THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

2006-CP-37-00030

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S.C. Supreme Court

Scott F. Lawing and Tammy R. Lawing, ... Appellants,

v.

Univar, USA, Inc., Trinity Manufacturing Inc.,
and Matrix Outsourcing, LLC, Defendants,

Of Whom Trinity Manufacturing, Inc. and
Matrix Outsourcing, LLC are ..... Respondents.

RECORD ON APPEAL - Volume I

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INDEX

Orders

Order of December 2, 2008 1

Order of December 3, 2008 6

Order of March 30, 2009 12

Pleadings and Motions

Amended Complaint of September 24, 2008 21

Answer to Amended Complaint of October 10, 2008 29

Defendant's Motion for Summary Judgment on Plaintiff's Negligence and Failure to Warn Claims of September 18, 2008 42

Defendant's Motion for Summary Judgment on Plaintiff's Strict Liability Claims of September 19, 2008 49

Plaintiff's Memo in Response to Defendant's Motion for Summary Judgment on Plaintiff's Negligence and Failure to Warn Claims of October 1, 2008 140

Plaintiff's Reply to Defendant's Motion for Summary Judgment on Strict Liability Claims of October 1, 2008 202

Plaintiff's Joint Motion for Judgment Notwithstanding a Verdict or, in the Alternative, New Trial of November 26, 2008 372

Plaintiff's Joint Motion for a New Trial Nisi Additur of December 22, 2008 377

Transcripts

Pretrial Transcript of October 2-3, 2008 391

Trial Transcript

Pretrial Motions 727

Testimony of Witnesses:
Harriett Simmons 749
David Williams 758
Richard Henderson 767
David Herrington 802
John Steven Knox 813
Paul Bailey 838
James Norris 861
Angela Granados 876
John Munson 887
Jerry Purswell 917
James Ashton 969
Tim Griffin 971
Charles Davis 974
Keith Black 984
Curtis Martin 1001
Scott Lawing 1016

Oral Motions 1037

Testimony of Witnesses:
Frank Lamson-Scribner 1095
Dwayne Nichols 1122
James Satterfield 1138
Karen Mesana 1148
Robert Acree 1179
Tommy Garrett 1229

Oral Motions 1234

Jury Charges 1256

Jury Question 1263

Post-Trial Hearing Transcript of November 18, 2008 1272

Post-Trial Motion Hearing Transcript of January 21, 2009 1355

Forms and Exhibits

Jury Verdicts Forms 1413

Plaintiff's Exhibits

1 - Sodium Bromate bag ..... on file with this Court
2 - Oxidizer label 10x10 1421
4 - Photo, bags and barrels 1422
8 - Consignment Procedures 1423
9 - Marking and Labeling Regulations 1426
10 - IMDG Code 1428
11 - DOT Appendix 1439
12 - 29 C.F.R., §1910.1200, pages 460-482 1441
13 - Hazardous Work Permit 1464
14 - Engelhard Purchase Order 1465
15 - Matrix Outsourcing Purchase Order 1472
16 - Hipage Company Delivery Order dated February 6, 2004 1475
17 - Univar Invoice 1476
18 - Engelhard Photographs 1478
19 - Engelhard Photographs 1479
20 - Engelhard Photographs 1480
21 - Engelhard Photographs 1481
22 - Engelhard Photographs 1482
23 - Engelhard Photographs 1483
27 - DVD bag burn ..... on file with this Court
46 - Schematic of Plant Area 1484
48 - Computer Print Screen 1485
51 - PO Inventory Receipt Inquiry 1487
95 - DOT Regulation 1488
96 - IMDG Regulation 1492
97 - IMDG Over-Pack definition 1495
100 - The Hipage Co 1496
110 - Diagram of plant area where fire occurred 1498

Defendants' Exhibits

12 - Engelhard Investigation Report 1499
15 - Flour Daniel Investigation Report 1504
21 - Engelhard Procedure 1509
25 - Engelhard Procedure 1519
26- Receipt of Purchased Material 1524
29 - MSDS for Sodium Bromate 1532
85 - Letter of September 14, 2004 1537
94 - Photograph 1539
100 - Purchase Order with the Terms and Conditions 1541
103 - Photographs 1557

106 - Email of April 26, 2002 1564
107 - Email of July 17, 2002 1565
109 - Email of July 18, 2002 1566
110 - Email of September 9, 2002 1567
114 - Hipage Company Entry Summary, Bill of Lading, etc. 1569
115 - OSHA Standard for Retention of DOT Markings and Placards 1576

Court's Exhibits

9 - Charge conference supplementation 1578
23 - Questions from jury - Re: Identity of sophisticated user 1651
23-A - Foster's requested charge in response 1652

Certificate of Counsel 1653

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2005-CP-37-604_

BLACK, MARTIN, LAWING

PLAINTIFF(S)

UNIVAR; TRINITY;MATRIX

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order. (Signed order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 2 day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY

/s/ Nicholson
PRESIDING JUDGE

This ORDER was entered on the 2 day of DECEMBER 2008, and a copy mailed first class and handed this 2day of DECEMBER, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY BRANDT; ROBIN FOSTER; WILLIAM WALKER

ATTORNEY(S) FOR PLAINTIFF

SAMUEL OUTTEN;ELLIS JOHNSTON; STEPHANIE ROBERTS

ATTORNEY(S) FOR DEFENDANT

SALLIE C SMITH

CLERK OF COURT

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC -2 A 11:03

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
Keith Black, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, Defendants.	C.A. No. 2005-CP-37-604 **ORDER DENYING JUDGMENT NOTWITHSTANDING THE VERDICT**
Curtis Martin and Tina Ann Martin, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. No. 2005-CP-37-605 (Reference)
Scott F. Lawing and Tammy R. Lawing, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. No. 2006-CP-37-30 (Reference)

This matter came before me on Tuesday, November 18, 2008, on Motions by Univar USA Inc. ("Univar") pursuant to the South Carolina Rules of Civil Procedure as follows: Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror

Doctrine pursuant to Rule 59 as to the jury verdict in the liability portion against Univar on the claim for breach of express warranty regarding labeling.

This case was tried before me by jury beginning on October 20, 2008. The Plaintiffs' cases were consolidated. The trial was then bifurcated. On Monday, November 17, 2008, the jury returned a verdict as to liability. The jury found in favor of Univar on the following claims: (1) negligence as to labeling (as to Lawing, Black and Martin); (2) negligence as to packaging (as to Lawing, Black and Martin); (3) implied warranty as to labeling (as to Lawing, Black and Martin); (4) implied warranty as to packaging (as to Lawing, Black and Martin); and (5) express warranty as to packaging (as to Lawing, Black and Martin). The jury found in favor of Plaintiffs on the claim for express warranty on the issue of labeling. The damage portion of the trial was set for December 1, 2008.

Counsel for Univar requested that I conduct a hearing on Tuesday morning, November 18, 2008, on Univar's post-trial motions as to liability, at which time the Court heard extensive oral argument from Univar and Plaintiffs, and received and reviewed legal authority from both sides in support of their respective positions. The hearing of the motions was premature in that they should have been heard after a damage award. These matters were taken under advisement following the hearing and this is the final order on the matters. Having considered the evidence in the record, the arguments presented and the legal authority submitted to me, I hereby deny Univar's Motion for Judgment Notwithstanding the Verdict as to the jury verdict on liability in Plaintiffs' favor on express warranty as to labeling on the grounds stated below. The Defendant shall renew

all motions at the end of the damage portion and add any additional arguments, at which time the Court will reconsider its positions and issue an additional order.

This court, viewing the evidence in the light most favorable to the non-movants, finds that the Defendant, Univar, unsuccessfully disclaimed its express warranty. This finding is based on the court's previous ruling that an express warranty existed. The South Carolina Court of Appeals has ruled that an attempt by a seller to disclaim warranties upon delivery of goods and after the deal has been closed is ineffective. *Goldkist, Inc. v. Citizens & Southern National Bank of South Carolina*, 333 S.E.2d 67, 70 (S.C. Ct. App. 1985). This court has ruled that a contract was accepted when the Sodium Bromate was shipped from China. The receipt of the invoice containing the disclaimer came after the deal was consummated. The attempt to disclaim the express warranty is ineffective.

This court also denies the motions in respect to the Defendant's claim that the Plaintiffs were not third party beneficiaries of the express warranty between Univar and Engelhard and that the product was not being used for its intended purpose. The court believes that the Plaintiffs were third party beneficaries to contract. S.C. Code Ann. 6-2-318 provides: A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty." The court believes that the Plaintiffs were persons who may be expected to be affected by the goods. The court's ruling is based on the belief that the express warranty entered into between Engelhard and Univar dealt strictly with Univar's warranting that the Sodium Bromate will be labeled in accordance with OSHA and DOT regulations as to labels and warnings. The use of the

Sodium Bromate is immaterial, in this case, because nothing dealing with the actual intended use of Sodium Bromate was included in the express warranty in question. The court believes that the warning labels themselves were the product in use, and the labels were being used for their intended purpose. Univar warranted a specific product and the product, ultimately, did not conform to the specifications that were warranted.

This leads to the court's belief that because the employees of Engelhard are the expected beneficiaries of Univar's compliance with OSHA and DOT regulations. The employees of Engelhard are the users of the warning labels on the Sodium Bromate, and the Plaintiffs, who are employees of Engelhard, should be considered as persons who may be expected to be affected by the goods in question.

Accordingly, Univar's Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b) and Motions for New Trial and New Trial Absolute under the Thirteenth Juror Doctrine pursuant to Rule 59 as to the jury verdict on liability against Univar on the claim for breach of express warranty regarding labeling are DENIED. The issues shall be addressed again after the damage portion of the trial.

AND IT IS SO ORDERED.

J. C. Nicholson, Jr.
Presiding Judge, Tenth Judicial Circuit

December 2 2008

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CLERK OF COURT - OCONEE COUNTY

FILED OCONEE, SC
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CLERK OF COURT
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FORM 4

STATE OF SOUTH ROLINA **JUDGMENT IN CIVIL CASE**

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS CASE NO. 2005-CP-37-604

KEITH BLACK, ET AL. UNIVAR USA, INC., ET AL.

PLAINTIFF(S) DEFENDANT(S)

HEARING/MOTION: ____

DATE & TIME: ____

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 03RD day of DECEMBER, 2008.

COURT REPORTER: DONNA BRADY ____ /S/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 03RD day of DECEMBER 2008, and a copy mailed first class this 03RD day of DECEMBER, 2008 to attorneys of record or to parties (when appearing pro se) as follows:

ROBERT P. FOSTER; WILLIAM P. WALKER; LARRY C. BRANDT
Attorney for Plaintiffs

SAMUEL W. OUTTEN; STEPHANIE U. ROBERTS
Attorney(s) for Defendant

SALLIE C. SMITH
Clerk of Court

FILED OCONEE, SC
STATE OF SOUTH CAROLINA
CLERK OF COURT
COUNTY OF OCONEE
2008 DEC -3 P 12:56

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

C.A. No. 2005-CP-37-604

Keith Black,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO LIFT AUTOMATIC STAY OF APPEAL

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,

Defendants.

C.A. No. 2005-CP-37-605 (Reference)

A TRUE COPY
DEC - 3 2008
CLERK OF COURT - OCONEE COUNTY

Scott F. Lawing and Tammy R. Lawing,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,

Defendants.

C.A. No. 2006-CP-37-30 (Reference)

This matter came before me on Tuesday, December 2, 2008, on Motions by Plaintiffs to lift the automatic stay of appeal. The Defendant filed an amended notice of appeal on this same day.

This case was tried before me by jury beginning on October 20, 2008. The Plaintiffs' cases were consolidated. The trial was then bifurcated pursuant to Rule 42(b) of the South Carolina Rules of Civil Procedure. This was done at Defense counsel's request. Defense counsel believed that testimony as to the extent of the Plaintiffs' injuries sustained in the explosion would be unfairly prejudicial to their client in the liability trial. The Plaintiffs in this case suffered horrific injuries. There is evidence that they sustained burns to significant portions of their bodies and extreme damage to their lungs and respiratory systems, that they had to be placed into drug-induced comas, and that they have suffered mentally and physically. Testimony of this during the liability phase was not necessary and the absence of this testimony would not result in any injustice. This Court agreed with Defense counsel that the testimony would be unfairly prejudicial and bifurcated the trial. The Court also considered the consolidation of the Plaintiffs' cases as a reason to bifurcate the trial because all three Plaintiffs had different damages. The Court believed that the consolidation and bifurcation would expedite the trial.

On Monday, November 17, 2008, the jury returned a verdict as to liability. The jury found in favor of Univar on the following claims: (1) negligence as to labeling (as to Lawing, Black and Martin); (2) negligence as to packaging (as to Lawing, Black and Martin); (3) implied warranty as to labeling (as to Lawing, Black and Martin); (4) implied warranty as to packaging (as to Lawing, Black and Martin); and (5) express warranty as to packaging (as to Lawing, Black and Martin). The jury found in favor of Plaintiffs on the claim for express warranty on the issue of labeling. The damage portion of the trial began December 1, 2008 and is estimated to end, if the jury is willing to work on Saturday, on December 9 or December 10, 2008.

Counsel for Univar requested that I conduct a hearing on Tuesday morning, November 18, 2008, on Univar's post-trial motions as to liability, at which time the Court heard extensive oral argument from Univar and Plaintiffs, and received and reviewed legal authority from both sides in support of their respective positions. These matters were taken under advisement following the hearing and an order denying the motions was filed on December 2, 2008. Following the issuance of the Court's order, Defense counsel served a Notice of Appeal and wished to stay the damages portion of this trial. Plaintiffs' counsel then filed a motion to lift the automatic stay of the appeal and continue with the damage portion. The Court heard oral arguments from both sides and this is the Court's order on the matter.

This Court denies the Plaintiffs' motion to lift the automatic stay of appeal, however, this Court retains jurisdiction to hear the damage portion of the trial and considers Plaintiffs' motion to be moot. The Defendant's argument has been that, pursuant to Rule 42(b) SCRCP, the bifurcation of this case essentially created two trials. This Court agrees with this analysis. South Carolina Courts have ruled that a trial may be bifurcated only if the issues are so distinct that a trial of each alone would not result in injustice. Flagstar Corp. v. Royal Surplus Lines, 332 S.C. 182, 503 S.E.2d 497, 500 (Ct. App. 1998). This Court believes that it was justified in bifurcating this trial and that the issues in each trial are so distinct that each would be tried separately without injustice resulting. Further, under this view, this Court believes that an appeal of the liability "trial" does not and cannot affect the damage "trial" and pursuant to Rule 225 SCACR, which states that "the lower court retains jurisdiction over matters not affected by the

appeal including the authority to enforce any matters not stayed by the appeal", this Court believes that it retains jurisdiction over the damage trial that is currently being heard.

Defense Counsel argues that the fact that, should their appeal be successful, this damage trial would become moot and a waste of judicial resources and thus the damage trial would be affected by the appeal. This Court disagrees. The South Carolina Supreme Court has ruled that the notice of appeal stays only the matters addressed in the order appealed from. Raby Const., L.L.P. v Orr, 358 S.C. 10, 23, 594 S.E.2d 478, 485 (S.C. 2004). The Defendant's notice appeals this Court's denial of Defendant's post-trial motions and the jury verdict in the liability trial and addresses nothing that is being considered or discussed in the damage trial. This Court believes that the damage, trial as a separate trial, is unaffected by the stay of appeal and may continue as a separate trial. This Court believes that the Defendant will not be prejudiced by the Court's maintaining jurisdiction over the damage trial and Defense Counsel's opportunity to try the damage trial is not affected by a pending appeal of the liability trial.

This Court is only able to reach one conclusion as to why Defense Counsel noticed an appeal before the damage trial was complete and is attempting to stay the damage trial. This is to avoid paying the interest that would accumulate during an appeal on any damage award that could be in favor of the Plaintiffs. This Court believes that to allow the Defendant to obtain a stay of the damage trial upon a notice of appeal of the liability trial would be unfair and extremely harmful. It is an abuse of Rule 42(b) which provides that a Court may bifurcate trials on other claims or defenses. This Court believes that the purpose of Rule 42(b) would not be served if the damage trial is considered to be affected and then stayed by the Defendant's notice of appeal.

This Court would also like to note that the jury is still empanelled in these three cases, and after almost five weeks of trial has not been discharged. It has already heard a significant portion of the damages evidence and needs to complete the damages trial before being discharged. To stay this damage trial, would result in a delay of up to two years. To attempt to force this jury to wait for that length of time to reconvene is absolutely unreasonable. The Court feels that the jury in this case deserves closure with this trial. The Court also feels that the parties in this case deserve closure. This should be considered. This case was filed in 2004. This trial has lasted for nearly five weeks. These parties, along with the Court employees and the lawyers involved, have worked diligently to try this case in an expedient matter and to delay this case another two years without finishing the separate damage trial thwarts the ends of justice. It is unfair, inimical to judicial economy, and, frankly, ridiculous.

Therefore, this Court denies the Plaintiffs' motion to lift the automatic stay of appeal, but retains jurisdiction to hear the damage trial that is in progress.

AND IT IS SO ORDERED.

J. C. Nicholson, Jr.
Presiding Judge, Tenth Judicial Circuit

December 3, 2008

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2008 DEC -3 P 12:56
CLERK OF COURT
OCONEE COUNTY

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2006-CP-37-030; 2005-C37-604;
2005-CP-37-605

KEITH BLACK, ET AL
PLAINTIFF(S)
HEARING/MOTION: ____
DATE & TIME: ____

UNIVAR USA, INC.
DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at WALHALLA, South Carolina, this 30TH day of MARCH, 2009.

COURT REPORTER: _____

/S/ J.C. NICHOLSON, JR.
PRESIDING JUDGE

This judgment/order was entered on the 31ST day of MARCH 2009, and a copy mailed first class this 31ST day of MARCH, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

LARRY C. BRANDT; ROBERT P. FOSTER; WILLIAM P. WALKER, JR.
Attorney for Plaintiffs

SAMUEL W. OUTTEN; ELLIS M. JOHNSTON, II
Attorney(s) for Defendant

BEVERLY H. WHITFIELD
Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Keith Black,

Plaintiff,

Curtis Martin and Tina Ann Martin,

Plaintiffs,

v.

Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC.,

Defendants.

COPY

CASE NO. 2005-CP-37- 0604

CASE NO. 2005-CP-37- 0605
(Reference)

ORDER DENYING SETOFF

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2009 MAR 31 P 2: 10

This matter is before me upon Univar's motion to setoff amounts of settlements received by Plaintiffs Curtis Martin, Tina Martin and Keith Black from defendants Trinity and Matrix as against the verdicts rendered by the jury as to these Plaintiffs. The parties filed briefs upon the issue and oral argument was heard January 21, 2009. For the reasons set forth below, the court denies the motion.

Prior to trial, Plaintiff Keith Black settled with defendants Trinity and Matrix and their insurance carriers for $2.5 Million dollars, and Curtis and Tina Martin settled with the same defendants for $2.0 Million dollars. The Martins allocated the settlement with $1.6 Million to Curtis Martin and $400,000 to Tina Martin on her loss of consortium claim. I find the allocation to be appropriate and fair.

The jury awarded verdicts of $2.6 Million to Plaintiff Keith Black, $1.4 Million to Plaintiff Curtis Martin, and $100,000 to his wife Tina Martin.

Common Law Equitable Setoff

Both parties agreed at the hearing that the joint tortfeasor setoff statute, S.C. Code Ann. §15-38-50 (Supp. 2008), is not applicable to the facts of this case. Both also agree that the facts present an equitable issue for resolution by this court.

Under South Carolina common law, "The trial court's jurisdiction to setoff one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties," *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, 425 (Ct. App. 2000), quoting *Smalls v. South Carolina Dep't of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), and are "addressed to the discretion of the court – a discretion which should not be arbitrarily or capriciously exercised". Id. at pages 425, 426.

In this case, as to each plaintiff, there has been a single indivisible harm, as opposed to a divisible harm. Mindful of the "one satisfaction rule", *McGee v. Bruce Hospital System*, 336 S.C. 410, 520 S.E.2d 623 (1999), the analysis becomes whether the plaintiffs have been overcompensated. See also *Chisholm v. UHP Products, Inc.*, 205 F.3d 734, 737(4th Cir. 2000)("...if defendants caused a single and indivisible harm, then the analysis must proceed to a determination of whether the plaintiff has been overcompensated."). The issue here becomes whether, in the opinion of the trial court, in the exercise of its discretion, the plaintiffs have been overcompensated.

I find and conclude that none of these Plaintiffs have been overcompensated as a result of the jury's verdict and the settlement allocations as to each. In fact, the court has also granted new trial nisi additur to Plantiffs Martin and Lawing because, in the court's view, the jury's inadequate verdict did not fit the evidence, at least as to the psychological injuries of Martin and the physical heel and lung injuries as to Plaintiff Lawing.

As to Keith Black, he has incurred past medicals of $1.75M, undisputed past lost wages since the accident in an amount included in the computation by Plaintiff's economist, future lost wages which were disputed, but computed by Plaintiff's expert to be $946,254 when combined with past wage losses, future medicals of $1.04M according to Plaintiff's experts, and $369,000 according to Defendant's expert. Without any medical opinion to the contrary, he sustained second and third degree burns to 47% of his body, had multiple surgeries and needs approximately nine more, according to burn surgeon Dr. Mullins. He spent 46 days in the burn center. He sustained PTSD from the explosion and has had ongoing problems related to this since the accident, and the experts testified those problems would continue. He endured tremendous pain and suffering, and the medical experts testified his skin, lung, and psychological problems would continue for his lifetime. His life expectancy is 43.6 years. He has been noticeably and significantly scarred, particularly to his face, neck, head and ears. I had the opportunity to observe Dr. Mullins demonstrating the scars and future procedures for the jury as Mr. Black stood with his shirt off before the jury. The evidence shows that he is stared at when he goes out in public. His stamina is diminished. He has suffered catastrophic injuries. He has clearly not been over compensated by the jury.

Likewise, Plaintiff Curtis Martin has too suffered catastrophic injuries. He incurred $720,000 in undisputed past medical bills. He has incurred some amount of undisputed past lost wages, and according to his economist, has incurred past and future wage losses of $660,000. He has losses of future medical expenses of $616,000 according to his economist, and $101,500 undisputed future medicals according to Defendant's expert. He suffered second degree burns to 25% of his body, and spent several weeks in the burn center. His burn surgeon testified that second degree burns were the most painful type because the nerve endings were not completely

burned away. He suffered pulmonary injuries as described by Dr. J. R. Shaver, of which reactive airway disease is permanent, as is his need for medicines for his life expectancy of 37.1 years. His PTSD caused by the accident has caused and will cause, major problems for him in the future, and, for the rest of his life according to Dr. Moss. Clearly, Mr. Martin has not been overcompensated for his losses caused by this accident.

Settlement as a Collateral Source

The Plaintiffs contend that the payments by Trinity and Matrix should be considered collateral source payments, citing *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), and *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004).

I find and conclude that the settlements by Trinity and Matrix are collateral source payments, and therefore not subject to setoff against the verdicts.

The collateral source rule provides that a plaintiff's damages may not be reduced by any benefits or compensation received by the plaintiff which are from a source wholly independent from the wrongdoer. *Haselden v Davis*, 353 S.C. 481, 579 S.E. 293 (2003).

In *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995), the Supreme Court considered whether a third party guaranty, who paid the Plaintiff bank for a loss, was a collateral source in the Bank's suit against its accountants for malpractice. The court, in disallowing the reduction of damages, explored what was meant by "a source wholly independent from the wrongdoer":

> "Other jurisdictions have specified a source is wholly independent, and therefore a collateral source, when the wrongdoer has not contributed to it, *see* Kistler v. Halsey. Colo., 173 Colo. 540, 481 P.2d 722 (Colo. 1971), and when payments to the injured party were not made on behalf of the wrongdoer, *see* Maduff Mortgage Corp. v. Deloitte, Haskins & Sells, 98 Ore. App. 497, 779 P.2d 1083 (1989). On the other hand, it is well-settled that

payment from a joint tortfeasor does not qualify as a collateral source. *See, e.g.*, Franklin Supply Co. v. Tolman, 454 F.2d 1059 (9th Cir. 1972)." 463 S.E.2d at p. 318.

The payments by Defendants Trinity and Matrix were "wholly independent," in as much as the 'wrongdoer' Univar in no way contributed to them, nor were they made on behalf of Defendant Univar. Without question, the payments were not made by each as a joint tortfeasor. All defendants were exonerated in tort, and, since Univar was held responsible to Plaintiffs under a breach of express warranty on a contract cause of action, there is clearly no relation between the two. Defendants Trinity and Matrix could never have been held liable to the Plaintiffs on the contract cause of action for which Univar was held liable under the facts of this case.

Collateral source treatment of these payments also finds support in the South Carolina Supreme Court's opinion in *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004), which applied the collateral source rule to reverse a circuit court that had ordered the setoff of a settlement from a one defendant from the judgment levied against the non-settling Defendant.

Atkinson sought damages from structural injury to a house from pest infestation. The Atkinsons sought unsuccessfully to have protection from Orkin on the home transferred to them when they bought it; Orkin wrongfully refused. The Atkinsons thus purchased coverage from Terminix, which went into force. Termite damage was discovered. Orkin refused to cover the damage because coverage had not been transferred. Terminix refused to cover the damage because it asserted that the damages had taken place during the 24 years the Orkin bond had been in place. The Atkinsons sued both companies but settled with Terminix before trial, after which it obtained a judgment awarding actual and punitive damages against Orkin at trial. The trial

court thereafter ordered the setoff, which the Supreme Court found to be improper because of the collateral source rule.

The court explained the collateral source rule, as follows:

> The Atkinsons argue that proceeds from their settlement with Terminix was a "collateral source," and therefore Orkin was not entitled to any set-off. We agree. According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source. *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989). Moreover, this rule has been liberally applied in South Carolina to preclude the reduction of damages. *See Otis Elevator v. Hardin Constr. Co.*, 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni*, 298 S.C. at 277, 379 S.E.2d at 890 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1976) (tortfeasor's liability for damages not reduced by disability payments from employer). To qualify as a collateral source, the source must be "wholly independent of the wrongdoer." *Citizens and S. Nat'l Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

Id., 604 S.E.2d at 393. Orkin made the argument in favor of the trial court setoff in the following way:

> Then, in a post-trial motion, Orkin asked the court to reduce the judgment by the amount the Atkinsons recovered from their settlement with Terminix. Because the judge viewed Terminix and Orkin as joint tortfeasors, the judge reduced the amount Orkin owed by the amount Terminix had already paid in settlement. The trial judge also reasoned that the negligence claim was "general in nature" and that "Terminix's conduct could be a contributing factor in this cause of action and, thus, a contributing factor to Plaintiff's damages under the negligence cause of action."

Id. The argument—and the setoff itself—was disapproved from the following reasons:

> We find that the trial judge erred in treating Orkin and Terminix as joint-tortfeasors. The duties that Orkin and Terminix owed the Atkinsons were based upon independent, unrelated contracts, not a common duty of care. Moreover, we see no indication that the claims against Terminix constituted a "contributing factor" to Orkin's negligent inspection of the house. Accordingly, we hold that the proceeds from

> the Terminix settlement was a collateral source, and therefore the trial court erred in offsetting the judgment, by the amount the Atkinsons received in settlement.

Id. at 394.

The relationship among Univar, Matrix and Trinity can be analogized to that between Terminix and Orkin in Atkinson. The collateral source rule thus precludes the requested setoff. The rule is applicable, because Univar, Matrix and Trinity are *not* deemed to be joint tortfeasors. None were found liable in tort by the jury. The rule is likewise applicable since the three defendants and the liability of each, were independent of each other, and liability was found to exist against Univar on a different cause of action (breach of contract), and not under some "common duty of care." *Id.* The only cause of action the settling Defendants could have been liable on was tort, not contract. *Hawkins v. Pathology Assocs. of Greenville*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (the reduction in the judgment must be from a settlement for the same cause of action). Thus, Plaintiff's settlements with Trinity and Matrix were "wholly independent" of any contract liability or act of Univar, and therefore a collateral source. Furthermore, as in *Atkinson*, the claims against Trinity and Matrix were not a "contributing factor" in the liability determined against Univar on breach of an express contract. The court notes here that in the equitable analysis of setoffs, the "rule has been liberally applied in South Carolina to preclude the reduction of damages." *Id.* at 393.

The majority of courts to consider the collateral source rule predicate their holdings on the central tenet of compensatory damages: awards are intended to make an injured person whole by placing him in the position enjoyed prior to the injury and no more. *See Kapuschinsky v. United States*, 259 F. Supp. 1, 6 (D.S.C. 1966); *Hutchison v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903); 22 Am. Jur. 2d *Damages* §§ 26, 27 (1988); 11 S.C. Jurisprudence *Damages* §

2, 3 (1992). Plaintiffs contend that the verdicts were inadequate, and do not make them whole. With this I agree for reasons stated above, and in the Order granting new trial nisi additur. The central tenant of placing Martin and Black in the position they enjoyed prior to the injury can and will be better served by treating the settlements as collateral sources.

The net result of this court's rulings on both setoff and new trial nisi additur leave the settling plaintiffs with amounts which are moderate, in this court's opinion, relative to the evidence of catastrophic injury and damage, which I saw and heard during this six week, 30 day trial. They are amounts within the range of expected verdicts in similar catastrophic cases.

Therefore, it is Ordered Adjudged and Decreed, that defendant Univar's Motion to Setoff is denied.

J. C. Nicholson, Jr.
Judge, Tenth Judicial Circuit

March 30, 2009
Anderson, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF OCONEE	THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
	CASE NO. 06-CP-37-30
Scott F. Lawing and Tammy R. Lawing, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC., Defendants.	**AMENDED COMPLAINT**

The Plaintiffs, complaining of the Defendants above named, would respectfully show unto the Court as follows:

1. That Plaintiffs are citizens and residents of the county of Oconee, state of South Carolina.

2. That Defendant Univar USA, Inc. is a corporation organized and existing under the laws of one of the United States, having agents and employees in the county of Spartanburg, state of South Carolina, for purposes of conducting business therein.

3. That Defendant Univar USA, Inc., (hereinafter "Univar"), transacts business regularly with Plaintiff Scott Lawing's employer, Engelhard Corporation, located in Oconee County, South Carolina.

4. That Defendant Trinity Manufacturing, Inc., (hereinafter "Trinity") is a corporation organized and existing under the laws of one of the United States, having its corporate headquarters located in the town of Hamlet, state of North Carolina. That said Defendant transacts business and sells and delivers chemicals and other materials within the state of

South Carolina, including delivery to the Plaintiff Scott Lawing's employer, Engelhard Corporation, (hereinafter "Englehard"), in Oconee County, South Carolina.

5. That Defendant Matrix Outsourcing, LLC, (hereinafter "Matrix"), is a Limited Liability Corporation formed under the laws of the state of North Carolina, having facilities in Charlotte, North Carolina, and regularly supplying the Plaintiff's employer, Engelhard, with chemicals and other products by delivery to the Engelhard plant located in Oconee County, South Carolina. Trinity, based upon information and belief, is the primary equity owner of Matrix.

6. That heretofore, on or about June 1, 2004, the Plaintiff Scott Lawing was working for Engelhard Corporation at its plant in Oconee County, South Carolina, and was inside the plant tied off with a safety harness in the pipe rack, approximately 25 feet off the floor, and was engaged in the repair and/or replacement of metal pipes near the roof of the plant, and was engaged in the activity of cutting metal pipes with an acetylene torch, when suddenly, and without any warning whatsoever, an explosion occurred directly beneath the Plaintiff, causing him to be burned severely and to sustain smoke inhalation injuries and to fall approximately 25 feet to the floor below, shattering both of his heels. Plaintiff was airlifted to the Augusta Burn Center and underwent extensive medical treatment including skin graft surgeries, pulmonary treatment, orthopedic surgeries and subsequent rehabilitation more fully described below.

7. That Plaintiff Scott Lawing incurred medical expenses over $1,000,000.00. The Plaintiff also sustained severe emotional and psychological injuries as a result of the accident which has necessitated medical treatment. Plaintiff suffered burn injuries over 42% of the surface area of his body, including his face, arms, legs, eyes, ears as well as his lungs. Plaintiff sustained comminuted fractures to both of his heels and ankles, sustained lacerations on his head requiring approximately fifty stitches to close as well as compression fractures of four of the vertebra in his spine. Plaintiff has developed asthma from the burn and smoke inhalation injuries to his lungs, requiring medications, which he will need for the remainder of his life. Plaintiff has sustained injuries to his eyes which have now lost the ability to lubricate themselves and his eyes are now extremely sensitive to light and intensity changes which has caused difficulty when seeing. Plaintiff is informed and believes he will need medications for his eyes for the remainder of his life and that he has sustained permanent impairment to same.

8. That Plaintiff Scott Lawing has endured tremendous pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, scarring to his body, limited lung capacity,

injury to his eyes, permanent injuries to his spine, heels and ankles, as well as disfigurement, all of which is permanent.

9. That as a further result of the accident and injuries, he has lost wages and benefits from his employment and is informed and believes that he will lose wages and benefits in the future, and that he will have a reduced earning capacity as a result of said injuries.

10. That Plaintiff Tammy R. Lawing has sustained consortium losses as a result of the injuries to her husband Scott Lawing, including but not limited to, damages to her marital relations, loss of his services and society, and other damages as may be shown by the evidence at trial.

11. That Plaintiffs are informed and believe that the injuries, damages and consortium losses were caused when sparks from the cutting process landed upon or against plastic bags containing Sodium Bromate stacked on pallets beneath the work area, ignited explosively, which in turn caused the accident and injuries complained of.

12. That Plaintiffs are informed an believe that Engelhard Corporation purchased the pallets of Sodium Bromate from Defendant Univar USA Inc., who in turn placed the order with Trinity Manufacturing Inc., who in turn utilized its company, Matrix Outsourcing LLC, to import the Sodium Bromate from China and deliver it to Engelhard directly.

FOR A FIRST CAUSE OF ACTION

13. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 12, where not inconsistent, as if fully set forth herein.

14. That the Defendants Univar, Trinity, and Matrix are manufacturers, distributors, and/or sellers within the meaning of §15 -73 -10 of the South Carolina Code of Laws, 1976, as amended, with respect to the sale of the chemical Sodium Bromate.

15. That Plaintiff's employer, Engelhard Corporation, did purchase the pallets of Sodium Bromate which caused the Plaintiff's injuries from Univar who in turn utilized Trinity and Matrix to supply said Sodium Bromate to and distribute same to Engelhard Corporation in Oconee County, South Carolina.

16. That all three Defendants were participants in the distributive chain of the Sodium Bromate to Engelhard which caused the Plaintiffs injuries and damages.

17. That based upon information and belief, the Sodium Bromate was in the same or similar condition when it caused the Plaintiff's injuries as it was when it left the Defendants' place of business and was placed into the stream of commerce by delivery to Engelhard Corporation.

18. That Plaintiffs are informed and believe that the Sodium Bromate, as imported, packaged, distributed by the Defendants was in a defective condition unreasonably dangerous to the user and consumer, namely the Plaintiff Scott Lawing herein.

19. That Plaintiffs allege that said product was in a defective condition unreasonably dangerous to the user and consumer in that it was not packaged with adequate materials to prevent or resist ignition and explosion, that said packaging was in violation of the applicable regulatory and statutory laws of the federal, state, and local governmental authorities.

20. That further, Plaintiffs allege that the product was defective and unreasonably dangerous in that it did not contain adequate warnings of the dangers posed by the product, mainly the propensity of the product to ignite explosively in the presence of the packaging materials used, which explosive properties carry risks of loss of great magnitude as were sustained by the Plaintiffs as a result of the accident.

21. That Plaintiffs allege further defects as the evidence may show at trial.

22. That as a direct and proximate result of the defective condition unreasonably dangerous to the user or consumer of the Sodium Bromate at issue, the Plaintiffs sustained injuries and damages as alleged in paragraphs 7 through 10 above.

23. That Plaintiffs believe that they are entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

FOR A SECOND CAUSE OF ACTION

24. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 23, where not inconsistent, as if fully set forth herein.

25. That the defendants, and each of them, have a duty to exercise reasonable care in the importation, packaging, labeling, sale, distribution and delivery of the Sodium Bromate product in question to Engelhard.

26. That plaintiffs are informed and believe that Defendants did breach their duty to exercise reasonable care, and thus, were negligent and reckless in the following, and other particulars, to wit:

a.) In negligently importing the Sodium Bromate and packaging from China;
b.) In negligently packaging the Sodium Bromate product when Defendant knew, or should have known, of the increase in risk of hazard to life and safety in utilizing the packaging chosen;
c.) In failing to place warnings of the risks and hazards associated with the Sodium Bromate as packaged to warn and notify users thereof, such as the Plaintiff herein, of the extreme danger of explosion if ignition sources came in contact with a plastic packaging;
d.) In failing to utilize a packaging material which was ignition resistant;
e.) In failing to conform with industry and commercial standards insofar as the packaging and shipment of Sodium Bromate in the United States;
f.) In failing to comply with Federal, State and local statutory and regulatory laws regarding the packaging, labeling, warning, distribution and shipment of Sodium Bromate.
g.) In failing to exercise that degree of care and prudence which a reasonable prudent importer, manufacturer, packager, shipper and suppler of Sodium Bromate would have exercised under the same or similar conditions;

All in violation of the common and statutory law of the State of South Carolina, of the Federal government and Regulatory laws as applicable.

27. That as a direct and proximate result of the negligent and reckless acts of the Defendants, the Plaintiffs sustained injuries and damages as set forth in paragraphs 7 through 10 above.

28. Therefore, Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

FOR A THIRD CAUSE OF ACTION

29. Plaintiffs incorporate all prior allegations contained in Paragraphs 1 through 28, where not inconsistent, as if fully set forth herein.

30. That the Defendants, and each of them, are sellers and merchants of Sodium Bromate within the meaning of §36-2-104 of the Code of Laws of South Carolina, 1976, as Amended.

31. That the Defendants did sell and deliver to Plaintiff's employer Engelhard Corporation pallets of Sodium Bromate for use in its plant operations in Oconee County, South Carolina.

32. That Engelhard did pay valuable consideration for the purchase of Sodium Bromate provided by the Defendants.

33. That there existed express warranties pursuant to §36-2-313 of the South Carolina Code of Laws given by Defendant Univar that the Sodium Bromate as shipped to Engelhard would comply with the DOT and OSHA regulations.

34. That the implied warranty of merchantability of all the Defendants and the express warranties given by Univar, do extend to the Plaintiffs pursuant to §36-2-318 of the Code of Laws of South Carolina, 1976, as Amended, and may not be limited or excluded by the seller Univar.

35. That Plaintiffs are informed and believe that Defendants breached the implied warranty of merchantability inasmuch as the product was not fit for the ordinary purposes for which it is used because it contained defects in packaging, labeling and warning which greatly increased the risk of injury and/or death if the product as packaged came in contact with ignition sources.

36. That Plaintiffs are informed and believe that the Defendant Univar breached the express warranties that the goods would be compliant with both OSHA and DOT regulations because they did not in fact comply with either OSHA or DOT regulations.

37. That Plaintiffs would show unto the Court that Defendants failed to conform with industry and commercial standards and practices as regarding packaging of Sodium Bromate sold in the United States.

38. That as a direct and proximate result of the breach of implied warranty of merchantability by all Defendants and the breach of express warranties by Defendant Univar, the product did cause an explosion which resulted in the injuries and damages complained of by the Plaintiffs.

39. That as a direct and proximate result of the breach of implied warranty of merchantability by the Defendants and the breach of express warranties by Defendant Univar, the Plaintiffs sustained the damages and injuries as set forth in paragraphs 7 through 10 above.

40. That Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in an amount of actual damages as may be determined by a jury and for costs of this action.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in an amount of actual and punitive damages as may be determined by a jury and for costs of this action.

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September 24, 2008

STATE OF SOUTH CAROLINA COUNTY OF OCONEE Scott F. Lawing and Tammy R. Lawing, Plaintiffs, vs. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	)	IN THE COURT OF COMMON PLEAS C.A. No.: 2006-CP-37-30 **ANSWER TO PLAINTIFFS' AMENDED COMPLAINT ON BEHALF OF TRINITY MANUFACTURING, INC. AND MATRIX OUTSOURCING, LLC** (Jury Trial Requested)

Defendants Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC (collectively "Trinity Defendants") answer the Amended Complaint of the Plaintiffs as follows:

FOR A FIRST DEFENSE
TO THE GENERAL ALLEGATIONS

1. Trinity Defendants admit the allegations of Paragraphs 1 of the Amended Complaint.

2. Upon information and belief, Trinity Defendants admit the allegations of paragraph 2 of the Amended Complaint.

3. Upon information and belief, Trinity Defendants admit the allegations of paragraph 3 of the Amended Complaint.

4. Trinity Defendants admit so much of the allegations of paragraph 4 of the Amended Complaint as allege that Defendant Trinity Manufacturing, Inc., is a corporation organized and existing under the laws of the state of Delaware, having its corporate headquarters located in the town of Hamlet, state of North Carolina. Trinity Defendants would further admit that Trinity Manufacturing transacts business and sales and delivers chemicals and other

products in the state of South Carolina. Trinity Defendants would further admit in regards to the specific transaction involved in this lawsuit that Trinity Manufacturing sold sodium bromate to Univar USA, Inc., who, upon information and belief, provided such sodium bromate to Plaintiff's employer, Engelhard Corporation in Oconee County, South Carolina. Trinity Defendants deny any allegations inconsistent with the above.

5. Trinity Defendants admit so much of the allegations of paragraph 5 as allege that Defendant Matrix Outsourcing, LLC, is a limited liability corporation formed under the laws of the state of North Carolina, having facilities in Charlotte, North Carolina. Trinity Defendants further admit that Matrix Outsourcing supplied sodium bromate to Trinity Manufacturing, who in turn supplied sodium bromate to Univar, who in turn supplied sodium bromate to Engelhard Corporation. Trinity Defendants finally admit that Trinity is the primary equity owner of Matrix. Trinity Defendants deny any allegations inconsistent with the above.

6. Trinity Defendants admit so much of the allegations of paragraph 6 of the Amended Complaint as allege that on or about June 1, 2004, Plaintiff Scott Lawing was working for Fluor Daniel at Engelhard Corporation at its plant in Oconee County, South Carolina. Based on the testimony of Mr. Lawing, Trinity Defendants would further admit that on the day in question, Mr. Lawing was inside the plant engaging in maintenance work to repair and/or replace steel condensate pipes in the facilities pipe rack which is located some distance off the floor of the plant. Trinity Defendants would further admit, upon information and belief that, as part of the activities that occurred that day, the maintenance team, of which Mr. Lawing was a member, was engaged in the activity of cutting the carbon steel condensate pipes with an acetylene torch. Trinity Defendants would further admit that as a result of this activity, approximately three pallets of sodium bromate ignited causing Mr. Lawing to be burned and to sustain smoke

inhalation injuries which required hospital treatment at both Oconee Memorial Hospital and eventually at the Augusta Burn Center. Trinity Defendants would further admit upon information and belief that Mr. Lawing required extensive medical treatment which included skin grafts, pulmonary treatment, and rehabilitation. Trinity Defendants lack information sufficient to admit or deny any allegations that were either not admitted or are inconsistent with the above, and, therefore, deny the same and demand strict proof. Trinity Defendants, however, specifically deny any and all liability in this matter.

7. Trinity Defendants admit so much of the allegations of Paragraph 7 of the Amended Complaint as allege that Mr. Lawing required medical treatments at a significant cost which exceeds the sum of $1,000,000.00. Upon information and belief, Trinity Defendants further admit that Mr. Lawing has undergone psychological treatment since the accident. Trinity Defendants lack information sufficient to admit or deny the remaining allegations of said paragraph 7 and, therefore, deny the same and demand strict proof. Trinity Defendants, however, specifically deny any and all liability in this matter.

8. Trinity Defendants admit so much of the allegations of paragraph 8 of the Amended Complaint as allege that Plaintiff Scott Lawing has sustained significant injury as a result of the accident. Trinity Defendants lack information sufficient to admit or deny the remaining allegations of said paragraph 8 and, therefore, deny the same and demand strict proof. Trinity Defendants, however, specifically deny any and all liability in this matter.

9. Upon information and belief, Trinity Defendants admit so much of the allegations of paragraph 9 of the Amended Complaint as allege that Mr. Lawing has not worked since the accident. Trinity Defendants lack information sufficient to admit or deny the remaining allegations of said paragraph 9 and, therefore, deny the same and demand strict proof.

10. Trinity Defendants lack information sufficient to admit or deny the allegations of paragraph 10 of the Amended Complaint and, therefore, deny the same and demand strict proof.

11. Trinity Defendants admit so much of the allegations of paragraph 11 of the Amended Complaint as allege that hot slag generated as a result of the maintenance work rained down and landed upon approximately three pallets stacked with woven plastic bags of sodium bromate. Trinity Defendants further admit that as a result of the molten slag, the sodium bromate reacted causing a fire which in turn injured the Plaintiff. Trinity Defendants deny each and every allegation inconsistent with the response set forth in this paragraph 11.

12. Trinity Defendants admit so much of the allegations of paragraph 12 of the Amended Complaint as allege that Engelhard Corporation placed an order for sodium bromate with Defendant Univar USA, Inc., who in turn placed an order with Trinity Manufacturing, Inc., who in turn placed an order with Matrix Outsourcing, LLC, who in turn placed an order with a Chinese export company, who in turn ordered the sodium bromate from the Chinese manufacturer. Trinity Defendants further admit that the sodium bromate was then shipped directly to Engelhard's Seneca, South Carolina, facility through the port in Charleston, South Carolina.

FOR A FIRST DEFENSE
TO THE FIRST CAUSE OF ACTION

13. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 13 of the Amended Complaint.

14. In response to paragraph 14 of the Amended Complaint, Trinity Defendants would assert the allegations of said paragraph 14 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 14.

15. Trinity Defendants admit so much of the allegations of paragraph 15 of the Amended Complaint as allege that Engelhard Corporation placed an order for pallets of sodium bromate with Univar, who in turn placed an order for sodium bromate with Trinity, who in turn placed an order for sodium bromate with Matrix, who in turn placed an order for sodium bromate from the Chinese. Trinity Defendants would further admit that the sodium bromate was then shipped directly to the Engelhard Corporation in Oconee County, South Carolina, through the port in Charleston, South Carolina. Trinity Defendants deny any allegations of paragraph 15 of the Amended Complaint that are inconsistent with the above.

16. Trinity Defendants would admit so much of the allegations of paragraph 16 of the Amended Complaint as allege that the order for sodium bromate was placed from Engelhard to Univar, who in turn placed the order with Trinity, who in turn placed the order with Matrix, who in turn placed the order with the Chinese. To the extent paragraph 16 alleges that the sodium bromate was in the physical possession of Trinity Defendants, Trinity Defendants specifically deny that allegation because the product was shipped directly to Engelhard Corporation from China.

17. Trinity Defendants lack information sufficient to admit or deny the allegations of paragraph 17 of the Amended Complaint and, therefore, deny the same and demand strict proof.

18. Trinity Defendants deny the allegations of paragraph 18 of the Amended Complaint.

19. Trinity Defendants deny the allegations of paragraph 19 of the Amended Complaint.

20. Trinity Defendants deny the allegations of paragraph 20 of the Amended Complaint.

21. Trinity Defendants deny the allegations of paragraph 21 of the Amended Complaint.

22. Trinity Defendants deny the allegations of paragraph 22 of the Amended Complaint.

23. Trinity Defendants deny the allegations of paragraph 23 of the Amended Complaint.

FOR A FIRST DEFENSE
TO THE SECOND CAUSE OF ACTION

24. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 24 of the Amended Complaint.

25. In response to Paragraph 25 of the Amended Complaint, Trinity Defendants would assert that the allegations of said paragraph 25 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 25.

26. Trinity Defendants deny the allegations of Paragraphs 26 of the Amended Complaint including subparts a through g.

27. Trinity Defendants deny the allegations of paragraph 27 of the Amended Complaint.

28. Trinity Defendants deny the allegations of paragraph 28 of the Amended Complaint.

FOR A FIRST DEFENSE
TO THE THIRD CAUSE OF ACTION

29. Trinity Defendants incorporate herein the previous paragraphs in response to Paragraph 29 of the Amended Complaint.

30. In response to Paragraph 30 of the Amended Complaint, Trinity Defendants would assert that the allegations of said paragraph 30 are legal conclusions for which no response is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 30.

31. Trinity Defendants admit so much of the allegations of Paragraph 31 of the Amended Complaint, as allege that Matrix Outsourcing purchased the sodium bromate from a Chinese export company, that Matrix in turn sold the sodium bromate to Trinity Manufacturing, that Trinity Manufacturing in turn sold the sodium bromate to Univar, and that Univar in turn sold the sodium bromate to the Engelhard Corporation. Trinity Defendants further admit that, ultimately, the sodium bromate was shipped from China directly to Engelhard Corporation in Oconee County, South Carolina. Trinity Defendants deny any allegations of said paragraph 31 that are inconsistent with the above.

32. Upon information and belief, Trinity Defendants admit so much of the allegations of Paragraph 32 of the Amended Complaint as allege that Engelhard did compensate Univar for the shipment of sodium bromate.

33. Trinity Defendants lack information sufficient to admit or deny the allegations of paragraph 33 of the Amended Complaint and, therefore, deny the same and demand strict proof.

34. In response to paragraph 34 of the Amended Complaint, Trinity Defendants would assert that the allegations of said paragraph 34 are legal conclusions for which no responses is necessary. However, to the extent a response is necessary, Trinity Defendants deny the allegations of said paragraph 34.

35. Trinity Defendants deny the allegations of Paragraph 35 of the Amended Complaint.

36. Upon information and belief, Trinity Defendants deny the allegations of paragraph 36 of the Amended Complaint.

37. Trinity Defendants deny the allegations of paragraph 37 of the Amended Complaint.

38. Trinity Defendants deny the allegations of paragraph 38 of the Amended Complaint.

39. Trinity Defendants deny the allegations of paragraph 39 of the Amended Complaint.

40. Trinity Defendants deny the allegations of paragraph 40 of the Amended Complaint.

FOR A SECOND DEFENSE
(Failure to State a Claim)

41. Trinity Defendants would show that Plaintiffs have failed to state facts sufficient to constitute a cause of action and therefore, may not recover herein against the Trinity Defendants.

FOR A THIRD DEFENSE
(Superceding and/or Intervening Negligence)

42. Trinity Defendants would show that the damages sustained by the Plaintiffs are due to or occasioned by the negligent, reckless, or willful intervening or superceding acts or omissions of a person or entity other than the Trinity Defendants; therefore, the Plaintiffs may not recover herein against the Trinity Defendants.

FOR A FOURTH DEFENSE
(Contributory and Comparative Negligence)

43. Trinity Defendants would show that the damages sustained by the Plaintiffs were due to, caused, and occasioned by the negligence and/or recklessness of the Plaintiffs, which is a

direct and proximate cause of the damages claimed. For these reasons, the Plaintiffs are legally barred from recovery in this matter.

44. Alternatively, if it is determined that the Plaintiffs are not legally barred from recovery and the finder of fact concludes that the Trinity Defendants were negligent and the alleged negligence and/or recklessness of the Trinity Defendants is equal to or greater than that of the Plaintiffs, then the Trinity Defendants would request the finder of fact to apportion such negligence and/or recklessness between the parties.

FOR A FIFTH DEFENSE
(Sophisticated User/Learned Intermediary)

45. Trinity Defendants would show that the product in question was distributed to a sophisticated users/purchaser and/or learned intermediary to whom the Trinity Defendants conveyed all warnings regarding the handling and storage of the product in question and/or whom had prior knowledge of all warnings regarding the handling and storage of the product in question.

FOR A SIXTH DEFENSE
(Assumption of the Risk)

46. Trinity Defendants would show that the Plaintiffs' claims are barred by their assumption of the risk, which was known by either the Plaintiffs and/or the Engelhard Corporation.

FOR A SEVENTH DEFENSE
(Product Misuse)

47. Trinity Defendants would show that the product in question was misused and such misuse was a proximate cause of the Plaintiffs' damages, thereby barring Plaintiffs from any recovery in this matter.

FOR AN EIGHTH DEFENSE
(Unforeseeable Use)

48. Trinity Defendants would show that the product in question was put to an unforeseeable use which was a proximate cause of the Plaintiffs' damages, thereby barring Plaintiffs from any recovery in this matter.

FOR A NINTH DEFENSE
(Modification or Alteration of Product)

49. Trinity Defendants would show that the product in question was not in a defective condition unreasonably dangerous at the time it was sold and/or distributed. Trinity would assert that if the product in question was substantially changed, altered, mishandled or misused by other parties after it left the care of the Trinity Defendants, then the Plaintiffs are barred from recovery against the Trinity Defendants.

FOR A TENTH DEFENSE
(Open and Obvious Danger)

50. Trinity Defendants would show that because the Plaintiffs subjected themselves to an open and obvious risk, the Plaintiffs are barred from recovering against the Trinity Defendants herein.

FOR AN ELEVENTH DEFENSE
(Failure to Inspect)

51. Trinity Defendants would show that pursuant to Article 2 of the South Carolina Uniform Commercial Code, the Plaintiffs and/or the Engelhard Corporation are under an obligation to inspect all goods for breaches of warranty. To the extent the Plaintiffs and/or Engelhard Corporation failed to perform an inspection or engaged in an inadequate inspection of the product in question that would have revealed the alleged breach of warranty complained of in this lawsuit, the Plaintiffs are barred from recovery against the Trinity Defendants herein.

FOR A TWELTH DEFENSE
(Failure to Properly Maintain)

52. The Trinity Defendants would show that the Plaintiffs and/or the Engelhard Corporation failed to properly maintain the product in question which is a proximate cause of the damages sustained by the Plaintiffs, therefore the Plaintiffs are barred from recovery herein.

FOR A THIRTEENTH DEFENSE
(Packaged According to Specifications)

53. The Trinity Defendants would show that because the product in question was packaged in accordance with the specifications of the Plaintiffs and/or Engelhard Corporation, the Plaintiffs are barred from recovery herein.

FOR A FOURTEENTH DEFENSE
(Punitive Damages are not Recoverable)

54. Trinity Defendants would show that an award of punitive damages would amount to an excessive fine, cruel and unusual punishment, a violation the Contracts Clause of the United States Constitution, and would deprive the Trinity Defendants of due process of law and, therefore, the Trinity Defendants pleads the Constitutions of the United States and South Carolina as a complete bar to Plaintiffs' claims for punitive damages. Trinity Defendants further plead the United States Supreme Court's decision in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), as a defense and bar to Plaintiffs' demand for an award of punitive damages.

FOR A FIFTEENTH DEFENSE
(Disclaimer of Warranties)

55. Trinity Defendants would show that Plaintiffs cannot maintain a cause of action for breach of implied warranty because such warranties have otherwise been properly disclaimed in accordance with the Uniform Commercial Code.

FOR A SIXTEENTH DEFENSE
(Sole Negligence of Others)

56. Trinity Defendants allege that the injuries and damages of Scott Lawing were the proximate result of the negligence and recklessness of third parties whose conduct and actions Trinity Defendants bear no responsibility or liability.

FOR A SEVENTEETH DEFENSE
(Right of Recovery Against Plaintiff's Employer Pursuant to §42-1-580, S.C. Code Ann.)

57. Trinity Defendants allege that they are entitled to have any verdict rendered against them reduced or cancelled to the extent of any payment made or to be made or for which Scott Lawing would have been entitled to be paid pursuant to the Workers' Compensation Act by Mr. Lawing's employer or any workers' compensation carrier because Mr. Lawing would not have suffered the injuries complained of had it not been for the recklessness, carelessness and negligence on the part of his employer, Engelhard Corporation.

FOR AN EIGHTEENTH DEFENSE
(Preemption of Claims)

58. To the extent the product warning labels and/or markings complied with federal standards, Scott Lawing is barred from proceeding with his state law claims based on the doctrine of preemption.

WHEREFORE, having fully answered Plaintiffs' Amended Complaint, the Trinity Defendants request that the Amended Complaint be dismissed, with prejudice, for the costs of this action, and for such other and further relief as the Court deems fair and equitable.

(signature page follows)

Respectfully Submitted,

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By: _____

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Date: October 10, 2008
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STATE OF SOUTH CAROLINA COUNTY OF OCONEE Keith Black and Channon Black, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, Defendants. Curtis Martin and Tina Ann Martin, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants. Scott F. Lawing and Tammy R. Lawing, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT C.A. No. 2005-CP-37-604 **DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE AND FAILURE TO WARN CLAIMS, WHICH IS BASED ON THE SOPHISTICATED USER DEFENSE** C.A. No. 2005-CP-37-605(Reference) C.A. No. 2006-CP-37-30(Reference)

Defendants jointly move this Court to dismiss Plaintiffs failure to warn and negligence claims. Defendants make this Motion as there is no genuine issue of material fact and they are entitled to judgment as a matter of law. *See* S.C. R. Civ. P. 56(c). As detailed below, South Carolina law imposed no duty on Defendants to warn Plaintiffs of the potential risks or dangers

inherent in the sodium bromate as Defendants distributed the product to a "sophisticated user" of chemicals, Engelhard. Furthermore, because Engelhard is a "sophisticated user" of chemicals, Defendants' belief that Engelhard would warn Plaintiffs of the sodium bromate's hazardous nature was reasonable. Defendants are entitled to summary judgment on Plaintiffs' failure to warn and negligence claims for the following reasons:

1. South Carolina courts have approved of and adopted the sophisticated user defense. *See, e.g., Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 549, 462 S.E.2d 321, 331-32 (Ct. App. 1995). According to this doctrine, the distribution of a product to a sophisticated user "obviate[s] any purported duty on the part of [the distributor] to warn the public" or the product purchaser's employees about the product's dangers. *Sizemore v. Georgia-Pacific Corp.*, Nos. 6:94-2894 3, 6:94-2895 3 and 6:94-2896 3, 1996 WL 498410, *6 (D.S.C. Mar. 8, 1996).

2. The sophisticated user defense "is permitted in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in his business." *Bragg*, 319 S.C. at 549, 462 S.E.2d at 331. According to the defense, the employer's "familiarity or extensive experience with the product" permits the product supplier to rely on the employer for warnings to its employees about the product's dangers. *Id.*

3. Thus, under the sophisticated user defense, a product distributor has no duty to warn of a product's dangers if the purchaser of the product has "special knowledge, sophistication, or expertise in relation to the product" and is aware or should be aware of the product's dangers. 30 S.C. Jur. Products Liability § 46 *Sophisticated User Defense.*

4. Additionally, the state court of appeals has emphasized that the sophisticated user defense also applies if the distributor of the product "acted reasonably in assuming that the [purchaser] would recognize the danger and take precautions to protect its employees.'" *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332 (quoting *O'Neal v. Celanese Corp.*, 10 F.3d 249 (4th Cir. 1993)).

5. Applying the sophisticated user defense, both South Carolina courts and the Fourth Circuit Court of Appeals have determined that suppliers of a product have no duty to warn a sophisticated user's employees of a product's hazards, including those involving personal injury. For example:

    a. In *Bragg*, the state court of appeals approved the application of the sophisticated user defense because the purchaser of the product was a large company, which "frequently used and was familiar with" the product and its dangers. 319 S.C. at 551, 462 S.E.2d at 332. The plaintiff, an employee of a

large electrical contractor, died when the aerial bucket device in which he was working on an electrical pole, caught on fire. The fire started because the plaintiff's conductive hose came into contact with an "energized power line." *Id.* at 535-36, 462 S.E.2d at 324. The court held that the defendant manufacturer of the aerial bucket device was entitled to assert a sophisticated user defense on plaintiff's failure to warn claim, because the plaintiff's employer "frequently used" aerial devices and was "well aware that conductive materials like conductive hoses should not be used in the buckets of aerial devices." *Id.* at 551, 462 S.E.2d at 332.

b. In *Beale v. Hardy*, 769 F.2d 213, 214-15 (4th Cir. 1985), the Fourth Circuit held that a supplier of silica sand had no duty to warn the plaintiffs of the hazards associated with the product, because the plaintiff's employer, the purchaser of the silica sand, had "extensive knowledge" of the product's risks. (applying Restatement (Second) of Torts, § 338, which sets forth the principles on which the sophisticated user defense is based).

c. In *O'Neal*, the Fourth Circuit approved of a jury instruction based on the sophisticated user defense, because the defendant "acted reasonably in assuming that the [plaintiff's employer, a salvage company with extensive experience in removing lead-based paint,] would recognize the danger [of] and take precautions to protect its employees" from lead-based paint. 10 F.3d at 252-53.

d. In *Emory v. McDonnell Douglas Corporation*, 148 F.3d 347, 352 (4th Cir. 1998), the Fourth Circuit emphasized that under the sophisticated user defense, "a supplier is not negligent when it relies on an intermediary[, who is] 'already well aware of the [product's] 'danger[,]' to relay any necessary warning." (internal citation omitted).

e. In *Brooks v. Medtronic, Inc.*, 750 F.2d 1227, 1231 (4th Cir. 1984), the Fourth Circuit applied South Carolina law to determine that a drug manufacturer has no duty to warn a drug consumer of the drug's risks if the consumer's doctor has received "adequate notice of [the drug's] possible complications." The court reasoned that the drug manufacturer's duty to warn was obviated because the doctor constituted a "'learned intermediary' between the manufacturer and the consumer," and the doctor was responsible for relaying the drug's risks to the consumer. *Id. See also Odom v. G.D. Searle & Co.*, 979 F.2d 1001 (4th Cir. 1992) (applying South Carolina law and holding that a drug manufacturer is not liable under a failure to warn theory if the plaintiff's doctor knew of the drug's risks).

6. Defendants are protected from liability by the sophisticated user defense because they distributed the sodium bromate to Engelhard, a sophisticated user.

7. Engelhard is a sophisticated user of sodium bromate because:

a. OSHA regulations mandate that Engelhard have knowledge of the sodium bromate's hazards and that it protect its employees, including Plaintiffs, from the chemicals' dangers. *See, e.g.*, 29 C.F.R. § 1910.1200(b) (requiring employees to "maintain [] material safety data sheets," which reveal chemicals' potential hazards, and to "ensure that they are readily accessible" for its employees) and 29 C.F.R. § 1900.1200, Appendix E (stating that employers that "'use' hazardous chemicals must have a program to ensure the information [about the chemicals' potential dangers] is provided to exposed employees"). Engelhard complied with OSHA regulations, and established a Hazard Communication Program. *See, e.g.*, Tunstall Depo. (Engelhard 30(b)(6) Deponent) at 62:3-9; 126:20-25; 127:1-24; 142:22-25; 143:1-25; 144:1-14 (Material safety data sheets are available to Engelhard employees); Hogan Depo. (Engelhard Safety Manager) at 62:8-25; 63:1-12; 67:14-25; 68:1-20 (Material safety data sheets were accessible to Engelhard employees); Lamson-Scribner Depo. (Engelhard Site Manager) at 29:8-19; 30:1-25; 31:1-23; (Engelhard frequently trains its employees about hazardous materials and Engelhard employees have weekly safety meetings); 41:3-17 (MSDS were accessible to Plaintiffs).

b. Plaintiffs all admit that they received Hazard Communication training at Engelhard. *See, e.g.*, Lawing Depo. at 97:11-25; 98:1-25 (Lawing participated in Engelhard courses about hazardous materials and knew how to read and access an material safety data sheet); Martin Depo. at 138:25; 139:1-21, 154:19-24, 197:8-16, 203:10-25; 204:1 (Martin received training at Engelhard about hazardous materials); Black Depo. at 80:5-25; 82:7-25; 83:25; 84:1-19; 85:2-25; 86:1-11 (Black participated in Engelhard hazardous material training).

c. Engelhard frequently purchases sodium bromate for use in its plant **(approximately 120 tons per year)**, and, thus, is well aware of the chemicals' potential hazards and dangers. *See, e.g.* Tunstall Depo. (Engelhard 30(b)(6) Deponent) at 130:8-13 (Engelhard engages in sophisticated chemical processes), 62:10-25; 63:1; 147:2-8 (Engelhard uses sodium bromate in its manufacturing process and estimating that Engelhard receives six shipments of sodium bromate a year); 142:22-25; 143:1-4 (Engelhard uses over a thousand different chemicals); Satterfield Depo. (Engelhard Utility Supervisor) at 109:15-23, 111:20-25 (Engelhard is "sophisticated and knowledgeable of chemical processes" and of the safe handling of chemicals it stores and uses; also noting that Engelhard is a chemical plant with lots of hazardous chemicals); and Hogan Depo. (Engelhard Safety Manager) at 45:17-25; 46:1-9 (Hazardous materials were "anywhere - - everywhere" at Engelhard); 50:20-25 (Sodium bromate was essential to perform Engelhard's tasks); 123:4-13 (While at Engelhard, Hogan walked past pallets of sodium bromate hundreds of times).

8. Engelhard's status as a sophisticated user negated any purported common law or statutory duty Defendants had to warn of the potential dangers of sodium bromate. *See, generally, Midwest Specialities, Inc. v. Crown Indus. Prod. Co.*, 940 F. Supp. 1160, 1167 (N.D.Ohio, 1996) (holding that the sophisticated user doctrine "applies to statutory, as well as common law, [failure to warn] claims").

9. Furthermore, Defendants' reliance on Engelhard to warn Plaintiffs of the chemicals' hazardous nature was reasonable as Engelhard is a sophisticated user of chemicals, such as sodium bromate.

10. This Court should dismiss Plaintiff's failure to warn and negligence claims with prejudice.

This Motion is based upon the applicable rules, statutes, case law, and deposition testimony. This Motion shall be supported by the pleadings filed in this case and any additional affidavits or supporting memoranda which may be filed with this Court at or before the hearing on this Motion.

This the 18 day of September, 2008

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Table of Cases:

1. *Sizemore v. Georgia-Pacific Corp.*, Nos. 6:94-2894 3, 6:94-2895 3 and 6:94-2896 3, 1996 WL 498410 (D.S.C. Mar. 8, 1996).

STATE OF SOUTH CAROLINA COUNTY OF OCONEE Keith Black and Channon Black, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc. and Matrix Outsourcing, LLC, Defendants.	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT C.A. No. 2005-CP-37-604 **DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' STRICT LIABILITY CLAIMS**
Curtis Martin and Tina Ann Martin, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. No. 2005-CP-37-605 (Reference)
Scott F. Lawing and Tammy R. Lawing, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. No. 2006-CP-37-30 (Reference)

Univar USA Inc., ("Univar"), Trinity Manufacturing, Inc. ("Trinity") and Matrix Outsourcing, Inc. ("Matrix") (collectively "Defendants") move for an Order granting them summary judgment on Plaintiffs' strict liability claims. Defendants make this Motion pursuant to Rule 56 of the South Carolina Rules of Civil Procedure as there is no genuine issue of material

fact and it is entitled to judgment as a matter of law. South Carolina law only recognizes a strict liability claim when the injury is to a "user or consumer." See S.C. R. Civ. P. 56(c). Liability does not extend to "casual bystander[s]," like Plaintiffs. Defendants are entitled to summary judgment on Plaintiffs' strict liability claims for the following reasons:

1. South Carolina imposes strict liability on a seller for selling "any product in a defective condition unreasonably dangerous to the *user or consumer* or to his property." S.C. Code Ann. § 15-73-10 (2007). **Ex. 1.**

2. South Carolina's General Assembly expressly adopted § 402A of the Restatement (Second) of Torts ("§ 402A" or "the Restatement") and all of the corresponding comments to § 402A as the legislative intent of the Chapter. Id. at §15-73-10 to 30. **Ex. 1.**

3. A "consumer" is "a person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes." It defines "user" as "[s]omeone who uses a thing." Black's Law Dictionary 265 &1289 (8th ed. 2005).

4. Comment *l* to the Restatement discusses the intended meaning of "user" and "consumer." Restatement (Second) of Torts § 402A cmt. *l*. **Ex. 2.** The comment states that "consumption includes all *ultimate uses for which the product is intended*" and "[u]ser includes those who are *passively enjoying the benefit of the product.*" Id.

5. Comment *o* to the Restatement discusses the intended extent of liability for non-users and non-consumers stating that courts, in applying the rule stated in § 402A, "have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment *l*." Id. at cmt. *o*. **Ex. 2.** The Restatement expressly states that "casual bystanders, and others who may come in contact with the product . . . have been denied recovery." Id. Lastly, the Institute stated that they express no opinion as to the ***expansion*** of the rule to permit bystander recovery, thus further emphasizing that the Restatement does not recognize bystander recovery. Id. (emphasis added), see also Lightner v. Duke Power Co., 719 F.Supp 1310, 1314 (D.S.C. 1989) (stating that "only a 'user or consumer' of a defective product can base a cause of action on strict liability"). **Ex. 3.**

6. In Bray v. Marathon Corp., the South Carolina Supreme Court found that the determination of whether or not an individual is a "user or consumer" is not based on a foreseeability standard, but is instead based on whether or not an individual's injury was a result of her direct use or consumption of the product. Bray v. Marathon Corp., 356 S.C. 111, 117, 588 S.E.2d 93, 95 (2003). **Ex. 4.**

7. Most importantly, the Bray Court recognized that it lacked authority to modify § 15-73-10 and its effect when the South Carolina General Assembly had already spoken on the

issue by passing the statute. Id. at 117, 588 S.E.2d 96 n.6. **Ex. 4.** The Court stated it was "without authority to graft the Kinard bystander analysis on § 15-73-10. Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute." Id., see also Little v. Brown & Williamson Tobacco Corp., No. C.A. 2:98-1879-23, 2000 WL 33957172, *11 (D.S.C. May 8, 2000) (stating that the General Assembly adopted the Restatement (Second) of Torts § 402A "as the law governing strict liability"). **Ex. 5.**

8. South Carolina limits recovery for strict liability to users or consumers. Additionally, other jurisdictions have followed the Restatement and denied recovery to "casual bystanders, and others who may come in contact with the product." Restatement (Second) of Torts § 402A cmt. *o*. **Ex. 2.** For example:

    a. A federal court, in Van Buskirk v. W. Bend Co., 100 F. Supp. 2d 281 (E.D.Pa. 1999), denied strict liability recovery to a toddler who suffered severe burns after he pulled a portable deep fryer kitchen appliance on top of his head and upper torso. **Ex. 6.** The court labeled the toddler an innocent bystander, rejecting the plaintiff's argument that the child was a "user" and "passive beneficiary" of the "benefits of the deep fryer since he was only old enough to eat Gerber jar foods and cereal." Id. at 284. Because the toddler was a bystander, the court concluded that he was barred from recovering under § 402A.

    b. Like the Van Buskirk court, a Pennsylvania state court denied strict liability recovery to a child bystander in Riley v. Warren Mfg. Inc., 455 Pa.Super. 384, 688 A.2d 221 (Pa.Super. 1997). **Ex. 7.** In Riley, the plaintiff child stuck his hand into a bulk feed trailer, which severed his fingers. The court, emphasizing that only users and consumers can recover under strict liability, determined that the child was not a "user of the trailer merely 'by coming into contact with the trailer and being injured while in its proximity.'" Id. at 396, 688 A.2d at 227 (internal citation omitted). **Ex. 7.**

    c. A court, in In re Voluntary Purchasing Groups, Inc. Litigation, No. Civ. 3:94-CV-2477-H, 2003 WL 21499262, *6 (N.D.Tex. June 24, 2003), denied strict liability recovery to communities, whose environment was contaminated with arsenic due to the defendant arsenic company's leakages and spills of the product, because the communities were not users and consumers of the arsenic. **Ex. 8.**

9. Applying South Carolina code section 15-73-10 to the facts of this case, Plaintiffs were not users or consumers of sodium bromate and are thus not entitled to recovery under South Carolina's strict liability statute.

    a. Plaintiffs were not "users" of the sodium bromate because they were not "enjoying the benefit of the product." Restatement (Second) of Torts § 402A cmt. *l*. **Ex. 2.** Plaintiffs' were not using sodium bromate in their work, and the only connection they had with the product is that they were in its vicinity.

i. See e.g., Hogan Depo., September 13, 2007 (Former Safety Manager and head of the 6/1/04 accident investigation) at 56:8-11 ("[Plaintiffs] did not handle sodium bromate as a routine part of their job"; "employees who worked in the refinery department would use sodium bromate in their day-to-day job") (**Ex. 9**); Pekarek Depo. (Operations Manager) at 55:17-25; 56:1-9 (because Engelhard was in shut down sodium bromate would not be used). **Ex. 10.**

b. The Plaintiffs were not "consumers" of the sodium bromate because they were not using the product as it was intended to be used. Id. The Plaintiffs' welding did not involve the consumption or use of sodium bromate.

i. See 9 a. i. above.

10. The Plaintiffs are more appropriately characterized as "casual bystanders." They are akin to a "passer-by injured by an exploding bottle," an example of a "casual bystander" given by the Restatement, except in this case a byproduct of the Plaintiffs' work came in contact with the product at issue. Id. at cmt. *o*. **Ex. 2.**

11. Because Plaintiffs were mere bystanders, this Court should dismiss Plaintiffs' strict liability claim with prejudice.

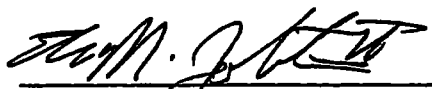
This Court should dismiss Plaintiffs' strict liability claims with prejudice. This Motion is based upon the applicable rules, statutes, case law, and depositions. This Motion shall be supported by the pleadings filed in this case, discovery conducted to date, and any additional affidavits or supporting memoranda which may be filed with this Court at or before the hearing on this Motion.

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Exhibit 1

1 of 1 DOCUMENT

SOUTH CAROLINA CODE OF LAWS ANNOTATED BY LEXISNEXIS(R)

*** This document is current through all legislation enacted in 2007 ***
*** Annotations are current through July 30, 2008 ***

TITLE 15. CIVIL REMEDIES AND PROCEDURES
CHAPTER 73. SELLERS OF DEFECTIVE PRODUCTS

GO TO SOUTH CAROLINA ARCHIVE DIRECTORY

S.C. Code Ann. § 15-73-10 (2007)

§ 15-73-10. Liability of seller for defective product.

(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 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

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) shall apply although

(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.

HISTORY: 1962 Code § 66-371; 1974 (58) 2782.

LexisNexis (R) Notes:

CASE NOTES

1. Intermediate court properly reversed a trial court's entry of summary judgment for a manufacturer as to an injured party's strict liability claim under the South Carolina Defective Products Act, *S.C. Code Ann. § 15-73-10* et seq., as the injured party, who operated a trash compactor in an effort to assist a co-worker who was crushed to death by the compactor, was a user within the meaning of *S.C. Code Ann. § 15-73-10*; there was a genuine issue of material fact as to whether the event was the proximate cause of the injured party's physical harm, although the intermediate court properly concluded that the bystander analysis did not apply to a strict liability claim. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

2. Intermediate court erred in affirming a trial court's entry of summary judgment for a manufacturer on an injured party's negligence claim as the injured party might have been able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker, and, as the injured party was considered a direct victim for the products liability claim under the South Carolina Defective Products Act, *S.C. Code Ann. § 15-73-10* et seq., she was a foreseeable plaintiff for a negligence claim. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

3. Trial court did not err in granting a builder a directed verdict as to owners' strict liability claim because *S.C. Code Ann. § 15-73-10* did not cover a general contractor supervising the construction of a home; the strict liability statute applies only to sales of products, not to the provision of services, and a general contractor building a home performs a service and does not sell a product. *Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80, 2008 S.C. LEXIS 54 (S.C. 2008).*

4. In an indemnity suit based on strict liability and breach of implied and express warranties, that a truck was sold in an unreasonably dangerous defective condition subjected the seller to liability by way of indemnity for damages arising out of a lawsuit where a driver was killed and his passenger injured when the buyer's agent lost control of the truck and hit the decedent's vehicle head-on; that the jury found the buyer negligent in the underlying action did not make the seller a joint tortfeasor. *Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 301 S.E.2d 552, 1983 S.C. LEXIS 253, 36 U.C.C. Rep. Serv. (CBC) 74 (S.C. 1983).*

5. Where strict liability in tort for sellers of products in a defective condition unreasonably dangerous to users, consumers or their property became the law of South Carolina by the enactment of 1974 Act No. 1184, effective July 9, 1974, there was no strict liability cause of action for a product entering the stream of commerce prior to July 9, 1974 and allegedly causing an injury after that date. *Schall v. Sturm, Ruger Co., 278 S.C. 646, 300 S.E.2d 735, 1983 S.C. LEXIS 246, CCH Prod. Liab. Rep. P9579 (S.C. 1983).*

6. Given the facts of a particular case, the Supreme Court of South Carolina did not decide, nor intimate, whether strict liability in tort had any applicability prior to enactment of *S.C. Code § 15-73-10. Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671, 1978 S.C. LEXIS 536,* 1 A.L.R.4th 394 (S.C. 1978).

7. Respondents' demurrer to appellant's strict liability cause of action was properly granted because strict liability was not recognized in the common law at the time of appellant's injury; the doctrine of strict liability in tort, imposed as a result of a product's defective condition, did not emerge until *S.C. Code Ann. §§ 15-73-10* to *15-73-30* were enacted after appellant's injury, and those sections applied prospectively only. *Hatfield v. Atlas Enters., 274 S.C. 247, 262 S.E.2d 900, 1980 S.C. LEXIS 288, CCH Prod. Liab. Rep. P8613 (S.C. 1980).*

8. In an action against a blood center after a patient contracted an AIDS-related virus from blood it supplied, blood was not a "product" for purposes of strict liability in tort. *S.C. Code Ann. § 15-73-10* imposed strict liability in tort upon the suppliers of defective products and was applicable only to products and not to services. *Samson v. Greenville Hosp. Sys., 297 S.C. 409, 377 S.E.2d 311, 1989 S.C. LEXIS 28, CCH Prod. Liab. Rep. P12084 (S.C. 1989).*

9. In an action against a blood center after a patient contracted an AIDS-related virus from blood it supplied, blood was not a "product" under *S.C. Code Ann. § 15-73-10* for purposes of strict liability in tort, and, based on the blood shield statute, *S.C. Code Ann. § 44-43-10*, the legislature did not intend for blood to be classified as a product within the context of strict tort liability. *Samson v. Greenville Hosp. Sys., 297 S.C. 409, 377 S.E.2d 311, 1989 S.C. LEXIS 28, CCH Prod. Liab. Rep. P12084 (S.C. 1989).*

10. Punitive damages were improperly awarded to an injured party in an action based solely upon the strict liability statute (the act), *S.C. Code §§ 15-73-10* to -30, which does not specify that punitive damages are recoverable and per-

mits liability only for "physical harm" under *S.C. Code Ann. § 15-73-10* of the act; punitive damages are not awarded for "physical harm" because their purpose is to punish a wrongdoer and to deter him and others from engaging in similar misconduct. *Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162, 1989 S.C. LEXIS 259, CCH Prod. Liab. Rep. P12499 (S.C. 1989).*

11. Recovery of punitive damages is not allowed under a cause of action based solely upon the South Carolina strict liability statute, *S.C. Code Ann. §§ 15-73-10* to -30; such damages are not awarded for "physical harm" within the meaning of *S.C. Code 15-73-10* of the strict liability statute. *Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162, 1989 S.C. LEXIS 259, CCH Prod. Liab. Rep. P12499 (S.C. 1989).*

12. Intermediate court erred in affirming a trial court's entry of summary judgment for a manufacturer on an injured party's negligence claim as the injured party might have been able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker, and, as the injured party was considered a direct victim for the products liability claim under the South Carolina Defective Products Act, *S.C. Code Ann. § 15-73-10* et seq., she was a foreseeable plaintiff for a negligence claim. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

13. Summary judgment was properly granted in favor of a manufacturer in plaintiff's suit to recover damages for personal injuries pursuant to *S.C. Code Ann. § 15-73-10(1)*; plaintiff failed to demonstrate that his injuries were proximately caused by the manufacturer's failure to equip an excavator with a seat belt. Because the excavator was made solely for use in Japan, where seat belts were not required, the manufacturer could not have reasonably foreseen that a user in a foreign market would be injured. *Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 609 S.E.2d 565, 2005 S.C. App. LEXIS 19 (S.C. Ct. App. 2005),* writ of certiorari denied by *2006 S.C. LEXIS 311* (S.C. July 20, 2006).

14. In an indemnity suit based on strict liability and breach of implied and express warranties, that a truck was sold in an unreasonably dangerous defective condition subjected the seller to liability by way of indemnity for damages arising out of a lawsuit where a driver was killed and his passenger injured when the buyer's agent lost control of the truck and hit the decedent's vehicle head-on; that the jury found the buyer negligent in the underlying action did not make the seller a joint tortfeasor. *Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 301 S.E.2d 552, 1983 S.C. LEXIS 253, 36 U.C.C. Rep. Serv. (CBC) 74 (S.C. 1983).*

15. *S.C. Code Ann. § 15-73-10* by its terms determines the liability of the seller of a defective product; the pertinent date to determine its application is the date the product was sold by the seller. *Scott v. Fruehauf Corp., 302 S.C. 364, 396 S.E.2d 354, 1990 S.C. LEXIS 162, CCH Prod. Liab. Rep. P12635 (S.C. 1990).*

16. Summary judgment was properly granted in favor of a manufacturer in plaintiff's suit to recover damages for personal injuries pursuant to *S.C. Code Ann. § 15-73-10(1)*; plaintiff failed to demonstrate that his injuries were proximately caused by the manufacturer's failure to equip an excavator with a seat belt. Because the excavator was made solely for use in Japan, where seat belts were not required, the manufacturer could not have reasonably foreseen that a user in a foreign market would be injured. *Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 609 S.E.2d 565, 2005 S.C. App. LEXIS 19 (S.C. Ct. App. 2005),* writ of certiorari denied by *2006 S.C. LEXIS 311* (S.C. July 20, 2006).

17. Estate representative's products liability and negligence claims against tobacco companies based on her decedent's death from smoking were properly dismissed because under *S.C. Code Ann. § 15-73-10*, the companies were not liable for a defective product since the cigarettes were accompanied by adequate warnings. *Aldana v. RJ Reynolds Tobacco Co., 2008 U.S. Dist. LEXIS 34322, CCH Prod. Liab. Rep. P17999 (D.S.C. Apr. 25 2008).*

18. Summary judgment was properly granted in favor of a seller in plaintiff's suit to recover damages for personal injuries pursuant to *S.C. Code Ann. § 15-73-10(1)*; plaintiff failed to show that the seller participated in the design of the product, an excavator, or that the excavator was in a defective condition unreasonably dangerous due to the fact that it lacked a seat belt. Though the excavator would have been more safe if this optional safety feature had been present, such did not make the excavator defective or unreasonably dangerous. *Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 609 S.E.2d 565, 2005 S.C. App. LEXIS 19 (S.C. Ct. App. 2005),* writ of certiorari denied by *2006 S.C. LEXIS 311* (S.C. July 20, 2006).

19. Where the trial court found in its judgment notwithstanding the verdict order, contrary to the jury's verdict, that a company's warning was adequate to defeat an estate representative's strict products liability case pursuant to *S.C. Code Ann. §§ 15-73-10*, -30, the trial court erred in making this finding, as there was evidence to support the jury's verdict in favor of the estate representative. *Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272, 2003 S.C. LEXIS 172, CCH Prod. Liab. Rep. P16697 (S.C. 2003).*

20. In a traditional tort setting *S.C. Code § 15-73-10(2)(a)* rendered irrelevant the concept of duty because recovery could be had although a seller exercised all possible care in the preparation of the sale of a product. *Schall v. Sturm, Ruger Co., 278 S.C. 646, 300 S.E.2d 735, 1983 S.C. LEXIS 246, CCH Prod. Liab. Rep. P9579 (S.C. 1983).*

21. If a person is considered a "direct victim" for the purposes of one products liability cause of action under the South Carolina Defective Products Act, *S.C. Code Ann. § 15-73-10* et seq., the person must be a direct victim for all causes of action; it is too fine a distinction to say that an injured party is a user and therefore a foreseeable plaintiff under a strict liability theory, but that she is not a "direct victim" and not a foreseeable plaintiff under a negligence cause of action. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

22. Viewing the evidence in the light most favorable to plaintiff executrix, a jury could have found that the lifting mechanism on a bin that fell on a worker and seriously injured him was defectively designed and unreasonably dangerous in ordinary use particularly where it was undisputed that the worker was injured by the product and that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the manufacturer; thus, the evidence was sufficient for the jury to have concluded that that the injury occurred because the product was in a defective condition unreasonably dangerous to the user. *Madden v. Cox, 284 S.C. 574, 328 S.E.2d 108, 1985 S.C. App. LEXIS 311, CCH Prod. Liab. Rep. P10464 (S.C. Ct. App. 1985),* appeal dismissed by *286 S.C. 127, 332 S.E.2d 102, 1985 S.C. LEXIS 570 (S.C. 1985).*

23. By bringing an action under *S. C. Code § 15-73-10*, a plaintiff assumes the burden of presenting evidence which tends to prove that a product was in a defective condition unreasonably dangerous, which proximately caused his injury; the fact that the injury occurred and the fact that the product could have been safer are not sufficient to support a finding that the product was unreasonably dangerous. *Marchant v. Mitchell Distrib. Co., 270 S.C. 29, 240 S.E.2d 511, 1977 S.C. LEXIS 246 (S.C. 1977).*

24. Trial court did not err in granting a builder a directed verdict as to owners' strict liability claim because *S.C. Code Ann. § 15-73-10* did not cover a general contractor supervising the construction of a home; the strict liability statute applies only to sales of products, not to the provision of services, and a general contractor building a home performs a service and does not sell a product. *Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80, 2008 S.C. LEXIS 54 (S.C. 2008).*

25. Summary judgment was properly granted in favor of a seller in plaintiff's suit to recover damages for personal injuries pursuant to *S.C. Code Ann. § 15-73-10(1)*; plaintiff failed to show that the seller participated in the design of the product, an excavator, or that the excavator was in a defective condition unreasonably dangerous due to the fact that it lacked a seat belt. Though the excavator would have been more safe if this optional safety feature had been present, such did not make the excavator defective or unreasonably dangerous. *Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 609 S.E.2d 565, 2005 S.C. App. LEXIS 19 (S.C. Ct. App. 2005),* writ of certiorari denied by *2006 S.C. LEXIS 311* (S.C. July 20, 2006).

