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LAW

Courts Lend Sympathetic Ear to Claims For Compensation Based on Cancer Fears

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Staff Reporter of THE WALL STREET JOURNAL

Residents of rural Hardeman County, Tenn., discovered in the late 1970s that their drinking wells had been contaminated with chemicals linked to cancer and other diseases. They blamed the Velsicol Chemical Corp., which had used a site in the area to dump waste from a nearby pesticide plant.

A group, eventually totaling 128 people, sued the company in state court in Hardeman County over alleged injuries such as liver and kidney damage. But apart from their physical ailments, the Hardeman County residents also demanded compensation for their fear of contracting cancer in the future.

Until about three years ago, most courts either would have thrown out such claims of anxiety or would have allowed only nominal awards. But in August, a federal appeals court in Cincinnati approved the award of a total of \$207,000 for "cancerphobia" to five people serving as representatives of the class action. Awards for other class members will be determined by a trial judge if the amounts aren't settled out of court beforehand.

Proliferation of Claims

Cancerphobia claims are winning in court—and sometimes for big money. Courts in California, New Jersey, Washington state and elsewhere are allowing compensation for people's fear of even minor statistical increases in the likelihood that they will get sick because of pollution.

"There has been a huge proliferation" of such claims in the past two or three years, says Arvin Maskin, a corporate defense lawyer with the New York firm of Weil, Gotshal & Manges. Cancerphobia charges, he adds, "are becoming routine in the big toxic [injury] cases, and the courts are showing signs of going along."

In major cases as recent as the litigation in the early 1980s over the Vietnam defoliant Agent Orange and the dioxin contamination of Times Beach, Mo., plaintiffs' lawyers didn't press claims regarding the fear of getting cancer, says Mr. Maskin, the Justice Department's lead counsel in those cases. The plaintiffs might have been able to negotiate larger settlements if they had added that theory to their legal attacks, he says.

The new theory creates a potentially massive threat to corporate defendants. A single incident of water contamination, for

example, could cause hundreds of people to claim fear of disease.

This new dimension of possible liability has already begun to affect negotiations between plaintiffs' lawyers and alleged polluters, Mr. Maskin says. In some instances, companies "are forced to compromise [out of court] because of the new risk of a thousand cancerphobia claims."

The development comes as courts are accepting a variety of new approaches de-

IN some instances, companies 'are forced to compromise out of court because of the new risk of a thousand cancerphobia claims,' says one attorney.

signed to provide compensation for potential future illness related to pollution. Other recent examples include successful claims for the cost of medical surveillance after a chemical spill and awards based on doctors' testimony that future ailments are more likely than not to develop.

Pressure on courts to expand such theories is expected to increase as a result of the recent enactment of state and federal "right-to-know" laws. These statutes force companies to disclose the contents of industrial emissions in great detail. Lawyers predict that the information will ignite lawsuits from citizens who hadn't realized what they were breathing or drinking.

A main cause of the rise in successful cancerphobia claims is the courts' relaxation of a basic legal rule limiting awards to cases in which victims can prove a physical injury is linked to their fears. Some courts now are accepting the mere ingestion of hazardous substances—even if no physical harm occurs—as the required injury, while others appear to have dropped the rule altogether.

In the Hardeman County case, the appeals court denied awards for the plaintiffs' actual heightened risk of contracting cancer and other diseases. That increase was found to be 25% to 30%. The court ruled that the plaintiffs' fear, however, "clearly constitutes a present injury."

James W. Gentry, a lawyer for Velsicol, says the appeals court's decision on cancerphobia "is an enigma to me." He declines to comment further on the case.

James S. Wilder III, lead counsel for those suing Velsicol, however, contends the awards are justified because the company's pollution has caused his clients "to be distressed on a daily basis about themselves and their children."

Critics of the new legal approach complain that no matter how slight the risks to plaintiffs, judges are likely to find that plaintiffs' fears were justified if there was any toxic exposure at all.

Robert L. Willmore, a lawyer with the Washington, D.C., firm of Arent, Fox, Kintner, Plotkin & Kahn, notes, for example, a 1987 case in Washington state in which a federal judge awarded cancerphobia damages of \$1,000 to \$25,000 each to nine plaintiffs for their consumption of well water contaminated by pollution from McChord Air Force Base. The plaintiffs' emotional distress was reasonable, the judge ruled, even though they weren't "exposed to any actual risk greater than one in 1,000,000." The real risk, the judge added, "was probably much less, and may be zero."

Worried Over Nothing?

Some courts have allowed awards even when it turns out there wasn't any need for fear in the first place. In a case now widely cited in other cancerphobia lawsuits, the Tennessee Supreme Court in 1982 approved a \$24,000 cancerphobia award to a four-person family after an exterminating company contaminated their water while spraying for termites.

The mother, Teresa Laxton, testified that the experience "just tore her to pieces" and that she frequently cried. But none of the Laxtons showed any physical symptoms. Eight months after they first began fearing harm, a family doctor told them that blood tests showed they weren't at risk of becoming ill. The court ruled that the Laxtons' "physical injury" was the unknowing ingestion of possible carcinogens, and that eight months of worry deserved recompense.

As is almost always the case when judges or juries assign dollar values to emotional distress, the size of cancerphobia awards can seem arbitrary. In contrast to the Laxton case, the court in the suit against Velsicol based its awards on the duration of the plaintiffs' exposure to toxic chemicals, rather than on the duration of their psychological unease.

As to the final amount, "it's absolutely nothing more than a guess," concedes the Velsicol plaintiffs' lawyer, Mr. Wilder.