IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CECIL SCOTT, ET AL	*	
	*	
	*	
VS.	*	CIVIL ACTION
	*	NO. B-84-1103-CA
	*	
MONSANTO COMPANY	*	

****
September 1, 1987
Volume XI
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BEFORE THE HONORABLE JOE J. FISHER
UNITED STATES DISTRICT JUDGE, AND A JURY

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ALSO PRESENT:

Mr. William Papageorge, Corporate Representative for the Monsanto Chemical Company.

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AFTERNOON SESSION

(1:15 p.m., Tuesday, September 1, 1987)

THE COURT: Please be seated. Who will the plaintiffs have next?

MS. BAKER: Your Honor, we would like to call Thomas L. Gossage by deposition.

And before I call Mr. Gossage by deposition, I would like to hand to the jury the document that we discussed in connection with Mr. Cunningham's deposition, which will again become relevant during the Gossage deposition.

THE COURT: Do you have something, Mr. Shoebotham?

MR. SHOEBOTHAM: Your Honor, one point that I wanted to make with regard to Mr. Gossage's deposition: We have been last week and in the early part of this week -- the plaintiffs have been reading both their offer and Monsanto's offer as well to save the Court's time and also so that the jury

can see each offer in context. We would ask that that be done with regard to Mr. Gossage's deposition, and I have provided counsel for plaintiffs with our offer.

THE COURT: The only thing about that -- you may be heard, if you care to.

MS. BAKER: Your Honor, our offer is very short. And the Federal rules and Rule 32 and Federal Rule of Evidence 106 provide for contemporaneously; I don't think means simultaneously. But if he wishes to read his offer, he can interrupt me.

THE COURT: This is the Court's understanding, that because of our insistence that the parties expedite the presentation of evidence as much as possible, it's my understanding that the plaintiff has eliminated all but a very small amount of testimony that they want to offer from certain witnesses from depositions.

So, I would think that it really doesn't matter now that as much evidence is offered and almost all aspects of the case have been covered to some degree. I would

think it would make a better presentation now for the plaintiffs to offer just certain portions of the deposition that they wish to offer, unless the witness is going to be here live. If the witness is going to be live and presented by the defendants, then we will not permit them to offer the deposition. But if they are not present and both the plaintiff and the defendant wish to offer certain portions, then I think the better arrangement will be for the plaintiff to offer the portion that they want to offer; then the defendant can offer the portion that they wish to offer either at this time or can wait until they begin the testimony as they wish to present it.

MR. SHOEBOTHAM: Very well, Your Honor. We appreciate that.

THE COURT: All right. You may proceed.

MR. LACEY: Did you want to pass out those letters, or did you do that?

MS. BAKER: Yes, sir.

THE COURT: This is Thomas Gossage?

MS. BAKER: Yes, Your Honor.

THE COURT: And he was an employee of Monsanto.

MS. BAKER: Yes.

THE COURT: All right.

MR. SHOEBOTHAM: Your Honor, should we read each question and answer in context as the deposition proceeds, or would you prefer that we wait until the plaintiffs complete their offer and then would do our offer.

THE COURT: I think this would be the better, yes.

MR. SHOEBOTHAM: Thank you, Your Honor.

THE COURT: You may proceed.

MS. BAKER: Beginning at Page 5, line 11.

(Reading from video deposition)

Q Will you state your name for the record, please, sir..

A Thomas L. Gossage.

(End of reading)

MS. BAKER: And continuing at Page 15, line 18.

(Reading from video deposition)

Q Then in 1970 you moved to yet another marketing position in the organic division in their specialty products group; is that correct?

A That's correct.

Q Now, at that point you actually came into the portion of the company that was, in 1970, selling PCBs, did you not?

A That's correct.

(End of reading)

MS. BAKER: And at Page 31, line 20.

(Reading from video deposition)

Q Approximately what percent of the entirety of the sales that you were marketing director for in 1970 included products containing PCBs?

A About a third.

(End of reading)

MS. BAKER: And continuing at Page 56, line 7.

(Reading from video deposition)

Q And some of your products, if not exactly

like, were almost like products sold by others.

A That's correct.

Q And their price competition was very important.

A That's correct.

Q And if yours cost a dollar a gallon more, you were going to have trouble selling it.

A That's correct.

(End of reading)

MS. BAKER: Continuing at Page 57 at the top of the page.

(Reading from video deposition)

Q And as such, for a substantial period of time at least, no one else was legally entitled to make PCBs and sell them, correct?

A That's correct.

(End of reading)

MS. BAKER: Continuing to Page 61, line 21.

