

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, et al., individuals
residing in West Virginia, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

Case No. 04-C-296-2
Thomas A. Bedell, Circuit Judge

E.I. DU PONT DE NEMOURS AND COMPANY, et al.,

Defendants.

**FINAL ORDER SETTING FORTH THE SCOPE AND OPERATION OF THE
MEDICAL MONITORING PLAN**

Presently pending before the Court is the "Special Master's Report No. 1 (Medical Monitoring), Recommendations, Requests for Comments, and Prayer for Relief from the Court," which was prepared at the Order of the Court and filed on or about June 23, 2008. Additionally, the Special Master filed a Supplement to Report No. 1 on or about October 25, 2010. Both the Report and the Supplement outline proposed actions for the Court to take while directing the administration of the medical monitoring program. The Report contemplated the original plan as outlined in the verdict. The Supplement slightly modified the Report to accommodate the judgment granted by this Court to the minors and incompetents in the medical monitoring class. Additionally, the Court previously entered the "Final Order Regarding the Scope, Duration, and Cost of the Medical Monitoring Plan," on February 25, 2008, although certain aspects of that Order have changed in conjunction with the Settlement, as noted in this Order and the Final Order Approving Settlement entered on January 4, 2011.

In relation to the medical monitoring program and the settlement of this case, the Parties have filed several motions. Namely, the Plaintiffs filed the "Motion for Appointment of Claims Administrator for Property Remediation," and the "Motion to Appoint a Claims Administrator & Establish Medical Monitoring Settlement Executive Committee," on December 22, 2010. On December 27, 2010, the Defendants filed a "Motion to Establish Medical Monitoring Settlement Executive Committee." On December 28, 2010, the Defendants filed a Response to the Plaintiffs' Motion to state that the Parties are not in agreement about the function of the proposed settlement executive committees.

Finally, the Parties and the Settlement Administrator, Edgar Gentle, executed the "Stipulation of Parties and Settlement Administrator," on or about January 10, 2011, for the purpose of "acknowledg[ing] the clear meaning of the aforesaid Memorandum of Understanding." The Stipulation includes two (2) provisions, the first, generally stated, is that DuPont has fully funded the administrative start up costs for the medical monitoring program through the seventy (\$70,000,000.00) million dollar settlement and will only have to provide additional administrative costs once testing commences. The second provision is that "there shall be no requirement that a medical monitoring class member register for or avail themselves of the medical monitoring program or service in order to receive a cash payment from the medical monitoring fund, provided that class membership is proven."

The Court will now address the Parties' Motions as to the Claims Administrator and proposed settlement executive committees.

Two primary observations greatly simplify the Court's decision on these Motions: first, there is no need to appoint a claims administrator for either the property class or the medical monitoring class because Edgar Gentle, of the law firm Gentle, Turner and Sexton, is the Claims Administrator for both classes as of the February 25, 2008, Order of this Court. Second, the Parties are not in dispute about the property remediation class, so its administration will proceed under the direction of Mr. Gentle, as previously Ordered by this Court.

The February 25, 2008, "Order Appointing Claims Administrator," specifically held that:

The Court hereby engages Edgar C. Gentle, III, as the Claims Administrator and Special Master to aid the Court in carrying out the medical monitoring, property remediation, and punitive damages distribution aspects of this case. Mr. Gentle will serve as Claims Administrator and Special Master at the discretion of the Court. The Court may modify this Order at any time... Mr. Gentle's appointment is under the authority of West Virginia law¹ allowing the Court to exercise general powers and responsibilities over class actions. His actions as Claims Administrator and Special Master (and those of his agents and employees), in accordance with this Order and all future Orders of this Court, will constitute judicial actions of this Court and be protected, to the maximum extent allowable by law, by the doctrine of judicial immunity. Lastly, pursuant to W. Va. R. Civ. Rule 54(b), the Court directs the entry of this Order as to the claims above upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The only aspect of the above cited Order which is no longer relevant is the distribution of money for punitive damages, as the award for punitive damages has been eliminated through the settlement, and the Court sees no reason to change the above quoted Order in any other respect.

¹ Aluise v. Nationwide Mutual Fire Insurance, 218 W. Va. 498, 625 S.E.2d 260 (2005); State ex rel Mantz v. Zakaib, 216 W. Va. 656, 609 S.E.2d 870 (2004).

