

LEAF RIVER FOREST PRODUCTS MISSISSIPPI DIOXIN LITIGATION

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BACKGROUND

Leaf River Forest Products, Inc. ("LRFP") operates a pulp mill adjacent to the Leaf River in New Augusta, Mississippi. Approximately 9,150 plaintiffs in 215 cases have sued the LRFP Mill claiming that 2,3,7,8-tetrachlorodibenzo-*p*-dioxin ("2,3,7,8-TCDD") and other dioxins and furans discharged in the Mill's effluent has damaged their persons and their property.* The plaintiffs assert a variety of claims, including negligence, nuisance and trespass. None of the plaintiffs, except one young girl diagnosed with Hodgkin's Disease, claim they suffer any physical injury as a result of the LRFP Mill's operations. The plaintiffs assert that they have consumed fish from the Leaf and Pascagoula Rivers (some of the fish in these rivers contain low levels of 2,3,7,8-TCDD) and that they have a fear of cancer as a result of their consumption of fish. Plaintiffs' property damage claims are based on trespass allegations and assertions that their property has been devalued as a result of the stigma associated with living downstream from the LRFP Mill. The plaintiffs live anywhere from 3 to over 100 river miles below the LRFP Mill. Many do not own property adjacent to the rivers.

The purpose of this paper is to discuss the three cases against LRFP that have been tried before juries and a fourth case that was dismissed.

* The plaintiffs also usually name as defendants Leaf River Corporation ("LRC"), which owns the stock of LRFP; Great Northern Nekoosa Corporation ("GNN"), which owns LRC's stock; Georgia-Pacific Corporation, which acquired virtually all of GNN's stock in March 1990; and the LRFP Mill's plant manager and environmental manager.

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THE LRFP MILL

The LRFP Mill is a state-of-the-art kraft pulp mill that began operating in September, 1984. The Mill discharges effluent into the Leaf River pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit issued by the Mississippi Department of Environmental Quality and approved by the United States Environmental Protection Agency ("EPA"). From September, 1984 through 1989 the Mill used varying amounts of elemental chlorine to bleach pulp. After the discovery by the EPA in the late 1980's that bleaching pulp with elemental chlorine formed trace amounts of 2,3,7,8-TCDD, the LRFP Mill converted to chlorine dioxide. By July, 1990, the Mill was operating completely with chlorine dioxide substitution.

The Mill produces 495,000 tons of bleached pulp per year (60% softwood and 40% hardwood). The current bleaching sequence is: D100 - E_{OP} - D100 - E - D100. Chlorine dioxide is generated by a R-8 unit.

Prior to completely converting to chlorine dioxide, the LRFP Mill's effluent, which is tested regularly pursuant to its NPDES permit, showed trace levels (measured in ppq) of 2,3,7,8-TCDD. The Mill never violated its NPDES permit with regard to allowable dioxin levels. The LRFP Mill's effluent has been non-detect for 2,3,7,8-TCDD since the summer of 1990, following the Mill's conversion to chlorine dioxide.

The Leaf River originates in Scott County, Mississippi, and flows south through Forrest County and Perry County where it passes by the LRFP Mill. Below the LRFP Mill, the Leaf River continues south through Perry and Greene Counties and into George County. In northern George County, approximately 42 river miles below the LRFP Mill, the Leaf River joins with the Chickasawhay River to form the Pascagoula River. The Pascagoula River flows south from this point through George and Jackson Counties, forks into the West and East Pascagoula Rivers, and enters the Gulf of Mexico at Pascagoula, Mississippi, more than 100 river miles below the LRFP Mill. Figure 1.

CASES

A. SIMMONS

In November, 1990, a jury in Greene County, Mississippi returned a verdict in favor of one plaintiff, Mr. Wesley Simmons, against the LRFP Mill for \$40,700 in compensatory damages and \$1,000,000 in punitive damages. Mr. Simmons lives adjacent to the Leaf River approximately 42 river miles below the LRFP Mill, near the confluence of the Leaf and Chickasawhay Rivers. Mr. Simmons had

no physical injury and he refused to test either his person or property for any dioxins or furans. The jury returned a verdict denying Mr. Simmons' fear of cancer claims, whereupon the trial judge directed the jury to rule in favor of Mr. Simmons on his nuisance claim and to assess compensatory and punitive damages.

