

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT,
WAUNONA MESSINGER, REBECCA
MORLOCK, ANTHONY BEEZEL, MARY
ELLEN MONTGOMERY, MARY LUZADER,
TRUMAN R. DESIST, LARRY BEEZEL,
and JOSEPH BRADSHAW, individuals residing
in West Virginia, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 04-C-296-2
(Judge Thomas A. Bedell)

E.I. DU PONT DE NEMOURS AND COMPANY,
a Delaware corporation doing business in West
Virginia, MEADOWBROOK CORPORATION, a
dissolved West Virginia corporation,
MATTHEISSEN & HEGELER ZINC
COMPANY, INC., a dissolved Illinois corporation
formerly doing business in West Virginia,
NUZUM TRUCKING COMPANY,
a West Virginia corporation,
T. L. DIAMOND & COMPANY, INC., a New York
corporation doing business in West Virginia, and
JOSEPH PAUSHEL, an individual residing
in West Virginia,

Defendants.

**REPLY SUBMISSION OF E. I. DU PONT DE NEMOURS AND COMPANY
IN CONNECTION WITH PRELIMINARY CT SCAN GUIDELINES
AND PRELIMINARY MEDICAL MONITORING BUDGET**

Now comes Defendant E.I. du Pont de Nemours and Company ("DuPont"), by counsel, and pursuant to the Court's August 31, 2011 Order submits this further pleading relative to the September 1 and September 20, 2011 submissions of the Claims Administrator. (See, September 1, 2011 and September 20, 2011 Submissions of Claims Administrator, attached as Exhibits 1 and 10, respectively, to DuPont's September 21, 2011 Submission). Through ongoing discussion

and this briefing process, the Claims Administrator and the Parties are now in accord with respect to the CT Scan Guidelines. Per the November 19, 2010 Memorandum of Understanding (“MOU”) between the Parties and the September 1 and September 20, 2011 Submissions of the Claims Administrator, CT Scans will not be a routine part of the Medical Monitoring program. Rather, the decision as to whether or not any particular Claimant will receive a CT scan will be made solely by the physicians participating in the Medical Monitoring program on a case by case basis. This decision will be made consistent with the dictate of the MOU:

The program shall provide those examination and tests set forth in the Court’s Order of February 25, 2008 with the exception that no routine CT scans shall be performed as part of the medical monitoring program. The Defendant does agree to provide CT scans that are diagnostically medically necessary as determined by a competent physician as relevant to possible exposure to the heavy metal contamination at issue in this litigation.

As to the preliminary Medical Monitoring budget, although the Parties may ultimately achieve agreement on this as well, the budget continues to be in a state of flux. DuPont received a revised budget, including participation rates and certain cost estimates, today October 1, 2011. DuPont’s preliminary comment on the received budget is set forth below at page 5.¹

Preliminary CT Scan Guidelines

1. CT scans are to be non-routine, having been negotiated out of the Medical Monitoring program by the Parties via the settlement. (See, MOU at par. 3(c), attached as Exhibit 3 to DuPont’s September 21, 2011 Submission).

2. As set forth in the MOU, only competent physicians – not the lawyers or the Claims Administrator – may make the decision regarding the diagnostic medical necessity of CT scans. *Id.*

¹ DuPont preserves all objections and argument relative to the preliminary budget previously set forth in DuPont’s September 21, 2011 Submission.

3. The September 20, 2011 Preliminary CT Scan Guidelines submitted by the Claims Administrator are in accord. (See, Preliminary Physicians CT Scan Verification Form, attached as Exhibit 10 to DuPont's September 21, 2011 Submission, at pars. 1 and 6)(“The decision to recommend a CT scan or not to recommend a CT scan rests with . . . the examining qualified health care professional.”) The Guardian *Ad Litem* (“GAL”) is in agreement that the examining physician alone should determine whether to recommend a CT scan for a Claimant” (See, September 21, 2011 Submission of the GAL at p. 1). Class counsel is likewise in agreement, stating, “[t]he only requirements expressed in the Settlement MOU were that a competent physician must make the determination that the CT scans were diagnostically and medically necessary related to the participant's exposure to heavy metals in the class area.” (See, September 21, 2011 Submission of Class Counsel, at p. 1).

4. Moreover, as reflected in the MOU as well as in the above-quoted statement of Class Counsel, any CT scans may only be ordered as related to the alleged heavy metal contamination that was at issue in this litigation, that is, arsenic, cadmium, zinc, and lead. (See, MOU at par. 3(c), attached as Exhibit 3 to DuPont's September 21, 2011 Submission).