Therefore, although the Court has the power to revisit its previous Orders as necessary, both of the Plaintiffs' Motions are **DENIED** as **MOOT**, because Mr. Gentle is the Claims Administrator for both classes pursuant to Order of the Court dated February 25, 2008.²

Next, the Court has considered the Defendants' arguments in the "Motion to Establish Medical Monitoring Settlement Executive Committee" and compared the function of said committee against the recommended plan in the Report and Supplement to the Report. Further, the Court has reviewed the November 19, 2010, Memorandum of Understanding, which outlines several agreed provisions of the medical monitoring plan, and the Stipulation of January 10, 2011. The Defendants now request, in contradiction to the Memorandum of Understanding and prior February 25, 2008, "Order Appointing Claims Administrator," that the ultimate administrative authority for running the medical monitoring plan should rest with a three person panel serving two year terms, with the authority to hire or fire the actual administrator of the plan and the authority to act as an intermediate appeal board for issues regarding exclusion or inclusion of potential class members. The Defendants assert that the power to administer the plan should not be vested in one individual due to the thirty (30) year length of the plan and that control of the plan needs to be "institutional."

The Court understands and appreciates the Defendant's concern with the course of the plan over the next thirty years, but the proposed settlement executive committee is unnecessary. First, the Court notes that Mr. Gentle and his firm have the prior

² However, the Parties should note, as further outlined in this Order, the Finance Committee as established by the Court will have many of the responsibilities that the Parties have requested for the proposed settlement executive committees.

experience and expertise³ needed to administer this plan, while the members of the proposed committee are unknown and likely would not have the same experience. Second, Mr. Gentle has been involved with this case for more than two (2) years and is ready to begin to administer the plan, while it would take time to form a committee, whose members would need even more time to understand the massive undertaking presented by this case. Third, a committee is unnecessarily expensive because Mr. Gentle can administer the plan with the oversight of the Court as a safeguard. Fourth, the creation of unnecessary committees is better suited to the legislative and executive branches of government. Fifth, the Court alone is the institutional oversight that the Defendants seek; namely, should Mr. Gentle retire, pass away, or commit some malfeasance, the Court will replace him. The Circuit Court has been serving the Citizens of Harrison County since 1863 and, from all indications, will continue to do so for the next thirty (30) years while the medical monitoring plan is implemented.

Mr. Gentle has not been appointed for life, but instead serves under the supervision and direction of the Court. Mr. Gentle, as Special Master and Claims Administrator, answers to the Court, and the Court serves the Citizens of this County and the State of West Virginia. Should the administration of the plan fail to satisfy any

³ The Court notes that Mr. Gentle has administered large class action settlements for approximately twenty years. Specifically, Mr. Gentle has served as a Special Master for the MDL 926 Court in the Baxter, Bristol, and 3M Breast Implant Settlement since 1992 which has involved more than 1.1 billion dollars, worldwide claimants, and over two hundred thousand (200,000) checks issued to claimants. Additionally, Mr. Gentle has been in charge of more than 1 billion dollars in investments for the Dow Corning breast implant settlement. Next, Mr. Gentle has administered the settlement of a class action over PCB contamination involving more than 18,000 claimants, a fund of approximately 300 million dollars, and the defendants Solutia, Inc., Monsanto Co., and Pharmacia Corporation. Said administration has resulted in more than seventy thousand checks being issued to claimants. See Gentle, Edgar C., III, "Administration of the 2003 Tolbert PCB Settlement in Anniston, Alabama: An Attempted Collaborative and Holistic Remedy," 60 Ala. L. Rev. 1249 (2009). Finally, Mr. Gentle is a Rhodes Scholar, and along with his law partner Terry Turner, drafted a complete and revised Constitution for the State of Alabama from 2000 to 2001.

of the Parties, they may petition the Court to change the administrator of the plan, and as outlined in the settlement, this Court retains jurisdiction over this case, and the Court's decisions are always subject to review by the Supreme Court.

The Court finds that it is critical that the Administrator be answerable to the Court and not subject to influential pressure from one side or the other or subject to deal making by the Parties. To create an executive committee with such vast authority as proposed by the Defendants would be an impermissible delegation of the Court's authority and responsibilities to the Parties. To do so would be tantamount to the inmates running the asylum.

For the foregoing reasons, the Court hereby **DENIES** the Defendants' "Motion to Establish Medical Monitoring Settlement Executive Committee."

