Litigation Panel
Litigation Panel:
The Litigation Hazards
Old Manufacturing Facilities Represent

Presented by:
Raymond G. Mullady, Jr.

Silvio J. DeCarli
DuPont
Indoor air testing expands in Pompton Lakes

Sunday, December 5, 2010

BY LESLIE SCOTT
Suburban Trends
STAFF WRITER

More relief has come to The Plume area residents as DuPont will now test for 61 chemicals in both the indoor air and sub-slab testing of homes possibly contaminated with toxic vapors.

Previously, the company was testing for 61 chemicals in the indoor air and only 10 in the sub-slab underneath the homes. For several months residents have questioned the disparity of the testing.

The environmental group the Citizens for a Clean Pompton Lakes (CCPL) even began a letter-writing campaign to local governmental officials to get the polluter to test for all potential chemicals in both tests.

CCPL founder Lisa Riggiola was happy to hear this news on Dec. 1.

"The residents won a long uphill battle and a well-deserved standing ovation for all their hard work. The residents stood their ground and we are honored to know them and stand by their side as we move forward in dealing with this toxic tragedy that has changed our lives so dramatically. Their hard work and focus on this issue is the reason for our success," said Riggiola.

Congressman Bill Pascrell was also pleased to hear this news.

"This is a great response to the many Pompton Lakes residents who reached out to our offices seeking help. The EPA (U.S. Environmental Protection Agency) and NJDEP (N.J. Department of Environmental Protection) acknowledge that what these Pompton Lakes residents need most is information and action," said Pascrell, who this year has brokered two meetings with borough residents and EPA Administrator Lisa Jackson and NJDEP officials. "This agreement will encourage residents to obtain the sub-slab soil vapor testing with the assurance that if there is contamination, it will be mitigated."
DuPont agrees to Spelter settlement

Nov 24, 2010 (The Charleston Gazette - McClatchy-Tribune Information Services via COMTEX) --

Read the settlement:

CHARLESTON, W.Va. -- DuPont Co. has agreed to a settlement valued at $150 million to resolve a bitter court battle over the pollution of the Harrison County community of Spelter, lawyers for the company and area residents announced Tuesday.

DuPont will pay $70 million and fund a 30-year medical testing program estimated to cost $80 million in a deal that still faces a review by 8,500 area residents and needs the approval of Harrison Circuit Judge Thomas Bedell.

If finalized, the settlement would eliminate the need for a retrial in March on the key issue of whether residents filed their original lawsuit within the legal time limits for doing so.

DuPont had appealed a variety of issues in a three-year-old jury verdict that awarded residents nearly $400 million for property cleanup, medical monitoring and punitive damages. The Supreme Court upheld most of the verdict, but ordered a new trial on the statute of limitations issue. Both sides were also facing the possibility of continued appeals after the retrial, and said they were happy to end the litigation.

"DuPont is pleased to reach an agreement that places our focus on the Spelter site and the community and not on lengthy and contentious legal proceedings," said DuPont general counsel Thomas L. Sager.

Farrest Taylor, lawyer for the residents, said, "We're very excited about the settlement. You've got a fairly substantial settlement here."

The Spelter site, just north of Clarksburg, was originally a DuPont gunpowder mill that opened in 1999. After that facility burned down, Grasselli Chemical Co. built a zinc smelter and a company town. DuPont bought Grasselli in 1926 and operated the smelter until 1950, when an internal report showed air-pollution upgrades would cost $325,000.

In the late 1980s, federal environmental officials began investigating the site. DuPont got involved, eventually repurchased the smelter and steered the cleanup toward the state Department of Environmental Protection's voluntary program, rather than the more stringent federal Superfund program.

Under the deal, $4 million from a $70 million guaranteed settlement would go toward kick-starting the medical monitoring program and toward cash payments for the nearly 6,000 current and former residents who do not own property in the area, said Charleston lawyer Jim Lees, who represented DuPont in settlement talks.

"The availability and amount of cash payments to property owners and medical monitoring class members will depend upon various factors, including, but not limited to, the total number of class members participating in the medical monitoring class," the settlement document states. "The amount of individual cash payments cannot be determined at this time."

