

# Judge's ruling has something for all participants

By DAN KENNEDY

BOSTON — U.S. District Court Judge Walter Jay Skinner did not grant any of the three parties in the Woburn leukemia trial everything it wanted in a ruling he handed down Wednesday.

He did not dismiss the lawsuit against W.R. Grace & Co. and Beatrice Foods Co., as the defendants had asked in motions seeking a directed verdict.

But the judge also did not leave the plaintiffs' case intact. His ruling will make it considerably more difficult for the plaintiffs to make their case against Beatrice, and will make the Grace portion of their case somewhat more difficult as well.

In interviews with reporters after Wednesday's court session, lawyers attempted to put the best face on Skinner's ruling.

Jan R. Schlichtmann, the plaintiffs' principal lawyer, declared victory, saying, "The point is a milestone has been passed and he (Skinner) has found sufficient evidence for the jury to find both these defendants liable."

Attorneys Jerome P. Facher, representing Beatrice, and Michael B. Keating, representing Grace, both stressed that Skinner's ruling narrowed the scope of the trial. They also expressed the hope that the judge will narrow it further before jury deliberations begin.

Facher and Keating filed motions for a directed verdict after Schlichtmann concluded his 51-day presentation Monday morning. The defendants opened their presentation Wednesday, following Skinner's ruling.

The plaintiffs, eight East Woburn families, charge that chemicals dumped at Grace's Cryovac manufacturing plant, 369 Washington St., and at the Riley Leather Co. tannery, 228 Salem St., contaminated groundwater and flowed into municipal wells G and H, which were closed in 1979 after 15 years of use. Beatrice owned the Riley tannery from 1978 to 1983 and retains liability.

The contamination led, the plaintiffs say, to six leukemia

deaths and two illnesses.

Grace and Beatrice argue that they did not pollute the wells, and that even if they did, the chemicals named in the suit do not cause leukemia.

## Key rulings

Key parts of Skinner's ruling, which he outlined before the jury was brought in Wednesday morning, were as follows:

—Neither defendant may be held liable for creating a nuisance on the basis of events that occurred before 1964, when well G opened. Schlichtmann had introduced evidence concerning alleged dumping before 1964, but Skinner ruled there were no parties who could be harmed by such action until the wells were on line. Skinner said he is still studying whether he should grant Beatrice's motion to drop the nuisance portion of the complaint entirely.

—Beatrice may not be held liable for negligence for events that occurred before 1968. That's the year the tannery received a letter from Denis Maher, a Woburn well driller, that pumping from wells G and H was affecting the groundwater table on a 15-acre tannery-owned property northeast of the main tannery grounds. (It is this 15-acre site, rather than the main tannery grounds, that is at issue in the Beatrice portion of the case.)

Skinner said that, prior to the Maher letter, there was no way then-tannery owner John J. Riley Jr. could have foreseen that groundwater on his property flowed toward wells G and H, because the Riley property is downstream from the wells and on the opposite side of the Aberjona River.

—On the same issue, Skinner ruled that negligence at the Cryovac plant could apply to any events after 1964. Although the judge said it might not be "reasonable" to assume Grace officials should have foreseen groundwater would flow toward the wells, legal precedent did not allow him to dismiss such a complaint unless he found it would have been "extraordinary" for Grace to have foreseen the consequences. "I don't

think it's an extraordinary phenomenon that water should flow downhill," he said.

—Beatrice may not be held liable under the standard of "strict liability," which states that property owners are responsible for any harmful consequences that arise from their land, regardless of their action or lack of action.

A property owner must be found to be engaging in a "purposeful" and "abnormally dangerous" activity for the strict liability standard to apply, and Skinner ruled that the plaintiffs' evidence did not demonstrate "a purposeful placing of material on the 15-acre property."

—The strict liability standard, on the other hand, does apply to the Grace property. The judge found testimony by present and former Cryovac employees that they poured chemical solvents into a drainage ditch and into a pit to the rear of the property as sufficient evidence that the jury may find Grace was engaging in an "abnormally dangerous" activity.

—By agreement of all three parties, chloroform was dropped as one of the chemicals named in the complaint. Skinner also granted a Grace motion to drop 1,1,1-trichloroethane as one of the chemicals in the Grace portion of the trial, ruling there was not sufficient evidence concerning that substance. The judge dropped benzene at Grace's request, too, although benzene is not specifically named in the plaintiffs' complaint. But Skinner rejected Grace's request to drop tetrachloroethylene from the case. That leaves three chemicals in the Grace portion of the case and four in the Beatrice portion.

## Historic first

Schlichtmann told reporters he was especially pleased that Skinner had found Grace must adhere to the standard of strict liability. He said it was the first time in the history of Massachusetts that a court had ruled the dumping of hazardous waste was an abnormally dangerous activity.

Schlichtmann produced no evidence of PCE use at the Cryovac plant before 1972. Since Dr. George Pinder, a hydrogeologist hired by the plaintiffs, testified it would take nearly 10 years for PCE to flow from the plant to the wells, Keating said there was no evidence that PCE from Cryovac could have contaminated the wells before they closed in 1979.

Attorney William Cheeseman, an associate of Keating, added that judges are "conservative" about eliminating portions of a lawsuit, preferring to let the jury decide unless there is "literally no evidence whatever."

"The fact that he (Skinner) granted actions on certain motions is actually quite favorable," Cheeseman said.

Facher said he was "pleased with the result of the elimination of strict liability," but "disappointed" that Skinner did not eliminate the negligence portion of the case.

"I don't think there's been any evidence of negligence after 1968," Facher said.

He added that Skinner's ruling underscores that there is a "big difference" between the plaintiffs' case against Beatrice and that against Grace.

He said the ruling shows that the Beatrice case rests solely on the plaintiffs' contention that the tannery negligently allowed trespassers to use the 15 acres as a dumping ground, while the Grace case involves charges of company-sanctioned dumping by employees.

After the jury was brought in

Wednesday morning, Skinner told them he had "narrowed the case," but that the scope had not changed significantly. He informed them that chloroform was no longer an issue, but added he would reserve comment on the other portions of his ruling until he issues his closing instructions.

## Geochemist testifies

Also Wednesday, Facher opened the defense portion of the trial by questioning Dr. Olin C. Braids, a geochemist who has studied the effects of

biodegradation on organic chemical solvents.

Braids is expected to testify that the absence of biodegradation byproducts on the Beatrice property is evidence that any chemicals present must have been deposited after 1979, the year wells G and H closed.

But before he could express that opinion, Schlichtmann objected that he had not had a sufficient opportunity to question Braids at a private deposition.

Skinner adjourned the session so that Schlichtmann could depose Braids before his testimony resumes today.



He said the ruling means the jury need only find that contaminants were on the Grace property and that they flowed into wells G and H.

Schlichtmann conceded Skinner's ruling will make his case against Beatrice more difficult to prove, since he must show the tannery acted negligently after 1968.

But he added he believed there was "more than enough evidence after those dates" and commented, "Beatrice is a more difficult case because it is a circumstantial case. We've always recognized that."

Keating said the elimination of three chemicals "narrows the focus a little bit," and added he was "confident" Skinner would eliminate tetrachloroethylene (PCE) before the case is sent to the jury.

Keating has contended that

