PERRINE DUPONT SETTLEMENT
SPELTER VOLUNTEER FIRE DEPARTMENT CLAIMS OFFICE
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October 14, 2011

SUPPLEMENT TO CLAIMS ADMINISTRATOR'S OCTOBER 10, 2011 MEDICAL MONITORING PLAN UNRESOLVED ISSUES REPORT TO THE COURT

VIA HAND DELIVERY

The Honorable Thomas A. Bedell
Circuit Judge of Harrison County
301 West Main Street, Room 321
Clarksburg, West Virginia 26301

Re: Perrine, et al. v. DuPont, et al.; Civil Action No. 04-C-296-2 (Circuit Court of Harrison County, West Virginia) - Supplement to October 10, 2011, Claims Administrator's Unresolved Issues Report and Proposed Working Order for October 17, 2011 10:00 a.m. Eastern Time Medical Monitoring Plan Design Finalization Hearing; Our File Nos. 4609-1 {R}, 4609-1 {NN} and 4609-1 {GG}

Dear Judge Bedell:

With this letter we supplement the referenced October 10, 2011 Report as follows: (i) In Attachment X is an October 14, 2011 Memorandum to the Finance Committee proposing a Medicare reporting procedures for which there is not a Finance Committee consensus (the "Medicare Reporting Issue"), with this supplement being a request for the Court to help resolve this issue; and (ii) In Attachment XI is a revised version of the Working Order provided in the October 10, 2011 Report, reflecting edits suggested by the Finance Committee, and adding the Medicare Reporting Issue.

Thank you for the Court's consideration.

Yours very truly,

Edgar C. Gentle, III
Claims Administrator

ECGIII/kjm
Attachments (Schedule of Attachments Included)

cc: (with enclosures)(by e-mail)(confidential)
Stephanie D. Thacker, Esq., DuPont Representative on the Settlement Finance Committee
Virginia Buchanan, Esq., Plaintiff Class Representative on the Finance Committee
Meredith McCarthy, Esq., Guardian Ad Litem for Children
Clerk of Court of Harrison County, West Virginia, for filing (via hand delivery)
Terry D. Turner, Jr., Esq.
Diandra S. Debrosse, Esq.
Katherine A. Harbison, Esq.
Paige F. Osborn, Esq.
Michael A. Jacks, Esq.
William S. ("Buddy") Cox, Esq.
J. Keith Givens, Esq.
McDavid Flowers, Esq.
Farrest Taylor, Esq.
Ned McWilliams, Esq.
Perry B. Jones, Esq.
Angela Mason, Esq.
Mr. Don Brandt
Ms. Pat Gagne
James B. Lees, Jr., Esq.
Leigh Anne Hodge, Esq., Outside Counsel for Claims Administrator

SCHEDULE OF ATTACHMENTS TO OCTOBER 17, 2011 SUPPLEMENT
TO CLAIMS ADMINISTRATOR'S OCTOBER 10, 2011 MEDICAL MONITORING
UNRESOLVED ISSUES REPORT TO THE COURT

ATTACHMENT NUMBER	ATTACHMENT DESCRIPTION
X.	Unresolved Medicare Issue Memorandum
XI.	Revised Working Order on Paper and Electronic Media

X. UNRESOLVED MEDICARE ISSUE MEMORANDUM

PERRINE DUPONT SETTLEMENT CLAIMS OFFICE
ATTN: EDGAR C. GENTLE, CLAIMS ADMINISTRATOR
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MEMORANDUM

BY E-MAIL

TO: **Virginia Buchanan, Esq.**
Stephanie D. Thacker, Esq.

FROM: **Edgar C. Gentle, III, Esq.**

DATE: **October 14, 2011**

RE: **Perrine v. DuPont Settlement - Medical Monitoring Medicare Reporting Concerns; Our File No. 4609-1 {GG}**

Dear Virginia and Stephanie:

I hope that you are well.

I am writing to address Virginia's concerns, expressed on Wednesday, regarding the Medicare Questionnaire Form and the Medicare reporting requirements, and to share a proposed final version of our reporting proposal, which we would like to review with the Court and you at our Medical Monitoring implementation hearing on Monday, October 17, 2011, beginning at 10:00 a.m.

As a preliminary matter, we share your position that Medicare does not apply to the Medical Monitoring Program. See attached May 10, 2011, and September 27, 2011 Memoranda to Medicare in Attachment A to this Memorandum. However, we do not expect agreement from Medicare soon, and certainly not before Medical Monitoring begins. Thus, to comply with potential Medicare reporting requirements, we have the following proposal.

According to the Medicare reporting obligation statute, 42 U.S.C. § 1395y(b)(8) (the "MSP Statute"), Medicare's reporting obligations not only apply to insurance companies, products liability and toxic tort defendants, but the MSP Statute also applies to Claims Administrators, and possibly to a Claims Administrators' governance advisory committee, such as yourselves, if you are deemed fiduciaries. The MSP Statute specifically states that "the term 'applicable plan' means the following laws, plans, or other arrangement, including the *fiduciary or administrator* for such law, plan, or

arrangement: (i) Liability insurance (including self-insurance). (ii) No fault insurance. (iii) Workers' compensation laws or plans." 42 U.S.C. § 1395y(b)(8)(F) (emphasis added).

The entities responsible for reporting to Medicare are known as Responsible Reporting Entities ("RREs"). RREs are required to report virtually all settlements, judgments, and awards (whether or not there is a determination or admission of liability), so that Medicare can determine whether it has an interest in any part of the Settlement. More specifically for this Settlement, reporting enables Medicare to refuse payment for future costs associated with the Medical Monitoring Program. See 42 U.S.C. § 1395y(b)(8)(C).

Medicare will use the reported information in two ways:

(i) Medicare will use reported information to recover conditional payment claims it previously paid related to treatment associated with the Settlement. Because this Settlement does not involve recovery for any past medical treatment or testing, Medicare's determination of any past conditional payments is not a concern in this Settlement.

(ii) Medicare will use reported information to more effectively deny payment for future medical claims related to the Medical Monitoring Program in this Settlement.

The reporting obligations of the RREs include "(i) determin[ing] whether a claimant (including an individual whose claim is unresolved) is entitled to benefits under the program under this subchapter on any basis." 42 U.S.C. § 1395y(b)(8)(A). In compliance of this section of the MSP Statute, we propose that all Claimants that appear for their initial Medical Monitoring visit complete the attached very simple Medicare Questionnaire Form, to be sent with the attached proposed memorandum to Medicare in Attachment B, which we propose to send to Medicare if approved by the Court.

As these Medicare Questionnaire Forms are completed, we propose to vet the completed Medicare Questionnaire Forms with Medicare to confirm Medicare eligibility for those Claimants with Federal government benefits enabling them to receive Medicare before reaching age 65 and on a rolling basis as Claimants reach age 65.

Failure to report to Medicare may result in substantial financial penalties. The MSP Statute states that "an applicable plan that fails to comply with the requirements under subparagraph (A) with respect to any claimant shall be subject to a civil money penalty of *$1,000 for each day of noncompliance with respect to each claimant*." 42 U.S.C. § 1395y(b)(8)(E) (emphasis added).

While there is no specific regulation or case law definitively resolving the question of whether our Medical Monitoring Program is subject to Medicare or regarding reporting requirements

with respect to Settlements where Medical Monitoring is the only recovery, if it is subject to Medicare, according to the foregoing, the attached, and the intent of the Medicare Secondary Payer Statute, we believe the prudent course is to determine Medicare eligibility of each Claimant, and report to Medicare unless or until Medicare confirms in writing that it does not apply to the Settlement.

I have attached a copy of the MSP Statute (without annotations) in Attachment C for your review.

We are submitting a copy of this Memorandum to the Court.

If you have any questions, please let me know.

Yours very truly,

Ed Gentle,
Claims Administrator

ECGIII/pfo
Enclosure

cc: (via e-mail)(with enclosures)
The Honorable Thomas A. Bedell (by hand delivery)
Leigh Anne Hodge, Esq., Outside Counsel for the Claims Administrator
Terry D. Turner, Jr., Esq.
Diandra S. Debrosse, Esq.
Katherine A. Harbison, Esq.
Paige F. Osborn, Esq.
Michael A. Jacks, Esq.
William S. ("Buddy") Cox, Esq.
J. Keith Givens, Esq.
McDavid Flowers, Esq.
Farrest Taylor, Esq.
Ned McWilliams, Esq.
Perry B. Jones, Esq.
Angela Mason, Esq.
Meredith McCarthy, Esq.

ATTACHMENT A

PERRINE DUPONT SETTLEMENT CLAIMS OFFICE
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MEMORANDUM

CONFIDENTIAL
VIA E-MAIL -
chris.bradfield@hhs.gov

TO: Ms. Christine Bradfield, Assistant Regional Counsel -
The United States Department of Health and Human Services

FROM: Edgar C. Gentle, III, Esq.

DATE: May 10, 2011

RE: Perrine v DuPont - Medicare; Our File No. 4609-1 {GG}

Dear Ms. Bradfield:

As we have discussed, I wanted to bring to your attention another settlement I am working on as Settlement Administrator. As the enclosed Amended Complaint indicates, the Plaintiffs Class did not ask for personal injury damages. This case involves medical monitoring and no payments to individuals for past or future medical treatment, services or costs, or personal injury payments. In this case, the claimants are only tested for exposure to certain heavy metals and specific diseases that may have been caused by such exposures. Even if the tests confirm heavy metal exposure or the presence of a specific disease, the Settlement does not pay for any medical treatment. All claims for personal injuries, including claims seeking past or future costs for medical treatment, are excluded from the Settlement and are not waived by the claimants.

The Defendant in this case has funded the start-up costs for the medical monitoring program and will pay for the implementation of the program on a "pay as it goes" basis. Included in the start-up costs is a small payment (between $400 and $800) to each class member who completes the registration process and is determined by the Court to be a member of the Settlement Class. These

payments are taxable to the Class members and do not represent any payment for past or future medical expenses or personal injury.

Please refer to the enclosed Memorandum of Understanding which is the Settlement Agreement in our case.

Under these circumstances, Medicare should not have any secondary payor claims to any aspect of the Settlement because there is no personal injury component to the case, either for past personal injury or present or future personal injury or medical expenses. Simply put, it seems that there are no past conditional medical payments for which Medicare can seek reimbursement, with Medicare not being a secondary payor with respect to medical treatment because the Settlement does not place any responsibility for payment for any medical treatment on a responsible primary payor.

Also, the cash payment to claimants registering for medical monitoring merely provides compensation for the time expended in signing up for the medical monitoring program and does not in any way relate to medical testing or treatment. Indeed, claimants who register for the medical monitoring program can check a NO box and just get the cash and not be tested at all, or check the YES box and get the same cash and be tested. Even if they check the YES box, they can decide not to be tested later.

On behalf of the Settlement, I am requesting your confirmation that Medicare has no interest in (a) the small payments that are being made to Class Members to compensate them for the time and effort required to register for the Class; (b) the amount of money paid by the Defendant to fund the start up of the Medical Monitoring Program and, (c) the monies paid by the Defendant in the future to fund the Medical Monitoring Program.

Please find enclosed a copy of the Memorandum of Understanding and the Amended Complaint for your review.

As always, we appreciate the opportunity to work with you in these matters.

Yours very truly,

Edgar C. Gentle, III
Settlement Administrator

ECGIII/kjm
Enclosures

MEMORANDUM OF UNDERSTANDING

Lenora 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.)

Comes now this 17th day of November 2016 the Plaintiffs in the above-captioned matter by Ed Hill, Esq. and comes the Defendant E.I. du Pont de Nemours and Company ("Defendant")in the above-captioned matter by James B. Lees Jr., Esq. and hereby set forth the terms and conditions of a proposed global resolution of this pending litigation as between these parties:

1. Plaintiffs shall dismiss any and all pending claims against Defendant with prejudice and shall release Defendant from any and all liability in this litigation, except as provided by this agreement.

2. The Defendant shall pay to the Plaintiffs the sum of $70,000,000.00 plus medical monitoring consistent with the Court Order dated February 29, 2008, as only modified by this agreement, under the following terms and conditions:

a. Although the parties understand that the final date of payment by Defendant to Plaintiffs depends on a number of factors and cannot be guaranteed, the parties agree to make all reasonable efforts to accomplish payment of the $70,000,000.00 from Defendant to a Qualified Settlement Fund on or before December 31, 2018.

b. $66,000,000.00 of the total $70,000,000.00 payment shall be available to the Plaintiffs as directed by the Court for the purposes of paying for remediation services, medical monitoring costs and expenses, and attorney fees and expenses.

c. The remaining $4,000,000.00 of the total $70,000,000.00 payment shall be made available only for a cash payment program for the medical monitoring sub-class of Plaintiffs as directed by the Court. Said sum shall not be used for any purpose other than for the sole benefit of the medical monitoring sub-class.

3. In addition to the above, Defendant shall provide on a pay-as-you-go basis a medical monitoring program for all enrolled Plaintiffs consistent with the previous referenced Court Order as only modified by this agreement, under the following terms and conditions:

a. There shall be an initial enrollment period of six (6) months beginning at a time reasonably determined by the Settlement Administrator for all Plaintiffs at which time any Plaintiff may enroll in the medical monitoring program to avail themselves of the future monitoring benefits of the program. No Plaintiff shall be entitled to participate in said program unless they have enrolled during the initial six (6) month enrollment period.

b. After said enrollment period has expired, a Finance Committee comprised of representatives from class counsel, DuPont, and the Settlement Administrator shall be created for purposes of advising the Court on the structure and execution of the medical monitoring program. On an annual basis the Court, with the recommendation of the Finance Committee, shall direct DuPont to pay a sum certain that will be set aside for each such calendar year that reasonably secures such expenditures for each such calendar year. In each subsequent year after year one DuPont shall be credited with any amounts remaining from the prior year in determining the amount of payment for the subsequent year.

c. The program shall provide those examinations 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.

d. 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, the Defendant in the ordinary course of their business shall set aside reasonable reserves as required by applicable law which shall cover the estimated cost of such medical monitoring program.

e. Public notice to class members to notify them of the initial six (6) month sign-up period shall be deemed sufficient if done on a state-wide basis. All advertising and other costs associated with any and all notice requirements under this agreement shall be paid from the $1,000,000.00 start-up expenses referenced above. Notice of this settlement and court costs shall be paid by the defendant.

f. It is contemplated by the parties that a Finance Committee shall exist for purposes of helping provide guidance and advice for the operation of this medical monitoring program with each party hereto having one (1) representative on said Committee. In the event any decision is reached with respect to the payment for services or costs in the medical monitoring program to which the Defendant takes exception, the Defendant shall have the right to have such objection or exception reviewed by the Court and,

if necessary, appealed within the West Virginia judicial system.

4. Defendant reserves the right to reasonably challenge the enrollment of any Plaintiff in the medical monitoring program and/or property remediation class. 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 not successful.

5. It shall be expressly understood by the parties that Defendant shall not be responsible for the payment of any other monies for any purposes associated with the execution of this agreement and that any and all Plaintiff attorney fees and Plaintiff expenses associated with the execution of this agreement shall come from the $70,000,000.00 paid by the Defendant pursuant to this agreement.

6. It is expressly understood by the parties that no part or portion of the payments agreed to by the Defendant pursuant to this agreement are or should be considered a compromise or settlement of any punitive damage award returned against the Defendant, which shall now be vacated.

7. The parties agree that pursuant to any final settlement of this matter the Court, if at the conclusion of the Fairness Hearing approves the final settlement of this matter, will vacate any and all prior judgments relevant to this matter and enter a new judgment order accurately reflecting the terms and conditions of the final settlement of this matter.

8. Any and all pending motions and/or unresolved issues shall be deemed moot by this agreement, including, but not limited to, the pending motion for sanctions filed by the Plaintiffs in this action.

9. Plaintiffs shall maintain any and all copies, including electronic copies, of discovery which has been produced by Defendant to Plaintiffs in this litigation in a manner consistent with all Protective Orders entered in this case, and any and all Protective Orders are understood to continue in effect.

10. In the event members of the Plaintiff class are legally permitted to opt-out of this settlement at the discretion of the Court, the participation rate of the Plaintiffs participating in a final settlement of this matter, consistent with the terms and conditions set forth herein, must equal or exceed 90%. If this 90% participation rate is not achieved, Defendant shall have the option to void the settlement. However opt-outs totaling 10% or less shall not reduce DuPont's obligations under this agreement.

11. Defendant understands and agrees that this proposed agreement must be approved by the Plaintiffs' class representatives and the Court pursuant to a Fairness Hearing and that counsel for the Plaintiffs shall strive to obtain such approval of the class representatives by the close of business on Monday November 22, 2010. Plaintiffs understand and agree that this proposed agreement must be approved by certain officers within the Defendant organization and that Defendant shall strive to obtain that approval by the close of business on Monday November 22, 2010. It is understood that neither party currently has legal authority to bind their respective clients today, but does agree to make a good faith effort to obtain the approval of the terms and conditions of this Memorandum of Understanding by their respective clients by the close of business on Monday November 22, 2010.