26. South Carolina's strict liability statute, the Defective Products Act, *S.C. Code Ann. § 15-73-10*, applies only to products, not to services, and the South Carolina Pharmacy Practice Act, *S.C. Code Ann. § 40-43-10*, specifically states that the practice of pharmacy centered around the provision of pharmacy care services and assisting the patient to achieve optimal therapeutic outcomes; because a pharmacy was providing a service, rather than selling a product, it may not have been held strictly liable for properly filling a prescription in accordance with a physician's orders, and a strict liability cause of action brought against the pharmacy by a drug consumer was properly dismissed. *Madison v. Am. Home Prods. Corp., 358 S.C. 449, 595 S.E.2d 493, 2004 S.C. LEXIS 92, CCH Prod. Liab. Rep. P16980 (S.C. 2004).*

27. Intermediate court properly reversed a trial court's entry of summary judgment for a manufacturer as to an injured party's strict liability claim under the South Carolina Defective Products Act, *S.C. Code Ann. § 15-73-10* et seq., as the injured party, who operated a trash compactor in an effort to assist a co-worker who was crushed to death by the compactor, was a user within the meaning of *S.C. Code Ann. § 15-73-10*; there was a genuine issue of material fact as to whether the event was the proximate cause of the injured party's physical harm, although the intermediate court properly concluded that the bystander analysis did not apply to a strict liability claim. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

28. Intermediate court erred in affirming a trial court's entry of summary judgment for a manufacturer on an injured party's negligence claim as the injured party might have been able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker, and, as the injured party was considered a direct victim for the products liability claim under the South Carolina Defective Products Act, *S.C. Code Ann. § 15-73-10* et seq., she was a foreseeable plaintiff for a negligence claim. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

29. Because *S.C. Code Ann. § 15-73-10* limits liability to the user or consumer, there is no need for a limitation on foreseeable victims to avoid disproportionate liability as has been found necessary in the bystander setting; it is not unreasonable to conclude the user of a defective product might suffer physical harm from emotional damage if the use of the product results in death or serious injury to a third person, irrespective of the relationship between the user and third person. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

30. If a person is considered a "direct victim" for the purposes of one products liability cause of action under the South Carolina Defective Products Act, *S.C. Code Ann. § 15-73-10* et seq., the person must be a direct victim for all causes of action; it is too fine a distinction to say that an injured party is a user and therefore a foreseeable plaintiff under a strict liability theory, but that she is not a "direct victim" and not a foreseeable plaintiff under a negligence cause of action. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

31. *S.C. Code Ann. § 15-73-30* provides that the comments to *Restatement of Torts, Second, § 402A*, are incorporated as the legislative intent of the South Carolina Defective Products Act, *S.C. Code Ann. § 15-73-10* et seq. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

32. South Carolina law recognizes the principles of strict liability in product liability actions and requires that one who sells any product in a defective condition unreasonably dangerous to the user is subject to liability for physical harm caused to the user. *S.C. Code Ann. § 15-73-10.* However, a seller may prevent a product from being "unreasonably dangerous" if the seller places an adequate warning on the product regarding its use; if a warning is given which, if followed, makes the product safe for use, the product cannot be deemed defective or unreasonably dangerous. *Allen v*

Long Mfg. N.C., Inc., 332 S.C. 422, 505 S.E.2d 354, 1998 S.C. App. LEXIS 105, CCH Prod. Liab. Rep. P15401 (S.C. Ct. App. 1998).

33. Healthcare provider was not held strictly liable for a medical device or instrument that was used in the course of treating a patient and could not be liable as a seller under the warranty provisions of the Defective Products Act, *S.C. Code Ann. § 15-73-10* to *S.C. Code Ann. § 15-73-30. In re Breast Implant Prod. Liab., 331 S.C. 540, 503 S.E.2d 445, 1998 S.C. LEXIS 62, 38 U C.C. Rep. Serv 2d (CBC) 49 (S.C. 1998).*

34. *S.C. Code Ann. § 15-73-10* imposes strict liability upon a manufacturer and seller for an injury to any user caused by its product if the product is expected to and does reach the user or consumer without substantial change. *Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321, 1995 S.C. App. LEXIS 125, CCH Prod. Liab. Rep. P14387 (S.C. Ct. App. 1995).*

35. In a products liability action, because *S.C. Code Ann. § 15-73-10* (1976) imposes strict liability upon the manufacturer and seller for an injury to any user caused by its product, if the product is expected and does reach the user or consumer without substantial change, if it can be shown that the product was (1) materially altered before it reached the injured user and (2) such alteration could not have been expected by the manufacturer or seller, then the manufacturer or seller is not liable. *Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589, 1994 S.C. LEXIS 200, 10 I.E.R. Cas. (BNA) 117, 129 Lab. Cas. (CCH) P57856 (S.C. 1994).*

36. Pursuant to *S.C. Code Ann. § 15-73-10*, a supplier and lessor were strictly liable to a victim because a trailer with a defective wheel rim and side ring was sold by the supplier and leased by the lessor after the effective date of the statute. *Scott v. Fruehauf Corp., 302 S.C. 364, 396 S.E.2d 354, 1990 S.C. LEXIS 162, CCH Prod. Liab. Rep. P12635 (S.C. 1990).*

37. *S.C. Code Ann. § 15-73-10* by its terms determines the liability of the seller of a defective product; the pertinent date to determine its application is the date the product was sold by the seller. *Scott v. Fruehauf Corp., 302 S.C. 364, 396 S.E.2d 354, 1990 S.C. LEXIS 162, CCH Prod. Liab. Rep. P12635 (S.C. 1990).*

38. Punitive damages were improperly awarded to an injured party in an action based solely upon the strict liability statute (the act), *S.C. Code §§ 15-73-10* to -30, which does not specify that punitive damages are recoverable and permits liability only for "physical harm" under *S.C. Code Ann. § 15-73-10* of the act; punitive damages are not awarded for "physical harm" because their purpose is to punish a wrongdoer and to deter him and others from engaging in similar misconduct. *Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162, 1989 S.C. LEXIS 259, CCH Prod. Liab. Rep. P12499 (S.C. 1989).*

39. Recovery of punitive damages is not allowed under a cause of action based solely upon the South Carolina strict liability statute, *S.C. Code Ann. §§ 15-73-10* to -30; such damages are not awarded for "physical harm" within the meaning of *S.C. Code 15-73-10* of the strict liability statute. *Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162, 1989 S.C. LEXIS 259, CCH Prod. Liab. Rep. P12499 (S.C. 1989).*

40. In an action brought by an injury victim against the manufacturer and designer of machinery, alleging causes of action for strict liability, negligence, and breach of warranties, the manufacturer was appropriately disallowed to assert the defense of completion and acceptance where the defense was consistent with neither *S.C. Code Ann. §§ 15-73-10* et seq., which provided that sellers of defective products were strictly liable for physical harm caused to ultimate users, nor *S.C. Code Ann. § 36-2-318*, which extended the warranty of sellers beyond those with whom they had a contractual relationship. *Stanley v. B.L. Montague Co., 299 S.C. 51, 382 S.E.2d 246, 1989 S.C. App. LEXIS 83 (S.C. Ct. App. 1989).*

41. In an action against a blood center after a patient contracted an AIDS-related virus from blood it supplied, blood was not a "product" for purposes of strict liability in tort. *S.C. Code Ann. § 15-73-10* imposed strict liability in tort upon the suppliers of defective products and was applicable only to products and not to services. *Samson v. Greenville Hosp. Sys., 297 S.C. 409, 377 S.E.2d 311, 1989 S.C. LEXIS 28, CCH Prod. Liab. Rep. P12084 (S.C. 1989).*

42. In an action against a blood center after a patient contracted an AIDS-related virus from blood it supplied, blood was not a "product" under *S.C. Code Ann. § 15-73-10* for purposes of strict liability in tort, and, based on the blood shield

statute, *S.C. Code Ann. § 44-43-10*, the legislature did not intend for blood to be classified as a product within the context of strict tort liability. *Samson v. Greenville Hosp. Sys., 297 S.C. 409, 377 S.E.2d 311, 1989 S.C. LEXIS 28, CCH Prod. Liab. Rep. P12084 (S.C. 1989).*

43. Claim for strict liability was improperly stricken from a complaint for failure to allege a sale because a cause of action under *S.C. Code Ann. § 15-73-10* did not require an allegation of a sale. *Henderson v. Gould, Inc., 288 S.C. 261, 341 S.E.2d 806, 1986 S.C. App. LEXIS 301 (S.C. Ct. App. 1986).*

44. Viewing the evidence in the light most favorable to plaintiff executrix, a jury could have found that the lifting mechanism on a bin that fell on a worker and seriously injured him was defectively designed and unreasonably dangerous in ordinary use particularly where it was undisputed that the worker was injured by the product and that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the manufacturer; thus, the evidence was sufficient for the jury to have concluded that that the injury occurred because the product was in a defective condition unreasonably dangerous to the user. *Madden v. Cox, 284 S.C. 574, 328 S.E.2d 108, 1985 S.C. App. LEXIS 311, CCH Prod. Liab. Rep. P10464 (S.C. Ct. App. 1985),* appeal dismissed by *286 S.C. 127, 332 S.E.2d 102, 1985 S.C. LEXIS 570 (S.C. 1985).*

45. Where strict liability in tort for sellers of products in a defective condition unreasonably dangerous to users, consumers or their property became the law of South Carolina by the enactment of 1974 Act No. 1184, effective July 9, 1974, there was no strict liability cause of action for a product entering the stream of commerce prior to July 9, 1974 and allegedly causing an injury after that date. *Schall v. Sturm, Ruger Co., 278 S.C. 646, 300 S.E.2d 735, 1983 S.C. LEXIS 246, CCH Prod. Liab. Rep. P9579 (S.C. 1983).*

46. In a traditional tort setting *S.C. Code § 15-73-10(2)(a)* rendered irrelevant the concept of duty because recovery could be had although a seller exercised all possible care in the preparation of the sale of a product. *Schall v. Sturm, Ruger Co., 278 S.C. 646, 300 S.E.2d 735, 1983 S.C. LEXIS 246, CCH Prod. Liab. Rep. P9579 (S.C. 1983).*

47. Under *S.C. Code Ann.§ 15-73-10*, lug nuts were not defective because they were not unreasonably dangerous to a consumer given the conditions and circumstances that foreseeably attend the use of the lug nuts. *Claytor v. GMC, 277 S.C. 259, 286 S.E.2d 129, 1982 S.C. LEXIS 248, CCH Prod. Liab. Rep. P9170 (S.C. 1982).*

48. Where a tire company installed tires on a customer's car and during the installation a deteriorated valve stem, not a part of the tire, was left on the wheel, the customer could not sue the tire company in strict liability under *S.C. Code Ann. § 15-73-10* for injuries resulting from the valve stem because that section imposed liability on sellers of products in a defective condition, and the tire company neither supplied nor used a defective product in conjunction with mounting the tires on the customer's car. *De Loach v. Whitney, 275 S.C. 543, 273 S.E.2d 768, 1981 S.C. LEXIS 289, CCH Prod. Liab. Rep. P8901 (S.C. 1981).*

49. Respondents' demurrer to appellant's strict liability cause of action was properly granted because strict liability was not recognized in the common law at the time of appellant's injury; the doctrine of strict liability in tort, imposed as a result of a product's defective condition, did not emerge until *S.C. Code Ann. §§ 15-73-10* to *15-73-30* were enacted after appellant's injury, and those sections applied prospectively only. *Hatfield v. Atlas Enters., 274 S.C. 247, 262 S.E.2d 900, 1980 S.C. LEXIS 288, CCH Prod. Liab. Rep. P8613 (S.C. 1980).*

50. To warrant recovery for the death of her husband in a boating accident on a theory of strict liability in tort for a boat manufacturer's failure to install a "kill switch" that cut power to the motor whenever the operator was thrown from the seat and was no longer in a position to control the boat, the widow had to establish that the absence of the kill switch constituted a defect "unreasonably dangerous to the user or consumer," *S.C. Code § 15-73-10*, and the test of whether or not the failure to incorporate the safety device constituted a defect was whether the product, absent such device, was unreasonably dangerous to the user or consumer or to his property, i.e., whether the absence of the kill switch per se rendered the boat dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics. Under such test, the widow could not recover because the danger posed by the obvious lack of a kill switch could hardly be beyond the husband's contemplation. *Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671, 1978 S.C. LEXIS 536,* 1 A.L.R.4th 394 (S.C. 1978).

51. Given the facts of a particular case, the Supreme Court of South Carolina did not decide, nor intimate, whether strict liability in tort had any applicability prior to enactment of *S.C. Code § 15-73-10. Young v Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671, 1978 S.C. LEXIS 536,* 1 A.L.R.4th 394 (S.C. 1978).

52. By bringing an action under *S. C. Code § 15-73-10,* a plaintiff assumes the burden of presenting evidence which tends to prove that a product was in a defective condition unreasonably dangerous, which proximately caused his injury; the fact that the injury occurred and the fact that the product could have been safer are not sufficient to support a finding that the product was unreasonably dangerous. *Marchant v. Mitchell Distrib. Co., 270 S.C. 29, 240 S.E.2d 511, 1977 S.C. LEXIS 246 (S.C. 1977).*

53. In an indemnity suit based on strict liability and breach of implied and express warranties, that a truck was sold in an unreasonably dangerous defective condition subjected the seller to liability by way of indemnity for damages arising out of a lawsuit where a driver was killed and his passenger injured when the buyer's agent lost control of the truck and hit the decedent's vehicle head-on; that the jury found the buyer negligent in the underlying action did not make the seller a joint tortfeasor. *Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 301 S.E.2d 552, 1983 S.C. LEXIS 253, 36 U.C.C. Rep. Serv. (CBC) 74 (S.C. 1983).*

LAW REVIEWS

1. *45 S.C. L. Rev. 337,* ARTICLE: A GUIDE TO THE COMMON LAW OF NUISANCE IN SOUTH CAROLINA

2. *46 S.C. L. Rev. 31,* ARTICLE: CONTRACT LAW

3. *48 S.C. L. Rev. 193,* ANNUAL SURVEY OF SOUTH CAROLINA LAW (January 1-December 31, 1995): The Law of Torts: I. Court of Appeals Adopts Restatement Approach to Determine an Accountant's Duty to Third Party Investors

4. *50 S.C. L. Rev. 463,* ADDENDUM TORT LAW: IV: Passing the Essence Test: Health Care Providers Escape Strict Liability for Medical Devices

5. *51 S.C. L. Rev. 1033,* ANNUAL SURVEY OF SOUTH CAROLINA LAW: Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.: South Carolina's Suboptimal Approach to Indemnity Claims of Retailers Against Manufacturers of Defective Products

6. *56 S.C. L. Rev. 815,* TORT LAW: Statutory Stalemate: Strict Products Liability and Comparative Negligence in South Carolina

7. *10 S. Carolina Lawyer 32,* FEATURE: PROBLEMS WITH SYNTHETIC STUCCO, by Rulph C. McCullough II and Michael M. Shetterly, November/December, 1998, Copyright (c) 1998 South Carolina BarSouth Carolina Lawyer

8. *11 S. Carolina Lawyer 38,* FEATURE: COMPARING FIRST COLLISION "FAULT" WITH SECOND COLLISION "DEFECT", By Robert H. Brunson, July/August, 1999, Copyright (c) 1999 South Carolina Bar South Carolina Lawyer

9. *17 S. Carolina Lawyer 32,* ARTICLE: NOT JUST FOR CONTRACTS ANYMORE: SUCCESSOR LIABILITY, By Tim Orr, March, 2006, Copyright (c) 2006 South Carolina Bar South Carolina Lawyer

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Products Liability

1 of 1 DOCUMENT

SOUTH CAROLINA CODE OF LAWS ANNOTATED BY LEXISNEXIS(R)

*** This document is current through all legislation enacted in 2007 ***
*** Annotations are current through July 30, 2008 ***

TITLE 15. CIVIL REMEDIES AND PROCEDURES
CHAPTER 73. SELLERS OF DEFECTIVE PRODUCTS

GO TO SOUTH CAROLINA ARCHIVE DIRECTORY

S.C. Code Ann. § 15-73-20 (2007)

§ 15-73-20. Situation in which recovery shall be barred.

If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

HISTORY: 1962 Code § 66-372; 1974 (58) 2782.

LexisNexis (R) Notes:

CASE NOTES

1. Under *S.C. Code Ann. § 15-73-20* defendant in a product liability action must prove, among other things, that the plaintiff proceeded unreasonably to make use of the product. *Koester v. Carolina Rental Ctr., 313 S.C. 490, 443 S.E.2d 392, 1994 S.C. LEXIS 80, CCH Prod. Liab. Rep. P13862 (S.C. 1994).*

2. Trial court erred in finding that a consumer's product liability action was barred by *S.C. Code Ann. § 15-73-20* because the supplier did not prove that the consumer proceeded unreasonably to make use of the product, where the consumer attempted to use the product, tree climbing equipment, in the manner intended by the supplier; under these circumstances, whether the use of the product was unreasonable was a question of fact for the jury. *Koester v. Carolina Rental Ctr., 313 S.C. 490, 443 S.E.2d 392, 1994 S.C. LEXIS 80, CCH Prod. Liab. Rep. P13862 (S.C. 1994).*

3. In a products liability action, the question of whether the injured individual continued using the product after discovering the defect was reasonable as a jury question, therefore the trial court was incorrect in ruling that *S.C. Code Ann. § 15-73-20* (1977) was a complete bar to recovery. *Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589, 1994 S.C. LEXIS 200, 10 I.E.R. Cas. (BNA) 117, 129 Lab. Cas. (CCH) P57856 (S.C. 1994).*

4. Under *S.C. Code Ann. § 15-73-20* defendant in a product liability action must prove, among other things, that the plaintiff proceeded unreasonably to make use of the product. *Koester v. Carolina Rental Ctr., 313 S.C. 490, 443 S.E.2d 392, 1994 S.C. LEXIS 80, CCH Prod. Liab. Rep. P13862 (S.C. 1994).*

5. Trial court erred in finding that a consumer's product liability action was barred by *S.C. Code Ann. § 15-73-20* because the supplier did not prove that the consumer proceeded unreasonably to make use of the product, where the consumer attempted to use the product, tree climbing equipment, in the manner intended by the supplier; under these circumstances, whether the use of the product was unreasonable was a question of fact for the jury. *Koester v. Carolina Rental Ctr., 313 S.C. 490, 443 S.E.2d 392, 1994 S.C. LEXIS 80, CCH Prod. Liab. Rep. P13862 (S.C. 1994).*

6. Summary judgment in favor of rental center in an action brought a customer seeking damages after sustaining injuries using tree climbing equipment was affirmed; the customer's strict liability claim was barred by *S.C. Code Ann. § 15-73-20* because he knew that the rented equipment was not complete and was aware of the danger, but nevertheless proceeded unreasonably to climb the tree using the equipment. *Koester v. Carolina Rental Ctr., 311 S.C. 115, 427 S.E.2d 708, 1993 S.C. App. LEXIS 15 (S.C. Ct. App. 1993),* reversed by *313 S.C. 490, 443 S.E.2d 392, 1994 S.C. LEXIS 80, CCH Prod. Liab. Rep. P13862 (S.C. 1994).*

LAW REVIEWS

1. *48 S.C. L. Rev. 193,* ANNUAL SURVEY OF SOUTH CAROLINA LAW (January 1-December 31, 1995): The Law of Torts: I. Court of Appeals Adopts Restatement Approach to Determine an Accountant's Duty to Third Party Investors

2. *50 S.C. L. Rev. 463,* ADDENDUM TORT LAW: IV: Passing the Essence Test: Health Care Providers Escape Strict Liability for Medical Devices

3. *52 S.C. L. Rev. 1,* ARTICLE: Products Liability: User Misconduct Defenses

LexisNexis 50 State Surveys, Legislation & Regulations

Products Liability

1 of 1 DOCUMENT

SOUTH CAROLINA CODE OF LAWS ANNOTATED BY LEXISNEXIS(R)

*** This document is current through all legislation enacted in 2007 ***
*** Annotations are current through July 30, 2008 ***

TITLE 15. CIVIL REMEDIES AND PROCEDURES
CHAPTER 73. SELLERS OF DEFECTIVE PRODUCTS

GO TO SOUTH CAROLINA ARCHIVE DIRECTORY

S.C. Code Ann. § 15-73-30 (2007)

§ 15-73-30. Intent of chapter.

Comments to *§ 402A of the Restatement of Torts, Second*, are incorporated herein by reference thereto as the legislative intent of this chapter.

HISTORY: 1962 Code § 66-373; 1974 (58) 2782.

LexisNexis (R) Notes:

CASE NOTES

1. There was an issue of fact as to whether the cigarettes smoked by the deceased husband were defective or unreasonably dangerous and whether there was a safer alternative design; during part of the time that the husband smoked cigarettes the dangers and risks were not common knowledge and the determination of whether smoking was unreasonably dangerous was left to the jury. *Little v. Brown & Williamson Tobacco Corp., 243 F. Supp. 2d 480, 2000 U.S. Dist. LEXIS 22067 (D.S.C. 2000).*

2. Where the trial court found in its judgment notwithstanding the verdict order, contrary to the jury's verdict, that a company's warning was adequate to defeat an estate representative's strict products liability case pursuant to *S.C. Code Ann. §§ 15-73-10*, -30, the trial court erred in making this finding, as there was evidence to support the jury's verdict in favor of the estate representative. *Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272, 2003 S.C. LEXIS 172, CCH Prod. Liab. Rep. P16697 (S.C. 2003).*

3. In an owner's products liability action alleging that a fire that destroyed his property was caused by a defective refrigerator compressor, no evidence was produced from which a jury could have concluded that either the manufacturer or the seller had reason to believe warning was necessary under *S.C. Code Ann. § 15-73-30*; the seller could not have known of any fire hazard because a remanufacturer had replaced other failed compressors and there was no evidence that the manufacturer was aware of any problems with the compressors. *Livingston v. Noland Corp., 293 S.C. 521, 362 S.E.2d 16, 1987 S.C. LEXIS 336, CCH Prod. Liab. Rep. P11645*, 72 A.L.R.4th 83 (S.C. 1987).

4. *S.C. Code Ann. § 15-73-30* provides that the comments to *Restatement of Torts, Second, § 402A*, are incorporated as the legislative intent of the South Carolina Defective Products Act, *S.C. Code Ann. § 15-73-10* et seq. *Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93, 2003 S.C. LEXIS 244, CCH Prod. Liab. Rep. P16764 (S.C. 2003).*

5. There was an issue of fact as to whether the cigarettes smoked by the deceased husband were defective or unreasonably dangerous and whether there was a safer alternative design; during part of the time that the husband smoked cigarettes the dangers and risks were not common knowledge and the determination of whether smoking was unreasonably dangerous was left to the jury. *Little v. Brown & Williamson Tobacco Corp., 243 F. Supp. 2d 480, 2000 U.S. Dist. LEXIS 22067 (D.S.C. 2000).*

LAW REVIEWS

1. *46 S.C. L. Rev. 31,* ARTICLE: CONTRACT LAW

2. *48 S.C. L. Rev. 193,* ANNUAL SURVEY OF SOUTH CAROLINA LAW (January 1-December 31, 1995): The Law of Torts: I. Court of Appeals Adopts Restatement Approach to Determine an Accountant's Duty to Third Party Investors

3. *56 S.C. L. Rev. 815,* TORT LAW: Statutory Stalemate: Strict Products Liability and Comparative Negligence in South Carolina

4. *11 S. Carolina Lawyer 38,* FEATURE: COMPARING FIRST COLLISION "FAULT" WITH SECOND COLLISION "DEFECT", By Robert H. Brunson, July/August, 1999, Copyright (c) 1999 South Carolina Bar South Carolina Lawyer

LexisNexis 50 State Surveys, Legislation & Regulations

Products Liability

Exhibit 2

C. Neither A nor B is liable to C in an action for negligence.

2. A, a retail dealer, sells to B a hot water bag purchased from a reputable manufacturer. A believes the bag to be in perfect condition, although he has not inspected it, but the bag is defective in that the stopper will not screw in securely. As a result of this defect, C, the minor son of B, is severely scalded by hot water that leaks out of the bag. A is not liable to B or to C in an action for negligence.

e. In many situations the seller who receives his goods from a reputable source of supply receives it with the firm conviction that it is free from defects; and where a chattel is of a type which is perfectly safe for use in the absence of defects, the seller who sells it with the reasonable belief that it is safe for use and represents it to be safe for use does not act negligently. Frequently, the manufacturer's literature and salesmen and his past record of sending the seller perfectly made chattels create a reasonable belief in the seller's mind that the particular chattel he is selling is made perfectly. When the seller reasonably believes that the chattel is safe, his representation in good faith to that effect is neither fraudulent, reckless, nor negligent.

Illustration:

3. A, a retail dealer, sells to B a defective gas heater, obtained from a reputable manufacturer, which A believes to be in perfect condition, although he has not inspected it. In making the sale, and in response to B's inquiry, A says, "This heater can be used with perfect safety." The heater when used emits poisonous fumes, injuring B. A is not liable to B in an action for negligence.

TOPIC 5. STRICT LIABILITY

§ 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(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

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(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.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether the rules stated in this Section may not apply

(1) to harm to persons other than users or consumers;

(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or

(3) to the seller of a component part of a product to be assembled.

Comment:

a. This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. The Section is inserted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence. The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.

b. History. Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners,

brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even though there was no showing of negligence on the part of the seller. These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract. In the beginning, these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market, as well as numerous others. In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use, where, for example, as in the case of cosmetics, the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.

c. On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which

See Appendix for Reporter's Notes, Court Citations, and Cross References

it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

d. The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

e. Normally the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated.

f. Business of selling. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an

automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2–314, to a seller who is a merchant. This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

h. A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he

See Appendix for Reporter's Notes, Court Citations, and Cross References

may be required to give adequate warning of the danger (see Comment *j*), and a product sold without such warning is in a defective condition.

The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption.

i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries

See Appendix for Reporter's Notes, Court Citations, and Cross References

and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

j. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, where the nature and extent of [redacted] is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and

See Appendix for Reporter's Notes, Court Citations, and Cross References

warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

l. User or consumer. In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

"Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Illustration:

1. A manufactures and packs a can of beans, which he sells to B, a wholesaler. B sells the beans to C, a jobber, who resells it to D, a retail grocer. E buys the can of beans from D, and gives it to F. F serves the beans at lunch to G, his guest. While eating the beans, G breaks a tooth, on a pebble of the size, shape, and color of a bean, which no reasonable inspection could possibly have discovered. There is satisfactory evidence that the pebble was in the can of beans when it was opened. Although there is no negligence on the part of A, B, C, or D, each of them is subject to liability to G. On the other hand E and F, who have not sold the beans, are not liable to G in the absence of some negligence on their part.

m. "Warranty." The liability stated in this Section does not rest upon negligence. It is strict liability, similar in its nature to that covered by Chapters 20 and 21. The basis of liability is purely one of tort.

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption.

See Appendix for Reporter's Notes, Court Citations, and Cross References

The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

n. Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Comment on Caveat:

o. Injuries to non-users and non-consumers. Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment *l*. Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such pro-

tection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

p. Further processing or substantial change. Thus far the decisions applying the rule stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section. If, for example, raw coffee beans are sold to a buyer who roasts and packs them for sale to the ultimate consumer, it cannot be supposed that the seller will be relieved of all liability when the raw beans are contaminated with arsenic, or some other poison. Likewise the seller of an automobile with a defective steering gear which breaks and injures the driver, can scarcely expect to be relieved of the responsibility by reason of the fact that the car is sold to a dealer who is expected to "service" it, adjust the brakes, mount and inflate the tires, and the like, before it is ready for use. On the other hand, the manufacturer of pigiron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer. The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.

See Appendix for Reporter's Notes, Court Citations, and Cross References

Exhibit 3

Analysis
As of: Sep 16, 2008

MOSES LIGHTNER, Plaintiff, v. DUKE POWER COMPANY, Defendant and Third Party Plaintiff, v. FORD NEW HOLLAND, INC., Third Party Defendant

Civil Action No. 3:89-422-16

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

719 F. Supp. 1310; 1989 U.S. Dist. LEXIS 9969; 12 U.C.C. Rep. Serv. 2d (Callaghan) 87

July 20, 1989, Decided
July 20, 1989, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Third party defendant lawnmower manufacturer sought to dismiss the third party complaint brought by defendant and third party plaintiff power company seeking indemnification or contribution from the manufacturer in a negligence action by an injured claimant. The power company claimed that the manufacturer was solely liable for any injury to the claimant under theories of strict liability, breach of warranty and negligence.

OVERVIEW: The power company contended that the sole proximate cause of the accident was the defective lawnmower and that the company's alleged negligence was at most an indirect cause of the accident. The court noted that the claimant asserted only the negligence of company employees, and did not allege a cause of action arising from the allegedly defective condition of the lawnmower. The court concluded that, if it was determined that the power company's negligence proximately caused the claimant's injury, the company would not be entitled to indemnification when the company was also negligent. The court also maintained that the company was not the user of lawnmower and it did not suffer damage as a result of the alleged breach of warranty. The court therefore held that the company could not maintain an indemnity action against the manufacturer based on breach of warranty. The court finally held that the company could not maintain a cause of action for contribution under the South Carolina Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 et seq. as the underlying tort arose before the effective date of that act; therefore, the act did not apply to the company's claim.

OUTCOME: The court granted the motion to dismiss the third party complaint.

CORE TERMS: causes of action, indemnification, indemnity, strict liability, breach of warranty, joint tortfeasors, seller, buyer, lawnmower, inchoate, right of action, right to contribution, tortfeasor, common liability, truck, citation omitted, user, action arising, real party in interest, right of contribution, giving rise, underlying tort, retroactive, warranty, consumer, jointly, join, Uniform Contribution Among Tortfeasors Act, substantive law, defective product

LexisNexis(R) Headnotes

Torts > Procedure > Multiple Defendants > Contribution > General Overview
[HN1]In the absence of a contractual or legal relation between the parties, one who is himself negligent cannot maintain an action for indemnity.

Torts > Procedure > Multiple Defendants > Contribution > General Overview
Torts > Transportation Torts > General Overview
[HN2]A right of indemnity exists whenever the relation between the parties is such that either in law or equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.

Governments > Legislation > Effect & Operation > Prospective Operation
Governments > Legislation > Effect & Operation > Retrospective Operation
Governments > Legislation > Interpretation
[HN3]There is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary. No statute will be applied retroactively unless that result is so clearly compelled as to leave no room for reasonable doubt. Changes in procedural, rather than substantive, law are an exception to this rule but that exception does not reach a case where before the statute there was no remedy whatever. To supply a remedy where previously there was none of any kind is to create a right of action.

Torts > Procedure > Multiple Defendants > Contribution > Uniform Contribution Among Tortfeasors Act
Torts > Procedure > Multiple Defendants > Joint & Several Liability
[HN4]Uniform Contribution Among Tortfeasors Act provides: (A) Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury there is a right of contribution among them even though judgment has not been recovered against all or any of them. (B) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability. S.C. Code Ann. § 15-38-20 (1988).

Torts > Procedure > Multiple Defendants > Contribution > General Overview
[HN5]There is a valid distinction between the accrual of the equitable, inchoate right to contribution that arises at the time of jointly negligent acts and the maturation of the right to recover contribution that arises only after payment of an unequally large share of the common obligation. Stated differently, the right to recover contribution arises only when one tort-feasor has paid or settled a claim for which other wrongdoers are also liable, while the cause of action for contribution arises at the time of the jointly negligent acts. Once in being, although contingent, subordinate, or inchoate, the cause of action has an existence in contemplation of law until it is no longer needed as a resource to which the joint tortfeasor may look for relief from an inequitable burden placed upon him by reason of the refusal of another to perform such other's duty by paying his honest share of the common obligation.

COUNSEL: [**1] William R. Sims, Esquire, for Plaintiff.

Stanley T. Case, Esquire, (for Duke Power Co.).

Robert A. Bernstein, Esquire, (for Ford New Holland, Inc.).

JUDGES: Karen LeCraft Henderson, United States District Judge.

OPINION BY: HENDERSON

OPINION

[*1311] ORDER

KAREN LeCRAFT HENDERSON, UNITED STATES DISTRICT JUDGE.

This matter is before the Court on motion of third party defendant Ford New Holland, Inc. [1] ("Ford") to dismiss the third party complaint brought by defendant and third party plaintiff Duke Power Company ("Duke") under Fed.R.Civ.P. 12(b)(6) or in the alternative for summary judgment pursuant to Fed.R.Civ.P. 56. The third-party complaint arises out of the primary action in which plaintiff Moses Lightner ("Lightner") sued Duke for negligence. Lightner alleges that Duke by its agents left a metal bolt on the grounds of a school in Chester County where Lightner was employed as a maintenance man. Lightner alleges that he and another employee were cutting the grass at the school when the other mower operator ran over the bolt and propelled it at a high speed into Lightner's back, causing him permanent injury. Lightner claims that Duke was negligent in the following particulars:

> (a) In permitting debris to accumulate at or near where its agents and/or servants had been working;
>
> (b) In [**2] failing to inspect for such debris both during and after performing its work;
>
> (c) In failing to warn the Plaintiff of such by signs, personnel, or barricades.

Complaint, at 6.

> 1 Ford was originally named in the complaint as Ford Motor Company. In its response to the Court's standard interrogatories Ford informed the Court that the corporation charged with manufacturing and distributing tractors under the Ford product name is Ford New Holland, Inc. The Court therefore substitutes Ford New Holland, Inc. as the correct third-party defendant.

In its third party complaint Duke seeks indemnification and, in the alternative, contribution [*1312] from Ford, the manufacturer of the lawnmower. Duke claims that Ford is solely liable for any injury to Lightner under theories of strict liability, breach of warranty and negligence. The third-party complaint also seems to allege that Ford is directly liable to Duke for strict liability, breach of warranty and negligence.

Ford moves to dismiss the third party complaint on several grounds. First, Ford alleges that a third party action under Fed.R.Civ.P. 14(a) is improper if it merely states that the third party defendant is or may be liable to the [**3] original plaintiff without stating a claim in favor of the third party plaintiff. Second, Ford claims that indemnity is not proper where, as here, a defendant is sued for its own negligence and is not forced to defend solely against allegations of another's wrongful conduct. Ford also argues in response to the indemnification claim that Duke and it, if liable, are joint tortfeasors and indemnification is therefore barred. Furthermore, Ford claims that Duke may not maintain a direct action against it for strict liability, breach of warranty or negligence for reasons specific to each of those causes of action. Last, Ford claims that, because Lightner's injury occurred before enactment of the South Carolina Contribution Among Joint Tortfeasors Act, S.C.Code Ann. §§ 15-38-10 *et seq.*, the common-law rule denying contribution among joint tortfeasors applies to this action.

In addition, Duke has moved to dismiss the plaintiff as a party because he is not the real party in interest under Fed.R.Civ.P. 17(a) or, in the alternative, to join the South Carolina School Board Insurance Trust as a party pursuant to Fed.R.Civ.P. 19(a).

I.

Ford resists Duke's indemnity claim based on Ford's [**4] alleged negligent manufacture of the lawnmower because Duke is not required by Lightner's negligence claims to defend solely the acts of Ford. According to the allegations of Lightner's complaint, Duke must defend its own alleged negligence in failing to remove the metal bolt after its agents had completed work on a power transformer on the school property. Duke contends that the sole proximate cause of the accident was the defective lawnmower and that Duke's alleged negligence was at most an indirect cause of the accident. Duke further argues that its alleged negligence is entirely separate from Ford's negligence and that the parties are not joint tortfeasors.

If the parties are joint tortfeasors, contribution may be allowed under S.C.Code Ann. § 15-38-20 (Law.Co-op.Supp. 1988), but indemnity is not allowed. *Atlantic Coast Line Railroad Company v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963). In *Whetstone*, the court noted:

> "Ordinarily, if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him; but this [**5] is subject to the proviso that no personal negligence of his own has joined in causing the injury."

[HN1]Thus, at least in the absence of a contractual or legal relation between the parties, one who is himself negligent cannot maintain an action for indemnity. *See McCain Manufacturing Corp. v. Rockwell International Corp.*, 695 F.2d 803 (4th Cir. 1982). Moreover, in *JKT Co. v. Hardwick*, 284 S.C. 10, 325 S.E.2d 329 (Ct.App. 1984), the state court of appeals disallowed indemnification for the costs of a successful defense because the party seeking indemnity was sued for its own acts of negligence. The court noted:

> [The parties seeking indemnity were] defending against their own alleged wrongful acts, which if proven, would have barred them from seeking indemnification over against Celotex. Their liability upon the allegations of the complaint would not have been constructive, vicarious, derivative, or technical, but rather on account of the 'active participation in the wrong.' Because they would not have been entitled to indemnification if found liable on the claim, neither are they entitled to indemnification for expenses [*1313] of litigation incurred in successfully defending against [**6] the claim.

Id. at 16, 325 S.E.2d at 333 (citation omitted).

The Court first notes that Lightner has alleged against Duke no cause of action arising from the alleg-

edly defective condition of the lawnmower; instead Lightner has asserted only the negligence of Duke's own employees. Applying the principles set forth above to Duke's indemnity claim based on negligence, the Court concludes that, if it is determined Duke's negligence proximately caused Lightner's injury, whether solely or in conjunction with Ford, Duke would not be entitled to indemnification for it would itself be negligent; moreover, it has alleged no contractual or legal relationship with Ford. *Whetstone*, 243 S.C. 61, 132 S.E.2d 172. Alternatively, if Duke establishes Ford is the sole cause of the injury, Duke would not be entitled to indemnification for its liability because it would have none; it also could not be indemnified for expenses incurred in successfully defending the action because it would have defended only against acts of its own negligence. *JKT*, 284 S.C. 10, 325 S.E.2d 329. It would not have defended against negligence imputed to it as the result of a tort committed by Ford, but instead would [**7] have defended against its own conduct using Ford's negligence as a defense to causation. Duke's claim for indemnification based on Ford's alleged negligence, therefore, is dismissed.

Likewise, Duke cannot maintain an action against Ford for negligently causing Duke to be sued. To the extent, if any, Duke's third-party complaint alleges that Ford's negligent manufacture of the lawnmower caused Duke to be sued by Lightner, it is dismissed for the same reasons the indemnification claim based on negligence is dismissed. Moreover, Duke does not allege and the Court does not discern any duty flowing from Ford to Duke to produce a lawnmower free from defects. Furthermore, Duke, if liable to plaintiff, will have suffered only intangible economic loss which is not recoverable in a negligence action. *2000 Watermark Association, Inc. v. Celotex Corp.*, 784 F.2d 1183 (4th Cir. 1986).

Duke also claims that Ford is liable for indemnification based on strict liability and breach of warranty. Duke relies primarily on *Stuck v. Pioneer Logging Machinery Co.*, 279 S.C. 22, 301 S.E.2d 552 (1983). [HN2]In *Stuck* the South Carolina Supreme Court held that "a right of indemnity exists whenever the [**8] relation between the parties is such that either in law or equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." *Id.* at 24, 301 S.E.2d at 553. In *Stuck*, the indemnitee ("buyer") bought a used and modified truck from the indemnitor ("seller") on the seller's assurance that the truck was suitable for hauling logs. During the first attempt to so use the truck, the buyer's employee depressed the brakes, lost control of the vehicle and had a serious accident. After settling the claim brought by a man killed in the accident, the buyer sought indemnity from the seller. The Supreme Court upheld the lower court's indemnity award. It concluded:

> [Buyer's] action is not based on negligence. He asserts that [seller] is liable on grounds separate from any purported fault of his: [seller] sold a defective product in an unreasonably dangerous condition, and it breached its warranty that the truck was roadworthy. This action is not based upon any claimed right of indemnity from a joint tortfeasor. Rather, it is an action to recover damages sustained by [the buyer] from [the seller's] [**9] failure to ensure the safe condition of the equipment it sold [the buyer]. Under the facts of this case, [the buyer's] failure to discover and correct the latent defects and correct [the seller's] breach of warranties cannot excuse the breach and defeat [the buyer's] claim.

Id., 301 S.E.2d at 553. Duke claims that under *Stuck* it has a claim for indemnity based on strict liability and breach of warranty because the allegedly defective lawnmower was the sole cause of the injury in [*1314] the same way that the defective truck in *Stuck* was the sole cause of the damage incurred by the buyer as a result of the accident and ensuing lawsuit.

The Court concludes that *Stuck* is inapplicable here because, unlike the buyer in *Stuck*, Duke has no standing to assert, either directly or under the rubric of indemnification, a cause of action against Ford for strict liability or for breach of warranty. As to the strict liability claim, only a "user or consumer" of a defective product can base a cause of action on strict liability. S.C.Code Ann. § 15-73-10 (Law.Co-op. 1976). In *Stuck*, the plaintiff was a user and consumer of the truck. Here, Duke was not a user or consumer of the [**10] allegedly defective product, the lawnmower, and therefore cannot avail itself of the statute.

With respect to Duke's breach of warranty cause of action, "[a] seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by the breach of the warranty." S.C.Code Ann. § 36-2-318 (Co-op. 1976). Here, Duke does not fall within the category of persons who may bring a breach of warranty action against Ford. In *Stuck*, the plaintiff was the purchaser and user of the goods and he suffered property damage. Duke was neither the user nor the consumer of the lawnmower and it has suffered no damage to its person or property as a

result of the alleged breach of warranty. Duke therefore cannot maintain an action either directly or under the rubric of indemnity against Ford based on breach of warranty.

Because the Court dismisses Duke's indemnification, negligence, strict liability and warranty claims, it does not reach Ford's contention that these claims cannot be brought in a third-party complaint.

II.

Ford also contends that Duke may not maintain a cause of action for contribution [**11] because the South Carolina Uniform Contribution Among Tortfeasors Act, S.C.Code Ann. §§ 15-38-10 *et seq.* (Law.Co-op.Supp. 1988) ("the Act"), does not apply to this action. Instead, Ford submits the common-law rule barring contribution among joint tortfeasors applies here. *Horton v. United States*, 622 F.2d 80 (4th Cir. 1980). The events giving rise to Lightner's action against Duke took place on or about October 7, 1986. The Act became effective on April 5, 1988, and "applies to those causes of action arising or accruing on or after the effective date of this act." Uniform Contribution Among Tortfeasors Act, 1988 S.C. Acts 432, § 10 (1988). Duke filed its third party complaint against Ford on March 10, 1989. The issue is whether the Act applies to a contribution action that is brought after the effective date of the Act but in which the claimant seeks contribution for liability that accrued or arose before the effective date of the Act.

This issue is before the Court under its diversity jurisdiction and therefore the Court is to apply the substantive law of South Carolina. *Erie Railroad v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938). There appears to be no controlling precedent in [**12] South Carolina on this issue. In the exercise of its diversity jurisdiction, this Court's duty as to a question of substantive law the South Carolina courts have not yet ruled on is to foretell the South Carolina Supreme Court's decision if presented with the same question. *Wilkie v. Home Security Life Insurance Co.*, 514 F. Supp. 896 (D.S.C. 1981).

The language used to define the applicability of the Act is ambiguous. The phrase "those causes of action arising or accruing on or after the effective date of this act" means either those underlying tort actions giving rise to a right of contribution among joint tortfeasors or those causes of action for contribution available to joint tortfeasors, if the two causes of action are deemed to arise at different times. If the contribution cause of action arises when the common liability of the tortfeasors arises, however, then the Act unambiguously requires prospective application and it would not authorize Duke to maintain its contribution claim.

[HN3]In South Carolina, "there is a presumption that statutory enactments are to be [*1315] considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative [**13] intent to the contrary. No statute will be applied retroactively unless that result is so clearly compelled as to leave no room for reasonable doubt." *Hyder v. Jones*, 271 S.C. 85, 88, 245 S.E.2d 123, 125 (1978). Changes in procedural, rather than substantive, law are an exception to this rule "but that exception does not reach a case where before the statute there was no remedy whatever. To supply a remedy where previously there was none of any kind is to create a right of action." *Id.* The Act here evinces no clear legislative intent that it be applied retroactively and the Act creates a remedy where none existed before in providing for a right to contribution. Consequently, application of the statute here would violate this well-settled rule of statutory construction if Duke's "cause of action" for contribution arose before the effective date of the statute.

The Court must determine, therefore, when a cause of action arises under the Act. The Act provides:

> [HN4](A) Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury . . . there is a right of contribution among them even though judgment has not been [**14] recovered against all or any of them.
>
> (B) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability.

S.C.Code Ann. § 15-38-20 (Law.Co-op.Supp. 1988). This language is taken from the Uniform Contribution Among Tortfeasors Act and has been adopted in substantially similar form by other states. A majority of the courts that have decided when a contribution cause of action arises have concluded that it arises when the underlying tort is committed. *See, e.g., Slaughter v. Pennsylvania X-Ray Corp.*, 638 F.2d 639 (3rd Cir. 1981) (applying Pennsylvania law); *Ogle v. Craig Taylor Equipment Co.*, 761 P.2d 722 (Alaska 1988); *Distefano v. Lamborn*, 46 Del. 195, 81 A.2d 675 (1951); *F.H. Ross & Co. v. White*, 224 Ga. 324, 161 S.E.2d 857 (1968); *Peacock Construction Co. v. Montgomery Elevator Co.*, 121 Ga. App. 711, 175 S.E.2d 116 (1970); *Van Slambrouck v. Economy Baler Co.*, 105 Ill. 2d 462, 475 N.E.2d 867, 86 Ill. Dec. 488 (1985); *Coos-Curry Electric Cooperative v. Curry County*, 26 Ore. App. 645, 554 P.2d 601 (1976); *Massey v. Sullivan County*, 225 Tenn.

132, 464 S.W.2d 548 (1971); *Shiflet v. Eller*, 228 Va. 115, [**15] 319 S.E.2d 750 (1984).

In *Shiflet, supra*, the Virginia Supreme Court addressed the issue *sub judice*. That court found the contribution statute inapplicable because application of the statute would have retroactively impaired substantive rights of the contribution defendant. The court distinguished between a "cause of action" and a "right of action." "A right of action is a remedial right to presently enforce a cause of action; operative facts giving rise to a right of action comprise a cause of action." 319 S.E.2d at 754. The court concluded that a contribution "cause of action" arises before the "right of action." It decided:

> [HN5]"There is a valid distinction between the accrual of the equitable, *inchoate* right to contribution that arises at the time of jointly negligent acts and the maturation of the right to *recover* contribution that arises only after payment of an unequally large share of the common obligation." Stated differently, the right to recover contribution "arises only when one tort-feasor has paid or settled a claim for which other wrongdoers are also liable," while the cause of action for contribution arises at the time of the jointly negligent acts. [**16] "Once in being, although contingent, subordinate, or inchoate, [the cause of action] has an existence in contemplation of law until it is no longer needed as a resource to which the joint tortfeasor may look for relief from an inequitable burden placed upon him by reason of the refusal of another to perform such other's duty by paying his honest share of the common obligation." This cause of action is a substantive right.

[*1316] 319 S.E.2d at 754 (citations omitted; emphasis in original).

The Court concludes that *Shiflet* correctly describes the nature of a cause of action, a right of action and a right to contribution and that the South Carolina Supreme Court would agree. A "cause of action" in South Carolina is defined as "'a legal wrong threatened or committed against the complaining party.'" *State v. Piedmont & N. Ry. Co.*, 186 S.C. 49, 194 S.E. 631, 633 (1938) (citation omitted). It is composed of three parts -- "'a right in the plaintiff, a correlative duty or obligation resting on the defendant, and some act or omission done by the latter in violation of the right.'" *Skalowski v. Joe Fisher, Inc.*, 152 S.C. 108, 149 S.E. 340, 344 (1929) (citation omitted). The court in [**17] *Skalowski* further stated that "'the cause of action is the right claimed or wrong suffered by the plaintiff on the one hand, and the duty or delict of the defendant on the other, and these appear by the facts of each separate case.'" *Id.* (citation omitted). The remedy sought to redress the cause of action is entirely separate from the cause of action itself and it is "'governed by different rules and principles.'" *Wilson v. Gregory*, 189 S.C. 62, 200 S.E. 358, 360 (1938). A "cause of action" may exist before the aggrieved party's "right of action" accrues. *Pharr v. Canal Insurance Co.*, 233 S.C. 266, 104 S.E.2d 394 (1958).

This Court holds that a right to contribution, and hence a cause of action for contribution, arises when the underlying tort giving rise to a common liability occurs. This inchoate right matures into a complete and enforceable right of action only after a tortfeasor pays more than his pro rata share of the judgment. The Act creates the right to contribution in express terms: "Where two or more persons become jointly or severally liable in tort for the same injury . . . there is a right of contribution among them even though judgment has not been recovered." [**18] S.C.Code Ann. § 15-38-20(A) (Law.Co-op.Supp. 1988). The Act limits the enforceability of this right, however, to "a tortfeasor who has paid more than his pro rata share of the common liability." *Id.* § 15-38-20(B). Thus, the inchoate right accrues when the common liability arises, but the remedy is not available until a tortfeasor pays more than his share of the judgment.

Here, because the alleged common liability and hence the inchoate right to contribution arose before the effective date of the Act, application of the Act would constitute a retroactive, and invalid, application. Some courts (the minority view) have held that application of the contribution statute in similar circumstances is not a retroactive application because the rights affected are not substantive and do not become substantive until a tortfeasor pays more than his share of the judgment. *See, e.g., Augustus v. Bean*, 56 Cal. 2d 270, 14 Cal. Rptr. 641, 363 P.2d 873 (1961); *Coniaris v. Vail Associates*, 196 Colo. 392, 586 P.2d 224 (1978); *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275 (Fla. 1978); *National Mutual Insurance Co. v. Whitmer*, 70 Ohio St. 2d 149, 435 N.E.2d 1121, [**19] 24 Ohio Op. 3d 248 (1982). This Court declines to follow these decisions because it believes the South Carolina Supreme Court would apply the Act prospectively only.

In *Schall v. Sturm, Ruger Co., Inc.*, 278 S.C. 646, 300 S.E.2d 735 (1983), the South Carolina Supreme Court declined to apply the then-recently adopted strict liability statute under similar circumstances. The court was unable to specify when "inchoate strict liability can

be deemed to exist." *Id.* at 650, 300 S.E.2d at 737. It described the evolution of a strict liability cause of action in the following terms: "Strict liability would be best analogized to a legal status: inchoate at the moment when the product leaves the seller's hands in a defective condition that is unreasonably dangerous; ripe for determination at the instant of injury; and fixed by action and final judgment." *Id.* at 649, 300 S.E.2d at 736. The court held that the statute did not apply to a product that entered the stream of commerce before the statute's effective date, even though only an inchoate liability of the manufacturer or seller would be affected.

Like the court in *Schall*, this Court concludes that application of the contribution statute to this [**20] action would be retroactive [*1317] because it would affect the inchoate right to contribution among tortfeasors that arises at the time the underlying tort is committed. Here, the underlying tort and the cause of action for contribution arose, if at all, simultaneously and before the effective date of the Act; the Act therefore does not apply. Accordingly, the Court interprets the phrase "those causes of action arising or accruing on or after the effective date of this act" to refer to the causes of action that arise when a tort is committed, that is, both the tort cause of action and the contribution cause of action. Ford's motion to dismiss is granted.

III.

There is also pending Duke's motion to dismiss Lightner on the ground that he is not the real party in interest under Fed.R.Civ.P. 17(a) or, in the alternative, to join the South Carolina School Board Insurance Trust ("the Trust") as a party plaintiff in this action pursuant to Fed.R.Civ.P. 19(a). Lightner has not responded to Duke's motion. Accompanying Duke's motion is a letter from the Trust indicating that it has paid workers' compensation to Lightner for the injuries that he seeks to recover for in this action. The Court [**21] is unable to determine from the record before it whether the Trust is a total or partial subrogee; nevertheless, it grants Duke's motion to join the Trust as a party plaintiff in order to give Duke an opportunity to present all defenses it has against the real party in interest, to prevent a multiplicity of lawsuits if Lightner is found not to be the real party in interest and to ensure that any judgment has proper res judicata effect. *Virginia Electric & Power Co. v. Westinghouse Electric Corp.*, 485 F.2d 78 (4th Cir. 1973).

For the foregoing reasons, the Court grants Ford's motion to dismiss Duke's third-party complaint and grants Duke's motion to add the South Carolina School Board Insurance Trust as a party plaintiff in this action.

IT IS SO ORDERED.

Columbia, South Carolina

July 20, 1989

Exhibit 4

LEXSEE



Positive
As of: Sep 16, 2008

Marilyn Bray and Allan Bray, Petitioners/Respondents, v. Marathon Corporation, an Alabama Corporation, American Refuse Systems, Inc., a North Carolina Corporation, John Doe and Richard Roe, Defendants, of whom Marathon Corporation, an Alabama Corporation, and American Refuse Systems, Inc., a North Carolina Corporation, are Respondents/Petitioners.

Opinion No. 25733

SUPREME COURT OF SOUTH CAROLINA

356 S.C. 111; 588 S.E.2d 93; 2003 S.C. LEXIS 244; CCH Prod. Liab. Rep. P16,764

April 1, 2003, Heard
October 13, 2003, Filed

SUBSEQUENT HISTORY: [***1]
Rehearing denied by Bray v. Marathon Corp., 2003 S.C. LEXIS 289 (S.C., Nov. 19, 2003)

PRIOR HISTORY: Appeal From Florence County. James E. Brogdon, Jr., Circuit Court Judge.
Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477, 2001 S.C. App. LEXIS 119 (S.C. Ct. App., 2001)

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner, an injured party, appealed by writ of certiorari from the affirmance by the Court of Appeals (South Carolina) of the trial court's entry of summary judgment for respondents, a manufacturer and a lessee (collectively, manufacturer), as to the injured party's negligence claim. The manufacturer appealed from the reversal of the trial court's entry of summary judgment for the manufacturer on the injured party's product liability claim.

OVERVIEW: The injured party alleged that she suffered serious and permanent physical injuries caused by the emotional trauma of witnessing the death of a co-worker in a trash compactor. The state's highest court held that the injured party was a user of the trash compactor within the meaning of S.C. Code Ann. § 15-73-10 (1976) because she operated the controls on the compactor in an effort to assist the co-worker. The injured party's alleged physical injuries arising from emotional trauma constituted physical harm. The intermediate court properly concluded that the Kinard bystander analysis did not apply to a strict liability cause of action. There was a genuine issue of fact regarding whether the event was the proximate cause of the injured party's physical harm. The intermediate court erred in affirming the summary judgment for the manufacturer on the negligence claim. The injured party could be able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker. As the injured party was considered a direct victim for the products liability claim, she was a foreseeable plaintiff for the negligence claim.

OUTCOME: The intermediate court's decision regarding the strict liability claim was affirmed. The intermediate court's decision was reversed as to the negligence claim.

CORE TERMS: user, summary judgment, compactor, bystander, negligence claim, decision granting, liability claim, liability cause of action, direct victim, defective products, liability claims, physical harm, foreseeable victims, causes of action, co-worker, emotional, trash, inside, physical injuries, emotional trauma, proximate cause, foreseeable, witnessing, abandoned, warranty, consumer, fright, reversing, button, product defect

LexisNexis(R) Headnotes

Torts > Products Liability > Strict Liability
[HN1]The strict liability action for defective products has been established by the legislature in S.C. Code Ann. §§ 15-73-10 to -30 (1976).

Torts > Products Liability > Strict Liability
[HN2]See S.C. Code Ann. § 15-73-10(1) (1976).

Torts > Products Liability > Strict Liability
[HN3]A "user" for purposes of S.C. Code Ann. § 15-73-10(1) (1976) includes those who are utilizing the product for purpose of doing work upon it. An employee performing maintenance on equipment is a "user" of a product. Further, an employee's alleged physical injuries arising from emotional trauma constitute physical harm.

Torts > Products Liability > Strict Liability
[HN4]S.C. Code Ann. § 15-73-30 (1976) provides that the comments to Restatement (Second) of Torts § 402A, are incorporated as the legislative intent of the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10 et seq. (1976).

Torts > Negligence > Causation > Proximate Cause > Foreseeability
Torts > Products Liability > Strict Liability
[HN5]A products liability plaintiff must prove the product defect was the proximate cause of the injury sustained. The proof must be sufficient to show that the defect was the direct and efficient cause of the plaintiff's injury. Proximate cause requires proof of both causation in fact and legal cause, which is proved by establishing foreseeability.

Torts > Products Liability > Strict Liability
Torts > Transportation Torts > Motor Vehicles > Personal Vehicles
[HN6]The South Carolina Court of Appeals has properly concluded that the Kinard bystander analysis does not apply to a strict liability cause of action. A user of a defective product is not a mere bystander but a primary and direct victim of the product defect. A manufacturer owes an independent legal duty to the plaintiff due to her status as a user of a car involved in an accident, rather than as a bystander.

Torts > Products Liability > Strict Liability
[HN7]Because S.C. Code Ann. § 15-73-10 (1976) limits liability to the user or consumer, there is no need for a limitation on foreseeable victims to avoid disproportionate liability as has been found necessary in the bystander setting. It is not unreasonable to conclude the user of a defective product might suffer physical harm from emotional damage if the use of the product results in death or serious injury to a third person, irrespective of the relationship between the user and third person.

Civil Procedure > Remedies > Damages > Punitive Damages
Real Property Law > Torts > Construction Defects
Torts > Products Liability > Strict Liability
[HN8]The appellate court is without authority to graft the Kinard bystander analysis on S.C. Code Ann. § 15-73-10 (1976). Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. If the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10 et seq. (1976), is to be amended so as to provide for the requirement of a close relationship in the context of a strict liability cause of action, this must be accomplished by the legislature, not the appellate court.

Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN9]Summary judgment is appropriate only if there are no genuine issues of material fact.

Torts > Negligence > Actions > Negligent Infliction of Emotional Distress > General Overview
Torts > Products Liability > General Overview
[HN10]A plaintiff may recover for a physical or bodily injury that results from mental and emotional trauma in the absence of physical impact. A defendant is liable for injuries sustained as result of mere fright and mental disturbance caused by its negligence. Recovery is allowed for injuries sustained as a consequence of shock, fright, and emotional upset.

Torts > Negligence > Actions > Negligent Infliction of Emotional Distress > General Overview
Torts > Negligence > Causation > Proximate Cause > Foreseeability

Torts > Products Liability > Strict Liability
[HN11]While proceeding on one theory of recovery under products liability and not proceeding on another is permissible, if a person is considered a "direct victim" for the purposes of one products liability cause of action, this person must be a direct victim for all causes of action. It is too fine a distinction to say that a plaintiff is a user and therefore a foreseeable plaintiff under a strict liability theory, but that she is not a "direct victim" and not a foreseeable plaintiff under a negligence cause of action.

Civil Procedure > Pretrial Judgments > Nonsuits > Voluntary Nonsuits
Civil Procedure > Appeals > Briefs
Civil Procedure > Appeals > Reviewability > Preservation for Review
[HN12]An issue not argued in a brief is deemed abandoned, which precludes its consideration on appeal.

COUNSEL: Ray Pratt McClain, of Charleston, and Ronald J. Jebaily, of Jebaily, Glass & Meacham, of Florence, for petitioners/respondents.

Gray T. Culbreath and Ellen M. Adams, both of Collins & Lacy, of Columbia, for respondent/petitioner Marathon Corporation.

Saunders M. Bridges, of Aiken, Bridges, Nunn, Elliott & Tyler, of Florence, for respondent/petitioner American Refuse Systems, Inc.

JUDGES: JUSTICE MOORE. TOAL, C.J., WALLER and BURNETT, JJ., concurs. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

OPINION BY: MOORE

OPINION

[**94] [*114] JUSTICE MOORE: We granted this writ of certiorari to determine whether the Court of Appeals erred by affirming in part and reversing in part the trial court's decision granting summary judgment on petitioner/respondent Marilyn Bray's products liability claims. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001). We affirm in part and reverse in part.

FACTS

Baron Blackmon was a [***2] maintenance mechanic at General Electric's manufacturing plant located in Florence, South Carolina. Bray and Blackmon had been co-workers for approximately fifteen years. On March 5, 1994, Blackmon was inside a Ram-Jet Trash Compactor [1] manufactured by respondent/petitioner Marathon and leased to General Electric by respondent/petitioner American Refuse Systems, Inc. (hereinafter collectively referred to as Marathon). When Bray approached [*115] the trash compactor to discard a bag of trash, Blackmon asked Bray to start the compactor. Because Blackmon was inside the compactor, Bray declined until Blackmon assured her it was safe to do so.

1 Blackmon was allegedly inside the compactor for the purpose of repairing it.

Bray pressed the "start" button, which caused the ram to move toward Blackmon instead of away from him. Bray attempted to stop the compactor, but the ram would remain stopped only as long as she maintained continuous pressure on the "stop" button. Blackmon was pinned inside the compactor, so Bray released [***3] the button and ran for help. Upon her return, she found Blackmon blue and unconscious. Blackmon subsequently died from his injuries. [2]

2 A report by the Engineering Design & Testing Corporation indicated the machine malfunctioned due to a defect in the manufacture of the compactor and a defect in the compactor's design.

[**95] Bray filed this products liability action against Marathon for breach of implied and express warranty, strict liability, and negligence. [3] She alleged she suffered serious and permanent physical injuries caused by the emotional trauma of witnessing her co-worker's death.

3 Petitioner/respondent Allan Bray also filed a loss of consortium claim. However, because his claim is dependent on his wife's claims, only wife's claims will be discussed.

The trial court granted summary judgment to Marathon on all causes of action. [***4] The court found Bray was not in direct danger from the operation of the compactor and her alleged injuries were the result of observing Blackmon's injuries. The court noted that any claim Bray had would have to be analyzed under Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985). [4] However, the court found Bray could not recover as a bystander because Blackmon and Bray were not closely related.

4 The Kinard court found that a bystander may have a cause of action for negligent infliction of emotional distress. The court adopted the cause of action with the following elements: (1) the negligence of the defendant must cause death or serious physical injury to another; (2) the plaintiff

bystander must be in close proximity to the accident; (3) the plaintiff and the victim must be closely related; (4) the plaintiff must contemporaneously perceive the accident; and (5) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

[***5] [*116] The Court of Appeals affirmed the trial court's decision granting summary judgment on Bray's negligence claim and reversed the decision granting summary judgment on her strict liability claim. Further, the court found that because Bray did not present an argument regarding the warranty claims, that issue was deemed abandoned.

ISSUE I

Did the Court of Appeals err by reversing the trial court's decision granting summary judgment on Bray's strict liability claim?

DISCUSSION

[HN1]The strict liability action for defective products was established by the Legislature in S.C. Code Ann. §§ 15-73-10 to -30 (1976). Section 15-73-10 (1) provides: [HN2]"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 caused to the ultimate user or consumer ... ."

Bray was a user of the trash compactor because she operated the controls on the compactor in an effort to assist Blackmon. *See* Restatement (Second) of Torts § 402A, cmt. 1 (1965) [HN3]("user" includes those who are utilizing the product for purpose of doing work upon [***6] it); [5] Curcio v. Caterpillar, Inc., 344 S.C. 266, 543 S.E.2d 264 (Ct. App. 2001) (employee performing maintenance on equipment was "user" of product). Further, under Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958), Bray's alleged physical injuries arising from emotional trauma constitute physical harm.

5 Section 15-73-30 [HN4]provides that the comments to § 402A of the Restatement of Torts, Second, are incorporated as the legislative intent of the Defective Products Act.

[HN5]A products liability plaintiff must prove the product defect was the proximate cause of the injury sustained. Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997) (citing Livingston v. Noland Corp., 293 S.C. 521, 362 S.E.2d 16 (1987) (proof must be sufficient to show defect was direct and efficient cause of plaintiff's injury)). Proximate cause requires proof of both causation in fact [***7] and [*117] legal cause, which is proved by establishing foreseeability. *Id.* Marathon contends the Court of Appeals erred by finding Bray's injuries were foreseeable given her strict liability claim arose from injuries to another.

We find [HN6]the Court of Appeals properly concluded that the bystander analysis of Kinard does not apply to a strict liability cause of action. A user of a defective product is not a mere bystander but a primary and direct victim of the product defect. *Accord* Kately v. Wilkinson, 148 Cal. App. 3d 576, 195 Cal.Rptr. 902 (Cal. Ct. App. 1983) (plaintiff, who was owner and driver of boat that killed daughter's friend, allowed to proceed on [**96] products liability claim as user of product); Gnirk v. Ford Motor Co., 572 F. Supp. 1201 (D.S.D. 1983) (manufacturer owed independent legal duty to plaintiff due to status as user of car involved in accident, rather than as bystander). [HN7]Because § 15-73-10 limits liability to the user or consumer, there is no need for a limitation on foreseeable victims to avoid disproportionate liability as was found necessary in the bystander setting. It is not unreasonable to conclude the user of a defective [***8] product might suffer physical harm from emotional damage if the use of the product results in death or serious injury to a third person, irrespective of the relationship between the user and third person. [6]

6 In any event, [HN8]we are without authority to graft the Kinard bystander analysis on § 15-73-10. Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989) (finding punitive damages are not recoverable under Defective Products Act); Schall v. Sturm, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983) (absent clear legislative direction, strict liability cause of action under § 15-73-10 does not exist in South Carolina where product entered stream of commerce prior to enactment of statute and is alleged to have caused injury thereafter). If the Act is to be amended so as to provide for the requirement of a close relationship in the context of a strict liability cause of action, this must be accomplished by the legislature, not the court.

[***9] We find there is a genuine issue of fact regarding whether the event in which Bray's co-worker lost his life was the proximate cause of Bray's physical harm. *See* Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002) [HN9](summary judgment appropriate only if no genuine issue of material fact). Therefore, we affirm the Court of Appeals' [*118] reversal of the

trial court's decision granting summary judgment on Bray's strict liability claim.

ISSUE II

Did the Court of Appeals err by affirming the trial court's decision granting summary judgment on Bray's negligence claim?

DISCUSSION

Bray asserts a products liability claim for negligence under Padgett v. Colonial Wholesale Distrib. Co., *supra.* The Padgett court held that [HN10]a plaintiff may recover for a physical or bodily injury that results from mental and emotional trauma in the absence of physical impact. *See also* Spaugh v. Atlantic Coast Line R. Co., 158 S.C. 25, 155 S.E. 145 (1930) (suffering from nervous breakdown, as result of defendant's negligence, would support verdict for plaintiff); Mack v. South-Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898) [***10] (defendant liable for injuries sustained as result of mere fright and mental disturbance caused by its negligence). Because Padgett allows recovery for injuries sustained as a consequence of shock, fright, and emotional upset, Bray may be able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker.

Bray further argues the Court of Appeals erred by finding her strict liability claim could survive a summary judgment motion but her negligence claim could not on the element of proximate cause. She argues that, under either claim, she was a foreseeable victim. [HN11]While proceeding on one theory of recovery under products liability and not proceeding on another is permissible, *see* Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995), if a person is considered a "direct victim" for the purposes of one products liability cause of action, this person must be a direct victim for all causes of action. It is too fine a distinction to say Bray is a user and therefore a foreseeable plaintiff under a strict liability theory, but that she is not a "direct victim" and not a foreseeable [***11] plaintiff under a negligence cause of action. Therefore, the trial court improperly granted Marathon's summary [*119] judgment motion on Bray's negligence claim and the Court of Appeals is reversed on this issue.

CONCLUSION

We affirm the Court of Appeals' decision regarding Bray's strict liability claim and reverse the decision regarding her negligence claim. We further affirm the court's ruling that Bray abandoned her breach of [**97] warranty claims. *See* First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) [HN12](issue not argued in brief deemed abandoned and precludes consideration on appeal).

AFFIRMED IN PART, REVERSED IN PART.

TOAL, C.J., WALLER and BURNETT, JJ., concurs. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

CONCUR BY: PLEICONES, (In Part)

DISSENT BY: PLEICONES, (In Part)

DISSENT

JUSTICE PLEICONES: I concur in part and dissent in part, and would affirm the decision of the Court of Appeals as written.

I agree with the majority that a bystander who is the user of the allegedly defective product, and who suffers physical harm from directly witnessing injury to another, may maintain a strict liability claim. [***12] See S.C. Code Ann. § 15-73-10 (1) (1976); see e.g., Gnirk v. Ford Motor Co., 572 F. Supp. 1201 (D.S.D 1983). Accordingly, I agree that we should affirm the Court of Appeals' decision reversing the trial court's grant of summary judgment on Bray's strict liability claim.

I disagree, however, with the majority's decision to reinstate Bray's negligence claim. Fundamentally, I disagree with the majority's holding that if a plaintiff is considered a "direct victim for the purposes of one products liability cause of action, [then the plaintiff] must be a direct victim for all [products liability] causes of action." When pursuing a products claim under a negligence theory, the plaintiff is subject to all the requirements and defenses of an ordinary negligence claim. See Hubbard and Felix, *The South Carolina Law of Torts* 245-246 (2nd ed. 1997). Where, as here, the negligence claim is predicated on bystander liability, then I would hold, as [*120] did the Court of Appeals, that the plaintiff must satisfy the foreseeability requirements set forth in Kinard v. Augusta Sash and Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985). [***13] Bray seeks to recover for the injury she suffered from witnessing the death of another: this claim brings her squarely within Kinard. She does not claim, as did the plaintiff in Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958), that her injuries resulted directly from the defendant's negligence. Bray cannot satisfy the Kinard requirements and is therefore not a foreseeable victim. The trial court properly granted summary judgment on this theory, and the Court of Appeals correctly affirmed that decision.

As the majority points out, the legislature has defined the class of plaintiffs entitled to bring a strict liability products claim and we are bound by the terms used in

that statute. When, however, the defective product claim is predicated on negligence, and the plaintiff is merely a bystander, then "there is... need for a limitation on foreseeable victims to avoid disproportionate liability..." Policy requires that we limit foreseeable victims where the defective product claim sounds in negligence.

For the reasons given above, I would affirm the decision of the Court of Appeals.

Exhibit 5

HLittle v. Brown & Williamson Tobacco Corp.
D.S.C.,2000.
Only the Westlaw citation is currently available.
United States District Court,D. South Carolina, Charleston Division.
Suzanne Q. LITTLE, Individually and as Personal Representative of the Estate of Samuel Martin Little, Deceased, Plaintiff,
v.
BROWN & WILLIAMSON TOBACCO CORPORATION, Individually and as Successor by Merger to the American Tobacco Company, and R.J. Reynolds Tobacco Company, Defendants.
No. C.A.2:98-1879-23.

May 8, 2000.

ORDER

DUFFY, J.
*1 This matter is before the Court upon Defendant R.J. Reynolds Tobacco Company's motion for partial summary judgment on Plaintiff Suzanne Little's addiction claims, common law fraud claims, and strict liability claims, and Defendant Brown & Williamson Tobacco Company's motion for partial summary judgment on Plaintiff Suzanne Little's addiction claims.[FN1]

FN1. Defendant Brown & Williamson incorporated and adopted verbatim Defendant R.J. Reynolds's argument, set forth in R.J. Reynolds' supporting memorandum, concerning Plaintiff's addiction claims.

I. *BACKGROUND*

Viewed in the light most favorable to Plaintiff Suzanne Little (hereinafter "Plaintiff"), the facts of this case are as follows: Martin Little began smoking cigarettes regularly in approximately 1961 at the age of sixteen. M. Little 10/26/98 Dep. at 116-20, Plaintiff's Exhibit 1; M. Little 3/22/99 Dep. at 11, Plaintiff's Exhibit 5. From about the age of sixteen until sometime in the 1970s, Mr. Little regularly smoked Defendant R.J. Reynolds Tobacco Company's (hereinafter "Reynolds") Winston cigarettes, a higher tar, higher nicotine brand. M. Little 10/26/98 Dep. at 114-16, Plaintiff's Exhibit 1 (stating that, being "pretty much brand-loyal," he smoked Winston for fifteen years or longer). At some point in the 1970s, Mr. Little began trying several different low-tar brands in an attempt to switch to a "healthier" cigarette, with his ultimate goal being to use low-tar, low-nicotine cigarettes as a "stepping stone" to quitting smoking altogether. *Id.* at 128; M. Little 2/24/99 Dep. at 50-51, Plaintiff's Exhibit 4. In the course of switching down, Mr. Little tinkered with several different low-tar brands, including Carlton, Barclay, Winston Lights, and what he recalls as "Ultra." M. Little 2/24/99 Dep. at 64, 66-67, Plaintiff's Exhibit 4; M. Little 3/22/99 Dep. at 88-89, Plaintiff's Exhibit 5. Though Mr. Little could not recall the exact order in which he experimented with the various brands, he eventually settled on Carlton as his regular low-tar brand sometime in the 1970s. *Id.;* M. Little 2/24/99 Dep. at 50-51, 60-61, Plaintiff's Exhibit 4. However, despite numerous attempts to quit, Mr. Little was unsuccessful, and he continued to smoke Carlton regularly until doctors diagnosed him with lung cancer in late 1995. M. Little 10/27/98 Dep. at 264-66, Plaintiff's Exhibit 2. Shortly thereafter, in December 1995, Mr. Little was finally able to quit smoking altogether. *Id.*

Mr. Little originally brought this action May 26, 1998 in state court. Defendants removed the case to this Court on June 26, 1998. On May 1, 1999, Mr. Little passed away. Plaintiff filed a Second Amended Complaint on July 9, 1999, alleging four causes of action against Defendants as survival and wrongful death claims: breach of implied warranties (Count I, brought against Brown & Williamson only); fraudulent misrepresentation, concealment, and nondisclosure (Count II, as a wrongful death action only); negligence (Count III); and strict liability (Count IV). Plaintiff also alleged a fifth cause of action for loss of consortium (Count V).

On July 29, 1999, Defendants filed a motion for Partial Dismissal of the Second Amended Complaint, arguing that Plaintiff failed to limit her strict liability claim to products placed in the stream of commerce

after July 9, 1974, and that she failed to plead her fraud claim with sufficient particularity under Federal Rule of Civil Procedure 9(b). The Court granted this motion in part on October 4, 1999. The Court, after finding that "to whatever extent plaintiff's second amended complaint states a claim for strict liability that is based on products that entered the stream of commerce prior to July 9, 1974, that claim is dismissed," Oct. 4, 1999 Order at 4, held that Plaintiff's strict liability claim stated a claim as pleaded. The Court noted, however, that application of this claim to particular defendants "may form an appropriate basis for summary judgment."*Id.* at 4-5.Regarding Defendants' motion to dismiss Plaintiff's fraud claim, the Court held that Plaintiff sufficiently pleaded this claim under Rule 9(b).

*2 On November 30, 1999, Reynolds filed the instant motion for partial summary judgment on Plaintiff's addiction claims, common law fraud claim, and strict liability claim. Defendant Brown & Williamson Tobacco Corporation (hereinafter "Brown & Williamson") subsequently filed a motion for partial summary judgment on December 2, 1999, incorporating and adopting verbatim Reynolds' arguments concerning Plaintiff's addiction claims. Plaintiff filed her response memorandum on December 15, 1999, and Reynolds filed its reply on January 4, 2000.

II. *SUMMARY JUDGMENT STANDARD*

To grant a motion for summary judgment, this Court must find that "there is no genuine issue as to any material fact."Fed.R.Civ.P. 56(c). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-124 (4th Cir.1990)."[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate."*Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir.1991)."[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."*Celotex*, 477 U.S. at 322. The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.' " *Hughes v. Bedsole*, 48 F.3d 1376, 1381 (4th Cir.1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir.1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." *Celotex*, 477 U.S. at 327.

III. *DISCUSSION*

A. Plaintiff's Addiction Claims

In her Second Amended Complaint, Plaintiff alleges that "[a]s a direct and proximate cause of Defendants' manufacture, supply and/or sale of their defectively designed cigarettes, Mr. Little has suffered injuries in the form of addiction, lung cancer and death."Second Amended Complaint at ¶ 68. As Defendants correctly point out, Plaintiff makes numerous other allegations in her Amended Complaint regarding the addictive nature of cigarettes and Mr. Little's own addiction to them. For example,

*3 Plaintiff alleges that Defendants 'have long known' but have 'never disclosed publicly its extensive knowledge of nicotine's addictive properties and its critical role in smoking'(*id.* ¶ 32), and that Defendants made false representations and omissions regarding ...'the addictive, carcinogenic and pathologic qualities of cigarettes.'(*Id.* ¶ 44(a)). As a result of Defendants' 'public deception' about the 'addictive' nature of cigarettes, Mr. Little allegedly began smoking and 'was forced to grapple with an addiction.'(*Id.* ¶ 33). Further, Plaintiff alleges that Defendants were negligent in failing to develop, test, market and sell 'cigarettes which would have reduced or eliminated the health and addiction dangers to product users.'(*Id.* ¶ 53(d)). Plaintiff also claims that 'Defendants' cigarettes were defective' because 'they caused Mr. Little's addiction, lung cancer and death-consequences which were vastly more grave than reasonably contemplated by Mr.

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Little, an ordinary user or consumer.'(*Id.* ¶ 63).

Defendant's Brief at 6.

Defendants argue that Mr. Little had actual knowledge of cigarettes' addictive nature, and his own alleged addiction to them, as early as the late 1960s. Defendants thus maintain that the Court should grant summary judgment on Plaintiff's claims to recover for Mr. Little's cigarette addiction because they are untimely under South Carolina's three-year statute of limitations, S.C.Code Ann. §§ 15-3-530(5) and (7). This three-year limitations period commences running "after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."S.C.Code Ann. § 15-3-535. As stated by the Supreme Court of South Carolina,

[t]he exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.

Wiggins v. Edwards, 442 S.E.2d 169, 170 (S.C.1994) (quoting *Snell v. Columbia Gun Exchange, Inc.*, 278 S.E.2d 333, 334 (S.C.1981)). This is an objective determination in which courts must focus on the date of discovery of the injury, not the date of discovery of the wrongdoer:

The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.

Id. (quoting *Tollison v. B & J Mach. Co.*, 812 F.Supp.618, 620 (D.S.C.1993)). Thus, under South Carolina case law, after a plaintiff has discovered or should have discovered his injury, his claims arising out of that injury have accrued and the three-year statute of limitations begins running, even if he does not know the full extent of his injuries.

*4 In this case, it is clear that Mr. Little had notice that he was suffering from an addiction to cigarettes more than three years prior to the filing of this lawsuit. As Mr. Little testified during his deposition, he knew of his cigarette addiction beginning in the late 1960s or early 1970s:

Q: When was the first time you thought you were addicted to cigarettes?

A: The first time I tried to quit.

Q: When was that?

A: I'm guessing late '60s, early '70s.

M. Little 1/25/99 Dep. at 487, Defendant's Exhibit C. Mr. Little further testified about his other unsuccessful efforts to quit smoking, stating that he attempted to quit in the mid-1970s when he decided to "live a healthier life," and during 1993-1994 when he used several prescription drugs, as well as nicotine patches, Nicorette gum, and hypnosis, to try to kick his smoking addiction. M. Little 10/26/98 Dep. at 38-39, 43-44, 53, Defendant's Exhibit A. These unsuccessful attempts to quit could only have reinforced Mr. Little's late 1960s or early 1970s belief that he was addicted to cigarettes.

In addition, Mr. Little testified that his doctors told him "ten, twelve years ago" (i.e.1986-1988) that cigarette smoking is addictive:

Q: Before you quit smoking [in 1995] did any doctor ever tell you you were addicted to cigarette smoking?

A: I've about told that cigarette smoking is addictive.

* * * * *

Q: But did you ever recall a doctor, one of your doctors-

A: One of my more recent doctors?

Q: No, no. Before you quit smoking.

A: Oh.

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Q: Ever telling you, Mr. Little-

A: Yeah. Yes.

Q: Who, which doctor?

A: John DuBois.

Q: When did he first tell you that?

A: When I used to go for my annual physical.

Q: When would that have started?

A: I don't know. It probably started 10 years ago.

Q: So-

A: 10, 12 years ago. I've had doctors tell me. I know it's an addiction, and I know it's going to be tough, but that is the key.

* * * * *

Q: In general terms?

A: I know what you are saying. I can't recall a conversation that took place 10 years ago, a 20-minute whatever it was. But I can tell you that I've had medical people say that it is going to be a tough addiction to beat.

Q: So even though medical people suggested in so many words it would be difficult to quit smoking, they still encouraged you to do it in order to improve your health?

A: Absolutely.

* * * * *

Q: Did any doctor ever tell you, Mr. Little, that you would be unable to quit smoking?

A: I have-I've had doctors tell me that nicotine addiction is probably-is comparable to heroin addiction or any of the other physically or psychologically addictive drugs. I mean, that is the context, if you will, what your are asking me would have come from ...

Defendant's Brief at 10 (quoting M. Little 10/26/98 Dep. at 106-108, Defendant's Exhibit A); (citing M. Little 10/27/98 Dep. at 281, Defendant's Exhibit B (testifying that "I can recall doctors saying that cigarette smoking is addictive, yes"); *id.* at 277 (acknowledging that he told a friend "four or five years ago" in 1993 or 1994, that he smoked cigarettes "because it was an addictive drug.")). The doctors' statements concerning the addictive nature of cigarettes would have further fortified Mr. Little's almost thirty-year conviction that he suffered from cigarette dependency.

*5 While it is thus clear that Mr. Little had notice of his cigarette addiction more than three years prior to this lawsuit, Plaintiff asserts that Mr. Little's testimony that he had no health problems prior to his lung cancer shows that the he did not view the state of having difficulty quitting smoking as an injury. Plaintiff's Brief at 5-6. Plaintiff therefore contends that the "injury" of addiction did not manifest itself until doctors diagnosed Mr. Little with lung cancer in late 1995, after which Mr. Little finally succeeded in quitting smoking, and thus had to "confront fully the injury of addiction."Plaintiff's Brief at 7. Plaintiff also states that she is not seeking any pre-1995 damages attributable to a "pure addiction" injury. *Id.* at 8 n. 3.

The Court, however, finds Plaintiff's argument flawed and illogical. First, *Webster's* dictionary defines "addiction" as the devotion or giving of oneself "habitually or compulsively to something." [FN2]By arguing that Mr. Little did not view his state of being unable to kick his cigarette compulsion as an injury, there does not seem to be any separate and distinct addiction injury from which Mr. Little suffered. Furthermore, Plaintiff has not provided any evidence to substantiate her claim that Mr. Little did not have to confront fully his cigarette addiction until he was diagnosed with lung cancer in 1995.[FN3] Rather, by tying the diagnosis of lung cancer directly to the manifestation of the addiction injury, Plaintiff has in actuality combined the two alleged injuries of lung cancer and addiction into one. While Mr. Little's cigarette addiction may indeed have led to his development of lung cancer, the injury which Plaintiff in actuality is alleging Mr. Little suffered

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from, and for which she may seek a recovery at trial, is the lung cancer, not his state of craving cigarettes. The Court therefore finds that Mr. Little's addiction injury manifested itself in the early 1970s, when his inability to shake his cigarette dependency alerted him to his addiction, and not when doctors diagnosed him with lung cancer in 1995. Accordingly, since Mr. Little had knowledge of his addiction by the early 1970s, and the instant suit was filed in 1998, the Court holds that any addiction injury claim is time-barred under South Carolina's three-year statute of limitations.

> FN2. *Webster's II New College Dictionary* 13 (Houghton Mifflin Company 1995). Any argument by Plaintiff that Mr. Little could not properly define "addiction." and thus did not understand what it meant to be "addicted," is refuted by Mr. Little's testimony. For example, he stated that his definition is "[s]omething that is psychologically and/or physically addicting about a substance," or something about a substance that draws you to use it "repeatedly." M. Little 1/25/99 Dep. at 486, Plaintiff's Exhibit 3. He further testified that doctors explained to him that cigarette addiction is akin to "heroin addiction or any of the other physically or psychologically addictive drugs."M. Little 10/26/98 Dep. at 108, Defendant's Exhibit A. The above-stated definition and analogy comports with the common usage of the term "addiction," and the Court thus rejects any argument by Plaintiff that Mr. Little did not understand what it meant to be "addicted" to cigarettes.
>
> FN3. Moreover, while Mr. Little may not have had to confront fully the withdrawal symptoms associated with his addiction until he finally quit smoking in 1995 (a fact which Plaintiff does not allege), a plaintiff need not have had knowledge of the full extent of his injuries before his claims accrued.

Plaintiff's reliance on *Higgins v. Crecraft*, 1991 WL 20387 (Tenn.Ct.App.1991), does not alter the above-stated ruling. Plaintiff argues that *Higgins* stands for the proposition that, since the meaning of "addiction" is unclear and the nature of an addiction is not a one-time event, the question of when a plaintiff becomes aware of his addiction is a question of fact for the jury. However, South Carolina law controls on this point, and the unpublished decision of *Higgins* does not represent the rule of law in South Carolina. Rather, the Supreme Court of South Carolina has held that a plaintiff's claim for damages based upon an addiction injury accrues when the plaintiff becomes aware of his addiction. *Preer v. Mims*, 476 S.E.2d 472, 474 (S.C.1996) ("Because Preer had knowledge of his addiction, and, hence, knowledge of Mims's negligence, by March 1990, the statute of limitations began running at that time, and any action after March 1993 would be barred."). Accordingly, this is a question of law for the Court to decide, not the jury, and, as stated *supra*, since Mr. Little had knowledge of his cigarette addiction more than three years prior to the filing of the instant lawsuit in 1998, Plaintiff's addiction claims are time-barred under South Carolina's statute of limitations as a matter of law.