The other $66 million of the $70 million will go toward property remediation of pollution in the Spelter area and legal fees and costs for the residents.
Litigation Panel:
The Threats Posed by a Disconnect Between MSDSs and Product Labels

Presented by:
Mary Ann Mullaney
Thomas A. Warnock
DuPont
LITIGATION RISKS POSED BY DISCONNECTS BETWEEN MSDSs AND LABELS

• Occupational Safety and Health Administration (OSHA) has authority over MSDSs.
• Resource regarding the requirements for MSDSs: www.osha.gov. This website provides useful information regarding OSHA’s requirements, and, in sum, advises, with respect to the labeling of chemicals.
“Chemical manufacturers and importers must convey the hazard information they learn . . . to downstream employers by means of labels on containers and material safety data sheets (MSDSs).

Also, chemical manufacturers, importers, and distributors must be sure that containers of hazardous chemicals leaving the workplace are labeled, tagged, or marked with the identity of the chemical, appropriate hazard warnings, and the name and address of the manufacturer or other responsible party.”
OSHA – Chemical Labeling (cont.)

• “In the workplace, each container must be labeled, tagged, or marked with the identity of hazardous chemicals contained therein, and must show hazard warnings appropriate for employee protection. The hazard warning can be any type of message, words, pictures, or symbols that provide at least general information regarding the hazards of the chemical(s) in the container and the targeted organs affected, if applicable. Labels must be legible, in English (plus other languages, if desired), and prominently displayed.”
OSHA - MSDSs

• “The MSDS is a detailed information bulletin prepared by the manufacturer or importer of a chemical that describes the physical and chemical properties, physical and health hazards, routes of exposure, precautions for safe handling and use, emergency and first-aid procedures, and control measures.

Chemical manufacturers and importers must develop an MSDS for each hazardous chemical they produce or import, and must provide the MSDS automatically at the time of the initial shipment of a hazardous chemical to a downstream distributor or user. Distributors also must ensure that downstream employers are similarly provided an MSDS.”
• “Each MSDS must be in English and include information regarding the specific chemical identity of the hazardous chemical(s) involved and the common names. In addition, information must be provided on the physical and chemical characteristics of the hazardous chemical; known acute and chronic health effects and related health information; exposure limits; whether the chemical is considered to be a carcinogen by NTP, IARC, or OSHA; precautionary measures; emergency and first-aid procedures; and the identification (name, address, and telephone number) of the organization responsible for preparing the sheet.”
OSHA – MSDSs (cont.)

• “Copies of the MSDS for hazardous chemicals in a given worksite are to be readily accessible to employees in that area. As a source of detailed information on hazards, they must be readily available to workers during each workshift. MSDSs have no prescribed format. ANSI standard no. Z400.1 -- Material Safety Data Sheet Preparation -- may be used. The non-mandatory MSDS form (OSHA 174) also may be used as a guide and a copy can be obtained from OSHA field offices.

Employers must prepare a list of all hazardous chemicals in the workplace. When the list is complete, it should be checked against the collected MSDSs that the employer has been sent.”
The Federal Hazardous Substances Act, 15 U.S.C. §§ 1261–1278, requires that certain hazardous household products bear cautionary labeling to alert consumers to the potential hazards that those products present and to inform them of the measures they need to protect themselves from those hazards. Any product that is toxic, corrosive, flammable or combustible, an irritant, a strong sensitizer, or that generates pressure through decomposition, heat, or other means requires labeling, if the product may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonable foreseeable handling or use, including reasonable foreseeable ingestion by children.
Case Worthy of Attention

• Lemon-scent additive’s MSDS “warns that the scent is incompatible with strong oxidizing agents.”
• CloWhite’s bleach label “describes the bleach as a ‘strong oxidizer.’”
• CloWhite’s MSDS “warned against inhalation [of the product’s fumes] but such warning was never placed on the product label.”
Zeigler

• “CloWhite’s decision not to include on its label a warning against inhaling the fumes of the product was made despite warnings of this danger contained in their MSDS.”

• Trial court’s summary judgment to manufacturer on the product liability, failure to warn, and punitive damages claims reversed.
The Ways in Which This Issue Can Arise

• Change in Formulation

• Purchase of an Asset
What Can You Do?