Agreed to:

Lenora Perrine, et al. by

E. I. du Pont de Nemours and Company et al. by

Dated: November 19, 2010

8/31

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT, WAUNONA MESSINGER, REBECCAH 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,

vs.

Case No. 04-C-296-2

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation doing business in West Virginia, MEADOWBROOK CORPORATION, a dissolved West Virginia corporation, MATTHIESSEN & 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.

SECOND AMENDED CLASS ACTION COMPLAINT (JURY TRIAL DEMANDED)

Pursuant to Rule 23 of the West Virginia Rules of Civil Procedure, Plaintiffs, Lenora Perrine, Carolyn Holbert, Waunona Messinger, Rebeccah 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, file this class action complaint against Defendants E.I. du Pont de Nemours and Company ("Dupont"), a

Delaware corporation doing business in West Virginia, Meadowbrook Corporation, a dissolved West Virginia corporation, Matthiessen & Hegeler Zinc Company, Inc. ("M & H"), a dissolved Illinois corporation formerly doing business in West Virginia, Nuzum Trucking Company ("Nuzum"), a West Virginia corporation, T. L. Diamond & Company, Inc. ("Diamond"), a New York corporation doing business in West Virginia, and Joseph Paushel ("Paushel"), an individual residing in West Virginia.

Nature of this Action

1. Plaintiffs' real properties have been invaded by, and their persons exposed to, hazardous substances released as a result of Defendants' conduct at the former zinc production facility known as the Spelter Smelter facility in Harrison County, West Virginia. Millions of tons of waste materials, including tailings and other materials generated from primary and secondary zinc production and related processes at the Spelter Smelter facility, were and are placed in a huge pile at the facility. The pile is located in close proximity to the West Fork River, which winds through several nearby communities.

2. The waste materials and other materials discharged from the facility were and are high in hazardous substances, including arsenic, lead, and cadmium. The hazardous substances were hidden in fine particulate matter and otherwise rendered airborne at the facility. Periodically the pile also has caught fire, rendering additional materials with hidden hazardous substances airborne.

3. The real properties of Plaintiffs and other area residents have been contaminated with hazardous substances contained within dust, smoke, and/or other releases from the Spelter Smelter facility. Releases of hazardous substances from the Spelter Smelter facility to the surrounding communities occurred on a continuing basis for over 90 years. Plaintiffs and other

area residents received no notice or warning of the discharges of hazardous substances to their real properties and persons. In addition to directly contaminating the real properties of Plaintiffs and other area residents, the hazardous substances also contaminated nearby drinking water supplies, the West Fork River, other water bodies, ground water, the flood plain, riparian shoreline, recreational areas, and rights-of-way.

4. Plaintiffs seek compensatory and punitive damages associated with the past and continuing intrusion of Defendants' hazardous substances upon their real properties, and the establishment of a medical monitoring program to diagnose diseases associated with the exposure to Defendants' hazardous substances.

Jurisdiction, Venue, and Parties

5. Jurisdiction over the subject matter and the parties is proper in this Court. Venue is proper in this Court.

6. Plaintiffs and others similarly situated are persons who have been exposed to hazardous substances released into the environment in and around the Spelter Smelter facility in Harrison County, West Virginia, by and as a result of the conduct of the Defendants.

7. Plaintiff Lenora Perrine owns and lives in her home at 86 C Street in the community of Spelter in Harrison County, West Virginia, directly across the narrow West Fork River from the Spelter Smelter facility. She has lived most of her life and raised children in close proximity to the Spelter Smelter facility.

8. Plaintiff Carolyn Holbert owns and lives in her home at Route 3, Box 87 in the community of Erie in Harrison County, West Virginia, near the Spelter Smelter facility. She has lived most of her life and raised children in close proximity to the Spelter Smelter facility.

9. Plaintiff Waunona Messinger owns and lives at her home at Route 3, Box 122G in the community of Lambert's Run in Harrison County, West Virginia, near the Spelter Smelter facility. She also grew up and continues to own real property in the nearby community of Meadowbrook, in close proximity to the Spelter Smelter facility.

10. Plaintiff Rebeccah Morlock grew up and continues to own a home in which her mother and daughter reside at Route 2, Box 234 in the community of Meadowbrook in Harrison County, West Virginia near the Spelter Smelter facility.

11. Anthony Beezel was a long-time resident of Erie and currently lives at and owns the real property at 203 Allen St. in the community of Hepzibah in Harrison County, West Virginia near the Spelter Smelter facility.

12. Mary Ellen Montgomery owns real property in and has lived most of her life in the community of Gypsy in Harrison County, West Virginia near the Spelter Smelter facility. Her mailing address is P.O. Box 60, Gypsy, West Virginia.

13. Mary Luzader owns real property in and since 1998 has lived in the community of Seminole in Harrison County, West Virginia near the Spelter Smelter facility. Her mailing address is P.O. Box 761, Lumberport, West Virginia.

14. Truman R. Desist owns and since 2001 has lived at 128 Hope Street in Lumberport, Harrison County, West Virginia near the Spelter Smelter facility.

15. Larry Beezel owns, lives in his home, and operates a small business at 101 Rose Avenue in the community of Erie in Harrison County, West Virginia near the Spelter Smelter facility. He has lived most of his life in Erie and attended school in Spelter.

16. Joseph Bradshaw owns and for approximately two years has lived at 28 B St. in the community of Spelter in Harrison County, West Virginia near the Spelter Smelter facility, and next to a church where he has been minister for approximately five years.

17. Defendant Dupont is a Delaware corporation that conducts business in the State of West Virginia and has a principle place of business at 1007 Market Street, Wilmington, Delaware 19898. Dupont began operating the Spelter Smelter facility in 1928. Dupont is liable for the operations of the Spelter Smelter facility back to 1910, through the operations of its predecessor in interest in the operation of the Spelter Smelter facility, Grasselli Chemical Corporation ("Grasselli"). Grasselli opened the Spelter Smelter facility in 1910, merged into Dupont in 1928, and was the predecessor to Dupont's Grasselli Chemicals Department. Dupont reacquired sole ownership of the Spelter Smelter facility in or about 2001 and is the current owner of the facility site. As used below, Dupont encompasses Grasselli.

18. Defendant Meadowbrook Corporation is a dissolved West Virginia corporation that operated the Spelter Smelter facility from approximately August 1950 to June 1971.

19. Defendant M & H is a dissolved Illinois corporation that formerly did business in West Virginia. M & H dominated and controlled the operations of Meadowbrook Corporation and operations of the Spelter Smelter facility, including its activities associated with the generation and emission of hazardous substances, and sanctioned the acts and omissions at issue in this action, all to its own profit and advantage. M & H's principal place of business was at 1375 9th Street, LaSalle, Illinois 61301.

20. Defendant Nuzum is a West Virginia corporation with a principal place of business at East Avenue, Shinnston, Harrison County, West Virginia. Nuzum contributed to the emission of hazardous substances from the facility by periodically dumping large amounts of sludge from

industrial ponds located at the Spelter Smelter facility onto the zinc tailings pile and by operating trucks and other heavy equipment in and on the zinc tailings pile and other areas at the facility.

21. Defendant Diamond is a New York Corporation doing business in West Virginia with a principal place of business at 30 Rockefeller Plaza, Suite #2825, New York, New York 10112. Diamond operated the Spelter Smelter facility from 1984 until approximately 2001. Diamond is liable for operations at the Spelter Smelter facility back to approximately October 1971, through a 1984 merger with "Meadowbrook Corporation (The)," a West Virginia corporation formed in 1971 to operate the Spelter Smelter facility. As used below, Diamond encompasses Meadowbrook Corporation (The).

22. Defendant Paushel was Plant Manager and Superintendent of the Spelter Smelter facility under Diamond and resides at 427 Howard Street, Shinnston, Harrison County, West Virginia. Paushel was charged with overseeing Spelter Smelter facility operations under Diamond and was the official with affirmative responsibility for the management and control of Diamond's business at the facility. He participated in, sanctioned, and failed to prevent tortious acts at issue in this action, including continuing emissions from the facility's accumulated waste pile and other discharges during Diamond's affiliation with the facility. In addition, during Paushel's tenure at the facility it was a regular part of the facility's operations to dump additional materials containing hazardous substances into outdoor areas at the facility, further adding to the facility's off-site emissions. These tortious actions and omissions occurred with his knowledge and consent, approval, or acquiescence.

Factual Allegations

23. The Spelter Smelter facility occupies approximately 112 acres and lies adjacent to the northerly flowing West Fork River in Spelter, Harrison County, West Virginia.

24. The Spelter Smelter facility was used as a processing facility for the manufacture of zinc products and materials. Millions of tons of waste materials containing hazardous substances, including, but not limited to, so-called zinc tailings, were and are dumped in a huge pile on the site.

25. The waste pile, known as the tailings pile, reached a height of over 100 feet and covered approximately 50 acres of the facility. Much of the pile is in close proximity to the West Fork River and is within a short distance of residential parcels.

26. Defendants Dupont, Meadowbrook Corporation, M & H, Diamond, and Paushel controlled zinc manufacturing and waste disposal activities at the Spelter Smelter facility at various times from 1910 through the present and were responsible for the generation and management of the waste materials containing hazardous substances dumped into the pile and otherwise stored, disposed, or released at or in relation to the site.

27. In addition, Nuzum periodically dumped large amounts of sludge from the facility's industrial ponds onto the pile, thereby significantly adding to the waste materials containing hazardous substances that were capable of being rendered airborne and otherwise released from the pile to the surrounding properties. In addition to dumping, Nuzum operated trucks and other heavy equipment in and on the zinc tailings pile and other areas at the facility, which significantly contributed to the contamination in the nearby communities.

28. In addition, during the 1930's Dupont designed, constructed, and placed into operation a drinking water system that provided drinking water to residents, school children, and other persons in the community of Spelter from a surface water reservoir at the Spelter Smelter Facility contaminated with hazardous substances.

29. Defendants never gave notice to or warned residents of the surrounding communities of the emission of hazardous substances onto their properties and into their persons nor obtained permission to use their properties and bodies as depositories and laboratories for hazardous substances released from the facility. Defendants each knew or should have known that their conduct was facilitating or likely to facilitate releases of hazardous substances to the surrounding area.

30. Dupont, Diamond, and their consultants have actively engaged in a campaign of deception to mislead neighbors into believing that the waste materials present and have presented no threat to the surrounding communities.

31. Dupont, Diamond, and their consultants have permanently left the waste materials dumped on-site under a thin layer of synthetic material and soil, which they know will eventually fail and will require permanent monitoring. Plaintiffs do not by bringing this action challenge this remedy for the Spelter Smelter facility. Rather, Plaintiffs allege as a matter of fact that the likely eventual failure of the chosen remedy and the need for permanent monitoring will further exacerbate the property damages to the surrounding communities.

32. During the implementation of this remediation plan to convert the Spelter Smelter facility into a permanent dump, releases of hazardous substances have continued.

33. Defendants have not implemented remediation in the surrounding communities, despite the fact that such remediation reasonably could be implemented so as to reduce the potential for human contact with the hazardous substances and the presence of hazardous substances on the private properties in the surrounding communities.

34. The waste materials have been and continue to be a source of hazardous substance emissions onto and within properties and persons in the surrounding communities. The waste

contains and has continuously released into the surrounding communities a variety of hazardous substances, including arsenic, lead, and cadmium. The hazardous substances contaminate private properties and pose and have posed health threats to the inhabitants of the nearby communities.

35. As a result of the use of their properties and communities as disposal locations for, and the exposure of their persons to, Defendants' hazardous substances, Plaintiffs and others similarly situated are and will be placed in continuing risk, fear, and uncertainty associated with the threat of developing diseases and other adverse medical conditions.

36. Exposure to arsenic can result in severe gastrointestinal toxicity, peripheral nervous system neuropathy, anemia, hyper-pigmentation, skin lesions, vascular disease, headaches, lassitude, weakness, respiratory ailments, and vision impairment. Arsenic is also associated with liver and kidney injury and disturbances of the central nervous system, as well as increased risk for lung cancer, skin cancer, kidney cancer, liver cancer, and bladder cancer. Arsenic has been classified as a human carcinogen.

37. Exposure of humans to lead can result in toxic effects in the brain and central nervous system, the peripheral nervous system, the kidneys, and the hematopoietic system. Anemia due to the inhibition of hemoglobin synthesis and a reduction in the life span of circulating red blood cells is an early manifestation of lead poisoning. Lead exposure can lead to kidney damage and possibly failure, fine motor nerve damage, bone damage, hypertension, lead encephalopathy, memory loss, and permanent brain damage. Lead exposure may have neurological and psychological effects.

38. Cadmium is another hazardous substance that threatens nearby properties and residents as a result of Defendants' conduct. Cadmium is associated with a lengthy biological half-life in

humans. Among other things, cadmium is associated with increased risk of lung disease, heart-related death and serious effects on the kidney, including, but not limited to, kidney cancer. Cadmium is also classified as a human carcinogen.

39. Experts retained on behalf of Plaintiffs began undertaking a heavy metal soil contamination study of communities surrounding the Spelter Smelter facility in December 2003. This study revealed that there is widespread heavy metals contamination from the Spelter Smelter facility within the surrounding communities, which have been extensively contaminated by the facility with the hazardous substances arsenic, lead and cadmium.

40. Wind erosion, smoke from fires in the waste pile, and other airborne and waterborne releases at the Spelter Smelter facility have caused these hidden hazardous substances to spread from the facility to the surrounding communities. The hazardous substances released from the facility were and are transported by wind and other natural processes onto and into the homes, properties, persons, and other areas of the surrounding communities. In addition, once in the soils of the surrounding communities, contamination can be continuously brought into homes.

41. Arsenic, lead, and cadmium from the Spelter Smelter facility have also contaminated nearby water bodies and groundwater. The material has washed into the West Fork River and other water bodies and low areas, as well as onto community trails, rights-of-way, and playgrounds.

Class Action Allegations

42. This civil action is an appropriate case to be brought and prosecuted as a class action by Plaintiffs against the Defendants pursuant to Rule 23 of the West Virginia Rules of Civil Procedure.

43. The proposed Plaintiffs' class initially consists of:

PERRINE DUPONT SETTLEMENT CLAIMS OFFICE
ATTN: EDGAR C. GENTLE, CLAIMS ADMINISTRATOR
C/O SPELTER VOLUNTEER FIRE DEPARTMENT OFFICE
55 B Street
P.O. Box 257
Spelter, West Virginia 26438
(304) 622-7443
(800) 345-0837
www.perrinedupont.com
perrinedupont@gtandslaw.com

MEMORANDUM

CONFIDENTIAL
VIA E-MAIL
Christine.Bradfield@hhs.gov

TO: **Ms. Christine Bradfield, Assistant Regional Counsel - The United States Department of Health and Human Services**

FROM: **Edgar C. Gentle, III, Esq.**

DATE: **August 23, 2011**

RE: **Perrine v. DuPont Settlement - Medicare; Our File No. 4609-1 {GG}**

Dear Ms. Bradfield:

On May 10, 2011, we tried to send you the attached memo. It could be that you did not get it, observing that the e-mail address listed in the attached report is incorrect.

Please consider this e-mail to follow-up on this matter.

At your convenience, please let me know if you require anything else at this time to tell you how you think we should proceed.

Many thanks for your help.

Yours very truly,

Ed Gentle,
Claims Administrator

ECGIII/mgc
Attachment

PERRINE DUPONT SETTLEMENT CLAIMS OFFICE
ATTN: EDGAR C. GENTLE, CLAIMS ADMINISTRATOR
C/O SPELTER VOLUNTEER FIRE DEPARTMENT OFFICE
55 B Street
P.O. Box 257
Spelter, West Virginia 26438
(304) 622-7443
(800) 345-0837
www.perrinedupont.com
perrinedupont@gtandslaw.com

MEMORANDUM

CONFIDENTIAL
VIA E-MAIL
Mr. Gary Kurz, Assistant Regional Counsel
The United States Department of Health and Human Services
Office of General Counsel, Region 4
Dept. Of Health and Human Services
61 Forsyth St., Suite 5M60
Atlanta, GA 30303
gary.kurz@hhs.gov

TO: Gary Kurz, Esq.

FROM: Edgar C. Gentle, III, Esq.

DATE: September 27, 2011

RE: Perrine v. DuPont Settlement - Medicare; Our File No. 4609-1 {GG}

Dear Gary:

I am writing in response to our telephone conference call on September 16, 2011, regarding the above referenced Settlement.

As we discussed, this Settlement involves property remediation and medical monitoring benefits, and not treatment for any past or future personal injuries.