(Reading from video deposition)

Q Is the cost of transportation of PCBs a

significant cost in the pricing of PCBs?

A Yeah, it can be a significant cost.

(End of reading)

MS. BAKER: And continuing on Page 62 at line 8.

(Reading from video deposition)

Q And what you are saying is that the cost of transporting PCBs was a significant factor in the pricing?

A Sure.

Q And that effectively meant that overseas producers had to have a very low manufacturing cost in order to compete with the U.S. because it would be a significant transportation cost, bringing the chemical into the country from overseas, correct?

A If they had the same manufacturing cost that we had, they would have a -- a disadvantage in trying to bring the material into the United States.

(End of reading)

MS. BAKER: And continuing at Page 65,

line 8.

(Reading from video deposition)

Q What percentage of the PCBs sold in the United States were sold by some company other than Monsanto? Maybe that's the easier way to put it?

A Are you asking whether anyone imported PCBs into the United States?

Q Yes. I guess that is still another way to ask the question.

A To my knowledge, no one was importing any significant quantities of PCBs.

Q Okay. So, for all practical purposes, all of the PCBs sold in the United States in the 1970's were manufactured by Monsanto in U.S. facilities and then sold here?

A For all practical purposes.

(End of reading)

MS. BAKER: And continuing at Page 113.

(Reading from video deposition)

Q You would have prepared it, if -- if the products -- and I'm talking about dieletric

fluids now. We are getting into the environment -- to stop sales, to prohibit the release into the environment; is that correct?

(End of reading)

MR. LACEY: I'm sorry. What line?

MS. BAKER: That was Page 113 at the bottom.

MR. LACEY: Okay.

MS. BAKER: And beginning at the top.

(Reading from video deposition)

A We had a policy within the company that if a customer was not being responsive, a dieletric customer was not being responsive to the practices required to contain the PCBs from getting into the environment, that we would -- we would take action to -- to stop selling to them.

Q Did you ever do that?

A No.

Q Let me -- and I want to see how this would relate to the pricing structure. If you had a major customer and you stopped selling PCBs to them as a dielectric fluid, that would reduce your net sales?

A That's correct.

Q It would also reduce your cost of goods sold, to a certain extent, because you wouldn't need the raw materials to make what you would have otherwise sold to them, correct?

A Well, let me -- yes, in principle, yes. But let me say that -- that -- if a -- if we had stopped selling to a customer, it is also possible and maybe probable that some other dieletric customer would have picked up that piece of business. In other words, if a customer was making transformers using PCBs --

Q Uh-huh.

A -- and we decided not to sell to him, it is possible that he could have switched that volume to mineral oil and he could have maintained his market position. Or it is equally possible that he could have lost that part of his business to someone else who was -- who was producing PCB transformers and were protecting the environment. And I -- it could go either way or a mixture of both.

(End of reading)

MS. BAKER: All right. Continuing at

Page 126 at line 22.

(Reading from video deposition)

Q What was the history of pricing of PCBs during the period of time that you were responsible for, from 1970 to 1975?

A Well, there was, from time to time, at least in the early '70's -- are we -- excuse me. Are we talking dieletric or --

Q I'm talking about PCB pricing generally. We -- and feel free to break these things down. I'm interested, as the deposition notice indicates, in getting information on the cost of production of PCBs, the overhead allocated to the production, the revenues associated with the products, the profits generated by PCBs. And however you chose to break them down is fine with me. I just need to get the information.

A Well, let me focus on dielectrics. And we can try to deal with the other areas, if you so desire. But in dielectrics during the period from 1970 to 1975, there were, from time to time -- once a year, maybe sometimes twice a year -- moderate price increases. Initially my memory would suggest a half-a-cent-a-pound price

increase was a typical price increase, driven by higher costs from some prior period. In the latter part of the '70 to '75 period, I can recall price increases as high as 2 or 3 cents at a given point in time, driven principally by the -- the enviromental cost and the cost of aiding dieletric industry in trying to find alternative fluids. I have -- I can't give you any estimate over the entire five-year period as to what the price increase was on dielectrics, but it certainly would have been more than the prior five years.

(End of reading)

MS. BAKER: And to Page 252, please, beginning at line 16. And at this point the indemnity letter that I have passed out to the jury comes into play.

(Reading from video deposition)

Q And, in fact, during the period of time that you were responsible for the marketing of PCBs as dielectric fluids in the '70's, Monsanto changed its contracts with its dieletric customers to whatever extent was necessary if it were

necessary to give Monsanto the specific right to stop selling to people, correct?

A If they were not being responsible in terms of containing the use of the material.

Q My question, though, is: You modified the contract to the extent it was necessary, if at all, to specifically say that you would stop selling if you weren't satisfied with their enviromental handling?

