- rather than a seller of goods. Rechlin, Liability of Certifiers of Products for Personal Injuries to the User or Consumer, 56 Cornell L. Rev. 132, 139 n.29 (1970). Since MCA performs a somewhat analogous function through the publication of safety guidelines it is arguable that the distribution of this safety information is a service and therefore not subject to the U.C.C.'s warranty provisions.

22/ See Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), where it was concluded that there was both an express and implied warranty that cigarettes were safe.

Under a breach of contractual warranty theory no proof of unreasonable behavior is necessary; it is in this sense similar to traditional strict liability, discussed infra, where the plaintiff need only prove that the product was defective when sold and that he was injured as a proximate result. The main stumbling block for plaintiffs in the traditional breach of warranty action has been the privity requirement; warranties by a manufacturer were held to run only to those to whom he contracted to sell his goods, and the ultimate purchaser or consumer of the goods normally had no direct action against the manufacturer under a warranty. Today, in many courts following the landmark case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), the privity requirement has been relaxed to permit implied warranties to extend, not only to purchasers or users, but also to all persons within the reasonable contemplation of the manufacturer or supplier.[23/]

23/ There is certainly no privity requirement where the manufacturer makes express warranties about the nature of his product in advertising or other communications on which the purchaser relied in purchasing the product. This theory is similar to the negligent misrepresentation theory discussed infra at page 56.

Nonetheless, the trend is away from the use of the breach of warranty theory for asserting product liability claims against manufacturers. This appears to be true for two reasons: first, many of the traditional contractual defenses such as necessity of a sale, notice of breach, and disclaimer limit the seller's liability in a breach of warranty action;[24/] second, changes in the law of strict liability have made the proper presentation of a claim under that theory easier than under a breach of warranty theory.[25/]

3. Strict Liability

The doctrine of strict liability in tort generally imposes liability upon the manufacturer of an inherently dangerous product for injury caused thereby, without requiring proof of unreasonable behavior and notwithstanding a lack of reliance on warranty.[26/] In

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24/ For example, a manufacturer or seller, by appropriate disclaimer language, might limit or exclude warranties, See U.C.C. § 2-316. However, even an otherwise valid disclaimer may be deemed unconscionable insofar as it seeks to limit the seller's liability for personal injuries arising out of the use of consumer goods, see U.C.C. § 2-719(3). And disclaimers do not bar a claim from an injured party who is not the purchaser of the goods.

25/ E. SWARTZ at § 2:13.

26/ Greenman v. Yuba Power Tools, Inc., 59 Cal. 2d 67,377 P.2d 897 (1962).

those jurisdictions accepting this doctrine the trend is clearly toward the expansion of manufacturer's liability. The best and almost universally accepted statement of the doctrine of strict liability is Section 402A of the Restatement (Second) of Torts:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> > (a) the seller is engaged in the business of selling such a product, and
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> > (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> > (a) the seller has exercised all possible care in the preparation and sale of his product, and
> >
> > (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Posing the liability in this way dispenses with the limitations encountered with the implied warranty theory; privity problems are eliminated as long as the injured party is an ultimate user or consumer, and waivers or disclaimers of liability have no effect.

Note that Section 402A requires the product to be both "defective" and "unreasonably dangerous."27/ Defects in products may be of three types: defects in manufacture, defects in design or concealed defects. Concealed defects, the ones most relevant to potential liability of MCA, exist, as we noted earlier, where the product, in the present state of human knowledge, is incapable of being made safe for even its intended uses (e.g., dynamite). However, such products, if socially valuable, properly prepared and accompanied by proper directions and warnings are neither "defective" nor "unreasonably dangerous" within the meaning of the strict liability doctrine.28/ Accordingly, as is the case under negligence, where such warnings and instructions are

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27/ California has recently modified the Restatement definition of strict liability in tort by eliminating the need for proof that a product was "unreasonably dangerous" on the ground that the definition of "unreasonably dangerous" had overtones of negligence.

28/ A good example of this is the area of rabies vaccination where to avoid almost certain and excruciating death from the disease itself the patient must submit to a series of vaccinations which science can render neither comfortable nor free from toxic reaction. Carmen v. Eli Lilly & Co., 109 Ind. App. 76, 32 N.E.2d 729 (1941) (where the patient died but the court denied recovery to his estate because sufficient warning had been given prior to treatment). See also Restatement (Second) of Torts §402A, comment k.

required, the failure to do so renders the product "defective" and subjects the manufacturer to liability. Restatement (Second) of Torts § 402A, comment j. For this reason, the duty to warn is the most critical responsibility in concealed risk situations.

In terms of MCA's publication program it is this duty to warn that is at the heart of potential liability under any of the theories just discussed.

B. The Duty to Warn

The cases establish the general rule that the duty to warn attaches when the risk of harm would be unreasonable without an appropriate warning. Canifax v. Hercules Powder Co., 237 Cal.App.2d 44, 46 Cal. Rptr. 552 (1965); Anderson v. Klix Chemical Co., 256 Or. 199, 472 P.2d 806 (1970). The determination of the existence of a duty to warn in situations involving inherently dangerous products or products with unknown toxic properties involves an assessment of the reasonableness of the manufacturer's behavior in light of a variety of factors: the social utility of the product;[29/] the probability of an injury occurring when the product is

29/ Restatement (Second) of Torts § 291-92.

put to normal use; the seriousness of an injury should it occur; and the feasibility of giving an effective warning. Butler v. L. Sonneborn Sons, Inc., 296 F.2d 623 (2d Cir. 1961). Even strict liability cases necessarily involve a determination of whether the defendant acted in accordance with a reasonable standard in carrying out his duty to warn.[30/] Thus, courts have held that "insofar as a duty to warn is concerned, there is no essential difference in the evaluation of a manufacturer's conduct under strict liability or negligence theories." Brizendine v. Visador Co., 437 F.2d 822, 825 (9th Cir. 1970).

Since considerations of "reasonableness" circumscribe the duty to warn or instruct, it is not surprising that liability depends upon the facts of the particular case. For this reason it is difficult to measure and evaluate the magnitude of this duty. Nevertheless, much can be gleaned from an analysis of the various factors affecting the scope of liability for failure to warn or instruct.

30/ Restatement (Second) of Torts § 402A, comment k.