LRFP has appealed the Simmons case to the Mississippi Supreme Court. An important issue on the appeal is the fact that one of the jurors was also a plaintiff against LRFP. In addition, LRFP also has raised the fact that Mr. Simmons produced absolutely no evidence whatever that either he or his property was exposed to 2,3,7,8-TCDD from the LRFP Mill.

B. FERGUSON

The Ferguson case involved three plaintiffs, Mr. and Mrs. Ferguson and Ms. Louise Mitchell. All plaintiffs live in Jackson County, Mississippi, approximately 100 river miles below the LRFP Mill. Like Mr. Simmons, neither the Fergusons nor Ms. Mitchell had any physical injury, but claimed they ate fish from the Pascagoula River and were afraid of contracting cancer. They also claimed that their properties were devalued due to the stigma of living 100 miles below the LRFP Mill. Like Mr. Simmons, the Fergusons and Ms. Mitchell refused to test either their bodies or their property for any dioxins or furans.

In February, 1992, a jury in Jackson County awarded the Fergusons \$10,000 each on their nuisance claims and \$90,000 each on their emotional distress/fear claims. Ms. Mitchell received no compensatory damages. The jury awarded \$3,000,000 in punitive damages against LRFP.

LRFP also has appealed the Ferguson case to the Mississippi Supreme Court. The primary issue on appeal is plaintiffs' complete lack of evidence or proof of any exposure to them or their property to 2,3,7,8-TCDD from the LRFP Mill. Even plaintiffs' experts, Drs. Arnold Schechter and Arthur Hume, testified that blood testing was the only reliable way to determine dioxin exposure. Although LRFP offered to pay for such testing, the plaintiffs refused. As a result, neither Dr. Schechter nor Dr. Hume was able to determine to a reasonable degree of scientific or medical certainty what exposure, if any, the plaintiffs had to 2,3,7,8-TCDD or other dioxins. Another important issue is whether the trial court should have allowed retired Admiral Elmo Zumwalt to testify as an expert on scientific and medical aspects of dioxin, despite, among other limitations, his lack of a degree in any science or medical field.

Simmons and Ferguson were argued to the Mississippi Supreme Court on March 21, 1994. As of the date of this paper, no decision has been rendered.

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C. BEECH AND WILLIAMS

The Beeches and the Williams live approximately 67 river miles below the LRFP Mill and between 1/4 mile and 1/3 mile from the Pascagoula River. The Beeches and Williams had no personal injury but asserted that they had a fear of cancer because they ate fish from the Pascagoula River and that the value of their properties was diminished due to dioxins and furans from the LRFP Mill on their properties and due to the stigma of living below the LRFP Mill.

Initially, the Beeches and Williams also refused to test either themselves or their property for dioxins and furans. LRFP then moved for summary judgment because plaintiffs had no proof of exposure to any dioxins and furans from the LRFP Mill. In response, plaintiffs tested their property but not themselves. Prior to trial, the court dismissed all plaintiffs' fear claims because they failed to produce any evidence of personal exposure beyond their inferential conjecture. The court also excluded Admiral Zumwalt from testifying on behalf of these plaintiffs, because he failed to meet the requirements of the rules of evidence in order to testify as an expert. The case went to trial on the property damage claims.

