

Bibb v. Monsanto

Stuart Calwell's Eight-Year Battle to Clean Up the Town of Nitro, West Virginia

West Virginia attorney and his team win unique damages settlement, forcing remediation of an entire town and monitoring of residents poisoned by dioxin

It was a long battle against tremendous odds, but West Virginia attorney Stuart Calwell and his team never gave up on their fight for the town of Nitro, West Virginia, and its residents, eventually reaching a settlement that forced Monsanto Company to — quite literally — clean up this factory town about 15 miles north of Charleston.

In January 2013, West Virginia Circuit Judge Derek C. Swope approved a \$100 million settlement between Monsanto and residents of Nitro. The residents accused the company of spreading toxins that remained in the area more than 40 years after the company stopped manufacturing at its Nitro plant.

In approving the agreement, Judge Swope noted that the mammoth lawsuit had been going on for more than seven years and had featured more than 53 court hearings. He noted that, at that time of the approval, the docket sheet boasted 3,271 lines, including more than 150 motions filed.



1-Stuart Calwell

Calwell, the residents' lead lawyer in the litigation, and his Charleston-based Calwell Luce diTrapano PLLC (at the time called The Calwell Practice) fronted over \$7 million in expenses and clocked 26,000 attorney hours and 37,000 staff hours. Calwell and his lawyers had spent more than a year investigating the case before they sued.

Judge Swope noted that “the history of this case demonstrates that this was litigation ‘to the death’ on every question, no matter how insignificant or collateral to the main issues.” He also said: “Class Counsel, the head of a small law firm, had to commit the time and resources necessary to battle one of the largest and most reputable firms in West Virginia.”

Removals, Appeals

Indeed, Calwell had to guide the legal action through two removals to federal court and two remands back to state court, three appeals to the West Virginia Supreme Court of Appeals (including on class certification), decertification of the property

class, bungled government testing that found no problems in the area, two rounds of discovery, a defense expert who was a Nobel Prize winner, a new judge on the case due to illness and two failed mediations.



2-Putnam County, WV Courthouse

He even had to deal with Monsanto's creation of a subsidiary to shield it from the Nitro liabilities, a subsidiary that in a bid for further isolation eventually went into bankruptcy. Calwell secured an agreement under which the Nitro claims passed through the bankruptcy case.

And, of course, he had to prove to the court that he was right about the science.

"That's the thing about these big environmental cases," Calwell said. "You don't just pound the law — you pound the science. In fact, you as the plaintiffs' attorney are often the one who has to go out and marshal the science."

Litigation Origins

The origins of the litigation went back to 1979, when Cleo Smith, a Monsanto worker, appeared in Calwell's Nitro law office complaining of serious health problems related to chemical exposures in Monsanto's Nitro plant. Hundreds of workers had chloracne (a skin disease resembling severe acne), bladder cancer and other health problems.

That launched Calwell's four-year effort to seek compensation for the workforce related to exposure to dioxin and other chemicals. The development of the evidence resulted in an 11-month jury trial in federal court ending in the spring of 1985. Unfortunately, the workers lost that case. "We had to prove Monsanto deliberately intended to poison its workers, but the jury found against us," Calwell said.

Although Calwell's interest in the issue went back to 1979, the roots of the problem stretched back much further.

Monsanto began operating in Nitro in the 1920s in a facility that was originally built by the United States to produce gunpowder, but that opened too late to aid in the country's World War I effort. Monsanto made several chemical products there, and after World War II it added herbicides to the manufacturing mix.

After an explosion at a pilot plant for a new herbicide, 2,4,5-T — an explosion that sent a cloud of dioxin drifting across the plant and local community — cases of

chloracne cropped up among the workers. This event was one of the earliest, if not the earliest, occasions in which chloracne was detected in an industrial workforce. Dioxin had been identified as the chloracnegenic agent early on.

In 1949 Monsanto opened a new unit to produce 2,4,5-T — a product that was only moderately successful. Then, in the early 1960s, the U.S. government identified 2,4,5-T as a potential warfare agent, particularly when mixed with 2,4-D, a related product. The combination became known as “Agent Orange.” With the advent of the Vietnam War, production of 2,4,5-T increased dramatically.

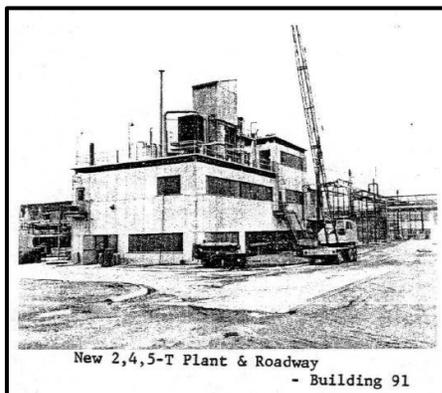
Many workers lived within a few blocks of the plant, which was separated from the center of town by nothing more than railroad tracks. Monsanto’s Nitro workforce developed a variety of adverse health problems associated with exposure to the 2,4,5-T production unit. Chloracne cases persisted in varying numbers from the explosion of the pilot plant through the end of 2,4,5-T production in 1969.