1. Probability and Extent of Harm

Since the use of almost any product, including chemicals, involves some risk, the duty of a manufacturer must be related in part to the probability and extent of harm involved in the use of the product. An illustration of how this factor is balanced with others is provided in the case of Pease v. Sinclair Refining Co., 104 F.2d 183 (2d Cir. 1939), where an oil company furnished science teachers a display consisting of a set of oil samples. The company had placed water in the bottle marked kerosene in order to make the display more mailable, avoid discoloration, and increase safety. A teacher used fluid from the bottle labeled kerosene to illustrate how metallic sodium is preserved by kerosene, the water came into contact with the sodium, and a serious explosion resulted. In permitting the jury to find a duty to warn, the court weighed the gravity of the possible harm against the practicality of a warning, observing that it "would have been so easy to have warned" of the inaccurate labeling. Id. at 186. If the harm from a possible accident had been less serious, perhaps no duty to warn would have been found, since the chances of the water being used for this experiment were remote.

Consistent with these principles, highly unusual reactions to a product generally do not render it defective or establish a duty to warn. Thus, for example, in most situations involving injury from an allergenic or hypersensitive reaction the courts have held that the duty to warn attaches only where an appreciable number of potential users were subject to possible harm. Alberto-Culver Co. v. Morgan, 444 S.W.2d 770 (Tex. Civ.App. 1969). But this may pertain only to those situations where the plaintiff's reaction is so unique that it could not reasonably have been guarded against. The case of Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968), is evidence that the probability of injury need not be large if the injury is a serious one. In Davis, a person contracted polio as a result of taking a vaccine designed to immunize against the disease. The court held that the defendant had a duty to warn the injured person of the possible danger involved, notwithstanding that the possibility of contracting polio by taking the vaccine was only one in a million. Similarly, in Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969), a case involving potential eye injury to a certain percentage of persons to whom defendant's drug was prescribed, the court noted that duties to warn are not measured in all instances by quantitative standards and that a manufacturer may in some circumstances have a duty to warn those few persons who it knows cannot use its product without serious injury.

2. Foreseeability of Harm

Of equal relevance to a determination of whether a duty to warn exists is the factor of foreseeability. The courts have held generally that the duty to warn applies only with respect to an intended use of the product, or a use reasonably foreseeable by the defendant.[31/] For example, in Barth v. B. F. Goodrich

31/ This is also the rule under the Restatement, whether plaintiff's case is based on negligence or on strict liability. Restatement (Second) of Torts § 395, comment j (negligence), § 402A, comment h (strict liability). There are, however, qualifications to this rule. For example, there is no need to warn of obvious dangers even if foreseeable (e.g., that a sharp knife will cut) or of dangers actually known to the user. Villanueva v. Nowlin, 77 N.M. 174, 420 P.2d 764 (1966); Restatement (Second) of Torts § 388, comment k. On the other hand, to the extent any unintended uses involving risk are reasonably foreseeable the product may be deemed unreasonably dangerous and defective if an adequate warning is not given. See Suchomajcz v. Hummel Chemical Co., 524 F.2d 19 (3d Cir. 1975), where the court found that a chemical manufacturer should have anticipated that a firecracker assembly kit would be handled by minors in whose hands the chemical components of the kit were likely to be misused, and therefore, that the manufacturer had breached its duty of care when a buyer of the firecracker kit abandoned the chemical bottle and someone threw a match into the bottle, causing an explosion which killed several children. See also Hall v. E. I. duPont de Nemours & Co., 345 F. Supp. 353 (E.D. N.Y. 1972), discussed infra at pp. 49-56.

<u>Tire Co.</u>, 265 Cal.App.2d 228, 71 Cal. Rptr. 306 (1968), the manufacturer had sold tires with a safe carrying capacity of 1,175 pounds, while knowing that the tires would be used on station wagons and other vehicles which would place a load on the tires of about 25 percent in excess of the safe carrying capacity. The court took the position that since the tire manufacturer knew, or should have foreseen, that its tires would be subject to overloading, it could be found to have had the duty to inform the users as to the carrying capacity of its tires and that, absent any such information or warning the tires could be considered defective notwithstanding that they were manufactured as intended.

As a necessary antecedent of the general rule, the manufacturer has a duty "to use reasonable care [in] making <u>reasonable tests</u> to discover latent hazards." <u>Barfield v. Atlantic Coast Line R.R.</u>, 197 So. 2d 545, 547 (Fla. App. 1967) (emphasis added). Though he is not required to "make tests that are not practical or economically feasible in relation to the risk," <u>id.</u>, the manufacturer is held to the knowledge and skill of an expert -- meaning that at a minimum he must keep abreast of scientific knowledge, discoveries and advances and is presumed to know what is imparted thereby.[32/] This implied expertise certainly expands the duty to warn by attributing to the manufacturer not only whatever knowledge an expert would possess, but also the knowledge that reasonable tests would have revealed. Chapman Chemical Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949).[33/] The question of what is adequate testing therefore becomes acute, particularly in the chemical area where toxic reactions in humans may be different from those of test animals and where it remains possible for a chemical to harbor unknown hazards to its user even if it has been fully tested to the limit of scientific knowledge.[34/]

32/ See Keeton, Product Liability--Problems Pertaining to Proof of Negligence, 19 Sw.L.J. 26, 30-33 (1965); Abell, "The Manufacturer's Duty To Test and Inspect" as reprinted in PRODUCTS LIABILITY: LAW, PRACTICE, SCIENCE 247-258 (2d ed. P. Rheingold & S. Birnbaum 1975).

33/ In Chapman a corporation which manufactured and sold chemical dust for use in spraying rice crops from airplanes was not excused from liability for damage to other crops where it was unaware of the peculiar carrying quality of the dust since "it was charged with the knowledge which tests would have revealed." 222 S.W.2d at 827.

34/ Of course, the risk of harm from unpredictable toxic reactions to new drugs or chemicals can be minimized but not entirely eliminated by testing. Philpot, The New Citadel: Enterprise Liability for Inherently Dangerous Products, 25 Food Drug Cosm. L.J. 414, 419 (1970).

To date, most courts have held that the danger must have been reasonably foreseeable at the time of marketing -- something which the manufacturer could have guarded against by the application of reasonably developed human skill and foresight. Thus, for example, courts have refused to hold cigarette manufacturers strictly liable for cancer deaths because the causal relationship between smoking and cancer was not known until recently. They have held that strict liability does not extend to dangers "'which no developed skill or knowledge thus far existing could avoid.'" Ross v. Philip Morris & Co., 328 F.2d 3, 11 (8th Cir. 1964), quoting Lartique v. R. J. Reynolds Tobacco Co., 317 F.2d 19, 39 (5th Cir. 1963).[35/]

Similarly, some courts have refused to hold drug manufacturers strictly liable for adverse effects which were not known or reasonably foreseeable, despite adequate testing, at the time the product was marketed. For example, in O'Hare v. Merck & Co., 381 F.2d 286 (8th

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35/ But compare Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), where it was concluded that there was both an express and implied warranty that cigarettes were safe.