As you requested, please find enclosed the Court's Individual Notice to Class Members Notice of Class Action Lawsuit (the "Notice"). Section II. Description of the Class Notice of the Notice states "[t]o the extent plaintiffs' counts seek monetary damages, they only relate to property owners." In addition, the Notice states "[p]laintiffs do not seek damages for personal injuries."

Also enclosed for your review, is the Court's Order Allowing Participation of Present Personal Injury Plaintiffs in Medical Monitoring Remedial Program Provided by the *Lenora Perrine, et al. v. E.I. Du Pont De Nemours and Company, et al.*, Civil Action No. 04-C-296-2 (the "Order").

The Order concerns individual *pro se* Plaintiffs that seek personal injury damages, separate and apart from the Settlement, and also seek participation in the Settlement's Medical Monitoring Program.

Because this Settlement concerns only Medical Monitoring benefits, the Court, in the enclosed Order, addresses whether *pro se* Plaintiffs may seek personal injury damages, while also participating in the Medical Monitoring Program. In making its decision to allow the *pro se* Plaintiffs to participate in the Medical Monitoring Program, the Court points out that a medical monitoring claim and a personal injury claim are two separate causes of action under West Virginia law. In the enclosed Order, the Court states that "[c]lear West Virginia precedent dictates that a claim for medical monitoring is a separate cause of action." For this reason, the Court held that personal injury damages and participation in the Medical Monitoring Program do not constitute "double recovery".

As the enclosed Notice and Order indicate, any claims for personal injury damages must be brought separately, as this Settlement does not resolve any past or future personal injury damages. As I mentioned in our conference call, there are several reasons that personal injury damages were not included in the Settlement: (i) the varying symptoms and injuries that could result from exposure to the subject heavy metals renders the personal injuries in this Settlement not "classable", (ii) personal injury damages may not be known at the time of the Settlement because of potential latent injuries, and (iii) significant legal issues, such as causation and statute of limitations, which resulted in years of complex litigation and appeals.

Because the Settlement does not resolve any past or present personal injury damages, the claimants in this Settlement are not barred from seeking personal injury damages in the future, as the *pro se* Plaintiffs have done, assuming such claimants survive any statute of limitations issues.

With regard to our conversation regarding the Medical Monitoring Program, I look forward to working with you regarding an agreeable notice that the "closed-network" physicians will sign informing them that Medicare and Medicaid is not to be billed for any Medical Monitoring costs associated with this Settlement. This procedure will help ensure that Medicare and Medicaid are not billed for any Medical Monitoring costs. Please note also that the Parties all agree that the Medical Monitoring Program is a primary and not a secondary plan.

I know that you are not currently in a position to enter into any agreement on behalf of Medicare, but I hope that the enclosed information is helpful through this process.

Please let me know if you have any questions regarding the above or the attached.

As always, many thanks for your help.

Yours very truly,

Ed Gentle,
Claims Administrator

ECGIII/pfo
Attachments

cc: (via e-mail)(confidential)(with attachments)
Terry D. Turner, Jr., Esq.
Diandra S. Debrosse, Esq.
Katherine A. Harbison, Esq.
Paige F. Osborn, Esq.
Michael A. Jacks, Esq.
Virginia Buchanan, Esq.
Stephanie D. Thacker, Esq.
William S. ("Buddy") Cox, Esq.
J. Keith Givens, Esq.
McDavid Flowers, Esq.
Farrest Taylor, Esq.
Ned McWilliams, Esq.
Perry B. Jones, Esq.
Angela Mason, Esq.
Meredith McCarthy, Esq.

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT, WAUNONA MESSINGER CROUSER, REBECCAH MORLOCK, ANTHONY BEEZEL, MARY 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.

E.I. DU PONT NEMOURS AND COMPANY, a Delaware corporation doing business in West Virginia, MEADOWBROOK CORPORATION, a dissolved West Virginia corporation, MATTHIESSEN & 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 JOE PAUSHEL, an individual residing in West Virginia

Defendants.

Case No. 04-C-296-2
Honorable Thomas A. Bedell

INDIVIDUAL NOTICE TO CLASS MEMBERS

NOTICE OF CLASS ACTION LAWSUIT

DO NOT BE ALARMED. YOU ARE NOT BEING SUED.

TO: THOSE WHO CURRENTLY OWN, OR WHO ON OR AFTER DECEMBER 1, 2003 HAVE OWNED, PRIVATE REAL PROPERTY LYING WITHIN THE CLASS AREA DEFINED BELOW ("PROPERTY CLASS"); AND

THOSE WHO CURRENTLY RESIDE, OR WHO AT ANY TIME IN THE PAST HAVE RESIDED, FOR A TOTAL OF 277 DAYS, ON PRIVATE REAL PROPERTY LYING WITHIN THE CLASS AREA DEFINED BELOW ("MEDICAL MONITORING CLASS").

Exclusions. (1) If you owned property only before December 1, 2003 or only after September 14, 2006 (the date of entry of the Order Granting Class Certification), you are not a Property Class member.

(2) If your total residence time is less than 277 days, you are not a Medical Monitoring Class member.

(3) You are not a class member if you are a defendant in this case, an entity in which a defendant in this case has a controlling interest, or a current employee, officer, director, legal representative, heir, successor, assign, or spouse of a defendant in this case.

Class Area Definition. The class area is generally depicted on the map attached hereto as Exhibit "A" to include, but not be limited to, several communities around the former Spelter Smelter facility. If you have questions about whether a particular parcel lies within the boundaries of the class area, you may contact the below-referenced Class Administrator for assistance. The class area is more specifically defined to include all parcels in Harrison County, West Virginia, within the boundaries formed by the following boundary parcels:

Northerly Boundary (generally from Lumberport to Shinnston):
Eagle – Outside Eagle – Lumberport Clay Map No. 207, parcels 17, 6, 5, 4, 3, and 2 of Sheet 18-05, parcels 46 and 46.1, parcels 156, 169, 170, 144, 152, 153, 154, 155, 190, 214, 235, and 236 of Sheet 18-01 southward of Jones Run, parcel 41, parcels 314, 243, 246, 247, 248, 249, 250, 258, 257, 255, 97, 96, 94, 91, 90, 89, 107, 108, 22, 25, 27, and 28 on Sheet 18-01 northward of Jones Run, parcels 156, 148, 140, 132, 124, 117, 110, 103, 96, 89, 82, 75, 68, 61, 51, 52, 53, 54, 173, 174, 176, 10, 9, 8, 7, 6, 5, 4, 3, 2, and 1 of Sheet 17-04, and parcels 1.2, 1, 2, and 14;
Eagle Map No. 206, parcel 31;
Clay – Eagle Map No. 187, parcels 58, 63, 10, and 14.1; and
Clay – Outside Clay – Shinnston Map No. 188, parcel 4, 54, 33, 37, 38, 39, 46, parcels 1, 2, 10.1, 10, 30, 41 through 49, and 107 of Map No. 10-06, parcels 260, 334, 337.1, 259, 258, 256, 255, 254, 253, 251, 250, 249, 248, 247, 247.1, 246, 243, 276, of Map No. 10-04, parcels 199.1, 199, 199.2, 200, and 200.1 of Map No. 10-05, and parcels 74, 81, 85, 110, 109, 108, 121, 124, 133, and 165 of Map No. 09-11.

Easterly Boundary (generally from Shinnston to Smith Chapel):
Clay Map No. 189, parcels 30 and 76.1;
Clay Map No. 209, parcels 6, 7.1, 7.5, 10, 12, 30, 13.7, 63, 44, 46, and 57;
Clay – Simpson Map No. 229, parcels 7, 7.1, 27, 26, 53, 53.2, and 53.25;
Clay – Simpson Map No. 249, parcels 7.2, 16, 30.3, 30.5, and 30.6;
Coal – Clarksburg Map No. 35, parcel 2; and
Simpson Map No. 269, parcel 2.

Southerly Boundary (generally from Smith Chapel to Edgewood):
Coal – Simpson Map No. 268, parcels 12, 9, 7, 17, 28, 38.1, 50, 48, 37, 26, 24.1, and 35;
Coal – Eagle Map No. 267, parcel 152;
Coal Map No. 287, parcels 7, 41, 40, 40.3, 40.4, 43, and 34, parcels 27, 28, 29, 30, 32, 34, 36, 43.1 and 19 of Sheet 11-21, parcels 127, 122, 121, 116, 514, and 95 of Sheet 11, parcels 177, 176, 153, and 121 of Sheet 10; and
Coal Map No. 286, parcel 31, and parcels 1, 2, 3 and 12 of Sheet 11-30.

Westerly Boundary (generally Edgewood to Lumberport):
Coal Map No. 266, parcels 68, 59, 46, 49, 27.6, and 77;
Eagle – Sardis Map No. 266-A, parcels 11, 10, and 6.3;
Eagle – Sardis Map No. 246, parcels 41, 34, 35, 10. 9, 8, 7, and 6;
Eagle Map No. 226, parcels 97, 96, 86, 52, 100, and parcels 30, 25, 27, 28, 29, and 24 of Sheet 17-10; and
Eagle Map No. 227, parcel 1.

PLEASE READ THIS NOTICE CAREFULLY. THIS NOTICE RELATES TO THE ABOVE-CAPTIONED CLASS ACTION AND IF YOU ARE A MEMBER OF THE PROPERTY CLASS AND/OR THE MEDICAL MONITORING CLASS, THIS CONTAINS IMPORTANT INFORMATION AS TO YOUR RIGHTS TO REMAIN A CLASS MEMBER AS FURTHER DESCRIBED BELOW.

THIS NOTICE IS NOT INTENDED TO BE, AND SHOULD NOT BE CONSTRUED AS, AN EXPRESSION OF ANY OPINION BY THE COURT WITH RESPECT TO THE TRUTH OF THE ALLEGATIONS IN THE ACTION OR THE MERITS OF THE CLAIMS OR DEFENSES ASSERTED. THIS NOTICE IS MERELY TO ADVISE YOU OF THE PENDENCY OF THE ACTION AND OF YOUR RIGHTS THEREUNDER.

Your rights may be affected by a class action pending in this Court, Case No. 04-C-296-2, against defendants E.I. Dupont De Nemours and Company, Inc., Meadowbrook Corporation, Matthiessen & Hegeler Zinc Company, Inc., Nuzum Trucking Company, T.L. Diamond & Company, Inc., and Joe Paushel. The Court has certified claims in this lawsuit as a class action. The purpose of this Notice is to advise you of the potential effect of this ruling on your rights.

I. DEFINITION OF THE PLAINTIFF CLASSES

By Order Granting Class Certification entered September 14, 2006, the Court determined that claims in this lawsuit shall be maintained as a class action, pursuant to West Virginia Rule of Civil Procedure 23.

The Property Class consists of:

THOSE WHO CURRENTLY OWN, OR WHO ON OR AFTER DECEMBER 1, 2003 HAVE OWNED, PRIVATE REAL PROPERTY LYING WITHIN THE CLASS AREA DEFINED ABOVE.

The Medical Monitoring Class consists of:

THOSE WHO CURRENTLY RESIDE, OR WHO AT ANY TIME IN THE PAST HAVE RESIDED, FOR A TOTAL OF 277 DAYS, ON PRIVATE REAL PROPERTY LYING WITHIN THE CLASS AREA DEFINED ABOVE.

Exclusions.

(1) If you owned property only before December 1, 2003, or only after September 14, 2006 (the date of entry of the Order Granting Class Certification), you are not a Property Class member.

(2) If your total residence time is less than 277 days, you are not a Medical Monitoring Class member.

(3) You are not a class member if you are a defendant in this case, an entity in which a defendant in this case has a controlling interest, or a current employee, officer, director, legal representative, heir, successor, assign, or spouse of a defendant in this case.

The Court has named Lenora Perrine, Carolyn Holbert, Waunona Messinger Crouser, Rebeccah Morlock, Anthony Beezel, Mary Montgomery, Mary Luzader, Truman R. Desist, Larry Beezel, and Joseph Bradshaw, as Class Representatives of the Property and Medical Monitoring Classes.

The Court also has named the following law firms as Class Counsel:

Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A.
P.O. Box 12308
316 S. Baylen Street
Suite 600
Pensacola, Florida 32591
Toll-free: 1-888-435-7001
Fax: 850-436-6074

Cochran, Cherry, Givens, Smith, Lane & Taylor, P.C.
163 W. Main Street
Dothan, Alabama 36302
Toll-free: 1-888-526-2472
Fax: 334-793-8280

Law Office of Gary W. Rich, L.C.
Brock, Reed & Wade Building
212 High Street
Suite 223
Morgantown, West Virginia 26505
Telephone: 304-292-1215

West & Jones
360 Washington Avenue
Clarksburg, West Virginia 26302
Telephone: 304-624-5501

Kennedy & Madonna, L.L.P.
48 Dewitt Mills Road
Hurley, New York 12443
Telephone: 845-331-7514

Establishment by the Court of these Classes does not mean that any relief will be obtained for members of the Classes, for these are contested issues which have not been decided. Rather, the ruling means that the ultimate outcome of claims in this lawsuit - whether favorable to the plaintiffs or to the defendants - will apply in like manner to the class members who do not elect to be excluded from the class action.

II. DESCRIPTION OF THE CLASS ACTION

Plaintiffs allege that hazardous substances from the former Spelter Smelter facility located in Spelter, Harrison County, West Virginia, have been released onto private real property in the Class Area and that these substances have health risks. Plaintiffs allege that the released hazardous substances include arsenic, cadmium, and lead. Specifically, plaintiffs allege that, as a result of these substances, they are entitled to property damages, including remediation costs, and medical monitoring. Plaintiffs also seek punitive damages, litigation costs, and legal fees for their attorneys. Plaintiffs are pursuing counts of negligence and recklessness, negligence per se, public and private nuisance, trespass, strict liability, unjust enrichment, medical monitoring, and punitive damages.

Defendants dispute that plaintiffs are entitled to any damages, medical monitoring, or other relief. Defendants dispute that hazardous substances from the Spelter Smelter facility have covered the entire class area and that the health of class members is at risk. Defendants also raise various affirmative defenses.

To the extent plaintiffs' counts seek monetary damages, they only relate to property owners. To the extent plaintiffs' counts seek medical monitoring, they relate to past and present residents, whether or not they are property owners. **Plaintiffs do not seek damages for personal injuries, and class members may risk being barred from pursuing any such potential claims in the future if they do not opt out of the class.**

III. RIGHTS OF PLAINTIFF CLASS MEMBERS

A. Automatic Inclusion

If you are a member of the Property Class and/or the Medical Monitoring Class as defined above, you are automatically a member of the Class Action; you do not need to take any action to confirm your membership in the Class, and you will have the opportunity to share in any applicable relief obtained for your Class by way of settlement or trial. If money is awarded to the Property Class, you may be entitled to a share of that money. If remediation costs and/or medical monitoring are awarded, common funds may be established to efficiently manage remediation and/or medical monitoring on behalf of multiple class members.

If you remain a member of the Class Action, you will have no responsibility for any litigation costs or legal fees, although costs and fees awarded by the Court to Class Counsel may be deducted from the proceeds of any judgment or settlement.

In addition, if you do not exclude yourself from the Class Action in the manner provided for below, any judgment issued or settlement approved by the Court will be binding on you, and you will not be able to commence any other litigation, arbitration or other claim against the defendants in any other forum with regard to the claims resolved in this litigation.

B. Right to Seek Exclusion

You have the option of excluding yourself from the Class Action by mailing, postage prepaid, a timely and valid request for exclusion postmarked on or before February 15, 2007, addressed to the following:

Class Administrator
Analytics, Incorporated
P.O. Box 2002
Chanhassen, Minnesota 55317-2002

Any request for exclusion must be in writing and set forth the following information with respect to the person or entity requesting exclusion: (1) full name; and (2) current mailing address. An Exclusion Request form is attached for this purpose. See Exhibit "B". All requests for exclusion must be signed by or on behalf of the person or entity requesting exclusion and must clearly state the intention to be excluded from the Class.

If a request for exclusion is not timely submitted, or does not include all of the information required in this Notice, or is not signed as provided in this Notice, it will not constitute a valid request for exclusion, and the person or entity filing an invalid request for exclusion will remain a member of the Class and be bound by any judgment or settlement of claims in this matter.

By making this election to be excluded, (1) you will not share in any applicable relief that might be obtained for members of the Class as a result of trial or settlement; (2) you will not be bound by any decision on claims favorable to the defendant; and (3) you may present any claims you have against the defendants by filing your own lawsuit.

PLEASE DO NOT CONTACT THE COURT. IF YOU HAVE QUESTIONS CONCERNING WHETHER OR NOT YOU SHOULD SEEK EXCLUSION FROM THE CLASS ACTION, YOU ARE ENCOURAGED TO CONTACT PLAINTIFFS' CLASS COUNSEL LISTED ABOVE, OR CONSULT COUNSEL OF YOUR OWN CHOOSING, AT YOUR OWN EXPENSE, TO SEEK FURTHER ADVICE.