5. Again, the Claims Administrator and the Parties are in agreement. The September 20, 2011 Preliminary Physician CT Scan Verification Form submitted by the Claims Administrator specifically states, “I, the examining physician, have, in my discretion, made a determination on whether to recommend a CT scan for the patient as being medically necessary and relevant to possible exposure to heavy metals (cadmium, arsenic, lead, or zinc) contamination.” (See, Exhibit 10 attached to DuPont's September 21, 2011 Submission, at par. 5).

6. The GAL supports this language, noting “Paragraph 6² of the proposed CT Scan Guidelines allows that an examining physician will, in his discretion, decide whether to recommend a CT scan for the Claimant as being medically necessary and relevant to possible exposure to heavy metals . . . contamination” Paragraph 6 conforms to the Parties’ MOU.” (See, September 21, 2011 Submission of the GAL, at p. 3).

7. The arguments set forth in the September 21, 2011 submissions of both the GAL and Class Counsel focus instead on the fact that the Claims Administrator’s initial September 1, 2011 proposed Preliminary Physician CT Scan Verification Form included a listing of signs and symptoms which could satisfy medical necessity. (See, DuPont’s September 21, 2011 Submission, Exhibit 1, at par. 7). Both the GAL and Class Counsel objected to inclusion of this listing of signs and symptoms in the CT Scan Guidelines. (See, September 21, 2011 Submissions of the GAL (pp. 3-8) and Class Counsel (pp. 2-4)). DuPont agrees with the GAL and Class Counsel. The Claims Administrator does as well. Indeed, in the *current* proposed CT Scan Guidelines submitted by the Claims Administrator on September 20, 2011, paragraph 7 of the initial September 1, 2011 Submission of the Claims Administrator--which was the paragraph that included the signs and symptoms listing--has been deleted and is no longer part of the criteria to be used by physicians in prescribing CT scans under the Medical Monitoring program. (See, September 20, 2011 Preliminary Physician CT Scan Verification Form, attached as Exhibit 10 to DuPont’s September 21, 2011 Submission).

² This paragraph reference is with respect to the September 1, 2011 submission of the Claims Administrator. As of September 20, 2011, the Claim Administrator revised certain portions of the Preliminary Physicians CT Scan Verification Form. Although the language of this paragraph was left intact, the paragraph number is now 5 in the revised September 20, 2011 form.

8. The GAL and Class Counsel apparently drafted and filed their initial September 21, 2011 briefs prior to receiving or reviewing the Claims Administrator's September 20, 2011 Submission. In any event, all Parties and the Claims Administrator are now in apparent agreement.

Preliminary Medical Monitoring Budget

9. DuPont recently received a revised budget for the initial implementation of the Medical Monitoring program. The proposed budget assumes that 86% of the 4000 claimants are adults. The proposed budget further assumes that 75% of these adults will show up for initial testing under the Medical Monitoring program and that 50% of the adults who show up for testing will be referred for a CT Scan. Thus, the proposed budget assumes that one out of every two adults that participate in the Medical Monitoring Program will be eligible for a CT Scan. Such a high eligibility rate fails to consider that only those adults age 35 or older are considered candidates for CT scans. Until the Court issues a ruling on the circumstances under which a CT scan will be available under the Medical Monitoring program, the settlement administrator, the third party administrator and the Finance Committee are not in a position to provide a reasonable estimate of the number of Medical Monitoring participants for whom a CT scan is available and the budget necessary to cover the costs of such tests.

The "Inactive" Claimant Procedures are Unnecessary and Wasteful

10. As to the Claims Administrator's proposed rule regarding the classification and handling of "inactive" Claimants, DuPont objects. The Claims Administrator proposes to expend the resources of the Medical Monitoring program to provide Claimants with **three** separate reminders before finally declaring them to be "inactive." (See September 1, 2011 Claims Administrator's Submission, Exhibit B). DuPont objects inasmuch as it is a waste of resources to

repeatedly remind adults about their medical appointments. DuPont submits that one reminder is sufficient.

11. In any event, assuming this “three reminder” rule is approved, following what could only be described as a clear expression of intent not to further participate in the Medical Monitoring program (after failing to show after the three proposed reminders), the Claims Administrator then proposes to further expend resources of the Medical Monitoring program by sending biennial correspondence to these “inactive” Claimants inviting them to again participate. Again, DuPont objects to this waste of resources. It is perfectly reasonable for a Claimant whose initial blood and urine testing via the Medical Monitoring program does not show any heavy metal exposure to make the decision to cease further participation. It is unreasonable, however, for the Medical Monitoring program to continue to expend resources wooing such “inactive” Claimants.