Cir. 1967), where the injury was intestinal lesions from the use of "HydroDIURIL Ka-50", the action failed as no negligence in testing was shown.[36/] However, other courts have been willing to impose strict liability where the risk of harm was unforeseeable, such as in a case where a hospital was held strictly liable for furnishing blood plasma which contained a serum hepatitis virus which allegedly was scientifically impossible to detect. Cunningham v. MacNeal Memorial Hospital, 47 Ill. 2d 443, 266 N.E.2d 897 (1970). The courts which take this position argue that strict liability applies regardless of fault. Thus, under this view, if the product proves harmful in normal use or consumption, it is defective, and foreseeability of such harm should be held immaterial.

In any event, once the defect is discovered or should have been discovered, another aspect of the foreseeability factor attaches: the continuing duty of the manufacturer to warn after the time of sale. In Comstock v. General Motors Corp., 358 Mich. 163, 99

36/ But compare Stromsodt v. Parke-Davis & Co. (257 F. Supp. 991) (D.N.D. 1966), where the defendant was said to be liable in negligence for inadequate testing before marketing notwithstanding that the drug satisfied the minimum standards set by the Federal Government.

N.W.2d 627 (1959), negligence liability was imposed on the manufacturer of an automobile for failure to warn consumers once it learned of a defect in the braking system. Without equivocation the court announced:

> "If such duty to warn of a known danger exists at point of sale, we believe a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market." 99 N.W.2d at 634.

Although this case involved a design defect the same logic could be applied to the defect of concealed danger in the chemical and drug areas. This is borne out by the decision in Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966), where the United States Court of Appeals for the Eighth Circuit affirmed a finding that the manufacturer of Aralen, a drug used for the treatment of arthritis, was negligent in failing to adequately warn physicians that the drug could also cause side effects leading to blindness, even though this danger was unknown at the time the drug was first placed on the market. Without expressly adopting the continuing duty concept, the decision rests not on failure to warn at the time of sale, but on the failure of the manufacturer to provide adequate warning when it learned of the defect after the drug had begun to be distributed. The strictness of this rule is shown by the fact that both Comstock, supra, and Sterling, supra, dealt with defects each of which would be likely to cause injury only to one or a few victims at a time. Additionally, in Comstock, General Motors' duty continued despite its exercise of due care in manufacturing and testing and despite its notice of the defect to its own distributors. The court makes clear that token efforts to warn are not enough; all reasonable means must be employed to convey an effective warning to those to whom a duty to warn is owed.

3. Persons Required to be Warned

Many of the leading cases on this subject deal with manufacturers of machines or other items which reach the user in exactly the same form as they leave the manufacturer's plant. In such instances, the courts have held that the duty to warn extends all the way to the user. A recent example of this is a 1975 case, Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851 (8th Cir.), cert. denied, 423 U.S. 865 (1975), in which the employee of a truck owner sued the manufacturer of a wheel rim for injuries sustained when a tire exploded because it and the rim were mismatched. The court held that the duty of the manufacturer did not end when it warned its immediate distributor of the danger of mismatching. The key factor in this case appears to have been the ease with which the manufacturer could have made the necessary warnings to the ultimate user by impressing the warning on the rims as they were being cast.[37/]

In other situations, the manufacturer's duty to warn extends only to the persons under whose direction the injured person worked or received the product. Thus, in the prescription drug area it is generally accepted that the warning or instructions are required to be directed to the prescribing physician or to the medical profession generally since in such cases the choice involved as to whether to take the drug is essentially a medical one involving an assessment of the medical risks in light of the physician's knowledge of his patient's needs and susceptibilities. Incollingo v. Ewing,

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37/ It is important to note that the Griggs situation differs significantly from situations involving chemicals, which will most likely be used in conjunction with other products not sold by the manufacturer and which, because of their very nature, cannot be labeled in such a way as to insure the warning with respect to a particular chemical reaching the ultimate consumer. This does not, however, dispose of the question of liability to employees of the chemical manufacturer nor of the question of joint liability where chemicals have been combined.

444 Pa. 263, 299, 282 A.2d 206 (1971). Similarly, where an allegedly defective product injured an employee who worked under the direction of technicians or engineers, and where understanding of the danger involved technical considerations, it has been held that the proper persons to be warned were the technical persons and engineers. Jacobson v. Colorado Fuel & Iron Corp., 409 F.2d 1263 (9th Cir. 1969). There it was held that an employee of a manufacturer of prestressed roof beams who was killed when a steel strand of wire snapped during the prestressing operation was not required to be warned by the manufacturer of the wire of the extreme danger involved in using the wire in such operation, where the employer and his supervisory personnel were already fully aware of the danger. Said the court:

> "There is no duty to warn those who simply follow the directions of engineers or technicians, or to put it differently, there is no duty of a supplier of a chattel to foresee that the engineers or technicians will fail to follow warnings given or to employ knowledge possessed." Id. at 1273.

Another case on point is Gutowsky v. M&R Plastics & Coating, Inc., 231 N.W.2d 456 (Mich. Ct. App. 1975), in which an employee was injured while he breathed vapors of a urethane chemical binder which was being used to manufacture foam rubber mattresses. The product was shipped to the plaintiff's employer in 55-gallon drums, each of which had two labels cautioning against the breathing of fumes or otherwise contacting the material.[38/] Despite the knowledge of the employer that adequate ventilation was needed, the employer continued to subject the plaintiff to the exposure which the job entailed. The jury returned a verdict for the defendant manufacturer and the case was affirmed on appeal.

Similarly, in Younger v. Dow Corning Corp., 202 Kan. 674, 451 P.2d 177 (1969), the court held that the defendants (two chemical manufacturers) had fully discharged their duty to warn where the plaintiff's employer had received adequate warnings from the defendants concerning the health hazards that could arise without adequate ventilation and where the plaintiff's employer was aware of these hazards:

38/ In Gutowski the adequacy of the manufacturer's warning to the employer as contained in the labels was a question for the jury to be determined under general negligence standards. Id. at 461. Interestingly, to aid the jury, the lower court in Gutowski admitted evidence of "industry standards as contained in the Manufacturing Chemists Association's Chemical Data Sheet" and permitted a witness to explain why, in his opinion, the label on the drums did not measure up. Id. at 465.