• Keep in Close Communication with Product Labeling Experts
• Utilize the Right Software So the Process Is Automated
• Audit Regularly
Full Prescribing Information: FLULAVAL

• FLULAVAL (Influenza Virus Vaccine)
  – Thimerosal, a mercury derivative, is added as a preservative.
  – Each dose contains 25 mcg mercury.
• **Section 2 - Composition / Information on Ingredients**
  - **Ingredient:** Thimerosal[, which] contains 49.6% w/w organically-bound mercury.

• **Section 3 - Hazards Identification**

  **Effects of Overexposure:** Topical allergic dermatitis has been reported. Thimerosal contains mercury. Mercury poisoning may occur and topical hypersensitivity reactions may be seen. Early signs of mercury poisoning in adults are nervous system effects, including narrowing of the visual field and numbness in the extremities. Exposure to mercury in utero and in children may cause mild to severe mental retardation and mild to severe motor coordination impairment. Based on animal data, may be irritating to the eyes.
Developments in Radiation Litigation relevant to Marcellus Shale natural gas production
Expert witnesses play a dominant role in radiation litigation. Their testimony is relied upon to establish:

- the proper standard of care;
- the radiation exposure pathways;
- the type of radiation exposure;
- the radiation dose;
- the risk of health effects; and
- general/specific causation.
Several potential expert witnesses have discussed the radiation hazards associated with Marcellus Shale development. I have selected three as representative:

- Dr. Tracy Bank (geologist)
- Dr. Marvin Resnikoff (physicist)
- Dr. Peter Davies (plant biologist)
This presentation will show how the developments in radiation litigation can be used to respond to the statements of these potential witnesses regarding the hazards of radioactivity in the Marcellus Shale.
1. Dr. Tracy Bank:

• is an assistant professor of geology at the University at Buffalo (SUNY) with extensive uranium experience at Oak Ridge National Laboratory.

• Her research has involved simulating the effect of fracturing fluid on uranium in the shale.
Dr. Bank’s research indicates that:

• there are slightly elevated levels of uranium in Marcellus shale; and
• under laboratory conditions, up to 35% of the uranium in the shale is solubilized by exposure to simulated fracturing fluid (HCl).
Dr. Bank has acknowledged that:

• the uranium levels in the shale are so low that she takes no special precautions in her laboratory; and

• she does not consider the uranium levels in the shale to constitute a radioactive risk; but ...
Dr. Bank has claimed that:

• “uranium is still a toxic, deadly metal” (10/25/10 press release);

and

• uranium causes kidney damage (11/19/10 Univ. of Pitt. presentation).
We recently obtained the dismissal of a depleted uranium case in which we worked with three scientists who served on National Academy of Science committees that studied the newest epidemiologic information regarding the health effects of uranium exposure.
The National Academy’s Institute of Medicine committee “concluded that there is inadequate/insufficient evidence to determine whether an association [exists] between exposure to uranium and:

- kidney disease;
- various cancers; and
- cardiovascular, genotoxic, hematologic, immunologic, and skeletal effects.
Further, comprehensive studies of the military personnel who were exposed to depleted uranium have been followed for 15 years at the University of Maryland. These studies indicate that “no clinically significant uranium-related health effects have been observed in the cohort, including those with retained depleted uranium fragments.”
2. Dr. Marvin Resnikoff:

- is an (uncertified) health physicist in New York City;
- has been an expert witness or consultant in many types of radiation cases; and
- has written on the presence of radium in Marcellus Shale flowback fluid and production water.
Dr. Resnikoff claims that:

- when radium-226 is ingested, it can cause leukemia; and
- residents whose homes are constructed on landfills where Marcellus Shale drill cuttings have been disposed will ingest significant amounts of radium-226.
We obtained the dismissal of several cases in which the leukemia deaths of a number of children were attributed to exposure to radium waste from a nearby uranium mill.
In the childhood leukemia cases and others, we have worked with a number of scientists who have researched the leukemia incidence in the radium dial painters.
The newest edition of the authoritative Casarett & Doull’s toxicology text concludes:

“It is significant that no study has identified a statistically significant excess of leukemia after even massive doses of radium.”
Dr. Resnikoff’s Marcellus Shale dose calculations are based on the Argonne National Laboratory RESRAD program.

