Perrine v. E.I. DuPont De Nemours

Civil Action No. 04-C-296-2 (Circuit Court of Harrison County, West Virginia), Feb. 25, 2008.

A West Virginia Circuit Court recently upheld a jury decision in a toxic tort class action suit awarding more than $130 million in damages for future medical monitoring in addition to more than $197 million in punitive damages.

A class action suit was brought by residents of Harrison County, West Virginia ("Plaintiffs") against DuPont De Nemours ("DuPont") for its conduct at the Spelter Smelter zinc production facility ("Spelter facility").

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According to the Plaintiffs, millions of tons of hazardous waste materials were generated from the Spelter facility, including arsenic, lead, and cadmium. The Spelter facility was in operation for more than 90 years, during which it purportedly released hazardous substances on a continual basis. Plaintiffs allege DuPont never gave notice to or warned residents of the surrounding communities of the hazardous substances released from the facility.

The Harrison County residents claimed their real properties were contaminated through the dust, smoke and other releases containing hazardous substances. The residents also asserted contamination due to DuPont's drinking water system that provided water to Harrison County residents from a contaminated surface water reservoir at the Spelter facility. As part of their lawsuit, the residents requested a medical monitoring system to be established to diagnose diseases associated with the exposure in the air and in the water.

On February 25, 2008, Harrison Chief Circuit Judge Thomas Bedell upheld the jury's finding that the Plaintiffs were entitled to $197 million in punitive damages and $130 million in damages for future medical monitoring. Additionally, Judge Bedell issued five other orders in the suit including a denial of DuPont's Motion for New Trial, selection of an administrator for the medical monitoring plan, and award of attorneys' fees.

While the trial is complete, this matter is likely far from resolved. Both DuPont and the residents have appealed the judgment. DuPont's primary argument on appeal is incident to the award of damages for medical monitoring.

The purpose of damages for medical monitoring is to recover "the economic costs of the extra medical check-ups that [the plaintiff] expects to incur as a result of his exposure" to a product.

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Medical Monitoring

A plaintiff must generally prove the following to recover damages for medical monitoring:

(1) plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant;

(2) as a proximate result of the exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease;

(3) the increased risk of disease makes periodic diagnostic medical examinations reasonable necessary; and

(4) monitoring and testing procedures exist which make early detection and treatment of the disease possible and beneficial.

Unlike virtually every other area of tort law, proof of actual injury or harm suffered by the plaintiff is not required to establish a case for medical monitoring. Because of this inconsistency, the concept of awarding damages for medical monitoring has been hotly contested. The Supreme Court rejected medical monitoring without injury in *Metro-North Commuter Railway Company v. Buckley*. However, some states, such as West Virginia, still use medical monitoring as a form of damages.

On appeal, DuPont likely will argue the verdict should not have included medical monitoring, as "[t]he evidence presented both at trial and in the post-trial proceedings shows that there is no increased risk of disease to the class members as a result of the smelter."

DuPont also complains the court erred in estimating the cost of a medical monitoring at $130 million, which includes low-dose CT scans for screening of lung cancer or other conditions for approximately 8,500 people for 40 years.

According to DuPont, Plaintiffs "presented a grossly inflated cost projection as justification for a larger award of attorneys' fees." DuPont also asserts the estimate is "based on implausible and inflated assumptions and forecasts about medical costs and participation rates for the class members."

As DuPont claims the costs of the program are inflated, the plaintiffs are appealing the judgment on the grounds that the damages were insufficient. Specifically, the plaintiffs claim the court erred in excluding 300 people out of a property cleanup plan.

Although the debate continues on a state-by-state basis as to whether medical monitoring is an appropriate remedy, it will be up to an appellate court in West Virginia to determine whether the damages against DuPont will stand.

Sources:

- Matt Harvey, *Judge Upholds Jury Award Against DuPont in Spelter Case*, THE CLARKSBURG EXPONENT TELEGRAM, Feb. 27, 2008, http://www.cpubco.com/articles/2008/02/27/news/01.txt.
- *Metro-North Commuter Railway Company v. Buckley*, 521 U.S. 424, 438 (1997).
- *In re Paoli*, 916 F.2d 829, 852 (3rd Cir. 1990).
- *DuPont Responds to Spelter, W.Va. Lawsuit Rulings*, PR NEWSWIRE, Feb. 26, 2008, http://news.moneycentral.msn.com/ticker/article.aspx?Feed=PR&Date=20080226&ID=8243310&Symbol=DD.
- *Plaintiffs Appeal DuPont Ruling*, AP, Mar. 10, 2008, http://www.forbes.com/markets/feeds/afx/2008/03/10/afx4754582.html

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