> [T]he manufacturer of a product which is potentially hazardous to health and who gives adequate warning of such potential hazard, by label or otherwise, to its immediate vendee, an industrial user, has no additional duty to warn the vendee's employee of such hazards, and is not liable in a negligence action to such employee for failure to do so." Id. at 184 (emphasis by the court).

Nevertheless, a manufacturer may not "rely unquestionably on others to sound the hue and cry concerning a danger in its products." Borel v. Fiberboard Paper Products Corp., 493 F.2d 1076, 1090 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). In Borel an industrial worker had contracted asbestosis and mesothelioma as a result of breathing asbestos dust. In responding to the defendants' arguments that it was the duty of the employer insulation contractors, not the manufacturers, to warn the insulation workers of the risk of harm, the court rejected the principle enunciated in Younger, supra, saying:

> "We agree with the Restatement [Restatement (Second) of Torts § 402A]: a seller may be liable to the ultimate consumer or user for failure to give adequate warnings. The seller's warnings must be reasonably calculated to reach such persons and the presence of an intermediate party will not in itself

> relieve the seller of its duty." Id. at 1091 (emphasis by the court).39/

There is no guarantee, therefore, that a manufacturer of chemicals will not be held to owe a duty to warn the ultimate users of its product even though adequate warning is provided to employers and distributors. Certainly, the difficulty of warning the ultimate consumer or user of the chemicals is one factor which will be considered, but not the controlling one.

> "Difficulty of giving notice is only one of the factors to be considered in deciding this question. ... The law demands only that the method used give 'reasonable assurance that the information will reach those whose safety depends upon their having it'." Cooley v. Quick Supply Co., 221 N.W.2d 763, 772 (Iowa 1974).

In Cooley, the plaintiff was injured by dynamite which he had purchased from Mateer Implement Company which had in turn purchased the dynamite from the defendant, a dynamite distributor. The plaintiff claimed that the defendant had failed to give adequate warning

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39/ In elaborating on this point, the Borel court was quick to add that "[i]n general, of course, a manufacturer is not liable for miscarriages in the communication process that are not attributable to his failure to warn or the adequacy of the warning," id. at 1091, particularly where, for example, "some intermediate party is notified of the danger, or discovers it for himself, and proceeds deliberately to ignore it and to pass on the product without a warning." Id. at 1091, 1092. But where a product is extremely dangerous, the manufacturer or seller cannot rely on the intermediate party to transmit a warning. Id. at 1092 n. 29.

regarding the safety fuses which were sold to Mateer in 50-foot rolls included in a single large carton on which was written a warning which referred to separate pamphlets furnished with each shipment. What is most significant is that the court suggested that the defendant might have a duty to determine through inquiry whether or not it was Mateer's practice to furnish such information to each purchaser.[40/] Additionally, since the defendant knew that the fuses were sold in small quantities the court found that the defendant must have foreseen that some purchasers would be unfamiliar with dynamite and that the probability of injury if the dynamite was not used properly would be significant. Thus the defendant's conduct was not reasonable in relation to the scope of its duty.

4. Sufficiency of Warning

Of course where there is a duty to warn the warning must be sufficient. The adequacy of any particular warning will turn in large measure on the facts of each case; however, there are several factors

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40/ Query whether under analogous circumstances a chemical manufacturer may have a duty to inquire into how the safety information it distributes is used by its immediate vendors.

to be considered. A warning should be communicated by the most effective means and should be specific as to the hazards involved in the product's use.[41/] While it would appear that the requirements are greater with respect to drugs and other dangerous products than for products with a low degree of danger, a warning or instruction is considered adequate as a general rule if, when considering the nature of the product, it reasonably informs the user of the full scope of the danger involved and how the product may be used with reasonable safety.

In the case of extremely dangerous products, the supplier may be required to go to considerable lengths to inform the required persons of danger and may be held liable if it engages in activity which has the effect of offsetting the otherwise sufficient warning given. An example of this type of reasoning occurs in Stevens v. Parke, Davis & Company, 9 Cal.3d 51, 107 Cal. Reptr. 45 (1973), where the drug company was held liable, notwithstanding the prescribing physician's cognizance

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41/ Examples of cases where the warnings failed to cover the full scope of the risk or were not specific enough include: Simonetti v. Rinshed-Mason Co., 200 N.W.2d 354 (Mich. Ct. App. 1972); Whitehurst v. Revlon, Inc., 307 F. Supp. 918 (E.D. Va. 1969); Tucson Industries, Inc. v. Schwartz, 501 P.2d 936 (Ariz. 1972).

of the risk inherent in the drug Chloromycetin, because of its failure to emphasize the warning in its promotional efforts for the drug. Citing Section 449 of the Restatement (Second) of Torts,[42/] the California Supreme Court concluded that, if it was reasonably foreseeable that promotional efforts directed at the medical profession urged doctors, consciously or unconsciously, to administer Chloromycetin when its use was not justified, Parke, Davis could not be "relieved of liability because of the intervening act of Dr. Beland in prescribing the drug while cognizant of its dangers." 9 Cal. 3d at 69. In Stevens, the promotional activities involved drug salesmen whose failure to communicate the warning to the medical profession, coupled with their giving away calendars and other promotional activities, represented the basis for the "overpromotion" charge. It is not clear, however, what other activities by a manufacturer would be considered capable of "diluting" or "cancelling" an otherwise sufficient warning.

42/ Restatement (Second) of Torts § 449:

> "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."

C. Trade Association Liability

The foregoing summary demonstrates that the manufacturer's duty to produce safe products, with adequate warnings and instructions where necessary, is an expanding one. Moreover, recent trends in the concept of foreseeability permit recovery by a larger class of plaintiffs, and against an expanding class of defendants.[43/] In this context the important question for MCA becomes whether liability can be extended to a trade association, either alone or jointly with its members, for harm caused by a chemical product which is manufactured by one of its members and handled in a manner consistent with the guidelines incorporated in MCA's safety publications. Current law is unsettled as to the liability of a trade association for industry practices over which it may have some influence. And to date, as far as we are aware, no trade association has been held liable under the circumstances mentioned above. Nevertheless, there are several theories under which such liability might be claimed.

43/ See generally Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791 (1966).