C. Appearance Through Counsel

If you are a member of the Property Class and/or Medical Monitoring Class, you may, but are not required to, enter an appearance in the Class Action through counsel of your own choosing at your own expense. If you do not do so, you will be represented by Class Counsel. Appearances by separate counsel must be filed by February 15, 2007.

D. Right and Obligations of Class Members

If you remain a member of the Class:

- The Class Representatives and Class Counsel will act as your representatives and counsel for the presentation of claims against the defendants. If you desire, you may appear by your own attorney. You may also advise the Court if at any time you consider that you are not being fairly and adequately represented by the Class Representatives and Class Counsel.
- Your participation in any applicable relief that may be obtained from the defendants through trial or settlement will depend upon the results of this lawsuit. If no recovery is obtained for the Class, you will be bound by that result.
- You may be required as a condition to participating in any relief obtained through settlement or trial to present evidence respecting your eligibility. You should, therefore, preserve records that may be evidence of ownership of private real property or residence within the Class Area boundaries.
- You will be entitled to notice of any ruling reducing the size or changing the membership of the Class and also to notice of any proposed settlement or dismissal of the Class claims. For this reason, as well as to participate in any applicable relief, you are requested to notify Class Counsel of any corrections or changes in your name or address.

IV. FURTHER PROCEEDINGS

As noted, the essential allegations of the claims against the defendants are contested by defendants. You may communicate with Class Counsel if you have evidence you believe would be helpful to the establishment of the claims, and you may be asked by the parties to provide information relevant to the claims.

PLEASE ALSO TAKE NOTICE that Plaintiffs are seeking Court approval to dismiss Nuzum Trucking Company and Joe Paushel from the case and to limit assets of T. L. Diamond & Company, Inc. which may be subject to execution ("Nuzum, Paushel and TLD Agreements"). Comments opposing the Nuzum, Paushel and TLD Agreements may be provided to the Court in person at a hearing on February 22, 2007, at 11:00 a.m., at the Harrison County Courthouse, Fifteenth Judicial Circuit, 301 West Main Street, Clarksburg, West Virginia. Copies of the Nuzum, Paushel and TLD Agreements are attached hereto as Exhibits "C" and "D".

V. ADDITIONAL INFORMATION

Any questions you have concerning the matters contained in this Notice (and any corrections or changes to name or address) should NOT be made to the Court, but should be directed to the Class Administrator who can be contacted Toll-free at 1-866-233-0124 or at the following address:

Class Administrator
Analytics, Incorporated
P.O. Box 2002
Chanhassen, Minnesota 55317-2002

A website (*www.Spelterclass.com*) has also been established to provide information and updates on the litigation.

You may, of course, seek the advice and guidance of your own attorney, at your own expense, if you desire. The pleadings and other records in this litigation may be examined and copied at any time during regular office hours at the Office of the Clerk of Court, Harrison County Courthouse, 301 West Main Street, Clarksburg, West Virginia 26301-2967.

VI. REMINDER AS TO TIME LIMIT

If you wish to be excluded from this class action, you must return the completed "Exclusion Request" to the Class Administrator by mail postmarked on or before February 15, 2007.

Dated: December 21, 2006

Honorable Thomas A. Bedell
Circuit Court Judge

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

WAUNONA JEAN CROUSER

Civil Action No. 10-C-247-2
CONSOLIDATED
Thomas A. Bedell, Judge

REBECCA FAITH MORLOCK, (10-C-248-2)
DONALD LEE CROUSER, (10-C-259-2)
AMANDA JANE FINCH, (10-C-260-2)
JOSHUA PAUL FINCH, (10-C-261-2)
JOEL R. MORLOCK, JR., (10-C-265-2)
CHRISTINA MORLOCK, (10-C-266-2)
MATTHEW DAVID NICHOLSON, (10-C-270-2)
MICHAEL JOSEPH MORLOCK, (10-C-271-2)
MARY JUNE LEASURE SPROUT, (10-C-272-2)
KASANDRA FAITH FINCH, (10-C-277-2)
ELIZABETH R. MORLOCK, (10-C-278-2)
NICKOLE HOPE RILEY, (10-C-284-2)
MARSHA LYNN MORLOCK, in her capacity as
Executrix of the Estate of JOEL R. MORLOCK, SR., (10-C-286-2)
MARSHA MORLOCK, (10-C-289-2)

Plaintiffs,

v.

E. I. DU PONT DE NEMOURS AND COMPANY,
a Delaware corporation doing business in West Virginia, MEADOWBROOK CORPORATION,
a dissolved West Virginia corporation,
MATTHIESSEN & HEGLER ZINC COMPANY, INC.,
a dissolved Illinois corporation formerly doing business in West Virginia, NUZUM TRUCKING, INC.,
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.

1) cc Brandt - fyi
2) Terry - p/s put on website
3) 4609-1-99-2
4) 4609-1 pldgs

AND

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

Plaintiffs,

v.

Civil Action No. 04-C-296-2
Thomas A. Bedell, Judge

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

Defendants.

ORDER ALLOWING PARTICIPATION OF PRESENT PERSONAL INJURY PLAINTIFFS IN MEDICAL MONITORING REMEDIAL PROGRAM PROVIDED BY *LENORA PERRINE, ET AL. V. E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.*, CIVIL ACTION NO. 04-C-296-2

Pending before this Court is the issue of whether or not the living *pro se* Plaintiffs in these consolidated cases are entitled to participate in the medical monitoring remedy provided by the settlement in *Perrine et al v. DuPont et al*, Civil Action No. 04-C-296-2 (hereinafter referred to as "Perrine / Dupont Settlement") while seeking damages for present personal injuries allegedly caused by exposure from the former zinc smelting facility.

Defendants DuPont and T.L. Diamond filed their *Submission in Connection with Precluding Medical Monitoring Program Participation for Present Personal Injury Plaintiffs who Already Allege a Multitude of Diseases and Illnesses* ("Defendants' Submission") on June 7, 2011. This Court received the *Submission of Class Counsel Regarding the Rights of Those "Present" Personal Injury Plaintiffs to Participate in the Medical Monitoring* on July 6, 2011. The guardian *ad litem* of the minors and

incompetents of both Plaintiff classes filed her *Response to Defendants Submission in Connection with Precluding Medical Monitoring Program Participation for Personal Injury Plaintiffs Who Currently Allege Multitude of Diseases & Illness* on that same day. Finally, the Defendants submitted their *Reply* to the above responses on July 20, 2011.

After a thorough review of those documents and all pertinent legal authority, this Court hereby **ORDERS** that current personal injury plaintiffs shall be allowed to participate in the medical monitoring program set forth pursuant to the DuPont / Perrine settlement for the foregoing reasons.

Relevant Factual and Procedural Backgrounds

1. This action was initially filed on June 15, 2004, against Defendants E.I. du Pont de Nemours and Company ("DuPont"), T. L. Diamond & Company, Inc., Meadowbrook Corporation, Matthiessen & Hegeler Zinc Company, Inc., Nuzum Trucking Company ("Nuzum"), and Joseph Paushel ("Mr. Paushel").
2. On September 14, 2006, this Court granted class certification and certified both a Property Class and a Medical Monitoring Class ("Plaintiff Classes") in this case pursuant to the provisions of Rule 23 of the West Virginia Rules of Civil Procedure. Upon appeal, the certification of both classes was upheld by the W. Va. Supreme Court. "Having found no error in the circuit court's disposition of each of the elements to be considered in certifying a class under Rule 23(a) and (b), we find that certification was proper. Consequently, DuPont's claim that class certification violated its due process rights by preventing it from presenting individualized evidence and individualized defenses is without merit." *Perrine v. E.I. du Pont de Nemours and Co.* 694 S.E.2d 815, 861 (2010).

3. After extensive discovery and pre-trial litigation, this matter proceeded to trial beginning on September 10, 2007, and the trial lasted for approximately six weeks. The trial consisted of four phases, and the jury returned verdicts in favor of the Plaintiffs. The verdicts were ultimately rendered as awards of fifty-five million five hundred and thirty-seven thousand five hundred and twenty-two dollars and twenty-five cents ($55,537,522.25) for property damage and associated remediation costs, an estimated award of approximately one hundred and thirty million dollars ($130,000,000.00) for a future medical monitoring program to last for 40 years, and a punitive damages award of one hundred and ninety-six million and two hundred thousand dollars ($196,200,000.00).

4. Said verdicts were the result of the jury finding that the Plaintiffs' property and persons were exposed to elevated and dangerous levels of lead, cadmium, and arsenic, among other heavy metals, due to the long operation of a smelting facility in Spelter which polluted the class area.

5. On November 16, 2007, this Court entered an *Amended Final Judgment Order* finalizing the jury's verdict in the amounts described above against Defendant DuPont.

6. Thereafter, both the Plaintiffs and Defendants appealed numerous aspects of this Court's pre-trial, trial, and post-trial rulings to the West Virginia Supreme Court of Appeals.

7. On March 26, 2010, after a lengthy appellate process, the West Virginia Supreme Court of Appeals remanded this litigation to the Court with directions to conduct a trial on DuPont's statute of limitations defense.

8. The Supreme Court modified the punitive damages award, but conditionally affirmed the remainder of the verdict, which then consisted of approximately three hundred million dollars ($300,000,000.00). The Supreme Court determined that this Court erred in granting judgment as a matter of law in favor of the Plaintiffs on the affirmative defense of the statute of limitations and directed this Court to hold a second trial to determine if the defense was merit worthy.

9. The effect of the Supreme Court's directive created an all or nothing proposition for the parties. If the Plaintiffs prevailed on the statute of limitations issue, they would receive the relief obtained in the 2007 trial, as modified by the Supreme Court opinion. If DuPont prevailed, this Court would set aside the 2007 verdicts and render judgment in favor of DuPont, and the Plaintiffs would receive nothing. *Perrine v. E.I. du Pont de Nemours and Co.*, 694 S.E.2d 815, 854 (2010).

10. The Plaintiffs and Defendant both considered the directives of the Supreme Court's opinion and prepared for trial, which was set for the month of March, 2011. The Parties reached this settlement after considering the substantial amount of risk and expense remaining in the case for both sides. On November 19, 2010, the Parties advised the Court that a proposed compromise and settlement had been reached. Thereafter, on November 24, 2010, the Court set a December 30, 2010, hearing to hear the Parties and to receive evidence and argument as to the fairness of the proposed settlement.

11. On December 6, 2010, the Court appointed Meredith McCarthy, a discrete and competent attorney practicing before this Court who is familiar with the facts involved in this case, to serve as guardian *ad litem* to protect the interests of any

minors who may be members of the Plaintiff Classes. Mrs. McCarthy previously served as a guardian *ad litem* in this matter and is uniquely familiar with this issues presented.

12. After determining that proper notice of the settlement was given to all members of the Plaintiff classes and determining that the settlement was fair, this Court entered its *Final Order Approving Settlement* on January 4, 2011.

13. Alongside that *Final Order Approving Settlement*, this Court entered a *Final Order Setting forth the Scope and Operation of the Medical Monitoring Plan*. ("Medical Plan Order"). In that *Medical Plan Order*, this Court adopted language from the parties' *Memorandum of Understanding*, stating that the "Defendant reserves the right to reasonably challenge the enrollment of any Plaintiff in the medical monitoring program and / or property remediation class. 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 not successful." It also dictates that this Court "will hear any disputes as to the inclusion or exclusion of a potential class member."

14. The *Medical Plan Order* also laid out the method by which members of the Plaintiff Classes would register for the medical monitoring program. It mandated that there be a six-month signup period, in which the Plaintiffs would submit "application[s] to enroll" in the program.

15. Personal injury plaintiffs who are currently alleging medical harms brought on by the Defendants' alleged tortuous actions began to sign up for the medical monitoring program after its enactment.

16. Defendants DuPont and T.L. Diamond filed their *Submission in Connection with Precluding Medical Monitoring Program Participation for Present Personal Injury Plaintiffs who Already Allege a Multitude of Diseases and Illnesses* ("Defendants' Submission") on June 7, 2011.

17. In the *Defendants' Submission*, they argue the following:

    a. Their exception to the participation of the present Plaintiffs in the medical monitoring program is properly litigated under the above-styled action and not in *Perrine, et al.* v. *E. I. Du Pont de Nemours and Company, et al.*, Civil Action No. 04-C-296.

    b. This matter is premature for adjudication because the full range of injuries suffered by the Plaintiffs would not be known until July 1, 2011.[1]

    c. The present personal injury Plaintiffs should not be allowed to participate in medical monitoring programs because they would be benefitting twice from the same claim.

18. The class counsel's *Response* and the guardian *ad litem's Response* are substantially similar and can be summarized as follows:

    a. This matter would be best litigated under *Perrine* and not in the instant action.

    b. This matter is ripe for adjudication.

    c. The present personal injury plaintiffs are entitled to participate in the medical monitoring program and pursue their personal injury claims, and their participation would not constitute a "double recovery."

19. The Defendants' *Reply* raised no new arguments.

[1] The Defendants filed their *Submission* containing this argument on June 7, 2011, well before July 1, 2011.

Analysis

In the pleadings discussing whether to allow the present personal injury plaintiffs to pursue medical monitoring, three issues present themselves before this Court. It now addresses those issues in turn.

i. **This issue would be best litigated in *Perrine* because all personal injury plaintiffs are class members under that case and because that case spawned the medical monitoring program.**

The Defendants chose to avail themselves in the above-styled action when challenging the present personal injury plaintiffs' participation in the medical monitoring program. They argue that they did so because they "seek to preclude any *present* personal injury Plaintiffs from participating in the medical monitoring portion of the Perrine / DuPont Settlement." (Defendants' Submission, p 3). Nowhere else in their *Submission* or *Reply* do they give any other sound reason for filing their challenge in the above-styled action.

However, all parties involved agree that the personal injury plaintiffs were class members of *Perrine*. This challenge is brought under the language adopted from the *Memorandum of Understanding* in *Perrine* and ultimately used in the *Medical Plan Order* entered in *Perrine*. It is abundantly clear to this Court that this challenge is under the dominion and subject-matter of *Perrine*.

Therefore, this Court sees no reason that the Defendants would avail himself to *Crouser* as a vehicle for this challenge. It is only logical, pursuant to the *Memorandum of Understanding*, the *Settlement Order* and the *Medical Plan Order*, that this challenge would be appropriately litigated in that matter, rather than *Crouser*. Shoehorning this matter into *Crouser* is senseless.

It is not necessary for this Court to speculate as to the Defendants' rationale for bringing this challenge under the banner of *Crouser*. Although the Plaintiffs raise poignant hypotheses as to that question[2], the fact that *Perrine* is the superior vehicle for this challenge will suffice. Therefore, this Court will hereby decide this matter under the terms of the *Settlement* and *Medical Plan Order* outlined in *Perrine, et al. v. E. I. Du Pont de Nemours and Company, et al.*, Civil Action No. 04-C-296.

ii. **This matter is ripe for adjudication because reports on causation have no bearing on the issue at hand: whether all present personal injury plaintiffs are entitled to medical monitoring under the *Perrine* / DuPont Settlement.**

In its *Submission*, the Defendants contend that "until [July 1, 2011, the deadline for Plaintiff expert disclosures] has come and gone, the full range of injuries Plaintiffs are alleging were caused from exposure to the former zinc smelting facility, as well as any further medical expense claims, will not be known." (Defendants' Submission, p 4). However, this argument fails for two reasons.

First, and perhaps most obviously, the July 1, 2011, has, in fact, come and gone. This, perhaps, negates the Defendants' argument *per se*, but even if it did not, this Court still sees no link between expert opinion and ripeness. Since the passage of that date, the Defendants have correctly indicated that the Plaintiffs have not yet produced any expert or medical opinion that exposure to heavy metals from the smelter caused any of the Plaintiffs' alleged injuries. However, the lack of opinions is irrelevant to the ripeness issue at hand.

---

[2] The *Perrine* class members, in their *Response to the Defendants' Submission*, contend that "[b]y bringing this issue in this matter, DuPont seeks to avoid the ramifications of unsuccessful challenges to enrollment in the medical monitoring, that is, the payment of attorneys' fees. As evidenced by its statement, 'DuPont questions whether Class counsel . . . should brief this issue at all,' DuPont also seeks to take advantage of pro se litigants who would have representation on this issue if this issue was brought in the appropriate forum."

"West Virginia does not require plaintiffs to show physical injury before obtaining medical monitoring." *Bower v. Westinghouse Elec. Corp.*, 552 S.E.2d 424 (W. Va. 1999). There is no correlation between whether expert opinion has established a causal link between alleged tortuous act and alleged harm and ripeness for this suit.