*6 Plaintiff also contends that even if Mr. Little's injury from addiction had accrued more than three years before filing the lawsuit, Defendants should be equitably estopped from raising a statute of limitations defense because they lied under oath to Congress that cigarette smoking is not addictive, while internally acknowledging cigarettes' addictive nature. Under South Carolina law, a defendant may be estopped from asserting a statute of limitations defense if "the delay that otherwise would give operation to the statute had been induced by the defendant's conduct ."*Wiggins*, 442 S.E.2d at 171 (quoting *Dillon Co. Sch. Dist. Two v. Lewis Sheet Metal*, 332 S.E.2d 555, 561 (Ct.App.1985))."This may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary."*Id.* (citing *Lewis Sheet Metal*, 332 S.E.2d at 561;*Rink v. Richland Memorial Hospital*, 422 S.E.2d 747 (1992)). Thus, to prove equitable estoppel, Plaintiff must have "reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire."*Dilmar Oil Co., Inc. v. Federated Mutual Insurance Co.*, 986 F.Supp. 959, 975 (D.S.C.1997)."Although the issue whether a defendant is estopped from claiming the statute of limitations is ordinarily a question of fact, summary judgment is appropriate where there is no evidence of conduct on the defendant's part warranting estoppel."*Black v. Lexington School Dist. No. 2*, 488

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S.E.2d 327, 330 (S.C.1997) (citing *Vines v. Self Mem. Hosp.*, 443 S.E.2d 909 (S.C.1994)).[FN4]

> FN4. Plaintiff asserts that under *Dillon County*, 332 S.E.2d at 562, where reasonable minds could differ on the issue of equitable estoppel, a jury question exists. Plaintiff's Brief at 9. However, as Defendants correctly point out, the South Carolina Supreme Court subsequently noted that this statement in *Dillon County* is "mere dictum," and that "a defense of equitable estoppel interposed in a law case should be tried by the court as an equitable issue."*Gaymon v. Richland Memorial Hospital*, 488 S.E .2d 332, 333 (S.C.1997); *see also Balck v. Lexington School Dist. No. 2*, 488 S.E.2d 327, 330-31 n. 1 (S.C.1997) (noting that *Dillon County* and similar cases "should be read for the proposition that equitable estoppel typically is a question of fact for the fact-finder (the judge), and not for the incorrect proposition that equitable estoppel is a jury question").

Here, Plaintiff offers excerpts from the 1994 congressional testimony by Defendants' officers, where the officers asserted that cigarettes are non-addictive, and contrasts these alleged lies with Defendants' internal memos acknowledging cigarettes' addictive nature. However, Plaintiff fails to offer any proof that Mr. Little witnessed any of this testimony, that the testimony lulled him into sleeping on his rights, and that such reliance was reasonable. *See id.*In short, Plaintiff does not allege any conduct by Defendants upon which Mr. Little relied, or which induced him, to delay filing his lawsuit. Plaintiff also does not cite any case law that would employ the equitable estoppel doctrine without such a showing. Plaintiff argues only that "[b]ecause both defendants in this action have cavalierly denied the addictiveness of nicotine while internally acknowledging the same, equitable justice demands they not be allowed the refuge of the statute of limitations defense on issues of addiction."Plaintiff's Brief at 9. That argument is appealing but unavailing in that Plaintiff contends that Mr. Little did not view his state of being unable to quit smoking as an injury, and since Plaintiff has failed to offer any evidence to support the contention that Mr. Little did not have to fully confront his addiction until 1995, equity does not permit estoppel. Accordingly, the Court will not apply the doctrine of equitable estoppel to prevent Defendants from raising their statute of limitations defense.

*7 To the extent that the Court dismisses any claims based on Mr. Little's alleged addiction injury contained in Plaintiff's survival and wrongful death causes of action, Defendants correctly argue that the same holding applies to Plaintiff's loss of consortium claims on that same alleged injury.[FN5]Under South Carolina law, unlike some other jurisdictions, loss of consortium is an independent action, not derivative. *Preer v. Mims*, 476 S.E.2d 472, 474 (S.C.1996) (citing S.C.Code Ann. § 15-75-20 (1976)) (other citations omitted). Nevertheless, the two actions are still related because in order to prevail in a loss of consortium action, "a plaintiff must prove the defendant's liability for the spouse's injuries, as well as damages to the plaintiff resulting from the spouse's injury."*Creighton v. Coligny Plaza Limited Partnership*, 512 S.E.2d 510, 523 (S.C.Ct.App.1998) (adding that "a loss of consortium claim cannot arise if no tort is committed against the impaired spouse") (citation omitted). Here, Plaintiff has foregone any pre-1995 "pure addiction" damages, and the Court has found that no cognizable claim exists for an addiction injury after 1994. Thus, since Mr. Little suffered no cognizable addiction injury, the Court dismisses any claim arising from the same injury alleged in Plaintiff's loss of consortium cause of action.

> FN5. Plaintiff did not oppose this argument in her brief.

Consequently, the Court grants Defendants' motion for partial summary judgment on Plaintiff's addiction injury claims, and dismisses such claims.[FN6]

> FN6. Of course, this holding does not preclude Plaintiff from offering evidence at trial concerning the addictive nature of cigarettes and the effect of the addiction on Mr. Little, so long as such evidence is relevant to the claims and defenses relating to Mr. Little's injuries of lung cancer and death.

B. Plaintiff's Common Law Fraud Claims

Plaintiff's second cause of action consists of a

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wrongful death claim for fraudulent misrepresentation, concealment, and nondisclosure. Plaintiff alleges that Reynolds,

through their own public pronouncements and communications as well as through public pronouncements and communications of their agents, aiders, abettors and co-conspirators, made false, material representations with knowledge of the falsity or with reckless disregard of the truth and, at all times including the period prior to July 1, 1969, intentionally failed to disclose material matters of fact, opinion, intention and/or law to Martin Little regarding:

a. the addictive, carcinogenic and pathologic qualities of cigarettes;

b. their strategy and efforts to market cigarettes to minors;

c. their manipulation of pharmacologically active nicotine in cigarettes;

d. the development, manufacture and sale of less hazardous cigarettes;

e. the status, purpose and activities of the Council for Tobacco Research;

f. the state of scientific knowledge about the health hazards of smoking; and

g. the control by tobacco industry "lawyers" of the affairs of the tobacco industry.

Second Amended Complaint at ¶ 44. The Second Amended Complaint further alleges that Reynolds "knew and intended that Mr. Little would rely and act upon [Reynolds'] false, material representations, as well as omissions and concealment ... and would have relied on [Reynolds'] other, honest, truthful, and forthright representations had Reynolds made such representations, by purchasing and smoking cigarettes." *Id.* at ¶ 47.Plaintiff further alleges that Reynolds "had sole access" to the above-stated facts, and that Mr. Little justifiably relied on Reynolds to disclose them. *Id.* at ¶¶ 45, 48.

*8 Under South Carolina law, a plaintiff must prove by "clear, cogent, and convincing evidence" the following elements in order to establish a fraud claim:

(1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

First State Sav. and Loan v. Phelps, 385 S.E.2d 821, 824 (S.C.1989); *Charleston Lumber Co. v. Miller Housing Corp.*, 458 S.E.2d 431, 436 (S.C.Ct.App.1995). Reynolds contends, however, that Mr. Little's own deposition testimony confirms that Plaintiff cannot establish that Mr. Little witnessed any statements by Reynolds containing false representations or omissions, or that Mr. Little relied on those statements. Since Reynolds asserts that Plaintiff carries the burden of proving both of these elements, Reynolds contends that it is entitled to summary judgment on this claim. Plaintiff counters that Mr. Little's testimony illustrates that he did view and rely upon certain statements by Reynolds, and that his testimony and additional evidence permit the clear inference that Mr. Little witnessed and reasonably relied upon additional statements and omissions of Reynolds.

Plaintiff maintains that the following testimony by Mr. Little "establishes [that] he witnessed statements by Reynolds:"

A: ... During the latter part of my smoking of Winstons I was aware of the nicotine and tar ratings.

Q: What was it, do you recall?

A: And I don't know if it's because I recall it or because of something more recent, but I think it was 17 or 18 milligrams of tar and 10 or 12 milligrams of nicotine, but that is just a guess.

Q: Have you gone back and done any kind of research into what the tar and nicotine delivery was?

A: I haven't done any research. Just out of curiosity if you will, just I looked at the ads in the paper-not the

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paper, the magazines just to see, you know, what it was.

Plaintiff's Brief at 10 (quoting M. Little 10/27/98 Dep. at 314-15, Plaintiff's Exhibit 2). The Court, however, finds this testimony insufficient to directly establish that Mr. Little witnessed or relied upon statements by Reynolds. Mr. Little admits in this excerpt that his testimony about these tar and nicotine ratings is "just a guess," and more significantly, that he did not know whether his knowledge of the ratings stemmed from his recall of ads he witnessed during the time he smoked Winstons or "because of something more recent." Furthermore, Mr. Little's above-quoted testimony shows that his memory may have been jolted by a recent viewing of magazine ads containing the ratings. The above-quoted excerpt makes clear only that Mr. Little could not remember where he gained knowledge of the ratings, and such speculation does not create a genuine issue of material fact regarding whether Mr. Little witnessed or relied upon statements by Reynolds. *See Beale v. Whitehead Brothers Co.*, 769 F.2d 213, 214 (4th Cir.1985) (asserting that a plaintiff "cannot create a genuine issue of material fact through mere speculation ...") (citing *Barwick v. Celotex Corp.*, 736 F.2d 946, 963 (4th Cir.1984))

*9 Plaintiff further argues, however, that the above-quoted testimony also supports the inference that Mr. Little relied on information in Reynolds' advertisements in settling on a particular cigarette brand as his brand of choice. Plaintiff points out that Mr. Little testified that he went through a period of smoking lower tar and nicotine cigarettes, and that he tried Winston Lights, a Reynolds product, "when Winston brought them out as an alternative to Winston regulars."Plaintiff's Brief at 10 (citing M. Little 2/24/99 Dep. at 51, 67, Plaintiff's Exhibit 4). Plaintiff thus argues that this testimony infers that Mr. Little "relied upon tar and nicotine information in choosing to try Winston Lights while still a Winston smoker. To the extent this information fraudulently misled Martin Little into thinking Winston Lights were less dangerous, the evidence supports Plaintiff's cause of action"*Id.*

The Court does not agree, as to make such an inference refutes Mr. Little's testimony that he could not remember where he obtained the tar and nicotine ratings information. Furthermore, as pointed out by Reynolds in its response memorandum, Plaintiff has not identified a single advertisement by Reynolds that Mr. Little would have witnessed and relied upon in switching from Winstons to a lower tar- and nicotine-content cigarette, nor has she stated how Reynolds' statements regarding its cigarettes' tar and nicotine content was false or misleading. Defendant's Response Brief at 9. In fact, the only advertisements that Mr. Little testified about were those he reviewed with his attorneys during the course of this litigation, and none of those were Reynolds' advertisements. *Id.* at 13 (citing S.M. Little 2/24/99 Dep. at 71, Defendant's Exhibit D; S.M. Little Dep. Exhibit 1, Defendant's Exhibit F; S.M. Little 3/22/99 Dep. at 14-15, Defendant's Exhibit E). Thus, as further asserted by Reynolds, Plaintiff is asking the Court to infer the following: that Mr. Little observed advertisements by Reynolds when he decided to switch to other brands in the mid-1970s; that these unidentified advertisements contained false or misleading information or omissions; that this information was material to Mr. Little; and that Mr. Little relied on this information when he made the decision to switch cigarette brands. *Id.* at 10.However, a plaintiff "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."*Beale v. Whitehead Brothers Co.*, 769 F.2d 213, 214 (4th Cir.1985) (citing *Barwick v. Celotex Corp.*, 736 F.2d 946, 963 (4th Cir.1984)). The Court therefore concludes that this chain of deductions does not rise to the level of a genuine issue of material fact regarding whether Mr. Little viewed and relied upon information contained in Reynolds' advertisements in making cigarette choices.[FN7]

FN7.*See Joy v. Brown & Williamson Tobacco Corp.*, No. 96-2645-CIV-T-24(B), slip op. At 6-7 (M.D.Fla. May 8, 1998), Defendant's Exhibit A (granting summary judgment where plaintiff failed to identify any specific statement as a misrepresentation, or show any detrimental reliance upon such an unidentified misrepresentation).

The Court also notes, although not argued by Plaintiff, that Mr. Little did testify that he looked at the tar and nicotine ratings "very strongly" when he switched from Winston to Carlton cigarettes, and that

> "with the Carlton, you would be getting a dramatically reduced amount of nicotine."M. Little 3/22/99 Dep. at 13-15, Defendant's Exhibit E. However, being induced by Winston advertisements' information concerning its tar and nicotine contents to switch from Winston cigarettes to another brand with a lower rating does not support Plaintiff's argument that the common law fraud claims should not be dismissed. Furthermore, the fact that Mr. Little may have relied upon Carlton advertisements in switching from Winston to Carlton cigarettes does not support the inference that he relied upon Winston Light advertisements when he switched from Winston to Winston Lights.

Plaintiff also argues that Mr. Little "witnessed and almost certainly relied upon Reynolds advertisements in the early 1960s when he was settling on a regular brand."Plaintiff's Brief at 11. Plaintiff points to Mr. Little's testimony that he regularly read the *Saturday Evening Post* during that time period, and that the evidence shows that full-page Winston ads from the same time period appeared regularly in the *Post. See* Plaintiff's Exhibit 17 (advertisements dated 5/25/63, 8/17/63, 2/22/64, 5/9/64, 7/18/64, and 11/7/64). Plaintiff further claims that the ads failed to disclose material information regarding the health risks posed by Winston cigarettes. Since Mr. Little began smoking Winston regularly, as a teenager, during the same time period that he regularly read the *Saturday Evening Post,* Plaintiff asks the Court to infer that Mr. Little must have seen the ads and relied upon them in reaching his decision to smoke Winston regularly. The Fifth Circuit has dealt with this exact argument, and held that proof that a smoker read news periodicals during the time period the defendant cigarette company allegedly made misrepresentations within those periodicals is not the equivalent of proof that the smoker read the misrepresentations, and "falls far short of proving he actually relied upon them."*Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir.1996); *see also Tompkins v. R.J. Reynolds Tobacco Co.*, 2000 WL 360099, at *10-11 (N.D.N.Y. March 3, 2000) (granting summary judgment to defendant Reynolds on plaintiffs' intentional misrepresentation and fraud claims where plaintiffs "fail[ed] to provide any link between Mr. Tompkins having read those publications and his having read and relied upon the [Reynolds] ads contained within"). Moreover, such an inference again contradicts Mr. Little's own testimony, as he stated that he did not know what influenced his choice, made while a teenager, to start smoking Winston regularly. M. Little 10/26/98 Dep. at 120, Defendant's Exhibit A ("Q: And why was it that you chose Winston? A: I have no way of telling you now. I don't know what influenced that choice."); M. Little 3/22/99 Dep. at 40, Defendant's Exhibit E (testifying that he "can't recall" why he chose Winston as his regular brand); *see also* M. Little 10/26/98 Dep. at 124, Defendant's Exhibit A (testifying that he did not know what, if anything, made Winston more preferable than other brands). Significantly, Mr. Little also testified that he could not recall even one statement or advertisement by Reynolds during this time period, much less one that particularly influenced his smoking behavior. M. Little 2/24/99 Dep. at 34-38 (testifying that any statement he may have heard by Reynolds concerning their cigarettes would have been in the last four or five years), 71-74, Defendant's Exhibit D. Accordingly, the Court will not make the inferential leap that, because Mr. Little regularly read a periodical containing Reynolds advertisements during the time period that he decided on Winston as his regular brand, he must have therefore read the advertisements, where Mr. Little's own testimony belies such an inference.

*10 Finally, Plaintiff directs the Court's attention to the affidavit of its expert witness, Professor Richard W. Pollay, as support for her allegation that Mr. Little relied upon Reynolds advertising in selecting and staying true to Winston during his teenage years. Professor Pollay states in his affidavit that "Martin Little's perceptions of cigarettes generally, and his selection of a specific brand of cigarettes, would almost certainly have been influenced by the large volume of cigarette advertising to which he had been inevitably exposed throughout his growing up."Plaintiff's Exhibit 6 at ¶ 10. Professor Pollay further states in his affidavit that the advertisements appearing in the *Saturday Evening Post* "were typical of much cigarette advertising of that era in that they conveyed a healthful image of the product by making reference to its 'pure, white modern filter' and by showing consumers as totally carefree," yet "did not communicate what was known to the manufacturer to be the harmful and addictive nature of the product."*Id.* at ¶ 9. However, as correctly argued by Reynolds, Professor Pollay never met or conversed

with Mr. Little, and thus has no personal knowledge of whether Mr. Little observed and relied upon Reynolds' advertisements during his adolescence. Furthermore, his conclusion that Mr. Little must have viewed and been influenced by Reynolds' advertisements contradicts Mr. Little's testimony that he did not know what influenced his teenage cigarette choices, or why he preferred Winston cigarettes over competing brands. Finally, the affidavit is inadequate because it does not make any reference to a specific representation by Reynolds. *See Joy,* No. 96-2645-CIV-T-24(B), at 7 (citing *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1103 (11th Cir.1983)). Thus, his speculative conclusions do not satisfy Federal Rule of Civil Procedure 56(e)'s requirements that an affidavit be made on "personal knowledge," "set forth such facts as would be admissible in evidence," and "show affirmatively that the affiant is competent to testify to the matters stated therein."*See Joy,* No. 96-2645-CIV-T-24(B), at 7 (finding that Plaintiff's assertions in his affidavit that one of the reasons the decedent continued to smoke was her reliance upon the defendant tobacco company's advertisements "would seemingly be either speculation (he assumed her state of mind) or hearsay (she told him of her reliance on advertisements)"). Accordingly, the Court finds Professor Pollay's affidavit insufficient to show that a genuine issue of material fact exists regarding whether Mr. Little witnessed and relied upon Reynolds' statements. *See Talley v. Danek Medical, Inc.*, 179 F.3d 154, 162 (4th Cir.1999) (ruling that where expert testimony is "entirely speculative," the district court did not commit error in disregarding it in deciding a motion for summary judgment) (citing *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 421 (4th Cir.1993); *Tyger Constr. Co. v. Pensacola Constr. Co.*, 29 F.3d 137, 142 (4th Cir.1994) (stating that "[a]n expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record")).

*11 In addition, Mr. Little could not recount any non-advertising assertions made by Reynolds about the effect of cigarette smoking on a person's health. M. Little 2/24/99 Dep. at 34-38, Defendant's Exhibit D.[FN8] Mr. Little also conceded that he only saw "A Frank Statement to Cigarette Smokers" in connection with this litigation. *Id.* at 36.Thus, Plaintiff has not produced sufficient evidence to show that Mr. Little witnessed and relied upon any non-advertising statements by Reynolds.

FN8. The following is an excerpt of Mr. Little's testimony on this point:

> Q: All right, have you ever heard any statement-heard or seen any statement by [Reynolds] about allegedly addictive qualities of cigarettes?
>
> A: Somewhere there seems to me that R.J. Reynolds has claimed or said something to the effect that they are not addictive.
>
> Q: Who at R.J. Reynolds said that?
>
> A: I don't know if it was R.J. Reynolds. It may have been one of their P.R. people. It may have been their CEO. I don't recall.
>
> Q: Do you recall when you heard this statement?
>
> A: No. It would have been within the last four or five years.
>
> * * * * * *
>
> Q: Do you recall where you saw that, where you heard it?
>
> A: No.
>
> Q: How do you know that it was a statement about R.J. Reynolds Tobacco Company as opposed to someone not connected with a cigarette company or some other cigarette company?
>
> A: It could have been some other cigarette company. I just somehow or another linked-as I said a minute ago, I linked R.J. Reynolds and that claim together, I may be wrong.
>
> * * * * * *
>
> Q: ... Have you ever heard anyone from R.J. Reynolds or have you ever seen any statement from anybody at R.J. Reynolds

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> that said that [there is no cause and effect between smoking and health]?
>
> A: Not that I-not right here this morning, no.
>
> M. Little 2/24/99 Dep. at 36-38, Defendant's Exhibit D.

Mr. Little also testified that he never heard that Reynolds marketed cigarettes to minors, *id.* at 37-38, and as stated *supra*, Mr. Little's testimony refutes Plaintiff's position that he relied on Reynolds ads during his adolescence.[FN9] Plaintiff therefore cannot establish that Reynolds made any misrepresentations or omissions regarding "their strategy and efforts to market cigarettes to minors," including any intentional targeting of Mr. Little before he turned eighteen.

> FN9. Mr. Little testified that he started smoking, not because of any advertisement he saw or heard, but because he was "trying to be an adult." M. Little 1/25/99 Dep. at 463, Defendant's Exhibit C; M. Little 3/22/99 Dep. at 39, Defendant's Exhibit E.

Mr. Little also maintained that he did not know anything about a "false scientific controversy," acknowledging that he did not even know what this allegation concerned. *Id.* at 38 ("I don't even know what it is."). He also testified that during his smoking days, he never heard of the Council for Tobacco Research. Thus, Plaintiff has failed to establish a genuine issue of material fact concerning any witnessing of, or reliance upon, misrepresentations allegedly made by Reynolds concerning "the state of scientific knowledge about the health hazards of smoking," or concerning "the status, purpose, and activities of the Council for Tobacco Research."Second Amended Complaint at ¶ 44. Finally, the Court notes that to the extent that Plaintiff bases her fraud claim upon allegations that Reynolds "publicly proclaimed and vowed to adhere to the Cigarette Advertising Code," Second Amended Complaint at ¶¶ 18-19, such claim must also fail since Plaintiff cannot establish that Mr. Little ever saw, and relied on, either this statement or the Cigarette Advertising Code. *See* Plaintiff's Responses to Reynolds' Request for Admissions, 8/23/99, No. 25-27, Defendant's Exhibit G.

Based on the above-stated reasons, the Court grants Reynolds' motion for partial summary judgment on Plaintiff's common law fraud claims, and dismisses such claims because no genuine issue of material fact exists.[FN10]

> FN10. Having found that Plaintiff cannot establish Mr. Little's witnessing of, and reliance on, Reynolds' statements, the Court does not reach Reynolds' dubious argument that even if Mr. Little relied on such statements, such reliance was not objectively reasonable.

C. Plaintiff's Strict Liability Claim

Plaintiff alleges that Defendants are "strictly liable for Martin Little's tobacco-related injuries pursuant to S.C.Code Ann. § 15-73-10" because "[a]t the time of manufacture, distribution, marketing and/or sale, Defendants' cigarettes were in a condition that was unreasonably dangerous," and Defendants had "the ability to design, test, manufacture, market and/or sell non- or less-addictive, carcinogenic and pathologic cigarettes."Second Amended Complaint ¶¶ 62, 65, 66.

The South Carolina General Assembly adopted Restatement (Second) of Torts § 402A as the law governing strict liability, effective July 9, 1974. *See*S.C.Code Ann. §§ 15-73-10; 15-73-30; *Schall v. Strum. Ruger Co.*, 300 S.E.2d 735, 736 (S.C.1983). Pursuant to South Carolina law, "a cause of action resting upon strict liability under [S.C.Code Ann. § 15-73-10] does not exist in South Carolina where a product entering the stream of commerce prior to July 9, 1974, is alleged to have caused the injury thereafter."*Id.* at 737;*see also Lightner v. Duke Power Co.*, 719 F.Supp. 1310, 1316 (D.S.C.1989). This holding is grounded upon "the well-settled rule that a statute may not be applied retroactively in the absence of specific provision or clear legislative intent to the contrary."*Schall*, 300 S.E.2d at 737. Consequently, where a plaintiff has not used a manufacturer's product after July 9, 1974, that plaintiff cannot state a strict liability claim against the manufacturer, even when the injury occurs after that date. *See, e.g., Sizemore v. Georgia-Pacific Corp.*, 1996 WL 498410 at * 12 (D .S.C. March 8, 1996) (granting summary judgment to defendant on

plaintiff's strict liability claim where the product entered the stream of commerce in 1970).

*12 This Court, in its October 4, 1999 Order, stated that "to whatever extent plaintiff's second amended complaint states a claim for strict liability that is based on products that entered the stream of commerce prior to July 9, 1974, that claim is dismissed."Oct. 4, 1999 Order, at 4. The Court noted that Plaintiff's strict liability claim against Reynolds "may form an appropriate basis for a summary judgment motion."*Id.* at 4-5.Reynolds has accordingly moved for summary judgment on Plaintiff's strict liability claim, as it contends that the record demonstrates that Mr. Little stopped smoking Reynolds' cigarettes prior to July 9, 1974, and Plaintiff cannot base her strict liability claim on Reynolds' cigarettes placed in the stream of commerce before that date. Plaintiff counters that the record shows that a genuine issue of material facts exists regarding whether Mr. Little smoked Reynolds' cigarettes after July 9, 1974.

It is not disputed that when Mr. Little began smoking cigarettes, he smoked Reynolds' Winston cigarettes regularly, as he "was pretty much brand loyal." M. Little 10/26/98 Dep. at 114, Defendant's Exhibit A. It is also not disputed that at some point in the 1970s, Mr. Little stopped smoking Winston, and switched to a lower-tar brand of cigarettes manufactured by a company other than Reynolds. The dispute centers on just when did Mr. Little make that switch.

Reynolds points to Mr. Little's testimony that he ceased smoking Winston regularly as much as "25 years ago," (i.e.1973), and switched to Barclay "in the '70s." M. Little 10/27/98 Dep. at 176, Defendant's Exhibit B; M. Little 10/26/98 Dep. at 124, Defendant's Exhibit A. Reynolds further cites Mr. Little's testimony that he did not return to smoking Winston after smoking Barclay; rather, he moved to Carlton "in the '70s, early '70s, '74." *Id.* at 127.In addition, Reynolds maintains that Mr. Little's deposition testimony ties his switch from Winston to several other memorable events which allegedly occurred in 1974. First, Reynolds points out that Mr. Little testified that he underwent a "lifestyle change" that year, and tried to "live a healthier life." *Id.* at 53 (stating that this change "would have been in the early '70s, maybe 1974 or '75"). Part of this lifestyle change encompassed "getting rid of cigarettes." *Id.* Reynolds further states that Mr. Little testified that as a stepping-stone to quitting cigarettes altogether, he switched from Winston to Barclay, and then to Carlton, because each was promoted as having a lower tar- and nicotine-content, and he viewed these lower tar and nicotine cigarettes as promoting a healthier lifestyle. *Id.* at 124-25.Reynolds claims that Mr. Little also began running in 1974 as part of his new healthier lifestyle, as evidenced by the following testimony:

A: Well, as I said, running was probably the biggest visible thing you could see if you were looking at me and changing my lifestyle, but there was other smaller things along the way as well. And switching from Winston to a lower tar cigarette could well have come *before* the first time I ever put on any running shoes.

*13 Q: Okay.

A: Again this was-this was the 19-I'm going to say '74, in that time frame. I mean, nobody was running that I can-I don't think anybody was running then.

Defendant's Brief at 20 (quoting M. Little 2/24/99 Dep. at 61-61) (emphasis added by Reynolds). Finally, Reynolds points to Mr. Little's recollection that he stopped smoking Winston cigarettes in the same year that his daughter, Kathryn, was born, which was 1974. M. Little 10/27/98 Dep. at 179, Defendant's Exhibit B ("It was in that same year or thereabouts."); M. Little 2/24/99 Dep. at 56, Defendant's Exhibit D (confirming Kathryn's birthdate as October 31, 1974).

However, Reynolds does not tell the whole story of how and when Mr. Little switched from Reynolds' Winston cigarettes to other brands, as Mr. Little's testimony shows that he made a gradual transition from smoking Winston regularly to Carlton regularly somewhere between 1974 and 1978. Initially, the Court notes that Reynolds' assertion that Mr. Little stated that he ceased smoking Winston regularly as much as "25 years ago," (i.e.1973) provides an incomplete picture of his testimony on this point, as evidenced by the full testimony:

Q: Can you give me the-as specifically as you can give it to me, when it was that you would have stopped smoking Winston on a regular basis?

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A: No, I can't give you a date.

Q: Would it be sometime in the '70s?

A: That's right. I would say sometime around the mid 19-mid-'70s. That is all I can tell you. 20 years ago. 25 years ago.

M. Little 10/27/98 Dep. at 176, Defendant's Exhibit B. Thus, this portion of Mr. Little's deposition establishes only that he quit smoking Winston on a regular basis between twenty and twenty-five years ago (i.e. somewhere between 1973 and 1978).

Furthermore, as both parties accurately point out, the one constant in Mr. Little's testimony was his linking of the transition from Winston to lower tar and nicotine cigarettes to his healthier lifestyle change. Plaintiff's Brief at 14 (citing M. Little 2/24/99 Dep. at 45, 68-69, Plaintiff's Exhibit 4; M. Little 10/26/98 Dep. at 53, Plaintiff's Exhibit 1; M. Little 10/27/98 Dep. at 307, Plaintiff's Exhibit 2; M. Little 1/25/99 Dep. at 478, Plaintiff's Exhibit 3; M. Little 3/22/00 Dep. at 17, 23 Plaintiff's Exhibit 5). While Reynolds asserts that Mr. Little's testimony unequivocally establishes that this lifestyle change occurred in 1974, it is more accurate to say that his testimony shows that the change occurred sometime between 1974 and 1978. As pointed out by Plaintiff, Mr. Little testified that he began leading a healthier lifestyle at about the time his then-wife, Linda, moved out of the house, which was in 1976. Plaintiff's Brief at 14 (citing M. Little 2/24/99 Dep. at 56-57, Plaintiff's Exhibit 4 (indicating that lifestyle changes occurred at about the same time that Linda moved out); *id.* at 70 (agreeing that lifestyle change occurred sometime between 1974 and 1977); M. Little 3/22/99 Dep. at 16, Plaintiff's Exhibit 5 (stating that lifestyle change occurred in the "mid '70s"); M. Little 10/26/98 Dep. at 53, Plaintiff's Exhibit 1 (indicating that his lifestyle change may not have started until 1975 or "something like that")). Mr. Little stated that his first behavioral change of significance was becoming a runner. *Id.* (citing M. Little 2/24/99 Dep. at 58, Plaintiff's Exhibit 4). Although he began running while still living in Spartanburg, South Carolina, with Linda, he was not yet a regular runner.*Id.* (citing M. Little 2/24/99 Dep. at 70, Plaintiff's Exhibit 4 (asserting that his running at that point "was real spotty")). Rather, he became a serious runner after he and Linda separated in 1976, *id.*(citing M. Little 2/24/99 Dep. at 69, Plaintiff's Exhibit 4), and he did not work up to running 30 miles per week until his move to Corners Apartments in 1977. *Id.* (citing M. Little 2/24/99 Dep. at 69, Plaintiff's Exhibit 4). Mr. Little maintained that his shift to Carlton did not occur until after he had worked up to running 30 miles per week, in other words, sometime in 1977 or 1978.[FN11] Thus, this testimony tends to show that a genuine issue of material fact exists regarding whether Mr. Little was still smoking Reynolds' Winston cigarettes after July 9, 1974.[FN12]

FN11. Plaintiff's Brief at 14-15 (citing M. Little 10/26/98 Dep. at 135, Plaintiff's Exhibit 1). Although this testimony differs from Mr. Little's testimony that he "could" have switched to a lower-tar cigarette well before he ever put on running shoes, Mr. Little's testimony on this point was equivocal, as noted by use of the tentative word "could."

FN12. In the period during which Mr. Little made the transition from Winston to Carlton, he testified that he smoked Barclay for several months. M. Little 10/26/98 Dep. at 132, Plaintiff's Exhibit 1. Since, as stated *supra*, Mr. Little's testimony establishes that he switched to Carlton in approximately 1977, his smoking of Barclay for several months would still not push his days of smoking Winston back to a time prior to 1976.

*14 Mr. Little also remembered that he first tried a low-tar brand-either Barclay or Carlton-at a party held by his friend, Tommy Pierce, that he and Linda attended together after the birth of his daughter, Kathryn, in October 1974, but before he and Linda separated in 1976. M. Little 2/24/99 Dep. at 58-59, 62, Plaintiff's Exhibit 4; *see also* M. Little 10/27/98 Dep. at 179, Plaintiff's Exhibit 2 (concurring that his change from Winston "to something else" occurred "in the same year or thereabouts" that Kathryn was born). Mr. Little also testified at another point during his deposition that he was smoking Winston when Kathryn was born. M. Little 10/27/98 Dep. at 179, Plaintiff's Exhibit 2. This testimony also establishes an issue of dispute regarding whether Mr. Little switched from Winston to lower-tar cigarettes after

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July 9, 1974.

In addition, Mr. Little asserted that during his pre-Carlton experimentation period with various lower-tar cigarettes, he tried Winston Lights "when Winston brought them out as an alternative to Winston regulars."Plaintiff's Brief at 16 (citing M. Little 2/24/99 Dep. at 66-67, Plaintiff's Exhibit 4; M. Little 1/25/99 Dep. at 366-67, Plaintiff's Exhibit 3; M. Little 3/22/99 Dep. at 64, Plaintiff's Exhibit 5). He further recalled trying Winston Lights during the time he was smoking Winston. *Id.* (citing M. Little 10/27/98 Dep. at 314, Plaintiff's Exhibit 2). Reynolds has disclosed that it introduced Winston Lights nationwide on June 26, 1974. Reynolds' Response to Plaintiff's First Set of Interrogatories, Plaintiff's Exhibit 22. As Plaintiff contends, it would be highly improbable, as well as contradicted by his testimony, that Mr. Little became cognizant of Winston Lights on the very same day Reynolds introduced them, and smoked them only in the ensuing two weeks. Accordingly, this line of testimony further supports a finding that a question of fact exists regarding whether Martin smoked Reynolds' cigarettes after July 9, 1974.

Finally, Mr. Little asserted that he made his initial attempts to walk away from cigarettes in "1970-something," after he and Linda were divorced. M. Little 10/26/98 Dep. at 39-40, Plaintiff's Exhibit 1. Although he estimated that this first attempt occurred in the "early '70s," the record reflects that he and Linda divorced on October 3, 1977. M. Little 2/24/99 Dep. at 57, Plaintiff's Exhibit 4; M. Little 10/26/98 Dep. at 39-40, Plaintiff's Exhibit 1; M. Little 10/27/98 Dep. at 177-78, Plaintiff's Exhibit 2. Plaintiff thus rightly contends that "[t]his suggests that Martin's testimony regarding his initial switch from Winston to lower tar cigarettes, an event which he linked numerous times to his separation and subsequent divorce from Linda Curtis, actually occurred in the mid- to late-1970s rather than the early to mid-1970s as he initially seemed to recall."Plaintiff's Brief at 15-16.

In conclusion, Mr. Little's testimony shows that he made a gradual transition from Winston to a lower-tar brand, which started somewhere between 1974 and 1978. His testimony clearly shows that there is an issue of fact regarding whether he smoked his last Reynolds-brand cigarette on or before July 9, 1974, and it will be up to a jury to decide this question. Accordingly, Reynolds' motion for partial summary judgment on Plaintiff's strict liability claim is denied.

IV. *CONCLUSION*

*15 It is, therefore,

ORDERED, for the foregoing reasons that Reynolds' motion for partial summary judgment is GRANTED in part and DENIED in part. As to Plaintiff's claims for Mr. Little's addiction injuries, Reynolds' and Brown & Williamson's motion is GRANTED. As to Plaintiff's common law fraud claims, Reynolds' motion is GRANTED. As to Plaintiff's strict liability claims, Reynolds' motion is DENIED.

AND IT IS SO ORDERED.

D.S.C.,2000.
Little v. Brown & Williamson Tobacco Corp.
Not Reported in F.Supp.2d, 2000 WL 33957172 (D.S.C.)

END OF DOCUMENT

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Exhibit 6

LEXSEE



Positive
As of: Sep 16, 2008

GERALD JOSEPH VAN BUSKIRK, III, a Minor, by his Parents and Natural Guardians, GERALD J. VAN BUSKIRK, JR. and LORI ANN VAN BUSKIRK, and in Their Own Right, Plaintiffs, v. THE WEST BEND COMPANY Defendant, v. LORI ANN VAN BUSKIRK Additional Defendant.

CIVIL ACTION NO. 96-6945

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

100 F. Supp. 2d 281; 1999 U.S. Dist. LEXIS 9310; CCH Prod. Liab. Rep. P15,560

June 24, 1999, Decided
June 24, 1999, Filed, Entered

DISPOSITION: [**1] Motion of Defendant, The West Bend Company, for Summary Judgment GRANTED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant company filed a motion for summary judgment in a products liability suit filed by plaintiff parents, alleging that a deep fryer manufactured by defendant was defectively designed and caused plaintiffs' sons' injuries from hot oil. Defendant asserted that the deep fryer was not defectively designed.

OVERVIEW: Plaintiff mother was using a deep fryer manufactured by defendant company. Plaintiffs' six month old son pushed his walker against a microwave cart where the deep fryer was located and sustained injuries when hot oil spilled on him. Plaintiffs filed suit against defendant, alleging that the deep fryer was defectively designed and proximately caused their sons' injuries. Defendant filed a motion for summary judgment, which was granted. Plaintiff filed an appeal, which was denied on plaintiffs' alternate design theory, but remanded on the issue of whether the lack of stabilizing features constituted design defects. Defendant filed a motion for summary judgment, asserting that the deep fryer was not defectively designed. The court granted defendant's motion because plaintiffs' son was not the intended user of the deep fryer and strict liability did not apply to him. Further, the court held that plaintiff did not sufficiently establish that the deep fryer was unreasonably dangerous to justify imposition of liability on defendant and entitle plaintiffs to present the case to a jury. In reaching this conclusion, the court analyzed the case under the seven factor risk-utility analysis.

OUTCOME: The court granted defendant company's motion for summary judgment in a products liability suit filed by plaintiff parents on the basis of defective design. The court held that plaintiffs' son was not the intended user of the deep fryer and strict liability did not apply to him. Further, the court held that under an analysis of the seven factor risk-utility test, plaintiffs did not establish that the deep fryer was unreasonably dangerous.

CORE TERMS: fryer, cups, user, oil, lid, locking, summary judgment, alternative design, unreasonably dangerous, risk-utility, hot, consumer, kitchen, deep fryer, microwave oven, cooking, safer, top, french fries, genuine, warning, food, design defects, feasibility, counter, pot, tested, citation omitted, strict liability, manufacturer

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN1]Pursuant to Fed. R. Civ. P. 56(c), summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. A factual dispute is material only if it might affect the outcome of the suit under governing law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Opposition > General Overview
[HN2]To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). Further, the non-moving party has the burden of producing evidence to establish prima facie each element of its claim. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper.

Torts > Products Liability > Strict Liability
[HN3]In the product liability context, the court must decide, as a threshold matter, whether the evidence is sufficient, for purposes of the threshold risk-utility analysis, to conclude as a matter of law that the product was not unreasonably dangerous, not whether the evidence creates a genuine issue of fact for the jury.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Torts > Products Liability > Strict Liability
[HN4]The Pennsylvania supreme court adopted the Restatement (Second) of Torts, section 402(A), and made it a part of Pennsylvania's substantive law. Section 402(A) makes a seller of products strictly liable for the physical harm caused by a product sold in a defective condition unreasonably dangerous to the user. Section 402(A) requires the plaintiff to prove that: (1) the product was defective; (2) the defect existed when it left the hands of the manufacturer; and (3) the defect caused the harm.

Torts > Products Liability > Strict Liability
[HN5]In order for section 402(A) to apply, therefore, there must be: (1) a product; (2) a sale of that product; (3) a user or consumer; (4) defective condition, unreasonably dangerous; and (5) causation, that the product caused physical harm to the ultimate user or consumer or to his property. Courts applying Pennsylvania law must determine, initially and as a matter of law, whether the product in question is unreasonably dangerous. Otherwise, without a showing of a defect, the supplier of a product has no liability under Section 402(A).

Torts > Products Liability > Strict Liability
Torts > Transportation Torts > Motor Vehicles > Personal Vehicles
[HN6]In strict liability, the focus is on a defect in the product, regardless of fault, and that defect is determined in relation to a particular subset of the general population, the intended user who puts the product to its intended use.

Torts > Products Liability > Plaintiff's Conduct
Torts > Products Liability > Strict Liability
[HN7]Any ordinary person could expect a child to injure himself, if left unattended near a container of hot food. When a small child is left unattended and within reach of potentially harmful items such as knives, appliances or containers of hot food or liquids, accidental injuries can occur.

Torts > Products Liability > Plaintiff's Conduct
Torts > Products Liability > Strict Liability
Torts > Transportation Torts > Motor Vehicles > Personal Vehicles
[HN8]A user is defined therein as including those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it.

Torts > Products Liability > Plaintiff's Conduct
Torts > Products Liability > Strict Liability
[HN9]Thus far the courts, in applying the rule stated in Section 402(A), have not gone beyond allowing recovery to users and consumers.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Torts > Products Liability > Strict Liability
[HN10]The Pennsylvania supreme court set forth the standard for determining whether a product is "unreasonably dangerous" when it stated that questions of law and their resolution depends upon social policy. It is a judicial function to decide whether, under a plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint.

Insurance Law > General Liability Insurance > Coverage > Products & Workmanship
Torts > Products Liability > Strict Liability
[HN11]Pennsylvania law requires an initial determination by the court whether strict liability applies, decided under the following seven factor risk-utility analysis (1) the usefulness and desirability of the product; (2) the safety aspects of a product; (3) the availability of a substitute product; (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive; (5) the user's ability to avoid danger by the exercise of care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition, or the existence of suitable warnings or instructions; and (7) the feasibility, on the part of the manufacturer, of spreading the loss of setting the price of the product or carrying liability insurance.

Torts > Products Liability > Strict Liability
[HN12]The court must balance the utility of the product against the seriousness and likelihood of the injury and the availability of precautions that, though not foolproof, might prevent the injury.

Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Obvious Dangers
Torts > Products Liability > Strict Liability
[HN13]Hot oil is an open and obvious danger.

Insurance Law > General Liability Insurance > Coverage > Products & Workmanship
Torts > Products Liability > Plaintiff's Conduct
Torts > Products Liability > Strict Liability
[HN14]A manufacturer should not have to spread among its customers the economic loss resulting from injuries from a product that is not defective, and for which the risk of harm can be eliminated by operating the product properly and heeding given warnings.

COUNSEL: For GERALD JOSEPH VAN BUSKIRK, III, a Minor, by his Parents and Natural Guardians, GERALD J. VAN BUSKIRK, JR. and LORI ANN VAN BUSKIRK and in Their Own Right, PLAINTIFF: RICHARD S. SEIDEL, AGINS HAAZ & SEIDEL, L.L.P., PHILADELPHIA, PA USA.

For THE WEST BEND COMPANY, DEFENDANT: BASIL A. DI SIPIO, SUSAN E. SATKOWSKI, LAVIN, COLEMAN, O'NEILL, RICCI, FINARELLI & GRAY, PHILA, PA USA.

JUDGES: Robert F. Kelly, J.

OPINION BY: ROBERT F. KELLY

OPINION

[*282] *MEMORANDUM*

R.F. KELLY, J.

JUNE 24, 1999

Presently before the Court is the Motion of Defendant, The West Bend Company ("West Bend" or "Defendant"), for Summary Judgment against Plaintiffs. Plaintiffs instituted this product liability action against West Bend for injuries sustained by their six and one-half month old son, Gerald Joseph Van Buskirk, III ("Gerald"), on February 3, 1995. Plaintiffs claim design defects in West Bend's Four Cup Deep Fryer ("Four Cup Fryer") proximately caused Gerald's injuries. For the reasons which follow, West Bend's Motion is granted.

I. *FACTS.*

On February 3, 1995, Mrs. Van Buskirk was home with Gerald and decided [**2] to make herself lunch consisting of chicken nuggets and french fries. She placed the french fries in the Four Cup Fryer atop a microwave oven which sat on a wheeled microwave cart next to the kitchen counter. Mrs. Van Buskirk previously used the Four Cup Fryer on the counter top, [1] but on this occasion, she placed it on the microwave oven.

1 Without the Van Buskirk's knowledge or permission, the Four Cup Fryer was thrown away by Mr. Van Buskirk's sister at a later time but prior to Plaintiffs' filing suit.

The final time she checked whether the food was cooked, she placed Gerald in his walker in the living room, went back into the kitchen, and heard a whooshing noise behind her, indicating Gerald had entered the kitchen in his walker. Without turning around, she told him to leave the kitchen and then heard him scream. Immediately, she turned and saw his head and upper torso covered in hot oil. She picked him up from his walker and ran water over his head in the sink. Gerald sustained severe burns to his head [**3] and upper torso.

Plaintiffs filed this lawsuit alleging that the Four Cup Fryer was defectively designed and was the proximate cause of Gerald's injuries. West Bend filed a Motion [*283] for Summary Judgment which was granted with respect to liability. Plaintiffs appealed to the United States Court of Appeals for the Third Circuit. The Appellate Court affirmed Summary Judgment on Plaintiffs' non-retractable cord alternative design theory, but remanded the case for this Court to address whether the lack of stabilizing features and the lack of an interlocking lid constitute design defects of the Four Cup Fryer. West Bend brings this Motion for Summary Judgment on the basis that its Four Cup Fryer is not defectively designed.

II. *STANDARD.*

[HN1]Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex* [**4] *Corp. v. Catrett*, 477 U.S. 317, 323, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A factual dispute is material only if it might affect the outcome of the suit under governing law. *Id.* at 248.

[HN2]To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Further, the non-moving party has the burden of producing evidence to establish prima facie each element of its claim. *Celotex*, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. *Id.* at 322; *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 83 (3d Cir. 1987).

[HN3]In the product liability context, the court must decide, as a threshold matter, "whether the evidence is sufficient, for [**5] purposes of the threshold risk-utility analysis, to conclude as a matter of law that the product was not unreasonably dangerous, not whether the evidence creates a genuine issue of fact for the jury." *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1049 n.10 (3d Cir. 1997).

III. *DISCUSSION.*

Pennsylvania law governs this case because, in a diversity action, the applicable law is the substantive law of the state where the court is sitting. *Wallace v. Tesco Eng'g, Inc.*, 1996 U.S. Dist. LEXIS 2383, No. 94-2189, 1996 WL 92081, *1 (E.D.Pa. Mar. 1, 1996)(citation omitted), *aff'd*, 101 F.3d 694 (3d Cir. 1996). [HN4]The Pennsylvania Supreme Court adopted the Restatement (Second) of Torts, section 402(A) ("section 402(A)"), and made it a part of Pennsylvania's substantive law. *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966); Restatement (Second) of Torts § 402(A). Section 402(A) makes a seller of products "strictly liable for the physical harm caused by a product sold in a defective condition unreasonably dangerous to the user." *Jordon by Jordon v. K-Mart Corp.*, 417 Pa. Super. 186, 189, 611 A.2d 1328, 1330 (1992)(citing *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 94, 337 [**6] A.2d 893, 899 (1975)). Section 402(A) requires the plaintiff to prove that: (1) the product was defective; (2) the defect existed when it left the hands of the manufacturer; and (3) the defect caused the harm. *Ellis v. Chicago Bridge & Iron Co.*, 376 Pa. Super. 220, 226, 545 A.2d 906, 909 (1988)(citing *Berkebile*, 462 Pa. at 98, 337 A.2d at 898).

[HN5]In order for section 402(A) to apply, therefore, there must be: "(1) a product; (2) a sale of that product; (3) a user or [*284] consumer; (4) defective condition, unreasonably dangerous; and (5) causation - that the product caused physical harm to the ultimate user or consumer or to his property." *Riley v. Warren Mfg., Inc.*, 455 Pa. Super. 384, 395, 688 A.2d 221, 226 (1997)(citation omitted). Courts applying Pennsylvania law must "determine, initially and as a matter of law, whether the product in question is 'unreasonably dangerous.'" *Riley v. Becton Dickinson Vascular Access, Inc.*, 913 F. Supp. 879, 881 (E.D.Pa. 1995)(citations omitted). Otherwise, "without a showing of a defect, the supplier of a product has no liability under Section 402(A)." *Jordon*, 417 Pa. Super. at 189, 611 A.2d at 1330 (citing *Berkebile*, 462 Pa. at [**7] 94, 337 A.2d at 899).

A. INTENDED USERS OF THE FRYER.

In order for section 402(A) strict liability to apply in this case, Gerald has to be an intended user of the Four Cup Fryer. "[HN6]In strict liability, the focus is on a

defect in the product, regardless of fault, and that defect is determined in relation to a particular subset of the general population : the intended user who puts the product to its intended use." *Griggs v. BIC Corp.*, 981 F.2d 1429, 1438 (3d Cir. 1992)(citation omitted). Despite Mrs. Van Buskirk's testimony at her deposition that she was not preparing the french fries for her son's use and enjoyment, but rather for herself, (Dep. of Lori Ann Van Buskirk of 3/14/97 at 81, 101), Plaintiffs state in their response to Defendant's Motion for Summary Judgment that Mrs. Van Buskirk was preparing the french fries "for her son's lunch. That fact is not in dispute." (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. at 11-12.) Just as "no one would reasonably anticipate that a two year old [child] would be using or given free access to a fondue pot" *Rock v. Oster Corp.*, 810 F. Supp. 665, 667 n.1 (D.Md. 1991), *aff'd*, 983 F.2d 1057 (4th Cir. [**8] 1993), it is unreasonable to anticipate that a six and one-half month old child would be using a deep fryer. This Court finds persuasive the statement that "[HN7]any ordinary person could expect a child to injure himself, . . . if left unattended near a container of hot food. . . .When a small child is left unattended and within reach of potentially harmful items such as knives, appliances or containers of hot food or liquids, accidental injuries can occur." *Kelley by Kelley v. Rival Mfg. Co.*, 704 F. Supp. 1039, 1044 (W.D.Okla. 1989)(child burned pulling crock pot containing hot baked beans from kitchen table). Plaintiffs contend that because there was no age restriction in the instruction booklet, children could use the Four Cup Fryer. (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. at 13.) This Court is not persuaded by Plaintiffs' argument and finds that it is not reasonable to anticipate that a six and one-half month old child would be using or given free access to a deep fryer.

Plaintiffs, in arguing that Gerald is a user of the Four Cup Fryer, rely on the definition of "user" found in the commentary to section 402(A). [HN8]A user is defined therein as "including [**9] those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it. . . ." *Riley v. Warren*, 455 Pa. Super. at 395, 688 A.2d at 227; Restatement (Second) of Torts § 402(A), comment (l). Thus, Plaintiffs contend that Gerald was a "passive beneficiary" of the Four Cup Fryer and compare Gerald to a passenger in an automobile who passively enjoys the benefit of the motor vehicle. (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. at 12.) Defendant correctly argues that Gerald was not "passively enjoying" the benefits of the deep fryer since he was only old enough to eat Gerber jar foods and cereal (Dep. of Lori Ann Van Buskirk of 3/14/97 at 80), not french fries.

Gerald was not a passive beneficiary, he was a bystander. "[HN9]Thus far the courts, in applying the rule stated in this Section [402(A)], [*285] have not gone beyond allowing recovery to users and consumers. . . ." *Riley v. Warren*, 455 Pa. Super. at 395, 688 A.2d at 227. As a bystander, Gerald is precluded from recovery under section 402(A) because "casual bystanders, and others who may [**10] come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery." *Id.* at 397, 688 A.2d at 227. Because Gerald was not an intended user of the Four Cup Fryer, strict liability does not apply and Defendant's Motion for Summary Judgment is granted. For purposes of this Motion, however, this Court must also determine whether the fryer was unreasonably dangerous or defective under the facts alleged.

B. UNREASONABLY DANGEROUS PRODUCT : *AZZARELLO* ANALYSIS.

[HN10]The Pennsylvania Supreme Court set forth the standard for determining whether a product is "unreasonably dangerous" when it stated:

> Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? Should adequate warnings of the dangerous propensities of an article insulate one who suffers injuries from those propensities? When does the utility of a product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends upon social policy.
>
> . . .
>
> It is a judicial function to decide whether, under plaintiff's [**11] averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint.

Azzarello v Black Bros. Co., Inc., 480 Pa. 547, 558, 391 A.2d 1020, 1026 (1978). Thus, [HN11]Pennsylvania law requires an initial determination by this Court whether strict liability applies, decided under the following seven factor risk-utility analysis:

> (1) the usefulness and desirability of the product - its utility to the user and the public as a whole;

(2) the safety aspects of a product - the likelihood that it will cause injury and the probable seriousness of the injury;

(3) the availability of a substitute product which would meet the same need and not be as unsafe;

(4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;

(5) the user's ability to avoid danger by the exercise of care in the use of the product;

(6) the user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public [**12] knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and

(7) the feasibility, on the part of the manufacturer, of spreading the loss of setting the price of the product or carrying liability insurance.

Fitzpatrick v. Madonna, 424 Pa. Super. 473, 476, 623 A.2d 322, 324 (1993)(citing Dambacher by Dambacher v. Mallis, 336 Pa. Super. 22, 50 n.5, 485 A.2d 408, 423 n.5 (1984) and John W. Wade, *On the Nature of Strict Tort Liab. for Prods.*, 44 Miss.L.J. 825, 837-38 (1973)). Even minors like Gerald must prove the requisite elements of causation and show a defect which makes the product unreasonably dangerous. Colosimo v. May Dep't Store Co., 466 F.2d 1234 (3d Cir. 1974). An examination of each risk-utility factor follows.

1. *Usefulness and Desirability of the Product - Its Utility to the User and to the Public.*

The utility of the Four Cup Fryer on February 3, 1995 is the first factor this [*286] Court must consider in its "unreasonably dangerous" risk-utility analysis. Defendant contends that deep fryers, like other kitchen appliances, make cooking easier. (Brief in Supp. Def.'s Mot. for Summ. J. at 8.) Plaintiffs' [**13] expert, Mr. Ver Halen, also states the fryer "presents an economical product, convenient to use for cooking a variety of deep fat fried foods (popular in our society)." (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. Ex. L.) Furthermore, the Van Buskirks repeatedly used the Four Cup Fryer. Mrs. Van Buskirk acknowledges use of the Four Cup Fryer prior to February 3, 1995, but cannot remember the exact number of times she used it. (Dep. of Lori Ann Van Buskirk of 3/14/97 at 33.) Mr. Van Buskirk used the Four Cup Fryer at least forty times. (Dep. of Gerald J. Van Buskirk, Jr. at 22.) The Van Buskirks' repeated use of the Four Cup Fryer is evidence of its utility.

Plaintiffs suggest that the addition of low-cost safety devices would make this fryer safer and still be economically feasible. (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. at 16-20.) This argument goes beyond the scope of the first risk-utility factor and will be addressed in section III.B.4. *supra.*

2. *Safety Aspects.*

Plaintiffs' experts rely upon Consumer Product Safety Commission ("CPSC") data and a CPSC report generated by the Artech Corporation ("Artech") to demonstrate [**14] that the Four Cup Fryer is unsafe. (Def.'s Brief in Supp. Def.'s Mot. for Summ. J. Ex. O.) This CPSC data, comprised of seven consumer product injury incidents, relates to another fryer brand, not West Bend's Four Cup Fryer. The Artech report data is likewise comprised of testing performed on non-West Bend products. The only West Bend product liability lawsuit involved a slotted spoon left in a two-cup fryer which caused the fryer to tip over. (Dep. of Joanne Turchany at 42.) There is no evidence of consumer complaints or lawsuits involving the Four Cup Fryer.

Defendant notes that this District Court in Monahan v. Toro Co., 856 F. Supp. 955, 959 (E.D.Pa. 1994), observed that the CPSC, in a four year study, estimated an average of 19,100 injuries regarding riding lawn mowers requiring emergency room treatment and estimated 7.65 million riding mowers were in use during those four years. Therefore, only 2.5 out of every 1,000 riding mowers were associated with injuries requiring emergency room treatment. *Id.* The *Monahan* court found the likelihood of serious injury was low since the CPSC reported 75 deaths per year, or one death for every 102,000 operating riding mowers. [**15] *Id.* Approximately 500,000 Four Cup Deep Fryers were manufactured and distributed by West Bend in the ten year period preceding February 3, 1995, with only one other product liability lawsuit filed against West Bend. (Dep. of Gregory Miller at 60.) This statistic, as well as the relatively low number of reported consumer accidents with non-West Bend fryers presented by Plaintiffs, weighs in favor of the safety of the Four Cup Fryer. Merely because "some injuries may occur does not mean that a [product] is defective." Monahan, 856 F. Supp. at 959; Shetterly v. Crown Controls Corp., 719 F. Supp. 385, 400 (W.D.Pa. 1989), *aff'd*, 898 F.2d 142 (3d Cir. 1990).

3. *Availability of a Safer, Substitute Product.*

The Court of Appeals for the Third Circuit remanded this case with instructions that this Court decide whether stabilizing features and a locking lid would make the Four Cup Fryer safer. Plaintiffs' mechanical engineering expert, Richard Ver Halen, proposes a number of alternative designs of the Four Cup Fryer incorporating both stabilizing features and a locking lid including : (1) suction cups on the fryer's feet; (2) a cover with a locking lid similar to those [**16] found on pressure cookers but with fewer locking tabs; (3) various wall, [*287] cabinet or counter top mounted designs attached with brackets and having alternative cord features or an integral electrical connector. (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. Ex. M.) There is no evidence that Mr. Ver Halen tested these alternative designs. West Bend tested similar alternative designs in its product development, but these alternatives were discarded for safety reasons including risk of oil spillage and inability to adhere suction cups or other non-skid components to surface materials. (Dep. of Gregory Miller at 58-60.)

The proposed alternative design must be "safer overall." *Riley v. Becton*, 913 F. Supp. at 886. As Defendant points out, *Riley v. Becton* stands for the proposition that if the risk of injury is not eliminated by the proposed safety device, then the proposed alternative design is not, in fact, a safer substitute product. (Def.'s Reply Mem. Law in Supp. of Def.'s Mot. for Summ. J. at 8). The proposed alternative designs proffered by Mr. Ver Halen cannot, therefore, be classified as overall safer substitutes because the risk of injury is not eliminated [**17] by the proposed safety devices.

Another alternative design presented by Plaintiffs' expert incorporates a locking lid. T-Fal, a competitor of West Bend, manufactured a deep fryer with a locking lid in 1995. (Dep. of Gregory Miller at 20.) Plaintiffs argue that this locking lid, if incorporated into the Four Cup Fryer, would have prevented Gerald's injuries. The accident involving Gerald, however, occurred during the cool-down phase of the deep frying process. The existence of the T-Fal locking lid model is therefore irrelevant to this case. The user instructions on the T-Fal model advise that the locking lid should be removed or not used in the cool-down of the fryer and oil. (Brief in Supp. of Def.'s Mot. for Summ. J. Ex. S.) West Bend itself began manufacturing a fryer in 1998 which incorporates a locking lid with a charcoal filter for use during cooking. The purpose of this fryer lid is to eliminate cooking odors, not for use during cooling. (Brief in Supp. of Def.'s Mot. for Summ. J. at 14.) Plaintiffs have not come forward with sufficient evidence to prove that the accident would not have occurred if the Four Cup Fryer was used with the cover removed during the cooling phase, [**18] as recommended in the West Bend Deluxe Deep Fryer instruction manual. (Brief in Supp. of Def.'s Mot. for Summ. J. Ex. T.) Accordingly, no safer, available substitute fryer existed at the time of Gerald's accident.

4. *Elimination of the Unsafe Character of the Product without Impairing its Usefulness or Making It Too Expensive.*

Defendant suggests, and this Court agrees, that adding a lid to a fryer does not eliminate the obvious danger of working with hot oil, especially present when the oil is uncovered and cooling. (Brief in Supp. of Def.'s Mot. for Summ. J. at 16.) The addition of a locking lid to the Four Cup Fryer would impair the cooking process because the user would not be able to view the food to determine if it is finished cooking. (Dep. of Gregory Miller at 67-68.) [HN12]This Court must "balance 'the utility of the product against the seriousness and likelihood of the injury and the availability of precautions that, though not foolproof, might prevent the injury.'" *Surace*, 111 F.3d at 1049-50 (quoting *Burch v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, 450, 467 A.2d 615, 618 (1983)).

Plaintiffs provide cost information and projections for their alternative fryer designs. [**19] (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. Ex. M.) None of the proposed alternative designs were tested to prove their feasibility. Plaintiffs note that the *Surace* court found that evidence that a particular design concept had been used in other contexts and tested and proven on the machines at issue was sufficient to satisfy the fourth prong of the risk-utility test. (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. [*288] at 26.) Although West Bend utilized locking lids on its coffee pots, (Dep. of Richard Franke at 51), the locking lids had not been tested and proven feasible on the Four Cup Fryer. Thus, any cost projections are unusable since the feasibility of the alternative designs is unknown.

5. *The User's Ability to Avoid Danger by Exercising Care in the Use of the Product.*

This Court must evaluate whether Mrs. Van Buskirk acted as an "ordinary" consumer in avoiding dangers associated with working with hot oil. *Berkebile*, 462 Pa. at 96 n.6, 337 A.2d at 899 n.6. Plaintiffs contend that Mrs. Van Buskirk used care in placing the Four Cup Fryer on the only available cooking surface, the microwave oven. (Brief of Pls. in Supp. of [**20] Resp. in Opp'n to Mot. Summ. J. of Def. at 28.) Based upon the evidence provided, the counter top under the kitchen cabinet was an area she had always used in the past which had a dry, level and heat-resistant surface. [2] In order to avoid the necessity of cleaning spattered oil from the kitchen cabinets, however, she placed the Four Cup Fryer on top of the microwave. (Dep. of Lori Ann Van Buskirk of 4/14/97 at 182-183.) Mr. Van Buskirk

testified that he always placed the fryer on the counter top. (Dep. of Gerald J. Van Buskirk, Jr. at 25-26.) At issue, then, is whether Mrs. Van Buskirk exercised care by placing the Four Cup Fryer on top of the microwave oven.

> 2 These circumstances are recommended in West Bend's instructions for Four Cup Fryers. (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. Ex. G at 3.) Mrs. Van Buskirk testified at deposition that she reads any product manuals and brochures when she buys a product so that she "can figure out how to use it." (Dep. of Lori Ann Van Buskirk of 3/14/97 at 51-52.)

[**21] Plaintiffs claim there was no testimony that the microwave cart and microwave oven were in any way unstable. (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. at 28.) Merely because no testimony was elicited that the cart was unstable does not impliedly mean that it was, in fact, stable. The cart was wheeled, therefore it was moveable. Just as the instructions for use warned that "serious hot-oil burns may result from a deep fat fryer being pulled off a countertop," (Brief of Pls. in Supp. of Resp. in Opp'n to Mot. Summ. J. of Def. Ex. G at 3), so too could serious hot-oil burns result from a deep fat fryer being pulled off or jarred from atop a microwave oven. Thus, the microwave oven top was not a reasonable location for the Four Cup Fryer and Mrs. Van Buskirk could have avoided danger associated with working with the Four Cup Fryer by not placing the Four Cup Fryer on the microwave oven.

6. The User's Anticipated Awareness of the Dangers and Their Avoidability.

[HN13]Hot oil is an open and obvious danger. *Rock v. Oster*, 810 F. Supp. at 1057 (no design defect where two year old child sustained oil burns from entanglement in electrical cord which tipped over [**22] fondue pot); Scoby v. Vulcan-Hart Corp., 211 Ill. App. 3d 106, 569 N.E.2d 1147, 155 Ill. Dec. 536 (1991)(no design defect where restaurant worker fell into fryer and was burned by oil); Kelley, 704 F. Supp. at 1044 (no design defect where child pulled crock pot of baked beans off kitchen table and severely burned). Because of the inherently dangerous nature of working with or around hot oil, Plaintiffs argue that there should have been a consumer warning in the product instructions that the oil would not cool immediately. Defendant contends, however, "this accident did not happen because [Mrs. Van Buskirk] did not know the oil was still hot." (Def.'s Reply Mem. of Law in Supp. of Def.'s Mot. for Summ. J. at 10.)

Mrs. Van Buskirk was aware of the danger that the oil would be hot and require some cooling. She stated at deposition, "when you would use the fryer and you [*289] would use the oil, after it cooled down, you would put the lid on it and put it back in the refrigerator so you could use it again." (Dep. of Lori Ann Van Buskirk of 3/14/97 at 31-32.) Even if there had been a warning about the length of time needed for the oil to cool, the accident occurred immediately after [**23] Mrs. Van Buskirk removed the french fries from the Four Cup Fryer. Therefore, any proposed warning regarding the length of cool-down time would not have prevented this accident.

7. Feasibility on the Part of West Bend of Spreading the Loss.

The final risk-utility factor is the feasibility, on the part of West Bend, of spreading the loss of a defective fryer by setting the price of the fryer or carrying liability insurance. Analysis of the previous six risk-utility factors reveals that the Four Cup Fryer is not defective. As the *Monahan* Court held, [HN14]a manufacturer "should not have to spread among its customers the economic loss resulting from injuries from a product that is not defective, and for which the risk of harm can be eliminated by operating the product properly and heeding given warnings." Monahan, 856 F. Supp. at 964. An examination of this final risk-utility factor is therefore unnecessary.

IV. *CONCLUSION.*

Based on the above reasons, the seven risk-utility factors weigh in favor of West Bend and against Plaintiffs. Plaintiffs have not sufficiently established that the Four Cup Fryer is unreasonably dangerous to justify imposition of liability [**24] on West Bend and entitle Plaintiffs to present their case to a jury. Thus, West Bend's Motion for Summary Judgment is granted.

An Order follows.

ORDER

AND NOW, this 24th day of June, 1999, upon consideration of the Motion of Defendant, The West Bend Company, for Summary Judgment and all Responses and Replies thereto, it is hereby ORDERED and DECREED that Defendant's Motion is GRANTED.

BY THE COURT:

Robert F. Kelly, J.

Exhibit 7

LEXSEE



Positive
As of: Sep 16, 2008

RICKY L. RILEY, AND JOAN M. RILEY, COBY J. RILEY, A MINOR, BY RICKEY L. RILEY AND JOAN M. RILEY, HIS GUARDIANS, Appellants v. WARREN MANUFACTURING, INC. AGRICULTURAL COMMODITIES, INC AND A.W. STAUFFER & SONS, INC, Appellee

No. 00898 Harrisburg 1995

SUPERIOR COURT OF PENNSYLVANIA

455 Pa. Super. 384; 688 A.2d 221; 1997 Pa. Super. LEXIS 180; CCH Prod. Liab. Rep. P14,905

January 21, 1997, FILED

PRIOR HISTORY: [***1] Appeal from the ORDER ENTERED November 09, 1995 Docketed November 13, 1995 In the Court of Common Pleas of YORK County, Civil, No. 92 SU 00001 01.

DISPOSITION: The judgment entered by the Court of Common Pleas of York County is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, guardians on behalf of a minor child, appealed from a judgment of the Court of Common Pleas of York County (Pennsylvania), which issued a directed verdict in favor of defendant manufacturing company. Plaintiffs contended that the design of a bulk feed trailer manufactured by defendant was defective. The basis of the directed verdict was that plaintiffs failed to prove that the bulk feed trailer was unreasonably dangerous.

OVERVIEW: Plaintiff minor child was injured by a bulk feed trailer manufactured by defendant manufacturer. Plaintiffs, guardians of the minor child, filed a products liability action against defendant and others. The others settled, and the case went to trial against defendant. The trial court entered judgment on a directed verdict for defendant, and plaintiffs appealed. The reviewing court found that the trial court was correct in holding as a matter of law that the bulk feed trailer was not unreasonably dangerous. The evidence established that a person could not be injured without placing a hand into the discharge tube and that there was no reason to do so while the machine was engaged. The evidence did not demonstrate that the trailer was unsafe as designed for its intended use. The court rejected plaintiffs' argument that it was "foreseeable" that someone might place their hand inside the discharge tube. The court determined that a child was never the intended consumer of the product and had no reason to come in contact with it. Therefore, plaintiff child was clearly an "obvious unintended user."

OUTCOME: Directed verdict for defendant manufacturer was affirmed. The trial court was correct in holding as a matter of law that the bulk feed trailer was not unreasonably dangerous. The evidence established that a person could not be injured without placing a hand into the discharge tube and that there was no reason to do so while the machine was engaged. The evidence did not demonstrate that the trailer was unsafe as designed for its intended use.

CORE TERMS: user, consumer, trailer, tube, feed, unreasonably dangerous, manufacturer, airlock, seller, blade, bulk, strict liability, foreseeable, warning, products liability, social policy, foreseeability, unsafe, matter of law, products liability, manufacturing, unintended, finger, rule stated, physical harm, citation omitted, machine, lighter, plate, bulk-feed

LexisNexis(R) Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]In reviewing a trial court's decision to direct a verdict in favor of a defendant, the court must view the evidence presented in the light most favorable to plaintiff and determine whether plaintiff failed to prove his case as a matter of law. If a jury could have reasonably concluded on the basis of the evidence and all reasonable inferences therefrom that liability should rest with the appellee, then the decision to direct a verdict must be reversed. In examining the trial court's determination to direct verdict, the court's standard of review is plenary, as it is with any review of questions of law.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview
Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Torts > Products Liability > General Overview
[HN2]Court control of jury action in products liability cases is more extensive than in an ordinary negligence action. It is a judicial function to decide whether, under the plaintiff's version of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the claims of the complaint.

Torts > Products Liability > Design Defects
Torts > Products Liability > Manufacturing Defects
Torts > Products Liability > Strict Liability
[HN3]In products liability cases, Restatement (Second) of Torts § 402A (1965) has been adopted as the law of Pennsylvania, and to prevail, the plaintiff must prove (1) that the product was defective, (2) that the defect existed when it left the hands of the defendant, and (3) that the defect caused the harm. The threshold inquiry in all products liability cases is whether there is a defect. This threshold can be crossed in one of two ways: either by proving a breakdown in the machine or a component thereof, traditionally known as a manufacturing defect; or in cases where there is no breakdown, by proving that the design of the machine results in an unreasonably dangerous product, traditionally known as a design defect.

Torts > Products Liability > Strict Liability
[HN4]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 (b) it is expected to and does reach the user or consumer without a substantial change in the condition in which it is sold. The rule applies although (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.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Torts > Products Liability > Strict Liability
[HN5]The question of whether a product is unreasonably dangerous is a question of law. In answering this question a court is essentially making a social policy determination and acting as both a social philosopher and a risk-utility economic analyst. The court considers certain factors in making this determination: The gravity of the danger posed by the challenged design; the likelihood that such danger would occur; the mechanical feasibility of a safer design; and the adverse consequences to the product and to the consumer that would result from a safer design.

Insurance Law > General Liability Insurance > Coverage > Products & Workmanship
Torts > Products Liability > Strict Liability
[HN6]Courts consider these factors in determining whether a product is unreasonably dangerous: (1) The usefulness and desirability of the product; its utility to the user and to the public. (2) The safety aspects of a product; the likelihood that it will cause injury, and the probable seriousness of the injury. (3) The availability of a substitute product which would meet the same need and not be as unsafe; (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. (5) The user's ability to avoid danger by the exercise of care in the use of the product. (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions. (7) The feasibility on the part of the manufacturer, of spreading the loss of setting the price of the product or carrying liability insurance.

Civil Procedure > Appeals > Standards of Review > General Overview
[HN7]An appellate court may affirm the decision of the trial court if it is correct on an alternative basis.

Torts > Products Liability > Strict Liability
Torts > Transportation Torts > Motor Vehicles > Personal Vehicles
[HN8]In order to prove a claim for strict liability in tort, a plaintiff must prove, inter alia, that he is a user or consumer of the product. A "user" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Torts > Products Liability > Strict Liability
[HN9]It is inappropriate to discuss foreseeability, a negligence principal, when analyzing a products liability theory.

Torts > Negligence > Duty > General Overview
Torts > Products Liability > Design Defects
Torts > Products Liability > Strict Liability
[HN10]In strict liability, the focus is on a defect in the product, regardless of fault and that defect is determined in relation to a particular subset of the general population: the intended user who puts the product to its intended use. In negligence, the focus is on the reasonableness of a defendant's conduct, and this reasonableness is determined in relation to a different subset of the general population, and that is conceivably broader: anyone who foreseeably may be subject to an unreasonable risk of foreseeable harm. In strict liability, the plaintiff need not show fault, but only prove a product defect. A product cannot be defective when its design and performance meet all of the requirements of the intended user, regardless of the foreseeability of misuse by unintended users. In negligence, the plaintiff must prove fault of the manufacturer, which is an element not required in strict liability law. The scope of inquiry, however, expands because of the duty to unintended but foreseeable users.

Torts > Negligence > Duty > General Overview
Torts > Products Liability > Strict Liability
[HN11]Foreseeability is a factor of the "reasonable man" standard in negligence and has no place in a products liability case.

Torts > Products Liability > Strict Liability
[HN12]The relevant inquiry where the product is not otherwise defective is not foreseeability of harm, but whether that harm was to an intended user.

Torts > Products Liability > Strict Liability
[HN13]A product is defective when it leaves the supplier's or manufacturer's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use. This concept of intended use a fortiori includes the participation of an intended user using a product for its intended use.

Torts > Products Liability > Strict Liability
Torts > Transportation Torts > General Overview
[HN14]Any motorized vehicle carries certain substantial risks to the user, and such products are not unreasonably dangerous merely because they may be involved in accidents or because an operator may be injured during their use. Additionally, there are certain risks that as a matter of law, or social policy, cannot support imposition of strict liability.

JUDGES: BEFORE: McEWEN, P.J., SCHILLER, AND BROSKY, JJ. OPINION BY: SCHILLER, J.

OPINION BY: SCHILLER

OPINION

[**223] [*388] OPINION BY: SCHILLER, J.

FILED JAN 21 1991

Appellants, Rickey L. Riley, Joan M. Riley and Coby Riley, bring this appeal from the judgment entered by the Court of Common Pleas of York County on a directed verdict in favor of appellee Warren Manufacturing, Inc. We affirm.

FACTS:

The facts in this case are not in dispute. Appellee Warren Manufacturing, Inc. ("Warren") is a manufacturer of bulk feed trailers which are used to transport animal feed from suppliers to various farms. Warren equips its trailers with an airlock device, manufactured by A.W. Stauffer & Sons ("Stauffer"), which forces the feed from the trailer through a discharge tube located at the rear of the truck. The airlock mechanism consists of eight blades or vanes that rotate at a high speed in order to expel the feed. These blades are located 6 3/4 inches from the end of the discharge [***2] tube. A steel hose or "elbow" is attached to the discharge tube to prevent

the feed from blowing in all direction Agricultural Commodities, Inc. ("AgCom") used such a bulk feed trailer, which it had purchased from Warren, to supply its customers with bulk feed.

On August 2, 1991, James Krichten, an employee of AgCom was operating the bulk feed trailer. Krichten's grandson, Coby Riley, ("Coby") accompanied him as he made his regular stops to deliver the feed. When Krichten and Coby returned to AgCom, Krichten activated the airlock in order to discharge residue. At the same time, Coby placed his fingers into the discharge tube, making contact with the blades of the airlock device. As a result, Coby had his left index, middle, and ring finger, along with the tip of his left pinky cut off. Surgeons were able to re-attach his index and middle fingers; Coby's ring finger was not located.

[*389] Appellants sued AgCom, Stauffer and Warren. AgCom and Stauffer settled with appellants before trial; the case proceeded to trial against Warren on the sole theory of products liability. Appellants contended that the design of the trailer was defective because the opening to the airlock was unguarded and [***3] unsafe. At the close of appellants' evidence, Warren moved for a compulsory non-suit, which was denied. However, after presenting its case, Warren moved for a directed verdict, which was granted. The basis of the directed verdict was that appellants failed to prove that the bulk-feed trailer was unreasonably dangerous. Appellants' motions for post-trial relief were denied and this appeal followed.

DISCUSSION:

The issue in this case is whether the trial court erred in directing a verdict in favor of [**224] appellee on the ground that the trailer design was not "unreasonably dangerous."

[HN1]In reviewing a trial court's decision to direct a verdict in favor of a defendant, we must view the evidence presented in the light most favorable to plaintiff and determine whether plaintiff failed to prove his case as a matter of law. *Edwards v. Brandywine Hospital*, 438 Pa. Super. 673, 678, 652 A.2d 1382, 1384 (1995). If a jury could have reasonably concluded on the basis of the evidence and all reasonable inferences therefrom that liability should rest with the appellee, then the decision to direct a verdict must be reversed. *Lattanze v. Silverstrini*, 302 Pa. Super. 217, 220, 448 A.2d 605, 606 [***4] (1982). In examining the trial court's determination to direct verdict, our standard of review is plenary, as it is with any review of questions of law. *Phillips v. A-Best Products Co.*, 542 Pa. 124, 130, 665 A.2d 1167, 1170 (1995).

[HN2]Court control of jury action in products liability cases is more extensive than in an ordinary negligence action. *Dambacher by Dambacher v. Mallis*, 336 Pa. Super. 22, 47, 485 A.2d 408, 422 (1983). In *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 558, 391 A.2d 1020, 1026 (1978), the Supreme Court held that it is a judicial function to decide whether, under the plaintiff's version of the facts, recovery would be [*390] justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averrants of the complaint. *Id.* at 558, 391 A.2d at 1026.

[HN3]In products liability cases, § 402A of the Restatement (Second) of Torts has been adopted as the law of this Commonwealth, *Webb. v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), and to prevail, the plaintiff must prove (1) that the product was defective, (2) that the defect existed when it left the hands of the defendant, and [***5] (3) that the defect caused the harm. *Ellis v. Chicago Bridge & Iron Co.* 376 Pa. Super. 220, 235, 545 A.2d 906, 909 (1988). [1] The threshold inquiry in all products liability cases is whether there is a defect. *Dambacher, supra* at 52, 485 A.2d at 425. This threshold can be crossed in one of two ways: either by proving a breakdown in the machine or a component thereof, traditionally known as a manufacturing defect; or in cases where there is no breakdown, by proving that the design of the machine results in an unreasonably dangerous product, traditionally known as a design defect. *See Ellis v. Chicago Bridge & Iron Co., supra.* The latter is the issue that is before us in this case.

1 [HN4]§ 402A reads in full as follows:

> "(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
>
> (b) it is expected to and does reach the user or consumer without a substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (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."

Restatement (Second) of Torts, § 402A (1965).

[***6] [HN5]

The question of whether a product is unreasonably dangerous is a question of law. *Azzarello, supra* at 556, 391 A.2d at 1026. In answering this question a court is essentially making a social policy determination and acting as both a social philosopher and a risk-utility economic analyst. *Fitzpatrick* [*391] *v. Madonna*, 424 Pa. Super. 473, 476, 623 A.2d 322, 324 (1993). [2] In *Dambacher*, [**225] *supra*, this Court identified certain factors to consider in making this determination:

> The gravity of the danger posed by the challenged design; the likelihood that such danger would occur; the mechanical feasibility of a safer design; and the adverse consequences to the product and to the consumer that would result from a safer design. (citation omitted).

Id. at 50 n.5, 485 A.2d at 423 n.5. The Court also cited to additional factors, which included:

> [HN6](1) The usefulness and desirability of the product - its utility to the user and to the public as a whole.
>
> (2) The safety aspects of a product - the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe;
>
> (4) [***7] The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> [*392] (7) The feasibility on the part of the manufacturer, of spreading the loss of setting the price of the product or carrying liability insurance.

These additional factors were derived from an article by Dean John Wade of Vanderbilt University, "On the Nature of Strict Tort Liability for Products," 44 Miss.L.J. 825, 837-38 (1973).

2 In *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 558, 391 A.2d 1020, 1026 (1978), the Court stated:

> The mere fact that we have approved Section 402A, and even if we agree that the phrase "unreasonably dangerous" serves a useful purpose in predicting liability in this area, it does not follow that this language should be used in framing the issues for the jury's consideration. Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? Should adequate warnings of the dangerous propensities of an article insulate one who suffers injuries from those propensities? When does the utility of a product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends upon social policy.

Id. at 557, 391 A.2d at 1026.

[***8] It is appellants' contention that the appellee was required to persuade the Court as a matter of law on each of the 7 factors identified by Wade in determining whether a product is unreasonably dangerous. [3] We disagree. The above factors are merely suggestions for the Court to consider when making its social policy analysis.

3 Appellants rely on *Shetterly v. Crown Controls Corp.*, 719 F. Supp. 385 (W.D.Pa. 1989), *aff'd*, 898 F.2d 142 (3rd Cir. 1990), for this proposition. There, the federal court stated: "This trial court is of the opinion that the list of factors approved by the Superior Court in *Dambacher* [336

> Pa. Super. 22, 485 A.2d 408 (1983)] ... are the most appropriate guidance for this trial court to use in making the determination as to whether or not the utility of (the product) outweighs the danger inherent in its use."
>
> However, nowhere in this case, or subsequent cases, does the federal court hold that each of the 7 factors must be proven. They are merely factors to be considered in the Court's overall social policy analysis.

[***9] In the instant case, the trial court considered the Azzarello standard as well as the "Wade factors" outlined in *Dambacher,* and held as a matter of law that the bulk feed trailer was not unreasonably dangerous. [4] For the following reasons we agree with the trial court's conclusion.

> 4 We note that the social utility of the bulk-feed trailer at issue here was undisputed. Robert Ross McEllhiney, who was qualified as an expert in animal feed manufacturing and transportation of animal feeds, testified that bulk feed trucks were developed in the late 1950's, primarily for the purpose of delivering feeds from the producing plants to the customer. The advantages of the bulk-feed trailer are that it can haul bulk commodities more conveniently to the farmers and can reduce the price of feed by $ 25 to $ 35 a ton.

Appellants offered the testimony of Dr. Charles Batterman as an expert in the area of engineering design, human factors and safety engineering. Although Dr. Batterman testified that in his opinion the [***10] trailer was unsafe because the blade vanes were easily accessible to anybody who put their hands [*393] into the discharge tube, and that the opening to the discharge tube was completely unguarded, he nevertheless conceded that there was no reason to put a hand inside the discharge tube. Further, appellants offered no evidence of other injuries involving an airlock, and Russell D. Warren, owner of Warren Manufacturing, testified that he knew of no such injuries. [5]

> 5 We reject appellants' argument that the trial court erred in considering the lack of evidence of other injuries because the trailer was custom designed to fit AgCom's specifications. The trial court relied on Mr. Warren's testimony that while certain properties of the trailer were customized for AgCom, the basic structure of the trailer, and the location of the airlock/discharge tube was the standard in the industry.

[**226] Based on the above summarized testimony, the trial court concluded: "There simply is not any evidence in the record that this type of injury [***11] was likely to occur." Slip. Op. *Riley v Warren,* Court of Common Pleas of York County, No. 92 SU 000001 01, November 9, 1995, p.23. The evidence established that a person could not be injured without placing a hand into the discharge tube, and that there was no reason to place a hand into the discharge tube while the machine was engaged. Thus, the evidence did not demonstrate that the trailer was unsafe as designed for its intended use. [6]

> 6 Appellants also argued that the trailer was defective because Warren never included safety information or directions on how to clean out the airlock. Comment (j) to § 402A states, in relevant part: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use." *See Ellis v. Chicago Bridge & Iron Co.,* 376 Pa. Super. 220, 229, 545 A.2d 906, 911 (1988). The necessity of a warning or instructions by the manufacturer depends in part upon the knowledge of the "ordinary consumer who purchases it, with the ordinary knowledge common to the community" as to the characteristics of the product. *Id.* In this case, the hazard in question, i.e., the blades, was obvious and known to the commercial grain haulers who used the product. Masser and Krichten both testified that they were aware of the proper method to clean the airlock and only used their hands to save time and only after they made sure that the blower was turned off before doing so. Further, Krichten testified that he warned Coby prior to the accident not to put his fingers in the discharge tube. Therefore, warnings or instructions would not have prevented Coby's accident.

[***12] Dr. Batterman also offered eight design considerations that he contended could have prevented someone from contacting [*394] the blade vanes if he or she put their hands into the discharge tube: [7] 1) a screen at the opening tube; 2) a longer discharge tube so that a hand could not reach the blades, 4) a curved tube, 5) an "interlock" that would not allow the blades to turn unless you inserted something (like an "elbow") into the tube; 6) a spring-loaded door at the end of the tube; 7) a hinged pipe extension to the tube; 8) a flexible piece of tubing permanently attached to the end of the tube. However, Dr. Batterman did not conduct any tests or show any blueprints, to determine whether any of his suggestions were feasible or cost efficient. Indeed, on cross-examination, he conceded that some of his suggestions were impractical. Dr. Batterman further testified that he had never examined a bulk-feed trailer besides the one in this case, and, in evaluating the possible alternatives, he considered neither the total use of the product, nor the

effect his suggestions would have on the utility of the bulk feed trailer.

> 7 In *Dambacher by Dambacher v. Mallis*, 336 Pa. Super. 22, 51, n.6, 485 A.2d 408, 423, n.6 (1983), this Court stated that a trial court could weigh the availability of feasible alternatives as part of its social policy analysis.

[***13] The trial court was not impressed with appellants' expert due to his lack of familiarity with the product in question and the "speculative" nature of his testimony. Essentially, the court concluded that this evidence was inadequate as a matter of law to show that the product was unreasonably dangerous. [8] We agree and detect no error in the court's resolution of this issue.

> 8 Appellants also argue that the trial court failed to view the evidence in a manner most favorable to the appellants when there were credibility and disputed factual issues regarding design alternatives which should have been left to the jury to decide. This is not correct. The trial judge here ruled that, even accepting appellants' expert testimony as true, it still did not satisfy this burden.

However, even if the judge had erred in peremptorily taking the issue of whether the trailer was unreasonably dangerous from the jury, there was an alternative basis for doing 50; and on this alternative basis the trial court's decision [*395] to direct [***14] a verdict was correct. [9]

> 9 [HN7]An appellate court may affirm the decision of the trial court if it is correct on an alternative basis. *Matos v. Rivera*, 436 Pa. Super. 509, 515, 648 A.2d 337, 340 (1994).

In *Schriner v. Pennsylvania Power and Light Co.*, 348 Pa. Super. 177, 501 A.2d 1128 (1985), this Court held:

> When we distill § 402A into its constituent elements, we find that the following are [**227] necessary to an appropriate application of this section:
>
> 1. a product;
>
> 2. a sale of that product;
>
> 3. a user or consumer;
>
> 4. defective condition, unreasonably dangerous; and
>
> 5. causation - that the product caused physical harm to the ultimate user or consumer or to his property.
>
> and if any of these requisite elements remain unsatisfied, § 402A has no applicability.

Id. at 185, 501 A.2d at 1132 (emphasis added). Consequently, [HN8]in order to prove a claim under § 402A, a plaintiff must prove, *inter alia*, that he is a user or consumer of the product.

The commentary to the Restatement [***15] defines "user" as follows:

> "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.
>
> ....
>
> Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment 1. Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There [*396] may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection [***16] of casual strangers.

