

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT,
WAUNONA MESSINGER CROUSER,
REBECCA 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,

vs.

Case No. 04-C-296-2

(Honorable Thomas A. Bedell)

E.I. DU PONT DE NEMOURS AND COMPANY,
a Delaware corporation doing business in West Virginia,
MEADOWBROOK CORPORATION, a dissolved
West Virginia corporation, MATTHIESSEN & HEGELER ZINC
COMPANY, INC., a dissolved Illinois corporation formerly
doing business in West Virginia, and
T. L. DIAMOND & COMPANY, INC.,
a New York corporation doing business in West Virginia,

Defendants.

**ORDER REGARDING PLAINTIFFS'
COUNSELS' FEES AND LITIGATION EXPENSES AND
CLASS REPRESENTATIVES AWARD AND INCENTIVE PAYMENTS**

THIS CAUSE came before the Court upon Motions filed in this matter as follows:

1. Petition for Approval of Attorneys' Fees and Litigation Expenses.
2. Class Representatives' Motion for Award and Incentive Payments.

The Court held proceedings on January 15, 2008, continued from proceedings commenced on December 20, 2007, to consider various matters, including the Petition for Approval of Attorneys Fees and Litigation Expenses and Class Representatives' Motion for Award and Incentive Payments. No objectors appeared at the proceedings, and no written objections were filed by any class members regarding these matters.

The Court considered material and information submitted in support of the motion for payment of attorneys' fees and costs, including the petition filed by counsel for a one-third contingency fee and litigation cost reimbursement. The Court also considered the testimony of Attorney Barry Hill as well as the affidavits of Attorneys Arnold Levin, Rhon Jones and Richard Lewis.

The Court finds that the one-third fee sought by class counsel is reasonable and appropriate under the circumstances. The Court further finds that the costs are reasonable. However, the Court believes that the requested incentive payments for the class representatives are not supported by West Virginia law.

Findings of Fact and Conclusions of Law

This case was filed on June 15, 2004, on behalf of current property owners and former and current residents who live[d] near Defendant E. I. DuPont De Nemours and Company's (DuPont) former zinc smelter in Harrison County, West Virginia. The case was removed to federal court and thereafter remanded back to state court. The second amended complaint alleged negligence and recklessness, negligence per se, public and private nuisance, trespass, strict liability and unjust enrichment and demanded damages including remediation, medical monitoring and punitive damages.

This Court certified the class and appointed the following as class counsel:

Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A.; Cochran, Cherry, Givens, Smith, Lane & Taylor, P.A.; The Law Office of Gary W. Rich, L.C.; West and Jones, P.A.; and Kennedy and Madonna, P.A. (Class Counsel).

This case was intensively litigated for nearly four years. Class counsel has presented and the Court has heard the testimony of Barry Hill, Esq., on the issue of fees, reviewed the affidavits of other expert counsel on this issue of fees and reviewed the documentation submitted by class counsel reflecting the work performed throughout the pendency of this litigation. Hundreds of thousands of pages documents were produced by Defendants and reviewed by counsel. Third-party subpoenas were served on multiple entities, resulting in the review of several thousand additional documents. Dozens of fact witnesses were deposed. Dozens of expert witnesses were disclosed and deposed, both before and after class certification. Each of the ten named Plaintiffs gave two depositions. Discovery took place in more than a dozen states across the country including West Virginia, Delaware, Illinois, Florida, Pennsylvania, Massachusetts, Colorado, Louisiana, Alabama, Washington, Washington, D.C., Virginia, North Carolina and Georgia.

The parties briefed and argued numerous contested motions, including the motion for class certification and half a dozen motions to compel. Numerous hearings took place during the tenancy of the litigation, including a three-day class certification hearing wherein expert and fact testimony and evidence were presented by both Plaintiffs and Defendants, with many of the same aspects of a trial including exhibit lists, witness list, and pre-hearing motions. In addition to the Court's monthly status conference hearings, the parties filed numerous discovery-based motions requiring a dozen hearings before the

discovery commissioner. DuPont also appealed two trial-level orders to the West Virginia Supreme Court. While both writs were ultimately denied, both writs also required extensive pleadings by the Plaintiffs.

The protracted litigation culminated in a five-week jury trial. Trial preparation of a case of this magnitude required thousands of attorney hours. During the trial, class counsel prepared and presented four opening and four closing arguments; prepared and presented live fact and expert testimony; prepared and presented videotaped fact testimony; responded to nearly daily motions offered by the defendant DuPont; offered evidence in the form of documents, graphics, animations and video presentations. Furthermore, class counsel prepared cross-examinations for each of the 70+ individual fact witnesses identified by DuPont as well as each of the twelve expert witnesses disclosed by DuPont.

Attorneys' Fees and Costs

The West Virginia Supreme Court of Appeals, consistent with the majority of jurisdictions, has laid out the factors that are to be considered when evaluating the reasonableness of attorneys' fees. In *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), the Court stated that "[t]he reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys (10) the

undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." After applying the factors outlined by the Court in *Aetna*, it is clear that the fees sought are reasonable:

Time and Labor Required

Class counsel has spent tens of thousands of hours of attorney time, as well as additional hours in paralegal and legal investigator time, to prepare the case and vigorously pursue the interests of the class. This expenditure of time and labor spanned more than four years, 20 lawyers, and numerous paralegals and legal investigators.