1. Restatement (Second) of Torts § 324A

One principle on which an injured party might rely in seeking damages against MCA is the "Good Samaritan Rule" embodied in Section 324A of the Restatement (Second) of Torts:

> § 324A. Liability to Third Person for Negligent Performance of Undertaking
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> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."44/

44/ See also the closely related Section 323 of Restatement (Second) of Torts which differs from Section 324A only with regard to whom the actor is liable:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise

The application of this section extends to any undertaking to render services to another where the negligent performance of the services, or the failure to exercise reasonable care to protect a third person when the service is discontinued, results in physical harm to the third person.[45/] Even where the negligence does not create new risks, liability may still be imposed if, by an undertaking with another (e.g., an employer) one has undertaken a duty which the other owes to the third person (e.g., an employee).[46/] And finally, where the reliance of another or of a third person has led to harm or induced either of them to forego other remedies or precautions against such risk, the harm results from the negligence of the entity undertaking the service as fully as if that entity had created the risk.[47/]

[Footnote continued]

> reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking."

45/ Restatement (Second) of Torts § 324A, comment h.

46/ Id. at comment d.

47/ Id. at comment e.

Under these interpretive guidelines MCA would more likely be exposed to liability if it enforced its recommended standards or if it expressly warranted that specific products were tested and handled in compliance with them. Nevertheless, even in the absence of such evidence of an "undertaking," Section 324A may be invoked as support for an argument that, by voluntarily sponsoring a program which develops and distributes recommended procedures for the labeling, packaging and storing of chemicals with inherently dangerous qualities, MCA has undertaken a service which it "should recognize as necessary for the protection of third persons" such as employees of MCA member corporations and the employees of their customers, not to mention other recipients of the safety information who rely upon such information. A version of this argument has recently been made in the case of Arnstein v. MCA, Civ. No. 74-3323 (E.D. Pa.), where the complaint alleges that the plaintiff's decedent died of cancer caused by his exposure to excessive amounts of vinyl chloride over many years of employment by various chemical companies.[48/] MCA filed a motion to dismiss in which it argued that plaintiff had failed to allege that MCA owed a legal duty to plaintiff's decedent or that MCA's alleged breach of that duty was a proximate cause of plaintiff's decedent's death. While pointing out that subsequent developments may establish that MCA is correct in either or both contentions, the court concluded that the issues could not be properly determined on a motion to dismiss, and denied the motion, stating that:

> "[T]he complaint can properly be interpreted as asserting a cause of action under §324 of the Restatement of Torts 2d, . . . *** or under the closely-related § 323." Memorandum and Opinion in *Arnstein*, *supra*, at 6 (Jan. 30, 1976).[49/]

48/ In *Arnstein*, plaintiff has alleged that:

> "[T]he negligence of . . . MCA consisted, of inter alia, recommending an exposure level of vinyl chloride without adequate testing when it was known or should have been known that said substance was harmful to humans; failing to advise plaintiff's decedent or others at the earliest opportunity of the potentially adverse effects of vinyl chloride once MCA knew of such adverse effects; and failing to correct its own recommendations as to the safe exposure level of vinyl chloride at the earliest opportunity. MCA was also negligent to plaintiff's decedent under principles set forth in *Restatement of Torts*, 2d §323." Complaint, ¶ 16.

49/ *Cf. Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (D. Del. 1967), where the court found the defendant Underwriter Laboratories, an independent

2. Joint Liability

Another theory of trade association liability is presented by the case of Hall v. E.I. duPont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972).[50/] The suit was brought by thirteen minor plaintiffs who were injured by blasting caps in twelve separate incidents over a five-year period. The children sought damages from six explosive manufacturers and from their unincorporated trade association, the Institute of Makers of Explosives (IME). Plaintiffs claimed that the industry-wide practice of not placing a warning on individual blasting caps and the ease with which the caps exploded constituted either negligence or a product defect which caused their injuries. By alleging that the lack of warning was a result of defendants' concerted action

[Footnote continued]
testing organization, liable under Restatement § 324A for the injuries sustained by an exploding fire extinguisher where it had negligently approved the extinguisher's design and permitted its label to be used. While MCA's role is distinguishable from that of Underwriter's in that MCA does no testing and makes no express warranties, there still may be an implicit assumption that following MCA's safety guidelines will assure that a product can be safely used. Indeed, the "safe use" statement on the cover of MCA Safety Sheets arguably amounts to an explicit assurance of this nature.

50/ The Hall caption comprehends two distinct cases. The stated facts are from Chance v. E.I. duPont de Nemours & Co., decided and reported with Hall. Hall differed from Chance in that the plaintiffs in Hall could identify the manufacturer of the particular injury causing caps.

plaintiffs sought to have all defendants -- virtually the entire United States blasting cap industry -- held jointly liable despite plaintiffs' inability to identify the manufacturer of any individual injury-causing cap.

In denying a motion to dismiss the complaint, the court held that if the plaintiff could demonstrate that defendants' concerted action created an unreasonable risk of harm, joint liability might be imposed on the entire industry under a theory of negligence or strict liability. The court also held that even absent a showing of concerted action, if plaintiff could demonstrate defendants' joint awareness of the risks and joint capacity to reduce or affect those risks, joint liability might be imposed under a theory of enterprise liability.[51/]

Under this latter theory liability is deliberately imposed on the "most strategically placed participants in a risk-creating process, even though injuries are caused 'directly' or partially by other participants..." Id. at 376. The justification stems

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51/ The Hall court also recognized many other delicate factors must be part of its judgment, including the social utility of the activity out of which the injury arose, compared with the risks, the cost of taking precautions, the kind of person with whom the actor is dealing and the foreseeability of the injurying-causing use, to mention a few. Id. at 366.

from the fact that the damage is often caused by multiple actors and the sole way of anticipating and spreading costs is to consider the activities of the group. In Hall, the enterprise group was defined as the entire industry and trade association because they "provided the logical focus at which precautions should be taken and liability imposed." Id. at 378. The fact that IME actually gathered accident data which allegedly gave the defendants actual knowledge of the risk was an important factor in this determination. But where there is no "joint awareness of the risk" and no "joint capacity to reduce the risk" the court would be reluctant to find liability. Id. To illustrate this point the court distinguished between a decentralized industry with thousands of small producers with regard to which enterprise liability may not be fair and a centralized industry with five or ten producers where there is greater likelihood that knowledge of the known risks are shared and that a joint capacity to reduce risks exists. Id.