A That was written into the contract.

Q And you also stopped selling PCBs to customers who refused to sign letters of indemnity indemnifying Monsanto for any problems that might arise from the use of PCBs?

A Those were the conditions that we had to operate under, yes.

Q And had a person not signed an indemnity letter, you would of stop selling them PCBs, wouldn't you?

A That is what we informed them, yes.

Q No matter how important PCBs were from the standpoint of the United States electrical system or anything else, correct?

A For an individual customer, that's -- that was our intent.

(End of reading)

MS. BAKER: Now, to Page 326, please, beginning at line 5.

(Reading from video deposition)

Q Had Monsanto gone out of the PCB business cold turkey in 1970 or 1971, there is no doubt that there would have been a substantial loss; isn't that correct?

A I cannot make that comparison in terms of whether that would have been a bigger loss or a lesser loss. I don't know.

Q That wasn't my question. My question was: Had Monsanto gone out of the PCB business entirely in 1971 or 1972, that would have resulted in a loss in getting out of the business, would it not?

A You asked -- you asked two different questions.

The first time you asked whether there was a substantial loss and the second time you asked whether there was a loss, if we had gone out of the business, though I have never seen such a calculation, I assume that there would have been

a loss, a substantial loss for -- for the company. I would suggest to you that the PCB business was a very small part of the corporation. It would not have been substantial.

Q Well, what is a substantial loss in terms of Monsanto, then? Just so that we can get that number pinned down.

A Well, you have the 10-K report. We were a one to $3 billion company, I think, over the time period that you referred to those, and we had incomes of, as I recall your number, 300 to 500 million.

Q Okay.

A A few million dollars is not substantial in -- in that context.

Q How much is it?

A A few million.

Q Okay. Setting aside then, since we say a few million dollars is not substantial, my question very specifically is: There is no question but what if Monsanto had gone out of the PCB business entirely in 1971 and 1972, just said, "we're stopping," there would have been a loss, correct?

A I don't know.

(End of reading)

MS. BAKER: And that ends our offer.

THE COURT: All right. Mr. Shoebotham?

MR. SHOEBOTHAM: Your Honor, Monsanto would like to present its offer at this time. We have pared ours down substantially as well.

THE COURT: We would like for you to eliminate as much of it as you can.

MR. SHOEBOTHAM: We have done that, Your Honor.

THE COURT: In fact, you can eliminate it all if --

MR. SHOEBOTHAM: We will move through it just as quickly as we can, Your Honor.

MR. SHOEBOTHAM: Mr. Hunt, we will be beginning at Page 56, line 7.

(Reading from video deposition)

Q And some of your products, if not exactly like, were almost like products sold by others?

A That's correct.

Q And their price competition was very important?

A That's correct.
Q If yours cost a dollar a gallon more, you were going to have trouble selling it?
A That's correct.
(End of reading)

MR. SHOEBOTHAM: Page 57, line 5.

(Reading from video deposition)
Q Do you know whether those patents were still in force when you came to the group in 1970?
A They were not.
Q How had it occurred, then, that Monsanto had been able to maintain its position as a sole producer of PCBs in the United States?
A Because we priced reasonably and -- contained our level of profitability such that it would have not been financially rewarding for anyone else to make the investment in PCB production to enter the U.S. market.
(End of reading)

MR. SHOEBOTHAM: Page 68, line 4.

(Reading from video deposition)

Q And was it your impression and understanding in your pricing, that no matter what the PCB application you had, at some point customers would switch to alternative products? There was a ceiling on which could you go to in your pricing?

A That was the case in all of the applications with the exception of carbonless papers, which at the time we were selling it, did not have an immediate alternative.

Q So, with the exception of carbonless paper in your pricing strategy, in terms of your pricing strategy, with the exception of carbonless paper, you had to take into account at some point, if you set the price too high, people would switch off the PCB products to whatever were, not identical, but at least competitive?

A That was one of our pricing concerns.

Q And that was one of those factors you took into account in setting PCBs prices in the 1970's?

A Amongst others.

(End of reading)

MR. SHOEBOTHAM: Mr. Hunt,to Page 124,

line 11.

MR. HUNT: All right.

(Reading from video deposition)

Q And you do not know whether Monsanto would have continued to manufacture and sell PCBs even though there was a continuing year-after-year loss?

A That would not have been my decision.

Q I understand.

A My -- if you are asking me what position I would have taken, I would have continued to sell the product because it was our impression at the time that the dieletric industry had no alternatives; and both the government and our customers were saying that we could not withdraw the product because the whole Eastern part of the United States would be -- would be shut down electrically.