Furthermore, delaying judgment on this issue could adversely affect the health of many of the medical monitoring claimants. Simply put, this Court sees absolutely no reason why it should wait to issue a ruling concerning medical monitoring participation.

iii. The present personal injury Plaintiffs have the right to participate in the medical monitoring program while pursuing their personal injury claims because they are entitled, under the Perrine / DuPont settlement, to be monitored for latent harms.

In their *Submission*, the Defendants accuse the Plaintiffs of attempting to obtain a double recovery. In essence, they contend that, because the present personal injury Plaintiffs already allege the existence of a myriad of injuries, those Plaintiffs should not be allowed to use the medical monitoring as a *de facto*, thinly veiled attempt to prove their alleged injuries sustained at the hands of the Defendants' alleged wrongful conduct.

The West Virginia Supreme Court has spoken out against double recovery. In doing so, it has stated that "[i]t is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury." Syl. Pt. 7, *Harless v. First Nat'l Bank of Fairmont*, 289 S.E.2d 692 (W. Va. 1982). However, as our Supreme Court has also articulated, medical monitoring constitutes a separate cause of action in tort cases. "A cause of action exists under West Virginia law for the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortuous conduct."

Bower v. Westinghouse Electric Corporation, 206 W. Va. 133, 140 (W. Va. 1999). Therefore, a medical monitoring claim constitutes an independent injury. In medical monitoring claims, the injury is "the exposure itself and the concomitant need for medical testing." *Id.* at 139. After all, "physical harm resulting from such exposure is often latent." *Id.* at 138.

Here, the present personal injury plaintiffs are currently seeking damages for already-identified diseases. In this case, like many other toxic tort cases, there are also latent diseases that can arise after the initial cause of action is long-gone. The Defendants miss the point in contending that "[e]ither the Plaintiffs suffer *present* injury as they have alleged [...] or they do not currently suffer any *present* personal injury." (Defendants' *Reply*, p. 3). The purpose of medical monitoring, pursuant to the DuPont / Perrine settlement, is to ensure that these latent diseases are found early, if they manifest, so that they might be treated in an expedient manner.

However, the Defendants argue that this cry for vigilance is a smokescreen. In their pleadings, they have submitted excerpts from several depositions in which members of the medical monitoring plaintiff class discuss using test results to detect present injuries. The Defendants contend that this motive should preclude all present injury plaintiffs from participating in the program. This Court disagrees. The fact that the Plaintiffs might decide to use testing results to bolster their claims is incidental to the terms of the Perrine / DuPont settlement. Ultimately, medical monitoring is still needed to scan for any latent diseases that might arise.

Conclusion

In seeking medical monitoring, the present personal injury Plaintiffs are not attempting to "have it both ways." Clear West Virginia precedent dictates that a claim for medical monitoring is a separate cause of action. Clear policy dictates that the present personal injury Plaintiffs need medical monitoring to ensure appropriate medical attention if latent diseases should manifest. Therefore, it is clear to this Court that the present personal injury plaintiffs should be allowed to participate in medical monitoring.

Accordingly, it is **ORDERED** that the present personal injury Plaintiffs shall be allowed to participate in the medical monitoring program promulgated in the Perrine / Dupont Settlement.

It is further **ORDERED** that, pursuant to that agreement and the *Medical Plan Order*, the Defendants shall pay the attorney's fees of all parties that accumulated because of and during this unsuccessful challenge.

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

Edgar C. Gentle, Esq.
c/o Spelter Vol. Fire Dept. Office
55 B. Street
P.O. Box 257
Spelter, WV 26438

Virginia Buchannan, Esq.
Levin Papantonio, Thomas, Mitchell
Rafferty & Proctor, PA
P.O. Box 12308
Pensacola, FL 32591

Stephanie D. Thacker, Esq.
Allen, Guthrie, & Thomas, PLLC
P.O. Box 3394
Charleston, WV 25333-3394

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

J Farrest Taylor, Esq.
Cochran, Cherry, Givens, Smith
Lane & Taylor, PC
163 W. Main St.
Dothan, AL 36301

Boyd L. Warner, Esq.
Waters, Warner & Harris
P.O. Box 1716
Clarksburg, WV 26302-1716

Waunona Jean Crouser
Rt. 3, Box 122-G
Clarksburg, WV 26301

Rebecca Faith Morlock
Rt. 2, Box 208
Meadowbrook, WV 26404

Joshua Paul Finch
Rt. 2, Box 208
Meadowbrook, WV 26404

Christine Morlock
Rt. 2, Box 205
Meadowbrook, WV 26404

Donald Lee Crouser
Rt. 3, Box 122-G
Clarksburg, WV 26301

Amanda Jane Finch
3205 Oakmound Dr.
Clarksburg, WV 26301

Elizabeth Rebecca Morlock
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Meadowbrook, WV 26404

Meredith H. McCarthy
901 W. Main St., Ste. 201
Bridgeport, WV 26330

Michael Joseph Morlock
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Meadowbrook, WV 26404

Kasandra Faith Finch
1417 39th St.
Parkersburg, WV 26104

Nickole Hope Riley
Rt 3, Box 122-G
Clarksburg, WV 26301

Joel R. Morlock, Jr.
Rt. 2, Box 205
Meadowbrook, WV 26404

Matthew David Nicholson
Rt. 2, Box 205
Meadowbrook, WV 26404

Mary June Leasure / Sprout
Rt. 1, Box 363-A
Wallace, WV 26448

Marsha Morlock
P.O. Box 12
Meadowbrook, WV 26404

ENTER: Aug 16, 2011

THOMAS A. BEDELL, Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 16 day of August, 2011.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix Seal of the Court this 16 day of August, 2011.

Donald L Kopp II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia

LEGAL NOTICE

If you are a current or former property owner or resident near the former Spelter Smelter facility in Harrison County, West Virginia, changes to a Class Action may affect your rights.

Lenora Perrine, et al. v.
E.I. Dupont De Nemours and Company, et al. Case No: 04-C-296-2

NOTICE OF CHANGES TO MEDICAL MONITORING CLASS DEFINITION

As previously noticed, the Circuit Court of Harrison County, West Virginia has certified a class action in this case against defendants E.I. Dupont De Nemours and Company, Inc., Meadowbrook Corporation, Matthiessen & Hegeler Zinc Company, Inc., and T.L. Diamond & Company, Inc. concerning the former zinc smelter facility in Spelter, Harrison County, West Virginia.[1] Prior notice of the class action was issued by the Court on December 21, 2006. The prior notice and other information about the class action may be viewed or downloaded at www.Spelterclass.com. In addition, a copy of the prior notice and other information about the class action may be obtained by contacting the Class Administrator at:

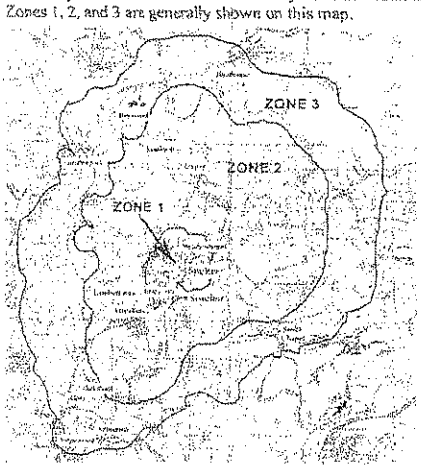
Class Administrator, Analytics, Inc.
P.O. Box 2002
Chanhassen, MN 55317-2002
1-866-233-0124

The Property Class definition[2] and the class boundaries (generally shown on the below map) set forth in the prior notice of the class action remain unchanged.[3]

However, the Medical Monitoring Class definition has been changed as follows:

Previously the Medical Monitoring Class definition was based on total residency time within the class area of 277 days. However, this definition has been changed to require one, three, or five years of total residency time since 1966, depending on where one lives or lived within the class area. Total residency time of one year since 1966 is required for Zone 1. Total residency time of three years since 1966 is required for Zone 2. Total residency time of five years since 1966 is required for Zone 3. Residency time within a zone or zones closer to the former smelter facility but not meeting the total residency time for a closer zone is accumulated with any residency time within a zone or zones further away in determining total residency time.

Zone 1 is the zone closest to the former smelter facility, and Zones 2 and 3 are further away from the former smelter facility but still within the class area. Zones 1, 2, and 3 are generally shown on this map.



If you have questions as to whether a particular parcel lies within Zone 1, 2, or 3, please contact the Class Administrator.

If you previously were in the Medical Monitoring Class based on total residency time of 277 days within the class area but do not have sufficient residency time under the amended Medical Monitoring Class definition stated above, you are no longer in the Medical Monitoring Class and are no longer represented by Class Counsel. You will need to take whatever action you deem appropriate to protect your rights, if any, which will no longer be protected in this class action and which will be subject to limitations on the timely bringing of claims.

If you meet the Property Class definition and did not previously "opt out" of the class action by filing a timely exclusion form as provided under the prior notice, you remain in the class action for purposes of the Property Class even if you do not meet the amended Medical Monitoring Class definition stated above. However, if you now wish to opt out of the class action entirely because you will no longer be part of the Medical Monitoring Class, you have until July 5, 2007 to submit an exclusion form. Otherwise, you will remain within the Property Class even if this means you will no longer be part of the Medical Monitoring Class under the amended Medical Monitoring class definition.

If you are a member of the Property Class and/or the amended Medical Monitoring Class and wish to remain in the class action, you do not need to take any action. If you are a member of the Property Class and/or the amended Medical Monitoring Class and do not request exclusion from the class action, you will be bound by any judgment whether favorable or not, or any settlement in this case.

To the extent the class action claims seek monetary damages, including punitive damages, they only relate to the Property Class. To the extent the class action claims seek medical monitoring, they relate to eligible past and present residents, whether or not they are in the Property Class. If money is awarded to the Property Class, Property Class members may be entitled to a share of that money. If remediation costs and/or medical monitoring are awarded, common funds may be established to efficiently manage remediation and/or medical monitoring on behalf of multiple class members. The precise monetary, remediation and/or medical monitoring remedies and distribution, if any, are to be determined in the class action proceedings. Litigation costs and legal fees for plaintiffs' attorneys may be deducted from awards to class members. The class action does not seek damages for personal injuries, and class members may risk being barred from pursuing any such potential claims in the future if they do not opt out of the class action.

If you are in the Property Class and/or the amended Medical Monitoring Class but do not want to be a part of this class action, you have the option of excluding yourself from the class action. Your written request to be excluded from the class action must be mailed to the Class Administrator and must include (1) your full name, and (2) your current mailing address. You also must sign the request and clearly state your intention to be removed from the class action. If your request is postmarked after July 5, 2007 you automatically will be included in the class action. A copy of the Exclusion Form is found below and may also be obtained at www.Spelterclass.com or by contacting the Class Administrator.

PLEASE DO NOT CONTACT THE COURT, THE CLERK'S OFFICE OR THE JUDGE, AND PLEASE DIRECT ANY QUESTIONS TO THE CLASS ADMINISTRATOR.

By order of the Honorable Thomas A. Bedell, Circuit Court Judge, Circuit Court of Harrison County, West Virginia. Date: _____, 2007.

[1] Plaintiffs allege that hazardous substances from the former Spelter Smelter facility have been released onto private real property in the class area and that those substances have health risks. Plaintiffs allege that the released hazardous substances include arsenic, cadmium, and lead. Specifically, plaintiffs allege that, as a result of these substances, they are entitled to property damages, including remediation costs, and medical monitoring. Plaintiffs also seek punitive damages, litigation costs, and legal fees for their attorneys. Defendants dispute that the plaintiffs are entitled to any damages, medical monitoring, or other relief. Defendants dispute that hazardous substances from the Spelter Smelter facility have covered the entire class area and that the health of class members is at risk. Defendants also raise various affirmative defenses.

[2] The Property Class is comprised of those who currently own, or who on or after December 1, 2003 have owned, private real property lying within the class area, excluding those who owned property only before December 1, 2003 or only after September 14, 2006 (the date of entry of the Order Granting Class Certification).

[3] Also, the class definitions continue to exclude defendants in the case, any entity in which a defendant in the case has a controlling interest, or a current employee, officer, director, legal representative, heir, successor, assign, or spouse of a defendant in the case.

REQUEST FOR EXCLUSION: MUST MAIL BY JULY 5, 2007

In the Circuit Court of Harrison County, West Virginia *Lenora Perrine, et al. v. E.I. Dupont De Nemours and Company, et al.*, Case No. 04-C-296-2

(Print or Type)

Full Name: _____
First *Middle* *Last*

Current Mailing Address: _____

_____
City *State* *Zip (if known)*

( ) _____
Telephone Number (optional)

Mail to:
Class Administrator, Analytics, Inc.
P.O. Box 2002
Chanhassen, MN 55317-2002

I do not wish to be a Member of the Class Action.
I have read the Notice Of Changes To Medical Monitoring Class Definition in the above-referenced case.

_____ _____
Signature *Date*

ATTACHMENT B

PERRINE DUPONT SETTLEMENT CLAIMS OFFICE
ATTN: EDGAR C. GENTLE, CLAIMS ADMINISTRATOR
C/O SPELTER VOLUNTEER FIRE DEPARTMENT OFFICE
55 B Street
P.O. Box 257
Spelter, West Virginia 26438
(304) 622-7443
(800) 345-0837
www.perrinedupont.com
perrinedupont@gtandslaw.com

MEMORANDUM

CONFIDENTIAL
VIA E-MAIL
Mr. Gary Kurz, Assistant Regional Counsel
The United States Department of Health and Human Services
Office of General Counsel, Region 4
Dept. Of Health and Human Services
61 Forsyth St., Suite 5M60
Atlanta, GA 30303
gary.kurz@hhs.gov

TO: **Gary Kurz, Esq.**

FROM: **Edgar C. Gentle, III, Esq.**

DATE: **October ____, 2011**

RE: **Perrine v. DuPont Settlement (the "Settlement") - Medicare; Our File No. 4609-1 {GG}**

Dear Gary:

As you know, this Settlement does not provide for any payment or medical treatment for any past, present or future personal injuries; however, the Settlement does provide for a nominal $400 cash payment for completing a claim form, which, once Class Membership based on living a minimum period in the Class Area is proven, allows the Class Member either (i) to participate in the thirty (30) year Medical Monitoring Program, (ii) or not participate and still get the payment. That is, the cash payment is paid to the Class Member regardless of whether the Class Member elects to participate in the Medical Monitoring Program.

While we understand that Medicare does not have an interest in the nominal cash payments provided to the Class Members, and we do not waive the position that there is no Medicare interest,

please consider the proposed procedures detailed in this letter to satisfy the Medicare reporting requirements pursuant to 42 U.S.C. § 1395y(8) with respect to the Medical Monitoring Program expected to begin on or about November 1, 2011, in this Settlement.

We anticipate that the Medical Monitoring Program will begin on November 1, 2011. As Class Members appear for Medical Monitoring testing, we will have Class Members fill out the enclosed Medicare Questionnaire Form, which you have approved in working with us in several other Settlements, including the Wayne v. Pharmacia Settlement. As the Medicare Questionnaire Forms are completed, we will confirm Medicare eligibility or lack thereof of each Claimant, and we will report Medicare eligible Claimants pursuant to 42 U.S.C. § 1395y(8) on a rolling basis. Because the Medical Monitoring Program is intended to last for thirty (30) years, we anticipate that Claimants will become eligible for Medicare as time passes. We will continue to report on an ongoing basis as Claimants become eligible for Medicare.

Please let me know if you have any questions regarding the above or the attached.

As always, many thanks for your help.

Yours very truly,

Ed Gentle,
Claims Administrator

ECGIII/pfo
Attachment

bcc: (via e-mail)(confidential)(with attachments)
Terry D. Turner, Jr., Esq.
Diandra S. Debrosse, Esq.
Katherine A. Harbison, Esq.
Paige F. Osborn, Esq.
Michael A. Jacks, Esq.
Virginia Buchanan, Esq.
Stephanie D. Thacker, Esq.
William S. ("Buddy") Cox, Esq.
J. Keith Givens, Esq.
McDavid Flowers, Esq.
Farrest Taylor, Esq.
Ned McWilliams, Esq.
Perry B. Jones, Esq.
Angela Mason, Esq.
Meredith McCarthy, Esq.

THE PERRINE MEDICAL MONITORING PROGRAM
MEDICARE BENEFITS QUESTIONNAIRE

I. CLAIMANT INFORMATION

Claimant Name: _____
(First Name) (Middle Initial) (Last Name)

Claimant Date of Birth: _____
(Month) (Day) (Year)

Claimant Social Security Number: ☐☐☐-☐☐-☐☐☐☐

II. MEDICARE QUESTIONS

1. Are you a Medicare beneficiary? YES ___ NO ___

2. **IF YOU ANSWERED YES TO QUESTION 1, list your Medicare Card Number, If available_____ (not required).**

III. OTHER FEDERAL GOVERNMENT HEALTH OR WELFARE BENEFITS

1. Are you eligible for, or have you received, medical care or other benefits paid for or provided by the Department of Veterans Affairs, the Department of Defense, the Indian Health Service, the Social Security Administration, or any other federal government medical care or benefit program? YES ___ NO ___

2. Do you receive Social Security Disability benefits? YES____ NO_____

3. Do you receive Social Security Survivor benefits? YES_____ NO_____

4. Do you receive Social Security Retirement benefits? YES_____ NO_____

IV. CONSENT TO RELEASE OF SOCIAL SECURITY NUMBER AND OTHER INFORMATION, CERTIFICATION AND SIGNATURE

By signing below, you agree to the release of the information given, and your name, address, social security number, and date of birth to any applicable Governmental Agency mentioned herein, including but not limited to the Centers for Medicare and Medicaid Services and Health and Human Services.