The other theory on which joint liability may be founded is joint control of risk. The distinction between "joint capacity to reduce risks" necessary for enterprise liability and the traditional element of joint control of risk is unclear since joint capacity implies joint control. The best illustrations of joint liability arising out of joint control of risk are the automobile racing cases where liability is extended to both participants who engaged in an impromptu and wreckless race on public roads resulting in injuries to nonparticipants. There, as in two cases cited by Judge Weinstein in Hall,[52/] the defendants had a physical association with the defective product which caused the injuries. But in Hall the alleged joint control of risk was not a physical association but an industry-wide agreement to forego labeling in the face of known risks. Thus, the joint control of blasting cap design was purportedly attained through a horizontal integration of those parties cooperating with the trade association to influence cap design.

The court concluded that it was not necessary for plaintiffs to demonstrate that the explosives industry was "rigidly controlled" through the trade association

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52/ Vandermark v. Ford Motor Co., 61 Cal.2d 256, 391 P.2d 168 (1964) (where an automobile retailer and the automobile manufacturer were both found to be strictly liable for injuries resulting from a car defect); Dement v. Olin-Mathieson Chemical Corp., 282 F.2d 76 (5th Cir. 1960) (where evidence showed that either of two component parts might have caused the accident, manufactuers of both were found to have joint control of the risk and both were therefore liable for injuries caused by the product).

with regard to the blasting cap labeling or to demonstrate that such control resulted in a reprehensible breach of duty. Id. at 374.[53/] Instead, the court listed several factors to be explored in determining whether joint control of risk actually existed:

> "Factors which must be explored to determine both the existence of joint control of risk and appropriate remedies (if any) include the size and composition of the trade association's membership, its announced and actual objectives in the field of safety, its internal procedures of decision making on this issue, the nature of its information-gathering system with regard to accidents, the safety program and its implementation by the association and member manufacturers, and any other activities by the association and its members (such as legislative lobbying) with regard to safety during the time period in question." Id. at 376.

The court specifically mentioned that the existence of safety standards, codes and practices for an industry might affect the joint liability of manufacturers and trade associations in that industry:

53/ It is worth noting that in the original Hall complaint, Hall v. DuPont, 312 F. Supp. 358 (E.D.N.Y. 1972), the plaintiffs alleged that the defendants conspired to eliminate competition in the field of safety, in violation of the Sherman Antitrust Act. The Sherman Act claims were dismissed because of the expiration of the applicable statute of limitations and plaintiffs were granted leave to amend.

> "Where such standards or practices exist, the industry operates as a collective unit. . . . As our decision in Hall below indicates, the existence of industry-wide standards or practices alone will not support, in all circumstances, the imposition of joint liability. But where . . . individual defendant-manufacturers cannot be identified, the existence of industry-wide standards or practices could support a finding of joint control of risk and a shift of the burden of proving causation to the defendants." Id. at 374. (Emphasis added).

The underscored qualification indicates that the industry-wide joint liability theory expressed in Hall is applicable only in those limited situations where the maker of a specific injury-causing product cannot be identified. The purpose of the joint liability theory is to overcome problems of proof of causation where there is uncertainty as to who the defendant should be. This is accomplished by three steps: first, joint control of risk or enterprise liability is found to sustain a finding of joint liability; once joint liability is found the responsibility of each group member is established; finally, since causation must still be proved, the plaintiff is permitted to shift the burden of proof inaccordance with Restatement (Second) of Torts §

433B(3).[54/] From this we can see that the focus on the trade association is required only for the first step in developing joint liability, which itself is necessary only in special circumstances. Accordingly, in the companion Chance case (see note 50, supra), where individual defendant manufacturers were identified, joint liability was held not to be warranted and the court declared that "the absence of any demonstrable need for joint liability in administrative or remedial terms,

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54/ Restatement (Second) of Torts § 433B(3) (1965) provides:

> "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."

Comment f to that section states:

> ". . . the reason for the exception is the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm."

See also Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1975) (jury should have been instructed that the failure of any defendant to prove nonculpability would trigger liability in an action against a surgeon, hospital, manufacturer and supplier for injuries sustained during surgery while the plaintiff was unconscious).

requires dismissal of each plaintiff's claims against the non-producer defendants." Id. at 386 (emphasis added).[55/]

Notwithstanding these limitations, the decision in Hall indicates a judicial willingness to alleviate problems of proof where harm has been done and to scrutinize the behavior of a trade association when necessary.

3. Negligent Misrepresentation

The third theory under which a plaintiff may attempt to claim liability against MCA is negligent misrepresentation, one of the tools recently deployed against an array of targets arguably part of the marketing chain.[56/] The best example of this is Hanberry

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55/ Judge Weinstein expressed his concern that trade associations not become automatic targets in every products liability suit when he stated that "[i]n the event that the evidence warrants it, the imposition of joint liability on the trade association and its members should in no way be interpreted as 'punishment' for the establishment of industry-wide institutions." Id. at 378.

56/ Recent articles and cases have recommended and/or upheld the extension of liability to various parts of the marketing chain: Note, Tort Liability of Trademark Licensors, 55 Iowa L. Rev. 693 (1970); Kasel v. Remington Arms Co., 24 Cal. App.3rd 711, 101 Cal. Rptr. 314 (1972) (trademark licensor); Note, Tort Liability of Independent Testing Agencies, 22 Rutgers L. Rev. 299 (1968) (recommending extension of strict liability for product certifiers); Hempstead, supra, 269 F. Supp. at 109 (liability of independent test organization for negligence); Werber & Trombetta, Product Liability: The Potential Liability of the Advertising Agency, 24 Clev. State L. Rev. 413 (1975); Shatterproof Glass v. Jones, 466 S.W.2d 873 (Tex. Civ. App. 1971) (liability of accountants for negligence to third parties).

v. Hearst Corp., 276 Cal. App.2d 680, 81 Cal. Rptr. 519 (1969), where the plaintiff was injured when she fell on a wet floor while wearing shoes she bought relying on the Good Housekeeping Seal. Hearst Corporation, the publisher of Good Housekeeping magazine, never inspected the shoes. Suit was brought against the retailer, the distributor and Hearst Corporation. After rejecting the privity doctrine as inapplicable to cases of personal injury caused by negligent misrepresentation,[57/] the court held the certifier's representations as to superior knowledge and special information were actionable because it voluntarily assumed a business relationship for economic gain in order to induce the plaintiff to buy the shoes.[58/]

57/ The subscribers to a certifier's publication arguably would be in privity of contract, making recovery easier. Similarly, MCA's subscribers to its safety publications might claim the same status.

58/ "[O]ne who endorses a product for his own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement." 81 Cal. Rptr. at 521.