Harmful Effects

One of Calwell’s challenges in his successful litigation against Monsanto was to show that, although the herbicide production ended decades before, its harmful effects still haunted the community.

After the failed individual cases against Monsanto and after West Virginia’s Supreme Court of Appeals recognized the legal validity of claims for medical monitoring, Calwell’s law office began investigating the presence of dioxin contamination in Nitro and the surrounding areas, which had been used by Monsanto as open dumps for chemical waste.

Although Monsanto hadn’t made 2,4,5-T at the plant since 1969, samples taken from inside homes revealed concentrations of a specific dioxin isomer identified with the company’s production of the herbicide. Soil samples also revealed concentrations of this specific dioxin. Documents and evidence gathered during the 1980s litigation had confirmed the generation of this dioxin during the manufacture of 2,4,5-T.



“In the earlier litigation, we learned a lot about Monsanto’s operations at the plant,” Calwell said. “I kept thinking about that operation. Monsanto hadn’t manufactured 2,4,5-T since 1969. Could anything be left from that operation? Samples found remarkable levels of toxins. We created models with experts to show where this contaminant likely went. We could fingerprint it back to that plant.”

3-Building 91 (2,4,5-T)

Simply put, calculating the difference between how much raw material went into the plant and how much left it in manufactured products showed how much Monsanto had dumped into the nearby Kanawha River or spewed into the atmosphere from smokestacks.

Class Action

In December 2004, Calwell's firm filed the class action against Monsanto alleging contamination of homes, schools and the environment as well as the need to have residents tested for dioxin blood levels and the need for medical monitoring for a host of serious health conditions related to dioxin exposure. Additionally, it filed 190 personal injury cases for dioxin-related cancers on behalf Nitro-area residents.

After over seven years of intense litigation, Calwell's firm reached its settlement with Monsanto while a jury was being selected for trial. (Jury selection had started with a pool of 5,000 residents, and voir dire had been conducted over two weeks.)



4-Remediated home, Nitro

Under the terms of the settlement, which totaled about \$100 million, Monsanto would fund the decontamination of potentially 4,500 homes and buildings and provide for periodic medical monitoring of qualifying area residents for 30 years. Every two years, 400 to 500 residents in the area are tested. The medical-monitoring trial alone could have taken four to six months, Judge Swope had predicted. Monsanto also compensated patients in the individual cancer cases and agreed

to pay \$22.5 million for the plaintiffs' legal fees and \$7 million for legal expenses.

Calwell was able to convince the court that his view of the science was correct. Indeed, among the many issues he needed to prove were how the dioxin molecules were made, how many were made, how they escaped the manufacturing process, where they went, how they got into properties and humans and what they did to humans.



5-Remediation, Monsanto site

Robert the Bruce

Judge Swope said of Calwell's efforts in the Monsanto litigation: "One of the things that makes this case novel is the sheer tenacity of class counsel in repeatedly bringing these cases. Class counsel obviously held a long-lasting belief that the 2,4,5-T process was dangerous. From the 1980s forward, at great expense in time and money, he chose an almost solitary course to make the defendants accountable for their actions. What makes this exceptional is the fact that he had been uniformly unsuccessful in his efforts up to now. Like Robert the Bruce watching the spider spin his web, he picked himself up each time and went back to the fray."

Calwell and his firm's work didn't end with the settlement. They discovered that the blood tests of the residents weren't being carried out properly and — just as they were about to sue a local hospital and national lab over that issue — Monsanto agreed to cut the testing period from every five years to every two years.

"We thought it was over, but the judge said we were not relieved of our responsibilities as class counsel," Calwell said. "The serum dioxin testing was not being handled properly. Monsanto eventually agreed that people would be tested every two years instead of every five years."

The plaintiffs' lawyers also oversaw the house remediations, including encouraging residents to allow them to be conducted in the first place.

"I just think companies should be made to pay for their actions when their actions are nefarious and hurt people — they need to right that wrong," Calwell said. "Sometimes that takes herculean effort, but I'm never afraid of that."

In the end, Calwell's tenacious efforts did show that a big-pocket defendant can be held responsible for its actions that put so many people's health at risk.



6-Robert the Bruce (Robert I, King of Scots)

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