



validity of epidemiological studies and statistics and a host of other hotly contested scientific and medical issues. In addition, there will be extensive testimony from the fields of hematology, toxicology, immunology, pediatrics, psychiatry, cardiology, epidemiology, hydrogeology, geology, chemistry, waste disposal, water contamination and water distribution.

This memorandum is written on behalf of the defendant Beatrice Foods Co. which is a party to the case because in 1978 it bought a tannery company in Woburn-John J. Riley Co. - which, in January 1983, it sold back to John J. Riley, with an agreement to indemnify Riley with respect to this litigation which had already started.~

I. DISPOSITIVE ISSUES AS TO "CONTAMINATION,"  
WASTE DISPOSAL AND FORESEEABILITY~

[The following] issues, which are not as complex and lengthy as others in this litigation, should be tried first and can be determinative of the alleged case against Beatrice without the necessity of a long and tedious trial involving the medical injuries, causations and damages of a single plaintiff.

If the plaintiffs fail to prove any one of the following dispositive issues by a preponderance of the evidence, the court or jury should exonerate Beatrice:

1. That the six Complaint Chemical were present on The Fifteen Acres in 1964 or in any other relevant period.

Put another way, if the plaintiff cannot show that in the relevant period The Fifteen Acres were "contaminated" by TCE or the Complaint Chemicals, they cannot prevail against Beatrice.

2. That the Complaint Chemicals were disposed of on The Fifteen Acres by Beatrice or some authorized person for whose conduct Beatrice was responsible; or that Beatrice knew or should have known that some other person was disposing of complaint chemicals on its property in the relevant period.

Put another way, if the plaintiffs cannot show that Beatrice disposed of the Complaint Chemicals on The Fifteen Acres, or knew or should have known of their disposal, the plaintiffs cannot prevail against Beatrice.

3. That Beatrice, or some authorized person for whose conduct or knowledge Beatrice was responsible or chargeable, knew in the relevant period that TCE and the Complaint Chemicals could cause serious bodily injury to humans as a result of being disposed of on The Fifteen Acres.

Put another way, if Beatrice had no such knowledge, or if the state of medicine or science was such that this knowledge was not available or reliable, plaintiffs cannot prevail against Beatrice.

4. That it was reasonably foreseeable to Beatrice that the Complaint Chemicals, if disposed of on The Fifteen Acres would move underground and eventually contaminate Wells G and H some distance away.

Put another way, if the plaintiffs cannot show that contamination of the wells by the Complaint Chemicals was reasonably foreseeable, the plaintiffs cannot prevail.

Any of these issues if decided by Court or jury adversely to the plaintiffs would result in dismissal of the complaint against Beatrice.

These issues do not involve the time, expense, complication and confusion of attempting to try the thirty plaintiffs' liability cases or of trying even one plaintiff's case in its entirety. Further, trial of these issues would not involve one of the most complex aspects of the case, namely medical causation.

To the extent these issues are similar or identical for the defendant Cryovac, resolution in Cryovac's favor would also terminate the case without the need for further trial of other issues.

## II. DISPOSITIVE ISSUES AS TO CAUSATION

If the dispositive issues about "contamination," waste disposal and foreseeability do not terminate the case, the Court should not be obliged to try 33 tort claims, but should turn to the dispositive issues relating to causation.

In order to prevail, the plaintiffs must prove that the defendants' conduct caused the plaintiffs' injuries. This means both that the defendants, or each of them, must be the legal cause of these injuries as well as the cause in fact.

In this context, the plaintiffs must show not only that the complaint Chemicals were disposed of, migrated from the defendants' properties, reached the wells and contaminated the water during the relevant period, but that each plaintiff was "exposed" to the water over a sufficient period of time and in a sufficient amount as to cause physical injury and death.

The plaintiffs must prove that plaintiffs were exposed to TCE or other chemicals in the water over a sufficient period of time to cause leukemia and each of the other illnesses, diseases or injuries that the plaintiffs are claiming. This requires expert testimony to establish, and if not established, the plaintiff cannot prevail.

Because of these considerations, there are the following dispositive issues on causation which, if found in the defendants' favor, will obviate the need for lengthy trial of the personal injury claims.

1. Was the conduct of Beatrice or Grace, the proximate cause of the plaintiffs' being exposed, over a sufficient period of time, to water containing the Complaint Chemicals?

2. If the plaintiffs were exposed to water containing the Complaint Chemicals, and the defendants or any of them was the cause of such exposure, did any of the Complaint Chemicals cause, leukemia and the other illnesses, diseases and injuries claimed by the plaintiffs?

If either of these questions is answered negatively, the plaintiffs cannot prevail and a great deal of time, expense and inconvenience are avoided and vast quantity of judicial resources is not needlessly consumed.

III. SUGGESTIONS AS TO "TEST" CASES OR REPRESENTATIVE PLAINTIFFS ARE UNWORKABLE

The plaintiff will undoubtedly argue that being entitled to their "day in court," the case should proceed in some fashion other than dealing with dispositive issues first. One argument might be to try a "test" or representative plaintiff on the ground that all the plaintiffs are alike in their claims and injuries. Such arguments and reasons are contrary to fact. Nor can the plaintiffs create some euphemism or umbrella term to cover the myriad of alleged injuries by claiming that the plaintiffs are suffering from "solvent poisoning," "immune dysregulation" or some form of "environmental" disease.

These are separate plaintiffs; each has a separate medical history, separate alleged injuries or non-injuries and each is seeking separate monetary damages for alleged physical and emotional injury. In addition, the events giving rise to these alleged injuries and damages also differ for each plaintiff. These claims cannot be lumped together nor can one plaintiff's case be a substitute for any other.

Having brought 30 or more separate claims and having sought money damages for each plaintiff in different amounts for

different alleged injuries, each plaintiff's case must be proved separately.

This cannot be said, however, for the issues of (1) contamination and (2) causation. There, all plaintiffs' claims are alike in that they must prove the defendants' negligence with respect to contamination, they must prove foreseeability and they must prove that the contaminants migrated from the defendants' properties in sufficient concentrations and quantities and thereafter entered the well water which in turn was distributed to each home and was thereafter ingested in sufficient quantities over a sufficient period of time to cause any injury. These dispositive issues are common to all and should be tried first.

V. CONCLUSIONS:

Unless the Court or jury tries and determines these dispositive issues first, the trier of fact must analyze medical and other evidence about each of the plaintiffs and the technical and scientific evidence about the fifteen year operation of the wells. In addition, as to each claim, compensatory damages are sought for physical and emotional injuries as well as alleged punitive damages. All of this medical, historical, scientific, economic and damage evidence will consume an enormous amount of time, energy and expense, none of which will be necessary if the plaintiffs do not prevail under the dispositive issues described in the Memorandum.

If the Court determines to try some or all of the dispositive issues, there is appropriate authority under Rule 42 to justify such a separate trial. In connection with the trial of these issues, Special Interrogatories under Rule 49 should be put to the jury to ascertain with specificity the fact issue which the jury is determining. At the appropriate time the defendants are ready to suggest the form and content of these Interrogatories. At present, however, the defendant Beatrice urges that the Court exercise its discretion and separate for trial the dispositive issues set forth above.

Respectfully submitted,

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Legend: ~ *matter omitted*

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