RESTATEMENT (2d) TORTS § 402A, Comments (l) and (o).

Appellants contend that Coby was a user of the trailer merely "by coming into contact with the trailer and being injured while in its proximity." (Appellant's Brief, p.26). Their argument can be summarized as follows: because it was "foreseeable" that someone might place their hand inside the discharge tube and come in contact with the blades, anyone who does so, is, *a priori*, a "user," and should recover because it is "the foreseeability that certain acts or injuries will occur" which determines who is a user of a product.

However, [HN9]it is inappropriate to discuss foreseeability, a negligence principal, when analyzing a products liability theory. [10] *See Dambacher, supra* at 55, 485 A.2d at 425 [*397] (§ 402A "does not import negligence principles into a strict liability case, but rather prevents a supplier sued in strict liability from being held liable as an insurer instead of as a guarantor."); *Lewis v. Coffing Hoist Div., Duff-Norton Co.*, 515 Pa. 334, 341, 528 A.2d 590, 593 (1987) ("negligence concepts [**228] have no place in a case based on strict liability"); *Berkebile v. Brantly Helicopter Corporation*, [***17] 462 Pa. 83, 97, 337 A.2d 893, 900 (1975) ("Foreseeability is not a test of proximate cause [under strict liability]; it is a test of negligence."); *Kimco Development v. Michael D's Carpet*, 536 Pa. 1, 637 A.2d 603 (1993) (underlying purpose of strict product liability is undermined by introducing negligence concepts into it); *Childers v. Power Line Equipment Rentals*, 452 Pa. Super. 94, 681 A.2d 201 (1996) (Supreme Court has been adamant that negligence concepts have no place in a strict liability action); *Metzgar v. Playskool, Inc.*, 30 F.3d 459, 463 (3rd Cir. 1994).

> 10 The distinction in Pennsylvania between products liability and negligence was aptly explained in *Griggs v. Bic Corp.*, 981 F.2d 1429 (3rd Cir. 1992):
>
> > [HN10]In strict liability, the focus is on a defect in the product, regardless of fault, *[Lewis v. Coffing Hoist Div., Duff-Norton Co., 515 Pa. 334, 341, 528 A.2d 590, 593 (1987)]*, and that defect is determined in relation to a particular subset of the general population: the intended user who puts the product to its intended use. In negligence, the focus is on the reasonableness of a defendant's conduct, *Id.*, and this reasonableness is determined in relation to a different subset of the general population, and that is conceivably broader: anyone who foreseeably may be subject to an unreasonable risk of foreseeable harm.
> >
> > ...
> >
> > In strict liability, the plaintiff need not show fault, but only prove a product defect. A product cannot be defective when its design and performance meet all of the requirements of the intended user, regardless of the foreseeability of misuse by unintended users. In negligence, the plaintiff must prove fault of the manufacturer, which is an element not required in strict liability law. The scope of inquiry, however, expands because of the duty to unintended but foreseeable users.
>
> 981 F.2d at 1438.

[***18] Simply put, [HN11]foreseeability is a factor of the "reasonable man" standard in negligence and has no place in a products liability case. *Berkebile, supra* at 97, 337 A.2d at 900. To allow a jury to consider the foreseeable consequences of a manufacturer's actions and knowledge would undermine the policy considerations that have continuously led the Supreme Court to hold that a manufacturer is not an insurer of his product's safety. *Id.* Indeed, the term "unreasonably dangerous" was included in § 402A specifically to obviate any contention that a manufacturer of a product with inherent possibilities of harm would become automatically responsible for every harm that could conceivably happen from the use of the product. *Dambacher, supra* at 53, 485 A.2d at 425. Strict products liability law is premised on the concept of enterprise liability for casting a defective product into the stream of commerce, *Kimco, supra;* because manufacturers market their product for use and because they have a better opportunity to control the defect, they should be responsible for injuries to those who ultimately use or consume their product. The focus is on the nature of the product and the consumer's [***19] [*398] reasonable expectations with regard to the product. *Id.* at 7, 637 A.2d at 605 (1993) (emphasis added). In retrospect, any possible harm is foreseeable. However, we do not want to conflate the "foreseeable user" with the "intended user" as there are many products which are dangerous to a foreseeable user but would be rendered significantly less useful if they were made in-

jury-proof. *See Metzgar, supra.* Thus, [HN12]the relevant inquiry here, where the product is not otherwise defective, is not foreseeability of harm, but whether that harm was to an intended user.

Recently, the Third Circuit had occasion to discuss specifically who is an "intended user." In *Griggs v Bic Corp.*, 981 F.2d 1429 (3rd Cir. 1992), the Third Circuit held that a child could not recover under Pennsylvania products liability law for injuries caused by a lighter which was not defective because children were not intended users of the lighter. [11] The Circuit Court based this holding on *Azzarello, supra*, where the Supreme Court stated that [HN13]a product is defective when it leaves "the supplier's [or manufacturer's] control lacking any element necessary to make it safe for its *intended use* or possessing [***20] any feature that renders it unsafe for the *intended* use." *Id.* at 559, 391 A.2d at 1027 (emphasis added). The Circuit Court held that this concept of intended use *a fortiori* included the participation of an intended user using a product for its intended use. *Griggs*, at 1433.

> 11 The Court did note that the manufacturer may have had a duty under negligence principles to manufacture childproof lighters if it was foreseeable that children would use the lighters to start fires.

In *Klemka v. Bic*, F. Supp. , 1996 U.S. Dist. LEXIS 15395 (E.D.Pa. 1996), the learned federal district court judge for the Eastern District of Pennsylvania further elucidated this distinction by setting forth a test which we find helpful in our discussion today: "Would an ordinary consumer have objectively understood that the manufacturer of the product intended it to be used by certain persons, not others? Put another way, if a person was a 'reasonably obvious unintended user,' the product used by [***21] that person would not have been employed for an 'intended use.'" 1996 U.S. Dist. LEXIS 15395 at *6 (citations omitted). [*399]

The decisions in *Griggs*, and *Klemka* are consistent with *Ellis v. Chicago Bridge & Iron Co., supra*, where this Court held that the test to determine whether a seller has a duty to place a warning on his product depends upon "the knowledge and realization of [**229] the danger that would be possessed by the ordinary consumer who purchases or uses the product. *Id.* at 229, 545 A.2d at 911 (citation omitted) (emphasis omitted in the original) (emphasis added). [12] In *Ellis*, the victim was a longshoreman who was killed when a large, heavy steel plate slid out of the chains that were used to carry it. This Court held that the manufacturer of the plates could not be held strictly liable for failing to provide shipping instructions, warnings or devices to assist them in lifting the plates because the danger attendant to moving large steel plates was "obvious to all parties involved." *Id.* at 237, 545 A.2d at 915. Judge Popovich, in a concurring statement, opined that the plaintiff should have been denied recovery because an intermediate shipper was not a member of the class of [***22] ultimate users or consumers which § 402A was developed to protect, and therefore an employee of the shipper should not be entitled to pursue a claim in strict liability. As part of his analysis, Judge Popovich cogently observed that the language "ultimate user or consumer" is pervasive throughout products liability case a *Id.* at 238, 545 A.2d at 916 (citations omitted). Indeed, § 402A specifically refers to the user or consumer of a product:

> § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (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
>
> [*400] (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without a substantial change in the condition which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (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 [***23] entered into any contractual relation with the seller.

Restatement (Second) of Torts, § 402A (1965) (emphasis added)

> 12 Additionally, we note that this analysis comports with the law in other jurisdictions: *Cottom v. McGuire Funeral Service*, 262 A.2d 807 (1970) (Wash.D.C. Court of Appeals); *Todd v. Societe*, 21 F.3d 1402 (1994) (7th Cir.), *cert. den.* 513 U.S. 947, 130 L. Ed. 2d 312, 115 S. Ct. 359 (U.S. 1994); *Spellmeyer v. Weyerhaeuser Corp.*, 14 Wash. App. 642, 544 P.2d 107 (1975); *Borchert v. E.I. Dupont and Co.*, 886 F. Supp. 629 (W.D.Mich 1995).

In the present case Coby was clearly, in the words of the Court in *Klemka,* a "reasonably obvious unintended user." *Klemka,* 1996 U.S. Dist. LEXIS 15395 at *6 The trailer was a sophisticated piece of industrial machinery, to be used by an educated group of industrial consumers. Its normal and intended use was to be by the trained employees of AgCom who were responsible for hauling the bulk feed to farms. All the expert witnesses agreed, including appellants' expert, [***24] that the trailer was not intended to be used by or around children.

Thus, the trial court correctly concluded that AgCom and its employees, as the consumers and operators of the product, were the "users" who were afforded protection under § 402A. Because a child was never the intended consumer of the product and had no reason to come in contact with it, Coby was clearly an "obvious unintended user." Consequently, § 402A relief was not available to him.

In summary, [HN14]any motorized vehicle carries certain substantial risks to the user, and such products are not unreasonably dangerous merely because they may be involved in accidents or because an operator may be injured during their use. *See Monahan v. Toro Co.,* 856 F. Supp. 955, 963 (E.D.Pa. 1993). Additionally, there are certain risks that as a matter of law, or social policy, cannot support imposition of strict liability. *Dambacher, supra* at 49, 485 A.2d at 422. To hold Warren strictly liable to someone who was not an intended [*401] user, who was injured by a product which was not unreasonably dangerous, would effectively make Warren the insurer of that person. [**230] This was not the intent of the Supreme Court in adopting Restatement [***25] (Second) of Torts, § 402A.

CONCLUSION:

Here the benefits of the trailer were clear, no feasible alternatives were shown to exist, the trailer was not defective, and there was no evidence that a risk of injury existed for intended users using the machine for its intended use. Hence, the trial court did not err in directing the verdict in favor of appellee.

Consequently, the judgment entered by the Court of Common Pleas of York County is affirmed.

Exhibit 8

1 of 30 DOCUMENTS

IN RE: VOLUNTARY PURCHASING GROUPS, INC. LITIGATION

CIVIL NO. 3:94-CV-2477-H

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2004 U.S. Dist. LEXIS 5812

April 7, 2004, Decided
April 7, 2004, Filed

PRIOR HISTORY: *In re Voluntary Purchasing Groups, Inc., Litigation, 2004 U.S. Dist. LEXIS 4851 (N.D. Tex., Mar. 25, 2004)*

DISPOSITION: [*1] Defendant Meridian's Motion for Summary Judgment on claim for Declaratory Judgment granted.

COUNSEL: For Voluntary Purchasing Groups Inc, Defendant: Patrick Kelley, Ireland Carroll & Kelley, Tyler, TX. R Douglas Rees, Cooper & Scully, Dallas, TX.

JUDGES: BAREFOOT SANDERS, SENIOR JUDGE, UNITED STATES DISTRICT JUDGE.

OPINION BY: BAREFOOT SANDERS

OPINION

ORDER

Before the Court is Defendant Meridian Housing Co.'s ("Meridian") Motion for Summary Judgment Against the Railroads on Their Declaratory Judgment Claim, filed July 8, 2003; Southern Pacific Transportation Company's and St. Louis Southwestern Railway Company's ("the Railroads") Response, filed July 28, 2003; and Meridian's Reply, filed August 11, 2003.

Upon review of the pleadings, Parties' briefs, and relevant authorities, the Court is of the opinion for the reasons stated below that Meridian's Motion for Summary Judgment on the Railroads' Declaratory Judgment Claim should be **GRANTED.**

I. BACKGROUND

The Railroads' Amended Third Party Complaint against Meridian was filed July 25, 2003, seeking declaratory judgment on their *Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")* claims for cost recovery [*2] under *§ 107(a)(4)(B)* and contribution under *§ 113(f)*. *See 42 U.S.C. §§ 9607* and*9613*. These claims are for expenses the Railroads allegedly incurred in the remediation of property owned by the Railroads and leased to Meridian on the Hi-Yield Site. (Resp. at 1). The cost recovery claim was dismissed by the Court in its Order of November 22, 2002. The claim for contribution under *§ 113(f)* remains.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the facts and law as represented in the pleadings, affidavits and other summary judgment evidence show that no reasonable trier of fact could find for the nonmoving party as to any material fact. *FED.R.CIV.P. 56*; *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Innovative Database Systs. v. Morales, 990 F.2d 217 (5th Cir. 1993)*. "The moving party bears the initial burden of identifying those portions [*3] of the pleadings and discovery in the record that it believes demonstrate the absence of a genuine issue of material fact, but is not required to negate elements of the nonmoving party's case." *Lynch Properties, Inc. v. Potomac Ins. Co. of Ill., 140 F.3d 622, 625 (5th Cir. 1998)* (citing *Celotex, 477 U.S. at 322-25*). If the movant fails to meet its initial burden, the motion must be denied, regardless of the nonmovant's response. *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)*.

If the movant does meet its burden, the nonmovant must go beyond the pleadings and designate specific

facts showing that a genuine issue of material fact exists for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Edwards v. Your Credit, Inc., 148 F.3d 427, 431 (5th Cir 1998)*. A party opposing summary judgment may not rest on mere conclusory allegations or denials in its pleadings unsupported by specific facts presented in affidavits opposing the motion for summary judgment. *FED. R. CIV. P. 56(e)*; *Lujan, 497 U.S. at 888*; [*4] *Hightower v. Texas Hosp. Ass'n, 65 F.3d 443, 447 (5th Cir. 1995)*.

In determining whether genuine issues of fact exist, "factual controversies are construed in the light most favorable to the nonmovant, but only if both parties have introduced evidence showing that a controversy exists." *Lynch, 140 F.3d at 625*; *see also Eastman Kodak v. Image Technical Services, 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*. However, in the absence of any proof, the Court will not assume that the nonmoving party could or would prove the necessary facts. *Lynch, 140 F.3d at 625*. A party must do more than simply show some "metaphysical doubt as to the material facts." *Matsushita, 475 U.S. at 586*. "If the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Friou v. Phillips Petroleum Co., 948 F.2d 972, 974 (5th Cir. 1991)*.

III. ANALYSIS

A. *Prima Facie* Case

To establish a *prima facie* case for a contribution action under *CERCLA § 113* the Railroads must prove that:

> (1) the Defendant is a "covered [*5] party" under section *§ 9607(a)*, *see 42 U.S.C. § 9607(a)*(2) the contaminated site is a "facility" under *§ 9601(9)*, *see 42 U.S.C. § 9607(a)*(3) a "release" or "threatened release" of a "hazardous substance" occurred at the site, *see 42 U.S.C. § 9607(a)(4)*; and
>
> (4) the "release" or "threatened release" caused the Railroads to incur response costs. *See 42 U.S.C. § 9607(a)(4). Uniroyal Chem. Co. v. Deltech Corp., 160 F.3d 238, 242 (5th Cir. 1999)*.

B. The August 7, 1997 Order

The Railroads argue the Court has already found facts to support elements of their CERCLA claim against Meridian in its Memorandum Opinion and Order of August 7, 1997 ("1997 Order"). They contend that this Order, which found the Railroads liable to VPG under CERCLA, also establishes the first three elements of their *prima facie* case against Meridian: (1) that Meridian is an owner/covered person under *§ 9607(a)*; (2) that the Hi-Yield Site is a "facility" under *§ 9601(9)*; and (3) that a release of arsenic occurred at the facility under *§ 9607(a)(4)*. [*6] (Resp. at 4).

The Court agrees in part. In the 1997 Order the Court made findings that support elements (2) and (3) of the Railroads' *prima facie* case. Specifically, the Court found the entire Commerce Site to be a single "facility" under CERCLA thus satisfying element (2) of the *prima facie* case. (August 7, 1997 Order, at 10-11). In addition, the Court found facts to satisfy element (3) that a release of arsenic, a hazardous substance, occurred at the facility:

> It is further undisputed, and the summary judgment evidence establishes, that arsenic has come to be located throughout the Commerce Site, including on the SSW property, *on the chemical plant property,* in Sayle Creek, and at the residential properties" (emphasis added). (August 7, 1997 Order, at 11-12).

The Order did not, however, find facts to satisfy elements (1) and (4) of the *prima facie* case: it did not find that Meridian was a "covered party" under *section 9607(a)*, not did it find that the Railroads had incurred response costs associated with the Hi-Yield Site.

C. The 1997 Order Did Not Find Meridian Was a Covered Party.

Under CERCLA § 107(a) four classes of "covered persons" are [*7] liable for response costs:

> (1) the [present] owner and operator of . . . a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treat-

> ment, of hazardous substances owned or possessed by such person . . ., at any facility, . . . and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . or sites selected by such person, . . . *Uniroyal, 160 F.3d at 243.*

The Railroads allege that the 1997 Order found Meridian to be a covered person under *§ 9607(a)(2)*, because it found that Meridian was an owner/operator of the Hi-Yield Site at the time arsenic was released onto the Site. (Resp. at 4). Meridian argues that the Order did not explicitly find that Meridian was an owner/operator *at the time* arsenic was released onto the Site. (Reply at Exhibit B). The Court agrees. Although the 1997 Order does find that Meridian and its [*8] predecessor-in-interest were owners of the Hi-Yield Site, it does not specifically find that Meridian owned or operated the chemical plant at the time of the release or disposal. [1]

> 1 The 1997 Order found the following: that the "Commerce Site" was originally owned and operated as a chemical plant by Lamar Cotton Oil Company; that Lamar transferred a portion of the property to Hi-Yield Chemical Company in 1951; that Universal was the predecessor-in-interest of Defendant Meridian Housing; and, that in 1968 Universal conveyed at least a portion of the plant property to VPG, which continued to operate the plant through 1971. (August 7, 1997 Order at 2-3).

IV. CONCLUSION

In the 1997 Order the Court found two elements of the Railroads' "owner/operator" *§ 113 CERCLA* case against Meridian:

> 1) the Hi-Yield Site is a "facility" under *§ 9601(9)*, and
>
> 2) a "release" or "threatened release" of arsenic, a "hazardous substance," occurred at the site under *§ 9607(a)(4)*.

The Court did not find [*9] facts such that the Railroads have met elements (1) or (4) of their *prima facie* CERCLA case for contribution: the 1997 Order did not find that Meridian was a covered person, nor did it find that the Railroads incurred response costs in connection with the Hi-Yield Site.

Meridian's Motion for Summary Judgment on the Railroads' claim for Declaratory Judgment is **GRANTED.** The Railroads' *§ 113* CERCLA claim against Meridian remains. The Railroads' Motion for Summary Judgment on this claim will be considered at a later date.

SO ORDERED.

DATED: April 7, 2004.

BAREFOOT SANDERS, SENIOR JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

Exhibit 9

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE)	
Keith Black and Channon Black,)	C.A. No. 2005-CP-37-605
Plaintiffs,)	
v.)	
Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,)	
Defendants.)	
Curtis Martin and Tina Ann Martin,)	C.A. No. 2005-CP-37-604
Plaintiffs,)	
v.)	Videotaped Deposition of DAN HOGAN
Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,)	September 13, 2007
Defendants.)	
Scott F. Lawing and Tammy R. Lawing,)	C.A. No. 2006-CP-31-30
Plaintiffs,)	
v.)	
Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC,)	
Defendants.)	

Videotaped deposition on oral examination of DAN HOGAN, reported by Lisa F. Huffman, Verbatim Court Reporter and Notary Public in and for the State of South Carolina; said deposition taken pursuant to notice of deposition, by agreement and in accordance with the South Carolina Rules of Civil Procedure, at the offices of Larry C. Brandt, P.A., 3691 Blue Ridge Blvd., Walhalla, South Carolina, on the 13th day of September, 2007, at the hour of 10:24 a.m.

A Okay. I don't know. I -- I can't say that they were trained specifically to handle sodium bromate, because that wasn't part of their routine job, so --

Q Help me understand that.

A Well, I mean, they were maintenance people.

Q Right.

A They did not handle sodium bromate as a routine part of their job. That was the refinery area 12. That was their -- they handled the sodium bromate as part of their job.

Q And as I understand -- understand that what happened is, Lawing, Black and Martin worked in the maintenance department, right?

A Correct.

Q They were replacing this pipe.

A It's a condensate pipe, yes.

Q And the accident occurred in the refinery area, right?

A Correct. Right there at the end, at the area 12 platform.

Q And the refinery area uses sodium bromate, right?

A Yes.

Q And some was stored near where the process is, right?

Exhibit 10

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	TENTH JUDICIAL CIRCUIT
Keith Black and Channon Black, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. NO. 2005-CP-37-605
Curtis Martin and Tina Ann Martin, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. NO. 2005-CP-37-604 Deposition of ED PEKAREK January 23, 2008
Scott F. Lawing and Tammy R. Lawing, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. NO. 2006-CP-31-30

Deposition on oral examination of ED PEKAREK, reported by Lisa F. Huffman, Verbatim Court Reporter and Notary Public in and for the State of South Carolina; said deposition taken pursuant to notice of deposition, by agreement and in accordance with South Carolina Rules of Civil Procedure, at the offices of Larry C. Brandt, P.A., 3691 Blue Ridge Boulevard, Walhalla, South Carolina, on the 23rd day of January, 2008, at the hour of 11:11 a.m.

A. Well, there were a couple of reasons. One, I wanted to see, you know, firsthand, what operations would be impacted by the fire. I mean, that's a main aisle way and there are a number of what I will call main lines back and forth through there. That's -- the condensate line was -- was -- was one of -- one that they were working on. But there are a lot of wastewater lines that come back through there. You know, there's -- there are conduits and things like that that go to equipment.

So I was trying to get a -- get an idea as to what, you know, what the damage was. You know, what did we need to do immediately with the folks that we had available to start to clean up the mess, and then, you know, what would we do going forward to go ahead and repair the facility.

Q. The sodium bromate is used in a process at Engelhard, right?

A. That's correct.

Q. What process?

A. We have a -- an electric arc furnace which is used to melt low-grade precious metals. An example would be like an auto catalyst. It would come into us ground, very low-grade. You know, we would put that powder in the furnace, but we get an alloy

that comes off of that, and then the alloy is ground, and then that material would be fed into the refinery. And the sodium bromate is used in that process to basically purify that alloy.

Q. Was that process going to be run that week?

A. I -- I'm assuming that it was running at the time. Or no, excuse me. Because we were in shutdown, it wasn't going to be running at that time. It wasn't -- wasn't going to run probably that week at all.

Q. Do you know why the pallets of sodium bromate were not taken back to the warehouse?

A. I do not know.

Q. Whose decision would it have been to leave the sodium bromate in the staging area, rather than take it back to the warehouse?

A. It might have been an operations judgment call.

Q. Well, who are the people who would have been making that call then?

A. Might have been a lead, senior lead, area manager.

Q. Give me names.

A. I'm trying to remember who was back there at the time. I would say Keith McAlister. I think he was a senior lead back there at the time.

Q. Do you know --

A. Sean Spann.

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT

Curtis Martin and Tina Ann Martin, Plaintiffs, -vs- Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	)	**Case No. 05-CP-37-605**
Keith Black, Plaintiff, -vs- Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	)	**Case No. 05-CP-37-604**
Scott F. Lawing and Tammy R. Lawing, Plaintiffs, -vs- Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	)	**Case No. 06-CP-37-30**

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFFS' NEGLIGENCE AND FAILURE TO WARN CLAIMS, WHICH IS BASED ON THE SOPHISTICATED USER DEFENSE

Defendants Univar USA, Inc. ("Univar"), Trinity Manufacturing, Inc. ("Trinity"), and Matrix Outsourcing, LLC ("Matrix") have filed a motion seeking summary judgment on Plaintiffs negligence and failure to warn claims, based upon the sophisticated user defense. To demonstrate why the Defendants motion should be denied, Plaintiffs respectfully tender their Memorandum in Opposition to the Motion.

I. INTRODUCTION

On June 1, 2004, Keith Black, Curtis Martin, and Scott Lawing, along lead supervisor Steve Knox, and the fire watch, Mark Powell, were replacing carbon steel condensate pipe in the Engelhard Refinery. At approximately 11:30 a.m., Plaintiff Black was cutting the condensate header that was located amongst a labyrinth of overhead piping when hot molten slag fell and came into contact with a pallet of sodium bromate lying near and below the site of the welding. Due to the chemical composition of sodium bromate, an explosion occurred leaving Lawing, Black, and Martin severely burned. All three were air lifted to the Augusta Burn Center for treatment.

At issue is what steps a distributor or a shipper should take to employees of Engelhard from being injured from the events that transpired on June 1, 2004. Plaintiffs say that, among other things, the following should have been done by Defendants. (1) Adequate warnings should have been clearly displayed. (2) Clear and conspicuous labeling should be on all hazardous materials in order to comply with the appropriate standards. (3) The packaging was improper.

Defendants contend that no standards apply since the product was delivered and that upon its delivery, the highly incendiary sodium bromate was not their problem. Defendants overlook a multitude of facts that do not support the granting of their motion.

Defendants' position, under this motion is that they are protected by the "sophisticated user" defense because they distributed the sodium bromate to Engelhard and that upon delivery it became Engelhard's problem. (Defendants Pre-Trial Brief hereinafter "Def. Brief" at 5.)

Succinctly stated, the Defendants contend that they are absolved from any and all liability because Engelhard and their employees should have known the danger of sodium bromate; despite the absence of adequate labeling and packaging. Defendants' say that since they did not see what they sold and shipped, and never touched it renders them not liable. This purported legal position is overly simplistic and not consistent with modern tort law.

II. ENGELHARD IS NOT A "SOPHISTICATED USER" UNDER SOUTH CAROLINA LAW; EVEN IF IT WERE, DEFENDANTS FAILED TO MAKE ANY REASONABLE INQUIRY INTO THE EXTENT OF THE KNOWLEDGE AND EXPERIENCE NECESSARY OF SUCH A STATUS.

A. ENGELHARD IS NOT A 'SOPHISTICATED USER'

Defendants contend that they are entitled to a 'sophisticated user" defense which would preclude Plaintiffs' from pursuing any claim against the Defendant distributors. (Def. Br. at page 5).

The sophisticated user defense, "is permitted in cases involving an employer who was aware of the inherent dangers of a product which the employer purchased for use in his business." Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 549 (Ct. App. 1995). According to the defense, the employer's "familiarity or extensive experience with the product" permits the product's supplier to rely on the employer for warnings to its employees about the product's dangers. Id.

One of the primary bases for this assertion by the Defendants is the quantity of products purchased by Engelhard from the distributors. (Def. Br. at p. 5). This does not, in and of itself, establish that Engelhard has the requisite knowledge and the extensive experience necessary in order to make a reasonable assumption that Engelhard is, in fact, a user sophisticated with respect to knowing all of the appropriate

standards, warnings, regulations and other appropriate materials necessary for one to be a sophisticated user within the meaning of the law. Indeed, Engelhard put that onus squarely on the Defendants by contract and by operation of law.

The quantity of products ordered is not the material concern; rather, the extent of the product's use and knowledge of its inherent dangers is. For example, the relationship between Engelhard and the Defendants did not begin until the Fall of 2003. The injury in this case occurred in June of 2004. (Def. Br. at 2). This was less than one year from the time these parties began doing business. The short period of time that the parties had a relationship is not sufficient in and of itself to render Engelhard a sophisticated user. It is illogical and unreasonable to assume that a purchaser automatically can be deemed a 'sophisticated user' simply because it purchases products in bulk, as the Defendants argue. In short, the quantity of the products purchased is irrelevant to the question of whether or not Engelhard had attained the requisite experience and knowledge necessary of a 'sophisticated user'.

The Defendants' only other basis is found in the applicable OSHA regulations requiring the employer to apprise itself of the dangers and risks of a certain product and to communicate such to its employees. (Def. Br. at 5) (citing 29 C.F.R. § 1910.1200 (b) and § 1900.1200, Appendix E). The OSHA regulations that Defendants submit as support for the suggested finding by the Court that Engelhard is a sophisticated user is a circular argument. It assumes, *arguendo*, that Engelhard had the requisite expertise and extensive experience using sodium bromate. There is little proof of that in the record.

Furthermore, it is conceded that the OSHA regulations applied to Engelhard; but compliance with those regulations, in and of itself, does not equate to obtaining the status of a 'sophisticated user'. In other words, OSHA does not require that one be a 'sophisticated user' in order to comply with these obligations. A corporate purchaser who first begins to purchase products would necessarily have to comply with these regulations; but that does not mean that

the corporate purchaser has the requisite knowledge and experience demanded by this defense. In fact, quite the contrary, such a purchaser would **not** be reasonably expected to have such an extensive knowledge and experience.

In Coffey v. Chemical Specialties, Inc., 1993 WL 318886, a South Carolina District Court referred to a number of factors that should be considered before the bulk supplier ("sophisticated user") defense may be invoked. These factors include: (1) the dangerous condition of the product; (2) the purpose for which the product is used; (3) the form of any warnings given; (4) the reliability of the third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved and (6) the burdens on the supplier by requiring that it directly warn all users. Id. at 3.

Defendants make no reference to any of the above factors nor is there any indication in the record that Defendants even inquired into any information relevant thereto. Therefore, Defendants have not presented sufficient evidence necessary to establish that no genuine issue of material fact exists as to the issue of whether or not Engelhard was a 'sophisticated user. This insufficiency of proof would certainly allow for reasonable minds to differ on this issue.

B. THE DEFENDANTS FAILED TO MAKE A REASONABLE INQUIRY AS TO THE LEVEL OF KNOWLEDGE AND EXPERIENCE NECESSARY OF A 'SOPHISTICATED USER' IN ORDER TO DETERMINE WHETHER OR NOT A DUTY EXISTED.

Defendants unreasonable assumption that Engelhard was a sophisticated user is not enough to allow them to avail themselves of this defense. The assumption must be supported by reliable information. Clearly, the facts seem, from the Defendants' Brief, to conclude that since Engelhard ordered sodium bromate, they ostensibly must know of the hazards associated with its use. Defendants would have to know or learn through a course of dealing whether one has the requisite knowledge and experience of a sophisticated user. Otherwise, how would a distributor ever know whether or not a duty exists? Isolated purchases of sodium bromate over a 9 month period would not provide the Defendants a reasonable and reliable basis to assume that Engelhard was a sophisticated user. There has to be some sort of reasonable inquiry and

in this case there was none. According to various personnel of the corporate Defendants, no such inquiries were made.

> Q: Have you inquired as to the way Engelhard stores the sodium bromate, handles the sodium bromate, or uses the sodium bromate?
> A: My inquiries to Engelhard regarding sodium bromate would pretty much be limited to and focused on, "How much are you using? When do you need it? Is our price good?" And that's – that's the – that's really the core of my job. So, as far as those other details, I can't say that I would focus on those. No, sir.
> Q: So the answer would be no, you didn't inquire as to those matters?
> A: Not to my recollection.

J. Munson dep. p. 108; (Ex. 1)

> Q: You have no idea of what Engelhard's ability to deal with the hazards associated with sodium bromate and its storage, handling and use, do you?
> A: No, sir.

A. Grandos dep. p.12. (Ex. 2)

The Defendants have offered no evidence that they inquired into Engelhard's status. Instead, the Defendants merely point to circumstantial evidence as to how they came to assume that Engelhard had the requisite knowledge and experience to warrant a 'sophisticated user' status. For instance, Defendants refer to the dissemination of the Material Safety Data Sheets (MSDS) as a sufficient manner of communicating the hazards and risks associated with this product. (Def. Br. at 6). Indeed the distributors are to provide at the very minimum an adequate MSDS. Yet, the MSDS from Trinity/Matrix is not the same as the one provided by Univar. Matrix's MSDS is a very vague reference to the volatile properties of sodium bromate. The MSDS sheet from Univar is even more confusing. To charge the Plaintiffs' employer, Engelhard, with the knowledge of what is in these perhaps confusing, different and vague MSDS sheets is not in the least bit informative.[1]

[1] It should be noted that Trinity and Matrix are one in the same for purposes of this argument. See the deposition of Messana page 23. (Ex. 3)

Over the course of the 9 month business relationship between Engelhard and Univar, Engelhard never was informed of the volatile nature of sodium bromate, nor did the "MSDS" provided to Engelhard by Univar tell them.

> A: So our reaction was, man, this is just—what happened. You know, we didn't know. I mean, we—it wasn't like it was something we knew that that could happen. I mean, there's some chemicals you kind of have a respect for that either they're energet—you know, the kind of things you don't want to mess with. But, I mean, I never would have—it wasn't under my expectation that it was that—
> Q: Wasn't?
> A: I didn't expect that bromate—at that point I had no idea bromate could do that really. It was just outside of my realm of–."

J. Norris dep. pp. 59-60. (Ex. 4)

In addition to the providing of the MSDS, Defendants rely on the various requirements provided by OSHA that Engelhard have programs ensuring that the hazardous nature and warnings of any volatile substance be sufficiently communicated to its employees. (Def. Br. at 6).

First, Engelhard did have a proper 'hazardous communications' training program for its employees. Engelhard is a company that works with thousands of chemicals per day and the proper training of its employees on how to safely work around these chemicals and products was necessary for the safe operation of the company. One of the most elementary, yet effective, ways to train these employees was to teach them the significance of the symbols associated with each product and the different hazards and dangers the symbols represented. Specifically, Engelhard's employees knew what the 'oxidizer' label signified. The problem, though, was not the proper education of the employees, but the lack of visible symbols the employees were trained to identify and adjust accordingly.

In short, Engelhard did comply with the OSHA regulations requiring it to obtain and make accessible the MSDS to for its employees as well as to provide its employees with proper safety programs. Defendants argue that they did not have a duty to communicate any hazards to Engelhard based on their reliance on Engelhard complying with the above obligations. Despite

such compliance on the part of Engelhard, the necessary communications were never brought home to Engelhard. Therefore, Defendants assumption that Engelhard was already aware of these hazards was unreasonably based in unreliable and unreasonable information. Defendants merely relied on the fact that if Engelhard complied with these obligations, it would have known of the hazards and this was obviously insufficient.

Additionally, a genuine issue still exists as to the fact of whether or not Defendants knew about these pre-existing obligations prescribed by OSHA at the time of the accident. Defendants have not provided any proof that they were aware of these requirements at the time. It is quite possible that Defendants did not even come to know these requirements existed until the start of this litigation. Therefore, reasonable minds could certainly differ as to this fact.

The Defendants refer only to circumstantial evidence supporting their contention that they 'believed' and had a 'reasonable basis' from which to assume that Engelhard had the requisite extensive knowledge and experience with this product so that any duty to communicate the danger to Engelhard's employees would be obviated. There is little, if any, evidence as to any reasonable inquiries made into the extent of Engelhard's knowledge and experience. For these reasons, it certainly can be established that reasonable minds can differ as to the issues of whether or not Engelhard was a 'sophisticated user'.

III. SOPHISTICATED USER DEFENSE CANNOT ABSOLVE DEFENDANTS OF ESTABLISHED DUTIES BY LAW AND CONTRACT.

It should be noted that over and above that which may be inferred by the common law is that the distributor Univar had a contractual obligation to the Plaintiffs and their employer to comply with the OSHA regulations and the IMDG regulations. J. Purswell dep. p. 19, 59, 60 (Ex. 5) The Terms and Conditions attached to Purchase Order S006011 (Ex. 6) from Engelhard to Univar, *inter alia*:

> 5. **Compliance with Applicable Legal Standards**
> . . . Also, in respect to all performance due hereunder, Vendor warrants that it is and will be in compliance with all applicable

provisions of federal, state and local laws and the rules, regulations and standards promulgated thereunder, including without limitation the following, as amended from time to time: (a) Occupational, Safety and Health Act of 1970, . . . (d) Toxic Substances Control Act of 1976.
. .

6. Safety
. . . If the goods provided or to be provided or the services performed or to be performed hereunder involve or may involve any risk of injury or death to persons or damage to property, Vendor shall provide Buyer with a written description of the nature and extent of any such risk, including a description of any precautions which should be taken to minimize the risk of death, injury or damage occurring and to minimize the injury, damage or loss in the event of any such occurrence.
. . .

They did not do so. The bags were not labeled properly and there is significant evidence in the record to that effect. Moreover, there was never a warning about the risk of a catastrophic explosion given by the Defendants to Engelhard.

Simply buying a chemical does not necessarily mean that one is completely cognizant and aware of all of its inherent. Communication of the hazard is contractually imposed upon Univar and its sub-distributors Trinity and Matrix. They have to make sure that the product they are shipping is properly packaged and does not create an unreasonable risk of harm if not properly labeled. The question is whether or not Engelhard had the awareness of these dangers through special knowledge gained through extensive experience with this product which is not in the record nor is any evidence of same set forth in the brief.

With respect to what duties applied to Defendants by operation of law, it should be noted that South Carolina has adopted The Restatement (Second) of Torts, Section 388. (See, Coffey v. Chemical Specialties, Inc., 1993 WL 318886), which states,

"§ 388. Chattel Known To Be Dangerous For Intended Use

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 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
(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous."

Section 388, Comment "n" addresses the third factor of this test and provides:

"Many such [dangerous] articles can be made to carry their own message to the understanding of those who are likely to use them by the form in which they are put out, by the container in which they are supplied, or by a label or other device, indicating with a *substantial sufficiency* their dangerous character."

Restatement (Second) of Torts § 388 comment n.

Defendants actually knew more about the potential hazards and dangers associated with sodium bromate than Engelhard knew. For example, Matrix – Trinity President C. Davis recognized the highest risk associated with the product were its explosive properties. For example,

Q: Would you believe that it probably represents the highest risk associated with sodium bromate, explosive properties under certain circumstances?
A: To my knowledge, yes sir.

C. Davis dep. p. 40 (Ex. 7)

The MSDS provided to Engelhard by Defendants did not adequately convey the hazard to the employer. In addition to this knowledge, Defendants also knew, or should have known, that the appropriate labeling communicating the character and nature of the substance contained in these plastic bags was invisible. In fact, the very issue of the labeling and packaging was addressed by the Defendants at the very beginning of their business relationship with Engelhard.

In an email dated June 26, 2003 sent by Sherry Greene from Matrix to John Munson at Univar, Ms. Greene discussed switching from the 50 kg drums to the 25 kg plastic bags. She said that the Chinese did not want to pack the explosive sodium bromate in plastic bags.

> "We discussed plastic bags in the very beginning – last May. The word from our office in China was that it's a hazardous cargo issue. They would not pack it in plastic."

Greene/Munson e-mail (Ex. 8).

This information was never communicated according to Engelhard's 30(b)(6) deponent, Andy Turnstall.

> "Q: Do you believe that, if your company was made aware of the fact that the Chinese supplier didn't want to package that sodium bromate in plastic bags due to the hazardous nature of the problem, that would have been something important that Engelhard would have taken into consideration?
>
> A: I think Engelhard would have taken it into consideration, Yes.
>
> Q: Did Univar or anybody from that company, to your knowledge, tell Engelhard of that fact?
>
> A: To my knowledge, no.
>
> Q: Do you know who Trinity is?
>
> A: By name only, you know, by seeing names on, you know, invoices and those sorts of things.
>
> Q: Do you know who Matrix is?
>
> A: By name only, you know, – I don't know people.
>
> Q: Do you know them as being suppliers of sodium bromate to Univar who supplies them to you?
>
> A: Yes. That is the only way I know them.
>
> Q: Have you seen e-mails going back and forth between those three entities and/or Engelhard?
>
> A: No.
>
> Q: Did anyone at Univar at any time ever tell Engelhard, to your knowledge, of the differences in ignition propensity between the bags used as packaging from the bromate and the drums used as packaging for the bromate?

A: No.

Q: Would that have been important information for Engelhard to have at the time that it made its decision as to whether or not to go to the plastic bags versus the drums, the differences in ignition propensity of one versus the other?

A: It could have been.

Q: If there were any differences in the safety of the product in bags versus drums, prior to this accident, was Engelhard ever made aware of any such differences through Univar or any of the suppliers?

A: I don't think so."

Tunstall dep. p. 152-154 (Ex. 9)

Munson's reply to the Sherry Greene e-mail a week later seemed to assure Matrix that he had "taken care of" or "talked the Chinese into," using the plastic bags instead of the cargo drums.

> "They [Engelhard] prefer 25 kg bags vs. 25 kg drums as the bags are easier to dispose of...Please advise your people to make the labeling changes with this. I think it will be acceptable to label each side of the pallet if they are shrink wrapped **instead of** labeling each bag." Greene/Munson e-mail (Ex. 8)[2]

This email clearly indicates that the Defendants knew of the potential problem of shipping and storing the sodium bromate in plastic bags. Additionally, Defendants did not have any reliable basis to assume that Engelhard also knew of the added dangers associated with the packaging and labeling utilized. The very fact that there had been issues concerning the safety of the packaging and labeling of this product should have brought home to Defendants the extra care necessary in assuring that this product would be delivered in the manner provided by the contract and law. The added danger due to the style of packaging created a heightened duty of care on the Defendants to make sure that this added danger was communicated. Plaintiffs refer to Comment 'n' to the Restatement 2d § 388 regarding warnings to third persons.

[2] There were no labels on the side of the pallets as recommended.

> [...] Here, as in every case which involves the determination of the precautions which must be taken to satisfy the requirements of reasonable care, the magnitude of the risk involved must be compared with the burden which would be imposed by requiring them (see § 291), and the magnitude of the risk is determined not only by the chance that some harm may result but also the serious or trivial character of the harm which is likely to result (see § 293). Since the care which must be taken always increases with the danger involved, it may be reasonable to require those who supply through others chattels which if ignorantly used involve grave risk of serous harm to those who use them and those in the vicinity of their use, to take precautions to bring the information home to the users of such chattels which it would be unreasonable to demand were the chattels of a less dangerous character.

Defendants knew of the potential dangers associated with sodium bromate. In addition, Defendants also knew that these dangers were heightened with the type of packaging and labeling that was utilized in its transport and ultimate delivery, plastic bag versus corrugated drum with metal lid. The very fact that the various options for the labeling were discussed, though never implemented, (as outlined by the deposition testimony and email communications described above), would have heightened the Defendants' duties to communicate the extra risks involved. How could Defendants have been able to assume that Engelhard's employees would have known what they were even standing beside if the warnings were not readily visible due to the absence of any worthy labeling, which issue was discussed amongst Defendants and outside of the presence or knowledge of Engelhard?

Warehouseman Paul Bailey, of Engelhard, testified that he did not see any oxidizer hazard warning labels on the bags of sodium bromate he offloaded from the boxes at the dock until after the accident. Bailey dep. p. 28, 30, 31, 36, 64, 70 (Ex. 10). He explained that if the oxidizer hazard warning labels were on the bags that he unloaded the top layer of the stack of bags on the pallets must have all been loaded label side down. Id. at 35, 41, 52, 53, 61, 76; (Ex. 11). There are no markings or labels on the sides of the bags as they are stacked on the pallet. If the top layer is label side down, then they are not "clearly visible" as required by 49 CFR 172.406(f). Since the Defendants do not inspect them at any point before they reach

Engelhard's dock in a sealed container, the warehouseman are the first to observe the product "as shipped" by Defendants.

Comment "n" from Section 388 also states:

> "There are many statutes which require that articles which are highly dangerous is used in ignorance of their character, such as poisons, explosives, and inflammables, shall be put out in such a form as to bear on their face notice of their dangerous character, either by the additional coloring matter, the form or color of the containers, or by labels. Such statues are customarily construed as making one who supplies such articles not so marked liable, even through he has disclosed their actual character to the person to whom he directly gives them for the use of others, and even though the statue contains no express provisions on the subject."

Restatement (Second) of Torts § 388 comment "n"

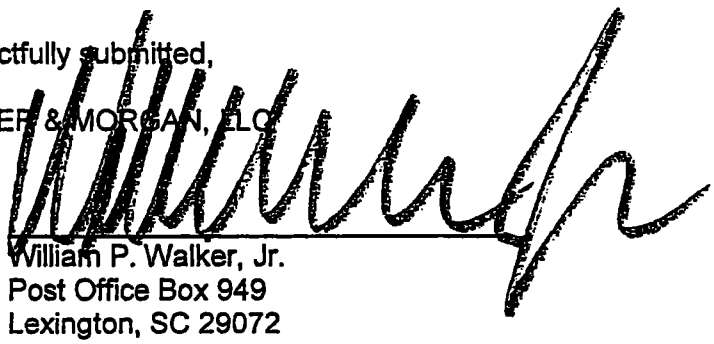
A distributor's full disclosure to the ultimate user of the hazardous nature of the product by simply giving a copy of the Material Safety Data Sheet, is not enough to absolve the Distributor of liability, no matter if the ultimate user is deemed a sophisticated user, if the product is not adequately labeled. The Plaintiffs have developed evidence through depositions that as many as 11 people, walked by, specifically saw the pallet, or were in the area during the morning of the fire. Not one of them saw any oxidizer symbol or hazard warning label on any of the bags or pallets. These persons include some of the crew, including Plaintiff Scott Lawing and crewman Steve Knox, who were within three feet of the pallets and said definitively that there were no warning labels on them. S. Lawing dep. p 83 (Ex. 12); Knox dep. p. 75, 118 & 119 (Ex. 13). Dave Herrington, the Health, Safety, and Environmental director for Fluor, conducted an investigation of the accident and stated upon looking at the sodium bromate bags in the warehouse that the hazard warning labels were not considered to be highly visible, and took exception with the portion of the report that said the bags were clearly marked. "It didn't catch the eye." D. Herrington Dep. p. 10 & 25 (Ex. 14).

The Defendant Univar was already obligated pursuant to a contract existing with Engelhard. All Defendants cannot now say that they are absolved by the sophisticated user defense when they realize that they did not adequately warn Engelhard of sodium bromate's potential danger.

For the above reasons, the Plaintiffs ask to allow the failure to warn claims to proceed, as there are genuinely material facts in question for trial and to deny the Defendants Motion.

Respectfully submitted,

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Attorneys for Plaintiffs

Lexington, South Carolina

October 1, 2008.

Exhibit 1

Q. Do you know anything of the specific way in which they use sodium bromate in their operations or processes?

A. No, other than it's used for some -- some type of reaction. That's really all I can tell you, sir.

Q. Okay. Have you ever gone to tour the plant and seen the sodium bromate part of the operation?

A. I have not.

Q. Okay. Have you ever inquired as to that operation with Engelhard and how specifically it's used?

Not to my recollection.

Q. Have you inquired as to the way Engelhard stores the sodium bromate, handles the sodium bromate, or uses the sodium bromate?

A. My inquiries to Engelhard regarding sodium bromate would pretty much be limited to and focused on, "How much are you using? When do you need it? Is our price good?" And that's -- that's the -- that's really the core of my job. So, as far as those other details, I can't say that I would focus on those. No, sir.

Q. So, the answer would be no, you didn't inquire as to those matters?

A. Not to my recollection.

Q. Okay. Have you ever inquired about Engelhard's

Exhibit 2

otherwise?

A No, sir.

Q You have no idea of what Engelhard uses sodium bromate for; is that correct?

A That's correct.

Q You have no idea as to Engelhard's ability to deal with the hazards associated with sodium bromate and its storage, handling and use, do you?

A No, sir.

Q Or its ability or reliability to warn its employees or other agents or people as to those hazards; correct?

A No.

Q That is correct?

A That is correct.

Q There was earlier mention in some of the testimony that you've heard today that there was some sort of an e-mail from Englehard to Univar about a weight reduction in the units that they were purchasing of sodium bromate; is that correct, you heard about it today?

A Yes.

Q Did you know about that e-mail before today?

A I knew about an e-mail requesting the

Exhibit 3

A No, I do not.

Q Do you know of any other customers for sodium bromate of Trinity?

A No, I do not.

Q Tell me what you know about Matrix?

A Matrix is a company that Trinity set up so that it could be like a -- to work with China, to try to see what kind of products we could sell in the United States, or at least be the -- you know, the company that gets the products from China to wherever they need to go.

Q Is it wholly owned by Trinity?

A I don't know.

Q Was it already set up when you got there or was it set up afterwards?

A After.

Q You got there in, say, 1999 or 2000; 1999, I guess?

A No, I actually started at Trinity in 1996.

Q So it was set up shortly after that?

A I don't know about shortly, but it was set up I would say within at least five years of then.

Q How many people does Matrix have that work for Matrix?

A Currently?

Exhibit 4

I walked down the hill after the accident I really thought that the acetylene -- something had happened with the acetylene container, and that was -- that was the only thing in my mind that could get that hot was acetylene torch. And they said it was all fine when it came -- I guess when people came back. Said it wasn't the torch, you know, it wasn't -- it was all still intact.

So our reaction was, man, this is just -- what happened. You know, we didn't know. I mean, we -- it wasn't like it was something we knew that that could happen. I mean, there's some chemicals you kind of have a respect for that either they're energet -- you know, the kind of things you don't want to mess with. But, I mean, I never would have -- it wasn't under my expectation that it was that --

MR. FOSTER: Wasn't?

A. I didn't expect that -- I didn't know that bromate -- at that point I had no idea bromate could do that

really. It was just outside of my realm of --

Q. Did you draw any conclusions from the tests you did with the iron filings?

A. I guess our conclusion was -- I guess at that point me and Sean were going to be -- we found out within a few minutes that we were going to be responsible for cleaning up the plant safely. So at that point we felt we knew what had -- we felt we had a working knowledge of what we think happened. And it gave us something to go off of, because if it had been some other chemical or something else -- if we couldn't have been able to trigger it that way, I guess we didn't know what could have triggered it. It would have left out another realm of things that could happen, and I didn't want to put anybody else out there to get hurt again. And we didn't really know what had happened at that point.

Q. And describe to us what your

Exhibit 5

Q. And the ANSI standard is voluntary, correct?

A. It is voluntary, yes.

Q. Univar, Trinity, and Matrix are not required to follow the ANSI standards, are they?

A. No. They are required to follow 1910.1200 that I drafted when I was at OSHA, which is actually more extensive than what is in 129. One is voluntary national consensus standard and one is regulatory.

Q. Is the answer, yes, Trinity, Matrix, and Univar are not obligated to or required to follow the ANSI standard, correct?

A. No. They're only required to follow the Z129 standard. I'm sorry, the 1910.1200 ANSI or OSHA 1910.1200.

MR. BRANDT: I'm going to make an objection in retrospect to the form of that question.

Q. (BY MR. OUTTEN) Now, what risk hazard analysis should the defendants have conducted here? What do you say they should have done, Doctor?

A. Well, more specifically, they

the information warning on the bags violated all of those code sections you just read?

A. Not every single one of them. Obviously it's not a solid material and then, of course, the last item, which is 5, speaks to the employer and all of the kinds of things that the employer has to do. I can read that if you wish.

Q. Well, what I'm trying to ask you, and I guess I'm doing a poor job, which code sections do you say we violated?

A. You violated specifically the one that says (ii) that we said in the beginning, "Appropriate hazard warnings." There was no hazard warning on the product in terms of the workplace.

Q. Are there any other parts of this CFR, this section that you say that we violated, other than the one you just said about the requirement of having appropriate warnings?

A. Well, to clarify, of course, it speaks to the manufacturer and distributor, and you asked me that question earlier about who's responsible and, of course, distributors

are responsible as well as the manufacturer, but other than that, no.

Q. Okay. So there won't be a question, Dr. Purswell, highlight the section that you say that we violated or sections.

A. (Deponent complied.)

Q. Okay. We're going to mark this as Exhibit 181.

(Deposition Exhibit-181 was marked.)

Q. Did you mark all the CFR sections, all the regs which you say we violated on --

A. Yes.

Q. -- on Exhibit 181?

A. Yes.

Q. Now, the next question, Dr. Purswell, is: How did we violate it?

A. Didn't provide a warning, appropriate warning.

Q. Is that yellow oxidizer symbol a warning?

A. Only in transportation circumstances, and it can be a part of a warning, but it is not a warning.

Q. Well, assuming that the yellow oxidizer symbol was on the bags, is that in

Exhibit 6

EXCEPT AS MAY OTHERWISE BE SPECIFICALLY PROVIDED ON THE FACE SIDE HEREOF THE PARTIES AGREE THAT THE FOLLOWING TERMS AND CONDITIONS SHALL GOVERN THE TRANSACTION DESCRIBED ON THE FACE HEREOF. AS USED HEREIN THE TERM "BUYER" SHALL MEAN AND INCLUDE ENGELHARD CORPORATION AND/OR ITS SUBSIDIARIES.

1. ACCEPTANCE AND MODIFICATION

This purchase order ("Order") can be accepted only upon the terms and conditions expressed herein, which may not be modified, amended or waived except by express written consent signed by an officer or Buyer. Objection is hereby given to any additional or different terms or conditions, whether or not material, contained in any acknowledgment or confirmation of this Order. This Vendor upon signing the Acceptance Copy, or commencing performance hereunder or by any other means which reasonably manifest Vendor's assent to be bound by the provisions hereon.

2. PERFORMANCE

Time is of the essence of this Order, and performance must actually be completed within the time stated on the face side hereof. In the event of Vendor's delay in performance or failure to perform, Buyer reserves the right, in addition to all other rights provided by law, to cancel this Order immediately upon giving notice and hold Vendor liable for any excess cost incurred, plus all other allowable damages. Neither Vendor nor Buyer shall be liable for delay in performance or failure to perform if such delay or failure is caused by any occurrence or contingency beyond the reasonable control of the affected party, which by the exercise of due diligence such party would be unable to overcome, or by compliance in good faith with any applicable foreign or domestic governmental requirement provided the affected party notifies the other party of such occurrence. Quantities affected by any such delay or failure may be deleted from this Order. Vendor shall deliver all goods to and perform all services at the premises designated on the face side hereof, and all prices stated herein shall be for such delivery or performances, free of all other costs and expenses. Buyer may inspect all goods provided and all services performed hereunder prior to being obligated to make payment, whether partial, full or final, on account thereof.

Vendor agrees to sell or otherwise make available to Buyer spare and replacement parts and component systems for each item of equipment or other goods to be provided hereunder on commercially reasonable terms and conditions throughout the entire reasonable life expectancy of each such item.

3. WARRANTY

Acceptance of this Order constitutes an express warranty by Vendor that (a) with respect to all goods to be provided hereunder Vendor has, or at the time of performance shall have, and shall transmit to Buyer good and marketable title thereto, free and clear of liens and encumbrances of any kind whatsoever, (b) all services to be performed hereunder shall be performed in a good and workmanlike manner and in accordance with sound nerally accepted practices, involve no unreasonable risk of injury or damage, conform to all applicable specifications and governmental requirements, and be without fault and free from all defects, and (c) all goods to be provided hereunder shall be merchantable, fit for the purpose intended and of first quality, involve no unreasonable risk or injury or damage when used as intended, conform to all applicable specifications and samples and be free from all defects in design, materials and workmanship. Buyer may accept or reject any or all goods or services which are in breach of this provision and, in any event, hold Vendor liable for all damages resulting from such breach.

4. COMPETITIVE OFFERS

At any time, Buyer may notify Vendor that it has received a bona fide offer to deliver similar goods in approximately the same quantity as the undelivered portion hereunder at a lower price than that which is then in effect under this Order. If within fifteen (15) days of its receipt of such notice Vendor shall not reduce its price hereunder sufficiently to meet the terms of such offer and advise Buyer of such reduction, Buyer may purchase any or all of the undelivered portions of goods hereunder from such offeror. All quantities so purchased shall be deleted from this Order.

If at any time during the duration of this Order, Vendor sells or offers to sell comparable quantities of similar grades of products as the goods to be provided hereunder at a price lower than Vendor's price to Buyer then in effect or upon other terms and conditions more favorable to buyers than the terms and conditions hereof, Vendor shall promptly notify Buyer thereof and offer such lower price or such other more favorable terms and conditions to Buyer during the period in which such lower price or such other more favorable terms and conditions are in effect.

5. COMPLIANCE WITH APPLICABLE LEGAL STANDARDS

Vendor further warrants that all goods provided and all services performed hereunder will be in compliance with all requirements of the Fair Labor Standards Act of 1938, as amended. Also, in respect of all performance due hereunder, Vendor warrants that it is and will be in compliance with all applicable provisions of federal, state and local laws and the rules, regulations and standards promulgated thereunder, including without limitation the following, as amended from time to time: (a) Occupational, Safety and Health Act of 1970, (b) Executive Order 11246, including the ial opportunity" clause set forth therein (incorporated herein by reference), (c) Rehabilitation Act of 1973 (incorporated herein by reference) and ...mam Era Veterans Readjustment Assistance Act of 1974 (incorporated herein by reference), including the "affirmative action" clauses set forth herein and (d) Toxic Substances Control Act of 1976. If the goods provided hereunder are chemical substances or mixtures of chemical substances, as these terms are defined in the Toxic Substances Control Act, Vendor certifies that such chemical substances of all component chemical substances of mixtures are included in the inventory of Chemical Substances as provided in the Toxic Substances Control Act of 1976.

6. SAFETY

Vendor agrees to observe all safety and security rules, instructions and requests of Buyer whenever in its performance hereunder Vendor or its employees or agents enter upon any Buyer location. If the goods provided or to be provided or the services performed or to be performed hereunder involve or may involve any risk of injury or death to persons or damage to property, Vendor shall provide Buyer with a written description of the nature and extent of any such risk, including a description of any precautions which should be taken to minimize the risk of death, injury or damage occurring and to minimize the injury, damage or loss in the event of any such occurrence. Upon request Vendor agrees to complete Buyer's standard chemical control form (currently titled "Material Safety Data Sheet") with respect to any chemical substance to be provided hereunder.

7. INDEMNIFICATION

Vendor shall indemnify and hold harmless Buyer, its agents and employees, from and against all claims, damages, losses and expenses, including attorney's fees, arising out of or resulting from all goods provided and all services performed hereunder, provided that any such claim, damage, loss or expense is caused in whole or in part by a breach of this Order or by a negligent, reckless or intentional act or omission of Vendor, its agents, employees or subcontractors. The obligations of Vendor hereunder shall not extend to any liability with respect to or arising out of any claim, damage, loss or expense which is attributable to an act or omission of Buyer, its agents or employees.

Exhibit 7

the same from both China and Israel?
A Yes, sir.
Q Do you believe that that drum and its labeling offers a better method of conveying information and containing better information for the user than does the plastic bags?
BY MR. HOWARD:
Object to the form.
BY THE DEPONENT:
It would appear to be more informative, yes.
DIRECT EXAMINATION RESUMED BY MR. FOSTER:
Q Can you think of any other hazard associated with sodium bromate that is greater in terms of its magnitude of danger than being explosive?
A No, sir.
Q Would you believe then that it probably represents the highest risk associated with sodium bromate, explosive properties under certain circumstances?
A To my knowledge, yes sir.
Q Let me ask you a little bit about some insurance, little bit off the subject. Does Trinity and Matrix use the same insurance carrier to provide it liability insurance

Exhibit 8

SODIUM BROMATE 7/2/2003

John Munson

From: John Munson
Sent: Wednesday, July 02, 2003 3:19 PM
To: 'Sgreene@matrixoutsourcing.com'
Cc: Carol Andersen; John Munson; Jon Eccleston; Kathy Burrell; Tim Griffin (E-mail)
Subject: RE: Your meeting with Tim this afternoon

Sherry,

I met with Judy Swaney this mornig and here is what I have:

Packaging - They prefer 25kg bags vs 25kg drums as the bags are easier to dispose of. Tim advised this morning that the bags are dooable. I advised that the container on the way in would still be the 110lb fiber drums, and that the plant could not make the conversion to bags until the next container.

Please advise your people to make the labeling change with this. I think it will be acceptable to label each side of the pallet if they are shrink wrapped instead of labeling each bag.

Arrivals - Engelhard stopped bromate usage for 3 or 4 weeks while they repaired some tanks in the process. It is now back on line, but they have 92,000lb in inventory. I advised that the next one is already on the way, so let's do this:

Take the ETA 7/15 container for your stock. If you can delay shipping the ETA 8/15 container go ahead, if not, OK. If they could even convert to bags for this 3rd release that would be great, but no problem if it is too short notice. I advised Judy we would most likely not be able to switch until release number 4.

Let me know what you hear and we can go from there.

Thanks

John

-----Original Message-----
From: Sherry Greene [mailto:Sgreene@matrixoutsourcing.com]
Sent: Thursday, June 26, 2003 5:18 PM
To: John Munson
Cc: 'Griffin, Tim at Trinity'; 'George, Angela at Matrix'
Subject: Your meeting with Tim this afternoon

Hi John,

Tim called me after he left the meeting this afternoon. I am following up with a couple of his questions.
Bromate-

Packing- I am aware of the concern with the 50 kg drums. We had discussed plastic bags in the very beginning...last May. The word from our office in China was that it's a hazardous cargo issue. They wouldn't pack it in plastic. However, I have sent an email overnight to ask for confirmation on this. If plastic can not be used, I have also requested the option ot pack it in 25 kg drums, instead of 50. I will look for an answer back first thing in the morning. I will update you.

Arrivals- We have a container on the water. It sailed 6/12...with an ETA of 7/15...maybe a day or two longer to be safe. We also have another container due to ship on 7/12...with an ETA of 8/15. Reason being.....we just recently were able to place multiple orders with the factory....which means...releases 4-6 will be shipped for

PLAINTIFF'S EXHIBIT 51

delivery as requested by you. For this 3rd release....we had anticipated when Englehard would need material...should have been around 8/15 (so we thought). But it got moved up to 8/9...then up to 8/1 just to be safe. By the time that decision had been made, it wasn't enough time to ask them to bump up our shipment in front of another customer's...And we also knew we had another container to work with.
So the bottom line is this: Englehard won't go without material. The question is: Can they take it early (around 7/15)...if not, Trinity will take it and Englehard can hold for the next container to come in (around 8/15). The goal here is to provide them with what they need, when they need it...and we can do it. That's not a problem. All I need to know is what they want to do.

Let me know your thoughts.
Thanks,
Skory

7/2/2003

UNIVAR_00283

Exhibit 9

Q. When you were -- I guess it was you and several other people in the plant were involved in the decision to go with the bags versus the drums?

Let me clear that up. Were you involved with other people in Engelhard in the decision-making process to go from just the drums to a combination of 25-kilogram bags and 25-kilogram drums?

A. I guess I'm not following your question. Let me say that I would not have been involved in the changes prior to the accident and any choices we would have made prior to the accident. After the accident, yes.

Q. Okay. So the August '03 change that was made --

A. I wouldn't have had any part in that.

Q. Do you believe that, if your company was made aware of the fact that the Chinese supplier didn't want to package that sodium bromate in plastic bags due to the hazardous nature of the problem, that would have been something important that Engelhard would have taken into consideration?

A. I think Engelhard would have taken it into consideration, yes.

Q. Did Univar or anybody from that company, to

your knowledge, tell Engelhard of that fact?

A. To my knowledge, no.

Q. Do you know who Trinity is?

A. By name only, you know, by seeing names on, you know, invoices and those sorts of things.

Q. Do you know who Matrix is?

A. By name only, you know, not -- I don't know people.

Q. Do you know them as being suppliers of sodium bromate to Univar who supplies them to you?

A. Yes. That is the only way I know them.

Q. Have you seen e-mails going back and forth between those three entities and/or Engelhard?

A. No.

Q. Did anyone at Univar at any time ever tell Engelhard, to your knowledge, of the differences in ignition propensity between the bags used as packaging for the bromate and the drums used as packaging for the bromate?

A. No.

Q. Would that have been important information for Engelhard to have at the time that it made its decision as to whether or not to go to the plastic bags versus the drums, the differences in ignition propensity of one versus the other?

A. It could have been.

Q. If there were any differences in the safety of the product in bags versus drums, prior to this accident, was Engelhard ever made aware of any such differences through Univar or any of the suppliers?

A. I don't think so.

Q. Does Univar have any packaging experts in their company, in-house?

A. I don't know.

Q. Now, tell me about the time period after the accident when there was some discussion to change, to get rid of the bags and to get it all in drums. Who at Engelhard was involved in that process that you can recall?

A. As I mentioned before, it would have been a lot of people. Because you are talking about a process, chemical, and you are talking about an incident, and you are talking about things that involve management and purchasing and people using the equipment. It would have been an extensive list.

Q. Who at Univar was involved in the process, if you know?

A. I don't know.

Q. Have you heard of a fellow named John

Exhibit 10

Q. -- piece of paper?

A. Oh, yeah.

Q. Was it stored somewhere?

A. Yeah.

Q. Filed somewhere?

A. Yeah. It's filed under - under -- under the -- the name, part number.

Q. Are you familiar with the warnings required to be placed upon oxidizers like sodium bromate?

A. Yes.

Q. What are they?

A. They're a -- a diamond with -- with the circle with the flame on it, the yellow.

Q. When sodium bromate was received into Engelhard's warehouse in June of 2004, did you or anyone on behalf of Engelhard check to see if the warnings were attached, affixed to the bags?

A. I personally did not see them.

Q. Tell me what you mean by that.

A. I did not see any warnings on the bags.

Q. On which bags?

A. On the sodium bromate bags.

Q. On any bags ever?

A. Not when this accident occurred. When -- after the accident, everything that we had in the warehouse

you were receiving into the warehouse around this time had those warnings?

A. We didn't know the hazard of them. We had -- there's a lot of sodium -- we have a lot of sodium silicate, sodium, you know, bicarb -- you know, bicarbonate. There's a lot of different sodiums that we have throughout the warehouse. And if it's not brought to us as a hazard, we don't know what kind of hazard it is.

Q. I'm not asking you that, Mr. Bailey. Let's try again.

A. All right.

Q. Did OSHA and DHEC require that oxidizers have the yellow warning symbol you described?

A. Yes.

Q. Did you, or someone on behalf of Engelhard, check to make sure that oxidizers, like sodium bromate, have that yellow warning symbol on it when it came into the facility?

A. Yes. When we know the hazard, yes.

Q. Okay. And did you check for when pallets of sodium bromate came in the facility, did you check to make sure they had the yellow warning symbol?

A. No. Because we weren't aware of the hazard.

Q. Tell me what you mean, you weren't aware of the

hazard.

A. It wasn't on the bill of lading; it wasn't on the side of the truck. To us, it's -- it's a shipment of material that we're using in a process.

Q. So is it your testimony today that the bags of sodium bromate did not have the yellow warning symbols on them when they came into the facility? Is that your testimony?

A. I did not see them.

Q. Well, let's try to make sure we understand one another. Are you testifying that the yellow warning symbols were or were not on the bags of sodium bromate when they came into your facility?

A. I don't know.

Q. You don't know one way or the other?

A. My recollection, I don't. I didn't see any.

Q. Well when you receive the HazMat training --

A. Uh-huh.

Q. -- what training did you get on whether warning symbols were required to be on --

A. Anything that we shipped out of the warehouse, we made sure that it was -- that it was done properly. Now on stuff that come in, we're not -- we're not in charge of the -- of the material coming in. That's -- that's the shipper's job is to make sure

A. Not that I saw.

Q. And if those bags were in the facility and came in, let's say they were shipped in in May of 2004, does that help your recollection?

A. After? Or before?

Q. Before June 1st of 2004.

A. Before, they didn't come in with -- with this. After the accident, they came with this.

Q. No bags were marked with the yellow symbol?

A. Not that I can remember, no.

Q. And I want to understand, you didn't know that sodium bromate was an oxidizer. Or did you know?

A. I can't remember.

Q. Well, what did you think sodium bromate was, as the receiving clerk?

A. A chemical that's used out in the process.

Q. Well, did you go pull the MSDS to see what the hazards associated with that chemical were?

A. The associates that work out in the refinery would know what -- what they're -- what they were using. I've never used the -- the material.

Q. Well again, how did -- how did Gary Shook and others go and get the sodium bromate and take it to the refinery department, or some other area, if you didn't know it was an oxidizer? How did you mark

outside of the shrinkwrap? On the sides?

A. Yes.

Q. Did the quantity of the incoming shipments of sodium bromate change --

A. Yes.

Q. -- after the accident?

A. Well, when they were coming in on -- on -- we started getting them in drums after -- shortly after this. I believe we -- we continued to get this amount, and then the quantity -- the actual that came in the drums were lighter weight.

Q. I mean the total quantity that would come in on a periodic basis like per week or per month, did it remain the same? Or did it change?

A. No, it changed.

Q. Up? Or down?

A. Down.

Q. And was it your testimony that the quantity began coming in, I think, you termed it, in abundance.

A. Yes.

Q. When did that occur in relation to the accident?

A. I'm -- I'm guessing a month to -- to prepare for this new -- for this -- I -- I don't know if it was new, but prepare for this run of -- of -- I guess, whatever they do in refinery.

A. Yeah. It wasn't -- it wasn't that bright. Everything on there is extremely bright.
Q. You're talking about on these pictures? Or --
A. Yeah.
Q. -- on the bags you saw?
A. On these pictures everything looks really bright.
Q. And that's better than what you saw on any bags?
A. Yes.
Q. Do you have -- now these shipping containers, that's what we'd normally call a Connex box. Is that what they were in when you -- on the back of a truck?
A. Container. It was a container.
Q. Oh, well --
A. Yeah.
Q. -- freight container?
A. Yeah.
Q. Do you know whether that container is the container that it was shipped in, leaving China, as opposed to being put in that container somewhere in route?
A. They -- they don't -- it's sealed. And they don't -- you know, once it comes into port, it comes straight to the plant.
Q. So, if everything followed then, that seal should have been put on there when it left the plant in

Exhibit 11

Q. Tell me when you've had a chance to look at Exhibit 87.

A. Uh-huh. I see it.

Q. Do you see the yellow diamond you described earlier on those bags of sodium bromate?

A. Sure do.

Q. And if those bags of sodium bromate were in the Engelhard facility in June of '04, does that help refresh your recollection about the state of the bags, or condition of the bags when they came in?

A. This is what -- what they would basically look like. The time, some of these may have been flipped over and you had the quantities on the outside, the -- the black writing. So not all of -- I can't say that these -- this was printed on every bag, because I didn't use the material.

Q. All right. Mr. Baily, I'm confused, but I'm going to make every effort to get to the bottom of this.

A. Great.

Q. Is it your testimony that the sodium bromate that came into Engelhard's facility around June of '04, that those containers, those bags did not have the yellow oxidizer symbol?

A. Those bags that came in at that time did not.

Q. None of them had the symbol. None at all.

I don't remember it.

Q. You mean the yellow markings? The yellow --

A. Yes.

Q. -- diamond?

A. Yellow diamonds. I don't remember.

Q. But if these bags that you're looking at, as part of Exhibit 87 and part of the same shipment that was involved in the accident, then you're testimony is not accurate about those warning symbols, is it?

A. If that was the same stuff, I can't -- I can't say that that was the same stuff.

Q. I'm not asking you that. I'm saying, if it is a part of the same shipment, then your testimony about that's not accurate, is it?

A. My testimony is, I didn't see it.

Q. Well, it's important to be as precise as we can. Is your testimony you did not see them? Or they were not on there?

A. I did not see them.

Q. So you can't testify whether they were on there or not.

A. No. They could have been flipped upside-down.

Q. You don't know.

A. Don't know.

Q. One way or the other.

A. I don't know what responsibility Engelhard has.

Q. What were you told by your supervisors at Engelhard about your responsibility as receiving clerk, to make sure materials were properly labeled and had the proper warning symbols?

A. That they needed to be -- they needed to be labeled. If they weren't, then a nonconformance would be done.

Q. Did you do a nonconformance on these shipments of sodium bromate?

A. At the time, I didn't know what it was.

Q. Well, I'm confused; help me understand. Did you follow the advice of your superiors with respect to these shipments of sodium bromate?

A. Yes.

Q. And how did you do that? How did you follow the advice you just told us about, to make sure they were properly labeled with regard to this sodium bromate shipment?

A. Well the sodium bromate when it came in, it came in with a bill of lading. It did not tell us the hazard. The -- the truck that came in did not have a hazardous marking on it. At the time, we did not know it was a hazardous material, so it was marked as sodium bromate, the weight, put into the

warehouse. There may have been a label on there, may have been flipped upside down, but was not seen, okay? Because I can -- by looking at your exhibit, I see bags in different positions.

These may have all been upside-down on the top. I did not physically see the yellow diamonds. They could have been on the bags, but I did not physically see them.

Q. Those are all the questions I have. Thank you very much, sir.

A. Okay.

MR. FOSTER: Mr. Bailey, I'm Robin Foster. I'm sorry -- Josh.

EXAMINATION

BY MR. HOWARD:

Q. Mr. Bailey, my name is Josh Howard. I'm here representing Trinity and Matrix. You testified about your employment with Engelhard. If we pulled your personnel file from Engelhard, what's it going to tell us about you?

A. (Witness pauses.)

Q. Let me ask it another way. Have you ever been disciplined by Engelhard?

A. Yes.

Q. In what ways?

Alabama and back, or Georgia and back?

A. Alabama and back. Usually I'll go to Alabama and back every day.

Q. And are you saying before this accident occurred, you had seen one or more shipments of sodium bromate come in the loading dock where the container in which the material was shipped, the truck container, had no placard on the side or sides, with the oxidizer symbol; is that correct?

MR. OUTTEN: I object to the form of the question.

MR. HOWARD: Same objection.

Q. Were there times before this accident occurred where you would open up the back end of a container of sodium bromate that came into the plant and you could see the top layer of the pallet, and you would see nothing but the black and white writing with no yellow oxidizers?

A. That is correct.

Q. And at that point in time, is it your testimony that you did not know what the material was in terms of its hazardous properties, if any?

A. At the time, yes.

Q. And did you learn after this accident that, that --

A. Yes.

A. They may have been there, okay? But they may have been turned upside-down to where they weren't visibly seen.

Q. Can we agree, though, that the ones in Exhibit 87 are plainly visible?

A. Yes.

Q. Now, Mr. Bailey, if it's shown that no new shipments of sodium bromate were received into the plant between this time the accident occurred and the time that photograph was taken, how do you explain the fact that those yellow oxidizer symbols are plainly visible on that pallet, in light of your testimony? How do you explain that?

MR. STEWART: Object to the form.

A. They could have been taken back to the warehouse, flipped over, shrinkwrapped, photographed. I don't know. They're shrinkwrapped. I mean, you can do anything with that. I mean, just because right here they're shown that they're facing up, when it came to me to begin with, they may have been facing down and not visibly seen. Or if it was out in production already, people could have already taken stuff off the pallet, and thus, bags upside-down, not being able to be seen.

Q. So if it's -- and we can go and find out whether

Exhibit 12

as much as I can, and I try to do as much as I can.

Q Okay. Do you do any yard work, or anything like that?

A I cut a little grass with the riding mower, yes, sir.

Q Okay. I don't know if you ever did before, did you ever tend a garden before?

A Yes, sir.

Q Can you tend a garden, now?

A Not like I did, no, sir.

Q Okay. Explain that.

A Well, there's no way that I could hoe a garden, and pull weeds for all day long. I just couldn't do it.

Q Okay. Do you have a garden today?

A Yes, sir. Yes, I have a garden.

Q Okay. What sort of activities -- do you still do any of the activities associated with gardening?

A Very, very little. Not nothing like I did, no, sir.

Q Okay. Who tends to that, does you wife?

A My wife does, and my uncle that lives next-door does.

Q Okay. How big of a spot, plot, do you use?

A About half of what we used to, probably 20 by 60,

Exhibit 13

cut?

A No.

Q Now, when y'all walked down and you saw those -- how many pallets were there? Do you recall?

A I don't recall.

Q Three, maybe?

A Might have been.

Q When you inspected the three pallets, did anybody request that they be moved?

A I'm not -- I don't recall. I'm not sure.

Q And nobody asked what they were?

A I believe everybody looked at the pallets, I don't think anybody questioned as far as us seeing anything that showed an immediate danger.

Q Do you recall what was on the pallets?

A Bags.

Q And the pallet's made of wood?

A Yes, it is.

Q And the bags are made of what?

A Paper.

Q And we've already talked about that bags and paper would qualify as -- that wood and paper would qualify as a flammable material, correct?

A Yes, it would.

Q And it was explained that y'all would be working

hazardous materials?

A Have I seen labels on hazardous materials?

Q Yes, sir.

A (Witness pauses.)

Q Isn't normally the business to have labels on hazardous material.

A I've seen labels on bags before.

Q It's normal to have labels on bags indicating they're hazardous.

A Yes.

Q Sir?

A I can't hardly understand you.

Q I said, isn't it normal to see labels on bags that contain hazardous materials?

A Is it normal?

Q Yes, sir.

A Is it normal to see them?

Q Yes.

A Yes, I guess.

Q I'll let it go at that. That's all I have.

REEXAMINATION

BY MR. HOWARD:

Q Mr. Knox, right back around. When you looked at those bags, did you see any writing on the bags?

A Only thing, I seen some black writing of some sort,

numbers or something. I'm not sure.

MR. OUTTEN: Can you say that again, sir? I couldn't hear.

A Black writing, maybe. Letters or numbers, maybe.

Q Do you recall what the letters spelled out?

A No.

Q Do you recall what the numbers were?

A No.

Q You can look up stuff on an MSDS by the numbers, correct?

A I assume you can.

Q And if there's the name of the product on there, you can look that up on the MSDS too?

A You should be able to, yes.

Q Do you recall if there was a name of the product on there?

A I don't recall.

Q You don't recall whether it was on there or not? Or did you not see it at all?

A I don't recall.

Q So you don't recall what, if anything, was on that bag.

A I know there was some black writing on the bag, but I don't know exactly what it was. I don't recall.

Q They teach you what that black writing is; don't

Exhibit 14

Q. As part of the hazardous communication training that you participated in as an instructor, did you instruct employees on the safe handling and storage of hazardous chemicals, like oxidizers?

A. Don't recall oxidizers. I'm sure it came up, but I really don't recall any previous experience prior to this event with oxidizers. Primarily the instruction consisted of how to interpret and read, understand material safety data sheets, their rights under the hazard communication standard, that sort of thing, generally. Where the MSDS's were retained; how to access them.

Q. Did you ever conduct training courses for the Fluor Daniel employees who were assigned to Engelhard?

A. No.

Q. When did you start working for Fluor Daniel?

A. I joined Daniel Construction Company in 1981.

Q. What is your current position?

A. Executive HSE Director, Fluor Global Services.

Q. And just for the record, what is the HSE stand for?

A. Health Safety and Environmental.

Q. And in June of 2004, what was your position?

A. HSE Director, Fluor Global Services.

MR. BRANDT: HSE Director for what?

THE WITNESS: Fluor Global Services. It's a

report?

A. Inspection of the accident area.

Q. And in your opinion, is that portion of the report true, accurate and complete?

A. My -- based on my recollection, I wouldn't have considered the bags to be highly visible, with a labeling that was on those bags. I would take exception with clearly marked with oxidizer. It wasn't the standard US NFPA label, you know the diamond with the multi-colored boxes. So, it really -- there was a symbol for, you know, a -- a -- with a flame on it. But it -- it didn't catch the eye, like our labeling system -- standard labeling system does.

Q. Who wrote that part of the report?

A. I don't recall.

Q. Did you provide the report to someone else at Fluor Daniel? I mean, was it prepared for a specific person? Or a specific --

A. I don't recall. But I'm sure it was prepared for management, Fluor management.

Q. Did you approve of the report before it was finalized?

A. I don't think I did.

Q. Now, I think you said something before, it's not

COPY

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
Keith Black and Charinon Black, Plaintiffs, v. Univar USA, Inc, Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. No. 2005-CP-37-604 **PLAINTIFFS' JOINT REPLY TO DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' STRICT LIABILITY CLAIMS**
Curtis Martin and Tina Ann Martin, Plaintiffs, v. Univar USA, Inc, Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. No. 2005-CP-37-605
Scott F. Lawing and Tammy R. Lawing, Plaintiffs, v. Univar USA, Inc, Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. No. 2005-CP-37-030

TO: SAMUEL W. OUTTEN, ESQUIRE ATTORNEY FOR DEFENDANT UNIVAR USA, INC. AND ELLIS M. JOHNSTON, II, ESQUIRE AND JOSHUA L. HOWARD, ESQUIRE ATTORNEYS FOR DEFENDANTS TRINITY MANUFACTURING, INC. AND MATRIX OUTSOURCING, LLC.

Replying to the Defendants' Joint Motion for Summary Judgment, the Plaintiffs submit that the Motion should be denied upon the grounds that South Carolina law affords protection through strict liability to users and consumers such as the Plaintiffs, that there are genuine issues of material facts in controversy that must be decided, and that the facts, when viewed in the light most favorable to the Plaintiffs, support all of the Plaintiffs' claims. In support of the Plaintiffs' position, the Plaintiffs jointly and respectfully submit the following to the Court:

FACTS

On or about June 1, 2004, the Plaintiffs, Lawing and Black, were working for Engelhard Corporation at its plant in Oconee County, South Carolina, and were part of a specially hand picked maintenance crew or team for the purpose of cutting out and replacing condensate pipe during the plant shutdown beginning on that date. The project upon which the Plaintiffs were working was critical to the operation of the Engelhard plant as almost all of the plant's operations were dependent on that pipeline being operational. In other words, the plant was out of business until the project was completed. Plaintiff, Martin, although a contract employee through Flour Daniel, was also a member of the crew/team and was assisting Black and Lawing with the work. As part of the job, Plaintiffs were using a cutting torch to cut out sections of the pipe which was approximately twenty-three (23) to twenty-five (25) feet above the floor. During the course of the work, a piece of slag from the cutting operation landed on a pallet of sodium bromate that was stored on the floor in the aisleway beneath the condensate pipe causing the bag to catch fire and the sodium bromate to "oxidize" the flame to such an extent that a fire ball engulfed the Plaintiffs in the pipe rack (Black) and a man lift (Martin and Lawing) approximately eighteen (18) to twenty-three (23) feet above the floor. As a result, each of the Plaintiffs suffered severe burns and other injuries which have totally

disabled them and rendered them in need of substantial medical care (physical and psychological) for the remainder of their lives.

The sodium bromate in issue was purchased by Engelhard from Defendant, Univar, USA, Inc., who, in turn, ordered it from Trinity Manufacturing, Inc. who, in turn, utilized its company Matrix Outsourcing, LLC, to import the sodium bromate from China to the port of Charleston where it was delivered by agreement between Trinity and Univar directly to Engelhard, with Trinity evidently paying the over land freight bill from the port of Charleston to Engelhard ***(Exhibit A)***.

The Plaintiffs brought these actions claiming that all three Defendants were participants in the distributive chain of the sodium bromate to Engelhard which caused the Plaintiffs injuries and damages. The Plaintiffs are informed and believe that the sodium bromate, as imported, packaged and distributed by the Defendants, was in a defective condition unreasonably dangerous to the user and consumer, namely the Plaintiffs herein, in that it was not packaged with adequate materials to prevent or resist ignition and explosion and, moreover, it was not properly labeled and/or marked in such a manner as to adequately warn the Plaintiffs of its dangers and hazards. The Plaintiffs base their lawsuits on claims of strict liability under S.C. Code §15-73-10 et. seq., on negligence, on breach of implied warranty of merchantability by all Defendants, and the breach of express warranties by Defendant Univar. This Reply to the Defendants Joint Motion for Summary Judgment discusses why the Defendants are strictly liable to the Plaintiffs under S.C. Code §15-73-10 et. seq.

STANDARD OF REVIEW

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53 (Ct.App.1999). All ambiguities, conclusions, and inferences arising from the evidence must be construed *most strongly* against the moving party. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115 (Ct.App.2001) (emphasis added). Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Lanham v. Blue Cross & Blue Shield, 349 S.C. 356 (2002); Trivelas v. South Carolina Dep't of Transp., 5348 S.C. 125 (Ct.App.2001).

ARGUMENT

I. The Plaintiffs are users and consumers of the products imported, manufactured, sold, and/or distributed by the Defendants.

The Defendants contend that the Plaintiffs in this matter were mere bystanders and did not use and consume the sodium bromate. Comment L to The Restatement (Second) of Torts, § 402A makes it clear that an employee of a consumer or user is within the intended protections of the section. ***(See Exhibit B).*** Moreover, Plaintiff Lawing was more than a mere employee of the purchaser as he was an actual employee user of the sodium bromate imported, manufactured, sold, and/or distributed by the Defendants. Plaintiff Lawing testified at his deposition on March 26, 2008 that he worked within the refinery hall at Englehard on occasions. Additionally, Plaintiff Lawing testified that he was an employee of Englehard. Plaintiff Lawing testified as follows:

7 Q. And who was your supervisor when you began
8 working for Engelhard?
9 A. I had several supervisors.
10 Q. Well, who was your direct -- who did you
11 report to directly when you began working for
12 Engelhard?

A. John Kirby.
Q. Give me a brief description of what you were hired to do at Engelhard.
A. I was hired to be a plant maintenance person.
Q. Did your job duties and responsibilities change from the time you were hired in 2000 until the accident occurred in June of 2004?
A. No, sir.
Q. Did you have the same job in 2004 that you did in 2000?
A. Yes, sir.
Q. Who did you report to in 2004?
A. Robby Acree.
Q. And by plant maintenance, does that mean what it sounds like, that you were -- your job was to assist with maintaining the various machines and equipment on site at Engelhard?
A. Yes, sir.
Q. Is there anything more to it than that?
A. That's pretty much it.
Q. If you were explaining to a jury what your job was, would you add anything to what you just told me?
A. I would just say that my job required working on whatever needs working on in the plant.
Q. And that was the case from when you were hired in 2000 until 2004?
A. Yes, sir.

[deposition of Scott Lawing dated 03/26/2008, Page 19, Line 7- Page 20, Line 16]

The refinery hall at Englehard is where sodium bromate is used or consumed. Plaintiff Lawing testified in his deposition that he worked in the refinery hall. Most importantly, Plaintiff Lawing testified that he helped load the sodium bromate. Responding to Attorney Outten's questions, Plaintiff Lawing testified as follows:

Q. Did you work in the refinery hall while employed at Engelhard?
A. Yes, sir.
Q. What did you do in the refinery hall?
A. Many different jobs.