The undersigned hereby swears under penalty of perjury that all of the information provided herein is true and accurate.

Your Signature if an adult, Parent or Guardian's Signature if a Minor, or
Personal Representative's Signature if Claimant Deceased:

_____

Date: ___ ___ / ___ ___ / ___ ___ ___ ___

ATTACHMENT C

Effective:[See Notes]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XVIII. Health Insurance for Aged and Disabled (Refs & Annos)
Part E. Miscellaneous Provisions (Refs & Annos)

§ 1395y. Exclusions from coverage and medicare as secondary payer

(a) Items or services specifically excluded

Notwithstanding any other provision of this subchapter, no payment may be made under part A or part B of this subchapter for any expenses incurred for items or services--

(1)(A) which, except for items and services described in a succeeding subparagraph or additional preventive services (as described in section 1395x(ddd)(1) of this title), are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member,

(B) in the case of items and services described in section 1395x(s)(10) of this title, which are not reasonable and necessary for the prevention of illness,

(C) in the case of hospice care, which are not reasonable and necessary for the palliation or management of terminal illness,

(D) in the case of clinical care items and services provided with the concurrence of the Secretary and with respect to research and experimentation conducted by, or under contract with, the Medicare Payment Advisory Commission or the Secretary, which are not reasonable and necessary to carry out the purposes of section 1395ww(e)(6) of this title,

(E) in the case of research conducted pursuant to section 1320b-12 of this title, which is not reasonable and necessary to carry out the purposes of that section,

(F) in the case of screening mammography, which is performed more frequently than is covered under section 1395m(c)(2) of this title or which is not conducted by a facility described in section 1395m(c)(1)(B) of this title, in the case of screening pap smear and screening pelvic exam, which is performed more frequently than is provided under section 1395x(nn) of this title, and, in the case of screening for glaucoma, which is performed more frequently than is provided under section 1395x(uu) of this title,

(G) in the case of prostate cancer screening tests (as defined in section 1395x(oo) of this title), which are performed more frequently than is covered under such section,

(H) in the case of colorectal cancer screening tests, which are performed more frequently than is covered under

section 1395m(d) of this title,

(I) the frequency and duration of home health services which are in excess of normative guidelines that the Secretary shall establish by regulation,

(J) in the case of a drug or biological specified in section 1395w-3a(c)(6)(C) of this title for which payment is made under part B that is furnished in a competitive area under section 1395w-3b of this title, that is not furnished by an entity under a contract under such section,

(K) in the case of an initial preventive physical examination, which is performed more than 1 year after the date the individual's first coverage period begins under part B of this subchapter,

(L) in the case of cardiovascular screening blood tests (as defined in section 1395x(xx)(1) of this title), which are performed more frequently than is covered under section 1395x(xx)(2) of this title,

(M) in the case of a diabetes screening test (as defined in section 1395x(yy)(1) of this title), which is performed more frequently than is covered under section 1395x(yy)(3) of this title,

(N) in the case of ultrasound screening for abdominal aortic aneurysm which is performed more frequently than is provided for under section 1395x(s)(2)(AA) of this title,

(O) in the case of kidney disease education services (as defined in paragraph (1) of section 1395x(ggg) of this title), which are furnished in excess of the number of sessions covered under paragraph (4) of such section, and

(P) in the case of personalized prevention plan services (as defined in section 1395x(hhh)(1)) of this title, which are performed more frequently than is covered under such section;

(2) for which the individual furnished such items or services has no legal obligation to pay, and which no other person (by reason of such individual's membership in a prepayment plan or otherwise) has a legal obligation to provide or pay for, except in the case of Federally qualified health center services;

(3) which are paid for directly or indirectly by a governmental entity (other than under this chapter and other than under a health benefits or insurance plan established for employees of such an entity), except in the case of rural health clinic services, as defined in section 1395x(aa)(1) of this title, in the case of Federally qualified health center services, as defined in section 1395x(aa)(3) of this title, in the case of services for which payment may be made under section 1395qq(e) of this title, and in such other cases as the Secretary may specify;

(4) which are not provided within the United States (except for inpatient hospital services furnished outside the United States under the conditions described in section 1395f(f) of this title and, subject to such conditions, limitations, and requirements as are provided under or pursuant to this subchapter, physicians' services and ambulance services furnished an individual in conjunction with such inpatient hospital services but only for the period during which such inpatient hospital services were furnished);

(5) which are required as a result of war, or of an act of war, occurring after the effective date of such individual's current coverage under such part;

(6) which constitute personal comfort items (except, in the case of hospice care, as is otherwise permitted under paragraph (1)(C));

(7) where such expenses are for routine physical checkups, eyeglasses (other than eyewear described in section 1395x(s)(8) of this title) or eye examinations for the purpose of prescribing, fitting, or changing eyeglasses, procedures performed (during the course of any eye examination) to determine the refractive state of the eyes, hearing aids or examinations therefor, or immunizations (except as otherwise allowed under section 1395x(s)(10) of this title and subparagraph (B), (F), (G), (H), (K), or (P) of paragraph (1);

(8) where such expenses are for orthopedic shoes or other supportive devices for the feet, other than shoes furnished pursuant to section 1395x(s)(12) of this title;

(9) where such expenses are for custodial care (except, in the case of hospice care, as is otherwise permitted under paragraph (1)(C));

(10) where such expenses are for cosmetic surgery or are incurred in connection therewith, except as required for the prompt repair of accidental injury or for improvement of the functioning of a malformed body member;

(11) where such expenses constitute charges imposed by immediate relatives of such individual or members of his household;

(12) where such expenses are for services in connection with the care, treatment, filling, removal, or replacement of teeth or structures directly supporting teeth, except that payment may be made under part A of this subchapter in the case of inpatient hospital services in connection with the provision of such dental services if the individual, because of his underlying medical condition and clinical status or because of the severity of the dental procedure, requires hospitalization in connection with the provision of such services;

(13) where such expenses are for--

(A) the treatment of flat foot conditions and the prescription of supportive devices therefor,

(B) the treatment of subluxations of the foot, or

(C) routine foot care (including the cutting or removal of corns or calluses, the trimming of nails, and other routine hygienic care);

(14) which are other than physicians' services (as defined in regulations promulgated specifically for purposes of this paragraph), services described by section 1395x(s)(2)(K) of this title, certified nurse-midwife services, qualified psychologist services, and services of a certified registered nurse anesthetist, and which are furnished to an individual who is a patient of a hospital or critical access hospital by an entity other than the hospital or critical access hospital, unless the services are furnished under arrangements (as defined in section 1395x(w)(1) of this title) with the entity made by the hospital or critical access hospital;

(15)(A) which are for services of an assistant at surgery in a cataract operation (including subsequent insertion of an intraocular lens) unless, before the surgery is performed, the appropriate utilization and quality control peer review organization (under part B of subchapter XI of this chapter) or a carrier under section 1395u of this title has approved of the use of such an assistant in the surgical procedure based on the existence of a complicating medical condition, or

(B) which are for services of an assistant at surgery to which section 1395w-4(i)(2)(B) of this title applies;

(16) in the case in which funds may not be used for such items and services under the Assisted Suicide Funding

Restriction Act of 1997;

(17) where the expenses are for an item or service furnished in a competitive acquisition area (as established by the Secretary under section 1395w-3(a) of this title) by an entity other than an entity with which the Secretary has entered into a contract under section 1395w-3(b) of this title for the furnishing of such an item or service in that area, unless the Secretary finds that the expenses were incurred in a case of urgent need, or in other circumstances specified by the Secretary;

(18) which are covered skilled nursing facility services described in section 1395yy(e)(2)(A)(i) of this title and which are furnished to an individual who is a resident of a skilled nursing facility during a period in which the resident is provided covered post-hospital extended care services (or, for services described in section 1395x(s)(2)(D) of this title, which are furnished to such an individual without regard to such period), by an entity other than the skilled nursing facility, unless the services are furnished under arrangements (as defined in section 1395x(w)(1) of this title) with the entity made by the skilled nursing facility;

(19) which are for items or services which are furnished pursuant to a private contract described in section 1395a(b) of this title;

(20) in the case of outpatient physical therapy services, outpatient speech-language pathology services, or outpatient occupational therapy services furnished as an incident to a physician's professional services (as described in section 1395x(s)(2)(A) of this title), that do not meet the standards and conditions (other than any licensing requirement specified by the Secretary) under the second sentence of section 1395x(p) of this title (or under such sentence through the operation of subsection (g) or (*II*)(2) of section 1395x of this title) as such standards and conditions would apply to such therapy services if furnished by a therapist;

(21) where such expenses are for home health services (including medical supplies described in section 1395x(m)(5) of this title, but excluding durable medical equipment to the extent provided for in such section) furnished to an individual who is under a plan of care of the home health agency if the claim for payment for such services is not submitted by the agency;

(22) subject to subsection (h), for which a claim is submitted other than in an electronic form specified by the Secretary;

(23) which are the technical component of advanced diagnostic imaging services described in section 1395m(e)(1)(B) of this title for which payment is made under the fee schedule established under section 1395w-4(b) of this title and that are furnished by a supplier (as defined in section 1395x(d) of this title), if such supplier is not accredited by an accreditation organization designated by the Secretary under section 1395m(e)(2)(B) of this title;

(24) where such expenses are for renal dialysis services (as defined in subparagraph (B) of section 1395rr(b)(14) of this title) for which payment is made under such section unless such payment is made under such section to a provider of services or a renal dialysis facility for such services; or

(25) not later than January 1, 2014, for which the payment is other than by electronic funds transfer (EFT) or an electronic remittance in a form as specified in ASC X12 835 Health Care Payment and Remittance Advice or subsequent standard.

Paragraph (7) shall not apply to Federally qualified health center services described in section 1395x(aa)(3)(B) of this title.

In making a national coverage determination (as defined in paragraph (1)(B) of section 1395ff(f) of this title) the

Secretary shall ensure consistent with subsection (l) of this section that the public is afforded notice and opportunity to comment prior to implementation by the Secretary of the determination; meetings of advisory committees with respect to the determination are made on the record; in making the determination, the Secretary has considered applicable information (including clinical experience and medical, technical, and scientific evidence) with respect to the subject matter of the determination; and in the determination, provide a clear statement of the basis for the determination (including responses to comments received from the public), the assumptions underlying that basis, and make available to the public the data (other than proprietary data) considered in making the determination.

(b) Medicare as secondary payer

(1) Requirements of group health plans

(A) Working aged under group health plans

(i) In general

A group health plan--

(I) may not take into account that an individual (or the individual's spouse) who is covered under the plan by virtue of the individual's current employment status with an employer is entitled to benefits under this subchapter under section 426(a) of this title, and

(II) shall provide that any individual age 65 or older (and the spouse age 65 or older of any individual) who has current employment status with an employer shall be entitled to the same benefits under the plan under the same conditions as any such individual (or spouse) under age 65.

(ii) Exclusion of group health plan of a small employer

Clause (i) shall not apply to a group health plan unless the plan is a plan of, or contributed to by, an employer that has 20 or more employees for each working day in each of 20 or more calendar weeks in the current calendar year or the preceding calendar year.

(iii) Exception for small employers in multiemployer or multiple employer group health plans

Clause (i) also shall not apply with respect to individuals enrolled in a multiemployer or multiple employer group health plan if the coverage of the individuals under the plan is by virtue of current employment status with an employer that does not have 20 or more individuals in current employment status for each working day in each of 20 or more calendar weeks in the current calendar year and the preceding calendar year; except that the exception provided in this clause shall only apply if the plan elects treatment under this clause.

(iv) Exception for individuals with end stage renal disease

Subparagraph (C) shall apply instead of clause (i) to an item or service furnished in a month to an individual if for the month the individual is, or (without regard to entitlement under section 426 of this title) would upon application be, entitled to benefits under section 426-1 of this title.

(v) "Group health plan" defined

In this subparagraph, and subparagraph (C), the term "group health plan" has the meaning given such term in

section 5000(b)(1) of the Internal Revenue Code of 1986, without regard to section 5000(d) of Title 26.

(B) Disabled individuals in large group health plans

(i) In general

A large group health plan (as defined in clause (iii)) may not take into account that an individual (or a member of the individual's family) who is covered under the plan by virtue of the individual's current employment status with an employer is entitled to benefits under this subchapter under section 426(b) of this title.

(ii) Exception for individuals with end stage renal disease

Subparagraph (C) shall apply instead of clause (i) to an item or service furnished in a month to an individual if for the month the individual is, or (without regard to entitlement under section 426 of this title) would upon application be, entitled to benefits under section 426-1 of this title.

(iii) "Large group health plan" defined

In this subparagraph, the term "large group health plan" has the meaning given such term in section 5000(b)(2) of Title 26, without regard to section 5000(d) of Title 26.

(C) Individuals with end stage renal disease

A group health plan (as defined in subparagraph (A)(v))--

(i) may not take into account that an individual is entitled to or eligible for benefits under this subchapter under section 426-1 of this title during the 12-month period which begins with the first month in which the individual becomes entitled to benefits under part A under the provisions of section 426-1 of this title, or, if earlier, the first month in which the individual would have been entitled to benefits under such part under the provisions of section 426-1 of this title if the individual had filed an application for such benefits; and

(ii) may not differentiate in the benefits it provides between individuals having end stage renal disease and other individuals covered by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner;

except that clause (ii) shall not prohibit a plan from paying benefits secondary to this subchapter when an individual is entitled to or eligible for benefits under this subchapter under section 426-1 of this title after the end of the 12-month period described in clause (i). Effective for items and services furnished on or after February 1, 1991, and before August 5, 1997, [FN1] (with respect to periods beginning on or after February 1, 1990), this subparagraph shall be applied by substituting "18-month" for "12-month" each place it appears. Effective for items and services furnished on or after August 5, 1997, (with respect to periods beginning on or after the date that is 18 months prior to such date), clauses (i) and (ii) shall be applied by substituting "30-month" for "12-month" each place it appears.

(D) Treatment of certain members of religious orders

In this subsection, an individual shall not be considered to be employed, or an employee, with respect to the performance of services as a member of a religious order which are considered employment only by virtue of an election made by the religious order under section 3121(r) of the Internal Revenue Code of 1986.

(E) General provisions

For purposes of this subsection:

(i) Aggregation rules

(I) All employers treated as a single employer under subsection (a) or (b) of section 52 of the Internal Revenue Code of 1986 shall be treated as a single employer.

(II) All employees of the members of an affiliated service group (as defined in section 414(m) of Title 26) shall be treated as employed by a single employer.

(III) Leased employees (as defined in section 414(n)(2) of Title 26) shall be treated as employees of the person for whom they perform services to the extent they are so treated under section 414(n) of Title 26.

In applying sections of the Internal Revenue Code of 1986 under this clause, the Secretary shall rely upon regulations and decisions of the Secretary of the Treasury respecting such sections.

(ii) Current employment status defined

An individual has "current employment status" with an employer if the individual is an employee, is the employer, or is associated with the employer in a business relationship.

(iii) Treatment of self-employed persons as employers

The term "employer" includes a self-employed person.

(F) Limitation on beneficiary liability

An individual who is entitled to benefits under this title and is furnished an item or service for which such benefits are incorrectly paid is not liable for repayment of such benefits under this paragraph unless payment of such benefits was made to the individual.

(2) Medicare secondary payer

(A) In general

Payment under this subchapter may not be made, except as provided in subparagraph (B), with respect to any item or service to the extent that--

(i) payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under paragraph (1), or

(ii) payment has been made or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance.

In this subsection, the term "primary plan" means a group health plan or large group health plan, to the extent that clause (i) applies, and a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance, to the extent that clause (ii) applies. An entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part.

(B) Repayment required

(i) Authority to make conditional payment

The Secretary may make payment under this subchapter with respect to an item or service if a primary plan described in subparagraph (A)(ii) has not made or cannot reasonably be expected to make payment with respect to such item or service promptly (as determined in accordance with regulations). Any such payment by the Secretary shall be conditioned on reimbursement to the appropriate Trust Fund in accordance with the succeeding provisions of this subsection.