Next, the Court **ORDERS** the following as to the establishment of the medical monitoring plan:

- a. There shall be an initial enrollment period of six (6) months, beginning no later than **April 15, 2011**, whereby the Claims Administrator, Edgar Gentle, will set up a system for any Plaintiff who is a member of the medical monitoring class to enroll in the medical monitoring program to avail themselves of the future monitoring benefits of the program. During this six (6) month enrollment period, any qualified Member of the Plaintiff Medical Monitoring Class may enroll in the medical monitoring program. No class member shall be entitled to participate in said program unless he or she has enrolled during the initial six (6) month enrollment period. However, if a purported class member submits an application to enroll

during the six (6) month period and such enrollment is disputed or unclear and a final determination as to the eligibility of the class member is made outside of the six (6) month period, said enrollment shall be retroactive to the application date, assuming that the individual is eligible, and the individual shall have timely enrolled in the Class. As long as the Class Member has continuously lived in the Class Area prior to reaching the minimum residence threshold, a Class Member's number of years of residence in each respective Class Area will be accumulated to determine if the threshold has been met. For example, if a Class Member lived ½ year in Zone 1 and 1 ½ years in Zone 2, he or she would qualify for medical monitoring, having fulfilled 50% of the residency required in each zone.

- b. A Finance Committee, comprised of three individuals, including one representative from class counsel, one from Dupont, and the Claims Administrator, Edgar Gentle, shall be created for purposes of advising the Court on the structure and execution of the medical monitoring program. Class Counsel and DuPont shall inform the Court of their respective choices for representatives on the Finance Committee within five (5) days of the entry of this Order.
- c. The Finance Committee shall exist for the purpose of providing guidance and advice for the operation of the medical monitoring program. In the event any decision is made by the Claims Administrator with respect to the payment for services or costs in the medical monitoring program to which

either Party takes exception, then either Party shall have the right to bring such objection or exception to the Court and, if necessary, may appeal the determination of the Court within the West Virginia judicial system.

- d. The Finance Committee will provide guidance and, hopefully, will operate in a collaborative fashion to provide an effective and efficient medical monitoring program. In the event that the Finance Committee cannot reach an agreement on how to proceed on any issue before it, final decision making authority shall rest with the Claims Administrator, Edgar Gentle, with such decision(s) reviewable by the Court.
- e. The Parties reserve the right to reasonably challenge the enrollment of any class member in the medical monitoring program. With respect to any challenge relevant to the issue of eligibility for enrollment, the challenger shall pay reasonable costs and attorney fees if the challenge is unsuccessful. The Court will hear any disputes as to the inclusion or exclusion of a potential class member.
- f. On an annual basis the Court, upon recommendation of the Finance Committee, shall direct DuPont to pay a sum certain that will be set aside for each such calendar year to reasonably secure such expenditures as are reasonably necessary to execute the Medical Monitoring Program, in advance, for such following calendar year. In each subsequent year after the first, DuPont shall be credited with any amounts remaining from the prior year in determining the amount of payment for the subsequent year. Additionally, should there be a monetary shortfall during a calendar year

due to reasonable expenditures exceeding the budget; the Class Administrator shall petition DuPont for such reasonable and necessary monies as to remedy the shortfall. DuPont shall provide such monies within twenty (20) business days of receipt of the Petition.

- g. The program shall be implemented consistent the Court's Order of February 25, 2008, and as modified by the Final Order Approving Settlement and this Order. The program shall provide those examinations and tests set forth in the Court's Order of February 25, 2008, with the exception that the duration of the program shall be thirty (30) years in length, and that no routine CT scans shall be performed. CT scans will only be performed as part of the medical monitoring program when a competent physician determines that a CT scan is diagnostically medically necessary as relevant to the possible exposure to heavy metal contamination. Any disputes and/or objections to the necessity of providing a CT scan in a given situation shall be decided by the Claims Administrator with such decision reviewable by this Court.
- h. Additionally, after the initial six (6) month sign-up period has concluded and the number of participating Plaintiffs, be they adults or minors, is known, Defendant DuPont, in the ordinary course of its business, shall set aside reasonable reserves as required by applicable law which shall cover the estimated cost of the entire thirty (30) year medical monitoring program.

i. In regards to the four (4) million dollar (\$4,000,000.00) fund specifically ear-marked for cash payments to the medical monitoring class by the Memorandum of Understanding, the Court makes the following Orders:

- i. The four (4) million dollar (\$4,000,000.00) fund is specifically for the sole benefit of the medical monitoring class and shall provide cash payments to the same, in a form and fashion to be determined by the Finance Committee and Claims Administrator and approved by the Court.
 - ii. There shall be two separate lists of medical monitoring claimants: the first shall be for only cash payments, and the second shall be for medical monitoring. Class members may sign up for either or both lists.
 - iii. There shall be no requirement that a medical monitoring class member register for or avail themselves of the medical monitoring program or service in order to receive a cash payment from the medical monitoring fund, provided that class membership is proven.
- j. The money to fund the administrative start-up expenses of the medical monitoring program, including providing notice to potential class members, shall come from the four million dollar (\$4,000,000.00) Qualified Settlement Fund. The Court finds that the most equitable solution to funding the start up costs of the medical monitoring program is to have only those individuals who are members of the medical

monitoring class shoulder the burden. Distribution of start up expenses from the sixty-six million dollar fund would negatively impact those property class members who do not participate, or are not eligible to participate, in the medical monitoring program.

- k. DuPont, by paying the sum of seventy million dollars (\$70,000,000.00) as part of the settlement of this matter, has paid in full for any and all start up costs and expenses necessary for the medical monitoring program, and DuPont will not be billed for or responsible for any associated costs or expenses until the testing commences. At that time, consistent with the yearly budget procedure outlined above, DuPont shall fund the medical monitoring program, including administrative costs, on an annual basis. Finally, the Claims Administrator shall attempt to combine administrative expenses between the property and medical monitoring classes to be as cost effective as possible. For such costs that are equally attributable to either class, the Claims Administrator shall establish an equitable ratio to split the costs between the property and medical monitoring classes.
- l. Any and all decisions of the Claims Administrator shall be reviewable by this Court, and each Settling Party shall have the right to pursue any and all appeals of this Court's final orders and decisions to the extent such is permissible under West Virginia law.

To accomplish the above stated guidelines, the Claims Administrator, Edgar Gentle, is hereby **ORDERED** to accomplish the following:

1. Within ten (10) days after the entry of this Order, the Claims Administrator should submit to the Parties and the Court the proposed Class Member Medical Monitoring registration forms and the recommended criteria for proof of Class Member Medical Monitoring eligibility. To the extent practicable, objective and easily obtained proof of residency in the Class Area for the period necessary to be eligible for Medical Monitoring will be utilized, with source documents such as Class Area voter registration rolls, Class Area ad valorem property tax records, Class Area Medical Clinic patient rolls, and Class Area utility billing records. For children, source documents will include Class Area school registration rolls and Class Area Medical Clinic patient rolls. To the extent possible, such source documents will be kept confidential.

2. Additionally, within ten (10) days after the entry of this Order, the Claims Administrator shall submit a timeline of reasonable goals and dates to accomplish the directives of the Court and any other administrative details that may be necessary to the Parties and the Court, including starting class sign ups on or before April 15, 2011.

3. The putative Class Members shall be given appropriate notice of and information concerning the Medical Monitoring Program's terms. Notice measures shall include a notice mail-out to those putative Class Members which have been identified, and publication of notice in local or prominent West Virginia newspapers. To facilitate notice to putative Class Members living outside the Class Area, the registering Class Members will be asked to complete a questionnaire providing the names and address of relatives and acquaintances known to live or to have previously lived in the Class Area, followed by a notice mail-out to these additional putative Class Members. No additional

funding beyond the seventy million dollar settlement funds shall be required from DuPont to accomplish these preliminary notices.

4. In order to organize and coordinate the medical monitoring program inside and outside of the Class Area, which will involve the completion of detailed health questionnaires, direct physical examinations, and collection of lab samples for analysis, the Claims Administrator shall create a computer-based data gathering system, with data for all Class Members to be entered into the same database wherever the participating medical provider and Class Member are located. Subject to the terms of a Protective Order, which shall be considered by the Finance Committee and the Claims Administrator and recommended to the Court, and after signing a Confidentiality Agreement, which shall likewise be considered by the Finance Committee and the Claims Administrator and recommended to the Court, the Claims Administrator shall have real time access to the database, and DuPont and Class Counsel shall have access to the database with claimant-specific information redacted and unique identifiers, such as a numbering system, used instead of names.