[deposition of Scott Lawing dated 03/26/2008, Page 23, Lines 14-18]

Plaintiff Lawing continued by explaining his use of sodium bromate as follows:

Q. Had you worked with sodium bromate before June 1, 2004?
A. I had helped a friend of mine put some into a reactor a few times because it was in little heavy kegs and he couldn't hardly lift them by hisself.
Q. So is your answer, yes, you had worked with it before June of 2004?
A. I had helped unload it before 2004. Because I worked night shift the last -- I don't know how long. Probably most of the time I was actually an employee with -- with Engelhard. And they had -- the production crew was pretty -- the plant was kind of -- it wasn't really struggling really, but they didn't have more people than they needed.
So at night if I wasn't just really, really busy, I would help Pat Grogan load the bromate into the reactor because it was heavy. He couldn't hardly lift it. The little old drums, they were awkward. He couldn't -- he just had a time loading. So I would help him.
[deposition of Scott Lawing dated 03/26/2008, Page 29, Lines 3-24]

Upon further questioning, Plaintiff Lawing testified how often he used the sodium bromate imported, manufactured, sold, and/or distributed by the Defendants. Plaintiff Lawing testified as follows:

Q. All right. And how many times did you help Mr. Grogan load the bromate into the reactor?
A. Probably --
Q. Did you help him five times or 20 or do you know?
A. Probably a few dozen probably or so. Several times.
[deposition of Scott Lawing dated 03/26/2008, Page 30, Lines 8-14]

It is clear from the testimony of Plaintiff Lawing that he was a user of sodium bromate imported, manufactured, sold, and/or distributed by the Defendants. To say that Plaintiff Lawing was not a user is absolutely and obviously without merit.

Notwithstanding Lawing's actual use of the sodium bromate, as hereinabove set out, Plaintiffs Lawing, Martin, and Black all were specific users and/or consumers and are within the class of persons intended to be protected by S.C. Code §15-73-10 *et. seq*. Plaintiffs Lawing, Martin, and Black, along with Steve Knox and Mark Powell, were working as a team that was specially chosen to repair/replace the condensate pipe within the refinery hall on the day of the tragic accident. The Plaintiffs, as well as Steve Knox, the team leader, had been trained to look for hazardous conditions within work areas and to look after each other ***(Exhibit C - Knox Depo., pp.49-50;66-70;115-120)***. The main thrust of the Plaintiffs' claim is that the sodium bromate imported, manufactured, sold, and/or distributed by the Defendants was not marked and labelled properly so as to enable the Plaintiffs to readily identify a hazardous chemical.

It is the Plaintiffs' position that they are afforded a cause of action in this case based in strict liability because they are users and/or consumers of the warnings and labels printed on dangerous chemicals within their workplace. As discussed above, comment L to The Restatement (Second) of Torts, § 402A makes it clear that an employee of a consumer or user is within the intended protections of the section. Plaintiff Lawing testified at his deposition as follows on these matters:

> 23 Q. Well, do Engelhard employees have the
> 24 responsibility to look out for their co-workers?
> 25 A. Yes, sir.
> *[deposition of Scott Lawing dated 03/26/2008, Page 59, Lines 23-25]*

Plaintiff Lawing testified about the "hot work" permit and how the permit was utilized to protect the team he worked with. He testified as follows:

> 19 Q. And are -- based on your experience are
> 20 employees at Engelhard who are going to work on a
> 21 project which requires a hot work permit, are those
> 22 workers supposed to look at the hot work permit
> 23 before the work begins?
> 24 A. Yes, sir.

25 Q. And is that why you did it?
1 A. Yes, sir.
2 Q. Are there safety reasons why you look at a
3 hot work permit before the project begins?
4 A. Yes, sir.
5 Q. What are some of them?
6 A. Well, just to make sure that the area
7 supervisor has done everything he was supposed to
8 do.
[deposition of Scott Lawing dated 03/26/2008, Page 65, Lines 19-25 – Page 66, Lines 1-8]

Plaintiff Lawing also described his training and his knowledge of oxidizers such as sodium bromate.

He testified as follows:

17 Q. When you began working at Engelhard in '93
18 were you given training by Engelhard?
19 A. And Fluor Daniel, some training, yes, sir.
20 Q. And that training occurred in the first
21 couple of weeks of your employment in '93, correct?
22 A. Yes, sir.
23 Q. During that training you were told that
24 you would be working with hazardous and flammable
25 and dangerous materials, right?
1 A. Yes, sir.
[deposition of Scott Lawing dated 03/26/2008, Page 21, Lines 17-25 – Page 22, Line 1]

18 Q. Did you know sodium bromate was an
19 oxidizer?
20 A. No, sir.
21 Q. Did you know what an oxidizer was?
22 A. Yes, sir.
23 Q. In June of 2004?
24 A. Yes, sir.
25 Q. What's your understanding -- what was your
1 understanding then in June of 2004 of what an
2 oxidizer was?
3 A. My understanding of an oxidizer, and I
4 could be wrong, but that it releases oxygen or
5 causes things to burn better.
[deposition of Scott Lawing dated 03/26/2008, Page 30, Lines 18-25 – Page 31, Lines 1-5]

4 Q.. You knew on the morning of June 1, 2004,
5 that any and all oxidizers should be removed from
6 the work area where a cutting torch was being used,
7 right?
8 A. Yes, sir.
[deposition of Scott Lawing dated 03/26/2008, Page 97, Lines 4-8]

Additionally, Glenora Ashworth, the area manager over shipping and receiving at Engehard at or about the time of the accident, testified in her deposition on page 31, lines 17-20 ***(Exhibit D)***, that it is important for the materials to be properly labeled and for proper warnings to be attached at all times ***"because you have to be sure that the material is handled properly and that no employee is put in danger. And that you don't put the company in danger, you know, as a fire hazard or a risk."*** Steve Knox further testified that the employees of Engelhard were taught to look for a label indicating that material is hazardous or dangerous and that he looked for such a label on the pallets of the sodium bromate and didn't see one. He did, however, see some writing on the bags but did not see the yellow oxidizer label ***(Exhibit C-pp.66-70;115-120)*** next to it as required by DOT and OSHA.

It is, therefore, clear from the testimony of Plaintiff Lawing and Steve Knox that the Plaintiffs, together with Steve Knox and Mark Powell, were working together as a team, had been trained to look after each other, and had been trained to look for oxidizers in order to remove them from "hot work" areas. Although Black and Martin do not remember seeing the pallets in the aisleway that morning, they are, nevertheless, users of the labels as members of the team, the same as Lawing and Knox, and should be deemed to have constructively and/or indirectly observed the pallets of bromate through the observations of Lawing and Knox, both of whom looked at the pallets of materials and did not see the "yellow" symbol or label.

The express purpose of labeling dangerous chemicals in a work place setting is to allow persons such as the Plaintiffs to use the information to protect themselves. As discussed below, this is the reason why laws, regulations, and various rules pertaining to dangerous products such as sodium bromate are in place. It is the Plaintiffs' contention that they use this information to protect themselves from harm and, indeed, on the date of this accident had Knox and Lawing observed the appropriate warnings on the packages, the work would have been stopped and none of the Plaintiffs would have been injured.

An importer, manufacturer, seller, and/or distributor that fails to properly label a dangerous chemical is placing into the stream of commerce a defective product. Persons such as the Plaintiffs, as well as Knox, through and one or more of the team members, look to the markings on these dangerous products for one primary purpose; that is, to *use* that information. To say that the Plaintiffs are not users would completely undermine the purpose of strict liability and would allow irresponsible companies to escape liability for their wrongful acts.

Of notable importance is the fact that the purchase agreement between Englehard and Defendant Univar requires that all packages be marked according to the Occupational Safety and Health Administration 1910.1200 requirements (hereinafter referred to as OSHA), according to the Department of Transportations Code of Federal Regulations requirements (hereinafter referred to as DOT), and according to all federal, state, and local law, rules, and regulations. ***(See Exhibit E and F, also marked in Simmons deposition as Defendants' Exhibits 118 and 119 and Exhibit G which is the back side of each page of Exhibits 118 and 119).*** According to OSHA instruction CPL 2.238C "Labels and Other Forms of Writing" (f)(1) and (f)(5), the purpose of labeling dangerous chemicals in the workplace is clear. According to this standard:

> "Labels provide an immediate warning to employees of the hazards they may be exposed to and, through the chemical identity, labels provide a link to more detailed information available through MSDS's [material safety data sheets] and other sources. Labels must contain the identity of the chemical, and appropriate hazard warning, and the name and address of the responsible party." ***(See Exhibit H).***

Additionally, OSHA regulation 1910.1200 (f)(1) requires importers, manufacturers, sellers, and/or distributors to label chemicals such as sodium bromate with appropriate hazard warnings. Additionally, OSHA regulation 1910.1200 (f)(3) requires importers, manufacturers, sellers, and/or distributors to label chemicals such as sodium bromate with warnings consistent with DOT Regulations. According to OSHA regulation 1910.1200 (f)(10), an employer does not have to add warnings to dangerous chemicals provided the importer, manufacturer, seller, and/or distributor has provided the proper warnings. Most importantly, OSHA regulation 1910.1200 (b)(4)(i) requires that employers insure that all labels affixed on chemicals by importers, manufacturers, sellers, and/or distributors remain in place ***(Exhibit I)***.

> The purchase order attached as ***Exhibits E, F and G*** provides in pertinent part:
>
> "The following information must appear on the side of each package: 1) Name of material, ... Each package must comply with the Occupational Safety and Health Administration 19.1200 requirements for packaging and labeling and the Department of Transportations Code of Federal Regulations.... Vendor warrants that it is and will be in compliance with all applicable provisions of federal, state, and local laws and the rules, regulations, and standards promulgated thereunder...."

It is clear that Defendants were not only required to adhere to applicable provisions of federal, state, and local laws, but Defendant Univar expressly warranted that it would adhere to these provisions. The Plaintiffs submit that these requirements were, at least, partially in place for the protection of all employees and other persons coming within contact with sodium bromate ***(See also, Ashworth Depo. excerpts referenced above and attached hereto as Exhibit D).***

According to DOT regulations, chemicals such as sodium bromate supplied in "overpack" form, must be labeled on the outside of the shrink wrap. The term "overpack" in this case refers to packages of sodium bromate stacked on a pallet then shrink-wrapped ***(Exhibit J)***. Section 172.406 of the DOT regulations require all pallets of material in excess of 64 cubic feet to be labeled on the outside of the shrink wrap on two sides with warning signs or symbols that are 10 inches by 10 inches in size. In the case of pallets containing less than 64 cubic feet, there must be two 4 inches by 4 inches warning signs or symbols on two sides of the shrink-wrap. Alternately, in the case of pallets containing less than 64 cubic feet the labels or symbols can be on the product inside the shrink-wrap provided the labels are clearly visible from a distance and the chemical contained within the package is identified. The signs that must be placed on sodium bromate are "Oxidizer" signs. Approved Oxidizer signs are a reflective yellow material containing a symbol and the word "Oxidizer". ***(Exhibit K)*** Additionally, the American National Standard Institute (ANSI 129.1) also sets forth standards for warnings within the chemical manufacturing industry. In addition to the DOT regulations discussed above, ANSI requires signal words such as "DANGER", "WARNING", and "CAUTION" be placed on packaging ***(Exhibit L - article written by Dr. S. Paul Singh, one of Defendants' experts; Exhibit M - excerpts of depo of Daniel Levine, another of Defendants' experts, at pages 134-135; Exhibit N, entitled "Interpretation of Chemical Labels")***. The Plaintiffs will show at the trial of this matter that ANSI is recognized as the industry standard. Most importantly, the Plaintiffs will show at the trial of this case that the Defendants failed to properly label their products in accordance with OSHA, DOT and ANSI, as well as IMDG and all applicable provisions of federal, state, and local laws and the rules, regulations, and standards promulgated thereunder.

Through depositions in this matter, it has been shown that the pallets of sodium bromate were

located within a "roped off" area where the Plaintiffs were performing work on an overhead pipe. The deposition testimony of Plaintiff Lawing and Steve Knox show that the team was in the roped off area for an extended period of time prior to performing the work on the overhead pipe with an acetylene torch. Plaintiff Lawing testified as follows:

Q. Did you walk through the area on -- the work area on June 1, 2004, before this project began?
A. Yes, sir.
Q. My understanding is that the area was taped off?
A. Yes, sir.
Q. What color was the tape?
A. Red, if I'm not mistaken.
Q. What is the purpose of putting the red tape around the work area?
A. Let people know that work is going on. If they need to come through the area, they need to speak with the fire watch or somebody associated with the job going on before they come through so nothing falls on their head.

[deposition of Scott Lawing dated 03/26/2008, Page 44, Line 20 – Page 45, Line 10]

Q. And how many times that morning had you walked through the work area before work began?
A. Several times.
Q. How many times did you walk through the taped off area before the work began that morning before 8:15?
A. Several times.
Q. By several times, let's be as precise as we can, three times, five times?
A. Four or five times maybe.

[deposition of Scott Lawing dated 03/26/2008, Page 69 ,Line 21 – Page 70, Line 5]

Plaintiff Lawing explained that he saw two pallets against the wall within the roped off area and that he thought that they contained baking soda or salt. Plaintiff Lawing testified as follows:

Q. The pallets of sodium bromate were within the area that was taped off that morning, right?

A. Yes, sir.
Q. Did you see them when you walked – the pallets of sodium bromate when you walked the area that morning?
A. I saw a pallet with material on it.
Q. Did you see the pallet with material on it before work began?
A. Yes, sir.
Q. Was there one pallet, two, three, do you remember?
A. I think there was two pallets. I'm not 100 percent sure.
Q. What was your purpose in walking the – walking through the work area before the project began?
A. I was walking through more or less just kind of talking and – and what have you with the other co-worker who was waiting on the permits to get through being issued.
Q. Who was with you when you walked through the work area?
A. Probably Mark Powell and maybe Keith Black before work started, but there were a lot of people through there that morning before work started.
Q. Were Curtis Martin and Steve Knox with you when you walked through the area?
A. I'm sure they probably were, yes, sir.
Q. Did anybody comment on the pallets of material within the taped off area?
A. No, sir.
Q. Can you tell us where they were?
A. They were against the wall.
Q. What did they look like? What did you see?
A. Seen sacks that looked like just sacks, just –
Q. Did they have shrink-wrap on them?
A. Yes, sir.
Q. What kind of containers? Were they bags or drums?
A. Bags. I thought it was baking soda.
Q. Why did you think it was baking soda?
A. Because they keep baking soda and salt stored in the same places.

[deposition of Scott Lawing dated 03/26/2008, Page 46, Line 9 – Page 48, Line 4]

In order to perform work in the refinery hall utilizing cutting torches, welders, etc., Englehard employees must be issued a hot work permit. As part of the process, a supervisor removes all hazardous and flammable material from the roped off area in order insure the safety of the repair crew. Plaintiff Lawing testified as follows concerning this process:

> 2 Q. So is it the hot work permit supervisor's
> 3 responsibility to make sure the work area is clear
> 4 of all hazardous and flammable materials?
> 5 A. Yes, sir.
> *[deposition of Scott Lawing dated 03/26/2008, Page 44 ,Lines 2-5]*

> 2 Q. So the fact that the pallets of material
> 3 were not removed, because they were not removed you
> 4 assumed they weren't hazardous or flammable?
> 5 A. I saw nothing to make me believe
> 6 otherwise, no, sir.
> *[deposition of Scott Lawing dated 03/26/2008, Page 90 ,Lines 2-6]*

A significant question of fact to be addressed by a jury at the trial in this matter is whether the bags of sodium bromate were properly labeled. According to the deposition testimony of Plaintiff Lawing and Steve Knox, they spent a notable period of time within the roped off "hot zone" prior to working on the overhead pipe. Of significant importance is that they both testified they never saw any markings on the sodium bromate bags or pallets that would indicate to them that they were hazardous or dangerous. Plaintiff Lawing testified as follows:

> 8 Q. Earlier when you said you saw the two
> 9 pallets of materials you said you didn't remember
> 10 seeing any labels or warnings. Did I get that
> 11 right?
> 12 A. Yes, sir.
> 13 Q. Now, are you saying that there were no
> 14 labels or warnings on the material that morning or
> 15 you don't remember seeing any?
> 16 A. I'm saying there wasn't none on or I would
> 17 have seen them as close as I was to it, but I was
> 18 close as me to you or closer.
> 19 Q. Four or five feet?

A. Yes, sir. Or less. Several times.
Q. And was there -- was there any -- were there any markings on the bags at all?
A. Not that I seen.
Q. Just solid white bags, no letters, no markings, no warnings, nothing?
A. Had shrink-wrap around the outside, a clear type shrink-wrap.
Q. I'm not asking you about the shrink-wrap for now. I'm asking you about the bags themselves. Okay?
A. Just bags. Yes, just bags.
Q. So they were -- they were -- they were clean white bags with no lettering, no markings at all?
A. White or beige looking.
Q. Okay.
A. The light in the plant is kind of yellow-ish. So it kind of tends to have kind of color effects, but, no, sir, I seen no -- no writing whatsoever, no, sir.
Q. So they were -- they were beige or white bags with nothing -- no identifying lettering, marks, or warnings at all, right?
A. I saw none, no, sir.
Q. Well, let's see if we can get on the same page. Are you saying there were none or you didn't see any?
A. I cannot say that there were any on there because I didn't see any. So I'm saying there was none.
Q. Okay.
A. Me personally, I'm saying there was none.
Q. So what we have --
A. Of what I saw.
Q. All right. Did I -- did I let you finish your answer?
A. Yes. Yes, I finished. I'm good. Go ahead.
Q. Let me know. I don't want to cut you off.
A. No, sir. I'm fine. Go ahead.
Q. All right. Thanks. So what we -- what you saw that morning were two pallets of materials, beige or white bags with no lettering at all, no warnings at all, no markings at all, right?

15 A. That's what I saw, yes, sir.
[deposition of Scott Lawing dated 03/26/2008, Page 102 ,Line 8 – Page 104, Line 15]

8 Q. What do you see in Exhibit 87?
9 A. Well, I see some pallets with oxidizer
10 labels on the material.
11 Q. Have you ever seen that photograph before
12 I showed it to you?
13 A. Not to my knowledge, sir.
14 Q. So you don't know when it was taken?
15 A. No, sir. Not to my knowledge.
16 Q. Can you tell whether or not that
17 photograph was taken in the Engelhard facility in
18 Seneca?
19 A. No, I cannot.
20 Q. Can we agree that the yellow diamond
21 oxidizer symbols are plainly visible in that
22 photograph?
23 A. Yes, sir.
24 Q. And is your testimony that the -- the bags
25 you saw the morning of June 1, 2004, did not have
1 those symbols on there?
2 A. Yes, sir.
[deposition of Scott Lawing dated 03/26/2008, Page 109 ,Line 8– Page 110, Line 2]
See also, Exhibit C - excerpts from Steve Knox depo, particularly, pages 67-71;115-116

Prior to receiving sodium bromate in plastic weave-type bags, Engelhard received the chemical in drums. Plaintiff Lawing testified concerning his familiarity with these drums used prior to the accident as follows:

2 Q. Had you seen the oxidizer label on drums
3 in the facility before?
4 A. Yes, sir.
5 Q. You talked earlier about putting the
6 material, the sodium bromate material, in the bin
7 with Mr. Grogan. Do you remember that?
8 A. Yes, sir.
9 Q. And when you were putting the material in
10 the bin with Mr. Grogan were there oxidizers, the
11 yellow symbol you described, was that on the drums?
12 A. It seemed like there was, sir, on the
13 side, yes, sir.

[deposition of Scott Lawing dated 03/26/2008, Page 105 ,Line 2 – 13]

8 A. I had never seen sodium bromate in a bag.
9 It had always been in -- in drums that came in. I
10 didn't know it was placed in bags.
11 Q. So as of the time this accident happened
12 you did not know that sodium bromate was shipped to
13 the facility in bags?
14 A. No, sir.
15 Q. To your knowledge, the sodium bromate
16 shipped to the facility had all come in what kind of
17 containers?
18 A. Little -- just a small tote, just a little
19 drum like tote.
[deposition of Scott Lawing dated 03/26/2008, Page 11 ,Line 8-19]

Plaintiff Lawing explained in his deposition that he would have moved the pallets of sodium bromate if they would have been labeled. He explained that he thought they were a wet pallet of salt or baking soda and was not concerned with them. Moreover, he explained that he would not have let anyone on his crew get above the pallets and cut the pipe had he known they were over an oxidizer. Plaintiff Lawing testified as follows:

16 A. I thought that I knew what this stuff was
17 is why -- if I had known that this was an oxidizer,
18 if I had seen a label, I would have moved it by hand
19 if I had to of.
[deposition of Scott Lawing dated 03/26/2008, Page 172 ,Line 16-19]

17 Q. I mean, just because it's wet doesn't mean
18 it's no longer hazardous or flammable, does it?
19 A. If it's wood or paper, it does. Wet wood
20 and wet paper don't burn, but, sir, if I had known
21 this was an oxidizer, if I had seen something that
22 said, "Scott, this is an oxidizer," I would not have
23 let anybody else even crawl up on there.
[deposition of Scott Lawing dated 03/26/2008, Page 192 ,Line 17-23]

20 Q. What did you notice about the pallets of
21 material when you saw them up there before the
22 accident happened?
23 A. When I was up in the lift?

24 Q. Yes, sir.
25 A. Just that they were a stack of wet
1 pallets. I didn't figure it could be -- I naturally
2 didn't figure it was anything worth much or it
3 wouldn't have been wet and left sitting there and it
4 would have been labeled as such.
[deposition of Scott Lawing dated 03/26/2008, Page 193 ,Line 20 – Page 194, Line 4]

It is obvious that a question of fact exists regarding the labeling and alleged failure to warn in this case. The Plaintiffs, through their training and routine, look for labels and warnings contained on chemical packages and overpacks in performing their jobs. For the Defendant to claim that the Plaintiffs are not users or consumers of the warning labels that are required by law to be affixed by an importer, manufacturer, seller, and/or distributor of this dangerous chemical is nothing more than a thinly-veiled attempt to shrug off liability for their wrongs. The Plaintiffs submit that they are users of the information required to be placed on sodium bromate packages. Moreover, significant questions of fact exist that should be heard by a jury of their peers.

II. The Plaintiffs are within the class of persons intended to be protected by Section 402A of the Restatement of Torts, Second.

The Defendants would have this Court believe that persons such as the Plaintiffs are not afforded protection under S.C. Code §15-73-10 *et. seq.* They claim, according to Bray v. Marathon Corporation, 356 S.C. 111 (2003), that "casual bystanders" are not allowed to recover in cases based upon strict liability. As discussed above, the Plaintiffs assert that they were not mere bystanders. However, even if the Plaintiffs were bystanders, the Bray case does not set forth a rule or any guidelines declaring to what extent a claimant must specifically "use" or "consume" an unreasonably dangerous product in defective condition in order to recover under strict liability.

In Bray the only issue before the Supreme Court related to this case was whether the Plaintiff (Bray) could recover as a bystander because he was not "closely related" to his co-worker that he saw

crushed to death. Plaintiff Bray brought a strict liability claim (along with other claims of negligence and warranty) against the manufacturer of the compactor that killed his co-worker. The trial court granted summary judgment against Plaintiff Bray and ruled that all claims, including strict liability, must be analyzed under Kinard v. Augusta Sash & Door, 286 S.C. 579, (1985) (*requiring a close relationship to be present in claims of negligent infliction of emotional distress*). Specifically, the trial court ruled that there was not a close relationship; therefore, Plaintiff Bray could not recover under strict liability.

The South Carolina Court of Appeals reversed the trial court's decision granting summary judgment to the Defendant on strict liability. On appeal to the South Carolina Supreme Court, the Court held that the bystander analysis of Kinard does not apply. Specifically, the Court held that a close relationship is not required in order to bring a strict liability claim for emotional distress under S.C. Code §15-73-10. The Court explained:

> "It is not unreasonable to conclude the user of a defective product might suffer physical harm from emotional damage if the use of the product results in death or serious injury to a third person, irrespective of the relationship between the user and third person."

It is the Plaintiffs' contention that the Bray decision is limited solely to cases of emotional trauma and the requirement of a close relationship. The Court did not address the issue of who a user or consumer is, nor did it address the extent to which an employee must handle, use, or consume a product in order to maintain a claim under S.C. Code §15-73-10. The Plaintiffs believe that the Defendants are stretching the holding of Bray beyond its intended holding based upon limited dicta contained in that case.

The Restatement (Second) of Torts, § 402A, Comment O (1965) ***[Exhibit B]*** recognizes the distinction between applying the strict liability doctrine to users and consumers and to non-users and

non-consumers; however, does not express approval or disapproval of the expansion of the rule to protect others. Additionally, there is no standard set forth which establishes a threshold that a claimant must cross in order to use or consume a product. For example, does looking to a warning on a dangerous product constitute use? Does looking to that label constitute use if an employee then uses that information to clear it from a work area before using an acetylene torch? The Plaintiff submits that the correct answer is that using that label in an industrial setting in order to be protected from personal injury constitutes use. To claim otherwise would completely undermine the intent of S.C. Code §15-73-10 and its intention to protect employees of an express user or consumer.

As proof that the Restatement (Second) of Torts, § 402A is to be construed in this manner, numerous courts have held that there is no distinction between applying the strict liability doctrine to strictly defined classes like users and consumers versus non-users and non-consumers. Darryl v. Ford Motor Co., 440 S.W.2d 630, (Tex 1969). Most Courts confronted with this issue have held that there is no adequate rationale or theoretical explanation why non-users and non-consumers should be denied recovery against the manufacturer of a defective product. Id at 633. A manufacturer who places in commerce a product rendered dangerous to life or limb by reason of some defect is strictly liable in tort to one who sustains injury because of the defective condition. Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1962). A seller of a product in a defective condition which is unreasonably dangerous to the user or consumer is liable to anyone who may reasonably be expected to be in the vicinity of the product's probable use and to be endangered by it if it is defective. Coca Cola Bottling Co., Inc. of Vicksburg v. Reeves by Reeves, 486 So.2d 374, (Miss.1986).

Even if the Plaintiffs in this case were construed as bystanders, numerous Courts have interpreted the Restatement (Second) of Torts, § 402A to include recovery for bystanders. In Caruth

v. Mariani, 11 Ariz.App. 188, 463 P.2d 83 (1970), the Court held that strict tort liability as to a manufacturer and retailer was available to bystanders. In so holding, the Court expressly stated that the bystander "should be entitled to greater protection than the consumer or user . . . because consumers and users, at least, have an opportunity to inspect for defects . . . " *See also* Williams v. National Trailer Convoy, Inc., 549 F.Supp. 305 (D.C.Colo., 1982) (*extending liability to non-users and non-consumers*). Caruth v. Mariani is a leading case in the field. It has been cited with approval by courts in numerous jurisdictions which have joined the trend toward extending strict liability to non users and non purchasers injured as a result of a defective product. Bradford v. Bendix-Westinghouse Automotive Air Brake Co., 33 Colo.App. 99, 517 P.2d 406 (1973); Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del.1976); Winnett v. Winnett, 57 Ill.2d 7, 310 N.E.2d 1 (1974); Chysler Corp. v. Alumbaugh, 342 N.E.2d 908 (Ind.App.), modified on other grounds, Ind.App., 348 N.E.2d 654 (1976); Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo.1974); Lamendola v. Mizell, 115 N.J.Super. 514, 280 A.2d 241 (1971); Codling v. Paglia, 32 N.Y.2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973); Moss v. Polyco, Inc., 522 P.2d 622 (Okl.1974) (*the doctrine of strict liability in tort is available in an action for personal injuries by a bystander against the manufacturer and the retailer*); Howes v. Hansen, 56 Wis.2d 247, 201 N.E.2d 825 (1972). Caruth v. Mariani was later supported by holding that a manufacturer's and seller's liability, with respect to injuries arising out of use of a defective, unreasonably dangerous product, is not limited to liability for injuries to consumer or user of the product, but, rather, includes liability for injuries to bystanders. Sullivan v. Green Mfg. Co., 118 Ariz. 181, 575 P.2d 811 (Ariz.App. 1977).

All of the cases described above show that the generally accepted interpretation of strict liability in tort allows for recovery by bystanders. If this Court were to construe the Plaintiffs as bystanders, there is overwhelming authority to support recovery in this case. As stated in Corpus

Juris Secundum:

> "While there is some authority to the effect that recovery under the strict liability doctrine is limited to users and consumers, it is generally held that the right to sue on that theory is not so limited, and that the right of action extends to any person whose injury from a product defect is reasonably foreseeable, or who is foreseeably within the range of danger created by the defective product. Accordingly, persons who may maintain an action under the doctrine of strict liability in tort include those who were not users or consumers of a product, such as innocent or mere bystanders, totally unconnected with the product's seller, except as the ultimate victim. The right to recover also may extend to persons having accidental contact with a product, and mechanics injured while repairing it.
>
> It has been held that a products liability act evinced the legislative intent to permit any "user or consumer" to recover for personal injuries or physical harm to property, without suggesting distinctions among types of users or consumers, and thus the term "user or consumer" as used in such a statute includes any bystander injured by a product.
>
> Even in actions based on negligence, the right to sue extends to a mere bystander, a person whom a manufacturer should foresee would be harmed by its negligent acts, or a person who might reasonably have been expected to be in the vicinity of the probable use of the product. A similar rule applies in some states, where the basis of recovery is a breach of warranty, but elsewhere, a bystander may only recover in strict liability, and not for breach of warranty."(72A C.J.S. Products Liability § 50)(*citations omitted*) ***[Exhibit O]***

Moreover, public policy in South Carolina dictates that an importer, manufacturer, seller, and/or distributor should be liable for injuries caused by defective dangerous products. The Defendants should not be allowed to offensively shield themselves with this "bystander' defense. As a matter of public policy, the Restatement (Second) of Torts, § 402A should be construed in a manner that protects a user, consumer, or bystander from a manufactured article distributed in a defective and dangerous condition. Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694, (Super. Ct. 1965).

The issue of user/consumer versus non-user/consumer in the employee context has been litigated in other jurisdictions. For example, New Jersey Appellate Courts have held that a manufacturer of a dangerous chemical could be liable to employees of a company that did not even

use the chemical where the manufacturer failed to warn the employees of that company of the dangers associated with it. Marcie v. SDS Biotech Corp., 267 N.J. Super. 34, 630 A.2d 805 (1993). In Marcie, the Defendant manufactured a fungicide that was extremely harmful if inhaled or if it came into contact with skin. The Defendant sold the fungicide to a farmer and provided instructions that the fungicide was not to be applied post-harvest. The farmer applied the fungicide to his crop post-harvest then sold the crop to a produce broker without any warning. Employees of the produce broker became sick once in contact with the fungicide. The Plaintiff (Marcie) brought a claim against the manufacturer of the fungicide based upon strict liability for failure to warn. The Defendant moved for summary judgment on the grounds that the employees of the produce broker were not "users" of the fungicide. The trial court granted the motion and the Plaintiff appealed to the New Jersey Superior Court. According the Superior Court, liability could be imposed upon the manufacturer of the fungicide, if found to have given inadequate warning of danger of hazards associated with use of the product, even though the claim was made, not by the farmer purchasing the fungicide from the manufacturer and applying it to crops, but by employees of the produce broker who had purchased crops coated with fungicide from the farmer. The Court rationalized that it was for a jury to determine under a risk-benefit analysis whether the manufacturer was required to provide persons, other than its direct customer, with warnings as to product toxicity, even though manufacturer claimed that it was impossible to provide such warnings.

Based in part on the reasoning outlined by the Marcie Court, the Plaintiffs submit that sufficient evidence has been shown regarding the improper, inadequate and ineffective labeling of the sodium bromate to give rise to a jury question. The Plaintiffs position that the sodium bromate was not properly labeled has been consistent throughout this litigation. Just as in the Marcie case, the main thrust of the Plaintiffs' claim is that the Defendants had a duty to warn of the dangers

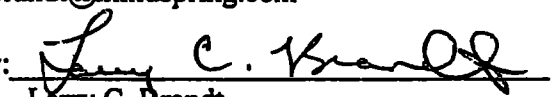
associated with sodium bromate. The Plaintiffs contend that the Defendants failed to properly label and warn of its dangerous product, thereby rendering it defective. The Plaintiffs looked for the labels they contend should be on the packaging and did not see any warnings that would have indicated danger. But for the failure of the Defendants to properly warn persons such as the Plaintiffs of the inherent dangers of sodium bromate, this most unfortunate accident would have been avoided. Strict liability was a jury question in Marcie as it pertains to failure to warn; it should be a question for a jury to decide in this case. At trial, the Defendants will have the opportunity to rebut the Plaintiffs' positions and attempt to prove that they did properly label the packages of sodium bromate.

CONCLUSION

Based upon the above, it is respectfully submitted that Defendants' Motion for Summary Judgment on Plaintiffs' Strict Liability Claims should be denied. The Plaintiffs were clearly users of the sodium bromate in question and included in the class of persons which S.C. Code Ann. §15-73-10, et. seq., is designed and intended to protect.

Respectfully Submitted,

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Attorneys for Plaintiffs

Date: October 1, 2008

Exhibit A

Matrix Outsourcing, LLC
715-1 East Boulevard, Charlotte, NC 28203 Tel: 704-344-0608 Fax: 704-344-0609

PURCHASE ORDER

Date: January 2, 2004

Purchase Order #: SBM-0401-01

Shipper:
Lianyungang Yuantai International Trade Co., Ltd.
No. 1-28 Tongguan South Road
Lianyungang, P.R. China
Tel: 86-518-550-9788.
Fax: 86-518-550-9799
Contact: Mr. Wu Bing

Consignee:
Blank Endorsed to Order

Notify Party:
Matrix Outsourcing, LLC
11 EV Hogan Drive
Hamlet NC 28345
Tel: 001-910-582-2477
Fax: 001-910-582-4433
Contact: Angela George/ Bonnie Lowry

Product: Sodium Bromate, 99.7% min.	**Manufacturer: Shandong Haida**
Ship By: January 22, 2004	**Shipping Company: ZIM (or shipper's choice)**
Port of Origin: China main port	**Port of Discharge: Charleston, SC USA**
Terms: CIF Charleston, SC	**Payment: L/C 90 days from B/L date.**
Insurance: To be covered by Shipper.	

Product:	Quantity:	Price (per MT.):	Total Price:
Sodium Bromate 99.7% min.	**18 MT**	**$1400/MT**	**$25,200.00**

Total Weight: 18,000 kgs. **Total Value: $25,200.00**

Packaging: **25 kgs. bags: 720 total**

Required Documentation:
1 original commercial invoice
1 original packing list
1 original certificate of analysis indicating lot numbers and specifications of each lot.
1 original certificate of origin + 1 copy
3 original bills of lading
Note: The commercial invoice, packing list, certificate of analysis and bill of lading must be faxed to fax number 910-582-4433, to the attention of Bonnie Lowry no later than 5 days from date of departure.

DEFENDANT'S EXHIBIT 101 Spivey 2-14-08

TRINITY 01780

Markings on the Bags:

Product: Sodium Bromate, 99.7% min.
Product Code: 1616
Gross WT: _____
Tare WT: _____
Net WT: _____
Lot Number: _____
Made in China

Special Instructions:
A copy of the original Certificate of Analysis must be faxed prior to shipment and must be included in the container when shipped. Faxed copy of documentation must be received no later than five days from date of departure. Fax Number: 001-910-582-5594, ATTN: Bonnie Lowry.

Order must be packed in bags (720 total), palletized and shrink wrapped.

****NOTE****
Original bill of lading must be marked: Freight Pre-Paid.

TRINITY
01781

Packing List

Trinity P.O. #: 12573 (#7)

Shipping Marks:	No. of Drums:	Specifics:
Sodium Bromate, 99.7% Min. Content: Gross Weight: Tare WT: Net Wt: Made in China	720 bags	Sodium Bromate, 99.7% min. Packed in 25 Kgs bags, palletized and wrapped. 1x20' Standard Container

Total # of Drums:	720
Total Net Weight:	18000 kgs.
Total Gross Weight:	18,144 kgs.
Englehard Product Code:	1616
Date:	January 01, 2004
Matrix Reference No.:	SBM-0401-01

UNIVAR_000527

03/19/2004 WED 10:04 FAX

THE HIPAGE COMPANY, INC.
PO BOX 62199
CHARLESTON SC 29419

Tel: 843-554-4111

NO. 450 P. 1/1
ICC MC # 152291 OP

DELIVERY ORDER

FOR ACCOUNT OF SHIPPER:
MATRIX OUTSOURCING, LLC
P.O.BOX 1169
HAMLET, NC. 28345
910-582-5650

DATE	OUR REF. NO.
02.06.04	30.149213.4

THE MERCHANDISE DESCRIBED BELOW WILL BE ENTERED AND FORWARDED AS FOLLOWS

IMPORTING CARRIER		LOCATION		FROM PORT OF ORIGIN AIRPORT
YM SAVANNAH 0275		COLUMBUS STREET TERMINAL		DALIAN, CHINA
VESSEL/VOYAGE NO.	ARRIVAL DATE	FREE TIME EXP.	LOCAL DELIVERY OR TRANSFER (DELIVERY ORDER ISSUED TO)	
KKLUTA8014256	02.06.04		OLD DOMINION FREIGHT LINE, INC.	
DELIVER TO		H.M./M.E. NO.	ENTRY NO.	CUST. REF. NO.
			100034921380	KKTU7082805

FOR DELIVERY TO

ENGLEHARD CORP.
554 ENGLEHARD DRIVE
SENECA, SC. 29678
864-885-1296 Lori ext 1295 Charlene - 12th Judy

00300798873 CSS

NO. OF PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS & EXCEPTIONS	WEIGHT	DO NOT USE
720 BAG	SODIUM BROMATE, CLASS 5.1, UN 1494 TOTAL WEIGHT:	40000 LBS Drewright	
	Ref# 8132228		
	THANKS, ANGIE WEST		
FREIGHT PAYABLE BY	TRINITY MANUFACTURING		
	PN 1616		
CONTR(S):	KKTU7082805 20' Lot# 1492.13 40,000 lbs	Chemicals	
	Last Friday 2.13.04		
	RECEIVED OLD DOMINION FREIGHT LINE INC. DATE 03/16/04 ACTUAL TIME SCHED TIME ARRIVED YES NO SEAL # OK TO UNLOAD	2-11-04 7:00AM 3:00PM	
Miles 234	Angie West		

INLAND FREIGHT

AMOUNT COLLECT: PAYABLE

RECEIVED IN GOOD ORDER

BY

ORIGINAL DELIVERY ORDER

Delivery Clerk: Deliver to Center Shown Above

THE HIPAGE COMPANY, INC.
PO BOX 62199
CHARLESTON SC 29419
Per

REF:

IMPORTANT! This order not valid until merchandise has been released and is available for delivery. Notify carrier at once if delivery cannot be effected as instructed. NOTE: The Hipage Company, Inc. is an agent only, and has no beneficial title to property.

DEFENDANT'S EXHIBIT 123 30(b)(6) Simmons 4-11-06

CONFIDENTIAL
ENGELHARD 005361

Exhibit F

E 122

HH Page 1 of 1
1

UNIVAR

P.O. BOX 34325
SEATTLE, WA 98124-1325

www.univarusa.com

ORIGINAL INVOICE

UNIVAR SPARTANBURG
2750 SOUTHPORT ROAD
SPARTANBURG SC 29302
864-580-2100

Page 1 OF 1

131964

APR - 5 2004

3.1.598 1 MB 0.309 31906511 KRK
476324
ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA SC 29678-1797

CUST. NO./SHIP TO

476324 001
ENGELHARD CORPORATION
CHEMICAL CATALYST GROUP
554 ENGELHARD DRIVE
SENECA SC 29678

S006011

INVOICE NO.	INV. DATE	ORDER NO.	CUSTOMER P.O. NUMBER	FREIGHT TERMS	FOB
SP-753897	02/16/04	457709	DAVID WILLIAMS	PREPAID DISTRIBUTOR	SHIP POINT
SHIP DATE	**TAX EXEMPT NO.**		**WAREHOUSE LOCATION**	**ON TIME DELIVERY**	
02/16/04	13222548-000.G		DIRECT WAREHOUSE	VENDOR CHOICE BULK	
		SALES PER	**SALES DEPARTMENT**	**ENTERED BY**	
		JOHN MUNSON	INDUSTRIAL CHEMICAL	CAROL ANDERSEN	

PRODUCT NO. / PRODUCT DESCRIPTION	PKG	ORDERED	SHIPPED	UNIT PRICE	EXTENDED AMOUNT
735476 SODIUM BROMATE	N	720.00	720.00	39683.21	27381.41
25 KG BG				0.6900	
TRINITY TECH POWDR		BG	BG	LB	
1616					
			MERCHANDISE:		27381.41
TERMS: **NET 30**			INVOICE TOTAL:		27381.41

49

Univar USA Inc.

Certain remit addresses have been updated. Please refer to yours in the lower right corner and update if necessary.

Univar USA Inc. warrants that the goods conform to Univar USA Inc.'s current published specifications. UNIVAR USA INC. MAKES NO OTHER WARRANTY, EXPRESS OR IMPLIED, INCLUDING FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY. BUYER ASSUMES ALL RISK OR LIABILITY RESULTING FROM USE OF SUCH GOODS. UNIVAR USA INC'S LIABILITY FOR NONCONFORMING GOODS IS EXCLUSIVELY LIMITED AT UNIVAR USA INC.'S OPTION, TO THE GOOD'S PURCHASE PRICE OR REPLACEMENT OF THE GOODS. UNIVAR USA INC. IS NOT LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES.

Buyer waives all claims for shortage or reasonably discoverable defect unless made in writing within 30 days after receiving the goods. Buyer waives all other claims unless made in writing within 90 days after learning the basis of the claim, or 120 days after receiving the goods, whichever occurs first. Except to the extent resulting from Univar USA Inc.'s negligence, Buyer shall indemnify, defend and hold Univar USA Inc. harmless from and against any claim, demand, action, penalty or liability (including reasonable costs and attorneys' fees) that Univar USA Inc. incurs or becomes responsible for arising out of Buyer's handling, use or resale of the goods after the goods are delivered to the F.O.B. point.

Buyer shall handle, use and dispose of the goods as necessary for the safety and protection of persons, property and environment, and in accordance with Univar USA's Inc. Recommendations and applicable governmental laws and regulations. Buyer shall deliver the most recent product literature to its customers and maintain a written record of such deliveries. Buyer shall only sell to those who, in the best judgment of Buyer, can handle, use and dispose of the goods safely.

Taxes have not been included unless specifically itemized on the invoice. Buyer shall pay all taxes or other charges related to the goods. The terms of this invoice are not modified by any Buyer purchase order or other similar writing.

PLEASE DETACH HERE AND RETURN BOTTOM PORTION WITH YOUR PAYMENT

UNIVAR

CUST NO/SHIP TO

INVOICE NO.	INVOICE DATE	AMOUNT DUE	AMOUNT PAID
SP-753897	02/16/04	27381.41	

476324
ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA SC 29678-1797

REMIT TO

UNIVAR USA INC
PO BOX 409692
ATLANTA GA 30384-9692

Exhibit D

PLEASE USE REVERSE SIDE FOR DETAILING DEDUCTIONS OR PAYMENT DISCREPANCIES

CONFIDENTIAL

UNIVAR

INVOICE

REMIT TO
UNIVAR USA INC
PO BOX 409692
ATLANTA GA 30384-9692

BRANCH
UNIVAR SPARTANBURG
2750 SOUTHPORT ROAD
SPARTANBURG SC 29302
864-580-2100

INVOICE NO.	INVOICE DATE	ORDER NUMBER	CUSTOMER P.O. NUMBER	WAREHOUSE LOCATION
SP-753897	02/16/04	457709	DAVID WILLIAMS	DIRECT WAREHOUSE

FREIGHT TERMS	FOB	SHIPPED VIA	SHIP DATE
PREPAID DISTRIBUTOR	SHIP POINT	VENDOR CHOICE BULK	02/16/04

CUST. NO./BILL TO

476324
ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA SC 29678

CUST. NO./SHIP TO

476324 001
ENGELHARD CORPORATION
CHEMICAL CATALYST GROUP
554 ENGELHARD DRIVE
SENECA SC 29678

TAX EXEMPT NO.	SALES REP.	SALES DEPT.	
1322340-000.G	JOHN MUNSON	INDUSTRIAL CHEMICAL	CAROL ANDERSEN

PRODUCT DESCRIPTION	TAX	QUANTITY ORDERED	QUANTITY SHIPPED/B.O.	BILLING QTY./ UNIT PRICE	EXTENDED AMOUNT
735476 SODIUM BROMATE	N	720.00	720.00	39683.21	27381.41
25 KG BG				0.6900	
TRINITY TECH POWDR		BG	BG	LB	

MERCHANDISE: 27381.41

TERMS: **NET 30** INVOICE TOTAL: 27381.41

UNIVAR

*** 1 ***

IT IS EXPRESSLY UNDERSTOOD AND AGREED *THAT SELLER MAKES NO EXPRESS OR IMPLIED WARRANTIES OF FITNESS OR OF MERCHANTABILITY OR OF ANY OTHER KIND WHATSOEVER* EXCEPT THAT THE GOODS SOLD HEREUNDER SHALL BE OF THE QUANTITY ABOVE SPECIFIED. BUYER ASSUMES ALL THE RISK OF LIABILITY WHATSOEVER RESULTING FROM THE USE OF SUCH GOODS, WHETHER USED SINGULARLY OR IN COMBINATION WITH OTHER SUBSTANCES. SELLER'S LIABILITY FOR NONCONFORMING GOODS IS EXCLUSIVELY LIMITED, AT THE SELLER'S OPTION, TO REPLACEMENT OF THE DEFECTIVE GOODS OR THE PURCHASE PRICE OF SUCH GOODS AND UNDER NO CIRCUMSTANCES SHALL SELLER BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES.
STATE AND LOCAL TAXES HAVE NOT BEEN INCLUDED UNLESS SPECIFICALLY ITEMIZED ON THE INVOICE.

Thank You For Your Order

VTL (SS)

Exhibit B

Restatement (Second) of Torts § 402A (1965)

Restatement of the Law — Torts
Restatement (Second) of Torts
Current through March 2008

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Division 2. Negligence
Chapter 14. Liability Of Persons Supplying Chattels For The Use Of Others
Topic 5. Strict Liability

§ 402A. Special Liability Of Seller Of Product For Physical Harm To User Or Consumer

Link to Case Citations

[Westlaw Note: This section has been superseded by the Restatement of the Law Third, Torts: Products Liability. To retrieve the Restatement of the Law Third, Torts: Products Liability documents, enter the following query: cl(torts-pl % t.d. p.f.d.).]

Note: This section of Torts Second is mentioned in Enterprise Responsibility for Personal Injury (ALI-ENTRESP). Use the query TE(402A) to retrieve the documents.

(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

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(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.

See Reporter's Notes.

Caveat:
The Institute expresses no opinion as to whether the rules stated in this Section may not apply

(1) to harm to persons other than users or consumers;

(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or

(3) to the seller of a component part of a product to be assembled.

Comment:

a. This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. The Section is inserted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence. The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.

b. History. Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even though there was no showing of negligence on the part of the seller. These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract. In the beginning, these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market, as well as numerous others. In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use, where, for example, as in the case of cosmetics, the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.

c. On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

d. The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

e. Normally the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of

poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated.

f. Business of selling. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2-314, to a seller who is a merchant. This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

h. A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment *j*), and a product sold without such warning is in a defective condition.

The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption.

i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

j. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

l. User or consumer. In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule

applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

"Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Illustration:

1. A manufactures and packs a can of beans, which he sells to B, a wholesaler. B sells the beans to C, a jobber, who resells it to D, a retail grocer. E buys the can of beans from D, and gives it to F. F serves the beans at lunch to G, his guest. While eating the beans, G breaks a tooth, on a pebble of the size, shape, and color of a bean, which no reasonable inspection could possibly have discovered. There is satisfactory evidence that the pebble was in the can of beans when it was opened. Although there is no negligence on the part of A, B, C, or D, each of them is subject to liability to G. On the other hand E and F, who have not sold the beans, are not liable to G in the absence of some negligence on their part.

m. "Warranty." The liability stated in this Section does not rest upon negligence. It is strict liability, similar in its nature to that covered by Chapters 20 and 21. The basis of liability is purely one of tort.

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

n. Contributory negligence. Since the liability with which this Section deals is not based upon

negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Comment on Caveat:

o. Injuries to non-users and non-consumers. Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment *l.* Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

p. Further processing or substantial change. Thus far the decisions applying the rule stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section. If, for example, raw coffee beans are sold to a buyer who roasts and packs them for sale to the ultimate consumer, it cannot be supposed that the seller will be relieved of all liability when the raw beans are contaminated with arsenic, or some other poison. Likewise the seller of an automobile with a defective steering gear which breaks and injures the driver, can scarcely expect to be relieved of the responsibility by reason of the fact that the car is sold to a dealer who is expected to "service" it, adjust the brakes, mount and inflate the tires, and the like, before it is ready for use. On the other hand, the manufacturer of pig iron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer. The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.

q. Component parts. The same problem arises in cases of the sale of a component part of a product to be assembled by another, as for example a tire to be placed on a new automobile, a brake cylinder for the same purpose, or an instrument for the panel of an airplane. Again the question arises, whether the responsibility is not shifted to the assembler. It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer. But in the absence of a sufficient number of decisions on the matter to justify a conclusion, the Institute expresses no opinion on the matter.

Exhibit C

COPY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE)	
Keith Black and Channon Black,)	C.A. No. 2005-CP-37-605
)	
Plaintiffs,)	
)	
v.)	
)	
Univar USA, Inc., Trinity)	
Manufacturing, Inc., and Matrix)	
Outsourcing, LLC,)	
)	
Defendants.)	
)	
Curtis Martin and Tina Ann Martin,)	C.A. No. 2005-CP-37-604
)	
Plaintiffs,)	
)	
v.)	Deposition of
)	JOHN STEVEN KNOX
Univar USA, Inc., Trinity)	
Manufacturing, Inc., and Matrix)	February 28, 2007
Outsourcing, LLC,)	
)	
Defendants.)	
)	
Scott F. Lawing and Tammy R. Lawing)	C.A. No. 2006-CP-31-30
)	
Plaintiffs,)	
)	
v.)	
)	
Univar USA, Inc., Trinity)	
Manufacturing, Inc., and Matrix)	
Outsourcing, LLC,)	
)	
Defendants.)	

Deposition on oral examination of JOHN STEVEN KNOX, reported by Lisa F. Huffman, Verbatim Court Reporter and Notary Public in and for the State of South Carolina; said deposition taken pursuant to notice of deposition, by agreement and in accordance with South Carolina Rules of Civil Procedure, at the law offices of Larry C. Brandt, P.A., 3691 Blue Ridge Boulevard, Walhalla, South Carolina, on the 28th day of February, 2007, commencing at the hour of 9:50 a.m.

A Yes, somewhere around area 12.

Q Now, tell me what type of work y'all were called in to do.

A We were removing a section of the condensate header that was corroded, leaking, to replace it with new piping.

Q How long of a section were you dealing with?

A All of it together would probably would have been somewhere around 80 foot, maybe a hundred, I'm not exactly sure. I'd have to measure it out.

Q How many sections would you have had to -- I mean, obviously, you couldn't take it out in one hundred foot section. So how many sections did you have to take it out?

A We was taking like in eight foot sections. There wasn't a certain -- just whatever we could handle.

Q So you'd probably have to remove upwards of, I guess, ten to 15 sections? Something like that?

A Approximately.

Q Now, were you present when Tim Wald went through the hot work permit?

A Yes, I was.

Q Who else was present?

A Everyone on this form here.

Q So that was you, Scott Lawing, Keith Black, Curtis

Martin, and Mark Powell.

A Yes.

Q What was your role that day?

A My role?

Q Yes.

A Removing condensate header, just like everyone else. I was working -- I was on my tools just like everyone else.

Q You said the same for Curtis Martin?

A Curtis Martin?

Q Yes.

A We were -- we were a team trying to get a job completed. We were working as a team.

Q Keith Black, same way?

A Yes.

Q Scott Lawing, same way?

A Yes.

Q Is Mark Powell a maintenance tech?

A Mark Powell is a production -- not exactly -- not exactly sure what Mark does, but he is on the ERT team, emergency response team.

Q So was Mark Powell doing anything but watching?

A No.

Q He's not a maintenance tech? He's not a welder?

A (Witness shakes head.)

Q Who inspected the area before the job started?

A Tim Wald, the permit supervisor.

Q You were present during that inspection?

A Yes.

Q Where did y'all walk? What did you conduct the inspection of?

A In the area where we were working.

Q Describe how far down. You said the area where you were working. Did you walk the entire length of the hallway?

A Well, we weren't working the length of the hallway. We was working -- we had like a 80-foot section all the way roped off where work was being performed.

Q Did you walk the entire length of that 80-foot section?

A Yes.

Q Now, there were pallets of material down at the end of that 80-foot section, correct?

A Yes.

Q Did anybody ever, in the course of your inspection, ever mention anything about those pallets of material?

A As far as being removed? No.

Q Anybody ask what they were?

A We looked to see, -- we looked to see if there was

any kind of danger as far as material for when we started.

Q What did you do when you looked to see?

A If there was any kind of labeling.

MR. OUTTEN: I'm sorry, can you say that again, please?

THE WITNESS: Labeling.

Q What type of labeling are you generally looking for?

A I'm just -- labels.

Q What do the hazardous labels generally look like?

A Depending on the label.

Q Tell me about the labels you're use to seeing.

A Flammable, corrosive oxidizers, just different material. I mean, I'm not a -- I'm not --

Q You're trained to recognize that, though, correct?

A Yes.

Q For your safety?

A Yes.

Q And the safety of others?

A Yes.

Q When you say, the label has flammable, corrosive oxidizers, what does the label look like that you're typically looking for?

A Shape wise?

Q Shape wise.

A I'm not exactly sure. Some of them square. And some of them is different colors: red, yellow, green.

Q If I was to say, "DOT label", do you know what I'm talking about?

A Yes, I do.

Q What's a DOT label look like?

A DOT is black and white, I believe.

Q It's black and white?

A I think it is. DOT? I'm not exactly sure.

Q Do you know what shape it is?

A Square, maybe.

Q Are you familiar with a label that's diamond shaped, yellow, and has black writing?

A I believe that's probably oxidizer?

Q Might say "flammable" or "combustible"?

A Label?

Q Does it say --

MR. HOWARD: Mark that.

DEPOSITION EXHIBIT #6, consisting of 1 sheet, marked for identification and made a part of this deposition. (Oxidizer Label.)

Q What I'm marking as Exhibit 6 is just a, it's unfortunately not colored. Have you ever seen that

label before?

A Yes, I have.

Q Do you know what an oxidizer is?

A I'm not a chemist, no. Not exactly. I know it's a hazardous material, but as far as what they use it for, no.

Q Do they teach you that in training?

A What they use it for?

Q No. What it does?

A I don't think I know as far as what they use it for or it does, no.

Q Or you just done recall?

A Never taught.

Q But you do understand that that's a hazardous material, correct?

A Yes, I do.

Q Had you seen that label before 2004?

A Yes, I have.

Q Have you seen it since?

A Yes, I have.

Q Is it on several different products?

A Yes, it is.

Q Now, as you went over to the pallets down the hallway, did you see any particular label on those pallets?

A No, sir.

Q You didn't see any label?

A No, sir.

Q Did anybody ask what those pallets were?

A I'm not -- I don't recall.

Q Do you recall if Mark Powell said anything?

A I don't recall.

Q Do you recall if Keith Black said anything?

A I don't recall.

Q Scott Lawing?

A I don't recall.

Q Curtis Martin?

A I don't recall.

Q Or Tim Wald?

A I don't recall. We're talking two-and-a-half years ago. Hard to remember everything that was said that morning. I'm not exactly sure of everything that happened and everything that was said. It's hard to pinpoint that.

Q Are you given training on general safety?

A General safety, meaning what?

Q Meaning, not necessarily hazardous materials or hazardous materials handling, but in general, if you come across a product you don't know or material you don't know, what do they tell you to

EXHIBIT
LH 6
Knox 2-28-07



that your testimony?

A Well, it shouldn't have been around a cutting operation.

Q That's all I have for now. Thank you for answering my questions, sir.

A Thank you.

EXAMINATION

BY MR. BRANDT:

Q Mr. Knox, if you would look at Exhibit Number 5 and again six point three point three point two. We've been over that and, of course, it says there that the fire watch and permit supervisor is to perform a thorough inspection of the work and all adjacent areas for the presence of combustible and/or flammable materials. Would you agree that that requires you to have knowledge, or whoever that's addressed to, to have knowledge of what is flammable and combustible?

A Yes.

Q Now, in your training at Engelhard, how were you trained or taught to determine the contents of a bag or any kind of container that you might encounter in the workplace?

A By a label.

Q And that would include, to determine whether or not

it was a hazardous material, would it not?

A Yes.

Q And whether or not it was an oxidizer.

A True.

Q Now, when you said you did not see any label on such as, I believe it's Exhibit Number 6, this oxidizer label, on those bags that you looked at.

A No, sir.

Q When you looked at those bags, did you look at them carefully enough or closely enough that if there had been that label on the bag, you would have seen it?

A Yes.

MR. OUTTEN: I object to the form of the question.

Q Did you see any label, or anything on there, that would indicate that what was contained in those bags was hazardous?

A No, sir.

Q Was an oxidizer?

A No, sir.

Q In your experience, and particularly your experience at Engelhard, have you ever encountered bags or containers of hazardous materials that were not labeled?

A Hazardous, not that I can recall, no.

Q Have you ever -- do you ever recall an incident, at the time of this accident or before, where a bag that was containing a flammable or an oxidizing agent didn't contain the appropriate labels or warnings?

A Not that I can recall.

Q To your knowledge, were all bags or containers in the Engelhard plant that contained hazardous materials, oxidizers, flammables, suppose to be properly labeled with warnings of such?

A Yes, you would assume so.

Q I don't have anything further.

REEXAMINATION

BY MR. OUTTEN:

Q What are you trained to do if there's no label on a --

MR. WALKER: If I could ask a question.

MR. OUTTEN: Oh, I'm sorry Billy. Go ahead.

MR. HOWARD: Billy, I was going to let you go. I was pointing to you.

EXAMINATION

BY MR. WALKER:

Q Are you used to having seen -- are you use to seeing hazardous labels on bags that contain

hazardous materials?

A Have I seen labels on hazardous materials?

Q Yes, sir.

A (Witness pauses.)

Q Isn't normally the business to have labels on hazardous material.

A I've seen labels on bags before.

Q It's normal to have labels on bags indicating they're hazardous.

A Yes.

Q Sir?

A I can't hardly understand you.

Q I said, isn't it normal to see labels on bags that contain hazardous materials?

A Is it normal?

Q Yes, sir.

A Is it normal to see them?

Q Yes.

A Yes, I guess.

Q I'll let it go at that. That's all I have.

REEXAMINATION

BY MR. HOWARD:

Q Mr. Knox, right back around. When you looked at those bags, did you see any writing on the bags?

A Only thing, I seen some black writing of some sort,

numbers or something. I'm not sure.

MR. OUTTEN: Can you say that again, sir? I couldn't hear.

A Black writing, maybe. Letters or numbers, maybe.

Q Do you recall what the letters spelled out?

A No.

Q Do you recall what the numbers were?

A No.

Q You can look up stuff on an MSDS by the numbers, correct?

A I assume you can.

Q And if there's the name of the product on there, you can look that up on the MSDS too?

A You should be able to, yes.

Q Do you recall if there was a name of the product on there?

A I don't recall.

Q You don't recall whether it was on there or not? Or did you not see it at all?

A I don't recall.

Q So you don't recall what, if anything, was on that bag.

A I know there was some black writing on the bag, but I don't know exactly what it was. I don't recall.

Q They teach you what that black writing is; don't

they?

A I didn't -- what do you mean?

Q In training, they teach you what all that labeling is, correct?

A Most of it is just seeing labels, labeling. You know if you see a label, you just -- I mean, there's writing on a lot of bags in that plant that don't -- that's not -- there's all kind of bags in that plant that's got writing on it that's not hazardous at all.

Q They teach you that you can take that writing in the plant on those bags and find out what that is, correct?

A I guess you could.

MR. OUTTEN: Just a couple. Are you through?

MR. HOWARD: I'm through.

REEXAMINATION

BY MR. OUTTEN:

Q Did you see these bags when they came into the plant?

A No, I don't work for shipping.

Q Excuse me?

A I don't work for shipping and receiving.

Q So you don't know whether somebody from Engelhard removed the labels, or whether they came in with --

Exhibit D

COPY

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	TENTH JUDICIAL CIRCUIT
Keith Black and Channon Black, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. NO. 2005-CP-37-605
Curtis Martin and Tina Ann Martin, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. NO. 2005-CP-37-604 Deposition of GLENORA ASHWORTH October 25, 2007
Scott F. Lawing and Tammy R. Lawing, Plaintiffs, v. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC, Defendants.	C.A. NO. 2006-CP-31-30

Deposition on oral examination of GLENORA ASHWORTH, reported by Lisa F. Huffman, Verbatim Court Reporter and Notary Public in and for the State of South Carolina; said deposition taken pursuant to notice of deposition, by agreement and in accordance with South Carolina Rules of Civil Procedure, at the offices of Larry C. Brandt, P.A., 3691 Blue Ridge Boulevard, Walhalla, South Carolina, on the 25th day of October, 2007, at the hour of 10:13 a.m.

A. No.

Q. Are you aware of any sodium bromate coming into the Englehard facility in May or June of 2004 which did not have the oxidizer symbol on it?

A. No. But again, I was on temporary assignment, so I wouldn't have been notified.

Q. After material is received into the Englehard facility, is it important that proper warnings and labels stay on the materials?

A. Yes, it is.

Q. And help us -- explain that to us, if you would please.

A. I don't understand the question.

Q. Well why is it important for the materials to be properly labeled and for proper warnings to be attached or affixed at all times?

A. Because you have to be sure that the material is handled properly and that no employee is put in danger. And that you don't put the company in danger, you know, as a fire hazard or a risk.

Q. Do you know of any instances in May or June of 2004 where there was unidentified material in the Englehard facility?

A. No, I do not.

Q. Have you ever heard that there was unidentified or

Q. Give me those again a little bit slower. Shipping?

A. Shipping, receiving, warehousing, and plant scheduling.

MR. BRANDT: I didn't hear the last answer.

THE WITNESS: Plant scheduling.

Q. Okay.

A. Okay. And then I -- I -- and that's what I was doing in 2004.

Q. Who was in charge of receiving materials into the Englehard plant in June of 2004?

A. I was the acting area manager. However I was on temporary assignment at the time.

Q. Tell us about that.

A. Okay. We were installing a new computer system, J.D. Edwards. And I was taken off of my day-to-day responsibilities managing both the customer service and the logistics areas, so that I could devote all of my time to the new computer project.

Q. So on June the 1st, 2004, you were devoting your time to the installation of a new computer system?

A. That's correct.

Q. And what was the new computer system to do?

A. It was a customer service module. It was for order entry and shipping and invoicing.

Q. So who was in the shipping and receiving department

A. About '94, maybe.

Q. All right.

A. Okay. And then after that, I was promoted to the -- well I still customer -- I was promoted to customer service manager and given responsibility for the shipping department.

Q. When was that?

A. That was probably about '96.

Q. All right. I'm going to make sure I have this right. You were promoted to customer service manager --

A. Uh-huh.

Q. -- is that right?

A. Right.

Q. And what did you say your responsibilities were as far as the shipping and receiving?

A. Well at that time, I was given responsibility for the shipping. I was the shipping department's supervisor.

Q. Okay.

A. Okay. And then about '98, I was still the customer service manager. But around that time I was given responsibility for all the logistics, which is shipping, receiving, warehousing, and plant scheduling.

Exhibit E

003/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03

PAGE 1
1/06/04

① TO: 125965
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

② SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-8841

*** CONFIRMED ***

JOHN

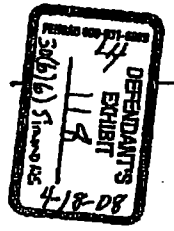
ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: | FOB: SHP | SALES / USE TAX: NO | AUTHORIZED: USD | TERMS: NET 30 | REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST
12/31/04	1003	AMMONIUM HYDROXIDE AQUA 26 BE	LB	1		10000.0000	.1600	1600.00
		AMMONIUM HYDROXIDE AQUA AMMONIUM,26 BE COMMERCIAL GRADE AS PER SPEC 1003,REV 2.0,DATED 12-MAR-92. 385 LBS PER DRM/1540 LBS PER PALLET. DRUM DEPOSIT.						
12/31/04	1003T	AMMONIUM HYDROXIDE AQUA 26 BE	LB	1		60000.0000	.1600	9600.00
		AMMONIUM HYDROXIDE AQUA AMMONIUM,26 BE COMMERCIAL GRADE AS PER SPEC 1003,REV 3.0,DATED 12-MAR-92. 385 LBS PER DRM/1540 LBS PER PALLET. DRUM DEPOSIT.						
12/31/04	1004T	AMMONIUM HYDROXIDE REAGENT	LB	1		25000.0000	.1300	0250.00
		AMMONIUM HYDROXIDE REAGENT GRADE AS PER SPEC 1004, REV 4.0,DATED 11-MAY-01. 385 LBS PER DRM/1540 LBS PER PALLET. DRUM DEPOSIT.						
12/31/04	1070	ACID,NITRIC,TECHNICAL,42 BE	LB	1		150000.0000	.2000	30000.00
		NITRIC ACID TECHNICAL GRADE 42 BE AS PER SPEC 1070 7/1184,ISSUE 3.0,DATED 17-JAN-02.						

Purchase Order Continued...

03/18/2008 WED 13:07 FAX



ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005370

Exhibit A-1

012/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
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③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03

PAGE 2
1/00/04

① TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

② SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

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SHIP VIA: | FOB: SHIP | SALES / USE TAX: NO | AUTHORIZED: USD | TERMS: NET 30 | REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL.	REV	QUANTITY	UNIT PRICE	EXTENDED COST
		600 LBS PER DRM/2400 LBS PER PALLET. DRUM DEPOSIT.						
12/31/04	1246	SODIUM CHLORATE, TECH., GRANULAR	LB	1		100000.0000	.4750	47500.00
		SODIUM CHLORATE GRANULAR TECHNICAL GRADE WITHOUT ADDITIVES AS PER SPEC 1246,REV 3.0, DATED 08-DEC-91.						
		19 X 100 DRUM PER PALLET OR 450 LBS DRUMS PALLETIZED AND BANDED						
12/31/04	1267	CELITE 545	LB	1		5000.0000	.4200	2100.00
12/31/04	1394	ETHYLENEDIAMINE, REAGENT 99% RF	LB	1		20000.0000	1.5800	31600.00
12/31/04	1400	ACID,BORIC,TECHNICAL NF GRADE	LB	1		10000.0000	1.2000	12000.00
		BORIC ACID TECHNICAL NF GRADE AS PER SPEC 1400; REV 4.0,DATED 08-JUNE-92. 100 LBS PER FIBER DRM/2200 LBS PER PALLET.						
12/31/04	1616	SODIUM BROMATE (PREP REFINERY)	LB	1		340000.0000	.6900	234600.00
		SODIUM BROMATE LOW GRADE AS PER SPEC 1616 ISSUE 1.0 DATED 13-FEB-02.						

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

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CONFIDENTIAL
ENGELHARD 005371

03/19/2008 WED 13:08 FAX

003/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
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ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/01

PAGE 1
1/06/04

① TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

② SHIP TO: ENGELHARD CORPORATION
864 ENGELHARD DRIVE
SENECA,SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: FOB: SHP SALES / USE TAX: SD AUTHORIZED: USD TERMS: NET 30 REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL.	REV	QUANTITY	UNIT PRICE	EXTENDED COST
		REFINERY USE ONLY PACKAGED: 110 LB DRUMS						
		CONTAINERS OF APPROXIMATELY 40,000 LBS EACH ARE SCHEDULED TO ARRIVE EVERY 6-7 WEEKS UNLESS OTHERWISE COMMUNICATED TO UNIVAR BY ENGELHARD						
12/31/04	1012	METHOCEL F4MP (PREMIUM)	LB	1		5000.0000	5.6000	28000.00
12/31/04	1120	SODIUM PERCARBONATE	LB	1		10000.0000	.0100	100.00
		SODIUM PERCARBONATE,UNCOATED AND UNSTABILIZED, AS PER SPECIFICATION 1120, REV. 1 DATED 07-MARCH-03						
		CALCIUM CHLORIDE REGULAR FLAKE						
12/31/04	1428	METHOCEL F4M	LB	1		40000.0000	3.7500	150000.00
12/31/04	1725	POTASSIUM HYDROXIDE, LO NA KOH	LB	1		40000.0000	.0100	400.00
		POTASSIUM HYDROXIDE,46% AS PER SPEC 1725, REV 5.0, DATED 16-SEPT-03 12.0 LBS PER GALLON 550 LBS PER DRUM						

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO TELEPHONE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005372

03/19/2004 WED 13:08 - FAX

03/19/2008 WED 13:09 FAX 014/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 9006011

DATE: 12/09/03

125968
② TO: UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
864 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

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JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: | FOR: SHF | SALES / USE TAX: NO | AUTHORIZED: DBD | TERMS: NET 30 | REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST
		LO SODIUM - <300 PPM						

****
* CONFIRMING TELECON ORDER *
* DO NOT DUPLICATE *
****

ENGELHARD-SENECA DELIVERY HOURS:
8AM-4 PM
MONDAY THROUGH FRIDAY

CERTIFICATE OF ANALYSIS: FAX A CERTIFICATE OF ANALYSIS OR TEST REPORT ON THE MATERIAL PRODUCED REFERENCING ENGELHARD SPECIFICATIONS, ENGELHARD CODES AND PURCHASE ORDER NUMBER TO THE FOLLOWING:

****
* ENGELHARD-SENECA *
* Purchasing Department 864-885-1375 *
****

SELLER TO PROVIDE BUYER WITH MATERIAL SAFETY DATA SHEETS ON CHEMICAL SUBSTANCES AND MIXES SUPPLIED PRIOR TO MATERIAL RECEIPT.

++
+MAIL MSDS TO THE ATTENTION OF PURCHASING DEPT. +

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005373

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011 DATE: 12/08/93 PAGE 5 3/08/94

L25962
① TO: OLIVER USA INC.
2750 SCOTTSPORT ROAD
SIMPSONVILLE, S.C. 29681

② SHIP TO: ENGELHARD CORPORATION
934 HIGHLAND DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 128
SENECA, SC 29679
864 882-8841

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ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA:	FOB: REF	SALES / USE TAX: NO	AUTHORIZED: USD	TERMS: NET 30	REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST

REFERENCE: STERICA BACKSET

PACKING REQUIRED: THE FOLLOWING INFORMATION MUST APPEAR ON THE SIDE OF EACH PACKAGE:
1. NAME OF MATERIAL
2. ENGELHARD'S CODE NUMBER
3. MANUFACTURER'S LOT NUMBER
4. NET WEIGHT PER PACKAGE
FAILURE TO MARK PACKAGES AS INDICATED ABOVE MAY RESULT IN THE SHIPMENT BEING REFUSED AT DESTINATION.

EACH PACKAGE MUST BE MARKED TO CORRECTLY SHOW THE CONSTRUCTORS' LABELS AND TRAFFIC ASSOCIATION TOKEN) 1910.1200 REQUIREMENTS FOR PACKAGING AND LABELING AND THE DEPARTMENT OF TRANSPORTATIONS CODE OF FEDERAL REGULATIONS (CFR) 49 RECONCILED. FAILURE TO COMPLY MAY RESULT IN THE CANCELLATION OF THIS AGREEMENT AND REFUSAL OF NOT ON ALL MATERIAL SHIPPED AGAINST THIS ORDER.

THIS ORDER IS ENTERED WITH THE CONDITION THAT ANY DEVIATION FROM THE TERMS HEREOF MUST BE AGREED TO IN WRITING BY THE SELLER.

THIS ORDER IS ENTERED WITH THE CONDITION THAT ANY
Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE PRINTED TERMS, TERMS AND CONDITIONS ON THE REVERSE SIDE, PLEASE REVIEW THESE CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

AN/10/2001 WED 10:10 FAX 015/010

CONFIDENTIAL
ENGELHARD 005374

03/19/2004 WED 10:10 FAX 010/010

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 5006021 DATE: 12/09/03 PAGE 6
1/06/04

① TO: 125965
KETIVAR USA, INC.
2750 ROCKINGHORSE ROAD
ENOREVILLE, S.C. 29501

② SHIP TO: ENGELHARD CORPORATION
194 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 128
SENECA, SC 29678
864-882-8841

*** CONTINUED *** JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: FOB: SALES/USE TAX AUTHORIZED: TERMS: REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL.	REV	QUANTITY	UNIT PRICE	EXTENDED COST

DEVIATION FROM THE DELIVERY SCHEDULE HEREON MUST BE APPROVED IN WRITING BY THE BUYER.

QUALIFICATION

A. ONLY VENDORS WHOSE PRODUCTS HAVE EXPERIENCED CONSUMERS MEET THE REQUIREMENTS OF THIS SPECIFICATION OF THIS SPECIFICATION WILL BE CONSIDERED AS QUALIFIED VENDORS.

B. QUALIFICATION TO ENGINEERING MATERIALS AGAINST THIS SPECIFICATION MUST BE RECEIVED IN WRITING FROM ENGELHARD CORPORATION PRIOR TO COMMENCEMENT OF ANY MANUFACTURE FOR ENGELHARD CONSUMPTION.

C. FOR INFORMATION PERTAINING TO QUALIFICATION REQUIREMENTS, CONTACT THE ENGELHARD CORPORATION PURCHASING DEPARTMENT.

MANUFACTURING CONTROL
A. THE SUPPLIER MUST NOTIFY ENGELHARD CORPORATION OF ANY CHANGES IN THE SOURCE, PROCESS OR COMPOSITION THAT Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE, PLANNED JOINTLY FROM PARAMOUNT THEY SHALL CONSTITUTE OUR CONTRACT UNLESS VARIED IN WRITING TO CHANGES OR ADDENDA.

CONFIDENTIAL
ENGELHARD 005375

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 5004511 DATE: 12/05/03 PAGE 1 1/06/04

① TO: 125961
INTVAC USA INC.
3760 BOOKHURST ROAD
SPARTANBURG, S.C. 29302

② SHIP TO: ENGELHARD CORPORATION
154 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:
ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 128
SENECA, SC 29679
864 882-5841

<<< CONTINUED >>>

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA:	FOB:	SALES/USE TAX:	AUTHORIZED:	TERMS:	REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST

WILL AFFECT ANY CHARACTERISTIC OF MATERIAL SUPPLIED.

3. IN CASE SUCH CHANGES ARE MADE, NO SHIPMENT OF MATERIAL AGAINST THIS DOCUMENT CAN BE MADE WITHOUT PRIOR, WRITTEN APPROVAL FROM ENGELHARD CORPORATION.

CANCELLATION
THIS ORDER MAY BE CANCELLED IN THE ENTIRETY IF THE BUYER CONFIRMS MODIFICATIONS CAUSED RESULTING FROM NEED FOR SUCH ADDITIONAL CHANGES.

DELIVERY
DELIVERY MUST MAKE AN APPOINTMENT WITH THE RECEIVING DEPARTMENT FOR MATERIAL DELIVERY.
CONTACT - JOHN STARNS
PHONE: 864-882-1363

A PACKING LIST DETAILING THE NUMBER OF PACKAGES IN THE SHIPMENT, THE NET WEIGHT OF EACH PACKAGE AND A TOTAL NET WEIGHT OF THE COMPLETE SHIPMENT MUST BE ATTACHED ONE OF THE INCOMING PACKAGES.
Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FRONT/BACK AND ATTACHED/REFERENCED TERMS AND CONDITIONS OF THE ENGELHARD SOLICITATION. EVEN COMMENCE, THIS WILL CONSTITUTE OUR CONTRACT UNLESS WE ACCEPT IN WRITING TO CHANGES OR ADDITIONS.

03/19/2008 WED 13:10 FAX 010/010

CONFIDENTIAL
ENGELHARD 005376

02/18/2004 WED 11:11 FAX 002/010

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 5006011 DATE: 12/09/03 PAGE 8 1/05/04

② TO: 128961
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
564 ZEELAND DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:
ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONTINUED *** NONE

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: FOB: SHIP SALES/USE TAX: NO AUTHORIZED: UNO TERMS: NET 30 REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST
		PLEASE INDICATE ACKNOWLEDGE THAT THE QUANTITIES ORDERED ON THIS ORDER ARE SATISFACTORY AND NO MATERIAL AMOUNT OTHER THAN ACTUALLY DETERMINED BY CUSTOMER ORDERS IS GUARANTEED. TO THAT END, WE WILL PROVIDE YOU WITH OUR BEST PROJECTION OF USAGE AS OFTEN AS YOU MAY REASONABLY REQUIRE.						
		RELEASES OF THIS ABOVE MATERIAL TO BE CALLED IN AS REQUIRED BY DAVID WILLIAMS/TONY RICE/SCOTT SHARPE.						
		CONTRACT DAVID WILLIAMS PHONE 864-855-1204/ CHUCK ROSS PHONE 864-855-6121. IN REGARDS TO PRICING, FORECAST OR TECHNICAL INFORMATION						
12/31/04	1033	ACID,SULFURIC,TECHNICAL,66DEG	LB	1		25001.0000	.1200	3000.00
		SULFURIC ACID TECHNICAL GRADE AS PER SPEC 1033 REF 6.0,DATED 12-NOV-02. 500 LBS PER DRM/2400 LBS PER RAILCAR. ORDER ENTERED. THIS ORDER IN CONSIST						
		End of Purchase Order						5367571.00

DAVID WILLIAMS

ENGELHARD AUTHORIZED AGENT

REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS APPLICABLE TO THIS ORDER

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND TO THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005377

Exhibit F

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03

PAGE 1
3/02/04

② TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA:	FOB: SHIP	SALES / USE TAX: NO	AUTHORIZED: USH	TERMS: NET 30	REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST
12/31/04	1003	AMMONIUM HYDROXIDE AQUA 26 BE	LB	1		10000.0000	.1600	1600.00
		AMMONIUM HYDROXIDE AQUA AMMONIUM,26 BE COMMERCIAL GRADE AS PER SPEC 1003,REV 3.0,DATED 12-MAR-92. 385.LBS PER DRM/1540 LBS PER PALLET. DRUM DEPOSIT.						
12/31/04	1003T	AMMONIUM HYDROXIDE AQUA 26 BE	LB	1		60000.0000	.1600	9600.00
		AMMONIUM HYDROXIDE AQUA AMMONIUM,26 BE COMMERCIAL GRADE AS PER SPEC 1003,REV 3.0,DATED 12-MAR-92. 385 LBS PER DRM/1540 LBS PER PALLET. DRUM DEPOSIT.						
12/31/04	1004T	AMMONIUM HYDROXIDE REAGENT	LB	1		25000.0000	.3300	8250.00
		AMMONIUM HYDROXIDE REAGENT GRADE AS PER SPEC 1004, REV 4.0,DATED 11-MAY-02. 385 LBS PER DRM/1540 LBS PER PALLET. DRUM DEPOSIT.						
12/31/04	1070	ACID,NITRIC,TECHNICAL,42 BE	LB	1		150000.0000	.2000	30000.00
		NITRIC ACID TECHNICAL GRADE 42 BE AS PER SPEC 1070 /1104,ISSUE 1.0,DATED 17-JAN-03, Purchase Order Continued...						

03/19/2008 WED 13:04 FAX

FEDLAD 800-631-6989 DEFENDANT'S EXHIBIT 119 4-19-06 Simmons

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THIS INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005362

EXHIBIT A-2

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 5086011

DATE: 12/09/03

PAGE 2
3/02/04

① TO: 129968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

② SHIP TO: ENGELHARD CORPORATION
554 ENGEHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA:	FOB: SHP	SALES / USE TAX: NO	AUTHORIZED: USD	TERMS: NET 30	REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL.	REV.	QUANTITY	UNIT PRICE	EXTENDED COST
		600 LBS PER DRM/2400 LBS PER PALLET. DRUM DEPOSIT.						
12/31/04	1246	SODIUM CHLORATE,TECH.,GRANULAR	LB	1		100000.0000	.4750	47500.00
		SODIUM CHLORATE GRANULAR TECHNICAL GRADE WITHOUT ADDITIVES AS PER SPEC 1246,REV 3.0, DATED 05-DEC-91.						
		15 X 100 DRMS PER PALLET OR 450 LBS DRUMS PALLETIZED AND BANDED						
12/31/04	1267	CELITE 545	LB	1		5000.0000	.4200	2100.00
12/31/04	1394	ETHYLENEDIAMINE,REAGENT 99% HP	LB	1		20000.0000	1.5800	31600.00
12/31/04	1400	ACID,BORIC,TECHNICAL,NF GRADE	LB	1		10000.0000	1.2000	12000.00
		BORIC ACID TECHNICAL NF GRADE AS PER SPEC 1400, REV 4.0,DATED 08-JUNE-92. 100 LBS PER FIBER DRM/2200 LBS PER PALLET.						
12/31/04	1616	SODIUM BROMATE (PREF REFINERY)	LB	1		340000.0000	.6900	234600.00
		SODIUM BROMATE LOW GRADE AS PER SPEC 1616 ISSUE 1.0 DATED 13-FEB-02.						

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005363

03/19/2008 WED 13:05 FAX

005/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03

PAGE 3
3/02/04

① TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA,SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: | FOB: SHP | SALES / USE TAX: NO | AUTHORIZED: USD | TERMS: NET 30 | REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST
		REFINERY USE ONLY PACKAGED: 110 LB DRUMS CONTAINERS OF APPROXIMATELY 40,000 LBS EACH ARE SCHEDULED TO ARRIVE EVERY 6-7 WEEKS UNLESS OTHERWISE COMMUNICATED TO UNIVAR BY ENGELHARD						
12/31/04	1012	METHOCEL F4MP(PREMIUM)	LB	1		5000.0000	5.6000	28000.00
12/31/04	1320	SODIUM PERCARBONATE	LB	1		10000.0000	.6300	6300.00
**** CHARGE ****	Freight	FREIGHT						166.40
		SODIUM PERCARBONATE,UNCOATED AND UNSTABILIZED, AS PER SPECIFICATION 1320, REV. 2 DATED 02-FEB-04						
		CALCIUM CHLORIDE REGULAR FLAKE						
12/31/04	1428	METHOCEL F4M	LB	1		40000.0000	3.7500	150000.00
12/31/04	1725	POTASSIUM HYDROXIDE, LO NA KOH	LB	1		40000.0000	.0100	400.00
		POTASSIUM HYDROXIDE,45% AS PER SPEC 1725, REV 5.0, DATED 15-SEPT-03 12.0 LBS PER GALLON 660 LBS PER DRUM						

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REGULARLY CLASSIFYING REQUIRED THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005364

03/19/2008 WED 13:05 FAX

275

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER: NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03

PAGE 5
2/02/04

② TO: 128968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-8841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA:	FOB: SHP	SALES / USE TAX: NO	AUTHORIZED: USD	TERMS: NET 30	REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST

+MAIL MSDS TO THE ATTENTION OF PURCHASING DEPT. +
+ ENGELHARD-SENECA FACILITY +
++

PACKAGE MARKINGS: THE FOLLOWING INFORMATION MUST APPEAR ON THE SIDE OF EACH PACKAGE:
1. NAME OF MATERIAL
2. ENGELHARD'S CODE NUMBER
3. MANUFACTURER'S LOT NUMBER
4. NET WEIGHT PER PACKAGE
FAILURE TO MARK PACKAGES AS INDICATED ABOVE MAY RESULT IN THE SHIPMENT BEING REFUSED BY ENGELHARD.

EACH PACKAGE MUST BE MARKED TO COMPLY WITH THE OCCUPATIONAL SAFETY AND HEALTH ASSOCIATION (OSHA) 1910.1200 REQUIREMENTS FOR PACKAGING AND LABELING AND THE DEPARTMENT OF TRANSPORTATIONS CODE OF FEDERAL REGULATIONS (CFR) 49 REQUIREMENTS. FAILURE TO COMPLY MAY RESULT IN THE CANCELLATION OF THIS AGREEMENT AND REFUSAL OF ANY OR ALL MATERIAL SHIPPED AGAINST THIS ORDER.

THIS ORDER IS ENTERED WITH THE CONDITION THAT ANY DEVIATION FROM THE PRICE SHOWN HEREON MUST BE APPROVED IN WRITING BY THE BUYER.

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005365

03/19/2008 WED 13:05 FAX

007/010

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03

PAGE 6
3/02/04

② TO: 125968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA:	FOB: SHIP	SALES / USE TAX: NO	AUTHORIZED: USD	TERMS: NET 30	REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST

THIS ORDER IS ENTERED WITH THE CONDITION THAT ANY DEVIATION FROM THE DELIVERY SCHEDULE HEREON MUST BE APPROVED IN WRITING BY THE BUYER.

QUALIFICATION

A. ONLY VENDORS WHOSE PRODUCTS HAVE DEMONSTRATED COMPLIANCE WITH THE REQUIREMENTS OF THIS SPECIFICATION OF THIS SPECIFICATION WILL BE DESIGNATED AS QUALIFIED VENDORS.

B. QUALIFICATION TO PROVIDE MATERIALS AGAINST THIS SPECIFICATION MUST BE RECEIVED IN WRITING FROM ENGELHARD CORPORATION PRIOR TO COMMENCEMENT OF ANY MANUFACTURE FOR ENGELHARD CORPORATION.

C. FOR INFORMATION PERTAINING TO QUALIFICATION REQUIREMENTS, CONTACT THE ENGELHARD CORPORATION PURCHASING DEPARTMENT.

MANUFACTURING CHANGES
A. THE SUPPLIER MUST NOTIFY ENGELHARD CORPORATION OF ANY CHANGES IN THE

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005366

277

03/18/2008 WED 13:08 FAX

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8005011

DATE: 12/09/03

PAGE 7
3/02/04

① TO: 125268
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

② SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: | FOB: SHP | SALES / USE TAX: NO | AUTHORIZED: USD | TERMS: NET 30 | REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST

DESIGN, PROCESS OR COMPOSITION THAT WILL AFFECT ANY CHARACTERISTIC OF MATERIAL SUPPLIED.

B. IN CASE SUCH CHANGES ARE MADE, NO SHIPMENT OF MATERIAL AGAINST THIS DOCUMENT CAN BE MADE WITHOUT PRIOR WRITTEN APPROVAL FROM ENGELHARD CORPORATION.