Q What was it that was being told to Monsanto about the Eastern part of the United States?

A Well, this was the period when we had blackouts in New York and so forth. That was -- it was that technology -- I'm sorry. It was that terminology that we were -- we were being given

by our customers and by the government that the use of PCBs in transformers and capacitors were necessary in order to prevent further occurrences of those kinds of episodes.

(End of reading)

MR. SHOEBOTHAM: To Page 211, line 19.

(Reading from video deposition)

Q And did you think the profitability that you had established through the price that you had established was a good one?

A It met the conditions we were operating under at the time.

Q Okay.

A It was far less than what we could have gotten if we had chosen to.

Q What could you have gotten if you had chosen to?

A Considerably higher. We had the market and if we wanted to price the product higher, we could have. We priced the product according to what we thought was proper for the industry.

Q I see.

A And what we thought the proper position for

the product under the circumstance.

Q I know --

A Far less, I might add, than many of the other products I had responsibility for, far less.

Q Well, why did you chose to price PCBs far less than other products for which you also set prices?

A Because -- because we were the sole supplier. We had a responsibility to the industry to be responsible, and we were going through a very difficult period of time, both in dieletrics as well as in our other fluids. And we felt we had a responsibility to the industry and, in part, to the government since they were also -- since they also were involved, to be a responsible supplier. And that was the ground rules we were operating under, to get a reasonable return, but not to try to price this thing to a significant higher return.

(End of reading)

MR. SHOEBOTHAM: To Page 292, line 20.

(Reading from video deposition)

Q Did you have any input into the language of the indemnity?

A No.

Q Did you ever comment -- an opportunity to even comment on the policy?

A I had opportunities to discuss it within my business unit, yes.

Q Before or after it was done?

A I don't recall.

Q Did anyone ever advise you what the purpose of requiring this hold harmless and indemnity agreement was?

A We told the corporation that we were continuing to sell the product in this single application of dielectrics because our customers and because our government had informed us that there was no other alternative, that we were encouraged or required -- I can't recall -- to continue the sales.

When that message came back down from the company, they said the result was this document; that if -- if we are going to continue, if the industry is saying that we must supply the product, these are the circumstances under which we will supply.

And we were asked to -- to implement this policy that the corporation sent down to us with the exception of Westinghouse and General Electric, which, because of their size and because of their importance, they were handled at the corporate level rather than at my level.

They were also handled at the corporate level because there were multiple locations and they -- those two companies were dealt with on a corporate-officer-to-corporate-officer basis rather than disbursed to every capacitor and transformer plant of G.E. and Westinghouse.

(End of reading)

MR. SHOEBOTHAM: To Page 303, line 14.

(Reading from video deposition)

Q If you were to compare Monsanto's PCB products with other products manufactured by Monsanto, what types of products would you compare it to?

A Well, in looking back at the time I was involved -- excuse me.

Well, in looking back at the time I was involved, I would compare it to -- to some of the

other specialty fluids within my specialty group, such as our heat transfer fluids, our non-PCB heat transfer fluids, certainly our Skydrol hydraulic fluid, which was also non-PCB. Or I would compare it with other similar type market situations in Monsanto.

For example, some of our proprietary herbicides or our Skydrol or our Skybond, our Saflex inner layer for automobile windshield material, those would be products that I would categorize as being generally in terms of market share, in terms of the terminology used earlier, franchise of similar type products.

Q If you compared the profitability of PCB products with the similar products that you have just mentioned, how would that comparison be made and what would be the result?

A Well, I would -- I would say again, dealing first with the products that I was most familiar with within my business unit, that I knew in considerable detail, some of our heat transfer fluids, some of our non-PCB heat transfer fluids, for example, would carry gross profit margins of 65 or 68 or 70 percent. That would be, for example, specifically the kind of profit margin I

can recall on Thermonol-66.

Skydrol, the fire resistant hydraulic fluid non-PCB for commercial aircraft, carried a profit margin that varied during that time period from, oh, 35 to 50 percent.

The herbicides, Lasso, being an example of a product where we had a strong position in the marketplace, carried profit margins of 70 or 80 percent.

So, overall, in a broad spectrum, Saflex which was another product I have mentioned would have had a gross profit margin of maybe 35 percent. So, I would put PCBs somewhere in the middle of the road. There were certainly some products of similar nature that were lower in profitability and a substantial number were also higher in profitability.

(End of reading)

MR. SHOEBOTHAM: Your Honor, that concludes our offer from the deposition of Mr. Gossage.

THE COURT: Very good, thank you.

Who do you have next, Mrs. Baker or Mr. Lacey?