The Non-Medical Monitoring Minor Procedures are Unreasonable

12. The Claims Administrator also proposes a rule to govern those Claimants who were minors during the Medical Monitoring program registration period, but whose parents/guardians chose not to register them to participate in the Medical Monitoring program. The proposed rule regarding the “minor-no” Claimants, provides that upon turning 18, the Claimant will be notified by the Claims Administrator of the program and afforded an opportunity to participate by responding affirmatively. It is further proposed that the “minor-no” Claimants continue to receive biennial correspondence regarding the program availability for the duration of the thirty years. (See August 19, 2011 Claims Administrator’s Submission, Exhibit B). DuPont does not object to the Claims Administrator contacting such minor Claimants once upon their

reaching the age of majority. However, for the reasons detailed above in connection with the “inactive” Claimant proposal, DuPont objects to continued biennial contact.

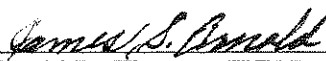
Upon the foregoing, DuPont requests this Court (i) to adopt the *current* CT Scan Guidelines which were proposed by the Claims Administrator and are consistent with the MOU and the agreement of the Parties, and (ii) to reject the recommended procedures for repeated communications with “inactive” Claimants and those Claimants who become adults.

Dated: October 3, 2011.

E.I. DU PONT DE NEMOURS AND CO.,

Defendant,

BY COUNSEL:



David B. Thomas (WV Bar No. 3731)
James S. Arnold (WV Bar No. 0162)
Stephanie D. Thacker (WV Bar No. 5898)
Guthrie & Thomas, PLLC
500 Lee Street East, Suite 800
Post Office Box 3394
Charleston, West Virginia 25333-3394
(304) 345-7250

Counsel for E.I. du Pont de Nemours and Company

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.

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

Defendants.

CIVIL ACTION NO. 04-C-296-2

Honorable Thomas A. Bedell

CERTIFICATE OF SERVICE


I, James S. Arnold, counsel for Defendant E.I. du Pont de Nemours, hereby certify that service of the foregoing "Reply Submission of E. I. du Pont de Nemours and Company in Connection with Preliminary CT Scan Guidelines and Preliminary Medical Monitoring Budget" has been made upon the parties herein by placing a true copy in the U. S. Mail, postage prepaid, this 3rd day of October, 2011, addressed as follows:

Virginia M. Buchanan
Levin, Papantonio, Thomas, Mitchell,
Echsner, Rafferty & Proctor, P.A.
316 S. Baylen St., Suite 400
Pensacola, FL 32502

Edgar C. Gentle, Claims Administrator
C/O Spelter Volunteer Fire Department Office
55 B Street
P.O. Box 257
Spelter, WV 26438

Meredith McCarthy, Esq.
901 W. Main Street
Suite 201
Bridgeport, WV 26330

Perry B. Jones
West & Jones
360 Washington Avenue
Clarksburg, WV 26301


James S. Arnold (WV Bar No. 0162)
Guthrie & Thomas, PLLC
500 Lee Street East, Suite 800
Post Office Box 3394
Charleston, West Virginia 25333-3394
(304) 345-7250
*Counsel for E.I. du Pont de Nemours and
Company*

LAW OFFICES
GUTHRIE & THOMAS, PLLC
P. O. BOX 3394
CHARLESTON, WEST VIRGINIA 25333-3394

TELEPHONE: (304) 345-7250
FACSIMILE: (304) 345-9841
WEBSITE: www.agmtlaw.com

500 LEE STREET, EAST, SUITE 800
CHARLESTON, WEST VIRGINIA 25301

WRITER'S DIRECT DIAL
(304) 720-4235
e-mail: sdthacker@agmtlaw.com

October 3, 2011

Via Telefacsimile

The Honorable Donald Kopp, Clerk
Circuit Court of Harrison County
301 West Main Street
Clarksburg, WV 26301

Re: Perrine, et al. v. E. I. du Pont de Nemours and Company, et al.
Civil Action No. 04-C-296-2 (Cir. Ct. of Harrison County, W. Va.)

Dear Mr. Kopp:

Enclosed for filing in connection with the referenced civil action, please find "Reply Submission of E. I. du Pont de Nemours and Company in Connection with Preliminary CT Scan Guidelines and Preliminary Medical Monitoring Budget." Copies of the foregoing have this day been properly served.

Thank you for your attention to this matter.

Very truly yours,


STEPHANIE D. THACKER

SDT/klm

Enclosure

cc w/encl.: The Honorable Thomas A. Bedell (Via Telefacsimile)
Meredith McCarthy, Esq. (Via Electronic and U. S. Mail)
Perry B. Jones, Esq. (Via U. S. Mail)
Virginia Buchanan, Esq. (Via Electronic and U. S. Mail)
Edgar C. Gentle, III (Via Electronic and U. S. Mail)