CANCELLATION
THIS ORDER CAN BE CANCELLED IN ITS ENTIRETY IF THE BUYERS CUSTOMER REQUIREMENTS CHANGE NEGATING THE NEED FOR THE MATERIAL ORDERED.

DELIVERY
TRUCKER MUST MAKE AN APPOINTMENT WITH THE RECEIVING DEPARTMENT FOR MATERIAL DELIVERY.
CONTACT - JUDY SHAMBY
PHONE: 864-885-1262

A PACKING LIST DETAILING THE NUMBER OF PACKAGES IN THE SHIPMENT, THE NET WEIGHT OF EACH PACKAGE AND A TOTAL NET WEIGHT OF THE COMPLETE SHIPMENT MUST BE

Purchase Order Continued...

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005367

03/19/2008 WED 13:08 FAX

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03

125968
② TO: UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

③ SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29678

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 128
SENECA, SC 29679
864 882-8841

*** CONFIRMED ***

JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA: FOB: SHP SALES/USE TAX: NO AUTHORIZED: USD TERMS: NET 30 REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST
		ATTACHED ONE OF THE INCOMING PACKAGES.						
		BOTH PARTIES ACKNOWLEDGE THAT THE QUANTITIES STATED IN THIS ORDER ARE ESTIMATES ONLY AND NO MINIMUM AMOUNT OTHER THAN ACTUALLY DETERMINED BY CUSTOMER ORDERS IS GUARANTEED. TO THAT END, HE WILL PROVIDE YOU WITH OUR BEST PROJECTION OF USAGE AS OFTEN AS YOU MAY REASONABLE REQUEST.						
		RELEASES OF THE ABOVE MATERIAL TO BE CALLED IN AS REQUIRED BY DAVID WILLIAMS/TONY MIZE/JODY SWANEY.						
		CONTACT DAVID WILLIAMS PHONE 864-889-1204/ TONY MIZE PHONE 864-886-0101 IN REGARDS TO PRICING, FORECAST OR TECHNICAL INFORMATION						
12/31/04	1033	ACID,SULFURIC,TECHNICAL,66BE	LB	1		25000.0000	.1000	2500.00
		SULFURIC ACID TECHNICAL GRADE 66 BE AS PER SPEC 1033,REV 6.0,DATED 15-NOV-02. 600 LBS PER DRM/2400 LBS PER PALLET. DRUM DEPOSIT. WAS DOWN IN JANUARY						
3/02/04	1057	SODIUM SILICATE N-CLEAR SOLN	LB	1		1270.0000	.4600	584.20
		Purchase Order Continued...						

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THE ABOVE

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005368

279

03/19/2008 WED 13:07 FAX

010/040

ENGELHARD

PLEASE REFERENCE ENGELHARD
① PURCHASE ORDER NUMBER
② SUPPLIER
③ SHIP TO ADDRESS
ON ALL INVOICES AND SHIPPING DOCUMENTS.

① PURCHASE ORDER: 8006011

DATE: 12/09/03

PAGE 9
3/02/04

① TO: 126968
UNIVAR USA INC.
2750 SOUTHPORT ROAD
SPARTANBURG, S.C. 29302

② SHIP TO: ENGELHARD CORPORATION
554 ENGELHARD DRIVE
SENECA, SOUTH CAROLINA 29679

INVOICE IN TRIPLICATE TO:

ENGELHARD CORPORATION
ACCOUNTS PAYABLE DEPARTMENT
P.O. BOX 129
SENECA, SC 29679
864 882-9841

*** CONFIRMED *** JOHN

ENGELHARD CODE NUMBER (IF USED) MUST BE REFERENCED ON ALL INVOICES AND PACKAGES

SHIP VIA:	FOB: SHIP	SALES / USE TAX: NO	AUTHORIZED: USD	TERMS: NET 30	REVISION:

SHIP TO ARRIVE	ENGELHARD CODE	DESCRIPTION	U/M	REL	REV	QUANTITY	UNIT PRICE	EXTENDED COST
		SODIUM SILICATE SOLUTION GRADE N-CLEAR,28% SIO 29% NA2O AS PER SPEC 1057,REV 3.0,DATED 17-OCT-92. 625 LBS PER DRM/2500 LBS PER PALLET.						

End of Purchase Order 565200.60

DAVID WILLIAMS

ENGELHARD AUTHORIZED AGENT

REFER ANY QUESTIONS REGARDING THIS ORDER TO THIS PERSON

THIS PURCHASE ORDER IS SUBJECT TO THE PROVISIONS ON THE FACE HEREOF AND THE INSTRUCTIONS, TERMS AND CONDITIONS ON THE REVERSE SIDE. PLEASE REVIEW THEM CAREFULLY. THEY WILL CONSTITUTE OUR CONTRACT UNLESS WE AGREE IN WRITING TO CHANGES OR ADDITIONS.

CONFIDENTIAL
ENGELHARD 005369

03/19/2008 WED 13:07 FAX

Exhibit G

TERMS AND CONDITIONS

EXCEPT AS MAY OTHERWISE BE SPECIFICALLY PROVIDED ON THE FACE SIDE HEREOF THE PARTIES AGREE THAT THE FOLLOWING TERMS AND CONDITIONS SHALL GOVERN THE TRANSACTION DESCRIBED ON THE FACE HEREOF. AS USED HEREIN THE TERM "BUYER" SHALL MEAN AND INCLUDE ENGELHARD CORPORATION AND/OR ITS SUBSIDIARIES.

1. **ACCEPTANCE AND MODIFICATION**

This purchase order ("Order") can be accepted only upon the terms and conditions expressed herein, which may not be modified, amended or waived except by express written consent signed by an officer or Buyer. Objection is hereby given to any additional or different terms or conditions, whether or not material, contained in any acknowledgment or confirmation of this Order. This Vendor upon signing the Acceptance Copy, or commencing performance hereunder or by any other means which reasonably manifest Vendor's assent to be bound by the provisions hereon.

2. **PERFORMANCE**

Time is of the essence of this Order, and performance must actually be completed within the time stated on the face side hereof. In the event of Vendor's delay in performance or failure to perform, Buyer reserves the right, in addition to all other rights provided by law, to cancel this Order immediately upon giving notice and hold Vendor liable for any excess cost incurred, plus all other allowable damages. Neither Vendor nor Buyer shall be liable for delay in performance or failure to perform if such delay or failure is caused by any occurrence or contingency beyond the reasonable control of the affected party, which by the exercise of due diligence such party would be unable to overcome, or by compliance in good faith with any applicable foreign or domestic governmental requirement provided the affected party notifies the other party of such occurrence. Quantities affected by any such delay or failure may be deleted from this Order. Vendor shall deliver all goods to and perform all services at the premises designated on the face side hereof, and all prices stated herein shall be for such delivery or performances, free of all other costs and expenses. Buyer may inspect all goods provided and all services performed hereunder prior to being obligated to make payment, whether partial, full or final, on account thereof.

Vendor agrees to sell or otherwise make available to Buyer spare and replacement parts and component systems for each item of equipment or other goods to be provided hereunder on commercially reasonable terms and conditions throughout the entire reasonable life expectancy of each such item.

3. **WARRANTY**

Acceptance of this Order constitutes an express warranty by Vendor that (a) with respect to all goods to be provided hereunder Vendor has, or at the time of performance shall have, and shall transmit to Buyer good and marketable title thereto, free and clear of liens and encumbrances of any kind whatsoever, (b) all services to be performed hereunder shall be performed in a good and workmanlike manner and in accordance with sound generally accepted practices, involve no unreasonable risk of injury or damage, conform to all applicable specifications and governmental requirements, and be without fault and free from all defects, and (c) all goods to be provided hereunder shall be merchantable, fit for the purpose intended and of first quality, involve no unreasonable risk or injury or damage when used as intended, conform to all applicable specifications and samples and be free from all defects in design, materials and workmanship. Buyer may accept or reject any or all goods or services which are in breach of this provision and, in any event, hold Vendor liable for all damages resulting from such breach.

4. **COMPETITIVE OFFERS**

At any time, Buyer may notify Vendor that it has received a bona fide offer to deliver similar goods in approximately the same quantity as the undelivered portion hereunder at a lower price than that which is then in effect under this Order. If within fifteen (15) days of its receipt of such notice Vendor shall not reduce its price hereunder sufficiently to meet the terms of such offer and advise Buyer of such reduction, Buyer may purchase any or all of the undelivered portions of goods hereunder from such offeror. All quantities so purchased shall be deleted from this Order.

If at any time during the duration of this Order, Vendor sells or offers to sell comparable quantities of similar grades of products as the goods to be provided hereunder at a price lower than Vendor's price to Buyer then in effect or upon other terms and conditions more favorable to buyers than the terms and conditions hereof, Vendor shall promptly notify Buyer thereof and offer such lower price or such other more favorable terms and conditions to Buyer during the period in which such lower price or such other more favorable terms and conditions are in effect.

5. **COMPLIANCE WITH APPLICABLE LEGAL STANDARDS**

Vendor further warrants that all goods provided and all services performed hereunder will be in compliance with all requirements of the Fair Labor Standards Act of 1938, as amended. Also, in respect of all performance due hereunder, Vendor warrants that it is and will be in compliance with all applicable provisions of federal, state and local laws and the rules, regulations and standards promulgated thereunder, including without limitation the following, as amended from time to time: (a) Occupational, Safety and Health Act of 1970, (b) Executive Order 11246, including the "equal opportunity" clause set forth therein (incorporated herein by reference), (c) Rehabilitation Act of 1973 (incorporated herein by reference) and Vietnam Era Veterans Readjustment Assistance Act of 1974 (incorporated herein by reference), including the "affirmative action" clauses set forth herein and (d) Toxic Substances Control Act of 1976. If the goods provided hereunder are chemical substances or mixtures of chemical substances, as these terms are defined in the Toxic Substances Control Act, Vendor certifies that such chemical substances of all component chemical substances of mixtures are included in the inventory of Chemical Substances as provided in the Toxic Substances Control Act of 1976.

6. **SAFETY**

Vendor agrees to observe all safety and security rules, instructions and requests of Buyer whenever in its performance hereunder Vendor or its employees or agents enter upon any Buyer location. If the goods provided or to be provided or the services performed or to be performed hereunder involve or may involve any risk of injury or death to persons or damage to property, Vendor shall provide Buyer with a written description of the nature and extent of any such risk, including a description of any precautions which should be taken to minimize the risk of death, injury or damage occurring and to minimize the injury, damage or loss in the event of any such occurrence. Upon request Vendor agrees to complete Buyer's standard chemical control form (currently titled "Material Safety Data Sheet") with respect to any chemical substance to be provided hereunder.

7. **INDEMNIFICATION**

Vendor shall indemnify and hold harmless Buyer, its agents and employees, from and against all claims, damages, losses and expenses, including attorney's fees, arising out of or resulting from all goods provided and all services performed hereunder, provided that any such claim, damage, loss or expense is caused in whole or in part by a breach of this Order or by a negligent, reckless or intentional act or omission of Vendor, its agents, employees or subcontractors. The obligations of Vendor hereunder shall not extend to any liability with respect to or arising out of any claim, damage, loss or expense which is attributable to an act or omission of Buyer, its agents or employees.

Exhibit H

(e)(4) Paragraph (e)(4) requires employers to make the written program available upon request to employees, OSHA and NIOSH, in accordance with the requirements of the Access Standard, 29 CFR 1910.20(e). This requirement is interpreted to apply to the requirement of the employer to provide a copy of the written program within the time periods discussed in 1910.20 (i.e., no later than 15 days after the request for access is made). It is not meant to allow an employer of a primary workplace facility or a fixed location worksite a 15-day time period in which to make the program available for inspection on-site. For fixed worksites and primary workplace facilities, the written hazard communication program must be maintained on-site at all times. OSHA interprets the 15-day period referenced in (e)(4) to pertain to the length of time the employer has in which to provide a copy of the program to the requesting party. (See discussion at subparagraph (e)(2) of this Appendix for OSHA citation policy regarding the maintenance of written programs on multi-employer or mobile worksite locations.)

Labels and Other Forms of Warning.

(f)(1) and (f)(5) The purpose for labels under the standard is clear. Labels provide an immediate warning to employees of the hazards they may be exposed to and, through the chemical identity, labels provide a link to more detailed information available through MSDSs and other sources. Labels must contain the identity of the chemical, an appropriate hazard warning, and the name and address of the responsible party.

OSHA recognizes that the degree of detail on a label needed to convey a hazard may be different within a workplace where other information is readily available, compared to labels required on shipped containers, where the label may be the only information available.

The standard's preamble recognizes the existence of numerous labeling systems that are currently in use in industry. Examples include the HMIS (Hazardous Materials Information System), NFPA (National Fire Protection Association) and ANSI (American National Standards Institute) systems. Some of these systems

Exhibit I

U.S. Department of Labor
Occupational Safety & Health Administration
www.osha.gov Search Advanced Search | A

Regulations (Standards - 29 CFR)

Hazard Communication. - 1910.1200

Regulations (Standards - 29 CFR) - Table of Contents

• Part Number:	1910
• Part Title:	Occupational Safety and Health Standards
• Subpart:	Z
• Subpart Title:	Toxic and Hazardous Substances
• Standard Number:	1910.1200
• Title:	Hazard Communication.
• Appendix:	A, B, C, D, E

1910.1200(a)

"Purpose."

1910.1200(a)(1)

The purpose of this section is to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

..1910.1200(a)(2)

1910.1200(a)(2)

This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject. Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals in the workplace, as well as of containers of chemicals being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and downstream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan.

1910.1200(b)

"Scope and application."

1910.1200(b)(1)

This section requires chemical manufacturers or importers to assess the hazards of chemicals which they produce or import, and all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training. In addition, this section requires distributors to transmit the required information to employers. (Employers who do not produce or import chemicals need only focus on those parts of this rule that deal with establishing a workplace program and communicating information to their workers. Appendix E of this section is a general guide for such employers to help them determine their compliance obligations under the rule.)

1910.1200(b)(2)

This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.

1910.1200(b)(3)

This section applies to laboratories only as follows:

1910.1200(b)(3)(i)

Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

..1910.1200(b)(3)(ii)

1910.1200(b)(3)(ii)

Employers shall maintain any material safety data sheets that are received with incoming shipments of hazardous chemicals, and ensure that they are readily accessible during each workshift to laboratory employees when they are in their work areas;

1910.1200(b)(3)(iii)

Employers shall ensure that laboratory employees are provided information and training in accordance with paragraph (h) of this section, except for the location and availability of the written hazard communication program under paragraph (h)(2)(iii) of this section; and,

1910.1200(b)(3)(iv)

Laboratory employers that ship hazardous chemicals are considered to be either a chemical manufacturer or a distributor under this rule, and thus must ensure that any containers of

hazardous chemicals leaving the laboratory are labeled in accordance with paragraph (f)(1) of this section, and that a material safety data sheet is provided to distributors and other employers in accordance with paragraphs (g)(6) and (g)(7) of this section.

1910.1200(b)(4)

In work operations where employees only handle chemicals in sealed containers which are not opened under normal conditions of use (such as are found in marine cargo handling, warehousing, or retail sales), this section applies to these operations only as follows:

1910.1200(b)(4)(i)

Employers shall ensure that labels on incoming containers of hazardous chemicals are not removed or defaced;

..1910.1200(b)(4)(ii)

1910.1200(b)(4)(ii)

Employers shall maintain copies of any material safety data sheets that are received with incoming shipments of the sealed containers of hazardous chemicals, shall obtain a material safety data sheet as soon as possible for sealed containers of hazardous chemicals received without a material safety data sheet if an employee requests the material safety data sheet, and shall ensure that the material safety data sheets are readily accessible during each work shift to employees when they are in their work area(s); and,

1910.1200(b)(4)(iii)

Employers shall ensure that employees are provided with information and training in accordance with paragraph (h) of this section (except for the location and availability of the written hazard communication program under paragraph (h)(2)(iii) of this section), to the extent necessary to protect them in the event of a spill or leak of a hazardous chemical from a sealed container.

1910.1200(b)(5)

This section does not require labeling of the following chemicals:

1910.1200(b)(5)(i)

Any pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.), when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Environmental Protection Agency;

1910.1200(b)(5)(ii)

Any chemical substance or mixture as such terms are defined in the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Environmental Protection Agency;

..1910.1200(b)(5)(iii)

1910.1200(b)(5)(iii)

Any food, food additive, color additive, drug, cosmetic, or medical or veterinary device or product, including materials intended for use as ingredients in such products (e.g. flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) or the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151 et seq.), and regulations issued under those Acts, when they are subject to the labeling requirements under those Acts by either the Food and Drug Administration or the Department of Agriculture;

1910.1200(b)(5)(iv)

Any distilled spirits (beverage alcohols), wine, or malt beverage intended for nonindustrial use, as such terms are defined in the Federal Alcohol Administration Act (27 U.S.C. 201 et seq.) and regulations issued under that Act, when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Bureau of Alcohol, Tobacco, and Firearms;

1910.1200(b)(5)(v)

Any consumer product or hazardous substance as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) respectively, when subject to a consumer product safety standard or labeling requirement of those Acts, or regulations issued under those Acts by the Consumer Product Safety Commission; and,

1910.1200(b)(5)(vi)

Agricultural or vegetable seed treated with pesticides and labeled in accordance with the Federal Seed Act (7 U.S.C. 1551 et seq.) and the labeling regulations issued under that Act by the Department of Agriculture.

..1910.1200(b)(6)

1910.1200(b)(6)

This section does not apply to:

1910.1200(b)(6)(i)

Any hazardous waste as such term is defined by the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6901 et seq.), when subject to regulations issued under that Act by the Environmental Protection Agency;

1910.1200(b)(6)(ii)

Any hazardous substance as such term is defined by the Comprehensive Environmental Response, Compensation and Liability ACT (CERCLA) (42 U.S.C. 9601 et seq.) when the

hazardous substance is the focus of remedial or removal action being conducted under CERCLA in accordance with the Environmental Protection Agency regulations.

1910.1200(b)(6)(iii)

Tobacco or tobacco products;

1910.1200(b)(6)(iv)

Wood or wood products, including lumber which will not be processed, where the chemical manufacturer or importer can establish that the only hazard they pose to employees is the potential for flammability or combustibility (wood or wood products which have been treated with a hazardous chemical covered by this standard, and wood which may be subsequently sawed or cut, generating dust, are not exempted);

1910.1200(b)(6)(v)

Articles (as that term is defined in paragraph (c) of this section);

1910.1200(b)(6)(vi)

Food or alcoholic beverages which are sold, used, or prepared in a retail establishment (such as a grocery store, restaurant, or drinking place), and foods intended for personal consumption by employees while in the workplace;

1910.1200(b)(6)(vii)

1910.1200(b)(6)(vii)

Any drug, as that term is defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), when it is in solid, final form for direct administration to the patient (e.g., tablets or pills); drugs which are packaged by the chemical manufacturer for sale to consumers in a retail establishment (e.g., over-the-counter drugs); and drugs intended for personal consumption by employees while in the workplace (e.g., first aid supplies);

1910.1200(b)(6)(viii)

Cosmetics which are packaged for sale to consumers in a retail establishment, and cosmetics intended for personal consumption by employees while in the workplace;

1910.1200(b)(6)(ix)

Any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) respectively, where the employer can show that it is used in the workplace for the purpose intended by the chemical manufacturer or importer of the product, and the use results in a duration and frequency of exposure which is not greater than the range of exposures that could reasonably be experienced by consumers when used for the purpose intended;

1910.1200(b)(6)(x)

Nuisance particulates where the chemical manufacturer or importer can establish that they do not pose any physical or health hazard covered under this section;

1910.1200(b)(6)(xi)

Ionizing and nonionizing radiation; and,

1910.1200(b)(6)(xii)

Biological hazards.

1910.1200(c)

"Definitions."

"Article" means a manufactured item other than a fluid or particle: (i) which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities, e.g., minute or trace amounts of a hazardous chemical (as determined under paragraph (d) of this section), and does not pose a physical hazard or health risk to employees.

"Assistant Secretary" means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or designee.

"Chemical" means any element, chemical compound or mixture of elements and/or compounds.

"Chemical manufacturer" means an employer with a workplace where chemical(s) are produced for use or distribution.

"Chemical name" means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature, or a name which will clearly identify the chemical for the purpose of conducting a hazard evaluation.

"Combustible liquid" means any liquid having a flashpoint at or above 100 deg. F (37.8 deg. C), but below 200 deg. F (93.3 deg. C), except any mixture having components with flashpoints of 200 deg. F (93.3 deg. C), or higher, the total volume of which make up 99 percent or more of the total volume of the mixture.

"Commercial account" means an arrangement whereby a retail distributor sells hazardous chemicals to an employer, generally in large quantities over time and/or at costs that are below the regular retail price.

"Common name" means any designation or identification such as code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

"Compressed gas" means:

(i) A gas or mixture of gases having, in a container, an absolute pressure exceeding 40 psi at 70 deg. F (21.1 deg. C); or

(ii) A gas or mixture of gases having, in a container, an absolute pressure exceeding 104 psi at 130 deg. F (54.4 deg. C) regardless of the pressure at 70 deg. F (21.1 deg. C); or

(iii) A liquid having a vapor pressure exceeding 40 psi at 100 deg. F (37.8 deg. C) as determined by ASTM D-323-72.

"Container" means any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank, or the like that contains a hazardous chemical. For purposes of this section, pipes or piping systems, and engines, fuel tanks, or other operating systems in a vehicle, are not considered to be containers.

"Designated representative" means any individual or organization to whom an employee gives written authorization to exercise such employee's rights under this section. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

"Director" means the Director, National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

"Distributor" means a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to employers.

"Employee" means a worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies. Workers such as office workers or bank tellers who encounter hazardous chemicals only in non-routine, isolated instances are not covered.

"Employer" means a person engaged in a business where chemicals are either used, distributed, or are produced for use or distribution, including a contractor or subcontractor.

"Explosive" means a chemical that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature.

"Exposure or exposed" means that an employee is subjected in the course of employment to a chemical that is a physical or health hazard, and includes potential (e.g. accidental or possible) exposure. "Subjected" in terms of health hazards includes any route of entry (e.g. inhalation, ingestion, skin contact or absorption.)

"Flammable" means a chemical that falls into one of the following categories:

(i) "Aerosol, flammable" means an aerosol that, when tested by the method described in 16 CFR 1500.45, yields a flame projection exceeding 18 inches at full valve opening, or a flashback (a flame extending back to the valve) at any degree of valve opening;

(ii) "Gas, flammable" means: (A) A gas that, at ambient temperature and pressure, forms a

flammable mixture with air at a concentration of thirteen (13) percent by volume or less; or

(B) A gas that, at ambient temperature and pressure, forms a range of flammable mixtures with air wider than twelve (12) percent by volume, regardless of the lower limit;

(iii) "Liquid, flammable" means any liquid having a flashpoint below 100 deg. F (37.8 deg. C), except any mixture having components with flashpoints of 100 deg. F (37.8 deg. C) or higher, the total of which make up 99 percent or more of the total volume of the mixture.

(iv) "Solid, flammable" means a solid, other than a blasting agent or explosive as defined in 1910.109(a), that is liable to cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from manufacturing or processing, or which can be ignited readily and when ignited burns so vigorously and persistently as to create a serious hazard. A chemical shall be considered to be a flammable solid if, when tested by the method described in 16 CFR 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

"Flashpoint" means the minimum temperature at which a liquid gives off a vapor in sufficient concentration to ignite when tested as follows:

(i) Tagliabue Closed Tester (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24-1979 (ASTM D 56-79)) for liquids with a viscosity of less than 45 Saybolt Universal Seconds (SUS) at 100 deg. F (37.8 deg. C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

(ii) Pensky-Martens Closed Tester (see American National Standard Method of Test for Flash Point by Pensky-Martens Closed Tester, Z11.7-1979 (ASTM D 93-79)) for liquids with a viscosity equal to or greater than 45 SUS at 100 deg. F (37.8 deg. C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

(iii) Setaflash Closed Tester (see American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTM D 3278-78)).

Organic peroxides, which undergo autoaccelerating thermal decomposition, are excluded from any of the flashpoint determination methods specified above.

"Foreseeable emergency" means any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace.

"Hazardous chemical" means any chemical which is a physical hazard or a health hazard.

"Hazard warning" means any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the specific physical and health hazard(s), including target organ effects, of the chemical(s) in the container(s). (See the definitions for "physical hazard" and "health hazard" to determine the hazards which must be covered.)

"Health hazard" means a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute

or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes. Appendix A provides further definitions and explanations of the scope of health hazards covered by this section, and Appendix B describes the criteria to be used to determine whether or not a chemical is to be considered hazardous for purposes of this standard.

"Identity" means any chemical or common name which is indicated on the material safety data sheet (MSDS) for the chemical. The identity used shall permit cross-references to be made among the required list of hazardous chemicals, the label and the MSDS.

"Immediate use" means that the hazardous chemical will be under the control of and used only by the person who transfers it from a labeled container and only within the work shift in which it is transferred.

"Importer" means the first business with employees within the Customs Territory of the United States which receives hazardous chemicals produced in other countries for the purpose of supplying them to distributors or employers within the United States.

"Label" means any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals.

"Material safety data sheet (MSDS)" means written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section.

"Mixture" means any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction.

"Organic peroxide" means an organic compound that contains the bivalent -O-O-structure and which may be considered to be a structural derivative of hydrogen peroxide where one or both of the hydrogen atoms has been replaced by an organic radical.

"Oxidizer" means a chemical other than a blasting agent or explosive as defined in 1910.109 (a), that initiates or promotes combustion in other materials, thereby causing fire either of itself or through the release of oxygen or other gases.

"Physical hazard" means a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

"Produce" means to manufacture, process, formulate, blend, extract, generate, emit, or repackage.

"Pyrophoric" means a chemical that will ignite spontaneously in air at a temperature of 130 deg. F (54.4 deg. C) or below.

"Responsible party" means someone who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

"Specific chemical identity" means the chemical name, Chemical Abstracts Service (CA Registry Number, or any other information that reveals the precise chemical designation o. the substance.

"Trade secret" means any confidential formula, pattern, process, device, information or compilation of information that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. Appendix D sets out the criteria to be used in evaluating trade secrets.

"Unstable (reactive)" means a chemical which in the pure state, or as produced or transported, will vigorously polymerize, decompose, condense, or will become self-reactive under conditions of shocks, pressure or temperature.

"Use" means to package, handle, react, emit, extract, generate as a byproduct, or transfer.

"Water-reactive" means a chemical that reacts with water to release a gas that is either flammable or presents a health hazard.

"Work area" means a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present.

"Workplace" means an establishment, job site, or project, at one geographical location containing one or more work areas.

..1910.1200(d)

1910.1200(d)

"Hazard determination."

1910.1200(d)(1)

Chemical manufacturers and importers shall evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous. Employers are not required to evaluate chemicals unless they choose not to rely on the evaluation performed by the chemical manufacturer or importer for the chemical to satisfy this requirement.

1910.1200(d)(2)

Chemical manufacturers, importers or employers evaluating chemicals shall identify and consider the available scientific evidence concerning such hazards. For health hazards, evidence which is statistically significant and which is based on at least one positive study conducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section. Appendix A shall be consulted for the scope of health hazards covered, and Appendix B shall be consulted for the criteria to be followed with respect to the completeness of the evaluation, and the data to be reported.

1910.1200(d)(3)

The chemical manufacturer, importer or employer evaluating chemicals shall treat the following sources as establishing that the chemicals listed in them are hazardous:

1910.1200(d)(3)(i)

29 CFR part 1910, subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration (OSHA); or,

1910.1200(d)(3)(ii)

1910.1200(d)(3)(ii)

"Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment," American Conference of Governmental Industrial Hygienists (ACGIH) (latest edition). The chemical manufacturer, importer, or employer is still responsible for evaluating the hazards associated with the chemicals in these source lists in accordance with the requirements of this standard.

1910.1200(d)(4)

Chemical manufacturers, importers and employers evaluating chemicals shall treat the following sources as establishing that a chemical is a carcinogen or potential carcinogen for hazard communication purposes:

1910.1200(d)(4)(i)

National Toxicology Program (NTP), "Annual Report on Carcinogens" (latest edition);

1910.1200(d)(4)(ii)

International Agency for Research on Cancer (IARC) "Monographs" (latest editions); or

1910.1200(d)(4)(iii)

29 CFR part 1910, subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration.

Note: The "Registry of Toxic Effects of Chemical Substances" published by the National Institute for Occupational Safety and Health indicates whether a chemical has been found by NTP or IARC to be a potential carcinogen.

1910.1200(d)(5)

The chemical manufacturer, importer or employer shall determine the hazards of mixtures of chemicals as follows:

1910.1200(d)(5)(i)

If a mixture has been tested as a whole to determine its hazards, the results of such testing shall be used to determine whether the mixture is hazardous;

..1910.1200(d)(5)(ii)

1910.1200(d)(5)(ii)

If a mixture has not been tested as a whole to determine whether the mixture is a health hazard, the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section;

1910.1200(d)(5)(iii)

If a mixture has not been tested as a whole to determine whether the mixture is a physical hazard, the chemical manufacturer, importer, or employer may use whatever scientifically valid data is available to evaluate the physical hazard potential of the mixture; and,

1910.1200(d)(5)(iv)

If the chemical manufacturer, importer, or employer has evidence to indicate that a component present in the mixture in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent) could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health risk to employees in those concentrations, the mixture shall be assumed to present the same hazard.

1910.1200(d)(6)

Chemical manufacturers, importers, or employers evaluating chemicals shall describe in writing the procedures they use to determine the hazards of the chemical they evaluate. The written procedures are to be made available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director. The written description may be incorporated into the written hazard communication program required under paragraph (e) of this section.

..1910.1200(e)

1910.1200(e)

"Written hazard communication program."

1910.1200(e)(1)

Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

1910.1200(e)(1)(i)

A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,

1910.1200(e)(1)(ii)

The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

1910.1200(e)(2)

"Multi-employer workplaces." Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (c) include the following:

1910.1200(e)(2)(i)

The methods the employer will use to provide the other employer(s) on-site access to material safety data sheets for each hazardous chemical the other employer(s)' employees may be exposed to while working;

1910.1200(e)(2)(ii)

1910.1200(e)(2)(ii)

The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and,

1910.1200(e)(2)(iii)

The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

1910.1200(e)(3)

The employer may rely on an existing hazard communication program to comply with these requirements, provided that it meets the criteria established in this paragraph (e).

1910.1200(e)(4)

The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director, in accordance with the requirements of 29 CFR 1910.1020 (e).

1910.1200(e)(5)

Where employees must travel between workplaces during a workshift, i.e., their work is carried out at more than one geographical location, the written hazard communication program may be kept at the primary workplace facility.

1910.1200(f)

"Labels and other forms of warning."

1910.1200(f)(1)

The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:

..1910.1200(f)(1)(i)

1910.1200(f)(1)(i)

Identity of the hazardous chemical(s);

1910.1200(f)(1)(ii)

Appropriate hazard warnings; and

1910.1200(f)(1)(iii)

Name and address of the chemical manufacturer, importer, or other responsible party.

1910.1200(f)(2)

1910.1200(f)(2)(i)

For solid metal (such as a steel beam or a metal casting), solid wood, or plastic items that are not exempted as articles due to their downstream use, or shipments of whole grain, the required label may be transmitted to the customer at the time of the initial shipment, and need not be included with subsequent shipments to the same employer unless the information on the label changes;

1910.1200(f)(2)(ii)

The label may be transmitted with the initial shipment itself, or with the material safety data sheet that is to be provided prior to or at the time of the first shipment; and,

1910.1200(f)(2)(iii)

This exception to requiring labels on every container of hazardous chemicals is only for the solid material itself, and does not apply to hazardous chemicals used in conjunction with, or known to be present with, the material and to which employees handling the items in transit may be exposed (for example, cutting fluids or pesticides in grains).

..1910.1200(f)(3)

1910.1200(f)(3)

Chemical manufacturers, importers, or distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked in accordance with this section in a manner which does not conflict with the requirements of the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.) and regulations issued under that Act by the Department of Transportation.

1910.1200(f)(4)

If the hazardous chemical is regulated by OSHA in a substance-specific health standard, the chemical manufacturer, importer, distributor or employer shall ensure that the labels or other forms of warning used are in accordance with the requirements of that standard.

1910.1200(f)(5)

Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

1910.1200(f)(5)(i)

Identity of the hazardous chemical(s) contained therein; and,

1910.1200(f)(5)(ii)

Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

..1910.1200(f)(6)

1910.1200(f)(6)

The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(5) of this section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each work shift.

1910.1200(f)(7)

The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are intended only for the immediate use of the employee who performs the transfer. For purposes of this section, drugs which are dispensed

by a pharmacy to a health care provider for direct administration to a patient are exempted from labeling.

1910.1200(f)(8)

The employer shall not remove or deface existing labels on incoming containers of hazardous chemicals, unless the container is immediately marked with the required information.

1910.1200(f)(9)

The employer shall ensure that labels or other forms of warning are legible, in English, and prominently displayed on the container, or readily available in the work area throughout each work shift. Employers having employees who speak other languages may add the information in their language to the material presented, as long as the information is presented in English as well.

1910.1200(f)(10)

The chemical manufacturer, importer, distributor or employer need not affix new labels to comply with this section if existing labels already convey the required information.

..1910.1200(f)(11)

1910.1200(f)(11)

Chemical manufacturers, importers, distributors, or employers who become newly aware of any significant information regarding the hazards of a chemical shall revise the labels for the chemical within three months of becoming aware of the new information. Labels on containers of hazardous chemicals shipped after that time shall contain the new information. If the chemical is not currently produced or imported, the chemical manufacturer, importers, distributor, or employer shall add the information to the label before the chemical is shipped or introduced into the workplace again.

1910.1200(g)

"Material safety data sheets."

1910.1200(g)(1)

Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

1910.1200(g)(2)

Each material safety data sheet shall be in English (although the employer may maintain copies in other languages as well), and shall contain at least the following information:

1910.1200(g)(2)(i)

The identity used on the label, and, except as provided for in paragraph (i) of this section on trade secrets:

1910.1200(g)(2)(i)(A)

If the hazardous chemical is a single substance, its chemical and common name(s);

1910.1200(g)(2)(i)(B)

If the hazardous chemical is a mixture which has been tested as a whole to determine its hazards, the chemical and common name(s) of the ingredients which contribute to these known hazards, and the common name(s) of the mixture itself; or,

1910.1200(g)(2)(i)(C)

If the hazardous chemical is a mixture which has not been tested as a whole:

..1910.1200(g)(2)(i)(C)(1)

1910.1200(g)(2)(i)(C)(1)

The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise 1% or greater of the composition, except that chemicals identified as carcinogens under paragraph (d) of this section shall be listed if the concentrations are 0.1% or greater; and,

1910.1200(g)(2)(i)(C)(2)

The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise less than 1% (0.1% for carcinogens) of the mixture, if there is evidence that the ingredient(s) could be released from the mixture in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health risk to employees; and,

1910.1200(g)(2)(i)(C)(3)

The chemical and common name(s) of all ingredients which have been determined to present a physical hazard when present in the mixture;

1910.1200(g)(2)(ii)

Physical and chemical characteristics of the hazardous chemical (such as vapor pressure, flash point);

1910.1200(g)(2)(iii)

The physical hazards of the hazardous chemical, including the potential for fire, explosion, and reactivity;

1910.1200(g)(2)(iv)

The health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical;

1910.1200(g)(2)(v)

The primary route(s) of entry;

..1910.1200(g)(2)(vi)

1910.1200(g)(2)(vi)

The OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet, where available;

1910.1200(g)(2)(vii)

Whether the hazardous chemical is listed in the National Toxicology Program (NTP) Annual Report on Carcinogens (latest edition) or has been found to be a potential carcinogen in the International Agency for Research on Cancer (IARC) Monographs (latest editions), or by OSHA;

1910.1200(g)(2)(viii)

Any generally applicable precautions for safe handling and use which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, including appropriate hygienic practices, protective measures during repair and maintenance of contaminated equipment, and procedures for clean-up of spills and leaks;

1910.1200(g)(2)(ix)

Any generally applicable control measures which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, such as appropriate engineering controls, work practices, or personal protective equipment;

1910.1200(g)(2)(x)

Emergency and first aid procedures;

1910.1200(g)(2)(xi)

The date of preparation of the material safety data sheet or the last change to it; and.

..1910.1200(g)(2)(xii)

1910.1200(g)(2)(xii)

The name, address and telephone number of the chemical manufacturer, importer, employer or other responsible party preparing or distributing the material safety data sheet, who can

provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

1910.1200(g)(3)

If no relevant information is found for any given category on the material safety data sheet, the chemical manufacturer, importer or employer preparing the material safety data sheet shall mark it to indicate that no applicable information was found.

1910.1200(g)(4)

Where complex mixtures have similar hazards and contents (i.e. the chemical ingredients are essentially the same, but the specific composition varies from mixture to mixture), the chemical manufacturer, importer or employer may prepare one material safety data sheet to apply to all of these similar mixtures.

1910.1200(g)(5)

The chemical manufacturer, importer or employer preparing the material safety data sheet shall ensure that the information recorded accurately reflects the scientific evidence used in making the hazard determination. If the chemical manufacturer, importer or employer preparing the material safety data sheet becomes newly aware of any significant information regarding the hazards of a chemical, or ways to protect against the hazards, this new information shall be added to the material safety data sheet within three months. If the chemical is not currently being produced or imported the chemical manufacturer or importer shall add the information to the material safety data sheet before the chemical is introduced into the workplace again.

1910.1200(g)(6)

1910.1200(g)(6)

1910.1200(g)(6)(i)

Chemical manufacturers or importers shall ensure that distributors and employers are provided an appropriate material safety data sheet with their initial shipment, and with the first shipment after a material safety data sheet is updated;

1910.1200(g)(6)(ii)

The chemical manufacturer or importer shall either provide material safety data sheets with the shipped containers or send them to the distributor or employer prior to or at the time of the shipment;

1910.1200(g)(6)(iii)

If the material safety data sheet is not provided with a shipment that has been labeled as a hazardous chemical, the distributor or employer shall obtain one from the chemical manufacturer or importer as soon as possible; and,

1910.1200(g)(6)(iv)

The chemical manufacturer or importer shall also provide distributors or employers with a material safety data sheet upon request.

1910.1200(g)(7)

1910.1200(g)(7)(i)

Distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and employers with their initial shipment and with the first shipment after a material safety data sheet is updated;

1910.1200(g)(7)(ii)

The distributor shall either provide material safety data sheets with the shipped containers, or send them to the other distributor or employer prior to or at the time of the shipment;

..1910.1200(g)(7)(iii)

1910.1200(g)(7)(iii)

Retail distributors selling hazardous chemicals to employers having a commercial account shall provide a material safety data sheet to such employers upon request, and shall post a sign or otherwise inform them that a material safety data sheet is available;

1910.1200(g)(7)(iv)

Wholesale distributors selling hazardous chemicals to employers over-the-counter may also provide material safety data sheets upon the request of the employer at the time of the over-the-counter purchase, and shall post a sign or otherwise inform such employers that a material safety data sheet is available;

1910.1200(g)(7)(v)

If an employer without a commercial account purchases a hazardous chemical from a retail distributor not required to have material safety data sheets on file (i.e., the retail distributor does not have commercial accounts and does not use the materials), the retail distributor shall provide the employer, upon request, with the name, address, and telephone number of the chemical manufacturer, importer, or distributor from which a material safety data sheet can be obtained;

1910.1200(g)(7)(vi)

Wholesale distributors shall also provide material safety data sheets to employers or other distributors upon request; and,

1910.1200(g)(7)(vii)

Chemical manufacturers, importers, and distributors need not provide material safety data

sheets to retail distributors that have informed them that the retail distributor does not sell the product to commercial accounts or open the sealed container to use it in their own workplaces.

..1910.1200(g)(8)

1910.1200(g)(8)

The employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Electronic access, microfiche, and other alternatives to maintaining paper copies of the material safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options.)

1910.1200(g)(9)

Where employees must travel between workplaces during a workshift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency.

1910.1200(g)(10)

Material safety data sheets may be kept in any form, including operating procedures, and may be designed to cover groups of hazardous chemicals in a work area where it may be more appropriate to address the hazards of a process rather than individual hazardous chemicals. However, the employer shall ensure that in all cases the required information is provided for each hazardous chemical, and is readily accessible during each work shift to employees when they are in in their work area(s).

1910.1200(g)(11)

Material safety data sheets shall also be made readily available, upon request, to designated representatives and to the Assistant Secretary, in accordance with the requirements of 29 CFR 1910.1020(e). The Director shall also be given access to material safety data sheets in the same manner.

..1910.1200(h)

1910.1200(h)

"Employee information and training."

1910.1200(h)(1)

Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards

(e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

1910.1200(h)(2)

"Information." Employees shall be informed of:

1910.1200(h)(2)(i)

The requirements of this section;

1910.1200(h)(2)(ii)

Any operations in their work area where hazardous chemicals are present; and,

1910.1200(h)(2)(iii)

The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

1910.1200(h)(3)

"Training." Employee training shall include at least:

1910.1200(h)(3)(i)

Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);

1910.1200(h)(3)(ii)

The physical and health hazards of the chemicals in the work area;

1910.1200(h)(3)(iii)

1910.1200(h)(3)(iii)

The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,

1910.1200(h)(3)(iv)

The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

1910.1200(i)

"Trade secrets."

1910.1200(i)(1)

The chemical manufacturer, importer, or employer may withhold the specific chemical identity, including the chemical name and other specific identification of a hazardous chemical, from the material safety data sheet, provided that:

1910.1200(i)(1)(i)

The claim that the information withheld is a trade secret can be supported;

1910.1200(i)(1)(ii)

Information contained in the material safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;

1910.1200(i)(1)(iii)

The material safety data sheet indicates that the specific chemical identity is being withheld as a trade secret; and,

1910.1200(i)(1)(iv)

The specific chemical identity is made available to health professionals, employees, and designated representatives in accordance with the applicable provisions of this paragraph.

..1910.1200(i)(2)

1910.1200(i)(2)

Where a treating physician or nurse determines that a medical emergency exists and the specific chemical identity of a hazardous chemical is necessary for emergency or first-aid treatment, the chemical manufacturer, importer, or employer shall immediately disclose the specific chemical identity of a trade secret chemical to that treating physician or nurse, regardless of the existence of a written statement of need or a confidentiality agreement. The chemical manufacturer, importer, or employer may require a written statement of need and confidentiality agreement, in accordance with the provisions of paragraphs (i)(3) and (4) of this section, as soon as circumstances permit.

1910.1200(i)(3)

In non-emergency situations, a chemical manufacturer, importer, or employer shall, upon request, disclose a specific chemical identity, otherwise permitted to be withheld under paragraph (i)(1) of this section, to a health professional (i.e. physician, industrial hygienist, toxicologist, epidemiologist, or occupational health nurse) providing medical or other occupational health services to exposed employee(s), and to employees or designated representatives, if:

1910.1200(i)(3)(i)

The request is in writing;

1910.1200(i)(3)(ii)

The request describes with reasonable detail one or more of the following occupational health needs for the information:

1910.1200(i)(3)(ii)(A)

To assess the hazards of the chemicals to which employees will be exposed;

1910.1200(i)(3)(ii)(B)

To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels;

1910.1200(i)(3)(ii)(C)

To conduct pre-assignment or periodic medical surveillance of exposed employees;

1910.1200(i)(3)(ii)(D)

To provide medical treatment to exposed employees;

..1910.1200(i)(3)(ii)(E)

1910.1200(i)(3)(ii)(E)

To select or assess appropriate personal protective equipment for exposed employees;

1910.1200(i)(3)(ii)(F)

To design or assess engineering controls or other protective measures for exposed employees; and,

1910.1200(i)(3)(ii)(G)

To conduct studies to determine the health effects of exposure.

1910.1200(i)(3)(iii)

The request explains in detail why the disclosure of the specific chemical identity is essential and that, in lieu thereof, the disclosure of the following information to the health professional, employee, or designated representative, would not satisfy the purposes described in paragraph (i)(3)(ii) of this section:

1910.1200(i)(3)(iii)(A)

The properties and effects of the chemical;

1910.1200(i)(3)(iii)(B)

Measures for controlling workers' exposure to the chemical;

1910.1200(i)(3)(iii)(C)

Methods of monitoring and analyzing worker exposure to the chemical; and,

1910.1200(i)(3)(iii)(D)

Methods of diagnosing and treating harmful exposures to the chemical;

1910.1200(i)(3)(iv)

The request includes a description of the procedures to be used to maintain the confidentiality of the disclosed information; and,

1910.1200(i)(3)(v)

1910.1200(i)(3)(v)

The health professional, and the employer or contractor of the services of the health professional (i.e. downstream employer, labor organization, or individual employee), employee, or designated representative, agree in a written confidentiality agreement that the health professional, employee, or designated representative, will not use the trade secret information for any purpose other than the health need(s) asserted and agree not to release the information under any circumstances other than to OSHA, as provided in paragraph (i)(6) of this section, except as authorized by the terms of the agreement or by the chemical manufacturer, importer, or employer.

1910.1200(i)(4)

The confidentiality agreement authorized by paragraph (i)(3)(iv) of this section:

1910.1200(i)(4)(i)

May restrict the use of the information to the health purposes indicated in the written statement of need;

1910.1200(i)(4)(ii)

May provide for appropriate legal remedies in the event of a breach of the agreement, including stipulation of a reasonable pre-estimate of likely damages; and,

1910.1200(i)(4)(iii)

May not include requirements for the posting of a penalty bond.

1910.1200(i)(5)

Nothing in this standard is meant to preclude the parties from pursuing non-contractual remedies to the extent permitted by law.

1910.1200(i)(6)

If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to OSHA, the chemical manufacturer, importer, or employer who provided the information shall be informed by the health professional, employee, or designated representative prior to, or at the same time as, such disclosure.

..1910.1200(i)(7)

1910.1200(i)(7)

If the chemical manufacturer, importer, or employer denies a written request for disclosure of a specific chemical identity, the denial must:

1910.1200(i)(7)(i)

Be provided to the health professional, employee, or designated representative, within thirty days of the request;

1910.1200(i)(7)(ii)

Be in writing;

1910.1200(i)(7)(iii)

Include evidence to support the claim that the specific chemical identity is a trade secret;

1910.1200(i)(7)(iv)

State the specific reasons why the request is being denied; and,

1910.1200(i)(7)(v)

Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the specific chemical identity.

1910.1200(i)(8)

The health professional, employee, or designated representative whose request for information is denied under paragraph (i)(3) of this section may refer the request and the written denial of the request to OSHA for consideration.

1910.1200(i)(9)

When a health professional, employee, or designated representative refers the denial to OSHA under paragraph (i)(8) of this section, OSHA shall consider the evidence to determine if:

..1910.1200(i)(9)(i)

1910.1200(i)(9)(i)

The chemical manufacturer, importer, or employer has supported the claim that the specific chemical identity is a trade secret;

1910.1200(i)(9)(ii)

The health professional, employee, or designated representative has supported the claim that there is a medical or occupational health need for the information; and,

1910.1200(i)(9)(iii)

The health professional, employee or designated representative has demonstrated adequate means to protect the confidentiality:

1910.1200(i)(10)

1910.1200(i)(10)(i)

If OSHA determines that the specific chemical identity requested under paragraph (i)(3) of this section is not a "bona fide" trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means to protect the confidentiality of the information, the chemical manufacturer, importer, or employer will be subject to citation by OSHA.

..1910.1200(i)(10)(ii)

1910.1200(i)(10)(ii)

If a chemical manufacturer, importer, or employer demonstrates to OSHA that the execution of a confidentiality agreement would not provide sufficient protection against the potential harm from the unauthorized disclosure of a trade secret specific chemical identity, the Assistant Secretary may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health services are provided without an undue risk of harm to the chemical manufacturer, importer, or employer.

1910.1200(i)(11)

If a citation for a failure to release specific chemical identity information is contested by the chemical manufacturer, importer, or employer, the matter will be adjudicated before the Occupational Safety and Health Review Commission in accordance with the Act's enforcement scheme and the applicable Commission rules of procedure. In accordance with

Received Dec-19-2007 07:27pm From-8642338280 To-Larry C. Brandt P.A. Page 027

the Commission rules, when a chemical manufacturer, importer, or employer continues to withhold the information during the contest, the Administrative Law Judge may review the citation and supporting documentation "in camera" or issue appropriate orders to protect the confidentiality of such matters.

1910.1200(i)(12)

Notwithstanding the existence of a trade secret claim, a chemical manufacturer, importer, or employer shall, upon request, disclose to the Assistant Secretary any information which this section requires the chemical manufacturer, importer, or employer to make available. Where there is a trade secret claim, such claim shall be made no later than at the time the information is provided to the Assistant Secretary so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

1910.1200(i)(13)

Nothing in this paragraph shall be construed as requiring the disclosure under any circumstances of process or percentage of mixture information which is a trade secret.

1910.1200(j)

1910.1200(j)

"Effective dates." Chemical manufacturers, importers, distributors, and employers shall be in compliance with all provisions of this section by March 11, 1994.

Note: The effective date of the clarification that the exemption of wood and wood products from the Hazard Communication standard in paragraph (b)(6)(iv) only applies to wood and wood products including lumber which will not be processed, where the manufacturer or importer can establish that the only hazard they pose to employees is the potential for flammability or combustibility, and that the exemption does not apply to wood or wood products which have been treated with a hazardous chemical covered by this standard, and wood which may be subsequently sawed or cut generating dust has been stayed from March 11, 1994 to August 11, 1994.

[59 FR 17479, April 13, 1994; 59 FR 65947, Dec. 22, 1994; 61 FR 5507, Feb. 13, 1996]

Next Standard (1910.1200 App A)

Regulations (Standards - 29 CFR) - Table of Contents

Back to Top www.osha.gov

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Occupational Safety & Health Administration
200 Constitution Avenue, NW
Washington, DC 20210

Exhibit J

HM-181 and HM-126F

A COMPLIANCE GUIDE

for

DOT's New Hazmat

Transportation Regulations

Brian Karnofsky

John E. Maroney

Michael F. Randall

ENVIRONMENTAL RESOURCE CENTER

the appropriate placard, orange panel or white square-on-point display configuration providing the correct identification numbers are entered legibly using an indelible marking material. When entered by hand, the identification numbers must be located in the white display area specified in §172.332. This section does not preclude required compliance with the placarding requirements of Subpart F of the subchapter.

Subpart E — Labeling

§172.400 General labeling requirements.

(a) Except as specified in §172.400a, each person who offers for transportation or transports a hazardous material in any of the following packages or containment devices, shall label the package or containment device with labels specified for the material in the §172.101 Table and in this subpart:

(1) A non-bulk package;

(2) A bulk packaging, other than a cargo tank, portable tank, or tank car, with a volumetric capacity of less than 18 m³ (640 cubic feet), unless placarded in accordance with subpart F of this part;

(3) A portable tank of less than 3785 L (1000 gallons) capacity, unless placarded in accordance with subpart F of this part;

(4) A DOT Specification 106 or 110 multi-unit tank car tank, unless placarded in accordance with subpart F of this part; and

(5) An overpack, freight container or unit load device, of less than 18 m³ (640 cubic feet), which contains a package for which labels are required, unless placarded or marked in accordance with §172.512 of this part.

(b) Labeling is required for a hazardous material which meets one or more hazard class definitions, in accordance with Column 6 of the §172.101 Table and the following table:

Hazard class or division	Label name	Label design or section reference (§)
1.1	EXPLOSIVE 1.1	172.411
1.2	EXPLOSIVE 1.2	172.411
1.3	EXPLOSIVE 1.3	172.411
1.4	EXPLOSIVE 1.4	172.411
1.5	EXPLOSIVE 1.5	172.411
1.6	EXPLOSIVE 1.6	172.411
2.1	FLAMMABLE GAS	172.417
2.2	NON-FLAMMABLE GAS	172.415
2.3	POISON GAS	172.416
3 (flammable liquid)	FLAMMABLE LIQUID	172.419
Combustible liquid	(none)	
4.1	FLAMMABLE SOLID	172.420
4.2	SPONTANEOUSLY COMBUSTIBLE	172.422
4.3	DANGEROUS WHEN WET	172.423
5.1	OXIDIZER	172.426
5.2	ORGANIC PEROXIDE	172.427
6.1 (Packing Groups I and II)	POISON	172.430
6.1 (Packing Group III)	KEEP AWAY FROM FOOD	172.431
6.2	INFECTIOUS SUBSTANCE[1]	172.432
7 (see §172.403)	RADIOACTIVE WHITE-I	172.436
7	RADIOACTIVE YELLOW-II	172.438
7	RADIOACTIVE YELLOW-III	172.440
7 (empty packages, see §173.427)	EMPTY	172.450
8	CORROSIVE	172.442
9	CLASS 9	172.446

[1]The ETIOLOGIC AGENT label specified in regulations of the Department of Health and Human Services at 42 CFR 72.3 may apply to packages of infectious substances.

§172.400a Exceptions from labeling.

(a) Notwithstanding the provisions of §172.400, a label is not required on--

(1) A cylinder containing a Division 2.1 or Division 2.2 gas that is

(i) Not poisonous;

(ii) Carried by a private or contract motor carrier;

(iii) Not overpacked; and

(iv) Durably and legibly marked in accordance with CGA Pamphlet C-7, appendix A.

(2) A package or unit of military explosives (including ammunition) shipped by or on behalf of the DOD when in--

(i) Freight containerload, carload or truckload shipments, if loaded and unloaded by the shipper or DOD; or

(ii) Unitized or palletized break-bulk shipments by cargo vessel under charter to DOD if at least one required label is displayed on each unitized or palletized load.

(3) A package containing a hazardous material other than ammunition that is--

(i) Loaded and unloaded under the supervision of DOD personnel, and

(ii) Escorted by DOD personnel in a separate vehicle.

(4) A compressed gas cylinder permanently mounted in or on a transport vehicle.

(5) A freight container, aircraft unit load device or portable tank, which--

(i) Is placarded in accordance with Subpart F of this part, or

(ii) Conforms to paragraph (a)(3) or (b)(3) of §172.512.

(6) An overpack or unit load device in or on which labels representative of each hazardous material in the overpack or unit load device is visible.

(7) A package of low specific activity radioactive material, when transported under §173.425(b) of this subchapter.

(b) Certain exceptions to labeling requirements are provided for small quantities and limited quantities in applicable sections in part 173 of this subchapter.

§172.401 Prohibited labeling.

(a) Except as provided in paragraph (c) of this section, no person may offer for transportation or no carrier may transport any package bearing a label specified in this subpart unless —

(1) The package contains a material that is a hazardous material, and

(2) The label represents a hazard of the hazardous material in the package.

(b) No person may offer for transportation and no carrier may transport a package bearing any marking or label which by its color, design, or shape could be confused with or conflict with a label prescribed by this part.

(c) The restrictions in paragraphs (a) and (b) of this section, do not apply to packages labeled in conformance with —

(1) Any United Nations recommendation, including the class number (see §172.407), in the document entitled *"Transport of Dangerous Goods."*;

(2) The International Maritime Organization (IMO) requirements, including the class number (see §172.407), in the document entitled "International Maritime Dangerous Goods Code";

(3) The ICAO Technical Instructions, or

(4) The TDG Regulations.

§172.402 Additional Labeling requirements.

(a) *Subsidiary hazard labels.* Each package containing a hazardous material—

(1) Shall be labeled with primary and subsidiary hazard labels as specified in Column 6 of the §172.101 Table; and

(2) For other than Class 2 or Class 1 materials (for subsidiary labeling requirements for Class 1 materials see paragraph (e) of this section), if not already labeled under paragraph (a)(1) of this section, shall be labeled with subsidiary hazard labels in accordance with the following table:

SUBSIDIARY HAZARD LABELS

Subsidiary hazard level (packing group)	Subsidiary Hazard (Class or Division)						
	3	4.1	4.2	4.3	5.1	6.1	8
I	X	***	***	X	X	X	X
II	X	X	X	X	X	X	X
III	*	N	X	X	N	N	**

X—Required for all modes.
*—Required for transport by vessel only.
**—Required for transport by aircraft and vessel only.
***—Impossible as subsidiary hazard.
N—None required.

(b) *Display of hazard class on labels.* The appropriate hazard class or, for Division 5.1 or 5.2 the division number, shall be displayed in the lower corner of a primary hazard label and may not be displayed on a subsidiary label.

(c) *Cargo Aircraft Only label.* Each person who offers for transportation or transports by aircraft a package containing a hazardous material which is authorized on cargo aircraft only shall label the package with a CARGO AIRCRAFT ONLY label specified in §172.448 of this subpart.

(d) *Radioactive Materials.* Each package containing a radioactive material that also meets the definition of one or more additional hazards, except Class 9, shall be labeled as a radioactive material as required by §172.403 of this subpart and for each additional hazard.

(e) *Class 1 (explosive) Materials.* In addition to the label specified in Column 6 of the §172.101 Table, each package of Class 1 material that also meets the definition for:

(1) Division 6.1, Packing Groups I or II, shall be labeled POISON; or

(2) Class 7, shall be labeled in accordance with §172.403 of this subpart.

§172.403 Radioactive material.

(a) Unless excepted from labeling by §§173.421 or 173.425 of this subchapter, each package of radioactive material must be labeled as provided in this section.

(b) The proper label to affix to a package of radioactive material is based on the radiation level at the surface of the package, the transport index (§173.403 of this subchapter) and, if appropriate, the fissile characteristics of the package. The proper category of label shall be determined in accordance with paragraph (c) of this section. The label to be applied shall be the highest category required for any of the three determining conditions for the package. Radioactive White-I is the lowest category and Radioactive Yellow-III is the highest. For example: a package with a transport index of 0.8 and a maximum surface radiation level of 60 millirem per hour which contains no fissile material must bear a Radioactive Yellow-III label.

(c) Category of Label to be Applied to Radioactive Materials Packages:

Transport index (T.I)	Radiation level at package surface (RL)	Fissile criteria	Label category.[1]
N/A	RL < 0.5 millirem per hour (mrem/h).	Fissile class I only, no fissile class II or III.	White-I.
T.I. ≤ 1.0	0.5 mrem/h < RL ≤ 50 mrem/h	Fissile class I, fissile class II, with T.I. ≤ 1.0, no fissile class III.	Yellow-II.
1.0 < T.I.	50 mrem/h < RL	Fissile class II with 1.0 < T.I., fissile class III.	Yellow-III.

[1]Any package containing a "highway route controlled quantity" (§173.403 of this subchapter) must be labeled as Radioactive Yellow-III.

(d) EMPTY label. See §173.427(d) of this subchapter for EMPTY labeling requirements.

(e) [Reserved].

(f) Each package required by this section to be labeled with a RADIOACTIVE label must have two of these labels, affixed to opposite sides of the package. (See §172.406(e)(3) for freight container label requirements).

(g) The following applicable items of information must be entered in the blank spaces on the RADIOACTIVE label by legible printing (manual or mechanical), using durable weather resistant means of marking:

(1) "Contents." The name of the radionuclides as taken from the listing of radionuclides in §173.435 (symbols which conform to established radiation protection terminology are authorized, i.e., Mo, Co, etc.). For mixtures of radionuclides, the most restrictive radionuclides on the basis of radiotoxicity must be listed as space on the label allows.

(2) "Activity." Units shall be expressed in appropriate curie units, ie., curies (Ci), millicuries (mCi) or microcurries (μCi) (abbreviations are authorized). For a fissile material, the weight in grams or kilograms of the fissile radiosotope also may be inserted.

(3) "Transportation index." (See §173.403.)

§172.404 Labels for mixed and consolidated packaging.

(a) *Mixed packaging.* When hazardous materials having different hazard classes are packed within the same packaging, or within the same outside container or overpack as described in §173.25 and authorized by §173.21 of this subchapter, the packaging, outside container or overpack must be labeled as required for each class of hazardous material contained therein.

(b) *Consolidated packaging.* When two or more packages containing compatible hazardous material (see §173.21) are placed within the same outside container or overpack, the outside container or overpack must be labeled as required for each class of hazardous material contained therein.

§172.405 Authorized label modifications.

(a) For Classes 1, 2, 3, 4, 5, 6, and 8, text indicating a hazard (for example FLAMMABLE LIQUID) is not required on a primary or subsidiary label when--

(1) The label otherwise conforms to the provisions of this subpart, and

(2) The hazard class or, for Division 5.1 or 5.2 the division number, is displayed in the lower corner of the label, if the label corresponds to the primary hazard class of the hazardous material.

(b) For a package containing Oxygen, compressed, or Oxygen, refrigerated liquid, the OXIDIZER label specified in §172.426 of this subpart, modified to display the word "OXYGEN" instead of "OXIDIZER", and the class number "2" instead of "5.1", may be used in place of the NON-FLAMMABLE GAS and OXIDIZER labels. Notwithstanding the provisions of paragraph (a) of this section, the word "OXYGEN" must appear on the label.

§172.406 Placement of labels.

(a) *General.* (1) Except as provided in paragraphs (b) and (e) of this section, each label required by this subpart must--

(i) Be printed on or affixed to a surface (other than the bottom) of the package or containment device containing the hazardous material; and

(ii) Be located on the same surface of the package and near the proper shipping name marking, if the package dimensions are adequate.

(2) Except as provided in paragraph (e) of this section, duplicate labeling is not required on a package or containment device (such as to satisfy redundant labeling requirements).

(b) *Exceptions.* A label may be printed on or placed on a securely affixed tag, or may be affixed by other suitable means to:

(1) A package that contains no radioactive material and which has dimensions less than those of the required label;

(2) A cylinder; and

(3) A package which has such an irregular surface that a label cannot be satisfactorily affixed.

(c) *Placement of multiple labels.* When primary and subsidiary hazard labels are required, they must be displayed next to each other. Placement

conforms to this requirement if labels are within 150 mm (6 inches) of one another.

(d) *Contrast with background.* Each label must be printed on or affixed to a background of contrasting color, or must have a dotted or solid line outer border.

(e) *Duplicate labeling.* Generally, only one of each different required label must be displayed on a package. However, duplicate labels must be displayed on at least two sides or two ends (other than the bottom) of—

(1) Each non-bulk package or overpack having a volume of 1.8 m^3 (64 cubic feet) or more;

(2) Each non-bulk package containing a radioactive material;

(3) Each DOT 106 or 110 multi-unit tank car tank. Labels must be displayed on each end;

(4) Each portable tank of less than 3,785 L (1000 gallons) capacity; and

(5) Each freight container or aircraft unit load device having a volume of 1.8 m^3 (64 cubic feet) or more, but less than 18 m^3 (640 cubic feet). One of each required label must be displayed on or near the closure.

(f) *Visibility.* A label must be clearly visible and may not be obscured by markings or attachments.

§172.407 Label specifications.

(a) *Durability.* Each label, whether printed on or affixed to a package, must be durable and weather resistant. A label on a package must be able to withstand, without deterioration or a substantial change in color, a 30-day exposure to conditions incident to transportation that reasonably could be expected to be encountered by the labeled package.

(b) *Design.* (1) Except for size and color, the printing, inner border, and symbol on each label must be as shown in §§172.411 through 172.448 of this subpart, as appropriate.

(2) The dotted line border shown on each label is not part of the label specification, except when used as an alternative for the solid line outer border to meet the requirements of §172.406(d) of this subpart.

(c) *Size.* (1) Each diamond (square-on-point) label prescribed in this subpart must be at least 100 mm (3.9 inches) on each side with each side having a solid line inner border 5.0 to 6.3 mm (0.2 to 0.25 inches) from the edge.

(2) The CARGO AIRCRAFT ONLY label must be a rectangle measuring at least 110 mm (4.3 inches) in height by 120 mm (4.7 inches) in width. The word "DANGER" must be shown in letters measuring at least 12.7 mm (0.5 inches) in height.

(3) Except as otherwise provided in this subpart, the hazard class number, or division number, as appropriate, must be at least 6.3 mm (0.25 inches) and not greater than 12.7 mm (0.5 inches).

(4) When text indicating a hazard is displayed on a label, the label name must be shown in letters measuring at least 7.6 mm (0.3 inches) in height except that--

(i) For a SPONTANEOUSLY COMBUSTIBLE or DANGEROUS WHEN WET label, respectively, the words "Spontaneously" and "When Wet" must be shown in letters measuring at least 5.1 mm (0.2 inches) in height.

(ii) For a KEEP AWAY FROM FOOD label, the word "HARMFUL" must be shown in letters measuring at least 7.6 mm (0.3 inches) in height.

(5) The symbol on each label must be proportionate in size to that shown in the appropriate section of this subpart.

(d) *Color.* (1) The background color on each label must be as prescribed in §§172.411 through 172.448 of this subpart, as appropriate.

(2) The symbol, text, numbers, and border must be shown in black on a label except that--

(i) White may be used on a label with a one color background of green, red or blue; and

(ii) White must be used for the text and class number for the CORROSIVE label.

(3) Black and any color on a label must be able to withstand, without substantial change, a 72-hour fadeometer test (for a description of equipment designed for this purpose, see ASTM G 23-69 (1975) or ASTM G 26-70).

(4)(i) A color on a label, upon visual examination, must fall within the color tolerances—

(A) Displayed on color charts conforming to the technical specifications for charts set forth in Table 1 or 2 in appendix A to this part; or

(B) For labels printed on packaging surfaces, specified in Table 3 in appendix A to this part.

(ii) Color charts conforming to appendix A to this part are on display in Room 8421, Nassif Building, 400 Seventh Street, SW., Washington DC 20590-0001.

(5) The specified label color must extend to the edge of the label in the area designated on each label except the CORROSIVE, RADIOACTIVE YELLOW-II AND RADIOACTIVE YELLOW-III labels on which the color must extend only to the inner border.

(e) *Form identification.* A label may contain form identification information, including the name of its maker, provided that information is printed outside the solid line inner border in no larger than 10-point type.

(f) *Exceptions.* A label conforming to specifications in the UN Recommendations may be used in place of a corresponding label which conforms to the requirements of this subpart.

Exhibit K

OXIDIZER
5.1
Reorder: DOT-9884 · www.ComplianceSigns.com

Exhibit L

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Pictorial Markings and Labels for Safe Transport and Handling of Packaged Goods

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This paper presents the various sources of pictorial markings and warning labels that can be used on packaged goods. Lack of appropriate warnings or markings can result in severe hazards that can affect the safety of individuals and the work environment. The paper shows examples of good and poor applications of warnings and also discusses the various standards that assist in developing appropriate package markings for your goods. New markings recently being developed will also be discussed. Copyright © 2005 John Wiley & Sons, Ltd.

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INTRODUCTION

This paper describes the various organizations and federal agencies that play an important role in developing markings and symbols that can be placed on packages to facilitate warning to the handler or customer. Packages often undergo various transitions between the buyer and seller through companies that facilitate transportation and handling. During these transfers, packages are exposed to various stresses in the form of physical and climatic hazards. Packages often get exposed to vibrations, compression forces, shocks, temperature and humidity changes, among other factors, that can drastically affect their contents and structural strength. As a result of these hazards, the packages may pose a safety concern. It is therefore important that packages be subjected to pre-shipment testing to ensure that the various damaging elements of the distribution environment can be met without producing damage or compromising safety.

It is important to note that no individual set of warnings by itself can preclude the damaging effects of the shipping environment. Designing packages with proper pre-shipment testing methods, along with appropriate labels and warnings, can reduce the risk of damage and injury. Use of precautionary labelling can further reduce these risks by warning package handlers and end-users as to the safe and appropriate conditions for these packages. Singh[1] presented various case studies and examples of package performance test methods that, together with appropriate use of pictorial markings, can reduce the risk of damage and personal injury.

The role of testing in the development and evaluation of packaging systems has become an important function in today's corporate manufacturing and development practices. The use of lab testing to evaluate the functionality of a product and package is often preferred to real-life testing because it can be better controlled and evaluated. Real-life testing, often more representative, is difficult to repeat, since the intensity varies with each shipment and also becomes expensive and time consuming. Various standards organizations use technical committees to develop methodologies

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that are repeatable and provide a representative simulation of the hazards that will affect a package and the product with a high degree of precision. Some of these sources include the International Standards Organization (ISO), the American Society of Testing and Materials (ASTM) and the International Safe Transit Association (ISTA), and are identified in the reference section of this paper.

There are a large number of test methods that are used to evaluate the various aspects of packaging. A company may test the gas and moisture barrier properties of a plastic film material. This information may be used to monitor material properties of the film and control the quality of procured raw material. The same test data could also be used to compare film materials obtained from different suppliers and different production lots. Another use of this information could also be to estimate the shelf-life of a product in a bag or pouch made from this film. In a similar example, a company may evaluate the torque retention properties of a closure (screw-on cap) and bottle used for its product. This information could be used to determine whether ease of opening by the consumer, and also determine whether the closure maintains integrity of the product after shipping and storage. A company may perform a combination of vibration, drop and compression tests on a shipping container to ensure that the product can be handled and shipped without getting damaged.

The above examples provide a small insight into the various needs that often dictate the type of test methods that will be used to evaluate a given type of package. For example, aerosol cans may be tested to determine the safe and proper dispensing of the contents by carefully examining the spray pattern and discharge by evaluating the pump and nozzle mechanism. In addition, various tests may be conducted to evaluate the quality and integrity of printing and graphics on the side panel of the can. Chemical compatibility tests may be required between the contents and the inside surface material of the can. In addition, shipping tests would be done to ensure that the entire system can be safely delivered to the consumer without damage.

If a package system is damaged during shipment, results in a potential injury to the user, or harms the environment, it is often a subject of contention. This could involve two or more parties that were involved in activities such as development, manufacturing, packaging, shipping and handling, retail distribution and the ultimate consumer. The authors have evaluated over 100 such cases involving packaging problems, which have resulted in litigation. It is important to combine an effective pre-shipment testing with use of appropriate pictorial markings that are easy to use and understand. These, together, can facilitate package transportation and handling.

PACKAGE FUNCTIONS

The term 'packaging', according to Abbott,[2] has been defined by the Packaging Institute USA and used in both teaching and practice as 'the enclosure of products in a container to perform one or several of the following major functions:

- Containment.
- Protection.
- Communications.
- Utility.'

It is important to briefly review each of the four functions, since they play an important role in the need to test and evaluate various package systems. The first function attributes to the *containment* of the product for handling, transportation and use and is often considered to be the 'original' package function required to move products in various forms and shapes. The different forms, solids, liquids and gases, can make this function a critical factor in the selection process for the type of material and package system.

The second function, *protection*, relates to protecting the contents from deterioration due to the physical and climatic changes during transportation and storage. This could mean protecting the product from shock (drops) and vibration (transportation) by using cushioning. It could also mean using a high-barrier film to avoid oxygen and moisture entering a package and causing spoilage to a food product. The protection function also relates to protecting the outside environment from being contaminated with the contents, especially if they are hazardous and dangerous.

The third function, *communications*, is often used to identify, among other factors, the contents, quality quantity and manufacturer. There are also various federal and state requirements that may be required as part of this function, depending on the

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product to be packaged and the choice of packaging materials used. Additional features, such as precautionary labelling to provide information for safe use, handling and storage of the container, is also an attribute of this function. Pictorial labels are used to mark and identify a package and are often used for both domestic and international labels to identify the safe handling, storage and human interaction with the container. An important label introduced in the US last year that serves this function is the nutritional information label on food packages.

Lastly, *utility* relates to the ease of use or performance of the package system. This includes the ease of opening and closing (if required), re-use, application, dispensing and, especially, a provision for instructions and directions. Most speciality packaging today often has several features that address the utility function of a package and are often the driving force for the sales of the product. An example would be a tamper-evident, child-resistant closure used for a pharmaceutical product that provides an easy-to-open feature for elderly.

One or more of these primary functions are essential in characterizing a container or system to be termed a *'package'*. The next section reviews the various packaging test methods that are commonly used to evaluate package systems for transportation, handling and storage.

DISTRIBUTION PACKAGING TEST METHODS

In addition to both the federal and state requirements there are several trade associations and professional organizations that, through their membership, develop packaging test methods that manufacturers could use for a given application. Standards and test methods used for pre-shipment testing have been discussed in an earlier paper by Singh.[1] The various requirements of international package test standards have also been discussed in detail by Fiedler.[3] This paper focuses on the markings and labelling requirements that can also facilitate safety and reduce the risk of damage or injury. The associations and organizations[4–6] most involved in developing the distribution packaging standards are:

- International Standards Organization.
- American Society of Testing and Materials International.
- International Safe Transit Association.

PICTORIAL MARKINGS

In addition to evaluating the protection function of the package using pre-shipment testing, an equally important function is 'communication'. The various forms of transport packages, such as large crates, export packaging and bulk containers, in addition to the basic labelling, may require additional forms of communication between the package and the user to facilitate and allow safe handling. The ISO Standard 780, *Packaging – Pictorial Marking for Handling of Goods*, provides a list of images that provide this function. The scope of this standard specifies a set of symbols that can be used to mark transport packages to convey handling instructions. These markings assist in the handling of the package in a country or region where citizens speak a language different from that used on the label, or are illiterate. The ISO 7000, *Registration of Markings and Symbols*, provides a specification on the placement of the symbol. The ASTM D 5445 standard practice for *Pictorial markings for Handling of Goods*, introduced in 1993, provides similar forms of markings that can be used for handling of packaged products.

PRECAUTIONARY LABELLING

In addition to the use of pictorial warnings, there are several laws that require *warnings* to be displayed on the package. Examples include the use of 'Danger – POISON', which may be required by the Federal Hazardous Substances Act on packages for toxic materials. The US Department of Transportation (DOT) also requires interstate shipments of hazardous materials to carry placards and labels on packages indicating the hazardous nature of the product. The DOT publishes a set of guidelines that shippers can use to comply with these requirements. Similarly, the chemical industry, through its association, has developed certain

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basic labelling principles to be used on packages containing hazardous chemicals. It provides distinction between the use of 'Danger' for the most severe hazards, 'Warning' for the intermediate hazards and 'Caution' for the least hazardous materials. ANSI Z 129.1 is a standard adopted by the American National Standards Institute for precautionary labelling of hazardous industrial chemicals.

Markings and labels are both used for domestic as well as export shipping cartons and containers for several purposes, including:

- To meet shipping regulations.
- To assure proper handling.
- To conceal the identity of the contents.
- To help shippers and receivers identify shipments.

A graphical symbol, according to ISO 7000, is a visually perceptible figure used to transmit information independently of language. It may be produced by drawing, printing or other means. The interest and the use of graphical symbols have increased all around the world because standardized symbols have the possibility of being understood by everybody, whatever the native language of the reader. The first thing to understand is that symbols are *the* essential ingredient of international package safety labels. According to Peckham,[7] the terms *pictogram, pictorial* and *symbol*, with reference to safety labels, each describe the same thing: an illustration that defines a hazard or an action to be taken to avoid a hazard. He further states that well-designed symbols communicate information quickly and do so across language barriers. Text-message-only safety labels are practically meaningless to protect users who are illiterate or do not speak the language of the label text. This is why the inclusion of symbols on labels is often considered to be the state of the art for communicating package-handling information. The use of symbols, with or without text, is often preferred to text-only warnings because there are huge practical problems involved with conveying safety information in multiple languages. The ability of symbols to communicate all or part of the safety message across language barriers is an important benefit in Europe, where many languages are spoken and products often cross borders.

Following are a few examples of pictorial markings developed by ASTM D 5445:

- *Symbol 1: 'Fragile Handle with Care'.*
  Function: To indicate:
  (a) That the contents of the package are fragile.
  (b) That it has to be handled with care.
  Remarks: Place on at least two adjacent sides in upper corner.



- *Symbol 5: 'Keep Dry'*
  Function: To indicate that the package shall be kept dry.
  Remarks: Place on at least two adjacent sides in upper corner.



- *Symbol 6: 'Centre of Gravity'*
  Function: To indicate the centre of gravity of the package.
  Remarks: Place on all six sides of package, relating to the real position of centre of gravity when different from the geometric centre.



- *Symbol 8: 'Package May Tip Over Easily'*
  Function: To indicate that the package is top-heavy and might tip over easily.
  Remarks: Place on at least two opposite sides of package. Required in NMFC classification Item 680. Recommended any time a package height is more than 48 inches and the centre of gravity is higher than 24 inches, or when the package falls over when tipped 22° or less in any direction.



- *Symbol 17: 'Do Not Use This Lift Truck for Handling'*
  Function: To indicate that the lift truck type depicted shall not be used to handle the package.
  Remarks: Place on each side of package where the lift truck is prohibited from handling.
  Note: Depending on package size and space availability in aircraft containers or semi-trailers, it is not always possible to honour the request.



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In the international arena, there are some regional variations among symbols. In Japan, for example, the set of ISO 780 symbols has subtle differences, such as a broken glass for 'Fragile' instead of the intact wine glass used in Europe. There are also variations around the world for the types of umbrella and number of raindrops used in the symbol 'Keep Dry', but the image is nevertheless recognized universally.

Some variations of ASTM D5445 Symbol 1:



Some variations of ASTM D5445 Symbol 5:



The preferred colour for symbols, according to ASTM D 5445, is black. If the colour of the package is such that the symbol would not show clearly, it recommends providing a panel of a suitable contrasting colour, preferably white, as a background. The use of red and orange colours is to be avoided, unless some existing regional or national regulations expressly prescribe such use. This is to avoid confusion with the labelling of dangerous goods, which often uses orange and red to classify such materials.

Packages are often marked with handling instructions in the language of the country of origin. While this may safeguard the consignment to some extent, it is of little value for goods consigned to, or through, countries using different languages, and of no value at all if people unloading the packages are illiterate. Addressing the need to provide several languages on the labelling poses problems of space, particularly on small packages. Companies can either: attempt to satisfy every market with one label; produce individual labels for each market – and this would depend on volume and market potential for specific products; or divide up the markets to cover a group of languages, such as southern Europe. Pictorial symbols offer the most likely means of conveying the consigner's intention and their adoption will therefore, undoubtedly reduce loss and damage through incorrect handling.

Some packages, such as drums and containers, are re-usable with appropriate cleaning and/or sterilization, even if sold as single-use. Manufacturers face a dilemma in such cases – should they label such packages as 'Single-Use Only, Not for Re-Use', even when they know that it is common practice to re-use? An important challenge is to develop a symbol for single-use containers that contain extremely toxic chemicals that will leach into the packaging material and can later be released if the container is re-used in a developing economy for storing food or water. Such a container requires one uniform symbol carrying the following individual messages:

- Do Not Re-Use
- Single-Use Only
- Do Not Store Water
- Do Not Store Food

Hazardous materials can be handled and stored more safely if they have labels that list the precautions associated with the material. Hazardous material labels must not be removed from a chemical container until the container is completely empty of all material. Chemical manufacturers are required by the Hazard Communication Standard to provide containers of hazardous chemicals with precautionary information. Some common labelling terms include *'combustible'*, *'corrosive'*, *'flammable'*, *'irritating'* and *'toxic'*. There are several systems and standards for labelling chemicals to communicate their hazards, but there is not a uniformly accepted practice in use at this time.

ANSI Z129.1

Precautionary labelling (Figure 1) for hazardous materials has been developed by the Chemical Manufacturers Association (CMA) and the American Conference on Chemical Labelling, and adopted as American National Standards (Z129.1) by the American National Standards Institute

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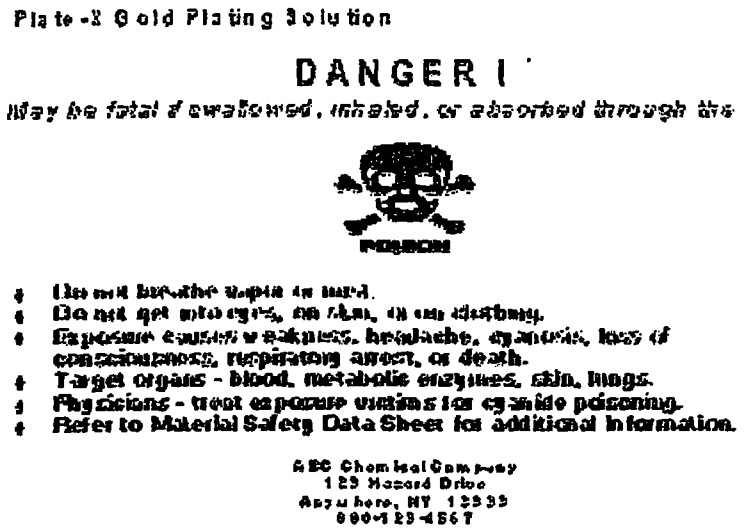


Figure 1. Precautionary label.

(ANSI).[8] This precautionary labelling contains: the name of the chemical; a signal word, such as 'WARNING' or 'DANGER'; the key hazard, such as 'flammable' or 'vapour harmful'; and statements of precautions to avoid the hazard. The use of a single term will not always provide adequate information because many chemicals have multiple hazards. Another problem is that the term 'corrosive' includes materials that may be incompatible with one another, e.g. strong mineral acids (e.g. hydrochloric acid) and strong alkaline materials (e.g. sodium hydroxide) are both corrosive, but if they mix during storage or use, they will react vigorously.

The American National Standard Institute (ANSI) has published a voluntary labelling standard (ANSI Z129.1-1988) followed by most chemical manufacturers. This standard[9] calls for the additional following items:

- Signal words – DANGER, WARNING, CAUTION.
- Highly toxic materials shall be marked POISON.
- Precautionary measures useful in preventing physical harm to the individual.
- Instructions in case of exposure.
- Notes to physician for emergency treatment.
- Instructions in case of fire or chemical spill.
- Instructions for chemical handling and storage.

Other labelling requirements:

- Simple wording.
- English language required, other language optional.
- Manufacturer should not rely on colour coding as the primary means in communicating hazards.
- Graphics may be used for easy identification, but they may not take the place of written legends. Three commonly used groups of pictorials are:
  - Hazard types.
  - Routes of entry.
  - Personal protective equipment.
- Number and/or colour coding may be used to rank the severity of the hazard.
- Hazard rating may be utilized to indicate 'degree' of hazard.

The two systems used for hazard rating commonly used are:

- NFPA.
- HMIS.

NFPA 704

The National Fire Protection Association (NFPA) has developed a colour-coded system called NFPA

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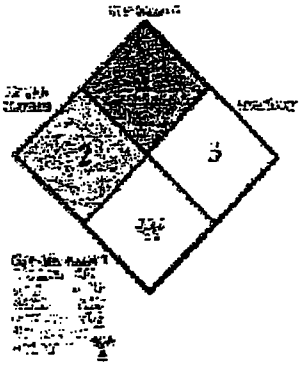


Figure 2. National Fire Protection Association symbol.



Figure 3. Hazardous Materials Information System label.

704. The system uses a colour-coded diamond with four quadrants, in which numbers are used in the upper three quadrants to signal the degree of emergency health hazard (blue), fire hazard (red), and reactivity hazard (yellow). The bottom quadrant is used to indicate water reactivity, radioactivity, biohazards, or other special hazards. The emergency hazards are signalled on a numerical scale of 0–4, with 0 = no unusual hazard, 1 = minor hazard, 2 = moderate hazard, 3 = severe hazard, and 4 = extreme hazard.[8]

The NFPA diamond (Figure 2) is used primarily by emergency response personnel and for emergency planning and, as such, does not adequately signal occupational hazards or precautionary information. The NFPA system is good for alerting personnel to the degree of hazard of the chemical and helpful in drawing attention to storage needs and emergency equipment needed.

HMIS

The National Paint and Coatings Association (NPCA) Hazardous Materials Information System (HMIS) is one of the most popular systems for labelling hazardous chemicals. The system uses standard labels to communicate hazards through the use of colours, numbers, letters of the alphabet and symbols. The HMIS is a five-part rectangle that provides identification of the chemical, acute health hazard, flammability, reactivity, personal protective equipment designations, and chronic health hazard information (Figure 3). The chemical identity is conveyed by the chemical name and should be the same as the name on the Material Safety Data Sheet (MSDS). The acute hazards to health (blue), reactivity (yellow) and flammability (red) are communicated by colour and by numerical ratings similar to the NFPA system. An alphabetical designation is used to denote recommended personal protective equipment. Chronic health hazards may be any abbreviation, such as an asterisk, communicated by placing on the label denoting reference to the specific MSDS, or the actual chronic information may be written on the label if space allows.[8]

DOT

The Department of Transportation (DOT) hazard labelling system (Figure 4) uses a colour-coded diamond in which there is a symbol and a term describing the major hazard of the material. DOT hazard classes include explosive, gases (flammable, non-flammable, corrosive, and poison), flammable liquids, flammable solids, oxidizers, poisons, radioactive materials and corrosives. Most chemicals are rated by what the DOT considers to be the single major hazard, but many chemicals have subsidiary hazard categories as well. The DOT system is used for the transportation of hazardous materials.

In 2000–2003, results from a Federal Aviation Administration study funded at Michigan state University showed that the package performance requirements for liquid chemicals to be shipped by air were much more severe than for ground shipments.[10] Air shipments also resulted in more fail-

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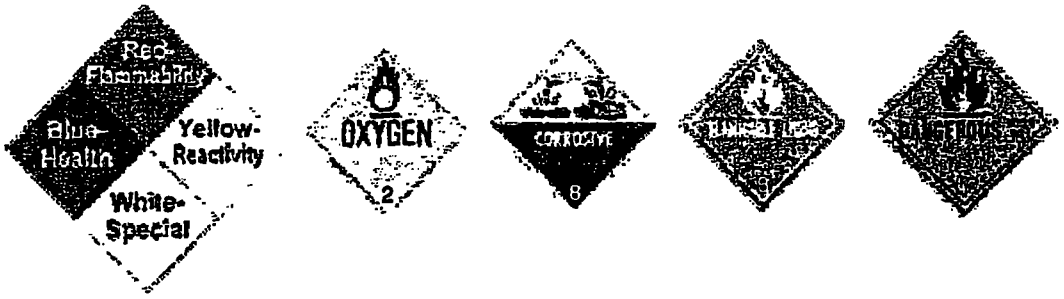


Figure 4. DOT hazard label.