Dr. Resnikoff exaggerated the dose by using the default factors in the program (assumed the presence of fields, orchards, gardens, seafood ponds, etc., all on an uncovered landfill).
We recently obtained dismissal of a case where two childhood cancer cases were attributed to emissions from a nuclear power plant. The court found that Dr. Resnikoff had relied upon false assumptions in using the RESRAD code and that his testimony was therefore unreliable.
3. Dr. Peter Davies:

• is a Professor of plant biology at Cornell University;
• states that he has a low-level radioactivity license from the university; and
• has “been doing work with low-level radioactive materials for 50 years;” but,
• his comments pertain to “high-level radioactivity.”
Dr. Davies assumes that the radium level in “flowback water” is the maximum level reported by the EPA for produced water in this table:

<table>
<thead>
<tr>
<th>Wastes</th>
<th>Radiation Level [pCi/g]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>low</td>
</tr>
<tr>
<td>Produced Water [pCi/l]</td>
<td>0.1</td>
</tr>
</tbody>
</table>
Radium Dial Painter
Health Effects Graph from United Nations Report Showing Threshold

Threshold of 1.2 billion picocuries (oral intake)
Based upon the radium dial research, even if the flowback fluid contains the EPA maximum 9,000 picocuries of radium-226 per liter, a person could drink a quart of flowback fluid (or produced water) every day for 369 years and not exceed the threshold for radium-induced cancer.
Dr. Davies recommends that the public dose limit be reduced from 100 to 10 millirem per year.

• Recommends a public dose limit of 10 millirem per year based on his misinterpretation of the IAEA/CRCPD exempt or “trivial dose” as a public dose limit.
• 10 millirem is the dose a person receives from a single chest x-ray.
• 10 millirem is about 4% of the dose we receive annually from natural sources.
Conclusion:

The proposed testimony of expert witnesses must be carefully scrutinized and excluded by *Daubert* motions where appropriate. This is particularly so where experts attempt to testify in subject areas where they do not have sufficient expertise.
Litigation Panel:
The Commingled Product Theory of Market Share Liability

Presented by:
Jeffrey S. Moller

Michael W. Silberman
FMC BioPolymer
Commingled Product Theory of Market Share Liability

- Created by Judge Shira A. Scheindlin
- United States District Court, SDNY
- In re MTBE Product Liability Litigation (MDL 1358)
• “[F]rom time to time courts have fashioned new approaches in order to permit plaintiffs to pursue a recovery when the facts and circumstances of their actions raised unforeseen barriers to relief.”

S. Scheindlin, U.S.D.J.
• “When a plaintiff can prove that certain gaseous or liquid products of many suppliers were present in a completely commingled or blended state at the time and place that the risk occurred, and the commingled product caused a single indivisible injury, then each of the products should be deemed to have caused the harm.”
Plaintiff’s Elements for Burden of Proof for a Viable Commingled Product Theory of Liability Claim:

“So long as plaintiffs allege that (1) defendants marketed and sold MTBE-containing gasoline, (2) in the relevant zone of injury and (3) defendants product were in a completely commingled state, [then] defendants potentially contributed to plaintiffs’ indivisible injury.”
• Court’s example:
  – 10 producers supplied 10% of the contents of a leaking underground storage tank

• Actual application:
  – 20+ refiners placed gasoline (via pipeline shipment, vessel or local refinery production) into the New York Harbor Market
Threshold Requirements for Plaintiff’s Due Diligence for Pleading under Commingled Product Theory

• Lack of “make whole” defendants with direct connection to harm

• Plaintiffs must identify those defendants who actually contributed to the commingled product that caused their injury

• In identifying commingled defendants, Plaintiffs:
  – Cannot simply name every producer of the product in the market
  – Must conduct some investigation to identify the defendants whose products were actually present
  – Need not identify every actual producer of the commingled substance
• What “unforeseen Barriers to Relief”?

1. Identifying LUSTs
2. Mom and Pop Retailers
3. Fungibility of gasoline makes ID of actual manufacturer difficult
4. Pure Market Share does not allow punitive damages
Defendant’s Opportunity to Avoid Suit or Mitigate Damages – Burden Shifting

• Once Plaintiff affirmatively pleads against a Defendant under the commingled product theory of market share liability, Defendant has the burden to exculpate itself

• Can do so by proving (preponderance) that its product could not be part of the commingled product because its product was not present:
  – at the relevant time; or
  – in the relevant place
Defendant’s Responsibility for Damages: Market Share?