In so doing, the Court rejected the contention that Hearst could effectively disclaim or limit liability for negligent misrepresentation. 81 Cal. Rptr. at 522. It also cited with approval Restatement (Second) of Torts § 311:

> § 311. Negligent Misrepresentation Involving Risk of Physical Harm
>
> "(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other, or
>
> (b) to such third persons as the actor should expect to be put in peril by the action taken.
>
> (2) Such negligence may consist of failure to exercise reasonable care
>
> (a) in ascertaining the accuracy of the information, or
>
> (b) in the manner in which it is communicated. (Emphasis added)

This section focuses on the reliance upon "false" information,[59/] and not necessarily the source,[60/]

59/ One major difference between liability for simple negligence (under Section 324A of the Restatement) and liability for negligent misrepresentation (under Section 311) is that, in the former case, reliance by the third party need not be shown to sustain recovery.

60/ Cf. Restatement (Second) of Torts § 402B, which limits recovery under its provisions to the "consumer" (including the purchaser's employee) who "justifiabl[y]" relied on the misrepresentations of the "seller."

suggesting that its authors intended it to be applied broadly. Even so, Hanberry is of questionable relevance to MCA because of the different function MCA plays vis-a-vis chemical manufacturers. While MCA establishes safety guidelines, it does not certify or endorse products. Secondly, MCA is not paid by its members to establish guidelines and does not do so for economic gain. And finally, unlike some certifiers, MCA is not an advertising medium for manufacturers. For all of these reasons, the logic of Hanberry would be less applicable to MCA.

On the other hand, there are several disturbing aspects to the Hanberry decision. First, the court held Hearst subject to possible liability even though the endorsement of Good Housekeeping involved in Hanberry was limited; the seal by no means expressed that it was a certification of safety, rather it stated that an "evaluation of samples and other pertinent data" satisfied Good Housekeeping as to the quality of the product.61/ In comparison MCA notes on the front cover

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61/ "We satisfy ourselves, by evaluation of samples and other pertinent data, that the products and services advertised in Good Housekeeping are good ones and that the claims made for them in our magazine are truthful. If any product or service advertised in Good Housekeeping proves to be defective, it will, upon request of the consumer and of its Safety Sheets that "Chemicals in any form can be safely . . . used if . . . the necessary precautions . . . are observed." Second, *Good Housekeeping* was held subject to liability notwithstanding its attempts to limit its liability by disclaimers[62/] which were almost as broad as parts of the disclaimer found on the inside cover of MCA's Safety Sheets.[63/] Finally, though the advertising aspect of the *Good Housekeeping* seal is evident, it cannot be said that there is a complete absence of economic benefit to MCA and its member companies associated with the publication of the Safety Sheets. They are sold to nonmembers as well as members, apparently at a profit, and distributed by some members to their customers. As a result, a court could find an implicit marketing benefit to MCA's safety publication program; it could also conceivably find that Safety

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[Footnote continued]
verification of the complaint, be replaced or the price which the consumer paid for it will be refunded. Except for this Consumer's Guaranty, *Good Housekeeping* makes no warranty or other guaranty, express or implied, with respect to such products and services. Insurance, realty, automobile, public transportation, travel facilities and institutional advertisements are not included in the Guaranty."

62/ See note 61, *supra*.

63/ See note 8, *supra*.

Sheets allay fears about the dangers in chemicals and thereby induce persons to purchase such chemicals they might not purchase otherwise.

Any attempt at analogizing MCA's role to that of an independent certifier or testing organization is, to be sure, far from convincing. The possibility cannot be excluded, however, that a judge will extend similar reasoning just that far. As the Hanberry court stated:

> "In arriving at this conclusion [that liability exists] we are influenced more by public policy than by whether such cause of action can be comfortably fitted into one of the law's traditional categories of liability." 81 Cal. Rptr. 519, 521 (1969) (Emphasis added).

It is this increasingly popular attitude which makes it very difficult to provide any assurance that perfectly valid legal and factual distinctions will be adhered to in the future.

* * *

In sum, it is well established that a manufacturer of an inherently dangerous product such as a chemical has a duty to exercise reasonable care in warning customers and users of his product of its hazards and how to deal with them. And a number of conceptual bases exist for extending such liability to a trade association such as MCA, which issues safety publications directly relevant to the use of its members companies' products. Plaintiffs' lawyers are already employing such arguments, and it is certainly within the realm of possibility that, given an appropriate set of facts, a finding of liability against a trade association will be entered by some court in the near future.

Traditional defenses[64/] such as contributory negligence,[65/] assumption of the risk, product misuse, intervening cause, lack of causation, and a lack of a duty running from the trade association to the ultimate user of the product will be available to MCA in a product liability suit, and they may or may not succeed depending largely upon the facts of the particular case. If they do not, the trade association's liability is likely to turn on the court's judgment as to the

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64/ See generally S. SCHREIBER & P. RHEINGOLD, PRODUCTS LIABILITY, 5.1-5.43 (1967).

65/ In states with comparative negligence statutes plaintiff's negligence may not bar recovery. Additionally, contributory negligence is not generally recognized as a defense under strict liability and there is a split in authority as to whether contributory negligence is a valid defense to a claim of breach of warranty. E. SWARTZ, §§ 2:3, 2:13.

reasonableness of its conduct. In judging the issue of reasonableness, the court will be influenced by the social utility of the association's program, the claims that are made for the program, and -- above all -- the reasonableness of the procedures by which the safety program is implemented.

III. Recommendations

The risk of liability that MCA faces in its publication program can be reduced but cannot be entirely eliminated. This raises the obvious question of whether the publication program should be continued -- a decision that requires a balancing of the inevitable risk of liability against the benefits to MCA, its members and the public that flow from the publication program. This balancing judgment is a difficult one, since it is impossible to quantify the risk in any precise way, and since judgments as to the value of the publication program may vary. However, the view that the program performs a substantial service to the industry and the public appears to be widespread and, if appropriate cautions are observed, the risks of legal liability are not so high that we feel obliged to recommend that the program be discontinued.

We do believe strongly that if MCA determines to continue its safety publications program -- particularly the publication of Safety Sheets -- various changes in policies and procedures should be made to minimize the risk that MCA will be successfully sued in a product liability suit. To be sure, some precautionary measures may have the side effect of emphasizing or even increasing the undertaking that MCA is making to persons who purchase or use its publications, and increasing the exposure of MCA and its members to claims of "enterprise liability." But, on balance, it seems to us that any legal disadvantage on this score is outweighed by the gain in legal protection in terms of exercise of due care. It is in this spirit that we offer the recommendations that follow.