Analytical results from both plaintiffs' properties were below the detection limit for 2,3,7,8-TCDD and 2,3,7,8-TCDF, the principal substances which plaintiffs alleged the LRFP Mill discharged into the Leaf River, later settling onto their properties. The analytical results showed levels of OCDD (10,000 ppt and 17,500 ppt) and some other highly chlorinated dioxins and furans. At trial, Prof. Christoffer Rappe testified for LRFP and showed how the PCDD/PCDF found on the Beeches' and Williams' properties could not have come from a pulp mill. The plaintiffs' expert, Dr. Douglas J. Hallett, testified that the OCDD and other PCDD/PCDF on the Beeches' and Williams' properties came from the LRFP Mill. Dr. Hallett principally relied on the soil tests performed on plaintiffs' property and a nearby lot out of the flood plain. He asserted that this test proved the LRFP was the "predominant" source of the dioxins on plaintiffs' properties, even though (i) it did not attempt to isolate the Mill as a point source to the Leaf River and (ii) he did not take into consideration any other potential sources to the Leaf or Pascagoula Rivers. To further support this opinion, Dr. Hallett testified that he "assessed the river, just visually, thought about it," "taste[d] the [river] water . . . for acidity [and] for phenolics," and "[l]ooked at the mud, looked at the sediment " When asked how the plaintiffs were exposed to the OCDD found in the soil on their properties, Dr. Hallett testified that their neighborhood, despite being in the flood plain, was "very dusty," their "furniture . . . was very dusty" and "[t]he dust on the refrigerator was very clearly the dust outside, it was not normal household dust. This I [Hallett] considered to be a major exposure route."

Dr. Hallett and another expert for the plaintiffs, Dr. James Olson also testified that there is no safe level of OCDD, that OCDD causes cancer and immunosuppression, and that background levels of OCDD

and the other highly chlorinated dioxins and furans found on the plaintiffs' properties are harmful to humans. More specifically, Dr. Olson testified that the OCDD on the plaintiffs' properties were "many orders of magnitude more potent than arsenic" and Dr. Hallett testified that this OCDD was "about a thousand times more toxic . . . than DDT." Dr. Olson expressed no reluctance in relying on Dr. Hallett's methods, particularly Dr. Hallett's dust exposure theory, in forming his own opinions.

The jury returned a verdict in favor of LRFP and against the plaintiffs.

D. MAUGH

The Maughs live adjacent to the Leaf River approximately 3.5 river miles below the LRFP Mill, the closest plaintiffs to the Mill. The Maughs brought their case in United States District Court and alleged fear of cancer and property damage. At his deposition, Mr. Maugh testified that he never ate fish from the Leaf River or any other fish because he did not like fish. Mrs. Maugh testified that she rarely cooked or ate fish herself because Mr. Maugh would not eat it. Shortly thereafter, the Maughs' attorneys said they would not pursue the fear of cancer claims.

In January, 1994, the plaintiffs' expert Doug Hallett conducted soil tests on plaintiffs' properties and other property in the area. Hallett's firm, Eco Logic International, Rockwood, Ontario, trespassed on LRFP Mill property and took soil without permission. Unfortunately for plaintiffs, the test results indicated that (i) the Maugh property and the LRFP Mill property both were non-detect for 2,3,7,8-TCDD and 2,3,7,8-TCDF; (ii) the only location where 2,3,7,8-TCDD was detected (4.6 ppt) was adjacent to Bogue Homa Creek -- a tributary to the Leaf River that is uninfluenced by the LRFP Mill; and (iii) the location defined by Dr. Hallett as "control", because it was outside the influence of the LRFP Mill and the flood plain of any waterway, had the highest I-TEQ (15.02 ppt) of any location sampled.

Shortly after receipt of these test results, the plaintiffs withdrew their claims and the case was dismissed.

CONCLUSION

The Mississippi Supreme Court should provide guidance for the resolution of future dioxin cases in Mississippi when it decides the Simmons and Ferguson appeals. LRFP believes dioxin exposure should be proven through sampling and analyzing of appropriate matrices according to the accepted scientific protocols and methodologies. Further, LRFP agrees with the scientific community that a determination then should be made regarding the source of any PCDD/PCDF that may be found.

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Figure 1: Area Map of Southern Mississippi

0 10 20 30 40 50 60 70 80 90 100



Kilometers