Liability is several, only

• Apportionment of damages by proof (preponderance) of defendant’s share of the market at the time a risk of harm was created to a class of potential victims.

• Despite clear linkage to Market Share Liability, Punitive Damages are available.
Judge Scheindlin’s claimed precedent – various states’ adoption of:
• Concurrent Wrong Doing
• Concert of Action Liability
• Alternative Liability
• Enterprises Liability
• Other Market Share Liability Variations
Concurrent Wrong Doing – Joint and Several Liability

• Based on concurrent liability which is traditionally defined as two causes (not necessarily simultaneously enacted) combining to cause an indivisible injury

• Generally involves a small amount of tortfeasors (according to the Restatement Third – typically 2 to 3) so that imposition of joint and several liability is not deemed unfair

• Often applied where actions of defendants rise to the level of recklessness or an intentional act such that imposition of joint and several liability is not deemed unfair
Concert of Action Liability – Conspiracy based-tort

• One party can be responsible for the actions of another party if it
  – helps commit a tortious act together with another with a common design; or
  – knows that the other’s conduct constitutes a breach of duty and gives assistance or encouragement
  – gives substantial assistance and its own conduct is separately considered to be tortuous
Alternative Liability

• Shifts burden of identification to two defendants where one committed the tort and plaintiff is unable to identify which one
Enterprise Liability

• Claim was permitted to go forward when all producers of a product were sued and plaintiff plead that all producers had knowingly conformed to an industry standard that the producers contributed to establishing despite having knowledge of significant risk created by design of product.

• Court stated that theory was only appropriate for industries composed of small number of actors and not appropriate for decentralized industries with mass producers.
Market Share Liability

- Designed for DES (diethylstilbestrol) cases re: Miscarriage Prevention Drug
- 200 producers
- Over 24 years of production
- Plaintiffs only sued 11 manufacturers
- Court rules plaintiff can proceed by establishing all elements of claim except for identification of actual tortfeasor and proportionality.
- Damages to be determined by market share of producer.
- Burden then shifts to Defendants to disprove that it contributed to the harm and/or refute proportionality of damages.
- Five states adopted Market Share for DES cases.
Other Precedent:
Statutory Commingled Product Liability

CERCLA and RCRA

• Joint and Several Liability for any “contributor” to a contaminated site or source regardless of indivisibility of harm from numerous and “commingled” pollutants but

• Statutes provide affirmative defense for contributor to avoid joint and several liability by proving the divisibility of its contaminant.
Contrary Precedent

• Case Law
• Restatement of Torts
Case law on “commingled” pollutants

- In instances of “commingled pollutants,” re: numerous producers of fungible products that are commingled and could not be differentiated for a common harm, 11 courts, including 7 state supreme courts) have ruled or stated that plaintiffs cannot obtain monetary damages through joint and several liability and instead must establish damages by proving culpability for apportionment of the harm created. Instead, plaintiffs can only obtain injunctive relief against contributors of commingled pollutants. Most cases date back to traditional common law principles of nuisance.
Restatement’s view on Market Share Liability

Restatement of Torts Third on Product Liability states Market Share Theory Liability has “an exceedingly limited reach”

- It also notes that courts that consider imposing market share liability consider 6 factors:
  - The generic nature of the product
  - The long latency period of the harm
  - The inability of plaintiffs to discover which defendant’s product cause plaintiff’s harm even after exhaustive discovery
  - The clarity of the casual connection between the defective product and the harm suffered by plaintiffs
  - The absence of other medical or environmental factors that could have caused or materially contributed to the harm
  - The availability of sufficient market share data to support a reasonable apportionment of liability

Judge Scheindlin candidly concedes that only three of the six factors are present in MTBE: 1,3 and 4.
• Courts that have Adopted Judge Scheindlin’s Commingled Product Theory of Market Share Liability....
• City of New York v. Exxon – numerous MDL rulings, including “commingled product,” will be brought to Second Circuit for review.