1. The main need, in our view, is to regularize and upgrade the process of reviewing and updating publications, particularly the Safety Sheets. In the past, review or revision has been somewhat haphazard in nature, apparently entirely dependent upon the initiative of an MCA committee member or staff representative in raising a question as to the need for review or revision. We gather that there is a general recognition that a more

regular review process is necessary. The recent questionnaire sent by the Secretary of the Safety and Fire Protection Committee to various Committee members and others seeking to determine whether particular Safety Sheets need to be withdrawn pending revision is a step in the right direction. The current proposal that each sheet be comprehensively reviewed at least once every five years, however, strikes us as inadequate. While a complete, in-depth review of each Safety Sheet may not be possible on a basis more frequent than, say, every three years, surely a more cursory but still meaningful review could be conducted on a more frequent basis. Questionnaires of the kind recently circulated, for example, could be employed on an annual basis.

2. A process of more regular review by the Safety and Fire Protection Committee could usefully be supplemented by a system for monitoring scientific and epidemiological literature on a continuing basis. The presumption that Committee members will be aware of all relevant developments and bring them promptly to the attention of MCA or the Committee in every case is unrealistic, in our view. And, in any event, it is a presumption that might not be persuasive in defending a lawsuit. We believe MCA should explore the feasibility

of assigning to a qualified staff person the responsibility of keeping up to date on published reports of tests of, and experience with, chemicals. As an alternative (and perhaps a more realistic one in light of the nature of the task and, especially, the problem of monitoring foreign language publications), MCA might retain an outside organization to perform this service. While there are real, and understandable, reservations in MCA and among member companies about involving outside experts in the process of drafting and revising safety publications, we can see little reason to object to use of a qualified outside group to perform a literature monitoring service.

3. The major substantive problem with respect to updating Safety Sheets appears to concern information on possible carcinogenic, mutagenic, and teratogenic effects of chemicals -- information that has been appearing with increasing frequency in the literature in the last few years and which has been the subject of great controversy. This type of information is clearly more difficult to deal with, in terms of the traditional form and function of a Safety Sheet, than ordinary information on the handling and use of chemicals. It is difficult to reach a consensus among experts as to the

significance of such information and as to what recommendations as to long-term exposure should be made.

It seems to us that the prudent course to follow is not to wait for a scientific consensus to be reached by the MCA member company experts, but rather to revise Safety Sheets promptly to reflect the existence of any significant study raising problems of carcinogenicity or other long-term effects, without passing judgment on the validity of the study or offering any recommendation based on its findings until MCA is ready to make such a recommendation. Such a report might well state:

> "Findings by Dr. Jones of the University of Wisconsin in a two-year rat feeding study on the effects of chemical X raise questions as to the carcinogenicity of chemical X. [Reference Dr. Jones' report] MCA is not in a position to comment on the validity of those findings or their implications for the safe use of this chemical pending additional tests and scientific evaluation."

This would serve to point out the possible problem, while putting it into perspective and disclaiming any assurance by MCA on the subject.

There is a special need for care in revising Safety Sheets for chemicals as to which MCA itself has sponsored or is sponsoring safety testing -- i.e., acrylorintrile and vinyl chloride. MCA must take steps to ensure that the results of such tests are fully reflected in Safety Sheets. It is also important that Safety Sheets clearly indicate where an MCA-sponsored test is a sourcé for a particular statement.

4. Obviously, when any significant change is decided upon, distribution of the Safety Sheet in question should be halted until a revised sheet is prepared. This is already the practice of MCA, and the Association's publication list is revised to indicate that revised Safety Sheets are under preparation or have been issued. A plaintiff might allege or a court might hold, however, that where a significant change is made MCA has some duty to warn persons who it knows or should know are using earlier, now outdated, versions of the Safety Sheet. Such a duty might be imposed notwithstanding the MCA disclaimer on each Safety Sheet that the information is valid only as of the date the Safety Sheet was issued.

It would seem clear that any general recall program for safety publications is impractical, since they are typically purchased in bulk and MCA has no way of knowing in whose hands they eventually end up.

However, some sort of less ambitious but effective program whereby users of Safety Sheets could register with MCA to receive notice of any revisions might well be feasible. A registration form could be included with each Safety Sheet. We think such a program is well worth considering.

5. The existing MCA safety publications are exclusively the product of the MCA committees made up of experts from member companies, who are assisted in their work by MCA's own staff. There can be little doubt that this process makes effective use of the best expertise in the nation on the safe use and handling of chemicals. And we are aware that there is a general feeling among MCA members and staff that it would be neither necessary nor particularly helpful to involve outside experts in the process of drafting, reviewing and revising these publications. Nonetheless, we think that if outside experts could be used in a meaningful way without interfering with the effective functioning of the program, their use should be considered by MCA.

6. As indicated in our earlier legal analysis, one small step that is worth taking, we think, to minimize the likelihood that a claim could be made that

a Safety Sheet "warrants" the safety of the chemical discussed, or is intended to promote the sale of the chemical, is to eliminate the gratuitous statement on the cover of the Safety Sheet which, in rather broad language, states flatly:

> "Chemicals in any form can be safely stored, handled or used if the physical, chemical and hazardous properties are fully understood and the necessary precautions, including the use of proper safeguards and personal protective equipment, are observed."

Despite the thorough disclaimer that appears on the inside cover of the Safety Sheet, the cover statement unnecessarily raises questions as to whether MCA is representing that nothing will go wrong if the recommendations in the Safety Sheet are followed. In the same vein, we also recommend that the word "safe" be eliminated from the phrase "Properties and Essential Information for <u>Safe</u> Handling and Use of . . ." which appears on the cover of each Safety Sheet. Any references in a Safety Sheet which suggest that the chemical may be <u>safely</u> used if MCA's recommendations are followed should similarly be eliminated.

7. We understand that consideration is currently being given to increasing the amount of MCA's liability insurance from $10 to $20 million or even $50 million. We believe this proposal worthy of serious consideration, and we recommend that the insurance policy be reviewed carefully as to the adequacy of the scope of coverage. For example, it is important that the policy cover costs of litigation as well as any ultimate judgments. And consideration should be given to the adequacy of coverage of individual officers, directors and staff personnel of MCA.

In closing, we would observe that if the Association is to continue its activities in this area, it must continually renew its commitment to operating the program in a careful and efficient manner. Recognizing the expert resources available to it through its various committees, and the inevitable difficulties in coordinating the work of these committees, MCA should place a high priority on ensuring that the publication program is viewed as a unified whole and that various parts of that program are consistently and effectively coordinated.

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