

EDITORIAL : HARD LESSONS TO LEARN

David L. Linhardt, publisher, MDN-Rejected.com August 30, 2005

Readers knowledgeable of recent dioxin developments may already know that a Mississippi jury awarded a Gulf Coast oyster fisherman \$14 million in the first of nearly 2,000 personal injury lawsuits targeting a E.I. duPont de Nemous Company plant producing titanium dioxide (a white pigment) – in addition to dioxins and furans (known and suspect carcinogens).

The punitive award phase of trial will begin as soon as life returns to a more normal mode following Hurricane Katrina. Since the lawsuit was filed prior to Mississippi's recent enactment of legislation to cap punitive damage awards to \$20 million, the size of the punitive award is of significant interest to DuPont.

Based on a small amount of litigation experience gained while part of Corporate America, I am aware – as are most people – that anyone foolish enough to file a lawsuit against any multi-billion dollar company (with seemingly unlimited legal resources) can expect a wide range of legal “tactics” meant to drag out resolution and discourage both plaintiffs and their attorneys.

Unfortunately, one of the tried and tested legal gimmicks used by some corporations backfired on DuPont and the case was lost. DuPont will, of course, appeal the “extremely erroneous” decision of the jury.

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The case was lost when many of DuPont's expert witnesses were barred from testifying shortly before the trial after a judge ruled that the company had failed to make them fully available for pre-trial interviews. Losing eight expert witnesses just prior to trial may have thrown a king-sized monkey wrench into the company's well designed defense strategy. Essentially, the jury only heard the injured plaintiff's side of the story.

The company stated that they had planned to prove there is no connection between activities at the plant and the health issues alleged by the plaintiffs. DuPont spokesman Terry Gooding said, “We are confident that the scientific evidence at trial will prove this.”

One question seems to require an answer – if DuPont’s science was “so sound”, why the need to use dirty tricks – such as deliberately avoiding the depositions of its expert witnesses – as part of its defense strategy? Why the need to limit a plaintiff’s right to fully interview “expert” witnesses – fear?

Similar questions can be asked of The Dow Chemical Company : “If your science is so sound, why the refusal to answer questions about the 18 or so scientific studies that make up your body of evidence? Why the refusal to engage into a public debate? Why the need to use the PR tactic, ‘I’ll get back to you on this question’ – and never do?”

Why the need to demand that a critic – yours truly – address all questions about dioxins to the Washington, D.C. lead legal firm directing Dow’s defense in the riverside residents lawsuit? What would a multi-billion dollar company with the most knowledgeable experts on dioxins and their health effects in the world have to fear from a technically obsolete chemical engineer that is not an epidemiologist?

Perhaps, some of the answers can be found in Dow’s latest study of its chlorophenol workers exposed to industrial levels of dioxins and furans.

In 2003, the company began a study to determine the dioxin levels in the blood serums of a small number of its employees that had been exposed to dioxins while working in the chlorophenol plants (245-TCP, 245-T, pentachlorophenol) plant at the Midland site. The study also included maintenance personnel assigned to chlorophenol plants and a group of “comparison” employees of similar age and hire date with no known exposure to pesticide plant dioxins.

In 2004 and 2005, the company began to release some of the results of the study in Melbourne, Australia, to the DEQ and, of course, to the Midland community and neighboring communities. The DEQ and the MI Department of Community Health (MDCH) were informed of some of the results at a verbal reporting session in December, 2004. The company did not provide a copy of the slides used in the session until March of the following year. Little wonder that the DEQ and the MDCH might be slightly suspicious of the study.

In July, 2005, the final report was published. Within two weeks, the DEQ, the MDCH and the EPA were quoted criticizing the study. The EPA has since stated that it was “misquoted” and now holds the study in high regard – the word “wimp” comes to mind.

The public response so far: (a) Dr. Philip Cole, the primary peer-reviewer of the study, wrote an open letter to a local newspaper praising the epidemiological expertise of the company and defending the study and (b) Dr. James Collins, the primary author of the study, wrote another open letter to a second local newspaper expressing the company's surprise that regulatory agencies would criticize the study.

So far, the public response has been "PR" in nature. To learn more about the scientific discussions that might be taking place in the darkened halls of the DEQ and MDCH, we will need to rely on a knowledgeable source to "leak" the information to the general public. The need for a "leak" is a very, very sad commentary on the regulatory processes in the State of Michigan.

An analysis of the study has been posted on the DioxinSpin.com website. The analysis points out a significant number of potential defects, including the potential that the study was "biased" and consisted mainly of employees exposed to low levels of dioxins. Of course, perhaps, there is no selection bias in the study. Perhaps, the apparent selection bias was the result of the coincidence that an over-abundance of low exposure employees prefer to live within 50 miles of Midland (a cohort selection criteria).

Will the company respond to DioxinSpin's analysis with a scientific discussion – very doubtful. The best way to deal with critics is to ignore them.

The best that can be hoped for is that the DEQ and the MDCH will consider the points raised in the analysis and ask the company those very same questions.

Perhaps, multi-billion dollar corporations will someday heed lessons of the past : (a) dirty tricks and non-responses are not needed if the science is indeed sound and (b) the American public, such as a Mississippi jury and Saginaw Valley residents, are not dumb-dumbs.

Perhaps... when pigs fly.