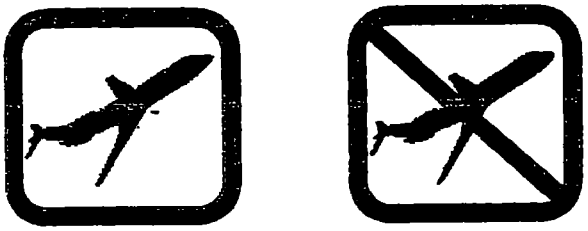


Figure 5. Air Eligible markings.

ures than ground shipments in the form of leaks. Air Eligibility Markings for air-shipped hazardous material packages were developed by the International Air Transport Association and the US DOT. These were then recommended to ASTM D5445 in a study conducted by the Consortium for Distribution Packaging at Michigan State University.[11] The study was aimed primarily at liquid hazardous materials and proposed the symbols in Figure 5 for visual verification of the eligibility of packages for air shipments. The markings are not intended as a replacement for any regulatory requirements, but as an addition, and were accepted by ASTM in 2003.

CONCLUSIONS

The use of package performance pre-shipment test methods and practices along with appropriate markings or warnings help reduce the degree of liability in the case of damage or potential accident resulting in an injury. The use of these practices assists the user in the following ways:

- Preventing damage during normal transportation, storage and handling of goods.
- Providing safety to the user (manufacturer, shipper, consumer).
- Protecting the environment.

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Exhibit M

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CA No. 2005-CP-37-605

COPY

KEITH BLACK and SHANNON BLACK,

Plaintiffs,

-vs-

UNIVAR USA, INC., TRINITY MANUFACTURING, INC., and MATRIX OUTSOURCING, LLC,

Defendants.

CURTIS MARTIN and TINA ANN MARTIN,

Plaintiffs,

-vs-

UNIVAR USA, INC., TRINITY MANUFACTURING, INC., and MATRIX OUTSOURCING, LLC,

Defendants.

SCOTT F. LAWING and TAMMY R. LAWING,

Plaintiffs,

-vs-

UNIVAR USA, INC., TRINITY MANUFACTURING, INC., and MATRIX OUTSOURCING, LLC,

Defendants.

Deposition of:

DANIEL LEVINE

August 18, 2008

A. Yes, this appears to be it.

MR. FOSTER: All right. I would like to mark that as 245.

(Whereupon, a website printout is marked Exhibit P-245 for identification.)

BY MR. FOSTER:

Q. Would you look at the first page of Exhibit 245, your printed out website? In the first paragraph, who is your target audience that you're soliciting or advertising or setting forth your services?

A. Basically, anyone who either produces or uses a chemical material in their process, in their industrial processes.

Q. In what way do you phrase it in your website paragraph?

A. Well, if you would like me to read it, I will.

Q. Yes.

A. I am reading from the first page of the website: "Product Safety Solutions is dedicated to serving clients in the chemical production, distribution, formulation and processing industries, and industrial users of chemical substances."

Q. Let me see it one more time. On the

third page of your website, do you advertise your ability to provide litigation support to your target audience?

A. Yes. It is included among the hazard communication --

Q. Okay. Would you read what you advertise you can provide under "Litigation support"?

A. Reading directly from the page: "Litigation support: Evaluation of your hazard communication documents relative to both regulatory and voluntary industry standards. (E.g., OSHA, Hazcom, ANSI MSDS standard, ANSI label standard). Expert testimony on the appropriateness of MSDSs and labels."

Q. Have you ever provided consultation services, as you just read there, to your corporate clients in the areas of ANSI, MSDS and ANSI label standards?

A. Yes, I have.

Q. Tell me, what is ANSI?

A. American National Standards Institute.

Q. What is it?

A. It is basically an organization that produces voluntary standards, consensus standards.

Q. What does the "consensus" mean in

connection with the standards that it produces?

A. I would have to provide you with an example.

Q. Okay.

A. An ANSI standard would look at all of the individuals affected by a standard; people that produce something, people that use something, as well as academia and Federal government and State government. They produce the standard. They would then send the standard out to anyone who has expressed an interest in being canvassed on the standard. Each sector, producers, users and academia and government would then vote on the standard, if they accept it or reject it. Basically, you have to have a super majority in all three sectors for a standard to be considered a consensus.

Q. Okay. Once a standard is passed, if you will, and becomes a consensus standard, where does it go from there? Does that represent an industry standard?

A. It is published. It is a non-mandatory standard, it's a voluntary standard. It is published and it is out there, and essentially is used by a lot of people.

Q. Would you consider it, in connection

with the ANSI, MSDS and label standards, to be good practice?

A. I would consider them to be good practice.

Q. Do you have an idea of an estimate of the number of or percentage of companies that would use and try to follow as a guide these ANSI MSDS and label standards?

A. I have no ability to quantify it. A lot do, but not everyone does.

Q. In your work as a consultant, when hired by a client, do you from time to time advise your clients to develop labels and assist them in developing labels and MSDS sheets in accordance with these two standards?

A. When I make a proposal to a client, I indicate that I will produce a document in accordance with those standards. That is my practice.

Q. They decide whether to adopt it or not?

A. They decide whether to accept my proposal. I will not produce a label that I consider inappropriate. I will not produce a data sheet that I consider inappropriate.

Q. Do a large majority of those clients accept your proposal?

A. Almost all.

MR. FOSTER: I need to take a break before the witness asks for one.

(Break in proceedings.)

BY MR. FOSTER:

Q. Do you know the number of the ANSI standard that applies to the label aspect we have been talking about?

A. Yes, I do.

Q. What is it?

A. It is ANSI Z129.1.

Q. What categories or groups of persons is that standard designed to protect?

A. The standard is designed to instruct people on how to develop labels. The scope of it, I would presume, would be anyone who handles or uses a material that is labeled accordingly.

Q. Would the plaintiffs in this case, Black, Lawing and Martin, fall into that category?

MR. HOWARD: Object to the form.

MS. ROBERTS: Object to the form.

BY MR. FOSTER:

Q. Do you know one way or another whether they fall into that category?

MS. ROBERTS: Same objection.

MR. HOWARD: Same objection.

A. I would say that if they were users of the material or handlers of the material, they would probably be warned by that label, yes.

Q. How do you define users or handlers?

A. A user is someone that uses the material in their job function. A handler is someone who would move the material from one place to another.

Q. Okay. How about those persons who might not be using or handling, but might be in the area in which the materials were located?

A. If they read the label, they would become a user of the label test.

Q. Okay. What is the ANSI number of the standard for the MSDS sheets?

A. Z400.1.

Q. Does that standard have the same group of categories of persons the object of which is to protect?

A. Essentially.

MS. ROBERTS: Object to the form.

BY MR. FOSTER:

Q. Did you find any deviations from the ANSI MSDS Section Z400.1 with respect to any MSDS sheet you reviewed in this case?

observed. I can't put my finger on the exact deposition where that occurred.

Q. Did you note in some instances the sales department of Univar went into the plant?

A. I don't recall.

Q. Do you know whether Univar has a product stewardship program?

A. No, I do not.

Q. Would that be significant in this case?

MS. ROBERTS: Object to the form.

A. I don't think it would have effected the outcome one way or the other.

Q. Tell me what you know about Univar.

A. Very little. I know very little about Univar. I know it is a chemical distributor.

Q. Is it a multinational company?

A. I do not know that.

Q. Do you know the size of it?

A. No, I do not.

Q. What do you know about Matrix?

A. I know Matrix is a smaller company than Univar. At least that was my impression.

Q. How about Trinity?

A. Trinity and Matrix are basically two parts of the same corporate entity. They're related

in some manner.

Q. If Trinity had a product stewardship program and wanted to hire you to assist them with the Matrix sodium bromate side of their business and following downstream users, how would you go about assisting them?

A. I would have to learn a lot more about the company and what they do. If they're a distributor, they probably would get information from the National Association of Chemical Distributors, which has their own stewardship program, which might be more appropriate for them if they are not a manufacturer, but just a distributor.

Q. What is your understanding of the closest role they played in this case? Would they be a distributor?

MS. ROBERTS: "They?"

MR. HOWARD: Object to the form.

A. Which company?

Q. "They" being Trinity/Matrix.

A. They -- my understanding was they were a supplier to Univar.

Q. Okay. What does the term "supplier" mean? Is it different than "distributor"?

A. "Distributor" -- in my thinking, a

distributor and supplier can be the same entity. Distributors usually have multiple customers for individual products and have a standard product selection. In the case of a supplier, I am thinking, "Okay, they were asked to supply a certain material to a certain customer." Again, the terms can be used interchangeably in many cases, in most cases.

Q. Here?

A. I would call them either a distributor or supplier; both would be appropriate.

Q. Okay. If you were going to assist them in a product stewardship program, maybe developing one if they didn't have one, would you try to get down to that end user again through Univar, down to the user?

MS. ROBERTS: Objection to the form.

MR. HOWARD: Objection to the form.

A. Product stewardship programs encourage salespeople to find out how their customers are using their product. They are not always successful. They know they're not always going to be successful, because it depends upon the level of information that the user is willing to share with the supplier. So, you know, I would ask them to make an attempt.

Q. To inquire as to how it is used?

A. Inquire.

Q. To offer some guidance?

A. Inquire, and then take that information back to the company and discuss it with people who are expert in the use of those materials, if they have such a capability.

Q. Okay. So then is product stewardship kind of a piece of the overall puzzle?

A. Product stewardship is a voluntary program that a lot of large companies and distributors have embraced. It is not a standard. It is not even the, quote, "standard practice." It is not.

Q. In your Exhibit 242 you listed as a material that you reviewed, the Engelhard refund request form to OSHA. What are you referring to there? We were provided an OSHA file, about 75 pages or so, Exhibit 66. What are you referring to there?

A. It is probably the title of the piece of paper that I received, whether I -- I don't know if I referenced it in my notes or not. I just listed all the documents that I had received from counsel.

Q. Okay. Then below that there is an OSHA citation package of materials. I believe that is what I was referring to as the larger stack of

regulations. Typically at least one side would have to be visible.

Q. That is your knowledge as we sit here today?

MS. ROBERTS: Object to form.

A. I would not attempt to tell you without going back to the regulation and reading the regulation.

Q. In your opinion, from all that you have seen in the role of Matrix as you understand it to be, did they have a duty or responsibility to assure that the labels on the sodium bromate complied with IMDG?

MR. HOWARD: Object to the form.

A. I believe that responsibility lies with the shipper, the Chinese company.

Q. In your opinion did Matrix have any duty or responsibility to assure that the labels on the sodium bromate complied with DOT requirements?

MR. HOWARD: Object to the form.

A. If they -- if Matrix shipped it, then it would have to be in compliance with DOT.

Q. In your knowledge of Matrix's role from all the documents that you have seen here, do you have an opinion as to whether or not they had a duty

or responsibility to do something to assure that the labels on the sodium bromate complied with DOT regs?

MR. HOWARD: Objection to form.

A. I would say if they shipped from the initial port to wherever they shipped, if they were listed as the shipper, it was their responsibility.

Q. If it was sent to them as consignee from the shipper, they took possession of it at the port, then shipped it overland to Trinity or directly to Engelhard, would they have any duty or responsibility to check those labels to make sure they comply?

MR. HOWARD: Object to the form.

A. They would need to ship it in compliance with DOT. It would have been their responsibility.

Q. So they would have responsibility. How about with OSHA, would they have a duty to make sure the labels complied with OSHA?

MR. HOWARD: Object to form.

A. Yes. If they shipped it, it would have to be in compliance with OSHA.

Q. We talked about Matrix. How about Trinity and their role in this thing and what you understand that role to be, would they have a duty to make sure that it was in compliance with IMDG, DOT and OSHA?

MR. HOWARD: Object to form.

A. Either Matrix shipped it or Trinity shipped it. They both couldn't have shipped it. Which one shipped it?

Q. Whichever one shipped, is what I asked.

A. Whichever one shipped it.

Q. So that's your answer. How about Univar? That was the one that Engelhard went to Univar and ordered this stuff. Did they have a duty or responsibility to ensure that the labels on the sodium bromate complied with DOT or OSHA?

A. If they --

MS. ROBERTS: Objection to form.

A. -- if they were shipped from their facility, they had to be responsible for complying with the regulations, yes.

Q. But if they had Trinity take it straight to Engelhard, would that change your opinion?

MS. ROBERTS: Object to the form.

A. If Univar's name did not appear on the packaging, they probably -- what's known as third-party direct shipment. They were supplying essentially not their product, someone else's product. They would have relied upon the importer to have it correctly labeled. They were not -- you

know, they were not assuming the role of responsible party.

Q. Okay. Were you supplied the entire OSHA file?

A. Excuse me?

Q. Were you supplied a copy of the OSHA investigation file?

A. I believe I was.

Q. Did you see -- I am looking at Engelhard document 00060, which is part of Exhibit No. 66 we marked previously. I am going to ask you if you have seen that before.

A. I may have.

Q. Okay. And it has Univar's name down on the bottom of that ticket, doesn't it?

A. Yes. What am I looking at?

Q. Do you know where it came from?

A. No.

Q. Assume that that was stuck to the outside of the shrink wrap on the pallets of sodium bromate supplied to Engelhard. Would that then impose upon Univar a duty to make sure that all the bags in that pallet were properly marked in accordance with DOT, IMDG or OSHA?

MS. ROBERTS: Object to the form.

A. If this document is telling me Univar took possession and then reshipped it, they would be responsible to comply with DOT and OSHA.

Q. If it didn't go through Univar's warehouse, but went straight from -- Trinity picked it up at the port and they shipped it straight to Engelhard because Engelhard was out of it and needed it, but Univar directed them to do that, would that alleviate Univar from making sure those labels were correct?

MS. ROBERTS: Object to the form.

A. If they did not ship it, they would not be responsible for DOT compliance. They would still be responsible for OSHA.

Q. Okay. Reclosable containers. Was this sodium bromate you saw in the pictures packaged in reclosable containers?

A. There is nothing in the pictures that would indicate these are reclosable containers.

Q. Is a reclosable container required for sodium bromate?

A. A reclosable container is not required for any product.

Q. Have you seen any evidence concerning the need to have a reclosable container for the

sodium bromate being shipped out of China in this case?

A. None whatsoever. My understanding is the entire package was consumed at one time.

Q. Do you have any information, have you ever been shown any information about the bags of sodium bromate being punctured by nails in the pallets and stuff being spilled during shipment?

MS. ROBERTS: Object to the form.

A. I recall questions being asked about it, but I don't recall anyone indicating they had seen it. I know the subject was brought up in depositions.

Q. If there were holes, nail holes, punctured in these bags and sodium bromate spilling out during transit, would you have to discard the bag of sodium bromate, or could you repair it --

MS. ROBERTS: Object to the form.

Q. -- according to the regulations?

A. I would have to read the regulations.

Q. If you can go to Exhibit -- I believe that it is the information exhibits that you said that you examined. When did you receive -- did you have all this information in your possession before you ever rendered an opinion in this case to defense

A. I don't know of many people that spend their time in cargo holds.

Q. How many people do you know that spend time at all in cargo holds?

A. Precious few.

Q. Do you know people that do that personally?

A. Personally, I do not.

Q. You're guessing, precious few?

MS. ROBERTS: Object to the form.

BY MR. BRANDT:

Q. Okay.

A. I do not know of any crew position called "Person who sits in the cargo hold."

Q. If overpacks are minimum of four feet by four feet by four feet, is it your opinion that those markings that you have seen in the pictures still comply with IMDG and DOT requirements?

A. Four by fours, 64 feet. 64 cubic feet. They may not.

Q. Why not?

A. It may require an additional warning on the side.

Q. Like what?

A. The class, the proper DOT diamond or

placard.

Q. You say they may, or do you know?

A. I would double-check, but they most likely would require it. If they constitute a bulk overpack, an area larger than 64 cubic feet.

Q. Who are those that the ANSI standards are designed to protect?

MS. ROBERTS: Object to the form.

MR. HOWARD: Object to the form.

A. Are you asking about the scope of the ANSI standard?

Q. Yes.

A. The ANSI standard is designed for industrial -- packaging of industrial hazardous material. I believe that is the title of the standard, or to paraphrase the title of the standard. It is designed primarily to protect people handling these materials and people using these materials.

Q. Is it designed to protect those who may just incidentally come in contact with the goods?

MS. ROBERTS: Object to the form.

A. It is not primarily design. It is a secondary benefit.

Q. Is ANSI a consensus standard?

A. Yes, it is.

Q. Would you say that more companies than not comply with ANSI?

A. In industrial chemicals?

Q. Yes.

A. I would say probably at least half.

Q. Excuse me?

A. At least half do.

Q. Would you say it's more than half or just half, 60/40?

A. I cannot base it -- my impression is probably half or more do.

Q. Page 5 on 244. Down there you've got under Hogan's deposition, this is just one confirmation of many in previous pages. That is confirmation that plaintiffs attended safety meetings?

A. Yeah. I believe there was a large dialogue about safety meetings.

Q. Did you put any weight on the fact that there was evidence that the plaintiffs attended safety meetings in rendering your opinion?

A. I placed the weight that they received training from their employer.

Q. But you don't know the substance of the training or whether or not it even covered what they

needed covered to handle sodium bromate, do you?

A. They were not responsible for handling sodium bromate. They were responsible for identifying hazards in their work area.

Q. 244, Page 6. Deposition of Karen Messana, it says, "Plaintiff's lawyer reference Z535, witness has not heard of it." There is a note that says, "It is not relevant to the labeling of chemical materials." Why is it not relevant?

A. Because Z535 is for mechanical devices and work areas. It specifically says in the preface of 535 that it is not to be used for chemical labeling.

Q. On Page 7 of that exhibit, again on the deposition of Karen Messana, it says, Page 57, you noted: "Has not retained experts on packaging," then you got "Not needed for defined commodity hazmats." Does that mean that experts aren't needed to counsel them from time to time on how to package and mark products, or does that mean it's just not required?

A. What it means is that the experts have already made determinations, and she is availing herself of the opinions of the UN Committee of Experts.

Q. In essence, the writings like IMDG, DOT,

A. I have used NFPA code 740 to designate numeric numbers where such numbers were required.

Q. How about the National Paint and Coating Association Hazardous Materials Information System?

A. That is the HMIS system. I'm aware of that.

Q. Have you ever made a recommendation to any client or customer of yours to comply with any suggestions or recommendations of that HMIS?

A. I have classified products according to the HMIS code, which again is a voluntary system used by some companies.

Q. Would you say that's one of the more popular systems for labeling hazardous chemicals?

A. It is, I would say, more popular. I would say it is used by many companies, especially in the paint and coatings industry. It is a numeric coding system that is valid inside that facility. It is not valid for communication for OSHA purposes and shipments.

Q. Are you familiar with the American Industrial Hygiene Association, AIHA?

A. I'm aware of them as well.

Q. Do you believe that appropriate markings or warnings have reduced the degree of liability in

case of accident resulting in an injury by preventing damage during normal transportation, storage and handling of goods?

MS. ROBERTS: Object to the form.

MR. HOWARD: Objection to form.

A. Could you please repeat the question?

Q. Do you believe appropriate markings, labels and warnings help reduce the degree of liability in case of accident involving hazardous materials resulting in injury by preventing -- helping prevent damage during normal transportation, storage and handling of goods?

MS. ROBERTS: Object to the form.

MR. HOWARD: Same objection.

A. To the extent that I understand the question, the appropriate markings and warnings are required and help prevent injuries. If they help prevent liability, that is good, but the primary purpose is to help prevent injuries and damage.

Q. Do you believe they assist in providing safety to the user, manufacturer, shipper, consumer, people that may come in contact with -- incidental contact with the goods?

MS. ROBERTS: Object to the form.

A. Different types of warnings provide

information to different types of individuals.

Q. What sets the industry standards with regard to labeling and markings? Is that regulations that are mandatory or industry practice?

A. I believe it is a combination of both.

Q. Do you know Paul Singh?

A. Excuse me? Can you repeat the name?

Q. Do you know Paul Singh, S-I-N-G-H?

A. I don't believe so.

Q. Nathan Doris?

A. No.

Q. Is the provision of MSDS's and labels by manufacturers, shippers, users of hazardous materials a standard business practice today?

MS. ROBERTS: Object to the form.

A. Can you repeat the question, please?

Q. Is the provision of MSDS's and labels on hazardous materials a standard business practice today?

A. I believe it is.

Q. On June 1, 2004 was it a standard business practice?

A. I believe it was.

Q. Do you know of any studies, either in the U.S. or Europe, that reveal the accuracy of

labels in MSDS pertaining to hazardous materials? And what I am talking about is some study that says, "We reviewed X number and found that only 25 percent fully complied, were correct" --

A. No.

Q. -- "or 60 percent or 70 percent the other way"?

A. No, I am not aware of a particular study.

Q. Not aware of any of those studies?

A. No.

Q. Do you agree or disagree with the statement: Since the United States is both a major importer and exporter of chemicals, the manner in which other countries choose to regulate has an impact on the protection of workers in the United States?

MS. ROBERTS: Object to the form.

MR. HOWARD: Objection to form.

A. I would probably disagree, because once the material is in the United States, it has to comply with the United States regulations, regardless of what the other regulations say.

Q. The answer is disagree?

A. I would say --

MS. ROBERTS: Objection.

A. -- I disagree with the way the statement is characterized.

Q. The GHS, United Nations Global Harmonization Standard; what is it?

A. It is a system of uniform classification and warning for hazardous chemical materials intended for all venues, but not every venue need adopt all of the criteria.

Q. Who is it designed to protect? Who is it trying to protect, anybody and everybody that might come in contact with the material?

MS. ROBERTS: Objection to form.

A. Users and handlers and people that may come in contact with the material.

Q. You keep using the word "user," and I want to clarify one thing. I may have misunderstood you. Mr. Foster was asking you about the user, and I understood you at one time to say anybody who reads the label on the package is a user.

A. Anyone who reads the label is using the information.

Q. Okay. So if I went up and saw a package there and read the label, you're not including me in that user?

A. You're not using the material, you're reading the information.

Q. Do you agree or disagree that the MSDS is not a stand-alone document; for it to be effective, it needs also labels and markings associated with it?

A. In what context? Relative to what? Hazard communication, relative to transportation?

Q. Relative to transportation.

A. There is no criteria for MSDS as a transportation, except if they're used as emergency documents as required by 126C. MSDS's are part of hazard communication, primarily.

Q. As part of hazardous (sic) communications, was MSDS intended to be a stand-alone document to warn?

A. I can only tell you what the regulation says, that there are three elements to hazard communication: MSDS's, labels and training. All three are required.

Q. Okay. Does OSHA require that the degree of detail on a label or marking needs to convey -- that needed to convey a hazard may be different within various workplaces than while in shipment?

MS. ROBERTS: Object to the form.

MR. HOWARD: Object to the form.

A. OSHA does not regulate the transport mode. OSHA requires that materials be labeled and readable.

Q. Would you agree that the degree of detail that might be needed on a label or marking is different within the workplace than while in shipping?

MS. ROBERTS: Object to the form.

MR. HOWARD: Same objection.

A. I would say the amount of detail is different because they serve different purposes.

Q. And that detail -- any given material could vary from workplace to workplace?

MS. ROBERTS: Object to the form.

MR. HOWARD: Object to the form.

A. Once within the workplace, the information should essentially be the same.

Q. Are you familiar OSHA compliance directives?

A. I'm aware of it, yes.

Q. Have you ever heard or seen a directive that makes that statement, that the degree of detail needed to convey a hazard may be different within a workplace than while in shipment?

A. I have not read those words exactly, no.

Q. Do you agree or disagree that the identification of safety labels is a critical component and part of a product?

A. Can you read the question again?

Q. The identification of safety labels or warning labels on hazardous materials, would you agree that those warnings, those labels, are a critical component part of the product itself, hazardous materials?

A. I would say that the warning labels are an important part of the packaging of a material for hazardous materials.

Q. Would you agree or disagree that in our global economy of today, and what existed on June 1, 2004 in particular, that using symbols to communicate dangers, hazards, is essential?

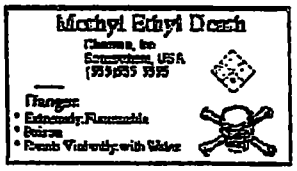
A. I would agree that symbols are more easily recognizable, but that most -- not all symbols are intuitively understood. You require training to understand the meaning of the symbols.

(Whereupon there was a discussion held off the record.)

MR. FOSTER: No further questions for our record for either one of us.

Exhibit N

Interpretation of Chemical Labels



The development of new chemicals through our research efforts, the re-evaluation of present inventories of chemicals, and the increasing diversity of uses for chemicals and chemical processes, have made increasingly apparent the need for specialized information on how to safely use, store and handle these materials. This need was first addressed by the American National Standard Institute in 1976 with the first edition of ANSI Z129.1 regarding precautionary labeling of hazardous chemicals. Precautionary statements are meant to be as brief and clear as possible, allowing the scientist to identify the primary hazards of a material with a cursory glance at the chemical container. Passage of the Hazard Communication Standard (29 CFR Sec. 1910.1200) made it mandatory for chemical manufacturers to include hazard information on chemical labels and to supply the purchaser with a material safety data sheet (MSDS).

Required Information on Chemical Labels

OSHA requires that all hazardous chemicals be labeled with the known immediate and delayed hazards and that each label contain the following information:

- the identity of the material
- the name and address of a responsible person from whom information can be obtained if necessary
- precautionary hazard warnings

American National Standard Institute (ANSI) has published a voluntary labeling standard (ANSI Z129.1-1988) followed by most chemical manufacturers. This standard calls for the additional following items:

- signal words - DANGER, WARNING, CAUTION
- highly toxic materials shall be marked POISON
- precautionary measures useful in preventing physical harm to the individual
- instructions in case of exposure
- notes to physician for emergency treatment
- instructions in case of fire or chemical spill
- instructions for chemical handling and storage

Other labeling requirements :

- simple wording
- English language required, other language optional
- manufacturer should not rely on color coding as the primary means in communicating hazards
- graphics may be used for easy identification, but they may not take the place of written legends. Three commonly used groups of pictorials are:
  - hazard types
  - routes of entry
  - personal protective equipment
- number and/or color coding may be used to rank the severity of the hazard
- hazard rating may be utilized to indicate "degree" of hazard; two systems are commonly used:
  - NFPA
  - HMIS

Recommended Keywords for Flammable and Toxic Materials

A hazardous chemical must be labeled with indications of the hazards, both immediate and delayed. Specific guidelines have been established to allow for consistency of identifying hazards. Signal Words indicate the most immediate threat through the use of only one of 3 words. The Hazard Statement then briefly indicates specifically all the hazards involved, immediate and delayed. Precautionary Measures briefly provides steps to take to avoid injury. The First Aid statements give recommendations on how to address accidental exposures to the hazard. In Case of Fire statements provide instructions on emergencies related to fire.

Signal Words

The 3 signal words used to indicate degree of hazard are "DANGER", for the most serious hazard, "WARNING", for moderate hazard, and "CAUTION" to indicate a lesser degree of hazard. In addition to these 3 signal words, extreme toxicity is indicated with the keyword "POISON". If more than one hazard exists, it is recommended that only the signal word associated with the primary hazard be used (i.e., don't put DANGER for toxicity and WARNING for flammability, the DANGER signal word is sufficient).

Hazard Statement

The statement of hazard will identify the hazard or hazards present for the conditions most likely encountered in the use of the material. If there is more than one hazard, there will be more than one hazard statement. Hazard statements for immediate hazards should be listed before hazard statements for delayed hazards, and the most serious hazard will be listed first. Examples of hazard statements are:

- MAY BE FATAL IF SWALLOWED (or as appropriate INHALED, or ABSORBED THROUGH THE SKIN)
- HARMFUL IF SWALLOWED (or as appropriate INHALED, or ABSORBED THROUGH THE SKIN)
- CAUSES SEVERE BURNS
- EXTREMELY FLAMMABLE LIQUID AND VAPOR - VAPOR MAY CAUSE FIRE
- FLAMMABLE SOLID
- STRONG OXIDIZER - CONTACT WITH OTHER MATERIALS MAY CAUSE FIRE
- CANCER HAZARD (CONTAINS MATERIAL WHICH CAN CAUSE CANCER)

Precautionary Measures Statement

Precautionary Measures supplement the Hazard Statements by indicating what to do to avoid an injury. Examples of Precautionary Statements are as follows:

- Wash thoroughly after handling.
- Avoid contact with eyes, skin and clothing.
- Keep container closed.
- Use only with adequate ventilation.
- Keep away from heat, sparks, and flame.
- keep away from contact with clothing and other combustible materials.

First Aid Statements

Instructions on what to do in case of accidental exposure will be included whenever immediate action is needed. Instructions will be given in a simple fashion that assumes no special knowledge or training on the part of the responder. If an antidote or special treatment is needed, these shall be included under the caption of ANTIDOTE or NOTES TO PHYSICIANS. Examples of First Aid statements are:

- If inhaled, remove to fresh air.
- If not breathing, give artificial respiration. If breathing is difficult, give oxygen.
- Get medical attention immediately.
- In case of contact, flush eyes immediately with water for at least 15 minutes.
- Wash clothing before reuse.

In Case of Fire (or Leak, or Spill) Statements

These instructions are provided to assist in a fire situation or in the clean-up of a chemical release, and are meant to be simple and brief. Suitable spill control materials should be specified. In some cases it is preferred to let the material burn rather than mitigate, and these situations should also be specified. Examples of this type of statement are:

- Do not flush into sewer.
- In case of spill, keep wet and remove carefully.
- Spill may cause fire. Do not get on floor.
- In case of fire, use water (flood with water), dry chemical, CO_2, or "alcohol" foam.
- In case of fire, use water spray (fog), foam, dry chemical, or CO_2.
- In case of fire, smother with dry sand, dry ground limestone, or dry powder-type agents specially designed for metal powder fires. Do not use CO_2 extinguishers or water.

Terminology

In an effort to standardize the language used on chemical labels, the following wording is recommended based on quantitatively measured flammability and toxicity characteristics of the material:

FLAMMABILITY

Rating	Key Word	Flash Point	Boiling Point
4	EXTREMELY FLAMMABLE	<73°F	<100°F
3	FLAMMABLE	<73°F	>100°F
		or >73°F	<100°]
2	COMBUSTIBLE	100°F - 200°F	
1	SLIGHTLY COMBUSTIBLE	>200°F	
0	NON-COMBUSTIBLE	will not burn	

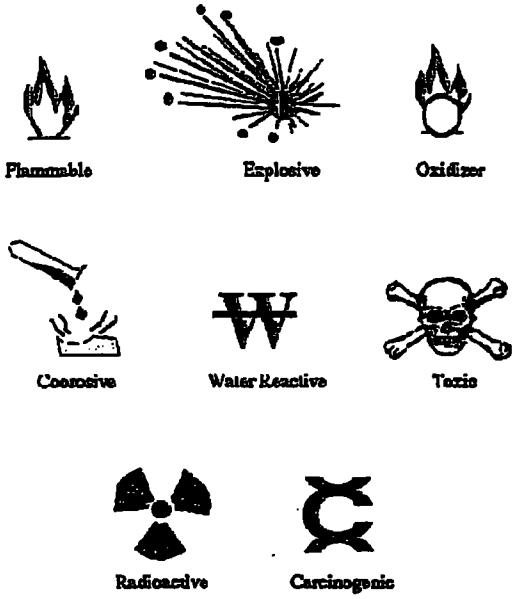
TOXICITY

Rating	Keyword	LD50(1)	LC50(2)
4	EXTREMELY TOXIC	5	1000
3	HIGHLY TOXIC	50	3000
2	MODERATELY TOXIC	500	5000
1	SLIGHTLY TOXIC	2000	10000
0	NO SIGNIFICANT HAZARD	>2000	>10000

(1) single oral dose - (mg/Kg)
(2) inhalation vapor exposure hazard - (ppm)

Recommended Graphics

The effectiveness of precautionary symbols in relaying the appropriate information about a hazard is dependent upon their recognition and association with the specific hazard. The following symbols have been found to have the highest recognition level among a given audience, and it is recommended that they be used to relay hazard information. Recognition was highest when the audience had been previously exposed to these symbols during training exercises. Many chemical manufacturers include these symbols as part of the hazard information on the chemical label.

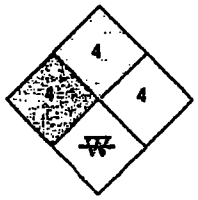


Recommended Color and Number Coding Systems

In addition to the symbols and precautionary statements that are used, many chemical manufacturers also use a color and/or number coded system to alert the lab personnel of specific hazards. Usually one of two systems is used - the NFPA system or the HMIS system. Lab personnel should obtain training in the use of both systems, and be able to recognize at a glance the inherent hazards of the material in use.

1. The NFPA (National Fire Protection Association) system utilizes a diamond diagram, divided into four color coded sections:

```
blue  health hazard
red   fire hazard
yellow      reactivity hazard
white other hazard information
```



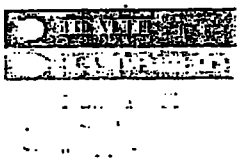
Within each section, a number ranks the degree of hazard:

```
4     extreme hazard
3     serious hazard
2     moderate hazard
1     slight hazard
0     no or minimal hazard
```

The white section alerts the user to special hazards the material may possess, such as:

```
water reactivity
strong oxidizer
corrosivity
radioactivity.
```

2. The HMIS (Hazardous Material Identification System) is very similar to the NFPA. The color and number coding are identical. But instead of the diamond, the HMIS uses a color bar system.



This system was developed by the paint manufacturers to address situations more common to their environment than the situations encountered by firefighters. With this system, the white section is used to indicate what level of protective equipment is required. Instead of a hazard ranking, a level of protection is indicated by a letter, with each letter specifying a different level of protection. Examples are:

```
A     safety glasses
B     safety glasses and gloves
C     safety glasses, gloves and an apron
D     face shield, gloves and an apron
E     safety glasses, gloves and a dust respirator
F     etc.
[see HMIS for full listing of protection options]
```

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Another feature that differs from the NFPA label system is that HMIS allows an * to designate a r
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REMEMBER :

Chemical manufacturers are required to label all chemical containers with appropriate hazard information.

ALSO, REMEMBER :

You have the right to work from labeled containers.

HOWEVER :

This is meaningless if you do not take the responsibility of learning how to use the information chemical manufacturers provide.

Home

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Exhibit O

72A C.J.S. Products Liability § 50

Corpus Juris Secundum
Database updated June 2008

Products Liability
by Francis Amendola, J.D., John R. Kennel, J.D., of the National Legal Research Group, Inc., Jack K. Levin, J.D., Charles J. Nagy, J.D.

III. Parties
A. Persons Entitled to Sue

Topic Summary References Correlation Table

§ 50. Persons who do not use or consume product; bystanders

West's Key Number Digest

West's Key Number Digest, Products Liability ⇨22
Under the doctrine of strict liability in tort for a defective product, and other theories of recovery, a bystander suffering injury may have a cause of action against the manufacturer.

While there is some authority to the effect that recovery under the strict liability doctrine is limited to users and consumers,[FN1] it is generally held that the right to sue on that theory is not so limited,[FN2] and that the right of action extends to any person whose injury from a product defect is reasonably foreseeable,[FN3] or who is foreseeably within the range of danger created by the defective product.[FN4] Accordingly, persons who may maintain an action under the doctrine of strict liability in tort include those who were not users or consumers of a product,[FN5] such as innocent or mere bystanders,[FN6] totally unconnected with the product's seller, except as the ultimate victim.[FN7] The right to recover also may extend to persons having accidental contact with a product,[FN8] and mechanics injured while repairing it.[FN9]

It has been held that a products liability act evinced the legislative intent to permit any "user or consumer" to recover for personal injuries or physical harm to property, without suggesting distinctions among types of users or consumers, and thus the term "user or consumer" as used in such a statute includes any bystander injured by a product.[FN10]

Even in actions based on negligence, the right to sue extends to a mere bystander,[FN11] a person whom a manufacturer should foresee would be harmed by its negligent acts,[FN12] or a person who might reasonably have been expected to be in the vicinity of the probable use of the product.[FN13] A similar rule applies in some states, where the basis of recovery is a breach of warranty,[FN14] but elsewhere, a bystander may only recover in strict liability, and not for breach of warranty.[FN15]

[FN1] U.S.—Davidson v. Leadingham, 294 F. Supp. 155 (E.D. Ky. 1968).

Only ultimate consumer

Under the theory that strict liability principles are intended to protect only the ultimate user or consumer of a product, a longshoreman injured when struck by bales of wood pulp falling from a disintegrating container could not recover based on a product liability theory.
Wash.—Spellmeyer v. Weyerhaeuser Corp., 14 Wash. App. 642, 544 P.2d 107 (Div. 1 1975).

[FN2] Cal.—Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319, 8

U.C.C. Rep. Serv. 449 (1st Dist. 1970).
Tex.—Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).

[FN3] Cal.—Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319, 8 U.C.C. Rep. Serv. 449 (1st Dist. 1970).

If injury might reasonably have been anticipated

La.—Nevle v. National Presto Industries, 416 So. 2d 144, 35 A.L.R.4th 658 (La. Ct. App. 4th Cir. 1982), writ denied, 421 So. 2d 906 (La. 1982).

Firefighter

A firefighter may recover in product liability to the extent he or she is a person to whom an injury from a product may reasonably be foreseen.
Ill.—Court v. Grzelinski, 72 Ill. 2d 141, 19 Ill. Dec. 617, 379 N.E.2d 281 (1978).
As to the effect of the firefighter's rule, see § 85.

[FN4] Or.—Russell v. Ford Motor Co., 281 Or. 587, 575 P.2d 1383 (1978).

Persons in vicinity

The duty imposed on a seller of a product in a defective condition, which is unreasonably dangerous to the user or consumer, is in favor of any person who may reasonably be expected to be in the vicinity of the product's probable use and to be endangered by it, if it is defective.
Miss.—Coca Cola Bottling Co., Inc. of Vicksburg v. Reeves by Reeves, 486 So. 2d 374 (Miss. 1986).

[FN5] U.S.—Williams v. National Trailer Convoy, Inc., 549 F. Supp. 305 (D. Colo. 1982) (applying Colorado law).
Ill.—Genaust v. Illinois Power Co., 23 Ill. App. 3d 1023, 320 N.E.2d 412 (5th Dist. 1974), judgment aff'd, 62 Ill. 2d 456, 343 N.E.2d 465, 82 A.L.R.3d 205 (1976).
Ky.—Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky. 1973).
Mich.—Williams v. Detroit Edison Co., 63 Mich. App. 559, 234 N.W.2d 702 (1975).
Tex.—Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969); Rourke v. Garza, 511 S.W.2d 331 (Tex. Civ. App. Houston 1st Dist. 1974), writ granted, (Jan. 15, 1975) and judgment aff'd, 530 S.W.2d 794 (Tex. 1975); Monsanto Co. v. Thrasher, 463 S.W.2d 25 (Tex. Civ. App. Amarillo 1970), writ dismissed w.o.j., (May 12, 1971).

A.L.R. Library

Products liability: extension of strict liability in tort to permit recovery by a third person who was neither a purchaser nor user of product, 33 A.L.R. 3d 415.

[FN6] U.S.—West v. Caterpillar Tractor Co., Inc., 547 F.2d 885 (5th Cir. 1977) (applying Florida law); Herman v. Welland Chemical, Ltd., 580 F. Supp. 823 (M.D. Pa. 1984) (applying Pennsylvania law); Lovelace v. Astra Trading Corp., 439 F. Supp. 753 (S.D. Miss. 1977) (applying Mississippi law); White v. Jeffrey Galion, Inc., 326 F. Supp. 751 (E.D. Ill. 1971).
Ariz.—Sullivan v. Green Mfg. Co., 118 Ariz. 181, 575 P.2d 811 (Ct. App. Div. 1 1977); Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (Div. 2 1970).
Cal.—Price v. Shell Oil Co., 2 Cal. 3d 245, 85 Cal. Rptr. 178, 466 P.2d 722 (1970); Elmore v. American Motors Corp., 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84, 33 A.L.R.3d 406 (1969); United Pacific Co. v. Southern Cal. Edison Co., 163 Cal. App. 3d 700, 209 Cal. Rptr. 819 (2d Dist. 1985); McClaflin v. Bayshore Equipment Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1st Dist. 1969).

Colo.—Frazier v. Kysor Indus. Corp., 43 Colo. App. 287, 607 P.2d 1296 (1979), judgment rev'd on other grounds, 642 P.2d 908, 22 A.L.R.4th 195 (Colo. 1982).
Fla.—Watson v. Lucerne Machinery & Equipment, Inc., 347 So. 2d 459 (Fla. Dist. Ct. App. 2d Dist. 1977).
Ind.—General Elec. Co. v. Drake, 535 N.E.2d 156 (Ind. Ct. App. 1st Dist. 1989); Gilbert v. Stone City Const. Co., Inc., 171 Ind. App. 418, 357 N.E.2d 738 (1st Dist. 1976).
Iowa—Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977).
Ky.—Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky. 1973).
Mich.—Moning v. Alfono, 400 Mich. 425, 254 N.W.2d 759 (1977).
Miss.—Hall v. Mississippi Chemical Exp., Inc., 528 So. 2d 796 (Miss. 1988); Ford Motor Co. v. Cockrell, 211 So. 2d 833 (Miss. 1968).
Mo.—Giberson v. Ford Motor Co., 504 S.W.2d 8 (Mo. 1974).
N.H.—Buckingham v. R.J. Reynolds Tobacco Co., 142 N.H. 822, 713 A.2d 381 (1998).
N.J.—Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (Law Div. 1971).
N.Y.—Codling v. Paglia, 32 N.Y.2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622, 13 U.C.C. Rep. Serv. 89 (1973); Tucci v. Bossert, 53 A.D.2d 291, 385 N.Y.S.2d 328, 85 A.L.R.3d 721 (2d Dep't 1976).
Ohio—Jones v. White Motor Corp., 61 Ohio App. 2d 162, 15 Ohio Op. 3d 292, 401 N.E.2d 223 (6th Dist. Erie County 1978).
Okla.—Moss v. Polyco, Inc., 1974 OK 53, 522 P.2d 622, 14 U.C.C. Rep. Serv. 906 (Okla. 1974).
Or.—Osborne v. International Harvester Co., 69 Or. App. 629, 688 P.2d 390 (1984).
Utah—Straub v. Fisher and Paykel Health Care, 1999 UT 102, 990 P.2d 384, 90 A.L.R.5th 721 (Utah 1999).
Wis.—Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

Reason for extension

The reason for extending the strict liability doctrine to innocent bystanders is the desire to minimize the risks of personal injury and property damage.
Tex.—Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).

A.L.R. Library

Bystander Recovery Under State Law for Emotional Distress from Witnessing Another's Injury in Products Liability Context, 90 A.L.R. 5th 179.

[FN7] Cal.—McClaflin v. Bayshore Equipment Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1st Dist. 1969).

Employees of broker of contaminated produce

Liability could be imposed upon a manufacturer of fungicide, if it is found to have given an inadequate warning of the hazards associated with the use of its product, even though the claim was made by employees of a produce broker who had purchased crops coated with the fungicide from the farmer who had purchased the fungicide.
N.J.—Macrie v. SDS Biotech Corp., 267 N.J. Super. 34, 630 A.2d 805 (App. Div. 1993).

[FN8] U.S.—Johnson v. Murph Metals, Inc., 562 F. Supp. 246 (N.D. Tex. 1983).

[FN9] Tex.—Hamilton v. Motor Coach Industries, Inc., 569 S.W.2d 571 (Tex. Civ. App. Texarkana 1978).
Wash.—Bich v. General Elec. Co., 27 Wash. App. 25, 614 P.2d 1323, 10 A.L.R.4th 842 (Div. 3 1980).

[FN10] Ind.—General Elec. Co. v. Drake, 535 N.E.2d 156 (Ind. Ct. App. 1st Dist. 1989).

[FN11] Mo.—McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W.2d 122 (1927).
Ohio—Jones v. White Motor Corp., 61 Ohio App. 2d 162, 15 Ohio Op. 3d 292, 401 N.E.2d 223 (6th Dist. Erie County 1978).
Wis.—Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855, 60 A.L.R. 357 (1928).

[FN12] U.S.—American Elec. Power Co., Inc. v. Westinghouse Elec. Corp., 418 F. Supp. 435, 19 U.C.C. Rep. Serv. 1009 (S.D. N.Y. 1976) (applying New York or Pennsylvania law).

[FN13] U.S.—Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (C.C.A. 3d Cir. 1948); McHugh v. Carlton, 369 F. Supp. 1271, 14 U.C.C. Rep. Serv. 638 (D.S.C. 1974).
Minn.—Atkins v. Jones & Laughlin Steel Corp., 258 Minn. 571, 104 N.W.2d 888 (1960).
Mo.—Winkler v. Macon Gas Co., 361 Mo. 1017, 238 S.W.2d 386 (1951).
N.J.—Shaw v. Calgon, Inc., 35 N.J. Super. 319, 114 A.2d 278 (App. Div. 1955).

[FN14] N.Y.—Singer v. Walker, 39 A.D.2d 90, 331 N.Y.S.2d 823 (1st Dep't 1972), order aff'd, 32 N.Y.2d 786, 345 N.Y.S.2d 542, 298 N.E.2d 681 (1973).

Reasons of public policy

Public policy that protects a user and consumer of a manufactured article should also protect innocent bystanders.
Conn.—Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694, 2 U.C.C. Rep. Serv. 1152 (Super. Ct. 1965).

[FN15] U.S.—West v. Caterpillar Tractor Co., Inc., 547 F.2d 885 (5th Cir. 1977) (applying Florida law).
As to whether bystanders may recover under the various alternative provisions of Uniform Commercial Code § 2-318, see C.J.S., Sales § 241.

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CJS PRODUCTSLI § 50

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STATE OF SOUTH CAROLIINA)
)
COUNTY OF OCONEE)

Keith Black and Channon Black,)
)
Plaintiffs,)
)
vs.)
)
Univar USA, Inc, Trinity)
Manufacturing, Inc. and)
Inc.,and Matrix Outsourcing,)
LLC,)
)
Defendants.)
_____)
Curtis Martin and Tina Ann Martin,)
)
Plaintiffs,)
)
vs.)
)
Univar USA, Inc, Trinity Manufacturing,)
Inc., and Matrix Outsourcing, LLC,)
)
Defendants.)
_____)
Scott F. Lawing and Tammy R. Lawing,)
)
Plaintiffs,)
)
vs.)
)
Univar USA, Inc, Trinity Manufacturing,)
Inc., and Matrix Outsourcing, LLC,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

C.A. No. 2005-CP-37-604
C.A. No. 2005-CP-37-605
C.A. No. 2006-CP-37-030

PLAINTIFFS' JOINT MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 NOV 26 P 2:22

#25 pd. copies to court

The Plaintiffs jointly move for a judgment notwithstanding the verdict or, in the alternative, for a new trial on their negligence and implied warranty claims as well as strict liability against all Defendants based upon the following errors of law which resulted in jury verdicts on those claims for Defendants, to-wit:

1: The Trial Court erred in submitting the sophisticated user defense to the jury on the negligence and implied warranty claims as the defense did not apply as a matter of law to the specific facts of this case. Plaintiffs' claims were simply based upon the fact that the yellow oxidizer labels required by DOT Regulations to be easily visible and by OSHA Regulations to be prominently displayed were not, in fact, easily visible and/or prominently displayed. The evidence was clearly that had the label been clearly visible and/or prominently displayed and had been seen by Lawing and/or Knox, the pallets of sodium bromate would have been moved, there would not have been a fire involving the sodium bromate and the Plaintiffs would not have been injured. Since the Defendants were required to put the particular label (warning) on the products by federal regulation, clearly visible and/or prominently displayed, independent of any reliance by Defendants upon Engelhard, all the evidence shows that the sodium bromate was in the same packaging and condition as it was in when received by Engelhard from Defendants, Plaintiffs were/are clearly within the protected class which OSHA Regulations are designed to protect, and the failure of the yellow oxidizer label (warning) caused the harm, the sophisticated user defense did not apply and the jury should not have been permitted to consider same.

2: The Trial Court erred in submitting the sophisticated user defense to the jury as a matter of law inasmuch as the label (warning) required by the DOT and OSHA regulatory schemes to be placed thereon by the Defendants without regard to any action on behalf of Engelhard failed and caused the harm; therefore, in order for the Defendants to be entitled to rely upon and/or assert the sophisticated user defense, they had to first show that they complied with the federally mandated regulatory schemes and/or requirements. Obviously, the jury found that the Defendants failed to do this; but, nevertheless, found in Defendants favor by applying the sophisticated user defense to the negligence and implied warranty claims. This was/is clearly error without which the verdicts would have been for Plaintiffs; therefore, judgment NOV is appropriate.

3: Although the sophisticated user defense was not available to the Defendants as a matter of law based on the facts of the case, it is submitted that, in the alternative, if the Trial Court felt it necessary to charge the sophisticated user defense, it failed to appropriately or correctly charge the jury in that regard. The charge given did not instruct the jury that before the sophisticated user defense was/is available to Defendants on the negligence and implied warranty claims, that the burden was/is on the Defendants to show that they complied with the DOT and OSHA requirements that the yellow oxidizer labels were on the product easily seen and/or prominently displayed and that, in the event that they found that the Defendants had not complied with the federal regulations and/or requirements, they were not to apply the sophisticated user defense to deny the Plaintiffs' claims.

4: The Trial Court erred in instructing the jury during its deliberations that the sophisticated user defense applied to all claims of Plaintiffs' except the express warranty claim against Univar. The sophisticated user defense, as a matter of law, only applies to all claims pertaining to warnings and the Defendants' duty to warn and does not apply to the negligence or implied warranty claims based on the packaging of the product; however, it is obvious that the jury not only applied it to the warnings claims but also to the packaging claims which is clearly error.

5: The Trial Court erred in instructing the jury in response to a question asked by the jury during its deliberations that Engelhard was the sophisticated user. This was done in such a way that the Courts' response to the question was tantamount to telling the jury that Engelhard was, in fact, a sophisticated user and they had no other choice but to find for the Defendants on the negligence and implied warranty claims, thereby leading the jury to believe they had no other choice but to find same and, in effect, to find for the Defendants on the negligence and implied warranty claims, not only as to the warnings but also as to the packaging claims as well. This is inconsistent with the initial charge given on sophisticated user in that, notwithstanding Engelhard's status as a sophisticated user, the jury still had the choice of applying the defense based upon the factors enumerated in the original charge. It is, therefore, obvious that the jury was confused and did not appropriately analyze the factors and/or correctly apply the defense to the case.

6: The Trial Court erred in denying Plaintiffs' Motion for Directed Verdict as to the sophisticated user defense insofar as the federal regulations require labeling and marking on packages in compliance with those regulations. The sophisticated user defense cannot be raised and/or used to avoid obligations under federal law - i.e., the sophisticated user defense cannot trump federal law and/or regulatory requirements or render them a nullity.

7: The Trial Court erred in charging the sophisticated user defense, and the Court should grant a JNOV on, or in the alternative, a new trial on the negligence and implied warranty claims, inasmuch as the facts were undisputed that Defendants could not have reasonably relied upon Engelhard to supply the on-product warnings on the bags, especially when Univar had agreed to supply them under the contract, and since the Federal Law required all Defendants to ensure that on product warnings were clearly visible and prominently displayed, on the bags. The jury found that they were not, entitling Plaintiffs to JNOV as to the negligence and implied warranty claims, or at a minimum, a new trial on the two causes of action.

8: The Trial Court erred prior to trial in granting Summary Judgment to Defendants on the strict liability claims of Plaintiffs by ruling that the Plaintiffs were not "users" or "consumers" within the meaning or protection of ***S.C. Code Ann. §15-73-10 et seq.*** On this issue the Pre-Trial Memorandums and Briefs of the Defendants are incorporated herein by reference.

AND I SO MOVE!

Respectfully Submitted,

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Attorneys for Plaintiffs

Date: November 26, 2008

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	)	COURT OF COMMON PLEAS
Keith Black, Plaintiff, Curtis Martin and Tina Ann Martin, Plaintiffs, Scott F. Lawing and Tammy R. Lawing, Plaintiffs, vs. Univar USA, Inc., Trinity Manufacturing, Inc., and Matrix Outsourcing, LLC., Defendants.	)	**Case #2005-CP-37-0604** **Case #2005-CP-37-0605** **Case #2006-CP-37-0030** **PLAINTIFFS' JOINT MOTION FOR A NEW TRIAL ABSOLUTE ON DAMAGES AND/OR, IN THE ALTERNATIVE, FOR A NEW TRIAL NISI ADDITUR RE: DAMAGES**

The Plaintiffs, jointly move for an Order of this Court, for a new trial absolute as to damages only or, in the alternative, for a new trial nisi additur. This motion is based upon the following errors of law, improper jury conduct and the Thirteenth Juror Doctrine, to wit:

1. The Court erred in charging the jury that the damages must be foreseeable; however, the jury had already made this finding of fact when it determined Plaintiffs' injuries were proximately caused by Univar's breach of the express warranty, as shown by its verdict form in the liability trial. Also, SC Code 36-2-715(b)2 does not require proof of foreseeability of the personal injury damages in a breach of warranty case, but only that they be proximately caused by the breach of the warranty. This instruction confused the jury as to the issue of damages and resulted in the jury revisiting that issue and apportioning the liability for the damages sustained by each of the Plaintiffs between Univar and Engelhard;

2. The Court erred in charging the jury that the damages must be proximately caused by the breach of the express warranty because the jury had already found as fact that the injuries were proximately caused by Univar's breach of the express warranty. The Court also erred in failing to charge the jury that the Plaintiff only had to prove that the damages were causally related to the injuries from the fire or explosion. This served to confuse the jury as to the issue of damages and resulted in verdicts that are not supported by the evidence;

3. The Court erred in charging the jury that the Defendant's conduct should be considered in light of the attendant circumstances, because the Defendant's conduct was not relevant to the issue of damages. Again, this confused the jury as to the issue of damages and resulted in the verdicts failing to comport with the evidence;

4. The jury's verdicts are totally unsupported by the evidence in the record, and so grossly inadequate that a finding by this Court that they were/are arbitrary, and based upon caprice, passion, and/or prejudice is demanded. As liability had already been established, the jury was required to award, without diminution or compromise, the substantial damages proven at trial. Toole v. Toole, 260 S.C. 235, 195 S.E.2nd 389 (1973); O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2nd 555 (1993);

5. The jury's verdicts are against and contrary to the greater weight of the evidence, and are grossly inadequate based on the evidence in the record. Toole, supra.;

6. The jury's verdicts were/are based upon matters not in evidence and upon matters outside the record which the jury should not have considered and some of which the Court specifically instructed it to disregard;

7. The jury failed to follow and abide by the Court's instructions of the law as it determined the facts from the evidence at trial, and, therefore, the verdicts were contrary to the Court's instructions on the law. Southeastern Mobile Homes v. Walicki, 282 S.C. 298, 317 S.E.2nd 773 (S.C. App. 1984);

8. The jury considered collateral sources, contrary to the Court's instructions upon same; therefore, the verdicts were/are contrary to the law as the Court instructed and cannot be allowed to stand. Walicki, supra.;

9. Under the Thirteenth Juror Doctrine, the Trial Judge should grant a new trial absolute on damages because the evidence does not justify or support the verdicts, and because justice will prevail only by granting a new trial on damages to the Plaintiffs. Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2nd 715 (S.C. App. 1996) (inadequate deliberation by the jury); Youmans, infra. The verdicts are inconsistent as the amounts for all damages for each of the Plaintiff are substantially the same. If the past uncontested medical expenses for each of the Plaintiffs are subtracted from the various verdicts, the Plaintiffs were awarded approximately the same amount of damages for all other elements, notwithstanding that each of the Plaintiff's injuries were substantially different and the damages flowing therefrom varied significantly. Black sustained much more visible scarring than either Lawing or Martin, but

Lawing sustained damage to his heels and the severity of the damages to his lungs were greater than the lung damage to either Martin or Black. On the other hand, all three (3) of the Plaintiffs received significant emotional and psychological injury, including post-traumatic stress disorder, however, it appears that Martin is the one with the greatest psychological injury. It further appears that any and all lost wages were totally ignored by the jury, including past lost wages which have already accrued. The evidence is overwhelming that none of the Plaintiffs are employable at the present time and will never be able to return to work, particularly any job for which they are qualified and/or trained. At the least, even if they could ever return to the work force the evidence is that significant retraining and further schooling will be required. Certainly, this demanded that some future lost wages should have been awarded;

10. The jury clearly based its verdicts on matters outside the record contrary to the Court's instructions, particularly that collateral sources were to be ignored. The jury evaluated the amount of each Plaintiff's damages, aside from past medical expenses, to be approximately the same and ignored the evidence on each of the damage elements for each of the individual Plaintiffs. Despite evidence that each Plaintiff suffered individual injuries, with significant differences in the nature, extent and full effect thereof, an analysis shows that once past medicals are taken from the jury verdicts, the jury basically added the sum of $600,000 and rounded that total up to the next $100,000 for each Plaintiff. It is simply too much of a coincidence to be based on the evidence in the record and, certainly, does not comport with the uncontroverted evidence presented on all of the damage elements. Obviously, the jurors did not deliberate on the evidence of each of the Plaintiff's damages as charged by the Court, but instead took a "one size fits all" approach evidencing its desire to hasten their discharge from the longest civil trial in Oconee County, and one of the longest in state history, rather than fairly assessing each Plaintiff's damages;

11. The jury, in its deliberations, disregarded evidence of obvious and uncontested elements of damages such as lost earnings, as well as some future lost earnings, and future medicals which were/are clearly supported by the evidence;

12. The jury did not deliberate on all of the elements of damage for each individual Plaintiff. This is evidenced by the fact that the jury heard the witnesses over a two (2) week period and numerous detailed documents relating to damages were submitted for each Plaintiff, including economists' analysis, life care plans, and the like. Again, the jury found approximately the same amount of damage(s) for each Plaintiff as evidenced by the difference between the amount of the verdicts rendered to each of the Plaintiffs, less past uncontested medical expenses. While this ground, in and of itself, may not be sufficient to form the basis for a new trial, it does, together with the other reasons set forth, conclusively shows error, improper motive, lack of conscientious reflection, outside influence, dispassionate consideration, caprice, passion and/or prejudice, sufficient to warrant the granting of a new trial. Youmans v. DOT, 2008 S.C. App. LEXIS 160 (September 24, 2008);

13. There was juror misconduct which resulted in verdicts unsupported by the evidence and conclusively proves that the verdicts were the product of caprice, improper methods, passion or prejudice against the Plaintiffs. This is supported by the Affidavits attached hereto as Exhibits A, B and C, which are incorporated herein by reference, showing that matters were considered that the Court specifically instructed the jurors not to consider, including, but not limited to, collateral sources (worker's compensation, social security disability and medicare).

14. It is obvious that the jury gave little thought to the loss of consortium claims and just arbitrarily threw in numbers which have absolutely no relationship to the severity of the damages proved and sustained by Tammy Lawing and Tina Martin.

IN THE ALTERNATIVE

In the alternative for a new trial absolute, the Plaintiffs also move for a New Trial Nisi Additur upon all of the above stated grounds, as well as the fact that the jury's verdicts shock the conscience, are offensive, wholly without support of the evidence at trial and are, clearly, the result of caprice, passion and prejudice against the Plaintiffs. Pinckney v. Winn Dixie Stores, 311 S.C. 1, 426 S.E.2nd 327 (S.C. App. 1992). The suggested additurs for each of the Plaintiffs are attached hereto as Exhibits D (Lawing) and E (Black and Martin) and are incorporated herein by reference as if set out verbatim.

Respectfully submitted,

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Attorneys for Plaintiffs

Date: December 22, 2008

PLAINTIFFS' EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
Keith Black and Channon Black, Plaintiffs, v. Univar USA, Inc., Defendants.	C.A. No. 2005-CP-37-604 **AFFIDAVIT OF NANETTE G. MAYER**
Curtis Martin and Tina Ann Martin, Plaintiffs, v. Univar USA, Inc., Defendants.	C.A. No. 2005-CP-37-605
Scott F. Lawing and Tammy R. Lawing, Plaintiffs, v. Univar USA, Inc., Defendants.	C.A. No. 2006-CP-37-030

I, the undersigned, Nanette G. Mayer, after being dully sworn on oath, depose and say:

My name is Nanette G. Mayer and I reside at , Walhalla, South Carolina . I am fifty-six (56) years of age and was an alternate juror (Juror #138) throughout the trial of the above captioned cases; however, I did not participate in any of the jury deliberations in the liability and/or damages phases of the trial.

On the evening of December 12, 2008, after the jury had rendered its verdict on damages and had been dismissed from further service, juror Gail Howe (Juror #103), called me and informed me what the jury had done and the amounts of the verdicts. When she told me what the jury had awarded, I was shocked at how low they were. I asked her why they did not award more, and specifically asked her what they did about future medical expenses. She stated that Scott Lawing and Curtis Martin didn't have any future medical expenses and that is why they gave Keith Black a little more. Gail realized how upset I was with the verdicts so she didn't say much of anything else that I recall and the conversation ended rather quickly.

The next day, December 13, 2008, I was Christmas shopping in Anderson, South Carolina and just happened to run into another juror, Nellie Overholt (Juror #156) at Chili's restaurant. I asked her why the verdicts were so low and she said that they didn't find Univar to be but twenty-five percent (25%) negligent. She also said that if the Plaintiffs had to pay back worker's compensation they could file a claim against worker's compensation and get that money back. She then said they also talked about the fact that if they're disabled they could file for Social Security Disability and get that and that, if they had Social Security Disability, then medicare would pay their medical expenses. I asked her about what they did about lost wages and she said that since they were still employed by Engelhard, that they were not entitled to lost wages. I reminded her that Judge Nicholson had told us not to consider worker's compensation because it would have to be paid back but she replied they discussed it and the Plaintiffs could file a claim to get back what they had to pay back.

IN WITNESS WHEREOF, I have herein set my hand and seal on this 19th day of December, 2008.

SWORN TO BEFORE ME THIS 19th
DAY OF DECEMBER, 2008.

Nanette G. Mayer
NANETTE G. MAYER

Debra C. Miller
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 9-17-2011

PLAINTIFFS' EXHIBIT B

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF OCONEE)	TENTH JUDICIAL CIRCUIT
Keith Black and Channon Black,)	C.A. No. 2005-CP-37-604
Plaintiffs,)	
v.)	
Univar USA, Inc.,)	
Defendants.)	**AFFIDAVIT OF BENJAMIN CANNON**
Curtis Martin and Tina Ann Martin,)	C.A. No. 2005-CP-37-605
Plaintiffs,)	
v.)	
Univar USA, Inc.,)	
Defendants.)	
Scott F. Lawing and Tammy R. Lawing,)	C.A. No. 2006-CP-37-030
Plaintiffs,)	
v.)	
Univar USA, Inc.,)	
Defendants.)	

I, the undersigned, Benjamin Cannon, after being dully sworn on oath, depose and say:

My name is Benjamin Cannon and I reside at l, West Union, South Carolina . I am 25 years of age and was a juror (Juror #260) throughout the trial of the above captioned cases. During the deliberations on damages, several things were brought to

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the attention of the jury by various jurors which were considered in rendering the verdicts and substantially affected the verdicts amounts. They were:

1. The relative negligence of Univar and Engelhard was discussed and it was determined that Univar was only 25% negligent and that Engelhard was 75% negligent. This was a very, very big factor in the final awards being low.
2. The Plaintiffs could apply for and receive Social Security Disability benefits.
3. Once the Plaintiffs got their Social Security Disability, Medicare would pay the medical bills.
4. The Plaintiffs would not have to repay workers' compensation. This was considered even though Judge Nicholson instructed us that we were not to consider collateral sources. I reminded my fellow jurors of Judge Nicholson's instructions in this regard and we had a copy of his instructions with us in the jury room. Even though I cautioned against any consideration of workers' compensation, the Judge's instructions were ignored and the verdicts were substantially affected.

IN WITNESS WHEREOF, I have herein set my hand and seal on this 22nd day of December, 2008.

SWORN TO BEFORE ME THIS 22ND
DAY OF DECEMBER, 2008.

BENJAMIN CANNON

Debra C. Miller
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 9-17-2011

PLAINTIFFS' EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF OCONEE	)	TENTH JUDICIAL CIRCUIT
Keith Black and Channon Black,	)	C.A. No. 2005-CP-37-604
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Univar USA, Inc.,	)	
	)	**AFFIDAVIT OF**
Defendants.	)	**ANGELA DRANE**
	)	
Curtis Martin and Tina Ann Martin,	)	C.A. No. 2005-CP-37-605
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Univar USA, Inc.,	)	
	)	
Defendants.	)	
	)	
Scott F. Lawing and Tammy R. Lawing,	)	C.A. No. 2006-CP-37-030
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Univar USA, Inc.,	)	
	)	
Defendants.	)	
	)	

I, the undersigned, Angela Drane, after being duly sworn on oath, depose and say:

My name is Angela Drane, and I reside at ., Walhalla, South Carolina .. I am thirty-four (34) years of age and was a juror (Juror #289) throughout the trial of the above captioned cases. During the course of the deliberations on damages, several

things were brought to the attention of the jury by certain members of the panel which were considered and substantially affected the jury verdicts.

The first thing that concerned me about our considerations was that a fellow juror stated that the Plaintiffs would not have to repay workers compensation, although we had a written copy of the Judge's instructions on collateral sources in the jury room and another juror reminded us of the Judge's instructions, nevertheless, the Judge's instructions were disregarded and the decisions were made upon the premise that anything that had been paid by workers compensation would not have to be repaid.

Another thing that was suggested and which we considered was the relative negligence of Univar and Engelhard. It was discussed and we decided that Univar was only twenty-five percent (25%) negligent and that Engelhard was seventy-five percent (75%) negligent. This was a very important and significant factor in the final verdicts.

Also suggested and considered was that the Plaintiffs could get Social Security Disability benefits and that once the Plaintiffs got their Social Security Disability, medicare would then pay the medical bills thereby making it unnecessary to award future medicals. This, again, substantially affected the verdicts and substantially reduced the amounts that would, most probably, have been otherwise awarded.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 19th day of DECEMBER, 2008, in Walhalla, South Carolina.

Angela Drane

Sworn to before me this 19th
day of December, 2008.

Debra C. Mullen
Notary Public for South Carolina
My Commission Expires: 9-17-2011

PLAINTIFFS' EXHIBIT D

SCOTT F. LAWING AND TAMMY LAWING

Supporting Calculations of Lawing's Damages For Additur

CALCULATION #1

	Past Medicals:	$ 1,150,139.87
	25% Future Medicals Claimed ($1,544,654.00)	$ 386,163.50
		$ 1,536,303.37
	Pain Suffering etc.	
(Conservative)	(2x's above medicals)	$ 3,072,606.74
	Lost After-Tax Earnings	
	Past (Accrued)	$ 187,527.00
	Future	$ 1,387,300.00
		$ 6,183,737.11

CALCULATION #2

	Past Medicals	$ 1,150,139.87
	50% Future Medicals Claimed ($1,544,654.00)	$ 772,327.00
	Total:	$ 1,922,466.87
	Pain Suffering, etc.	
(Conservative)	(2x's above medicals)	$ 3,844,933.74
	Lost After-Tax Earnings	
	Past (Accrued)	$ 187,527.00
	Future	$ 1,387,300.00
	Total:	$ 7,342,227.61

CALCULATION #3

	Past Medicals	$ 1,150,139.87
	50% Future Medicals Claimed ($1,544,654.00)	$ 772,327.00
		$ 1,922,466.87
	Pain Suffering, etc.	
(Conservative)	(2.5x's above medicals)	$ 4,806,167.17
	Lost After-Tax Earnings	
	Past (Accrued)	$ 187,527.00
	Future	$ 1,387,300.00
	Total:	$ 8,303,461.04

FURTHER NOTE

Further, per the attached Affidavits, the jury apportioned liability between Univar and Engelhard at 25% and 75%. If $1,900,000.00 is 25% of the whole, the total damages should be least $7,600,000.00. Likewise, Tammy Lawing's damages equal $400,000.00.

As shown by the above calculations, Scott F. Lawing's damages are at a bare minimum $6,000,000.00 and the evidence fully supports an award of $8,000,000.00 plus. It is, therefore, respectfully submitted that a new trial nisi additur should be granted to increase the verdict as to Scott F. Lawing to an amount within the $6 to $8 million dollar range. It is further submitted that Tammy Lawing's damages be increased to $400,000.00 plus.

RESPECTFULLY SUBMITTED,

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Larry C. Brandt, P.A.
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Tel: (864) 638-5406
Fax: (864) 638-7873

Date: December 22, 2008
Walhalla, South Carolina

By: Larry C. Brandt
Attorney for Scott F. Lawing

PLAINTIFFS' EXHIBIT E

KEITH BLACK, CURTIS MARTIN AND TINA MARTIN

Based upon the matters contained herein, the evidence adduced at trial and the attached Affidavits of Ms. Mayer, Ms. Drane and Mr. Cannon, which clearly show that the jury considered collateral sources (workers' compensation, Medicare, and Social Security Disability) and further improperly apportioned liability between Univar and Engelhard at 25% and 75% respectively which had the net affect of reducing the damages below any reasonable value it is respectfully submitted that the verdicts for Keith Black, Curtis Martin and Tina Martin should be increased to amounts within the following ranges:

Keith Black	–	between $5,000,000.00 and $6,000,000.00
Curtis Martin	–	between $4,500,000.00 and $5,500,000.00
Tina Martin	–	$400,000.00 plus

RESPECTFULLY SUBMITTED,

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Date: December 22, 2008

STATE OF SOUTH CAROLINA)	
)	COURT OF COMMON PLEAS
COUNTY OF ANDERSON)	
SCOTT AND TAMMY LAWING,)	
PLAINTIFFS,)	
vs.)	TRANSCRIPT OF RECORD
)	2006-CP-37-30
UNIVAR USA, INC., TRINITY MFG,)	
INC., AND MATRIX OUTSOURCING,)	
LLC,)	
DEFENDANTS,)	
)	
KEITH BLACK AND CHANNON BLACK,)	
PLAINTIFFS,)	
vs.)	2006-CP-37-605
)	
UNIVAR USA, INC., TRINITY MFG.)	
INC., AND MATRIX OUTSOURCING,)	
LLC,)	
DEFENDANTS,)	
)	
CURTIS MARTIN, TINA ANN MARTIN)	
PLAINTIFFS,)	
vs.)	2006-CP-37-605
)	
UNIVAR USA, INC., TRINITY MFG.)	
INC., AND MATRIX OUTSOURCING,)	
LLC.,)	OCTOBER 2, 2008
DEFENDANTS.)	ANDERSON, SOUTH CAROLINA

B E F O R E:
THE HONORABLE J. C. NICHOLSON, JR.; JUDGE.

A P P E A R A N C E S:
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Thursday, October 2, 2008

(WHEREUPON, Court convened with all parties present, when the following proceedings were had:)

THE COURT: I believe you all have agreed on how you want to proceed --

MR. BRANDT: Yes, sir.

THE COURT: -- as far as the motions are concerned? Everybody come forward and give her a card so she can get everybody straight, who represents who.

And does anybody have a copy of the list of dispositive motions and motions in limine? You know the order you want to hear, the order you want them to be heard?

Mr. Walker, you representing Black and Martin or just Lawing? Mr. Brandt?

MR. BRANDT: No, just Lawing.

THE COURT: All right. Who's going first? I believe the first joint motion is for summary judgment on plaintiffs negligence and failure to warn claims based on the sophisticated user defense. Who's going first?

MS. ROBERTS: We are.

THE COURT: Okay. Before we get started, can somebody explain to me very briefly about these warning labels? There's talk in your motions and your information about a yellow warning label, a DOT warning label. Can

somebody distinguish the warning labels? All they talked about was a yellow warning label, is that the DOT? What is that?

MR. OUTTEN: Your Honor, if I could approach, give you some photographs, that would help you.

THE COURT: All you kept talking about was these warning labels, the DOT label and you talk about a yellow warning label. I'm trying to figure out in my mind which warning is which.

MR. OUTTEN: May I approach, your Honor?

THE COURT: Yes, sir. All right. So, the yellow looks like actually part of a bag; is that correct?

MS. ROBERTS: Yes. The bag itself on one side has writing on it, the writing under the regulations is called markings. So if we refer to markings, we're referring to the writing on the bags.

THE COURT: The writing on the bag, like this PI:008?

MS. ROBERTS: Right. All the writing on the bag, those are known as markings.

THE COURT: Okay.

MS. ROBERTS: And on the other side of the bag is a yellow diamond. It has a symbol inside of it says, "Oxidizer 5.1." That symbol is called a label. And the Department of Transportation and the International Maritime Dangerous Goods Regulation recognize and require

markings and labels on the packages. So, like I said, if we're talking about markings, we're talking about the writing. And if we talk about that yellow diamond, that is a label.

THE COURT: Okay.

MS. ROBERTS: To differentiate the two.

MR. WALKER: Your Honor, just so we can understand what counsel just said, one of the motions they filed is that there's no regulations under the IMDG that apply. If they're conceding that it does apply, we need to know that now at the outset of the argument.

THE COURT: We're just talking about what they are.

MS. ROBERTS: And we ought to call the writing on the bag markings, and -- writing on the bag markings; and the yellow diamond is a label.

MR. WALKER: Can we establish whether counsel is going to take the position that the IMGD and DOT regulations do or do not apply at this point?

MR. OUTTEN: Your Honor, can we take the motions as we agreed to take them? We're not conceding anything.

THE COURT: We'll see what they say. Okay. You can address it at the appropriate time.

MR. WALKER: All right.

THE COURT: I just wanted to try to get what they were talking about in my mind. In all your briefs, labels

and yellow warnings, et cetera, et cetera. It was all sort of jumbled up.

MR. WALKER: Thank you.

THE COURT: And I understand you all know it because you been living with it, but I haven't. Okay.

Please proceed on your first motion on sophisticated user defense.

MS. ROBERTS: Your Honor, my name is Stephanie Roberts, here for Univar, USA, Inc. On behalf of the defendants, I'm arguing the motion for summary judgment as to sophisticated user. I know that we have provided your honor with a pretrial brief, and I did want to refresh the court's recollection as to why we are here today.

It is because on June 1, 2004, Mr. Black, Mr. Martin, and Mr. Lawing were injured in a workplace accident while Engelhard, the Engelhard Plant was shut down for maintenance. The three plaintiffs were maintenance workers working on a project to replace a condensate pipe, which is in the refinery area of the Engelhard facility. Sodium bromate, which you've now seen some photographs of, was inadvertently left in the refinery where the plaintiffs were to work that day.

No one on that work crew was going to use the sodium bromate. The crew was to go into the refinery and replace a condensate pipeline.

THE COURT: What did Engelhard use it for?

MS. ROBERTS: Engelhard uses the sodium bromate to refine precious metals. So production in the refinery -- employees take the sodium bromate, as you see in the single-use packages. The refinery workers rip open the top and pour the sodium bromate into a vat, refine precious metals which they sell to their clients, Engelhard's customers. Those are things like platinum, titanium and things like that.

THE COURT: Okay.

MS. ROBERTS: And so, at the time of the accident which of course, was in June of 2004, Engelhard at that time was ordering approximately six shipments a year. And these shipments were coming in 40 -- about 40,000 pounds at a time. So, Engelhard was using about 120 tons of sodium bromate every year at the time of the accident.

THE COURT: How many tons?

MS. ROBERTS: A hundred and twenty tons of it a year. At the time of the accident -- and just for context I wanted to explain what happened on June first so you would have an idea of why we were here. No one on that work crew was supposed to use the sodium bromate. It happened to be in the refinery area of the plant where the plaintiffs and two other crew members were going to be doing a maintenance project.

So, because Engelhard has a shut-down week every year, and this was their shut-down week, no one at the plant was even going to use sodium bromate that week. It was certainly a maintenance week.

Now, the defendants have moved for summary judgment with respect to the sophisticated user defense. We argue that that sophisticated user defense precludes plaintiffs to use the claim. As a matter of fact 30(c) Jurisprudence, product liability section 46, explains the sophisticated user defense, and under that defense product distributors have no duty to warn purchasers if the purchaser has special knowledge, sophistication, or expertise in relationship to the product and is or should be aware of the product's dangers. And South Carolina courts have adopted, approved of and adopted a sophisticated user defense in South Carolina product liability cases.

One of the cases we've cited for the Court is the 1995 case of Bragg versus Hi-Ranger, Incorporated. And I believe we have a notebook of cases for you. If I can approach, I can give that to you. We have a notebook with the cases in there. Do you have -- do you have one?

THE COURT: I think we have it, but I'll take it.

MR. OUTTEN: May I approach?

MS. ROBERTS: They're listed in alphabetical order,

so if you need to find a particular case, they're in there.

Bragg versus Hi-Ranger, 319 SC 531, in that particular case the defendant, Hi-Ranger, was a manufacturer of an aerial bucket device. And you've seen these bucket devices on work trucks. And the intent of that is to allow the workers inside the truck to get into the aerial bucket device and work on a power line.

This particular aerial device was manufactured by Hi-Ranger and sold to plaintiff's employer, which is a large electrical contractor. And this contractor did work for Duke Power. So the plaintiff at the time of his accident was working on an electrical pole change-out. He was inside the aerial bucket. One of his conductive hoses came in contact with a charged power line and the bucket caught on fire. The plaintiff jumped from the truck and several days later died from injuries sustained in the fall.

The plaintiffs' estate sued the defendant, who made the aerial bucket device, for negligent and strict liability. And at the conclusion of the plaintiff's case the defendant moved for directed verdict on both claims. The Court granted it on strict liability, denied it on negligence.

At the end of the defendant's case, the trial court

instructed the jury on the sophisticated user defense; and there is, in that case, the Court had a jury instruction and this---

THE COURT: Who was the injured party in that case?

MS. ROBERTS: The injured party was a gentleman employed by an electrical contractor who had purchased the truck, a work truck, like a Duke Power truck with this aerial bucket device installed on it.

THE COURT: He was a contractor?

MS. ROBERTS: He was an employee. The plaintiff was the employee of the electrical contracting company.

THE COURT: Well, the reason I ask that question -- I want to ask you a question about a sophisticated user defense. The Sizemore case and Georgia-Pacific, that case you cited talked about, does not give a duty on the part of distributor to warn the public. Its transferring that duty to whoever receives the product.

Now, in this particular case the public wasn't injured. Isn't the sophisticated defense designed to transfer the warning from the distributor to whoever receives it? And they're saying on the sophisticated use you don't have to -- in other words, whoever receives the product is the one that's going to have to do the warning?

MS. ROBERTS: That's right.

THE COURT: Isn't that defense in theory designed to

protect the public?

MS. ROBERTS: Well, it's designed to protect not just the public.

THE COURT: The unsuspecting public.

MS. ROBERTS: Not just the public, though. It doesn't apply strictly to, like, the sale of a consumer product, somebody to purchase. It stems from learned intermediary, like a company, like we cited the Medtronic Case, a company manufactures a medical device or a pharmaceutical, they have put it in the stream of commerce, it's for sale in a drug store; but a learned intermediary, like an M.D. has to prescribe to the plaintiff, pass on warnings to the plaintiff, who would be the patient.

Similarly, in the Bragg case, the manufacturer of this aerial bucket device passes along the instruction manual for this device to the electrical contracting company that bought it. The electrical contracting company has a duty to warn its own employees about safely using the aerial bucket device. And one of the things that the plaintiff should have been warned about was the contact of the conductive hose with a live electrical wire, because the conductive hose ended up causing a fire in the bucket.

And so, it is not just a matter of conveying a

warning to someone else to warn the general public. It can occur in the employee context. I actually have another case I can hand up to your Honor which is fairly similar to our case, and it is a case which was not published but it is a Federal Fourth Circuit case.

THE COURT: Just tell me what it says.

MS. ROBERTS: It's a case in which a manufacturer, it's called Coffee -- I have it right here. If I can approach, I can hand you a copy.

THE COURT: Yes, ma'am. So you don't think there's a distinction between the employees versus the public?

MS. ROBERTS: No. Not for the learned intermediary or sophisticated user defense.

THE COURT: All right.

MS. ROBERTS: This case actually explains it pretty well. Coffee versus Chemical Specialties, Inc., a 1993 U.S. at Lexis 21430, a 1993 case. And this is an opinion by the Fourth Circuit. And it's appeal from the District in South Carolina. This case involves a bulk supplier defense. But it is very close to the facts of this case.

In the Coffee case the plaintiff, like the Bragg versus Hi-Ranger case, was using chemicals supplied by a chemical supplier. This chemical in the Coffee case is known as chromated copper arsenate, which is a wood preservative. Mr. Coffee had worked for five years in a

pressurized wood-treating company, and he is exposed to this chemical. He contracts an illness then sues the supplier of these chemicals because he got injured and he sues for failure to warn claims.

In this case the District of South Carolina held that the plaintiffs employer controlled the chemical after delivery, and the plaintiffs employer was responsible to train its employees. There was -- the supplier owed no duty to the plaintiff. That's really similar to our case.

In our case the defendants supply Engelhard, a sophisticated user of chemical products, with sodium bromate that Engelhard uses a substantial amount of it in its refining process. This sodium bromate was delivered February 16, 2004, and plaintiffs' employer, Engelhard, controlled it.

They were in charge of the storage and handling of the material between February 16th, 2004, and June 1, 2004. Moreover, the plaintiffs' employer, Engelhard, was responsible to train the employees on hazard communication standards, the OSHA Hazard Communication Standards and did so. They did train the plaintiffs. So one of the things the defendants were to supply, the warning that the defendants were to supply to Engelhard---

THE COURT: Wouldn't the -- isn't it in dispute as to the warnings? Wouldn't they have to have proper warnings

on the bags for the employees to realize it was hazardous? Because in this case we're dealing with a welder, a mechanic, and a precision welder. Black wasn't even an employee of Engelhard, he was working for another corporation. I mean, but doesn't it have to be something on the bag to give them notice that, "Hey, I've been trained, this is hazardous, I got to take appropriate steps," even if you say Engelhard was a sophisticated user?

MS. ROBERTS: There are several questions here. First of all, our contention is that the photographic evidence, which you have, we've shown you pictures---

THE COURT: I understand that. But, I mean, isn't that a factual dispute? The plaintiff very violently disagrees with that, I assume. I haven't seen their brief because I didn't get it until yesterday on this particular point. I got to assume they're going to disagree with you or they wouldn't be here.

MS. ROBERTS: Agree or disagree that the labels were on the bags?

THE COURT: Right.

MS. ROBERTS: Our contention is that the photographic evidence of the first shipment, the photographs taken by the OSHA investigator and by Engelhard on June 2nd, 2004, which is the next day, all had labels on every bag.

THE COURT: What's the plaintiffs' position on the labels?

MR. JOHNSTON: Their position, your Honor, is they didn't see them.

THE COURT: But they don't disagree they weren't there?

MR. JOHNSTON: They would disagree with that, I suspect, but not real hard. Sort of like somebody heard the whistle blow on the train. Gary Shook personally delivered the bags to the refinery hall, he says they were on there.

MR. WALKER: Your Honor, we dispute that fact.

THE COURT: I understand.

MS. ROBERTS: Our photographic evidence, as well as the testimony involved in the Engelhard plant would establish that one side of the bag has the yellow oxidizer label, and the other side of the bag has written material on it which includes the name of the product. In addition, this is the -- our contention, this is the other warning and this is described in the Coffee case.

THE COURT: What did Engelhard teach the employees about the oxidizing agent 5.1? What do they teach them about that particular warning label, oxidizing agent 5.1?

MS. ROBERTS: All of the plaintiffs testified that they received hazard communication training at Engelhard.

THE COURT: I didn't ask you that. I said what were they taught about this yellow warning sign that says Oxidizing agent 5.1 and had some kind of symbol above it?

MS. ROBERTS: That it is an oxidizing agent.

THE COURT: Okay. They were taught about sodium bromate?

MS. ROBERTS: Yes. We showed the plaintiffs in their depositions the computer-based testing that they took following their new employee testing. The reason I brought up hazard communication testing is because part of hazard communication training Engelhard gives every employee is called the new-employee training, when they first get there and it is to teach the employees what the labels are, what they mean.

So we have and showed the plaintiffs in their depositions, the video, the computer-based testing that they had to do to work at Engelhard. And one of the symbols they were taught to recognize was an oxidizer symbol.

THE COURT: All right. Thank you.

MS. ROBERTS: In addition to this training that Engelhard did give its employees, I don't think there's any dispute that the plaintiffs received the hazard communication training. OSHA, in fact, when they investigated this accident, checked the plaintiffs'

personnel files to see that they had hazard communication training. Then Engelhard had a Hazcom training program and all of that was done and they all had it.

But, in addition, the defendant supplied Engelhard with a material safety data sheet, just like the defendant in the Coffee case supplied the pressurized wood treating company that employed that plaintiff, the MSDS sheet. This MSDS sheet is very detailed about all the different hazards associated with the product; and all the plaintiffs testified that they had training on how to locate an MSDS. They knew where MSDS's were located in the plant, how to go find them. There were two ways to find them: One, hard copies that were stored in the state director's office, near the refinery. Also they had computer terminals in different areas of the plant where you can access an MSDS and receive all the information about the hazards associated with the chemical.

So we contends that A, Engelhard is a sophisticated user by virtue of its sophisticated chemical processes, admissions by Engelhard employees, including the plant manager about the sophistication case of that company.

The plaintiffs' expert, who we deposed, Jerry Purswell, also told us, we asked Dr. Purswell, "Have you seen any evidence to suggest that Engelhard was anything less than a sophisticated chemical company manufacturer?

He answered, "No."

So the plaintiffs own expert has told us that Engelhard is a sophisticated chemical company manufacturer. So we contend that Engelhard is a sophisticated user of sodium bromate, uses a huge volume a year, and this fact is very important, your Honor, that the sodium bromate involved in the accident was delivered on May 20, 2004, to the refinery.

That means the refinery workers were actually using it without any problem for a week before the accident. So Engelhard is a sophisticated user.

THE COURT: I'm sure they didn't drop any hot solvents on it while they were using it a week before the accident. I mean, what difference does that make on the issue we're talking about, since the employees were using the sodium bromate before the accident?

MS. ROBERTS: Right. Engelhard is a sophisticated user of the sodium bromate and had in fact its own employees in the refinery, had been using that exact same batch that week before. Engelhard had a hazard communications program. Nobody at Engelhard has said anything other than that Engelhard itself is a sophisticated corporation and users of chemicals. They use thousands of chemicals, according to the manager, even hazardous chemicals. Because Engelhard is a sophisticated

company and has obligations under OSHA to train its employees and provide the employees with MSDS sheet, which it did, our defendants had no duty to warn those plaintiffs, those employees, of the specific hazards associated with sodium bromate.