Novelty and Difficulty of Questions

The legal and factual issues litigated in this case were complex and challenging in the legal field. Class actions by definition are considered complex litigation. Plaintiffs' counsel presented factual and expert testimony on subjects such as environmental risk assessment, fate and transport of contaminants, epidemiology, toxicology, hydrogeology, historical industrial standard of care, property appraisal, geochemistry, environmental medicine, demography and medical economics.

Time Limitations Imposed by the Client or the Circumstances

Class counsel moved the case forward expeditiously in accordance with this Court's trial schedule. These matters were set with short response times and required availability at all times to keep pace with the case progress. Having been made a priority due to the scheduling docket of the trial court, appellate court and discovery commissioner, class counsel helped ensure the case did not languish. In addition, since mandatory notice was required on multiple occasions, Plaintiffs worked within tight

timelines to ensure adequate notice to the class while still ensuring expeditious movement of the case.

The Amount Involved and the Results Obtained

Plaintiffs prevailed in each of the stages of the trial proceedings, and the verdicts obtained for property remediation, punitive damages and medical monitoring were significant.

The Experience, Reputation, and Ability of the Attorneys

Class counsel is composed of a team of experienced litigators. They have handled substantial litigation matters in the past and ably performed all tasks necessary to achieve the result obtained in the case.

Class counsel nearly always litigate their cases on a contingent basis, covering the expenses and costs of litigation and bearing the opportunity costs of expending their efforts on the class case rather than on other potentially remunerative activities. If the litigation is unsuccessful, counsel will receive no reimbursement for these outlays. The present case is no exception. There was no practical way for class counsel to mitigate the risk of nonpayment. No individual class representative could pay counsel fees in the event the case was unsuccessful, since he or she would thereby be advancing large amounts of money in return for only a relatively small potential recovery. Accordingly, the Court finds that given the complexity of the action, the risks undertaken by class counsel, the commitment of time, and the results of this action, the one-third fee requested in the motion filed with the Court is a reasonable and appropriate fee. The one-third fee, based upon the remediation and punitive damage awards and projected medical

monitoring cost, is \$127,108,410.64.¹ The one-third fee shall be collected from the common fund created through class counsel's efforts. The common fund consists of the projected cost of the medical monitoring fund, the remediation cost, and the punitive damage award. In addition, the Court finds class counsels' costs in the amount of \$7,904,646.65² are reasonable and appropriate. Both the fees and costs will be paid from the common fund.

Stipend for Class Representatives

Plaintiffs' counsel requested that each class representative receive an incentive payment of \$75,000 from the common fund for their cooperation and assistance in this class action. However, Plaintiffs' counsel cited no West Virginia authority approving incentive payments of this size to class representatives. After careful consideration the Court believes the class representatives in this matter have well served the interests of the class, nevertheless, the Court finds that a \$75,000 incentive payment per class representative is not supported by West Virginia law.

ORDER

IT IS THEREFORE ORDERED AND ADJUDGED:

1. Counsels' petition for fees and litigation costs is **GRANTED**, and counsel is awarded \$127,108,410.64 in attorneys' fees and \$7,904,646.65 in litigation costs from the common fund of \$381,363,341.25. The Court reserves jurisdiction for taxing of further litigation costs.

¹ The fee is based upon the fund potentially available for distribution, not the amount actually distributed. Boeing Co. v. Van Gemert, 444 U.S. 472, 100 S. Ct. 745 (1980).

² Counsel may submit additional cost requests as additional costs are incurred throughout the pendency of the case, and the Court reserves jurisdiction to consider further cost petitions.

2. The class representatives' motion for award and incentive payments is

DENIED.

3. Lastly, pursuant to W.Va. R. Civ. Rule 54(b), the Court directs the entry of this Order as to the claims above upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The Clerk is directed to forward certified copies of this Order to J. Farrest Taylor, Esquire, Cochran, Cherry, Givens, Smith, Lane & Taylor, PC, 163 W. Main Street, Dothan, Alabama 36302, liaison counsel for Plaintiffs, and David B. Thomas, Esquire, Allen Guthrie McHugh & Thomas, PLLC, P.O. Box 3394, Charleston, West Virginia 25333-3394, counsel for Defendant Dupont.

ENTERED this 25th day of February, 2008.



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 25 day of February, 2008.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 26 day of February, 2008

Donald L. Kopp, II Pa

Circuit Clerk
Harrison County, West Virginia

Law Offices

West & Jones

360 Washington Avenue

P. O. Box 2348

Clarksburg, West Virginia 26302-2348

JAMES C. WEST, JR.
JERALD E. JONES
DEAN C. RAMSEY, PLLC
NORMAN T. FARLEY
KATHRYN K. ALLEN
PERRY B. JONES

TELECOPIER TRANSMITTAL

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Subject matter/Comments:

Order regarding Plaintiff's counsels' fees and litigation expenses and class representatives award and incentives payments.

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