5. Next, the Claims Administrator shall initiate a bidding process through a Third Party Administrator of health plans who shall be engaged to facilitate identification of a national laboratory or other such vendor to provide out-of-Class Area medical monitoring and in-Class Area medical providers, located in or near the Class Area, to provide medical monitoring in the Class Area, while assuring testing and access to care per the Medical Monitoring Order of February 25, 2008, at page 10. The Third Party Administrator of health plans using the CPT Codes contained in Appendix A to Dr. Werntz's March 30, 2007 Proposed Medical Monitoring, shall negotiate prices charged

by in-Class Area and out-of-Class Area medical providers, subject to review by the Parties through the Finance Committee and approval by the Claims Administrator and, ultimately, the Court. In the medical monitoring registration process, Class Members living both inside and outside the Class Area will be asked which medical providers they prefer to conduct the testing, which will be a material factor in selecting the providers utilized for medical monitoring along with the lowest cost per unit of testing.

6. The Court has determined that there shall be a Medical Advisory Panel to facilitate the Claims Administrator's quality control audits of the medical monitoring program, and to advise the Claims Administrator and the Court, with input from the Parties, on periodically updating medical monitoring protocols based on scientific and medical developments following the first five years of medical monitoring, as contemplated on page 15, decretal paragraph 1 of the Medical Monitoring Order of February 25, 2008. The Parties, via the Finance Committee, shall have input concerning the appropriate make up of the Medical Advisory Panel, its membership and its specific duties for the Court's review.

7. Next, the Court Orders that the Claims Administrator, Edgar Gentle, establish a Claimants' Advisory Committee, to consist of class members willing and able to provide input as to the administration of the medical monitoring plan. Said Committee shall only have an advisory capacity. The Committee will exist in order to ensure that Class Members are heard in the design and implementation of the Medical Monitoring Program, and other aspects of the Claim Administrator's duties. The Claimants' Advisory Committee shall be established as soon after the Effective Date as practicable, with 5 members to be residents of the Class Area and 4 to be non-residents of the

Class Area. It is requested that Claimants Advisory Committee nominations be provided by Class Counsel within 15 days after the Effective Date. In nominating potential Committee members, Class Counsel should provide adequate facts to facilitate the Court's determination of each candidate. To the extent practicable, Committee members will be incumbent Class Representatives, and the Parties, via their role on the Finance Committee, will be invited to provide input on the proposed Committee members prior to their selection. The Committee will have an initial organizational meeting with the Court, the Claims Administrator, and the Finance Committee in person, conduct periodic telephonic meetings, and have one annual meeting with the Court, the Claims Administrator and the Parties in person thereafter.

8. In order for the Claims Administrator, in collaboration with the Finance Committee, to prepare the initial budget and administrative actions for the Medical Monitoring Program for review and approval by the Court, the logistics for this aspect of the case should be finalized as soon as practicable. The Claims Administrator shall attempt to find usable office space for lease in the Class Area in or near Spelter and utilize the same office space for both the property and medical monitoring classes.

9. To facilitate efficient utilization of the class funds and to minimize administrative expenses, the Claims Administrator shall look into obtaining living quarters in the Class Area for the first two (2) years of medical monitoring, during which time the Claims Administrator's staff will have an ongoing presence. Such a residence will be more cost effective than a hotel, and create less of a burden on the classes. Additionally, the Claims Administrator shall look into the cost effectiveness of obtaining a vehicle to reduce rental car bills. Said living quarters and/ or administrative vehicle

shall be discussed by the Finance Committee and recommended by the Claims Administrator to the Court for final approval.

The Court, as noted in the Final Order Approving Settlement, shall retain continuing jurisdiction and the ultimate authority over the administration of this settlement.

Next, because the administration of the property remediation settlement has not yet been brought before the Court, the Claims Administrator is directed to prepare a proposed time line and punch list for the same and submit it to the Parties and the Court within twenty (20) business days of the entry of this Order.

The Court intends to retain the services of the Guardian *ad litem*, Meredith McCarthy, for the purposes of providing legal representation to the minors and incompetents in the classes, assuming that she is still ready and willing to serve. The details and necessary duties of the Guardian *ad litem* can be determined as a need for such services becomes apparent. The Court directs the Finance Committee and the Claims Administrator to orchestrate such necessary services for the classes and provide direction to Mrs. McCarthy. The Guardian *ad litem* shall serve at the previously established rate, or such additional just rate of compensation to be determined by the Finance Committee and the Claims Administrator and paid along with the administrative and start up costs for each of the classes.

Lastly, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court directs entry of this Order as a Final Order as to the claims and issues above upon an express determination that there is no just reason for delay and upon an express direction for the entry for judgment.

IT IS SO ORDERED.

Finally, it is **ORDERED** that the Clerk of this Court shall provide certified copies of this Order to the following:


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ENTER: January 18, 2011


Thomas A. Bedell, Circuit Judge