(ii) Primary plans

A primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means. If reimbursement is not made to the appropriate Trust Fund before the expiration of the 60-day period that begins on the date notice of, or information related to, a primary plan's responsibility for such payment or other information is received, the Secretary may charge interest (beginning with the date on which the notice or other information is received) on the amount of the reimbursement until reimbursement is made (at a rate determined by the Secretary in accordance with regulations of the Secretary of the Treasury applicable to charges for late payments).

(iii) Action by United States

In order to recover payment made under this subchapter for an item or service, the United States may bring an action against any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment with respect to the same item or service (or any portion thereof) under a primary plan. The United States may, in accordance with paragraph (3)(A) collect double damages against any such entity. In addition, the United States may recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity. The United States may not recover from a third-party administrator under this clause in cases where the third-party administrator would not be able to recover the amount at issue from the employer or group health plan and is not employed by or under contract with the employer or group health plan at the time the action for recovery is initiated by the United States or for whom it provides administrative services due to the insolvency or bankruptcy of the employer or plan.

(iv) Subrogation rights

The United States shall be subrogated (to the extent of payment made under this subchapter for such an item or service) to any right under this subsection of an individual or any other entity to payment with respect to such

item or service under a primary plan.

(v) Waiver of rights

The Secretary may waive (in whole or in part) the provisions of this subparagraph in the case of an individual claim if the Secretary determines that the waiver is in the best interests of the program established under this subchapter.

(vi) Claims-filing period

Notwithstanding any other time limits that may exist for filing a claim under an employer group health plan, the United States may seek to recover conditional payments in accordance with this subparagraph where the request for payment is submitted to the entity required or responsible under this subsection to pay with respect to the item or service (or any portion thereof) under a primary plan within the 3-year period beginning on the date on which the item or service was furnished.

(C) Treatment of questionnaires

The Secretary may not fail to make payment under subparagraph (A) solely on the ground that an individual failed to complete a questionnaire concerning the existence of a primary plan.

(3) Enforcement

(A) Private cause of action

There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A).

(B) Reference to excise tax with respect to nonconforming group health plans

For provision imposing an excise tax with respect to nonconforming group health plans, see section 5000 of Title 26.

(C) Prohibition of financial incentives not to enroll in a group health plan or a large group health plan

It is unlawful for an employer or other entity to offer any financial or other incentive for an individual entitled to benefits under this subchapter not to enroll (or to terminate enrollment) under a group health plan or a large group health plan which would (in the case of such enrollment) be a primary plan (as defined in paragraph (2)(A)). Any entity that violates the previous sentence is subject to a civil money penalty of not to exceed $5,000 for each such violation. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(4) Coordination of benefits

Where payment for an item or service by a primary plan is less than the amount of the charge for such item or service and is not payment in full, payment may be made under this subchapter (without regard to deductibles and coinsurance under this subchapter) for the remainder of such charge, but--

(A) payment under this subchapter may not exceed an amount which would be payable under this subchapter for such item or service if paragraph (2)(A) did not apply; and

(B) payment under this subchapter, when combined with the amount payable under the primary plan, may not exceed--

(i) in the case of an item or service payment for which is determined under this subchapter on the basis of reasonable cost (or other cost-related basis) or under section 1395ww of this title, the amount which would be payable under this subchapter on such basis, and

(ii) in the case of an item or service for which payment is authorized under this subchapter on another basis--

(I) the amount which would be payable under the primary plan (without regard to deductibles and coinsurance under such plan), or

(II) the reasonable charge or other amount which would be payable under this subchapter (without regard to deductibles and coinsurance under this subchapter),

whichever is greater.

(5) Identification of secondary payer situations

(A) Requesting matching information

(i) Commissioner of Social Security

The Commissioner of Social Security shall, not less often than annually, transmit to the Secretary of the Treasury a list of the names and TINs of medicare beneficiaries (as defined in section 6103(l)(12) of the Internal Revenue Code of 1986) and request that the Secretary disclose to the Commissioner the information described in subparagraph (A) of such section.

(ii) Administrator

The Administrator of the Centers for Medicare & Medicaid Services shall request, not less often than annually, the Commissioner of the Social Security Administration to disclose to the Administrator the information described in subparagraph (B) of section 6103(l)(12) of the Internal Revenue Code of 1986.

(B) Disclosure to fiscal intermediaries and carriers

In addition to any other information provided under this subchapter to fiscal intermediaries and carriers, the Administrator shall disclose to such intermediaries and carriers (or to such a single intermediary or carrier as the Secretary may designate) the information received under subparagraph (A) for purposes of carrying out this subsection.

(C) Contacting employers

(i) In general

With respect to each individual (in this subparagraph referred to as an "employee") who was furnished a written statement under section 6051 of the Internal Revenue Code of 1986 by a qualified employer (as defined in section 6103(l)(12)(E)(iii) of such title), as disclosed under subparagraph (B), the appropriate fiscal intermediary or carrier shall contact the employer in order to determine during what period the employee or employee's spouse may be (or have been) covered under a group health plan of the employer and the nature of the coverage that is or was provided under the plan (including the name, address, and identifying number of the plan).

(ii) Employer response

Within 30 days of the date of receipt of the inquiry, the employer shall notify the intermediary or carrier making the inquiry as to the determinations described in clause (i). An employer (other than a Federal or other governmental entity) who willfully or repeatedly fails to provide timely and accurate notice in accordance with the previous sentence shall be subject to a civil money penalty of not to exceed $1,000 for each individual with respect to which such an inquiry is made. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(D) Obtaining information from beneficiaries

Before an individual applies for benefits under part A of this subchapter or enrolls under part B of this subchapter, the Administrator shall mail the individual a questionnaire to obtain information on whether the individual is covered under a primary plan and the nature of the coverage provided under the plan, including the name, address, and identifying number of the plan.

(6) Screening requirements for providers and suppliers

(A) In general

Notwithstanding any other provision of this subchapter, no payment may be made for any item or service furnished under part B of this subchapter unless the entity furnishing such item or service completes (to the best of its knowledge and on the basis of information obtained from the individual to whom the item or service is furnished) the portion of the claim form relating to the availability of other health benefit plans.

(B) Penalties

An entity that knowingly, willfully, and repeatedly fails to complete a claim form in accordance with subparagraph (A) or provides inaccurate information relating to the availability of other health benefit plans on a claim form under such subparagraph shall be subject to a civil money penalty of not to exceed $2,000 for each such incident. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(7) Required submission of information by group health plans

(A) Requirement

On and after the first day of the first calendar quarter beginning after the date that is 1 year after December 29, 2007, an entity serving as an insurer or third party administrator for a group health plan, as defined in paragraph

(1)(A)(v), and, in the case of a group health plan that is self-insured and self-administered, a plan administrator or fiduciary, shall--

(i) secure from the plan sponsor and plan participants such information as the Secretary shall specify for the purpose of identifying situations where the group health plan is or has been a primary plan to the program under this subchapter; and

(ii) submit such information to the Secretary in a form and manner (including frequency) specified by the Secretary.

(B) Enforcement

(i) In general

An entity, a plan administrator, or a fiduciary described in subparagraph (A) that fails to comply with the requirements under such subparagraph shall be subject to a civil money penalty of $1,000 for each day of noncompliance for each individual for which the information under such subparagraph should have been submitted. The provisions of subsections (e) and (k) of section 1320a-7a of this title shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title. A civil money penalty under this clause shall be in addition to any other penalties prescribed by law and in addition to any Medicare secondary payer claim under this subchapter with respect to an individual.

(ii) Deposit of amounts collected

Any amounts collected pursuant to clause (i) shall be deposited in the Federal Hospital Insurance Trust Fund under section 1395i of this title.

(C) Sharing of information

Notwithstanding any other provision of law, under terms and conditions established by the Secretary, the Secretary--

(i) shall share information on entitlement under Part A and enrollment under Part B under this subchapter with entities, plan administrators, and fiduciaries described in subparagraph (A);

(ii) may share the entitlement and enrollment information described in clause (i) with entities and persons not described in such clause; and

(iii) may share information collected under this paragraph as necessary for purposes of the proper coordination of benefits.

(D) Implementation

Notwithstanding any other provision of law, the Secretary may implement this paragraph by program instruction or otherwise.

(8) Required submission of information by or on behalf of liability insurance (including self-insurance), no fault insurance, and workers' compensation laws and plans

(A) Requirement

On and after the first day of the first calendar quarter beginning after the date that is 18 months after December 29, 2007, an applicable plan shall--

(i) determine whether a claimant (including an individual whose claim is unresolved) is entitled to benefits under the program under this subchapter on any basis; and

(ii) if the claimant is determined to be so entitled, submit the information described in subparagraph (B) with respect to the claimant to the Secretary in a form and manner (including frequency) specified by the Secretary.

(B) Required information

The information described in this subparagraph is--

(i) the identity of the claimant for which the determination under subparagraph (A) was made; and

(ii) such other information as the Secretary shall specify in order to enable the Secretary to make an appropriate determination concerning coordination of benefits, including any applicable recovery claim.

(C) Timing

Information shall be submitted under subparagraph (A)(ii) within a time specified by the Secretary after the claim is resolved through a settlement, judgment, award, or other payment (regardless of whether or not there is a determination or admission of liability).

(D) Claimant

For purposes of subparagraph (A), the term "claimant" includes--

(i) an individual filing a claim directly against the applicable plan; and

(ii) an individual filing a claim against an individual or entity insured or covered by the applicable plan.

(E) Enforcement

(i) In general

An applicable plan that fails to comply with the requirements under subparagraph (A) with respect to any claimant shall be subject to a civil money penalty of $1,000 for each day of noncompliance with respect to each claimant. The provisions of subsections (e) and (k) of section 1320a-7a of this title shall apply to a civil money penalty under the previous sentence in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title. A civil money penalty under this clause shall be in addition to any other penalties prescribed by law and in addition to any Medicare secondary payer claim under this subchapter with respect to an individual.

(ii) Deposit of amounts collected

Any amounts collected pursuant to clause (i) shall be deposited in the Federal Hospital Insurance Trust Fund.

(F) Applicable plan

In this paragraph, the term "applicable plan" means the following laws, plans, or other arrangements, including the fiduciary or administrator for such law, plan, or arrangement:

(i) Liability insurance (including self-insurance).

(ii) No fault insurance.

(iii) Workers' compensation laws or plans.

(G) Sharing of information

The Secretary may share information collected under this paragraph as necessary for purposes of the proper co-ordination of benefits.

(H) Implementation

Notwithstanding any other provision of law, the Secretary may implement this paragraph by program instruction or otherwise.

(c) Drug products

No payment may be made under part B of this subchapter for any expenses incurred for--

(1) a drug product--

(A) which is described in section 107(c)(3) of the Drug Amendments of 1962,

(B) which may be dispensed only upon prescription,

(C) for which the Secretary has issued a notice of an opportunity for a hearing under subsection (e) of section 355 of Title 21 on a proposed order of the Secretary to withdraw approval of an application for such drug product under such section because the Secretary has determined that the drug is less than effective for all conditions of use prescribed, recommended, or suggested in its labeling, and

(D) for which the Secretary has not determined there is a compelling justification for its medical need; and

(2) any other drug product--

(A) which is identical, related, or similar (as determined in accordance with section 310.6 of title 21 of the Code of Federal Regulations) to a drug product described in paragraph (1), and

(B) for which the Secretary has not determined there is a compelling justification for its medical need,

until such time as the Secretary withdraws such proposed order.

(d) For purposes of subsection (a)(1)(A) of this section, in the case of any item or service that is required to be provided pursuant to section 1395dd of this title to an individual who is entitled to benefits under this subchapter, determinations as to whether the item or service is reasonable and necessary shall be made on the basis of the information available to the treating physician or practitioner (including the patient's presenting symptoms or complaint) at the time the item or service was ordered or furnished by the physician or practitioner (and not on the patient's principal diagnosis). When making such determinations with respect to such an item or service, the Secretary shall not consider the frequency with which the item or service was provided to the patient before or after the time of the admission or visit.

(e) Item or service by excluded individual or entity or at direction of excluded physician; limitation of liability of beneficiaries with respect to services furnished by excluded individuals and entities

(1) No payment may be made under this subchapter with respect to any item or service (other than an emergency item or service, not including items or services furnished in an emergency room of a hospital) furnished--

(A) by an individual or entity during the period when such individual or entity is excluded pursuant to section 1320a-7, 1320a-7a, 1320c-5, or 1395u(j)(2) of this title from participation in the program under this subchapter; or

(B) at the medical direction or on the prescription of a physician during the period when he is excluded pursuant to section 1320a-7, 1320a-7a, 1320c-5, or 1395u(j)(2) of this title from participation in the program under this subchapter and when the person furnishing such item or service knew or had reason to know of the exclusion (after a reasonable time period after reasonable notice has been furnished to the person).

(2) Where an individual eligible for benefits under this subchapter submits a claim for payment for items or services furnished by an individual or entity excluded from participation in the programs under this subchapter, pursuant to section 1320a-7, 1320a-7a, 1320c-5, 1320c-9 (as in effect on September 2, 1982), 1395u(j)(2), 1395y(d) (as in effect on August 18, 1987), or 1395cc of this title, and such beneficiary did not know or have reason to know that such individual or entity was so excluded, then, to the extent permitted by this subchapter, and notwithstanding such exclusion, payment shall be made for such items or services. In each such case the Secretary shall notify the beneficiary of the exclusion of the individual or entity furnishing the items or services. Payment shall not be made for items or services furnished by an excluded individual or entity to a beneficiary after a reasonable time (as determined by the Secretary in regulations) after the Secretary has notified the beneficiary of the exclusion of that individual or entity.

(f) Utilization guidelines for provision of home health services

The Secretary shall establish utilization guidelines for the determination of whether or not payment may be made, consistent with paragraph (1)(A) of subsection (a) of this section, under part A or part B of this subchapter for expenses incurred with respect to the provision of home health services, and shall provide for the implementation of such guidelines through a process of selective postpayment coverage review by intermediaries or otherwise.

(g) Contracts with utilization and quality control peer review organizations

The Secretary shall, in making the determinations under paragraphs (1) and (9) of subsection (a) of this section, and for the purposes of promoting the effective, efficient, and economical delivery of health care services, and of promoting the quality of services of the type for which payment may be made under this subchapter, enter into contracts with utilization and quality control peer review organizations pursuant to part B of subchapter XI of this chapter.

(h) Waiver of electronic form requirement

(1) The Secretary--

(A) shall waive the application of subsection (a)(22) in cases in which--

(i) there is no method available for the submission of claims in an electronic form; or

(ii) the entity submitting the claim is a small provider of services or supplier; and

(B) may waive the application of such subsection in such unusual cases as the Secretary finds appropriate.

(2) For purposes of this subsection, the term "small provider of services or supplier" means--

(A) a provider of services with fewer than 25 full-time equivalent employees; or

(B) a physician, practitioner, facility, or supplier (other than provider of services) with fewer than 10 full-time equivalent employees.

(i) Awards and contracts for original research and experimentation of new and existing medical procedures; conditions

In order to supplement the activities of the Medicare Payment Advisory Commission under section 1395ww(e) of this title in assessing the safety, efficacy, and cost-effectiveness of new and existing medical procedures, the Secretary may carry out, or award grants or contracts for, original research and experimentation of the type described in clause (ii) of section 1395ww(e)(6)(E) of this title with respect to such a procedure if the Secretary finds that--

(1) such procedure is not of sufficient commercial value to justify research and experimentation by a commercial organization;

(2) research and experimentation with respect to such procedure is not of a type that may appropriately be carried out by an institute, division, or bureau of the National Institutes of Health; and

(3) such procedure has the potential to be more cost-effective in the treatment of a condition than procedures currently in use with respect to such condition.

(j) Nonvoting members and experts

(1) Any advisory committee appointed to advise the Secretary on matters relating to the interpretation, application, or implementation of subsection (a)(1) of this section shall assure the full participation of a nonvoting member in the deliberations of the advisory committee, and shall provide such nonvoting member access to all information and data made available to voting members of the advisory committee, other than information that--

(A) is exempt from disclosure pursuant to subsection (a) of section 552 of Title 5 by reason of subsection (b)(4) of such section (relating to trade secrets); or

(B) the Secretary determines would present a conflict of interest relating to such nonvoting member.

(2) If an advisory committee described in paragraph (1) organizes into panels of experts according to types of items or services considered by the advisory committee, any such panel of experts may report any recommendation with re-

spect to such items or services directly to the Secretary without the prior approval of the advisory committee or an executive committee thereof.

(k)(1) Subject to paragraph (2), a group health plan (as defined in subsection (a)(1)(A)(v) [FN2] of this section) providing supplemental or secondary coverage to individuals also entitled to services under this subchapter shall not require a medicare claims determination under this subchapter for dental benefits specifically excluded under subsection (a)(12) of this section as a condition of making a claims determination for such benefits under the group health plan.

(2) A group health plan may require a claims determination under this subchapter in cases involving or appearing to involve inpatient dental hospital services or dental services expressly covered under this subchapter pursuant to actions taken by the Secretary.