THE COURT: All right. I believe they got, what, four causes of action? Negligent, strict liability, implied warranty of merchantability and express warranty?

MS. ROBERTS: Yes.

THE COURT: What cause of action you think a sophisticated user goes to?

MS. ROBERTS: It goes to strict liability and negligence as to the failure to warn claim. To the extent it's failure to warn under strict liability and negligence, it goes to both claims.

And, again, this is discussed in the Coffee case. If you look on -- it's in section five of the opinion, on the last page. The plaintiff argued that in a failure to warn context that the supplier, the bulk supplier defense, sophisticated user defense, would defeat negligence but not strict liability. And the Court specifically said in a failure-to-warn context, that we see no significant distinction between a negligence claim and a strict liability claim.

THE COURT: All right.

MS. ROBERTS: And the case does set forth reasons, policy reasons, why the defendant's suppliers should not have a duty to warn those plaintiffs. And, in part, it's because the defendants, only Engelhard controls the chemical. Once it's delivered, our clients don't go into that plant. We don't go in there, control the operations of Engelhard. Engelhard does. It was difficult to get in there just for purposes of inspecting things for this lawsuit.

The other thing is that the employer, Engelhard, has a federally mandated duty under OSHA to train its own employees and did. So, and the plaintiffs all acknowledge that they got this training in their depositions. And we showed them, like I said, we showed them specifically the computer-based training excerpts where they were shown the oxidizer symbol in training and what that meant. And given the number of employees that Engelhard has and the restrictions that Engelhard imposes on anybody coming into the plant, it's only practical for the employer, Engelhard, to give those warnings to its employees by providing them with MSDS sheets and any other warning or training that is necessary.

MR. JOHNSTON: Your Honor, may I add one or two comments to what Stephanie already said? The plaintiffs seem to take some issue that Engelhard is a sophisticated

user. And that, I think, is a matter of law. They are ten thousand -- they use a thousand different chemicals at that plant, 120 tons of sodium bromate. They know what it is, that type of thing. So, you know, I just throw that out. That's just not real world.

What is the real world is this product was delivered three and a half months before this accident occurred. It admittedly was delivered in March of 2004. It sat there under their control in their warehouse section until it was taken out to the refinery hallway ten days before this accident occurred.

Engelhard had it, they knew what it was, unquestionably. They order sodium bromate to be brought to the refinery hallway to be used in the process. They have an MSDS sheet that describes in minute detail -- if you and I read it, you might not understand it totally and I wouldn't -- but it describes in minute detail all the chemical characteristics, all the dangers associated with it and everything. So Engelhard has all of it.

And I'll be happy to hand it up. I think it's in the exhibits you already have. So Engelhard already has all of this. They are a sophisticated user. And they know that there a shut-down week coming up. They been planning for it for months, and they know it's coming up. And they know that one of the principle things they're going to be

doing is taking out that condensating pipe. And they know they're going to be using an acetylene torch to do it, and know sparks are going to be coming out of that condensate pipe as part of the cutting operation. And they left the stuff there.

Now, no defendant here was told they were going to have a shut-down week. No defendant here was asked, what should we do? No defendant here was asked anything. And yet, they want to point the fingers at us.

We say that Engelhard is a sophisticated user and they clearly they know what this stuff can do. Okay. And they failed to move it out. And that, your Honor, is what this case is all about, has been from the get go. And, you know, they collected their workers comp, that's great. Now they're hunting for a little bit more.

THE COURT: Thank you very much.

MR. WALKER: Your Honor, please?

THE COURT: Yes, sir.

MR. WALKER: Billy Walker for the plaintiff. Your Honor, I suggest to the Court that counsel should become painters, because they would be great with a very broad brush or rolling, they're now painting this picture of this case. The facts, however, are totally determinative of your obligation in ruling upon this case.

The question here at this point in this proceeding is

whether or not there's any material facts which are in dispute which would allow the denial on this motion. I submit to you on behalf of the plaintiffs, there are significant and material, numerous material facts in question and in dispute.

Number one, there's nothing in the record whatsoever to indicate that any employee of Engelhard was ever trained on the hazards associated with this product, sodium bromate. And I repeat that. There's nothing in the record to indicate these horrifically injured people with millions of dollars of medical bills and life changing situations were ever trained on sodium bromate.

THE COURT: Even if that's true, how does that affect the sophisticated user defense? That failure to train would fall on Engelhard, not these people. I mean, even assuming that's correct -- I'm not trying to say it's incorrect or not. Let's assume Engelhard did not train in sodium bromate, you are correct; but how does that affect the defense position on sophisticated user? That's Engelhard's fault, not the delivery people.

MR. WALKER: If you assume, as the defense has assumed, that Engelhard is -- Engelhard is in fact a sophisticated user, which the defense is doing, they've only had a business relationship for nine months, nine months, '03 to '04.

THE COURT: Let me ask you this. How can you -- why don't you think Engelhard would be a sophisticated user of sodium bromate?

MR. WALKER: Because, your Honor, evidence is in the record and I cited in my brief that nobody from Engelhard was ever aware of the explosive nature of sodium bromate. Nobody. In fact, the -- one of the big issues in this case, which I've cited in my brief, is that Engelhard---

THE COURT: That alone doesn't mean they're not a sophisticated user. That falls on Engelhard, doesn't it? Not the supplier.

MR. WALKER: No, sir. The obligation is this. These people have got to comply with federal law because it's in the contract. They have to comply with federal -- federal law says that they have to put a certain label. Those labels have to be clearly visible.

We contend, and the evidence shows -- we have 11 people who will testify there were no labels visible -- the labels were upside down; that the side of the bag with the oxidizer label was upside down and incapable of being seen. We have 11 people who will testify to that.

Now, in addition to that, the two people that saw the bags on the morning, that saw the pallets on the morning, your Honor, Mr. Knox and Mr. Lawing, one of the plaintiffs, both testify, and it's in the record that they

looked at the pallets, did not see any warnings whatsoever. There is nobody for the defense who can get up there and contradict that. But that, in and of itself, is a material question of fact.

THE COURT: But you still haven't answered my question. Assume---

MR. WALKER: I'll answer it.

THE COURT: Assuming you're correct, how do you still get around the fact that Engelhard is not a sophisticated user? And if they are, that's the fault of Engelhard, not the supplier in terms of that defense, those two causes of action. I'm not talking about the warranty, implied warranty of merchantability. But I'm talking about strict liability and negligence. Everything you've said is something Engelhard should have done.

Now, the supplier should have complied with OSHA regulations; and the other regulations for warnings. That may be a factual dispute as to the implied warranty of merchantability and the express warranty. But what does that have to do with negligence and strict liability issue. How can you say that Engelhard is not a sophisticated user when they use 120 tons of sodium bromate a year and they're a chemical company and they deal in it everyday?

MR. WALKER: I'll tell you how.

THE COURT: That's what I want to know, because that's the issue.

MR. WALKER: Up to this point in time this sodium bromate was being delivered in a corrugated drum. Let me finish.

THE COURT: The Chinese wanted to ship it that way?

MR. WALKER: The Chinese didn't want to ship it that way. They said it's too dangerous to do it. But these folks didn't bother to tell my clients that it's too dangerous. That's their onus, not mine.

THE COURT: I understand that. But how does that affect their defense on the user, sophisticated user?

MR. WALKER: Because my, if my client don't know that it's too dangerous to take sodium bromate in plastic bags and it is explosive in plastic bags, it's up to the distributor who has to comply with all these laws, the federal laws, to tell these people, look, this stuff is dangerous as the devil in plastic bags; but it's not dangerous in the corrugated containers, which is what they received up until Matrix, Trinity, and Univar started to ship it to them.

THE COURT: So you think that's the obligation of the supplier to even a sophisticated user? Is that what you're telling me?

MR. WALKER: Yes, sir.

THE COURT: Not the manufacturer, but the supplier?

MR. WALKER: Absolutely. They put it in the chain of commerce.

THE COURT: Do you have any cases that make that distinction.

MR. WALKER: Your Honor, you have to -- if you buy the assumption that my client is a sophisticated user and they have a right to do anything and deliver it anyway they want, regardless of its danger, if my clients simply, because they used sodium bromate, is a sophisticated user, that's a huge assumption.

Now, what the defendants omit to tell you is that they have to investigate the reliability and pass on the dangers of this substance to the plaintiffs. And what they did -- and I'll show this to you -- this is the MSDS sheet we got from Matrix. And the only thing it says in here is this, "Appearance, white. Danger, oxidizer. Contact with any other material may cause fire."

That's it.

THE COURT: So you're telling me now that the supplier has a duty to warn even the sophisticated user of the product they're delivering? Is that what basically you're telling me?

MR. WALKER: Yes, sir. In the contract -- and here is the MSDS sheet, I'll give it to the Court.

THE COURT: I think you referred to that in your brief.

MR. WALKER: I did.

THE COURT: I believe on implied warranty of merchantability, I believe you explained that, didn't you?

MR. WALKER: Yes, sir, I think I did. But what the defense is submitting to you, Judge, is they're allowed to violate the federal law by improperly labeling the product, even if they are a sophisticated user. How is a sophisticated user like Engelhard and their employees going to know the stuff is what it is unless it is properly labeled?

THE COURT: How many chemists does Engelhard employ?

MR. WALKER: I have no idea.

THE COURT: Don't they employ some? Wouldn't they know?

MR. WALKER: I don't know.

THE COURT: I would imagine it's not -- I'm not a chemist, but I would imagine a chemist would pretty well know the properties of sodium bromate.

MR. WALKER: Can I show you this? If you, a chemist, got this MSDS sheet and it said the only danger is this, how does that put a common, reasonable person on notice that it's an explosive material? That's it.

THE COURT: "Contact with other material may cause

fire."

Tell me about this explosive material. What do you have as far as that's concerned, the sodium bromate being explosive? Tell me what you have --

MR. WALKER: We have the facts.

THE COURT: -- factually.

MR. WALKER: We have witnesses.

THE COURT: It caught on fire and it exploded? Tell me what happened.

MR. WALKER: Your Honor, there was a pallet.

THE COURT: I understand.

MR. WALKER: We had some testing done. Hot molten fell on it, it caught on fire, literally explodes, or just the flames exploded into a fire ball up to 23 feet high, where our people were.

THE COURT: What does your expert say about the properties of sodium bromate exploding?

MR. WALKER: Said it's highly incendiary. It will explode under these circumstances. The packaging---

THE COURT: You're making a distinction where you say contact with material may cause fire, you're saying contact with other material may cause explosion?

MR. WALKER: Yes, sir. That's the missing link. If I'm a sophisticated user and I have the MSDS sheet that was given to me by the people that supplied it, contact

with other material may cause fire, contact with any material, with this table here, certain material will cause fire.

THE COURT: What material you talking about will cause a fire?

MR. WALKER: Here is where the rubber meets the road. The oxidizer, this sodium bromate, Judge, in and of itself it's piled up in a pile, is not dangerous nearly as much as it would be if it's put in plastic bags, which are inherently flammable and shrink wrapped in plastic. So once the slag hits that the sodium bromate, it's not going to explode. The sodium bromate does not explode until the combustible material, i.e. the plastic which these people put it in, is touched off by the hot slag. So that's where we are here with this case.

THE COURT: Will the sodium bromate explode without the plastic?

MR. WALKER: No, sir.

THE COURT: Will it burn?

MR. WALKER: I don't know what it will do, but it's used as a combustible.

THE COURT: What's the combustible temperature of sodium bromate?

MR. WALKER: Sir?

THE COURT: What's the combustible temperature of

sodium bromate?

MR. WALKER: If you see the flashpoint on the MSDS sheet, it puts "not applicable."

MR. OUTTEN: Just for clarification, Mr. Walker is telling this court if it were not for the plastic, there would not have been a fire?

THE COURT: That's what I was trying to get to.

MR. OUTTEN: Surely not, your Honor.

MR. FOSTER: The point is you have to have a fuel in there. And the plastic was the fuel. Sodium bromate, when it decomposes, all it's doing is releasing huge amounts of oxygen.

THE COURT: You telling me if I have a pile of sodium bromate sitting on my desk and I put a blowtorch on it, it's not going to ignite?

MR. FOSTER: Which these people did.

THE COURT: Would it ignite?

MS. ROBERTS: It will not ignite. But if you put on something combustible, if you put on it on this paper, a pile of it and you put a torch down to the paper, you have to have that triangle. You have to have the fuel, which is the paper, you have to have an ignition source, the torch. And then you throw this huge amount of oxygen on it and you get this highly exothermic reaction. And in a second or two it's like a flash fire. In this case it was

just white hot heat, as described by chemical engineer Jimmy Norris, who was there. He's a four-year chemical engineer and he testified he had no idea it would do that.

THE COURT: Your position is that the plastic and the paper made it more combustible than it would have been otherwise?

MR. FOSTER: A lot more. And further, Richard Henderson is our chemist from Florence, expert. He says that the plastic provides a very low melting point, like 300 degrees Fahrenheit, so it's easy to get to the bromate when the ignition hits it. And, secondly, it's got a lot of energy per gram. It's got ten thousand calories per gram of combustible, which is a lot of fuel.

THE COURT: There again, shouldn't Engelhard have known that as a sophisticated user?

MR. FOSTER: They didn't know that. They weren't advised by the MSDS sheet.

THE COURT: But they use this stuff, they use it every day. They have chemists that know the properties of it.

MR. FOSTER: There's no record evidence of that. We have to go by what we have in the record. And if I may address just one more point and I'll hand it back to Billy. This Coffee case, if you look at headnote number five, it says a number of factors may be considered before

the defense may be invoked. Now, this was a bulk supplier case, talking about essentially the same sophisticated user. And it sets forth six factors that the Court's supposed to consider before they get to invoke the defense.

The first one says, the dangerous condition of the product. That rates pretty high as a factor. The greater the danger of the product, the more due care has to be used in order to deal with that and advise people.

Number two, the purpose for which the product is used.

Number three, the form of any warnings which were given. Well, we claim those were defective. Those were in violation of federal law.

THE COURT: What was the third one?

MR. FOSTER: The form of any warnings given. That's one factor to consider as to whether you're going to allow that defense to go or whether the jury can decide whether it should prevail. And that form of warning given is on-bag warnings.

This Coffee case dealt with railroad cars full of stuff. We have something on product warnings that we're dealing with here. They already put them on there, but they just weren't right.

Number four, and this is important. We've been

talking about sophisticated user with respect to the knowledge of the chemists and all that. The number four factor though is the reliability of Engelhard as a conduit of necessary information about the product and its dangers. How reliable was Engelhard at that point in time in passing the information along to its employees?

I asked every corporate representative under oath, because I knew about this defense. And I asked them, "What questions did they ask Engelhard?

I got Charles Davis, the president of Trinity; Angela Granados, the chief of importation of Matrix. I've got Karen Messana, and I've got Tim Griffin. All four of those people didn't ask Engelhard squat about the reliability of Engelhard to pass along the information. And that's in the record.

Number five, the magnitude of the risk involved. Well, Charles Davis at Trinity, the president, testified that he was aware that the highest risk associated with the sodium bromate was its explosive properties. It doesn't get much more dangerous than that.

And, number six factor, the burden's imposed on the supplier by requiring that it directly warn all users. What we're talking about here is putting the warning on the bag where they'll see it. What is the burden? It's zero because they've already got to do it under federal

OSHA and DOT and IMDG law. It's no extra burden. They have this Exhibit E118, they've got a contractual duty, at least Univar does, to provide this information on the package.

So that's my answer to your question.

THE COURT: Thank you very much.

MR. WALKER: Maybe Robin needs to argue this.

THE COURT: Go ahead, Mr. Walker.

MR. WALKER: Can I point a few things out?

THE COURT: Yes, sir --

MR. WALKER: -- I think is telling? Univar's primary witness, Mr. Munson, was asked this question in his deposition: "Have you ever inquired as to the way Engelhard stores the sodium bromate, handles the sodium bromate, or uses the sodium bromate?

And the answer was, "My inquiries to Engelhard regarding sodium bromate pretty much be limited to and focused on how much are you using; when do you need it; and is our price good? That's really the core of my job. So, as far as those other details, I can't say that I would focus on those. No, sir."

"So, the answer would be, no, you didn't inquire as to those matters?"

"Not to my recollection."

Then you have Granados, from Matrix, who says, "You

have no idea of what Engelhard's ability to deal with the hazard associated with sodium bromate in storage handling and use, do you?"

The answer, "No, sir."

So if they were to rely on Coffee, they can't take the part from Coffee they like and ignore the rest of Coffee. Coffee's got six, as Robin so eloquently pointed out, a six-prong test. And they fail in application of Coffee in many of the ingredients of Coffee if they want to rely on it. Which you have taken, if you will, your Honor, the defense -- these are sophisticated users because they use so much sodium bromate.

But the test is not whether or not they use it, the question is whether they've met the six-prong test of the Coffee case which they rely on, which by the way is an unpublished opinion of the Fourth Circuit.

I would like to add a couple other things before I sit down. Is the derth of training, the lack of training, even if my clients are sophisticated users, these folks got up got here and told you they were trained on hazardous materials. There's no question about it. There's nothing in the evidence or record to indicate my clients were ever trained on the use of sodium bromate and the inherent dangers therewith.

In fact, if they would have gone and picked up that

MSDS sheet, which I just submitted to you. There's no evidence in that MSDS sheet submitted by Matrix to my client, to Engelhard, that it was explosive, which was the primary danger, which is what happened in this case. And if you'll notice in the Coffee case, the form of any warnings given, well the contract here, Judge, is critical, because Univar's with Engelhard says you, Mr. Univar, have got to comply with OSHA and DOT regulations and make sure they're labeled properly. I'm paraphrasing but that's what's in the record. You got to do it. It's not us. We're going to put the onus of labeling this stuff on you.

We have the person who delivered it, who accepted it from Univar, testifying he never saw any oxidizer labels on the material when it came in. The notion that these people who are suppling essentially a bomb without a fuse can come in just dump it on the floor at Engelhard and walk away with no with impunity is violative of --

THE COURT: I don't think they dumped it on the floor. I'm sure they dumped it on the loading ramp, and it was taken on pallets to wherever they were. So I think that's an exaggeration. Okay. I'll take it as exaggeration.

MR. WALKER: I'm giving exaggeration. That's my job.

THE COURT: All right. I understand.

MR. WALKER: But just to say simply -- "hey, guys, these guys use a lot of"---

THE COURT: I assume these planks in you all's briefs, these pallets, have them stacked, where you could get a hoist under it, lift it up. Plank in your brief means the same thing as a pallet?

MR. OUTTEN: Sir?

THE COURT: A plank in your brief mean the same thing as pallet?

MR. OUTTEN: I don't think -- I don't know we used that term.

THE COURT: Used pallet occasionally and you also used planks. To me there's a difference between a plank and a pallet. I'm just curious, what were they using?

MR. OUTTEN: Pallets. The bromate came in on pallets, your Honor.

THE COURT: Okay. Because you can't get a hoist under a plank. It's sort of hard.

MR. OUTTEN: They came in on pallets.

THE COURT: Okay.

MR. WALKER: Let me---

THE COURT: I guess you can get under it; but it would topple it over.

MR. WALKER: Can I point out a couple of things in closing? If you find that the they complied with the

six-prong test of Coffee, upon which they rely, which we submitted that does not absolve the defendants of established duties by law and contract. The terms and conditions which are located in my brief as Exhibit 6, which are appended to the -- appended to the brief, says that vendor, that's Univar, warrants that it is and will be in compliance with all applicable provisions of federal, state, and local laws, OSHA being a primary.

And under safety, this is a duty imposed by contract, by Engelhard on Univar. And it says "safety." If the goods provided may involve any risk of injury or death to persons or damage to property, defendant shall provide buyer with a written description of the nature and extent of such risk, including a description of any precautions that should be taken to minimize the risk of injury or damage occurring and to minimize the risk of such events occurring.

So if you want to -- if you want to go to the next level, even if my clients are a sophisticated user, we have evidence in the record, page 7 of my brief, which is a quote from Jimmy Norris, they didn't have any clue about explosive nature.

THE COURT: I don't know how you can you stand there and say they're not a sophisticated user. They may not be able to take advantage of that legal defense and meet all

the elements; I don't see how you can stand there and legitimately argue they're not a sophisticated user.

As was pointed out earlier, that you know you may not have met it as Robin, Mr. Foster, just pointed out very eloquently, it may not meet the elements of that defense, or maybe I'm using, interchanging the words.

MR. WALKER: I think the layman term sophisticated user, I would concede if the layman would say sophisticated user, most probably---

THE COURT: I don't know how you can say they aren't.

MR. WALKER: I don't think I can say that with a straight face, but legally.

THE COURT: Whether they meet the elements of the defense is another issue.

MR. WALKER: That is the issue, your Honor. That is what we argued throughout the brief, and I'm not going to sit here and read the brief to you. I'm not going to insult your intelligence. If you read the brief, read the citations to the record we have attached to the brief, you will see that there's significant and numerous material questions of fact as to whether or not our client meets the definitions imposed by the courts as to a sophisticated user and the motion must fail as a consequence.

THE COURT: You have anything else, other than

unpublished Fourth Circuit opinion that lays out these elements?

MR. WALKER: I can say this, the restatement section 388---

THE COURT: Is there anything else, other than this unpublished opinion that lays out the six elements?

MR. WALKER: Yes, sir. If I can speak to that, there is a case in South Carolina.

THE COURT: Is that the Sizemore case?

MR. WALKER: It's the---

THE COURT: Bragg versus Hi-Ranger, Inc. That's South Carolina Court of Appeals, '95 case.

MR. WALKER: In the Coffee case the court ruled---

THE COURT: Wasn't the Coffee Fourth Circuit unpublished? My question, do you have you have a case that is published that lays out these six elements?

MR. WALKER: I don't know, but in the Coffee case the Court says this.

THE COURT: I know you -- I've been told what the Coffee case says.

MR. WALKER: One other issue about Coffee I didn't say. Coffee case says South Carolina has adopted restatement second of torts 388.

THE COURT: Restatement of torts, okay, 388.

MR. WALKER: Section 388. And I put that on Page 9

and 10. And it goes into the duties beyond which defendant, beyond sophisticated user defense; if they, in fact are, it says if the defendant fails to exercise reasonable care to inform of dangerous conditions or of the facts which make it likely to be dangerous -- and I'll let you read that without me having to read it to you.

THE COURT: Restatement of torts, 388.

MR. WALKER: Yes, sir. On page nine and ten of my brief.

THE COURT: Okay. Thank you very much. Appreciate it.

MR. FOSTER: I have a printout of the whole thing, the whole 388.

THE COURT: Yeah, I'd love to see it if you got it. You been standing up for two minutes. What do you want to say? Let me hear from you.

MR. BRANDT: I want to just clarify a few things about labels and markings and briefly talk about -- I understand what you are talking about, a sophisticated user may not be able to use the defense. We don't think they can do that because they don't satisfy the requirements of Coffee. But basically what we do is go back through the regulations. I mean the contract certainly with Univar, Univar specifically contracted with Engelhard to market in accordance with DOT and OSHA to

meet to have their marks and labels in compliance with DOT and OSHA.

Now, clearly throughout and in some of these other motions we'll get to that, basically puts it upon the employer that you can't remove any labels, any warnings or anything. You can add to it but you can't take it away. And all that, the stuff that was involved in this, came in; and it wasn't just in a bag. They put it in what's called an overpack.

THE COURT: A what?

MR. BRANDT: An overpack. That's where you put the bags on pallets and then you wrap cellophane or shrink wrap around it. And then we get to a question in this case as to whether or not---

THE COURT: They had the plastic around the pallets?

MR. BRANDT: Yeah, so it becomes one unit. And it's clearly defined DOT, all of them called it an overpack. And in the industry it's called an overpack. There is an issue as to the size of that overpack. And, of course, requirements for labeling, and again the label are these things here. Okay. And the requirements vary as far as DOT goes. And if you go back to even IMDG, and IMDG really is what covers the goods and ships.

THE COURT: IMDG?

MR. BRANDT: International Maritime Dangerous Goods

Code. It covers the goods and applies while the goods are in transit over the seas. When it comes to port and it starts traveling over land, then our DOT regs apply. When it gets to the destination, to the employer, then OSHA picks it up.

Now, OSHA says that you can't remove any of those labels and it has provisions in there specifically addressing the chemical manufacturer, the importers, and the distributors; and it says they must mark their goods. And the purpose of OSHA is to protect the employees. Before you can know what you've got on hand, you have to know what it is. Now an MSDS sheet -- and there is plenty of evidence, plenty of testimony, and it's authoritative that these things here do not stand, the MSDS sheet, does not stand alone. It is to be used in conjunction with labels.

The first thing you have to know is that can hurt me. Then you have to have a way to the check the MSDS. And you can get it through a UN number, which is universally recognized throughout everywhere. Or you can get a product number. Once it got to Engelhard, if you went in at Engelhard, they could have used the Engelhard product number, which was on the pictures of the bags that they have taken after this fire, does have the product, I think 1616. And you could have gotten into MSDS sheet first.

Now, the Hazcom training that the people that's involved, our clients, or Lawing, my client, Lawing and Black, and of course Martin, got -- they were taught what oxidizers were. They were not taught that it had this propensity to put a fire ball in the air. It went up about 28 feet.

THE COURT: They were taught what now? What were they taught?

MR. BRANDT: Excuse me?

THE COURT: You said they were taught what?

MR. BRANDT: Were not taught, they were taught what oxidizers were. They were taught to recognize this symbol here as being something that was dangerous and to be cautious about.

THE COURT: Dangerous to what?

MR. BRANDT: For fire because you got the flame. It can burn.

THE COURT: That's all they were told?

MR. BRANDT: But they could, they were not told the thing would go up. There was nothing in the MSDS sheet that says this thing will shoot a fireball in the air; in this case probably 28 feet because the ceiling stopped it.

Jimmy Norris is the chemical engineer at Engelhard. And in his deposition, basically with tears in his eyes, said, "I didn't realize it would do that. I'm a chemical

engineer. I didn't know it would do that."

Well if they would have seen this label here and it was also -- these other arguments you'll hear---

THE COURT: What do the regs say that label imparts? What does it say? Do these IMDG---

MR. BRANDT: IMDG, International Maritime Dangerous Goods.

THE COURT: What does that tell people?

MR. BRANDT: That tells people that it burns.

THE COURT: That's all it tells them?

MR. BRANDT: About all. There's supposed to be an MSDS sheet that travels with the goods all the way across the water through DOT channels.

THE COURT: Then you go MSDS sheets.

MR. BRANDT: MSDS, yes.

THE COURT: This is as bad as the military with all these abbreviations. But go ahead.

MR. BRANDT: I apologize. I assume, being a Citadel background, you---

THE COURT: I don't know anything about IMDG.

MR. BRANDT: Material Safety Data Sheet is what we will be calling MSDS. This marking is supposed to be on the bag; and then again if you get the overpack being a certain size, then you come into this is supposed to be on outside of the overpack. This can be, the size that's

supposed to be on the bags themselves. And if you can see it through the shrink wrap, you can see one through the shrink wrap, that they say that's sufficient if it's less than 64 cubic feet. If 64 cubic feet or better, then you have to have one this size, it's called a placard. And it has to be on two opposite sides of the pallet.

But this on the bag, you're supposed to have this next to where it says sodium bromate and the UN number so that you don't have to go touch it. If you see it over there and say, hey, that can hurt me; then you can go and look, see sodium bromate and go check MSDS.

But this is what is the most important part, and I included in one of my briefs an article written by Paul Singh, which is one of their experts. And he talks about the standards in the industry and how to mark things. Now this Hazcom trainee these people got at Engelhard taught them how to recognize these markings as well as National Fire Prevention Association markings, say things that will hurt them; talk about the ANSI standard and how you're supposed to have words connected with it like caution, danger, warning, to bring the attention to it. And that all brings it together.

But in this case if you go to the restatement that's section N, it says part of that comment is quoted I think in the brief here; but let me just to satisfy me, read it

for the record.

"Since the care in which must be taken always increases with the danger involved, it may be reasonable to require those who supply through others chattels which if ignorantly used involve grave risk of serious harm to those who use them and those in the vicinity of their use to take precautions to bring the information home to the users of such chattels, which it would be unreasonable to demand were the chattels of a less dangerous character."

And this was a very dangerous product. It didn't have adequate warnings. That's the whole extent. So I submit to you based upon Coffee case and the facts as you set them up and as you analyze this thing to see what should have been there, what did they have a legal duty to do? To warn, to tell Engelhard even, what it is and what the dangers are; and you look at the contract provisions and all, they can't qualify to use that defense against our claims.

Naturally, as always, I can go on and on and on discussing things about the sophisticated user defense; but certainly in this case I don't think, again, that they can avail themselves or should be entitled to avail themselves of that. Because if you do that, then the sophisticated user defense, as to Univar anyway, would allow them to say, it doesn't matter what the contract

says. We don't have to do it. And they contracted on the face of the purchase order. They said they'd mark it in compliance with DOT and OSHA.

And then over on the back of those, that's 118 and 119, is the exhibits that in depositions, we've attached them throughout these briefs. On the back of it, it flat says that they will comply, that the vendor will comply with all federal, state, and local laws and rules and regulations promulgated thereon, including not limiting -- words to that effect, it doesn't included but not limited to -- but it specifically says OSHA. They contracted to do that.

Now, they come along and they say we avail ourselves, at least Univar, of a sophisticated user defense to abrogate our contract, our clause in the contract? They were paid to do that marking for Engelhard for two reasons. Number one, so Engelhard wouldn't have to have a person there to check it and mark it, remark it when they got it; and it would be in compliance with OSHA for the protection of their employees. And the sophisticated user defense, invoke it as to Univar.

Now, as to Matrix and Trinity, again, we say they made no inquiry whatsoever, they weren't in privity with us at all, Engelhard at all. The only contact I know that Engelhard had with the purchase of this stuff was with

Univar. But Matrix and Trinity---

THE COURT: Who made the decision not to ship it in corrugated boxes or containers?

MR. BRANDT: It started coming in in 50 kilogram drums, fiberboard drums with metal tops. And that was, workers comp I guess, didn't like that because they had people representatively lifting, putting it in these reactors.

They wanted it in something lighter and they asked if it could be in 25 kilogram bags. There was some discussion and we have some of that where the Chinese questioned the safety of it.

THE COURT: Chinese wanted to ship it in corrugated barrels?

MR. BRANDT: Somewhere back through the shipping chains they questioned whether or not should be done. Emails going back and forth. It finally comes out, they agree to put it in these 25 kilogram bags. And it had been recently changed to that. It had been recently changed to those bags before this accident and I think under that PO---

THE COURT: You may not know this. But was it the Chinese's position it was just easier to ship to preserve the product, or were they worried about the safety of it or both? Or do you know?

MR. BRANDT: You depend on Chinese to get it right, rolling the dice.

THE COURT: They got the Olympics right.

MR. BRANDT: But anyway, they ended up and put it in the bag. And you'll hear us argue later because after this fire, shortly after this fire Engelhard said, "We didn't realize it would do all that. Get it back in the drums."

THE COURT: Let me ask you one more question then I'll leave you alone. Your position is this became a highly explosive product because of the wrapping and the packaging; is that correct?

MR. BRANDT: (Nods head up and down.)

THE COURT: Not the product itself? I know the product itself is flammable.

MR. BRANDT: Yes. You can put it in an oven and bake that stuff and it won't fire. You have to have the flame, you have to have fuel.

MR. FOSTER: I'll hand you the 388.

THE COURT: Yes, sir, please. Mr. Foster, anything you'd like to say?

MR. FOSTER: Yeah, I would. Henderson characterized this pallet like a Dagwood sandwich. You have a layer of combustible material, you have the sodium bromate below it in the bag, another layer of combustible plastic, and then

on down the layers in the pallet.

THE COURT: The plastic is all through the pallet, the bags?

MR. FOSTER: It's like lasagne. You have a layer of this strong oxidizer, lots of air, you have the plastic, lots of energy per gram. And it's a disaster looking for an ignition source.

THE COURT: Okay. Miss Roberts, you want to or Mr. Johnston want to say anything briefly in rebuttal?

MR. JOHNSTON: I'd like to say something briefly, then turn it over to Miss Roberts.

THE COURT: Okay.

MR. JOHNSTON: Your Honor, I'm not sure what material safety data-sheet they handed up to you, but if it's Matrix material data safety sheet, turn to the second page it says, "unusual hazard."

THE COURT: Hang on a second. This is Matrix.

MR. JOHNSTON: I'm looking at the one Univar had. It should say OSHA --

THE COURT: Matrix Gut Sourcing? Looks like Gut Sourcing; but I guess it does say Outsourcing.

MR. JOHNSTON: Page two, look at "Unusual hazards: During fire highly toxic gases may be generated by thermal decomposition. Oxidizers greatly increase the burning rate of combustible materials. Vapors may be heavier than

air, they can spread along the ground and collect in lower areas. May accelerate burning involved in a fire. May explode. Volatile. Exposure to fire heat by the material may result in explosion."

This is out of the OSHA file and this is the one out of Engelhard's own files. They had another one there, too. And I'm going to hand it up to the Court. This is at OSHA 32. This is what OSHA got from them. And it says, "Unusual fire and explosion hazard. Strong oxidizing nature. Noncombustible but when involved in a fire it liberates oxygen which increases the rate of burning of the combustible materials involved and can cause explosion.

THE COURT: This second one is what?

MR. JOHNSTON: That came from OSHA files and OSHA got it from Engelhard, your Honor, is the testimony.

THE COURT: All right.

MR. JOHNSTON: Now, so I guess, I think it's clearly an explosion you know, this material was well described and did what it does when you put it with any combustible material.

THE COURT: Want to say the plastic initiated it?

MR. JOHNSTON: Sure. You have to have some combustible there. Got hot slag there, and that's a combustible, molten lead, molten steel is combustible.

But you're going to have to have some combustible material before this reaction can happen. No question about that.

They complained about the bags. As we pointed out, and I think they concede and certainly their expert has conceded, these bags are what are called 5H3 bags, number one. Number two, that is a recognized type of packaging for sodium bromate by the UN by IMDG and by the Department of Transportation. They all say that. That's unquestioned.

Number three, on the bags -- the client, Engelhard, wanted it in bags. They wanted it in smaller quantities for the back injuries and they wanted it in bags for easier disposal. This is the sophisticated user. They asked for it. They controlled the workplace. They control where it's put. They control when it's put there, and they control whether they're going to let welders weld over the top of it. It's not any of these three people.

Your Honor, about the only facet of this case that my clients and Sam's clients part company is on the "express warranty" claim which they have against him and not us. I represent Trinity and Matrix.

THE COURT: You didn't have a contract with them?

MR. JOHNSTON: I didn't have a contract with them. The order that came to us was a verbal order. We -- the order that went from Trinity to Matrix was a verbal order.

There was an invoice to the Chinese and I guess emails.

THE COURT: Mr. Johnston, let me ask you this. I understand you're going to part ways with them and I understand why. Mr. Foster, when he was talking about the Coffee case, enumerated number four on the factors for the Court to consider, liability of Engelhard as to the conduit of information to others.

What's your position on that? Apparently they had a chemist at Engelhard who said it was explosive, and he didn't realize it would explode like that with the plastic combustible.

MR. JOHNSTON: He read his MSDS, would have seen exactly.

THE COURT: It says may.

MR. JOHNSTON: I understand.

THE COURT: But that make them a non-reliable conduit of the information?

MR. JOHNSTON: That's not something we know. You have to understand, their chemist was talking, he realized that it would do exactly what it says in the MSDS. He was talking about the---

THE COURT: My question, doesn't that create a material issue of fact whether Engelhard was the proper conduit for the information from the product to the users and the public? That's the question. Because if it is,

then you're not entitled to your summary judgment motion. That's the question.

MR. JOHNSTON: I think I understand the question, I will try, the best I know how, to answer it. Engelhard is, I think we agree, is a "sophisticated" user.

THE COURT: For use of that term, yeah. Now, whether they're entitled to the defense, that's a separate issue. I thought we put that to bed.

MR. JOHNSTON: And does the distributor, and that's what we are, not the manufacturer, just pass -- we're passing paperwork back and forth. Does the distributor have an obligation to go to Engelhard and say, hey, fellows do you know what will happen to this stuff if you drop hot slag on it? I don't think they have that obligation.

I think that, you know, I cannot anticipate every possible thing that could go wrong. What I do know in the general knowledge of this company which is, you know -- you and I wouldn't understand everything they do, and I don't think even if they told us. In that regard they're a lot more sophisticated than either of us. But the sophisticated user does not require that the drug manufacturer makes sure the pharmacist knows what's the terms mean. The sophisticated user defense doesn't require that the drug company check out the doctor and

make sure he knows this stuff.

What it says is simple, passing on something to someone who knows, you know, is a "sophisticated user," I don't have to go give them a pop quiz. And think if they'd let me, you know, what do you know about this chemical, this chemical, this---

THE COURT: As much trouble as you had getting certain information about the training process, they probably wouldn't have talked to you. That's long ago.

MR. JOHNSTON: Anyway that's our position on that. I they think it's stated for record, we couldn't possibly sit up there and describe every possible eventuality that could occur, every possible, of the one thousand chemicals they have.

THE COURT: You think the material safety data sheet met your obligation?

MR. JOHNSTON: I think it did. If you look up oxidizer, I think we're there.

THE COURT: Okay. Thank you, Mr. Johnson.

MR. JOHNSTON: Thank you. Miss Roberts knows a lot more about the law than I do. I'll let her address some of those things. Probably knows more about the facts, too.

THE COURT: Miss Roberts, let me hear you on this contract issue.

MS. ROBERTS: With all due respect I believe the contract issue, the breach of express warranty, breach of implied warranty, that's the subject of separate motions. And it's confusing for us to argue them all together.

THE COURT: I understand it's part of it. Part of their argument, at least Mr. Brandt's argument, is that you tried to negate your obligations with the regulations.

MS. ROBERTS: Sure.

MR. OUTTEN: Look, Judge, they really didn't tell you the whole story. Here's what happened. They sent us a purchase order, the purchase order didn't say that. It said, you'll comply with all OSHA and DOT regs. It did say that. We sent an invoice back. And our invoice coming back said we disclaim all express and implied warranties. They didn't tell you that. But that's what our invoice said. We think under UCC we don't have any express or implied warranties under that.

Now, but there are a couple of other significant defenses that we have. I understand that this product was delivered on February 16, 2004. It comes in a truck, goes to the back of the Engelhard facility. Okay? And Engelhard, Judge, has the right to reject the goods if they don't conform to OSHA and if they don't conform to the DOT.

And Engelhard has written policies that we went into

in detail where the Engelhard employees have systems and procedures set up to examine and inspect these shipments when they come in. They have something called a nonconforming data base. That means if goods come in and they don't have the DOT warnings or don't have the IMDG labels, they're not labeled properly, they put them in the nonconforming data base.

We went to the trouble of deposing the lady who knows the most about the nonconforming data base. And we said, did any sodium bromate come in that was not properly labeled such that it would be put in the nonconforming data base?

She said, "no, it did not."

Well, here's what happened. The sodium bromate comes into the Engelhard facility. It is inspected by Engelhard employees. One thing they look for are the proper DOT labels and markings. After being satisfied that those labels and markings are there, they accept them in the facility and put them in a place in the warehouse where oxidizers are stored.

The point of my telling you all this, Judge, is not just to suggest to you that the proper labels and markings are on there, because they were; but it is to say that this contract was completed in 2004. So, we're now in 2008 and they're trying to resurrect a claim based upon

that contract. That contract is completed. Engelhard never complained that the goods didn't comply with DOT and OSHA. Engelhard, by their acceptance, agreed that this sodium bromate complied with DOT and with OSHA. They used the product for a while before this tragic accident happened.

So, Mr. Brandt and Mr. Foster suggest to you with such certainty that there was a contract and they are respectfully wrong about that. They're wrong because our invoice disclaimed the warranty. They're wrong because the contract was completed. They're also wrong because the contract was between Engelhard and Univar. And their clients are not third-party beneficiaries of that contract.

That's our position. Your Honor may rule differently down the road. The reason I wanted to address this issue is I don't want to get too far in this hearing with your Honor accepting as a fact what these gentlemen say, there's a contract. We believe we have lots of defenses to that contract.

THE COURT: I understand.

MR. OUTTEN: And, your Honor, remember the procedural posture we find ourselves in. At the status conference before you Mr. Foster said I want to amend my complaint and add a claim for express warranty. I believe your

Honor said to me, do you object, and I believe my response was something along the lines, I don't think an objection would do any good at this point. Sort of an agreement he probably had a right to amend under our rules at that time, the way I remember it at least. That's certainly not an agreement that he has a claim for express warranty.

So we have several different defenses to this express warranty claim. Because it was made so late, we're probably going to have to address it at summary judgment before the trial begins. But I wanted to address those issues because I don't want to get to after lunch and have your Honor accepting as a fact we gave them a contract to comply with OSHA and DOT. We disagree with that.

We don't think that we have -- that there is such a contract. Even if there were such a contract, the statutes run and these plaintiffs aren't third-party beneficiaries. Now, if I could, I'd like to give the floor back to Ms. Roberts.

THE COURT: Thank you, Mr. Outten. Ms. Roberts, I'll be glad to hear you.

MR. WALKER: Judge, can I just address what he said?

THE COURT: When we get to that issue, you can address it. Make yourself a note. Okay?

Go ahead, Ms. Roberts, I'll be glad to hear you on your rebuttal as to sophisticated user defense.

MS. ROBERTS: Certainly. Just a few follow-up points I want to make in response to plaintiffs' arguments. First of all, your Honor asked about a reported case that lists the factors. The Coffee case is actually citing, it is actually citing a case called Goodbar versus Whitehead Brothers, 591 F. Sup. 552, Western District of Virginia, a 1974 case. That is -- that case sets out these factors. And another thing that's significant is---

THE COURT: What did the -- let me find the case. The Bragg case here in South Carolina, it just referred to---

MS. ROBERTS: The Bragg case discussing the sophisticated user defense, but it also does --

THE COURT: Just refers to restatement?

MS. ROBERTS: It does. Refers to the restatement section of torts, section 388, which is exactly the same section of the restatement as the Coffee case discusses.

And I just wanted to provide your Honor with the original case in which the factors were listed. Now, these are factors that that may be considered before the supplier defense can be invoked. It doesn't say these are elements of the sophisticated user defense. These are just factors for the Court to consider.

And so, one of the things we would like this Court to consider is that there's no dispute whatsoever that the

defendants provided Engelhard with the material safety data sheet for sodium bromate, no dispute that that was done; and that there also should be no dispute that the MSDS that was provided. Says on the first page, "Danger, oxidizer."

On the second page it does warn of the possibility of explosion. And, of course it doesn't say may explode if slag comes in contact with it because slag is never supposed to come in contact. No flame is supposed to come in contact with this oxidizer. It tells you right here how to store, how to store the oxidizer. It says to store it in a cool, dry place away from heat and flames, away from combustibles.

Engelhard knew the oxidizer was dangerous because Engelhard has a section in its warehouse where the oxidizers are kept. They were kept all by themselves in a part of the warehouse for oxidizers, had a huge sign over it that said "Danger, Oxidizers."

THE COURT: That's in the pictures?

MS. ROBERTS: Yes. It's in the pictures that we provided for you.

We also wanted to bring your attention to some deposition testimony that we have attached to our motion on the sophisticated user defense. One of the people we deposed was a Mr. Tunstall, who was here today, and he was

the 30(b)6, one of the 30(b)6's representatives of Engelhard. We asked him about Engelhard's use of sodium bromate in manufacturing. And he was asked to read his answer, I suppose an answer to interrogatories.

And he said, "Sodium bromate is an oxidizer, which means it is used to rust or break down metals in reaction."

"In June of '04 did Engelhard use sodium bromate in its manufacturing process?"

"Yes."

And he was asked also, even in August 30 of 2006, when his deposition was taken, "Do you still use sodium bromate for your manufacturing process?"

Yes, they do. He knew what it was used for and where it was used.

We didn't talk to anybody at Engelhard who did not know that was an oxidizer. We also specifically asked the plaintiffs about their training. Because the training is an obligation imposed by OSHA on Engelhard under OSHA.

We asked Scott Lawing, and again this is attached to our motion as an Exhibit, we asked him, "Who taught the Hazmat courses?"

He said they were CBT, computer-based training classes, to the best of my knowledge.

Said, "Now, we've been told, Mr. Lawing, there were

videos that you would see, short little videos about different safety issues. Do you remember seeing those?"

"Yes, sir."

"Do you remember taking tests on computer-based training about different topics?"

"Yes, sir."

"And those would include Hasmat training?"

"Yes, sir."

"Fire safety training" --

"Yes, sir."

-- "and things like that?"

"Yes, sir."

"Would be information in those Hasmat courses about oxidizers, like sodium bromate, right?"

"Yes, sir."

"And there would be information in the training courses how to use a cutting torch?"

He said, no, he didn't think there was.

We asked him, "What -- do you know what MSDS is?

"Yes, sir."

"Were you trained in these Hazmat courses, safety training courses, in how to read an MSDS?"

"We were trained where they were."

We asked Mr. Black also about going to an MSDS, had he ever done that. And Mr. Black told us in his

deposition that he had in fact for another job on a prior occasion had to go and look up the MSDS to read what the material was, what it would do so that they would know how to handle it with a project, a maintenance project he was working on.

THE COURT: What about their argument, the packaging, I think it was referred to as the shrink wrap, the overpack, made it much more dangerous to deal with from a flammability or explosion standpoint? And that doesn't address warning labels at all. All these regs and everything address labels, but nobody addressed the packaging. I assume they have somebody that said it was in the industry the wrong way to package. I don't know.

MR. WALKER: We do, your Honor.

THE COURT: I have to assume that from their argument. How does that fit into your argument?

MS. ROBERTS: The plaintiffs' expert on packaging, Dr. Cooksey, admitted in her deposition that the packages, the bags themselves, the individual bags were compliant with DOT and IMDG regulations. Then these bags were shrink wrapped onto a pallet for transportation.

THE COURT: Right.

MS. ROBERTS: She also said that the method of packaging the bag on pallets with shrink wrap was acceptable.

MR. JOHNSTON: Let me read exactly what she said.

"Question: It is appropriate for the manufacturer exporter, distributor, importer, consignor, consignee, whatever you want to call them, all those people?"

"Answer: Yeah."

"Question: Put sodium bromate, solid sodium bromate in a 5H3 bag for shipment; is that correct?"

"Answer: Is it appropriate? Let me think. Yes. It meets the regulations."

"Question: Okay."

"Answer: Yes."

"Question: And I think you earlier testified" -- this is their expert -- "that the regulations are the standards against which you measure the appropriateness of any product in any particular packaging?"

"Answer: Right."

THE COURT: That's the packaging of the bromide itself, not the packaging of the bromide as a group?

MR. JOHNSTON: You talking about stacking on top of each other?

THE COURT: Not the overpacking and shrink wrap as referred to earlier; is that right? That doesn't address that at all?

MR. JOHNSTON: No. No, I was talking about a bag.

THE COURT: Yeah, that's not my question. My

question, I believe the plaintiffs' position is because of the plastic that was wrapped in these bags, in between the bags on this pallet, made it extremely explosive because of the flammability of the plastic. I have to assume the expert testified that's not the way you should package them, I assume from what they said. I don't know what she said. I haven't read the deposition. I'm just trying to ask the question, find out what your positions are.

MS. ROBERTS: We asked Dr. Cooksey whether or not it was appropriate to shrink wrap the pallet for transportation purposes, which she said was acceptable.

THE COURT: For transportation purposes, but to leave it on after it gets there?

MS. ROBERTS: The accident didn't happen during transportation.

THE COURT: I understand.

MS. ROBERTS: The accident happened when it was within the storage, it was in the control and custody of Engelhard, not our clients.

THE COURT: Okay. Then my ultimate question, going back to these factors, I understand they're not mandatory on the Court; but the factors as you all laid out, that wrapping, doesn't it increase the magnitude of the risk, which is number five? And the second question is reliability of Engelhard -- address that about the

magnitude of the risk, i.e. the shipping packaging. Doesn't that increase it?

MS. ROBERTS: Well, the shrink wrap increasing the risk of a fire?

THE COURT: Well, they said explosion, not fire. That's a stronger word. Kind of like rather than saying accident, say collision.

MS. ROBERTS: The MSDS tells Engelhard, the sophisticated user, you need to store this in a cool, dry place. Okay. They're not supposed to store the sodium bromate in an area where slag will fall on it. That's not our fault. It could never be foreseeable. Our clients would never even sell sodium bromate to Engelhard if we thought they were going to leave it out where slag can fall on it. We provide this MSDS sheet to Engelhard. Engelhard is the one with custody and control of the sodium bromate for three and a half months. They have a cool, dry place, a oxidizer warehouse where they keep all oxidizers.

THE COURT: Did the fire occur in the storage area?

MS. ROBERTS: No, sir. It occurred in the production floor. So what happens, our client delivers 40,000 pounds of sodium bromate to Engelhard. About close to 8,000 pounds of it is taken to the refinery on May 20, 2004. Refinery workers were using the sodium bromate for

about a week, so they have about two pallets and a partial pallet left. Instead of taking the sodium bromate back to the warehouse --

THE COURT: They just left it there.

MS. ROBERTS: -- Engelhard left it there. Right. They know that they're not going to be doing any production that week. It's dangerous, of course, to do production when it's shut-down week. The purpose of shut-down week is to stop, they send all the refinery workers, all the production workers home so they can work on these pipes and machines and vats. They don't have a log-out/tag-out process, so they don't turn on any machines. There's no gasses and fumes in the machines, so that the people can work on them.

So, your question is difficult because the sodium bromate was never supposed to be subjected to slag. The slag is 2700 degrees. It's not, you know, like a lighter or spark or match, that the heat from the slag -- and that's coming from the plaintiffs' expert, Dr. Henderson, when I deposed him, I asked him how hot he thought the slag would be when it hit the pallet.

And he said about 2700 degrees. So that's why I'm struggling with your question, because it was never supposed to be there.

THE COURT: I understand.

MS. ROBERTS: All the plaintiffs even admitted that if it had been moved back to the warehouse, you know, this wouldn't have happened.

THE COURT: All right. Well, let me ask you another question. The reliability of Engelhard as a conduit for information. That looks good on paper. That looks great in an opinion; but how is a supplier buying goods all over the world going to comply with that? From a practical standpoint, how do you envision factually how that particular factor should work as far as your defense of the sophisticated user? I know it sounds good, but how is it going to--

MS. ROBERTS: We contend Engelhard was reliable to convey this information. First of all, we have the 30(b)6 witness.

THE COURT: Do you think that's imposing a burden on every supplier before they sell something go check, see, hey, are these people reliable?

MS. ROBERTS: Yes, I would agree with that. I misunderstood your question. Our defendants' position is that Engelhard was a reliable conduit of information to the plaintiffs for several reasons. First of all, OSHA required Engelhard to train its employees on hazard communication. They were required by federal law to do that.

THE COURT: You think OSHA requires -- make people reliable?

MS. ROBERTS: Well, no. Not just that. If OSHA had investigated this accident and said, you know what, Engelhard doesn't have a hazard communication program, they don't have one, or it's insufficient.

THE COURT: But how were you supposed to know that, the supplier?

MS. ROBERTS: I don't think that---

THE COURT: That's my question. How would a supplier have ever known that until after the fact? Isn't that a very unreasonable burden to put on the suppliers?

MS. ROBERTS: It is. But we have a reasonable right to rely on Engelhard complying with federal law. I mean, that's reasonable for us to assume as defendants, suppliers, that Engelhard is going to comply with its federal obligation under OSHA to train the employees.

THE COURT: So long as they comply with OSHA requirements, you feel like the reliability issue is resolved?

MS. ROBERTS: In our opinion. OSHA required Engelhard to train its employees. We know for a fact they did have a Hazcom program. Their 30(b)6 witness and many, many, many other witnesses testified about it. The plaintiffs all admitted they got Hazcom training. They

got it as new employees, they got computer-based training.

We also know that our clients provided the MSDS sheet to Engelhard. We know that. Nobody is disputing that Engelhard didn't have the MSDS sheet or -- I don't even think there's a dispute that the plaintiffs were trained in how to locate and read an MSDS sheet. And so, when you consider the factors under the sophisticated user defense, here again, this goes to the negligent failure to warn aspects of the negligence claim and the strict liability claim. We're not talking about implied warranty, express warranty claims, we're talking about those two limited claims under the factors that are listed in Coffee, citing the Goodbar case. The factors are relevant here and we believe that, that the sophisticated user defense has been satisfied in this particular case.

THE COURT: Okay. Thank you, Miss Roberts.

MR. OUTTEN: I want to make one narrow point. And if I'm corrected by my friends at this table, you raised the issue of did wrapping the product in the shrink wrapping the product increase the danger? I think your Honor asked that question.

THE COURT: I did. I thought that was what the plaintiff was saying, the overpacking, the shrink wrap increased the danger. I think that's what they told me.

MR. OUTTEN: I don't believe, and I'm saying this

cautiously.

THE COURT: Maybe I'm wrong.

MR. OUTTEN: No, sir. I don't believe any of their experts said you shouldn't have wrapped it in shrink wrap. I don't think any of their experts said, in fact, when Dr. Cooksey said, was asked whether we shrink wrapped the bromate or, I think she said that's acceptable. I can't quote from her deposition.

THE COURT: That's a shipping method.

MR. OUTTEN: Yes, sir.

THE COURT: It's an acceptable method to ship?

MR. OUTTEN: It's an acceptable method, yes, sir. And if they can point to it and I'm wrong, then I'm telling the Court up front it may be out there; but I don't believe there's any testimony where any of the plaintiffs' experts said we're critical of the fact that this sodium bromate was in the -- in a shrink wrap.

Now, there is an issue that Mr. Brandt brought up about putting the placard on the outside.

THE COURT: Outside the shrink wrap?

MR. OUTTEN: Right. We're going to get to that later. Again, another issue I don't want your Honor to think there's agreements on.

THE COURT: Once we go through these issues, when we're going through these other motions, let's don't go

through them again. Okay?

MR. OUTTEN: I'll try not to. Let me just say this and I'll sit down. In order to be overpack, it has to be over 64 cubic feet. There was not only one affidavit, one piece of reliable evidence about the dimensions of this pallet. And Karen Messana, who works for Ellis's client, submitted an affidavit. The rest of it just sort of -- I saw it could have been three -- but there was reliable evidence from Miss Messana, you can look at her affidavit, less than 64 cubic feet. We agree with Mr. Brandt that the placard needed to be on the outside of it.

But, anyway, the reason I stood up, you asked if the shrink wrap increased the danger of the product, you said that may be an issue of fact. There's no evidence in the record that I know of that any expert or any lay witnesses that said the sink wrap was improper or increased the risk here.

MR. FOSTER: He asked for an answer, and I've got it. Dr. Henderson testified, of course, the amount of energy in one gram of that plastic is about ten thousand calories. That's a heck of a lot compared to this wood, other things. He testified this bag they used had like three layers of combustible material, and each of those layers represented a combustible fuel with lots of energy. He testified -- I can find the page at lunch -- he

testified that the shrink wrap provided another layer of plastic combustible fuel, like each layer of the bags.

THE COURT: I thought that's what you said.

MR. FOSTER: He said it was dangerous.

THE COURT: He said it made a hotter fire is what it boils down do.

MR. OUTTEN: That doesn't affect the applicability of use of a sophisticated user defense. It was an acceptable way to go out to Engelhard, Engelhard and other places. We're going to see shrink wrap materials everywhere. If that holds up, we respectfully submit, doesn't hold up a finding of a sophisticated user.

MR. WALKER: Three quick points and I'll sit down. If the Anderson County Sheriff's Department or the Clerk of Court of Anderson County sends Engelhard -- I mean, not Engelhard -- Univar, Trinity, Matrix a purchase order for 50,000 pounds of sodium bromate, under Coffee the obligation for them, before they ship it, is to say, are you people qualified to hold it, retain it, and keep it safe? They have to require an inquiry, Coffee and 388 requires an inquiry as to whether or not they had reliability to take that shipment.

Number two, if you never ask, and the people that testified, said we never asked, we didn't have any idea what the reliability of Engelhard was. And you cannot

pick and choose the six prongs of Coffee and take the ones you like and forget the ones you don't. All six must apply to avail yourself of the defense.

THE COURT: Thank you very much. Who's going to make the motion on, argument on the motion for strict liability?

MR. WALKER: Could I take -- I need a point of personal privilege.

THE COURT: All right. We'll take about five minutes.

MR. FOSTER: I join in that.

MR. JOHNSTON: Can we make it ten, your Honor?

THE COURT: Yeah, we'll make it ten.

(Brief recess taken.)

THE COURT: Who is making the motion for argument on strict liability?

MR. JOHNSTON: That would be Ellis Johnston.

THE COURT: I'll be glad to hear you, Mr. Johnston. I think we expounded the facts pretty well.

MR. JOHNSTON: I'm going to avoid saying one fact.

THE COURT: I asked a lot of questions because I didn't understand a lot of the facts. I was trying to make sure I had a grasp of the facts. I'll be glad to hear you.

MR. JOHNSTON: This will be pretty straightforward,

your Honor. Let me say this, I drew the short straw several weeks ago and I'm going to do not only section 15-73-1040 (2)(a) strict liability statute, also going to do the negligence motion and also the breach of implied warranty motion. And I think it's sort of important to look at those in context.

Strict liability looks at the product itself, doesn't look at the conduct of the defendants whatsoever. It's is this product defective and unreasonably dangerous to the user or consumer? Negligence looks to the conduct of the defendants. And to complete the triangle, the breach of warranty claim looks to the contract side, it's a business -- it's an obligation created through a business relationship.

And I think if we look at the how, and all of their causes of action based either on the strict liability, the alleged negligence, or some sort of contractual undertaking, either required by statute or undertaken in connection with a purchase order or invoice.

And before I get too far down the line on strict liability, Professor David Owens submitted an affidavit in this Court in support of plaintiffs. And we object very much to it. First of all, we feel like it violates the separation of powers clause of our constitution. He has undertaken to act not only in your capacity as Judge, also

in the capacity of the legislature. He is neither. I'm afraid that makes him a lawyer, which we all are. We object on that basis.

THE COURT: Which affidavit is that?

MR. JOHNSTON: Professor David Owens, you may have had and I may have had back in law school.

THE COURT: No. I haven't read it.

MR. JOHNSTON: Then I won't -- please don't. It's not any good.

THE COURT: Well, that's a good, valid reason. That's getting to the heart of the matter.

MR. JOHNSTON: And if you do, understand he's acting as a lawyer. They call it an affidavit. I don't understand that at all. If he's acting as some sort of expert, we object to it. He hasn't ever been designated as an expert. We haven't taken his deposition, all that stuff. I think he's acting as a lawyer. If it's acting as a brief filed on the other side, if that's what they want to call it, then I'm happy.

THE COURT: Okay.

MR. JOHNSTON: I think, well, until I saw their briefs I thought the facts were pretty well undisputed as far as user, consumer, that type of thing. There may be some, and we'll get to those. I'm going to hand up with the Court's permission section 15-73-10, 20, and 30, and

the comments to the restatement. You may already have them. If I could hand those up, I think it will facilitate our discussion of this issue.

Clearly, your Honor, this is a legal issue, not something that requires any inquiry into the facts. It is our, the restatement -- excuse me 15-73-10 says specifically, "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 caused to the ultimate user or consumer or to his property."

This is a -- it is our belief and, that the undisputed facts are that none of the plaintiffs in this case were users or consumers of this product. It is our firm belief that no one at Engelhard was a user or consumer of this product when this accident occurred. It is our firm belief the sodium bromate was merely sitting there in the refinery hall as these people were welding over the top of it, dropping slag onto bags that were flammable that should have been removed and were not.

But one thing is certain, the sodium bromate played no part in the work that was being done. In fact, it shouldn't have even been there. So we start with that.

And let me hasten to add, your Honor, when we talk about section 15-73-10, our Supreme Court has said on

numerous occasions, that the legislature has spoken and it is not up to us, the Courts, to expand it. That can be found in the Bray case, it can be found in Barnwell versus Barbara Coleman and Shaw versus Sturm and Ruger. These are all cited in the brief and cited in the Bray case.

I don't think anyone here, other than perhaps Professor Owen would dispute that. I certainly didn't see anything about that from my friends over here, I don't think. They sent a lot of stuff over yesterday I had to read late into the evening and early this morning. If I misspeak on that, I'm sure they'll tell me.

The important thing, obviously, our position is that because the strict liability statute only applies to a user or consumer of the product and our product was not being used or consumed, that it does not apply. And we're not without some help on that issue. The -- our legislature incorporated by reference the---

THE COURT: Restatement of torts.

MR. JOHNSTON: Yes, sir. Incorporated by reference the comments.

THE COURT: On what you just handed up on 402(a), I believe looks like "L" or "I".

MR. JOHNSTON: "L".

THE COURT: Okay, "L", where says it may be a member of the family or his employee.

MR. JOHNSTON: Yes, sir, unquestionable.

THE COURT: Tell me what that means.

MR. JOHNSTON: I think if you'll read that part, that entire paragraph, it's basically what used to be considered the old privity requirements. It says we don't care how you fit into this, we don't care how you fit into this thing, it's not necessary that you be a purchaser, it's not necessary, you know, that you -- I mean, the examples they give of---

THE COURT: So you think that was addressing the privity issue, not defining who was a user?

MR. JOHNSTON: Absolutely. If you turn to comment O, one of the specific examples that they use, comment O, the second sentence, "Casual bystanders and others who may come in contact with the product, as in the case of employees of the retailer, are not covered."

I think that I saw that argument coming out of the plaintiffs. I understand what they're trying to make that say. I think if the Court reads it as it is written and in the context which it is written, that is not saying, Oh, employees are all covered. Okay? I think that you -- it is saying in essence, I didn't buy the product, my employer did; and I'm using it and I'm insured by it, then I have a cause of action. Then I have a claim.

Well, as many product cases have come down since this

statute was passed---

THE COURT: There's many products cases that have come down since this statute was passed. Can you find any cases that address that particular issue? Because I understand the plaintiffs' position is he was an employee of the ultimate purchaser of the product, therefore, he's covered. I haven't read your brief. Is that correct? I don't know what else they could say, but go ahead.

MR. JOHNSTON: That's correct. That's what I get out of their brief, is that because he's an employee that makes him covered, because the employer bought the product. But it still has to be used. You have to be a user or a consumer of the product. And I think the Bray case addresses that. Let me go through the comments. Maybe then it will bring us to the Bray case.

THE COURT: All right.

MR. JOHNSTON: It talks about consumers in the second paragraph, comment L, it includes not only those who in fact consume the product, also those who prepare for consumption. In other words if I'm making, boiling a rabbit -- while cooking a rabbit I'm covered. I'm opening a bottle of beer, I'm covered. But in consuming, includes all ultimate users for which the product is intended. And I think that's an accurate statement. And this is -- and I don't think, quite frankly, the plaintiffs in this case

are claiming that they would, they were consuming the product. Obviously this was not an intended use.

So, they've tried to come into the second part of it, which is user. And it says users are those who are passively enjoying the benefit of the product as in the case of passengers in an automobile or airplanes, as well as those utilizing it for the purpose of doing work on it. You know, if I'm working on the sodium bromate, I'm a user. As in the case of employees of the ultimate buyer, who is making repairs upon an automobile which he has purchased.

The -- let me sort of back up. And the Court may -- I guess we're both old enough to remember when strict liability was getting talked about in the early 70's and ultimately passed in the legislature in 1974. It was a new concept for me back then, because we have traditionally dealt with fault, with conduct, with what did the defendant do?

And as professor Owens' article in 1976 makes clear, that there were a number of factors that went into the creation of strict liability that looks at the product. Doesn't care whether you were negligent or not; doesn't care whether you received a box from somebody and sold the box to someone else and it caused an injury, you're going to be liable. You know you weren't negligent, you didn't

do anything wrong, you just passed it on down the stream and, you know, stock piled it; and you sold it and you didn't do anything wrong, so you're not negligent.

But there's a concern. And, again, the thought was in enacting it was that a seller of a product doesn't apply just to the manufacturer, applies to anyone in the chain. Applies to all three of us, okay. Seller of a product is in a better position to ensure against the injuries that might be created by that product. And so, you know, it was a concept hard to swallow for people that were used to dealing with fault. But it was one that passed our assembly.

But there's an important thing there. That is you can have disproportionately -- if I sell a product and somebody is using it and is injured, I can protect myself against that lawsuit. But what if I sold the product and it caused the car to stall on a bridge and someone 30 people back from that missed a big business appointment which closing a ten-million-dollar deal. That's an old Pfaltzgraff [phonetic] type of analysis. So, we -- they asserted, and we believe intentionally, some limitations on that disproportionate liability.

And if you go to comment "O", the people that drafted the restatement said, look, we're not -- this is where the courts have gone, casual bystanders and others in contact

with product, in case of employees, the retailer, a passerby injured by exploding bottle, or a pedestrian injured by an automobile denied recovery. Doesn't express an opinion as to whether it ought to go further than that; institute expresses neither approval nor disapproval of expansion of the rule to cover those people, expansion of the rule. This is what our legislature adopted.

We do have some -- cited two cases. We cited both in our brief. They are attached. These are South Carolina cases. The first one is Bray. And admittedly that dealt with, the plaintiff in that case was operating some sort of compactor. One of her coworkers was inside the danger area of the compactor. Told her to go ahead and crank it up. She cranked it up. There was a malfunction, couldn't get it to retract, and got crushed. And she sued for emotional distress as a result of it.

The lower court analyzed it under the Kinard standard, which would -- you have to be a close relationship, that type of thing. The Court probably remembers that. And in Kinard, when the Court recognized emotional -- negligent infliction of emotional distress, it set up limitations because their fear of the disproportionate liability.

We were talking about user or consumer and so, and there were six of them. You know, it must cause the death

or physical injury; the plaintiff, bystander, must be in close proximity; the plaintiff or victim must be closely related. You know, six -- no, five tests. I won't go through them all.

The Supreme Court in Bray in rejecting the -- I guess the defendants' arguments that that was the appropriate standard and that standard applied to strict liability also, said and this is at -- well, it's page four of the Lexis thing, it is page -- it looks like, hard to say, looks like page 8 of the actual opinion.

It says -- they talk about those things and then they say, "hence, section 15-73-10 limits liability to the user or the consumer. There is no need for a limitation on foreseeability of victims to avoid disproportionate liability as was found necessary in the bystander. Said, i.e., the Kinard type of thing. And what I think they're telling us there and I -- and certainly the statute itself supports, is that this user or consumer is something, is a limitation on application of that rule of the strict liability rule. And that is the foundation of where we are.

This is, you know, we can -- you know, clearly in Bray this lady was using something that caused the trash compactor -- it compacted, there was injury, she had emotional distress as a result; and they said that was

appropriate. You already have something that limits the disproportionate liability. It's already built into the products liability statute; and that is, you must be a user or consumer of the product. And in this case Mr. Black, Mr. Lawing, and Mr. Martin, were not using this product for any purpose. No one in the plant was using this product for any purpose. It was sitting there, it should have been removed. It was not.

THE COURT: Let me ask you this question, Mr. Johnston.

MR. JOHNSTON: Yes.

THE COURT: Let's assume and -- we talked about this earlier. For purposes of my question, I'm going to state a couple of facts and ask you a question. Whether the facts are right or wrong, I'm not trying to make that decision. Okay? Just -- but let's just assume that the way this sodium bromate was packaged, i.e. with the -- I forget now what they call it.

MR. JOHNSTON: Overpack with shrink wrap around it.

THE COURT: And shrink wrap wrapped between all the packages. When that ignited, basically it created a large explosion or a bomb, the wrapping in the package. Assume for purposes of my question that is a defective product. Okay?

MR. JOHNSTON: I assume this is defective and

unreasonably dangerous for purpose of this discussion.

THE COURT: Right. Assume that for my question. My question to you, and I'm reading from Bray -- it says whether or not an individual is an individual as a user or consumer is not based on the foreseeability standard. A user of a defective product is not a mere bystander, but a primary and direct victim of the product defect, i.e. in this case the wrapping creating the explosion or the bomb or whatever you want to call it.

MR. JOHNSTON: Yes, sir.

THE COURT: Would that make him a user under the strict liability theory?

MR. JOHNSTON: No. Using a product is sort of like me using this pen.

THE COURT: So you think they had to be physically using the product?

MR. JOHNSTON: Yeah.

THE COURT: If there had been somebody down there opening a bag, getting ready to use them, it exploded, you would say he was a user?

MR. JOHNSTON: Yeah, I would.

THE COURT: The welders up on the top didn't have anything to do with using the product? You don't think they were the direct victim of the defect?

MR. JOHNSTON: Clearly dropping hot slag on this

stuff, to quote the comment, is not an intended use of that product.

THE COURT: Oh, yeah.

MR. JOHNSTON: That's -- and I don't think they'll argue that, either.

THE COURT: Okay. Thank you, Mr. Johnston.

MR. JOHNSTON: Thank you, sir.

MR. OUTTEN: I'll try to be brief. First of all, in ruling on the motion and other motions before you, I asked the Court to consider the type of accident we're talking about. As you just alluded to, this was not an accident where one of the processes Engelhard engages in was being run and while the process was being run an injury occurred. That's not what happened. It's important, it's critical the Court understand the context.

The context is the plant was shut down. These guys are using an acetylene cutting torch to replace then condensate pipe; and for whatever reason, they left this sodium bromate, two pallets and a partial pallet up against the wall. And as they were going down the line replacing the pipe, they cut it out in 6- or 8-foot sections. There's a man up there, takes it down, hands it to the ground. They had already cut the, or manufactured the pipe, fabricated the pipe to replace it with.

So this accident happened not in the ordinary course

of business at Engelhard. It's important for the Court to know that in ruling not just on this motion but in all the motions.

It's also important for the Court to know that nobody claimed to be using the product. Now, the plaintiffs -- Larry says, "Oh, yeah, they were using the products." We asked all the plaintiffs, "Mr. Lawing, were you using the sodium bromate that day?"

"No, sir."

"Mr. Massey, were you using the sodium bromate?"

"No, sir."

"Mr. Black, were you using the sodium bromate?"

"No, sir."

Plaintiffs' expert at the time of this accident, "Were the plaintiffs using the sodium bromate?"

"No, sir."

And asked them all. Not any testimony, you know, in the record that I'm aware of before David Owen filed his affidavit that these three plaintiffs in this case were using the sodium bromate. Again, the plaintiff said very clearly in their depositions, we weren't using it.

Your Honor touched upon a very interesting question; and that is, and I think that indicates your Honor does understand the basis of our motion and I hope you grant it; but you understand the basis of it, and that is these

gentlemen are not ripping open a bag of sodium bromate and pouring in the vat and using it at the time this accident happened. It was stuck up against the wall. It probably should have been taken back to the warehouse and this accident never would have happened.

The next thing I want to say to your Honor is that this is a legislatively created cause of action, not a common law negligence claim. You and I have seen over the years all kinds of different common law negligence claims and all kinds of different contexts. But that's not what this is. The legislature passed this statutory scheme and in order for the plaintiffs to pursue a strict liability theory they have to fit under what the legislature has said is a strict liable case.

As Mr. Johnston said very eloquently, they have to be users or consumers. Didn't say they have to be near it. Doesn't mean it could be used or doesn't mean it was going to be used the next week.

Now, your Honor probably remembers one of the earliest discussions about -- McPherson Buick, a Mortgage Company case. One of the points the Court made, they said, "Well, one, reason we're going to allow strict liability, because the disproportionateness between the plaintiff and the defendant." Boy, it would be difficult for an individual plaintiff to prove that the Buick Motor

Company was negligent in manufacturing this car. That would be almost impossible. What individual would have the resources to do that?

So they started looking at a way to allow a person in the shoes of McPherson to bring a claim against a product manufacturer and recover without having to sustain that high of a burden of proof, without having to prove negligence. And so we created strict liability.

But everybody doesn't have a strict liability claim. I know the plaintiffs want to come in to court and present a strict liability claim. We all know why they do. But everyone doesn't have a strict liability claim. As Mr. Johnson said very well, they have to be using or consuming the product. And it was just stuck up against the wall and nobody was using it.

And it brings me to the next point that I think should not be overlooked; that is, strict liability isn't -- is intended to say to the public, if you're using a product and you're injured, well, you are relieved of the burden of proving negligence and we'll let you recover if you can prove a product was in a defective condition, unreasonably dangerous, and it came to you without substantial change in its condition. That's what you have to -- that's what you have to prove. But you have to get in the starting gate so to speak, Judge. You have to be

using or consuming the product.

And it is really uncontroverted in this case that these gentlemen were not using the sodium bromate. You have to be using the product to pursue strict liability.

Now, some courts, your Honor, have expanded the class of plaintiffs that can bring products liability cases beyond users or consumers to casual bystanders. But our Courts in South Carolina have decided not to do that, expressly decided not to do that. And if I'm wrong, I'm sure my colleagues will tell me. But I don't believe there's a case which says that. I think they say we're not going to extend recovery in strict liability cases beyond what the legislature has said.

THE COURT: What the restatement of tort, where it talks about passive users, where if I'm a purchaser, member of the family employees. Engelhard was the final purchaser of the product and these are employees of Engelhard. And the restatement section 402(a) refers to the passive use. You know, referring to some of your baby products would be prime examples.

MR. OUTTEN: I think that requires that Engelhard be using the product. If the product had been in use.

THE COURT: You think the employee would have to be using the product at the time it occurred?

MR. OUTTEN: Absolutely. They have to be using

product to have a strict liability claim. And, your Honor, if you look at the motion we filed, the Courts even in very difficult cases declined to extend product liability. Did you look at this Van Buskirk case, which is not a South Carolina case, but apparently there was a child who suffered serious burns when he pulled a portable deep fryer on top of his head up.

THE COURT: I mean, they had the one right here in Anderson where they bought the tent, the kid burned up, a flammable tent. I mean, there's all kind of cases from kids and children.

MR. OUTTEN: Yes, sir.

THE COURT: But they were using the product in all those cases, I'll have to agree with you.

MR. OUTTEN: Right. They're using the product. Even in this case they talk about the infant was injured -- this kitchen appliance is where it's supposed to be. Maybe like the sodium bromate it was going to be used, I'm sure, when a meal was prepared sometime; but it wasn't being used at the time of the accident. That case turned on whether or not the child was a bystander and the Court said no. But it said that he was not a user of the product.

So to answer your question. If Engelhard had been using the product in one of its processes, these gentlemen

walked by, there had been an explosion or fire, it may be a different answer to the question the Court gives but not when it's absolutely undisputed it was up against the wall. No one was using it. And here's the thing, no one planned to use it that week. It wasn't as if they were getting ready to be used. The testimony from, I believe Mr. McCarrick, and I stand to be corrected on that, "We were shut down. Nobody is going to use that sodium bromate all week. It's just going to sit there."

Nobody was going to use it, no production was going to be run.

Now, I want to make one comment. Ellis covered Professor Owens' affidavit pretty well. There are no cases out there that allow recovery. If there were, he would have called them to your attention. There are no cases out there. I challenge plaintiffs' counsel to submit a case with facts similar to this. It's absolutely undisputed, the product was not being used, not being prepared to be used; undisputed testimony is it was not being prepared for use. All the plaintiffs said they didn't use it, all the witnesses said they didn't use it, somehow they're users or consumers is not the case.

Final point I want to make, his Honor asked a question about the wrapping, the shrink wrap. And I think the Court may be concerned that's an issue here.

Mr. Henderson may have talked about the shrink wrap but, Judge, there's no testimony from the plaintiffs' side, at least none I'm aware of, and if I need to be corrected on this, I'm sure the plaintiffs will do it. No one is claiming that that was defective or departed from reasonable industry practices. No.

THE COURT: Let me back up. The first part of strict liability has to be a defective product. What are they saying is defective?

MR. OUTTEN: They're saying the washing is defective.

THE COURT: All right.

MR. OUTTEN: As I understand, they have two theories of liability, Judge. Number one, the warning is defective and didn't apprize the plaintiffs of the dangers of using sodium bromate; the second theory, the bags were not sufficiently resistant.

THE COURT: One problem I had, I've had you all's brief and I've read them; but I didn't get the plaintiffs' briefs. And I understand why. They were on a short time frame. And I haven't read most of theirs. So I apologize if I'm asking dumb questions.

MR. OUTTEN: No, sir.

THE COURT: I just don't know. Because I haven't read their briefs.

MR. OUTTEN: No, sir, I'm just attempting to clarify

that there's not been a claim by the plaintiffs or the plaintiffs experts that the -- and the shrink wrap by the way didn't go between the individual bags. It went over whole pallets, I think it was 36 bags.

THE COURT: I thought somebody told me they were in between the bags.

MR. FOSTER: When you stack the bags on the pallet, you get a layer of oxidizer, a plastic from the bag, then you get the next layer of plastic from the bag, then another level of oxidizer. It's like a sandwich all the way up. That's what I was describing. The wrap holds the bags on the pallet.

THE COURT: All right. I misunderstood.

MR. JOHNSTON: The wrap doesn't wrap all -- it goes around it like this to hold them in place; but it I mean it's not cocooned.

THE COURT: All right. I misunderstood.

MR. OUTTEN: Yes, sir. And I don't believe there's been a claim that using the shrink wrap to hold the bags in place, as Mr. Foster said, I don't believe there's been a claim that that was defective or increased the danger on the part of industry practice.

MR. FOSTER: I disagree, but go ahead. It's your floor.

MR. OUTTEN: He may change his tune now, but there's

been no claim that the shrink wrap was defective, been no claim that the shrink wrap departed from industry standards. To clarify, Mr. Henderson did say the plastic in the shrink wrap would add to the fuel. But there has to be something to hold it together, though. Again, Judge, if you went around and looked at industrial standards, shrink wrap material to keep in place is a common practice.

THE COURT: Okay. Thank you very much.

MR. WALKER: Your Honor, please? We filed the affidavit of Professor Owens with the Court. I thought we emailed you a copy. If you don't have it, I'll be glad to give you one now. We emailed it Tuesday. This has been filed in Walhalla, Judge. I'll give you this in lieu of the original. Apologize.

Judge, what I just heard counsel say is kind of appalling because they take the position that the and -- Mr. Johnston said something about privity, privity was outlawed when they enacted 73402(a).

THE COURT: He was just saying that -- the comment was talking about the privity issue. You don't have to -- they were explaining, because the law in South Carolina prior to that, where you had to have privity, he was just using that as an example of no privity is what he said.

MR. WALKER: I misunderstood him. User, consumer.

The legislature adopted 15-73-10, in essence adopts 73-402 (a), been around since '73, something like that.

MR. JOHNSTON: Seventy-four.

MR. WALKER: What they also did is they adopted the comments as law. And the comments as you picked up on, comment L, as these folks have been artfully dodging the implementation and challenged me to show them a case. I'd say there's no case out there because the law is clear as to what a user and consumer is. I don't want to read it to you.

But he may have acquired it through one or more mediary dealers, not even necessary the consumer to purchase the product, it may be a family member of the final purchaser, Engelhard, or his employees, the plaintiffs. The liability stated is one in tort, not required to contract out privity so on and so forth.

Then they want to change the meaning of 402(A) to they got to be using actually the sodium bromate. Well, if you look at the case law that's come down and they heavily rely on Bray, but what Bray says is this. The Bray case holds that a Court cannot attach the common law limiting elements in negligence for emotional distress by third-party bystanders onto strict liability basis for relief.

The Bray case is completely different than this case

because the Bray case is a psychic [sic] injury case, negligent infliction of emotional distress. What the Court says in Bray does not in any way change what the statute says, no reason to interpret. The special cause of action for negligent infliction of emotional distress adopted in Kinard versus Augusta Sash, quoted in page 5 of Professor Owens' affidavit, limits recovery to a special type of bystander closely related to accident victim, defined by carefully framed foreseeable factors to curtail the possibility of limitless range of claims to third-party bystander, emotional distress. I submit to you that case has nothing to do with the definition, nor does it change the definition under the consumer statute, subsection "L".

Now, if you assume for argument purposes substantive comment "L" is not applicable, then you want to go to comment "O". But the gravamen of their argument is that comment "O" is where our people stand. But I would submit to you, even if you feel that my clients are not covered under comment "L", then comment "O" says, if I could -- give me just a minute. We certainly cannot tell you, Judge, that 402(a) covers every possible situation in which workers are covered. It does state that the category procedurally includes repairing, doing work on, or even passively enjoying the benefits of a product.

That's what they were doing under these circumstances.

All industrial employees, other employment, part two, and, hence, passively benefit from each industrial product purchased by the enterprise, Engelhard, and used in pursuit of its corporate objectives, making chemicals to sell, so they can make a profit, pay their employees. Each employee is a constituent part of the collective enterprise.

Then go to comment O, they don't go into -- they cast no opinion on whether 402(a) should be applied to persons other than users or consumers. If you get to the point where you say these people are not users or consumers, comment O does not state that such persons are not covered by 402(a); only that there was not then, the early 60's, judicial support under warranty and strict liability in tort to cover casual accident victims.

Welders working in the vicinity of highly a explosive material purchased by their employer for use in their employment in the enterprise are hardly casual strangers or bystanders. With respect to the hidden risk embedded in this sodium bromate, for argument purposes, Mr. Johnston clearly stated that for purposes of this argument, assume the stuff is unreasonably dangerous, at least that criteria, the only criteria the Court has to make in this case, whether they're users or consumers.

Ostensibly, the stuff has to be stored somewhere. Has to be stored somewhere on site. It was stored in this case directly beside the vats into which it was going to be poured. It wasn't just a random selection of where it was stored; the evidence shows, the pictures show, it was stored on a pallet near where it was going to be used, which makes plenty of sense if you think about it. There were two huge vats that we have photographs of, which they had to go up, put them in the vats, that's why they were located where they were located.

The implication that it shouldn't have been there goes to the negligence of Engelhard, not necessarily to negligence of the plaintiffs. We contend that Engelhard, and they make -- during trial will make big accusations against Engelhard. That's not the question. The question is whether there's any actionable negligence by any of these defendants which caused or contributed to their injuries. So, the issue about Engelhard's negligence or the liability of Engelhard under strict liability is misplaced.

That's basically all I have. I think the law is fairly clear. I think the comments are clear. I think the motion is without merit.

I've submitted Professor Owens' affidavit as supplemental memorandum for the Court's use for whatever

purpose the Court deems appropriate. And I defer now to cocounsel for the remainder of the argument.

THE COURT: Thank you, Mr. Walker.

MR. BRANDT: Yes, sir, your Honor. Thank you.

Mr. Outten challenges the plaintiffs to show a case that says we are users, consumers under the strict liability statute. But I challenge them to show me one case in South Carolina that says we're not. There's not. The truth of the matter, the Court hasn't really expounded on this question, addressed it, or taken any stand one way or the other as to what is a -- necessarily, try to give a complete definition of what a user or consumer may be, so it hasn't excluded a whole group of people out there. Neither has it addressed the bystander issue and ruled on the bystander issue.

We've quoted in my brief numerous cases and talks that have allowed, even under statutes that read exactly as ours, very similar, user and consumer and it does expand it to bystanders. If you analyze those cases, of course from all jurisdictions, you look at it, and it's about 50 percent of the Courts that say no, we're going to stick with user and consumer. We're not going to go to bystanders.

The others say, well, it's got the user and consumer, but we're going to let bystanders go. However, those

Courts, again, and you get down, it depends on how---

THE COURT: Excuse me just a second. Hold on just a second.

Go ahead.

MR. BRANDT: It depends on how the Court would extend, even under the narrow construction, that the defendants suggest. And that's just trying to guess what our Court's would do with it. There's nothing there that tells them that. They're just trying to build on one little piece of writing after another when comment L clearly says that these people are employees and that they are covered.

So, I submit to you that Bray case and that Bray case they started off and I think the lady had her hand on a switch or button involving a machine that was being used, and she saw her fellow employee be hurt by the machine. And it was that whole issue was certified and it was up there and they start off with saying she's a user. But that didn't say that you had to be using the machine to be a user. It said in that case she was a user.

And then they went to the meat of the issue and talked about can you recover psychological injuries on strict liability when the machine didn't actually hurt you, it hurt someone else.

And they said, yes, she could.

Now, it doesn't make sense to extend it to someone standing back here, and is not bothered physically by the machine when she sees -- and they said didn't even have to be -- you know? Kinard we always had thought it had to be a member of the immediate family, that kind of stuff. It said under strict liability, said, no, don't have to. All you have to do is watch it. Then under strict liability you can receive psychological damages, purely psychological damages.

That makes no sense to try to analogize from Bray that they would exclude people who are actually injured by the product. We have to remember that this is a warnings and labels case. Labels and warnings are part of the package. And part of the package, the experts have said, is part of the product. So you have a defective product.

In this case our people were users of that product. They were users of the warnings and labels on that package.

THE COURT: Users of what?

MR. BRANDT: The warnings and labels on the package. Because the whole issue is they were taught at Hazcom training with Engelhard, to recognize these labels and the warnings on packages and to take precautionary measures. So they go up there and they look at it and they don't see it. There's nothing there for them to use. But they did

look at it and it wasn't there. So they were using that, and from that they drew the conclusion, the opinion, that it's not something that will hurt me.

Now, Lawing had used this material, and I pointed this out in my brief on -- he worked the night shift. And he was the sole maintenance person on the night shift. Prior to it going into the bags, which was fairly recent in close proximity in time to the accident itself. They had switched from drums to bags -- had been getting it in those bigger drums -- and he would go out there at night; and when the operator, the sole operator out there at night was trying to get this stuff over into the vats, the reactors that they call it, Lawing would help him dump it over into the vat.

So Lawing had been a user. He wasn't using it at that time; but I'd submit to you that on that basis alone, that he would be considered a user of the sodium bromate within his work capacity at Engelhard. He just wasn't using it at the time. But he was certainly a user of the labels. He was a user of the product inasmuch as that's part of the product, and he looked at it and did see the warnings.

Knox, who is also a part of that maintenance team and was the lead, states unequivocally in his deposition he, looked at it too and he saw some writing. But he did not