(l) National and local coverage determination process

(1) Factors and evidence used in making national coverage determinations

The Secretary shall make available to the public the factors considered in making national coverage determinations of whether an item or service is reasonable and necessary. The Secretary shall develop guidance documents to carry out this paragraph in a manner similar to the development of guidance documents under section 371(h) of Title 21.

(2) Timeframe for decisions on requests for national coverage determinations

In the case of a request for a national coverage determination that--

(A) does not require a technology assessment from an outside entity or deliberation from the Medicare Coverage Advisory Committee, the decision on the request shall be made not later than 6 months after the date of the request; or

(B) requires such an assessment or deliberation and in which a clinical trial is not requested, the decision on the request shall be made not later than 9 months after the date of the request.

(3) Process for public comment in national coverage determinations

(A) Period for proposed decision

Not later than the end of the 6-month period (or 9-month period for requests described in paragraph (2)(B)) that begins on the date a request for a national coverage determination is made, the Secretary shall make a draft of proposed decision on the request available to the public through the Internet website of the Centers for Medicare & Medicaid Services or other appropriate means.

(B) 30-day period for public comment

Beginning on the date the Secretary makes a draft of the proposed decision available under subparagraph (A), the Secretary shall provide a 30-day period for public comment on such draft.

(C) 60-day period for final decision

Not later than 60 days after the conclusion of the 30-day period referred to under subparagraph (B), the Secretary

shall--

(i) make a final decision on the request;

(ii) include in such final decision summaries of the public comments received and responses to such comments;

(iii) make available to the public the clinical evidence and other data used in making such a decision when the decision differs from the recommendations of the Medicare Coverage Advisory Committee; and

(iv) in the case of a final decision under clause (i) to grant the request for the national coverage determination, the Secretary shall assign a temporary or permanent code (whether existing or unclassified) and implement the coding change.

(4) Consultation with outside experts in certain national coverage determinations

With respect to a request for a national coverage determination for which there is not a review by the Medicare Coverage Advisory Committee, the Secretary shall consult with appropriate outside clinical experts.

(5) Local coverage determination process

(A) Plan to promote consistency of coverage determinations

The Secretary shall develop a plan to evaluate new local coverage determinations to determine which determinations should be adopted nationally and to what extent greater consistency can be achieved among local coverage determinations.

(B) Consultation

The Secretary shall require the fiscal intermediaries or carriers providing services within the same area to consult on all new local coverage determinations within the area.

(C) Dissemination of information

The Secretary should serve as a center to disseminate information on local coverage determinations among fiscal intermediaries and carriers to reduce duplication of effort.

(6) National and local coverage determination defined

For purposes of this subsection--

(A) National coverage determination

The term "national coverage determination" means a determination by the Secretary with respect to whether or not a particular item or service is covered nationally under this subchapter.

(B) Local coverage determination

The term "local coverage determination" has the meaning given that in section 1395ff(f)(2)(B) of this title.

(m) Coverage of routine costs associated with certain clinical trials of category A devices

(1) In general

In the case of an individual entitled to benefits under part A of this subchapter, or enrolled under part B of this subchapter, or both who participates in a category A clinical trial, the Secretary shall not exclude under subsection (a)(1) of this section payment for coverage of routine costs of care (as defined by the Secretary) furnished to such individual in the trial.

(2) Category A clinical trial

For purposes of paragraph (1), a "category A clinical trial" means a trial of a medical device if--

(A) the trial is of an experimental/investigational (category A) medical device (as defined in regulations under section 405.201(b) of title 42, Code of Federal Regulations (as in effect as of September 1, 2003));

(B) the trial meets criteria established by the Secretary to ensure that the trial conforms to appropriate scientific and ethical standards; and

(C) in the case of a trial initiated before January 1, 2010, the device involved in the trial has been determined by the Secretary to be intended for use in the diagnosis, monitoring, or treatment of an immediately life-threatening disease or condition.

(n) Requirement of a surety bond for certain providers of services and suppliers

(1) In general

The Secretary may require a provider of services or supplier described in paragraph (2) to provide the Secretary on a continuing basis with a surety bond in a form specified by the Secretary in an amount (not less than $50,000) that the Secretary determines is commensurate with the volume of the billing of the provider of services or supplier. The Secretary may waive the requirement of a bond under the preceding sentence in the case of a provider of services or supplier that provides a comparable surety bond under State law.

(2) Provider of services or supplier described

A provider of services or supplier described in this paragraph is a provider of services or supplier the Secretary determines appropriate based on the level of risk involved with respect to the provider of services or supplier, and consistent with the surety bond requirements under sections 1395m(a)(16)(B) and 1395x(o)(7)(C) of this title.

(o) Suspension of payments pending investigation of credible allegations of fraud

(1) In general

The Secretary may suspend payments to a provider of services or supplier under this subchapter pending an investigation of a credible allegation of fraud against the provider of services or supplier, unless the Secretary determines there is good cause not to suspend such payments.

(2) Consultation

The Secretary shall consult with the Inspector General of the Department of Health and Human Services in determining whether there is a credible allegation of fraud against a provider of services or supplier.

(3) Promulgation of regulations

The Secretary shall promulgate regulations to carry out this subsection and section 1396b(i)(2)(C) of this title.

CREDIT(S)

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XI. REVISED WORKING ORDER ON PAPER AND ELECTRONIC MEDIA

[OCTOBER 14, 2011 REVISION TO PROPOSED WORKING ORDER FOR OCTOBER 17, 2011 10:00 A.M. HEARING]
[PROVIDED ON PAPER MEDIUM, PDF, WORD AND WORDPERFECT]

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. DUPONT DE NEMOURS & COMPANY, et al.,

Defendants.

ORDER RESOLVING PENDING MEDICAL MONITORING PROGRAM ISSUES IN PREPARATION FOR NOVEMBER 1, 2011 IMPLEMENTATION DATE

Presently before the Court are the unresolved issues described below and related to the November 1, 2011 implementation of the Medical Monitoring Program.

In order to allow the Parties to be heard on these issues and all other issues related to the implementation of the Medical Monitoring Program, this matter came on to be heard on October 17, 2011, at 10:00 o'clock a.m., and said hearing was held before the Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County, West Virginia, in the Division 2 Courtroom located on the 4th Floor of the Harrison County Courthouse, 301 West Main Street, Clarksburg, West Virginia.

At the Hearing, the Claims Administrator submitted his Report respecting the recommended resolution of the issues, while presenting the alternative positions of the Parties. Also appearing was Dr. Jubal Watts, an expert sponsored by the Claims Administrator, to address the CT Scan issue.

The Claims Administrator and Dr. Watts subjected themselves to cross-examination by the Parties, with the Claims Administrator, as a neutral for the Court, then resting. Class Counsel, the Guardian ad Litem for Children and DuPont then presented their positions for the Court's consideration.

After a careful review of the Claims Administrator's submission and the submissions of the Parties, and having weighed the evidence and the presentations made at the October 17, 2011 hearing, and in consideration of the applicable law, the Court ORDERS the following:

1. The Parties have stipulated that the Medical Monitoring Program is a primary plan for medical testing benefits, with DuPont being responsible for all costs thereof. The Court accepts this stipulation of the Parties.

2. To facilitate the collection of Medical Monitoring Plan data for possible future scientific and medical research, the Court hereby approves the use by the Medical Monitoring Plan of the final Optional Data Collection Consent Form submitted by the Claims Administrator in Attachment II to his October 10, 2011 Report, with Claimants being allowed to complete and sign the Form, at their option, during their initial Medical Monitoring Provider visit.

3. The Court has carefully considered the positions of the Guardian ad Litem and DuPont on how to handle "No" box minor Medical Monitoring Claimants, whose parent or guardian checked the "No" box and therefore did not choose Medical Monitoring, when these minor "No" box Claimants become adults. The Court further considered their positions on when an "Inactive" Medical Monitoring Claimant (a Claimant who signed up for Medical Monitoring but then fails to use it) may become "Active" again.

The Guardian ad Litem suggests that the Medical Monitoring Plan is a right which cannot be waived through a lack of use by a Claimant, while DuPont argues that the Medical Monitoring Plan is a right that can be waived by a Claimant through lack of use.

DuPont also objects to the use of resources to continue to notify such inactive Claimants of the Program and invite them back in. DuPont, however, does not object to current minors whose parents have marked the "no" box on their behalf being notified once they turn 18 and given the option themselves of participating in the Program. But, DuPont contends that this should be a one-time notification.

Although this is a difficult issue, the Court makes the following determination:

[ALTERNATIVE A: CANNOT BE WAIVED]

The Medical Monitoring Plan is a right of a Claimant that cannot be waived, with such a waiver not being reflected anywhere in the Settlement Memorandum of Understanding ("MOU") or any related Orders. The Court therefore decides that the Claims Administrator's suggested procedures to notice these Claimants, with the procedures being contained in Attachment III to the Claims Administrator's October 10, 2011 Report, are well taken and are hereby approved.

[ALTERNATIVE B: CAN BE WAIVED]

The Court finds that a Claimant who has registered for Medical Monitoring has a duty to avail himself of the benefit or else it will be waived. Minor Claimants whose parents or guardians checked the "No" box shall be reminded of their Medical Monitoring benefit three times by the Claims Administrator after they reach adulthood. If they still do not then use the benefit, they will be deemed to have waived it, and will not be provided further notice. Likewise, an active Claimant that is ripe to be medically monitored shall be provided three notices to set up an appointment to begin the process. If the active Claimant does not participate after three notices, the active Claimant will be deemed to have waived his Medical Monitoring right, and will be classified as inactive, and will not receive further notice.

4. In connection with CT Scans, the Court has carefully reviewed the proposed CT Rule and CT Scan Verification Form provided by the Claims Administrator in his October 10, 2011 Report. The Court understands that DuPont supports the Claims Administrator's suggested approach to CT Scanning and these related forms, but the Guardian ad Litem for Children and Class Counsel suggest that there first be baseline CT scanning made available to all CT Scan eligible Claimants during their first round of Medical Monitoring, and for younger Claimants as they reach age 35, with the CT Rule and the CT Scan Verification Form suggested by the Claims Administrator then being implemented thereafter.

After careful consideration of the submission of the Claims Administrator and the positions of DuPont, the Guardian ad Litem for Children and Class Counsel in this matter, the Court hereby makes the following determination:

[ALTERNATIVE A: CT RULE AND CT SCAN VERIFICATION FORM APPROVED]

The approach suggested by the Claims Administrator best carries out the terms of the MOU which provide that:

> "The program shall provide those examinations 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." [Emphasis added].

That is, CT Scans cannot be baseline or routine even at the commencement of Medical Monitoring. However, as suggested by all Parties, the Claims Administrator's CT Rule and CT Scan Verification Form vouchsafes the diagnosis of a CT Scan by the attending physician for a decision. Exposure to heavy metals and not a specific diagnosis are all that is required to diagnose a CT Scan.

[ALTERNATIVE B: APPROVES MY UNDERSTANDING OF GUARDIAN AD LITEM AND CLASS COUNSEL POSITION]

Although the Claims Administrator and DuPont correctly state that the MOU at Paragraph C on page 2 does not allow routine CT Scanning under the Settlement, the Court finds it appropriate to have baseline CT scanning at the commencement of the Medical Monitoring Plan, and as younger Claimants reach age 35, in order for physicians to make an early determination of disease and thereby save lives. Thereafter, the Claims Administrator's CT Rule and CT Scan Verification Form will be utilized by the Medical Monitoring Plan.

5. The Claims Administrator has submitted his proposed Budget for Medical Monitoring implementation from November 1, 2011 through August 31, 2012, which is divided into (i) a separate Medical Monitoring Implementation Budget without incremental CT Scan Costs totaling $1,977,207.41 and (ii) an incremental CT Scan Costs Budget, in an effort to ensure the timely commencement of Medical Monitoring on November 1, 2011 even if the CT Scan issue is further litigated.

The two major objections by DuPont to the finalization of the Budget at this time are that the number of Medical Monitoring Participating Claimants is unknown and the Medical Monitoring Medical Provider prices are not finalized.

However, as suggested by the Claims Administrator in his Report and in his Budget and supporting documentation in Attachment VII thereto, a materially accurate projection of the number of Medical Monitoring Participating Claimants was provided on October 3, 2011, and totals 4,000. In addition, Medical Monitoring Provider contracts are in the process of being finalized, with a letter containing the prices, that was previously vetted with the Parties, having been submitted to the

Providers on October 6, 2011, and with Medical Provider contracts, after vetting with the Parties, having been submitted to the Providers for review and possible signature.

The Court also understands that the Medical Monitoring prices that were ably negotiated by CTIA, the Third Party Administrator, are substantially below that originally budgeted on August 19, 2011. The Court therefore finds that these two variables have been reasonably established so that setting a Budget now, funding it by October 31, 2011, and commencing the Medical Monitoring Program on November 1, 2011 are appropriate.

Respecting the second component of the Medical Monitoring Budget, the amount of funding necessary to fund CT scans, the Claims Administrator reports that the amount of funding required depends on (i) whether the CT Rule and CT Scan Verification Form suggested by the Claims Administrator are implemented at the beginning of the Medical Monitoring Plan; or (ii) the baseline CT Scan approach suggested by Class Counsel and the Guardian ad Litem is implemented at the beginning of the Medical Monitoring Plan and as younger Claimants reach age 35; (iii) with the Incremental CT Scan Budget under the Claims Administrator's Proposal being $839,302.10 and with the incremental CT Scan Budget under Class Counsel's and the Guardian ad Litem's proposal being $1,192,414.93.

After carefully considering this matter, the Court makes the following decision:

[ALTERNATIVE A: CT RULE AND CT SCAN VERIFICATION FORM APPROVED]

The Claims Administrator's approach to CT Scans is the correct one, so that the Incremental CT Scan Budget is $839,302.10.

THEREFORE, THE NEW CONTRIBUTION OF DUPONT TO THE MEDICAL MONITORING FUND DUE TO BE PAID OCTOBER 31, 2011 (FOR NON-CT SCAN AND FOR CT SCAN MEDICAL MONITORING) IS $2,789,984.94.

[ALTERNATIVE B: CLASS COUNSEL AND GUARDIAN AD LITEM BASELINE CT SCAN POSITION ACCEPTED]

Class Counsel's and the Guardian ad Litem's baseline approach to CT Scanning is more appropriate, so that the Incremental CT Scan Budget is $1,192,414.93.

THEREFORE, THE NEW CONTRIBUTION BY DUPONT TO THE MEDICAL MONITORING FUND DUE TO BE PAID BY OCTOBER 31, 2011 (FOR NON-CT SCAN AND FOR CT SCAN MEDICAL MONITORING) IS $3,143,097.77.

6. In his August 24, 2011 and September 1, 2011 Reports to the Court, the Claims Administrator suggested that the Court consider whether DuPont should pay an additional $26,524.57 for expenses incurred by CTIA, the Third Party Administrator for the Medical Monitoring Plan, during September and October 2011, as being post-implementation expenses, or whether these expenses should be paid from old money already contributed by DuPont at Settlement, as pre-implementation expenses. In his October 10, 2011, Report, the Claims Administrator now suggests that these expenses are not materially great and the appropriate payment is debatable. He also reports that approximately half of this amount, or $15,440, is attributed to monthly charges of CTIA under its contract with the Settlement, which are not directly related to actual testing. The other costs are for communications materials, production and distribution of ID cards, and the scheduling of appointments and reminder letters and design consulting services. Although some of these costs are reasonably related to actual testing, there is a reasonable basis to find that none of them deal with testing itself until the testing actually begins.

Therefore, the Court accepts the Claims Administrator's proposal that these Bridge Funding expenses will be paid from the initial $4,000,000.00 previously paid by DuPont to start up the Medical Monitoring Program.

7. In his October 14, 2011 Supplement to his October 10, 2011 Report, the Claims Administrator describes a Medicare reporting compliance proposal without admitting that Medicare is applicable to the Medical Monitoring Program. One of the Class Counsel has challenged the need for such reporting, while the Claims Administrator suggests that it is prudent.

After considering this matter carefully, the Court decides the following:

[ALTERNATIVE A: REPORTING ALLOWED]

The Claims Administrator is hereby authorized to carry out the Medicare reporting proposal.

[ALTERNATIVE B: REPORTING DISALLOWED]

The Claims Administrator is not authorized to carry out the Medicare reporting proposal.

IT IS SO ORDERED.

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

David B. Thomas
James S. Arnold
Stephanie Thacker
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P.O. Box 3394
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Meredith McCarthy
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Guardian ad litem

Virginia Buchanan
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Dothan, AL 36301

Edgar C. Gentle, III
Michael A. Jacks
Gentle, Turner & Sexton
P. O. Box 257
Spelter, WV 26438
Special Master

ENTER: _____

_____
Thomas A. Bedell, Circuit Judge